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Fragmentation and Coherence

A Study Into the Law of the World Trade Organization

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Tiivistelmä — Referat — Abstract

Tämä työ käsittelee kansainvälisen oikeuden ja Maailman kauppajärjestön (WTO) oikeuden suhdetta. Suhdetta tarkastellaan yleisesti kansainvälisen oikeuden fragmentaation ja koherenssin käsitteiden avulla.

WTO:n oikeus on luonteeltaan julkista kansainvälistä oikeutta. WTO:n oikeus on kuitenkin eriytynyt muusta julkisesta kansainvälisestä oikeudesta valtioiden vastuuta koskevien sääntöjen osalta. Näiden sääntöjen osalta WTO:n oikeus on fragmentoitunut erityiseksi kansainvälisen oikeuden osa-alueeksi.

WTO:n riidanratkaisuelin on soveltanut järjestelmällisesti WTO:n ulkoista kansainvälistä oikeutta kuten tapaoikeudellisia sääntöjä kansainvälisten sopimusten tulkinnasta. Riidanratkaisuelin on tuonut WTO:n oikeuteen myös yleisiä aineellisia ja menettelyllisiä oikeusperiaatteita. Riidanratkaisuelimen käytäntö on todiste WTO:n oikeuden koherenssista.

Työssä WTO:n ulkoisen oikeuden soveltamisen esittely aloitetaan oikeuslähteiden määrittelyllä. Tämän jälkeen työ esittää yksityiskohtaisesti WTO:n riidanratkaisuelimen toimivallan ja sovellettavan lain. Kuvaus perustuu WTO:n sitoviin oikeuslähteisiin sekä riidanratkaisuelimen tapauskäytäntöön.

Vaikka riidanratkaisuelimen käytäntö osoittaa pyrkimystä koherenssiin yleisen kansainvälisen oikeuden ja WTO:n oikeuden välillä, suurin haaste koherenssille ovat kansainvälisen oikeuden erityisten osa-alueiden kuten ympäristöoikeuden, ihmisoikeuksien ja WTO:n oikeuden väliset aineelliset ristiriidat. Lopulta työ paljastaa esimerkinomaisesti näitä ristiriitoja sekä arvioi onko niiden ratkaisu mahdollista WTO:n oikeudessa.

Avainsanat — Nyckelord — Keywords
WTO, Public International Law, Fragmentation of International Law, Coherence

Säilytyspaikka — Förvaringsställe — Where deposited

Muita tietoja — Övriga uppgifter — Further information

Abbreviations

AB	Appellate Body of the WTO
AD Agreement	Anti-Dumping Agreement
DSB	Dispute Settlement Body of the WTO
DSU	Dispute Settlement Understanding
EC	European Communities
GATS	General Agreement on Trade in Services
GATT or GATT 1994	General Agreement on Tariffs and Trade 1994
GATT 1947	General Agreement on Tariffs and Trade 1947
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Law Materials
MEA	Multilateral Environmental Agreement
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
PIL	Public International Law
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TPRM	Trade Policy Review Mechanism of the WTO
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations Organization
UNTS	United Nations Treaty Series
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization

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1. Introduction

”To grant me a vision of Nature's forces
That bind the world, all its seeds and sources
And innermost life – all this I shall see,
And stop peddling in words that mean nothing to me.”[1]

1.1 WTO Law, External International Law and the WTO Dispute Settlement Body

This study analyzes the relationship between public international law and the legal system of the World Trade Organization from the perspective of fragmentation of international law specializing in the application of external public international law in the Dispute Settlement Body of the WTO. The WTO dispute settlement system is a central element in providing security and predictability in the multilateral trading system by preserving the rights and obligations of WTO Members under the WTO agreements.[2] According to Mr. Bacchus, a former Chairman of the standing Appellate Body of the WTO,

> The WTO offers an example to the world for the first time of what even the skeptics are bound to acknowledge by their own terms is real ‘international law’. The WTO has moved beyond the anarchy, beyond the primitivism, and beyond the skepticism to construct a system in which international rules and international rulings are both made and enforced.[3]

Since international law is by nature decentralised and fragmented compared to national law, it is essential for legal research to pursue an analytical and systematic approach in review of the institutions and processes of international law. The aim of this study is to find a systematic framework of reference in the relationship between WTO rules and those of external international law. In an ideal situation, such framework exhibits and builds coherence in WTO law. In this thesis, the term external international law includes all rules of

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[1] Goethe, *Faust*, lines 382 – 385.

[2] Article 3.2 of the Dispute Settlement Understanding

[3] James Bacchus, Address to Harvard Law School, Cambrigde, Massachusetts, October 1, 2002. Published in 44 *Harvard International Law Journal,* Number 2 (2003). Mr. Bacchus served as the Chairman of the Appellate Body from 2001 to 2003.

international law within the scope of Article 31(1) of the Statute of the International Court of Justice.

The World Trade Organization is based on the General Agreement on Tariffs and Trade, 1947. WTO came into being through the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)[4]. The primary aim of the WTO is to liberalize international trade.[5] WTO deals with rules of trade between nations on a global level. Agreements drafted by states under the WTO cover goods, services and intellectual property. These agreements contain trade rules which nations have negotiated through a diplomatic process. A lawyer looks at the WTO as a set of rules, but the WTO can also be analyzed in political terms. There are various political perspectives which can also be legally relevant to the WTO, such as trade – environment, trade – labour, trade – development and trade – human rights. This study attempts to restrict itself to legal analysis. The trade agreements of the WTO, 'covered agreements', are annexed to the WTO Agreement.[6] Covered agreements are the primary sources of WTO law. New agreements are negotiated, and currently the negotiations are following the Doha Development Agenda, launched by a WTO Ministerial Conference in 2001.

The Dispute Settlement Body was developed by the WTO Members during the Uruguay Round of Multilateral Trade Negotiations to replace the old GATT 1947 dispute settlement system. In addition to providing predicability and security for the trading system, the DSB serves to clarify the provisions in WTO covered agreements in accordance with customary rules of interpretation of public international law.[7] It has the ability to settle trade disputes in a swift and conclusive manner. The main users of the DSB have been the United States and the European Communities.[8] The WTO dispute settlement system functions automatically and in a unified manner, preventing blocking, a practice of voting against the product of the rulings

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[4] *Agreement Establishing the World Trade Organization in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (1994) 33 I.L.M. 1125 (WTO Agreement).

[5] Preamble of the WTO Agreement.

[6] The WTO Agreement itself, as well as the Dispute Settlement Understanding, are also covered agreements. This study uses occasionally the wording 'WTO Agreement and covered agreements', which is not to be taken to mean that the WTO Agreement is not a covered agreement. Although the WTO Agreement belongs to covered agreements, it superseeds other covered agreements.

[7] Article 3.2 of the Dispute Settlement Understanding

[8] Zimmermann, p. 33, graph 3. Data from years 1995 – 2004.

of the dispute organ in the adoption phase to avoid negative consequences of a lost case.[9] The Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly known as the Dispute Settlement Understanding (DSU), governs the settlement of trade disputes in the WTO.[10] It establishes the Dispute Settlement Body, which has powers to establish dispute panels which deal with individual disputes in an *ad hoc* manner.[11] The DSB also has a standing organ, the seven-member Appellate Body.

The primary method of settling trade disputes between WTO Members is for the parties to engage in negotiations to reach a mutually acceptable solution. It is only if a solution cannot be reached through negotiations, the complainant is guaranteed an examination of the case by an independent panel and in case of appeal, the Appellate Body.[12] These negotiations are mandatory.[13] Article 25 of the DSU provides that disputes can also be resolved through arbitration. Equally, Article 5 of the DSU provides dispute settlement by good offices, conciliation or mediation. However, dispute settlement under Articles 25 and 5 DSU has been rarely or never used.[14] The most important dispute settlement methods in the WTO are mutual negotiations and procedure of the panels and the Appellate Body.

A dispute arises when a WTO Member takes a trade restricting measure or performs actions that one or more of the other WTO Members recognise to be in violation of the WTO covered agreements, or when a WTO Member fails to abide the obligations in covered agreements. Third WTO Members can claim interest in the case.[15] The dispute is taken to a panel, which produces a recommendation. The parties to the dispute can appeal the panel's recommendation to the Appellate Body. The Appellate Body can modify, uphold or reverse the findings of the panel. In the final phase the DSB shall rule on the report of the Appellate Body. The adoption of the report of a panel or the Appellate Body is automatical unless WTO

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[9] Jackson 1998, p. 162.

[10] Annex 2 to the WTO Agreement (1994) 33 I.L.M 1226.

[11] Zimmermann, p. 29.

[12] The mutually acceptable solution reached through negotiations has to be consistent with WTO law. See Articles 3.4 – 3.6 of the DSU.

[13] Zimmermann, p. 29.

[14] See in detail Van den Bossche, pp 186 – 187. This study takes into account the sources of WTO law and application of WTO law and external international law in the Dispute Settlement Body.

[15] See Articles 4, 6, 9 and 10 of the DSU.

Members block it by a consensus vote.[16] This is called a negative consensus or reversed consensus.[17]

In case the consensus is not reached, the dispute settlement mechanism aims to secure the withdrawal of the measures concerned if they are found to be inconsistent with the provisions in the WTO covered agreements. According to Article 3.7 of the DSU, compensation and countermeasures are available as secondary and temporary responses and they shall only be used if the immediate withdrawal of the measure in question is impracticable. The last resort provided by the DSU to the claimant is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member. Such measure is subject to the authorization of the DSB.[18]

The basic premise of this study is that the both the WTO in general and especially the Dispute Settlement Body act within the framework of public international law. According to Article 3.2 of the Dispute Settlemen Understanding, the DSB serves to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. In multiple cases the panels and the Appellate Body have included the Vienna Convention on the Law of Treaties in their interpretation of the covered agreements.[19] The covered agreements are international conventions.[20] In a wider sense the whole WTO system is part of public international law as the WTO is an international organization based on a multilateral treaty. The term 'WTO law' is meant in this thesis to include the WTO Agreement, covered agreements and agreements incorporated to the covered agreements.[21]

[16] Steinberg, p. 247.

[17] Marceau 2002, p. 758 and Jackson 1998, p. 167.

[18] Article 3.7 of the Dispute Settlement Understanding

[19] Cameron and Gray, p. 252.

[20] *Japan – Alcoholic Beverages II*, WT/DS11/AB/R, p. 15.

[21] These are the primary sources of WTO law. The delimitations of WTO law shall be necessary and fruitful for the research of WTO. See e.g. Von Bogdandy, p. 613.

1.2 Research Problem and Scope of Study

The purpose of this study is to describe the position of WTO law in international law by applying two opposite concepts: fragmentation and coherence. Fragmentation of public international law can be viewed as both substantial and institutional. States can subscribe to and contract out of multiple sets of international rules. These rules can be contradictory in nature and since there is no general international legislator or judiciary, it is difficult to settle conflicts between rules. An exhibit of fragmentation is a self-contained regime, which by its nature operates completely or partly independent from general or particular international law.

The opposite of fragmentation, coherence, can be achieved by harmonisation.[22] Particular regimes such as WTO law can attain coherence by reference to general public international law and through frictionless co-existence with other particular regimes. Self-contained regimes have been discussed in the International Law Commission, in academic research and in international tribunals. According to the ILC Fragmentation Report a self-contained regime is a group of rules with special principles applied to a particular subject matter.[23] This study aims to evaluate if the WTO can be classified as a self-contained regime. The description of the sources of WTO law in covered agreements and the review of the reference of external international law in the panels and the Appellate Body are essential steps in the determination of the coherence of WTO law. Following questions are reviewed:

1. How fragmentation of international law applies to WTO law;
2. How the Dispute Settlement Body of the WTO provides coherence in WTO law;
3. How the Dispute Settlement Body addresses crises of coherence revealed in regime conflicts;
4. Does the WTO exhibit a degree of coherence which breaks its alleged self-containment.

[22] Tuori, p. 311.

[23] ILC Fragmentation Report, para 15 at 14.

These questions have direct implications for the WTO dispute settlement system since many disputes brought before the panels and the Appellate Body include examinations of external international law in addition to WTO law. The linkage of general international law of treaty interpretation and the process of the panels and the Appellate Body can be claimed to be a matter of legal technicality, but the collision between different regimes of international law cannot. Through coherence, the WTO could drive the recognition of universal human rights, environmental protection, protection of the global workforce and the abolishment of poverty and disease in the world.

The scope of the study includes review of WTO law, i.e. covered agreements, panel and Appellate Body case practice, legal doctrine and official material. The history of the WTO, including but not limited to GATT 1947 practice, is restricted out of the temporal scope. The WTO is a single undertaking. When the WTO came into existence, the practice of GATT 1947 was absorbed into WTO law. WTO rules are primary towards GATT 1947 practice.[24] Another reason for the exclusion of GATT history is the fact that GATT 1947 did not provide a rule-based dispute settlement system such as the Dispute Settlement Body. The relationship between national law and WTO law is left outside this study, as is also the relationship between WTO law and EU law.

1.3 Structure of Study

This study includes four substantive chapters. Chapter two introduces two competing forces in international law: fragmentation and coherence. It further analyzes the general nature of WTO law from the perspective of fragmentation and coherence of international law and applies the concept of a 'self-contained regime' to WTO law. Chapter two takes into consideration academic and official views of the relationship of external international law and WTO law.

Chapter three aims to establish through the study of panel and Appellate Body recommendations that the legal activism of these organs has been paramount in providing both external and internal coherence in WTO law. The chapter begins with a description of

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[24] Article XVI of the WTO Agreement. For details see chapter 4.1 of this study.

the sources of WTO law in instruments such as the WTO Agreement and the Dispute Settlement Understanding. The chapter subsequently describes the application of external international law in the panels and in the Appellate Body as evidence of the coherence of WTO law.

Chapter four analyzes conflicts of rules within WTO law and between WTO law and external international law as they are governed by current WTO law and practice. Hidden and apparent rule conflicts are a threat to coherence, especially when there are no binding meta-rules directing their solution. Chapter four also takes into account the views expressed in academic research *de lege ferenda* on the conflicts of WTO law and external rules.

The final chapter, conclusions, summarises the findings of previous chapters. It concludes if the WTO Agreement and covered agreements, as well as the practice of the DSB can determine the limit of public international law in the WTO. The answer to this question provides evidence of the degree of coherence of WTO law.

2. Gravity of International Law

2.1 Fragmentation of International Law

We no longer live according to a paradigm in which the Sun circles the Earth. Our planet was forged by the gravitational forces of the Sun; Sun maintains life on Earth by the warmth of its light. Much like WTO law is born out of the coherence of international law, it cannot escape its light. Although this much is sure, the heritage of Ptolemaeos lives on in the universe of international law. An epic struggle ensues, where the habitants of individual planets fail to achieve motivation or technological capability to visit other planets. While the Sun is too hot to be visited at all, sometimes we are able to send missions to other planets and moons – at least to plant a flag of the perpetrator of the mission.

A classic argument on the nature of international law results from the structure of the international political system: there exists no central legislature, government or judiciary on a world scale. States as creators of law are equal. International law is based on bilateral and multilateral relationships entered into by states. According to Jenks,

> Law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationship are in some respects analogous to those of separate systems of municipal law.[25]

Such groups co-exist with each other in a reactive manner. Different groups of 'law-making' treaties result from the introduction of various international organizations on a regional and functional levels. Groups or subsystems such as human rights law, environmental law and trade law can be pointed out as having their own legislative instruments. The existence of subsystems of international law supposes the existence of conflicts in a similar fashion than in municipal law.[26] Conflicts arise when legal instruments in different subsystems deal with the same subject matter. Such conflicts are very difficult to resolve, since there are no general

[25] Jenks, p. 403.

[26] *Ibid.*

hierarchy between the subsystems of international law.[27] An additional problem is presented by multinational instruments of non-binding legal nature. For example, the rules of *lex mercatoria* can be seen as bottom-up, private international regulation.

Tuori sees that a critical view of international law recognizes the various subsystems or regimes such as human rights law and WTO law as contestants over the jurisdictional power to define international law.[28] In the WTO, such contest is hard to distinguish based on the recommendations of the DSB organs. The nature of WTO law is different from human rights law, because the violations of WTO law appear to be contained in the bilateral relationship of WTO Members. Human rights violations have profound graveness, which implicates that such violations carry a justification for a collective punishment.

The result of the fragmentation of international law is that individual subsystems are relatively independent and autonomous from other branches. Since the individual subsystems have proliferated in vast numbers, they have produced similar numbers of mechanisms of implementation and their jurisdictions have become partly overlapped.[29] Trade law within the WTO does not contain the same legal rules, principles or institutions as, say, environmental law. Some commentators have noted, that the object and purpose of the WTO is very distinct from other subsystems of intrenational law. Jackson recognises that WTO's goal is to provide rule of law in international trade by limiting the use of unilateral trade measures by governments. [30] The view of Jackson contests the claim of bilateralism of WTO law. One must bear in mind that the wording 'multilateral trading system' does include the term 'multilateral' – rule of law shall be a universal principle.

Pauwelyn reaffirms the bilateral nature of WTO obligations in comparison to collective obligations or *erga omnes* obligations. According to Pauwelyn, a breach of WTO obligations happens between the breaching WTO Member and the victim of the breach. A collective system would react to the breach of a single member in a collective manner – all the members

[27] Tuori, p. 309.

[28] *Ibid.*

[29] Abi-Saab, p. 924 and 925 – 926.

[30] See Jackson 1999, p. 825.

of the collective could claim that their rights and obligations were violated.[31] Similar distinction can be found in domestic law: a crime carries a punishment issued by the state as a collective, while a breach of contract carries remedies contained in the relationship between parties to the contract. In support of the view taken by Pauwelyn, the Appellate Body maintained in *Japan – Alcoholic Beverages II* that 'the WTO Agreement is a treaty – the international equivalent of a contract'.[32] While the academic debate on the nature of WTO obligations rages on, the WTO continues to sanction and enforce breaches of its rules. This study takes a departure of from the generalized debate on the nature of WTO obligations towards the review of the recommendations of the Dispute Settlement Body. Allegations of legal activism on the part of the panels and especially the Appellate Body suppose that it actually might take place.

However, one should not go quietly into the darkness of particularity. The backdrop of the study still remains in the general conceptions of international law and its subsystems. The subsystems, also referred to as *lex specialis*, suppose that there exist a general body of law higher in jurisprudential hierarchy. The investigation into the nature of the subsystems of international law should follow from an investigation into general international law.[33] General international law is said to include customary international law and general principles of law.[34] Numerous initiatives have been taken to codify the rules of international law. Customary law and general principles of law recognized by civilized nations have received special attention from codifiers of public international law.[35] When the United Nations Charter was drafted, the drafters did not want to give UN powers to enact binding rules of international law. As a result, the International Law Commission was established. The objective of the ILC is the 'promotion of the progressive development of international law and its codification'.[36]

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[31] Pauwelyn 2003 B, pp. 949 – 951.

[32] Japan – Alcoholic Beverages II, WT/DS11/AB/R, p. 15

[33] *Lex specialis derogat legi generali*. See Simma, Bruno and Pulkowski, Dirk, 'Of Planets and the Universe: Self-contained Regimes in International Law', 17 *European Journal of International Law* (2006) 483 – 529, 2006.

[34] Pauwelyn 2001, p. 536.

[35] Customary law and general principles are taken to mean the rules within the scopes of ICJ Statute Article 38(1)(b) and ICJ Statute Article 38(1)(c) respectively.

[36] Article 1.1 of the Statute of the International Law Commission

Article 15 of the ILC Statute provides the ILC powers to draft conventions on subjects which have not been regulated by international law or which have not been sufficiently developed in the practice of states. According to Article 15, the ILC can also formulate and systematize rules of international law in fields where there already has been extensive State practice, predecent and doctrine. The ILC has addressed the problem of fragmentation of international law in a study group report of its fifty-eight session.[37] Much of the work of the study group dealt with the concept of self-contained regimes.

2.2 Legal Identity of the WTO

Self-contained regimes were initially defined as sets of secondary rules which dispose from general rules of State responsibility.[38] The ILC Fragmentation Report distinguishes a second, broader meaning for the term. According to the Report,

> In a broader sense, the term is used to refer to interrelated wholes of primary and secondary rules, sometimes also referred to as 'systems' or 'subsystems' of rules that cover some particular problem differently from the way it would be covered under general law.[39]

Self-contained regimes are assumed to have contracted out of public international law or modified its rules. The relationship of a self-contained regime to external international law has been described with the concepts of *lex specialis* and *lex generalis*. The definition of a self-contained regime in the broader meaning of the term is more controversial than the narrow one. Analysis by various academic writers supports the conclusion that WTO law includes both primary and secondary rules which are *lex specialis* towards public international law.[40]

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[37] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, in Report of the International Law Commission, 58th Session, UN Doc. A/61/10 (2006).

[38] See e.g. PCIJ *S.S.Wimbledon* case (1923) and ICJ *Hostages* case (1980).

[39] ILC Fragmentation Report, para 128 at 68.

[40] See e.g. Pauwelyn 2001, p. 539, Simma & Pulkowski, p. 483 and Marceau 2002 p. 767. Pauwelyn maintains, that while WTO law has contracted out of some rules of public international law, it has not contracted out of all of them.

Such structure is not distinctly mentioned in the WTO Agreement nor in the Dispute Settlement Understanding. According to Abi-Saab, the Dispute Settlement Understanding should have provided a stuctural link to the jurisdiction of the International Court of Justice. In the vision of Abi-Saab, specialised tribunals could seek for an interpretation of general international law from the ICJ through the structural linkage. [41] Article 3.2 of the Dispute Settlement Understanding is too ambiguous and vague a clause to fill such a task.

If the concept of a self-contained regime was applied to WTO law in the narrow sense, the conclusion would seem to follow that WTO is a self-contained regime. Such finding would result from the fact that WTO law has specific rules on State responsibility in Article 23 of the Dispute Settlement Understanding which prohibits unilateral determinations of breach of WTO Agreement and covered agreements and limits unilateral countermeasures.[42] The Dispute Settlement Understading provides the DSB exclusive powers to determine a breach, sanction countermeasures and control the exercise of such measures implemented in order to re-establish a balance of trade obligations and rights between WTO Members.

It can be claimed, that WTO has justification to provide rule of law in international trade. Economists have stated that a functioning market presupposes the existence of rule of law and democratic political governance. According to DSU Article 3.2, 'the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'. The WTO is a system of rules to be applied and enforced. It is justifiable to give WTO such status, since the purpose of its existence is to provide benefits such stability and predictability to the global market.[43] It has also been noted that especially the Appellate Body has characteristics of administrative tribunals such as concentrated expertice, and even resemblance to domestic high courts.[44] Some have seen the tendency of the panels and the Appellate Body to resolve disputes based on their earlier rulings as evidence of self-containment.[45] Such practice can also be seen as evidence of coherence. The

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[41] See Abi-Saab, p. 928.

[42] Marceau 2002 p. 766, Pauwelyn 2001 p. 540, ILC Fragmentation Report, para 134.

[43] For utilitarian justification of rules and punishment, see Rawls, 'Two Concepts of Rules', 64 *Philosophical Review* (No. 1, January 1955) 3 – 32.

[44] Cameron and Grey, p. 251 and Abi-Saab, p. 923. Abi-Saab calls the panels and the Appellate Body 'administrative tribunals of an international organization'. See also Von Bogdandy, pp. 624 – 625.

[45] See Palmeter and Mavroidis, p. 413.

organs of the Dispute Settlement Body have continuosly and coherently applied general international law in the interpretation of WTO law. In conclusion, a claim that *stare decisis* would exist *de facto* in the practice of panels and the Appellate Body is not completely out of question. Especially the lines of interpretation of WTO law based on the Vienna Convention have ran through the case law. There are 'landmark cases' like *US – Gasoline*, which shape up WTO law and the dispute system. [46]

There can be various reasons for the panels and the Appellate Body to create WTO law instead of merely interpreting it. The DSB is a relatively new rule-based system of dispute settlement and a very unique one in its nature compared to other systems within trade law or other international tribunals. The lack of support from earlier institutions gears the panels and the Appellate Body to actively and independently develop practices, working procedures and even the law itself. One reason for the success of the rule-based dispute settlement system is that the rules the DSB interprets, the WTO Agreement and covered agreements, are a single undertaking in an inherent structure of primary, secondary and procedural rules.

The broad meaning of a self-contained regime would seem to imply that such regime had contracted out of all public international law. The broad definition would also arguably include the disposition of general international law. Contracting out of public international law is possible with the exception of rules of *jus cogens*.[47] However, in Abi-Saab's view a totally self-contained regime cannot exist within the legal order. According to Abi-Saab, total disposition from the legal order creates a 'legal frankenstein' without a basis in legitimacy.[48] The broad definition does not seem to fit WTO law. The panels and the Appelate Body have continuously applied public international law, i.e. codified customary law and principles of international law. The applied public international law has mostly, but not exclusively, dealt with treaty interpretation. In addition to Articles 31 and 32, at least Articles 28, 59(1), 30(3), 33(4), 41 VCLT have been applied in the panels or the Appellate Body.[49]

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[46] *US – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.

[47] ILC Fragmentation Report, paras 45 and 150, ICJ *North Sea Continental Shelf* case [1969] ICJ Rep 4. See also Pauwelyn 2004, pp. 37 – 40.

[48] Abi-Saab, p. 926.

[49] For details see chapter 3.3.5 of this study.

General principles of law or general principles of international law used in panel and AB practice include, inter alia, *in dubio mitius*, good faith, *pacta sunt servanda*, legitimate intentions, effective treaty interpretation and *lex specialis.*[50] Furthermore, DSB organs have introduced certain procedural principles in their working procedures.[51] The introduction of public international law such as the Vienna Convention has usually been subsequent to previous examination of WTO law. This would imply that the panels and the Appellate Body use external rules as second rather than primary option for interpretation. Simma and Pulkowski recognize that the International Court of Justice and the Claims Tribunal resort to general international law as the primary option for interpretation whether the states in question have contracted out of the general rules of international law.[52] Simma and Pulkowski also recognise the second option practise of the WTO panels in applying external international law. Such exhibition of self-containment would follow from the nature of the WTO as a subsystem of public international law.[53]

It is clear that both universalism and particularity try to court the heart of the Dispute Settlement Body of the WTO. How do the DSB organs reply to persuasion? Appellate Body vocalised its stance to public international law in *US – Gasoline*, stating that the WTO Agreement should not be 'read in clinical isolation from public international law'.[54] On the normative level, Article 3.2 of the Dispute Settlement Understanding provides that covered agreements shall be clarified in accordance with customary rules of interpretation of public international law. It is further assumed that WTO Agreement and covered agreements are created in the system of public international law as multilateral treaties and thus belong to the corpus of public international law.[55] In case *Korea – Procurement* the panel stated, that 'customary international law applies generally to the economic relations between the WTO Members' and that 'customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO'.[56] Emerging picture of WTO law would look *specialized* rather than self-contained. Some commentators consider even *lex specialis* as too

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[50] For details see chapter 3.3.6 of this study.

[51] For details see chapter 3.3.7 of this study.

[52] See Simma and Pulkowski, p. 488.

[53] *Ibid.*

[54] *US – Gasoline*, WT/DS2/AB/R, p. 17.

[55] See Pauwelyn, p. 538.

[56] *Korea – Procurement*, WT/DS163/R, para 7.96.

strict a classification of WTO law because it does not include political and societal aspects of the WTO.[57] Franconi prefers the concept of subsystem.[58] According to Franconi such a system would include co-ordination between other interrelated subsystems.[59] Also Simma and Pulkowski call the WTO a special legal subsystem.[60]

It is doubful if the *lex specialis* or subsystem label would carry significant consequences in the everyday practise of the DSB. It must be kept in mind, that while the DSB process is a rule-based approach to trade disputes, the primary method of dispute settlement within the WTO is diplomacy through negotiations for a mutually acceptable solution.[61] A diplomat's approach to a trade dispute is very different to the view of an academic researcher of international law. The diplomat would most likely be concerned with the substance of the trade measure in question. The negotiations on the dispute would be thus carried out on the basis of material aspects rather than reverting to customary international law of treaty interpretation.

Based on the cases examined in this study, it seems clear that the primary actor invoking public international law in the WTO disputes is the panel or the Appellate Body. The DSB organs are allowed to resort to rules of customary international law of treaty interpretation and they willingly engage. The principle of legality increases predictability and stability in rules-based dispute settlement and provides legal authority to the panels and the Appellate Body. The next chapter of this study describes the normative tools used to analyze the recommendations of the DSB and pursues to view the introduction of external international law in the DSB as an exhibition of coherence.

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[57] For details see chapter 4.1 of this study.

[58] WTO in Ten, Franconi, p. 149.

[59] *Ibid.*

[60] Simma and Pulkowski, p. 448.

[61] Articles 3.6 and 3.7 DSU.

3. Emerging Coherence: Legal Activism of the Dispute Settlement Body

3.1 The Relationship between WTO Law and External International Law

Traditionally legal interpretation has addressed the difficulties arising from conflicting rules with principles such as 'special rules superseed general ones' (*lex specialis*) or that 'previous/subsequent rules on the same subject matter superseed latter/prior ones' (*lex prior and posterior*). These principles apply to international law, but their application is not as well established in international law as in domestic law.[62] Michaels and Pauwelyn advocate for the use of tools of domestic jurisprudence in addressing conflicts of rules in public international law.[63] Vranes sees that the problem of resolving conflicts of rules in international law with traditional concepts such as *lex specialis* or *lex posteriori* requires a wider definition for the notion of conflict.[64]

In the study of the WTO Dispute Settlement, an institution characterised with 'compulsory jurisdiction, short timeframes, an appellate review process and an enforcement mechanism',[65] there is a strong theoretic and practical temptation for the traditional approach. This argument rests on the assumption that the WTO has achived a significant level of constitutionalization and spesialization. However, as this might be true on the part of the WTO, it is not always so on the part of external general or particular international law. Comparison becomes problematic when the subjects under review have different value-systems or normative structures. Furthermore, it can be claimed that the standard of measurement is problematic in itself, an example thereof being the application of the Vienna

[62] Klabbers 2011, pp. 196 – 200.

[63] Michaels and Pauwelyn, p. 28 – 30. See also Tuori p. 288. Tuori maintains that 'legal culture has possessed distinctive nation-state features' although 'international law has been a special case with regard to the territorial differentiation of legal culture'.

[64] Vranes, p. 396.

[65] Van den Bossche, pp 53 and 187 – 190 and Von Bogdandy, p. 616. Von Bogdandy uses the wording 'independent adjudicative organs' to describe the panels and the Appellate Body of the WTO.

Convention on treaty conflicts.[66] Keeping in mind the ever-present internal critique of the argumentation of international law, this study attempts to persuade the reader to take into account the progressive economic interdepence of states acting in the multilateral trade system and the novel creation of WTO on the basis of such interdependence as a force of coherence in international law. A countering argument of the critique of the lack of positive instruments addressing the conflicts or rules and value-systems can be made – in the case of the WTO such argument would rest on the legal activism of the organs of the Dispute Settlement Body.[67] This study provides an detailed description of the attempts of the panels and the Appellate Body to provide coherence in WTO law by reference to external general and particular international law.

In order to put WTO under analysis of international law, it must be assumed that WTO law is international law. The system of trade law and especially the WTO manifest a specialised area of law in the context of public international law. One of the reasons of such specialisation is the economic nature of trade law. Some commentators have coined trade law as a system of interdepence among sovereign states in contrast to regular doctrines of state sovereignty and laws of peace and war.[68] A global system of trade is held together by rules of law instead of the use of force.[69] According to the notion of *lex specialis* trade law should then be hierarchically distinct from other rules of public international law. However, public international law dictates some core elements of the WTO. Public international law includes the law of treaties. Since no international constitution, executive government or judiciary exists, the treaties between sovereign States form the foundations of international law.[70] As the ILC Fragmentation Report puts it,

[66] See e.g. Klabbers, Jan, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Cannizzaro, Enzo (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011) at 192 – 205.

[67] Klabbers 2011, p. 204. Klabbers recognizes the role of adjudication in providing coherence in the pluralist legal reality.

[68] See Binder, p. 4. Binder recognises that the claim to powerful international legal order rests on the argument that the proliferation of international commerce requires greater cooperation among states.

[69] See e.g. Van den Bossche, pp. 35 – 38 and Jackson, 'Fragmentation or Unification Among International Institutions: The World Trade Organization', 31 *N.Y.U. J. Int'l L. & Pol.* 823 (1998-1999).

[70] In other words, there is no formal hierarchy of norms in international law.

> One aspect that does seem to unite most of the new regimes is that they claim binding force from and are understood by their practitioners to be covered by the law of treaties.[71]

The new regimes, conceived and born as products of international law are governed by the Vienna Convention on the Law of Treaties, drafted by the International Law Commission of the United Nations. The ILC Fragmentation Report acknowledges that the fragmentation of these regimes into technical sets of rules such as 'trade law' bear resemblance to the fragmentation of law into territorial sets of rules, i.e. national legal systems.[72] The ILC Fragementation Report justifies the application of traditional jurisprudential rules of hierarchy and conflict to the relationship between the specialised regimes of international law such the WTO system and general international law.[73]

There are different outcomes in conflicts of rules, such as invalidation, mutual support or harmonious co-existence. It shall be assumed that the WTO Agreement and covered agreements are by their nature international treaties in the scope of the VCLT Article 38(1)(a). The ILC Fragmentation Report acnowledges the existence of so-called general instruments of international law, which exist in the background of special regimes such as WTO. These general instruments may control the way the rules in the special regime are interpreted and applied.[74] The general instruments behind WTO are at least customary international law of treaty interpretation, specifically the Vienna Convention on the Law of Treaties, and the general principles of law within the meaning of Article 31(1)(c) of the ICJ Statute. The WTO Agreement and covered agreements are international conventions within the meaning of Article 31(1)(a) of the ICJ Statute, which distinguishes them from non-binding international instruments such as *soft law*.[75] This is supported by the findings of the ILC, by substantive rules of the WTO, by the rulings of its judiciary and also by academic research on WTO, as shall be discussed in the following chapters of this study.

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[71] ILC Fragmentation Report, para 17 at 15.

[72] See also Jenks p. 403.

[73] ILC Fragmentation Report, para 18 at 16.

[74] ILC Fragmentation Report, para 98 at 54.

[75] For a definition of *soft law* see e.g. Klabbers – Peters – Ulfstein pp. 51 – 55, where Ulfstein treats the late GATT 1947 as an example of a *de facto* international organization. See also Van den Bossche, pp 81 – 82.

The ILC Fragmentation Report includes necessary tools to analyze the relationship between the different regimes of international law. The initial step is to find the applicable rules and principles.[76] Chapter 3.2 begins with the discovery of the sources of WTO law and public international law relevant to WTO law. The conclusion of the analysis, according to the ICL Fragmentation Report, can lead to two outcomes. In the first outcome, the different rules in conflict are harmonised through interpretation. The second outcome of the systematic approach leads to a hierarchy, where *lex specialis* or *lex posteriori* distinguish the structural relationship between the conflicting rules.[77] Chapter 4 of this study provides conclusions on the internal structure of WTO law and on the problematic relationship of WTO law with other sets of international law.

WTO law appears to co-exist harmoniously with general international law through the application of Article 3.2 of the Dispute Settlement Understanding. In DSB practice public international law takes a gap-filling role when WTO law is found to lack intrepretative guidance. Gap-filling can also take place when WTO law does not provide for the procedural aspects of the DSB panels and the Appellate Body. For example, the dispute settlement organs have established that they can accept *amicus curae* submissions.[78] This practice does not receive direct support from the Dispute Settlement Understanding. The introduction of private presentation in the dispute settlement procedure is an other example of gap-filling.[79]

However, it must be kept in mind that the primary method of solving WTO trade disputes is not the rule-based approach of the DSB. Before any dispute is taken to the DSB, the WTO Members are obligated to reach a mutually agreed solution to the dispute. According to DSU Article 3.7, the preferred objective of the DSU is for the Members concerned to settle the dispute between themselves in a manner that is consistent with the WTO agreements.[80] Article 3.9 of the DSU must also be taken into account. According to the 3.9 DSU, the provisions of the Dispute Settlement Understanding do not limit the rights of the Members to seek authoritative interpretations of provisions of a covered agreement through decision-making under the WTO Agreement or a under covered agreement which is a Plurilateral

[76] ILC Fragmentation Report, para 36 at 24.

[77] *Ibid.*

[78] Rule 21 of the Working Procedures for the Appellate Review, WT/AB/WP/3, 28.2.1997.

[79] The application of procedural principles of law in the DSB is reviewed in Chapter 3.3.7 of this study.

[80] Articles 4.4, 4.5 and 4.7 of the DSU regulate the procedure of the consultations.

Trade Agreement. According to Article IX(2) of the WTO Agreement only the Ministerial Conference and the General Council have the authority to pass legislative interpretations of the covered agreements by a majority decision. These interpretations may dispose from previous panel and AB recommendations.[81] The interpretations of panels and the Appellate Body relate to the individual dispute brought before them.

The Members in dispute have the possibility to return to consultations at any phase of the DSB proceedings if the consultations initially fail. On the other hand, the DSB is one of the most powerful international dispute settlement bodies in terms of its jurisdiction, insofar that it has the power to provide legal rulings in trade disputes and most of all, authorize sanctions to Members in breach of their obligations under the WTO Agreement and the covered agreements. Article 23 of the DSU plays a role in determining the disputes which shall be brought before the DSB. According to 23 DSU, WTO Members cannot take unilateral measures or countermeasures against actions which violate their obligations or nullify or impair benefits arising from the covered agreements. In addition, Members shall not make individual determinations if such violations have occured except through recourse to the DSB in accordance with the DSU.[82] Article 23 provides the panels and the Appellate Body exclusive powers to examine complaints based on the WTO Agreements and covered agreements.[83]

In the next chapter, this study will attempt to create a coherent view of WTO law by applying the doctrine of sources therein and reviewing the practice of the panels and the Appellate Body. What has been said earlier on this study on the problematic methodology of such pursuits and the limited value of findings of such analysis should not blind the reader of the novel and innovative activism of the Dispute Settlement Body.

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[81] Pauwelyn 2004, p. 112

[82] Article 23 DSU. Article 23 is reviewed in detail in chapter 3.3.8.

[83] The panel ruled in *US – Certain EC-Products*, WT/DS/165/R, paragraph 6.133 that 'it is clear that a Member cannot find in another Member's violation a justification to set aside the prescriptions of the DSU.'

3.2 Sources of WTO Law

3.2.1 WTO Agreement and WTO Covered Agreements

A fundamental classification of the sources of public international law can be found in the Statute of the International Court of Justice. According to the Statute Article 38(1):

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The classification of the ICJ Statute Article 38(1) applies to WTO law.[84] The primary source of WTO law is the WTO Agreement including its annexes.[85] The specific trade agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization are called covered agreements. The WTO Agreement itself and the Dispute Settlement Understanding are also listed as covered agreements. The covered agreements are particular international conventions within the meaning of the Statute of the International Court of Justice (ICJ Statute) Article 38(1)(a).[86] The covered agrements in Annexes 1 – 3 to the WTO Agreement are the only enforceable sources of law in the dispute settlement system. Only the violation of obligations and rights of covered agreements can act as a basis for a complaint in the Dispute Settlement Body.[87]

The Dispute Settlement Understanding is applicable to all the complaints under all the covered agreements, with the exception of some special and additional rules of procedure

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[84] *Contra* see Pauwelyn 2004, p. 90.

[85] WTO Dispute Settlement Handbook, p. 10.

[86] Palmeter and Mavroidis 1998, p. 398.

[87] Articles 1 and 6.2 of the DSU. Van Den Bossche, p. 44.

contained in the covered agreements.[88] The Appellate Body maintained in *Guatemala – Cement I*, that 'a special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them.'[89] The WTO Agreement includes a provision which puts the covered agreements and GATT 1947 agreements into hierarchy. According to Article XVI(3), the WTO Agreement prevails over other multilateral trade agreements. The WTO Agreement and the covered agreements superseed the decisions, procedures and the customary practices of the GATT 1947 treaty.[90]

The content of the term 'covered agreement' has been reiterated in the DSB. In case *Brazil – Desicatted Coconut* the Appellate Body stated that covered agreements include WTO Agreement Annexes 1 and 2 and the Plurilateral Trade Agreements (PTAs) in Annex 4.[91] The application of the DSU to Plurilateral Trade Agreements is subject to the adoption of a decision by the parties to each of these agreements setting out the terms for the application of the DSU to the individual agreement.[92] The TRIPS Agreement was stated to belong to covered agreements in *India – Patents (US).*[93] However, the Trade Policy Review Mechanism (TRPM) is not included in the covered agreements.[94] The TRPM monitors the national trade policies of all WTO Members.

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[88] Article 1.2 DSU.

[89] *Guatemala – Cement I*, WT/DS60/AB/R, para 65.

[90] WTO Agreement article XVI(1) and Klabbers 2009, p. 250. The internal hierarchy of WTO law is addressed in detail in chapter 4.1 of this study.

[91] *Brazil – Desicatted Coconuts*, WT/DS/22/AB, paras 331 - 332

[92] WTO Dispute Settlement Handbook, p. 10. The Plurilateral Trade Agreements include the *Agreement on Trade in Civil Aircraft* and the *Agreement on Government Procurement*. The obligations and rights provided in the PTAs are binding only upon the parties that have entered them.

[93] *India – Patents (US)*, WT/DS/50/AB, para 29.

[94] There are also other WTO documents which are not part of the jurisdiction of the DSB since they are not covered agreements. These include for example the Chairman's determinations, decisions of the WTO organs and the reports of the Panels and the Appellate Body.

3.2.2 Incorporated Agreements and Other International Agreements

Some covered agreements make specific references to other international agreements and are thus considered part of the covered agreements. Such agreements are referred to as incorporated agreements. These agreements include the major international intellectual property agreements referred to in TRIPS Article I(3)[95] and the *Arrangement on Guidelines for Officially Supported Export Credits* of OECD, referred to in the WTO Agreement on Subsidies and Countervailing Measures.[96] Ambiquity remains in the legal status of other international agreements, such as multilateral environmental agreements, which are not incorporated in the covered agreements.

In *Canada – Pharmaceutical Patents* the panel affirmed that the major international intellectual property agreements incorporated into the TRIPS Agreement were to be taken into account in the interpretation of specific TRIPS provisions.[97] The panel also stated, that 'any agreement between the parties relating to incorporated agreements within the meaning of Article 31(2) of the Vienna Convention' was relevant in the interpretation of specific TRIPS provisions. [98] The panel chose to use the *Berne Convention* in the extended context of interpretation, noting that the such context in case of TRIPS went beyond the negotiation history of TRIPS. The negotiation history revealed no clarification on the term 'legitimate interests', a clarification necessary for a successful examination of the case.[99] The panel concluded that Article 30 of the TRIPS Agreement was 'obviously based' on the text of Article 9.2 of the *Berne Convention* and performed examination of the drafting material of the *Berne Convention* in order to extract an ordinary meaning for 'legitimate interests'. What was found from the extended context was in line with the initial interpretation of the panel. It can be argued, that although the panel had previosly found an ordinary meaning for the term in question, it was reluctant to rely solely on its own deliberations. Those deliberations needed normative support from the text of a relevant covered agreement. Since the TRIPS Agreement

[95] These conventions include the *Paris Convention* (1967), the *Berne Convention* (1971), the *Rome Convention* and the *Treaty on Intellectual Property In Respect of Integrated Circuits*.

[96] Annex 1(k) to the *SCM Agreement.*

[97] *Canada – Pharmaceutical Patents,* WT/DS114/R, para 7.14.

[98] *Ibid*.

[99] *Ibid.* at para 7.70.

provided no such support, the panel went on a quest to find support from the *Berne Convention*, legitimised by the incorporation of the convention to the TRIPS Agreement.

Multilateral Environmental Agreements (MEAs) can involve provisions which affect international trade. The provisions of MEAs have been invoked in the DSB to support the intrepretation of environmental terms not explained in WTO law. In *US – Shrimp*, the Appellate Body intrepreted a term of GATT 1994 with support from various sources of international environmental regulation. The referenced agreements included the *United Nations Convention on the Law of Sea* (UNCLOS), the *Convention on Biological Diversity*, *Agenda 21*, the *Resolution on the Assistance to Developing Countries* adpoted in conjunction with the *Convention on Migratory Species of Wild Animals*, and the *Convention on International Trade In Endangered Species of Wild Flora and Fauna*.[100]

The complaint was launched by India, Malaysia, Pakistan and Thailand against the United States. The complaint claimed that United States had breached the GATT 1994 by placing import limits on shrimp products from the complainant countries on the grounds of environmental protection of sea turtles. On the part of UNCLOS, referenced by the parties and the Appellate Body, it is relevant to note that although United States had not signed the treaty, it stated in an oral hearing that in respect of fisheries law it 'believed that UNCLOS reflects international customary law'.[101] The AB noticed, that the term 'natural resources' in Article XX(g) of GATT 1994 was an evolutionary, not a static concept, and the modern interpretation was to follow from UNCLOS.

The examination of the Appellate Body in *US – Shrimp* recognised a substantial, although supplementary, source of interpretation outside the covered agreements. The DSU Article 3.2 provides for the clarification of covered agreements in accordance with the customary rules of intrepretation of public international law, codified in the Vienna Convention.[102] The multilateral environmental agreements cited by the Appellate Body in *US – Shrimp* do not include customary rules of *interpretation* of public international law, as they are substantial international conventions to be *interpreted* as provided in the Vienna Convention. However,

[100] *US – Shrimp,* WT/DS58/AB/R, paras 130 – 134.

[101] *US – Shrimp,* WT/DS58/AB/R, footnote 110.

[102] Article 3.2 DSU.

the Appellate Body did not apply the MEAs as such in the examination of the case, but rather as supplementary means of interpretation when it was obvious that a term had to be interpreted and the interpretation had no support in WTO law. Some commentators have explored the wider use of the 'evolutionary interpretation' of WTO law in terms of human rights and environmental law.[103] Evolutionary interpretation is a prime example of legal activism creating coherence in public international law. It creates hope that aims of different value-systems such as environmental protection and the liberation of trade can indeed be mutual even in international legal argumentation. The importance of environmental protection is explicated in the Preamble of the WTO Agreement.[104]

The Appellate Body considered the effect of a bilateral treaty in interpretation of *EC – Poultry*. The bilateral treaty in question had not been explicitly referenced to in the covered agreements. The Appellate Body ruled, that the instrument, Oilseeds Agreement, could provide supplementary means of interpretation within the meaning of Article 32 of the VCLT because it was a part of the historical background of the consessions of the European Communities for frozen poultry meat.[105] The AB also reiterated, that the Oilseeds Agreement is not a covered agreement, although it was negotiated in the framework of GATT XXVIII.[106] The case *EC – Poultry* seems to be unique in WTO case law, since the panels disqualified similar bilateral instruments from altering the legal interpretation of relevant GATT 1994 and other WTO provisions in cases *Turkey – Textiles*[107], *US – FSC*[108] and *Argentina – Poultry*[109]. In conclusion, agreements incorporated to the covered agreements are considered themselves as covered agreements and therefore primary sources of WTO law. Agreements which are not incorporated can and should act as supplementary means of interpretation of WTO law.

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103 Such exploration has been taken in *de lege ferenda*. See e.g. WTO in Ten, Franconi p. 151. This issue is addressed in chapter 4.2 of this study.

104 WTO Agreement, preamble, para 2. For details see chapter 4.2.2 of this study.

105 *EC – Poultry*, WT/DS69/AB/R, para 83.

106 *Ibid*. at para 79.

107 *Turkey – Textiles*, WT/DS34/R, para 3.31.

108 *US – FSC*, WT/108/R, para 4.110. However, the AB chose to use the terminology of the bilateral agreements in its interpretation of the case, WT/DS108/AB/RW paras 141 – 144.

109 *Argentina – Poultry*, WT/DS241/R. In this case the panel disqualified the findings of an *ad hoc* panel erected to resolve a bilateral dispute under a multilateral non-covered agreement from the interpretation of relevant covered agreement.

3.2.3 Reports of Panels and the Appellate Body

According to Article 38(1)(d) of the ICJ Statute, judicial decisions are applied as subsidiary means of determination of the rules of law.[110] In WTO practice the prior judicial decisions include the reports of WTO panels and the Appellate Body.[111] Judicial decisions are subsidiary sources of public international law in the sense that they do not possess the force of legal precedents. The binding nature of the decisions in the WTO judiciary is restricted to the parties of the case in question, as also provided in Article 59 of the ICJ Statute.[112] In practice the dispute resolution bodies of the WTO do not use the power to part from previous decisions easily. It is also very common for the panels and the Appellate Body as well as the complainants and defendants to quote numerous previous rulings in the examinations and submissions to subsequent cases.[113]

In *Japan – Alcoholic Beverages II* the Appellate Body looked into panel and AB reports as manifestations of subsequent practice of treaty application under Article 31(3)(b) of the Vienna Convention. The AB found the adopted reports of the panels both under GATT 1947 and under GATT 1994 not to have the legal nature of subsequent practice within the meaning of VCLT 31(3)(b).[114] Furthermore, the AB stated that unadopted reports were not to have any legal status in the WTO system since they had not been endorsed through decisions of the Contracting Parties to GATT or the by the WTO Members.[115] The AB stated that the content of subsequent practice within the meaning of Article 31(3)(b) VCLT according to international law is a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a pattern implying the agreement of the parties regarding its interpretation, not an isolated act. The AB still saw that 'the panel could nevertheless find

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110 Article 38(1)(d) of the Statute of the International Court of Justice. Palmeter and Mavroidis 2004, p. 51.

111 Palmeter and Mavroidis, p. 51. Palmeter and Mavroidis claim that also GATT 1947 panel reports are included in WTO law.

112 See *Japan – Alcoholic Beverages II*, WT/DS11/AB/R, pp 12 – 14.

113 There is a guidance clause in the WTO Agreement for GATT 1947. Article XVI:1 provides, that except otherwise provided, the WTO shall be guided by the decisions, procedures and customary practices of the Contracting Parties and the bodies established in the framework of the GATT 1947.

114 *Japan – Alcoholic Beverages II*, WT/DS11/AB/R, pp 12 – 14.

115 *Ibid.* at 14 – 15.

useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.'[116]

Since the adoption of the reports was found to carry legal value, the AB reviewed the significance of whether a report in question was adopted by the Contracting Parties or not. The adoption of a report takes place in the Dispute Settlement Body, where a vote is taken on adoption or rejection of the report. The AB outlined in case *Japan – Alcoholic Beverages II* that the adoption of a report in the DSB does not constitute a legislative interpretation of the WTO Agreement or the covered agreements, since according to WTO Agreement IX(2) only the Ministerial Conference and the General Council have the authority to pass such interpretations.[117] The AB compared its findings on the legal status of adopted reports to Article 59 of the Statute of ICJ, adding that 'this has not inhibited the development by that Court (and its predecessors) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.'[118]

In conclusion, the previous practice of GATT and WTO panels and the Appellate Body is at least a supplementary source of WTO law, although the reports lack the value of subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention. They create legitimate expectations for the WTO Members and the dispute settlement bodies should provide reasons for a departure from previous findings.[119] According to Palmeter and Mavroidis, 'Adopted reports have strong persuasive power and may be viewed as a form of non-binding precedent.'[120] However, the panels are less likely to follow the reports of previous panels than the AB, since the AB is a standing judicial body and the panels are just *ad hoc* instances.[121] The cementation of WTO jurisprudence is a feature of a constitutionalized order. Although it is rather *de facto* in its practical nature, it is an important development for the coherence of WTO law.

[116] *Japan – Alcoholic Beverages II*, WT/DS11/AB/R, p. 15.

[117] *Ibid.* at 13.

[118] *Japan – Alcoholic Beverages II,* WT/DS11/AB/R, footnote 30 at 14.

[119] *Japan – Alcoholic Beverages II,* WT/DS11/AB/R, p. 31.

[120] Palmeter and Mavroidis 1998, p. 401.

[121] Palmeter and Mavroidis 2004 p. 62, Van den Bossche p. 56.

3.2.4 General International Law

Kelsen recognizes general or common international law to be customary law valid for all States belonging to the international community. [122] Kelsen also refers the principles of international law to general international law. A prime example of coherence of WTO law is the application of external customary law of treaty interpretation in the Dispute Settlement Body. The application of public international law in WTO panels and the Appellate Body is provided for in the Dispute Settlement Understading Article 3.2. Public international law relevant to WTO dispute settlement includes at least the customary rules of treaty interpretation and the general principles of law.

The most important source of rules of treaty interpretation in WTO dispute settlement is the Vienna Convention on the Law of Treaties, especially Articles 31 and 32 therein. Some commentators argue, that articles 31 and 32 VCLT are the only exhibition of customary international law in the practice of the panels and the Appellate Body.[123] However, the DSB organs have applied general principles of law within the meaning of ICJ Statute 38(1)(c). The panels and the Appellate Body have also applied procedural principles of law.[124] The application of general international law in the panels and the AB is viewed in detail in chapter 3.3 of this thesis.

3.2.5 Theoretic Limits of WTO Law

The set of trade rules in covered agreements is a particular system, insofar that WTO law is distinct and special in comparison to other forms of international law. WTO law is created within the WTO and it is special to the WTO context.[125] This means that WTO law can be recognised as a specialised regime or a branch of international law, comparable to

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[122] See Kelsen 1952. Pauwelyn provides a conclusion similar to Kelsen's. See Pauwelyn 2001 p. 536. For a critical opinion on the categorisation of 'general principles of international law' see Brownlie p. 18. This study uses the terms 'customary international law' and 'principles of law' within the meanings provided by the ICJ Statute Articles 31(1)(b) and 31(1)(c) respectively.

[123] See e.g. Palmeter and Mavroidis 1998, p. 406.

[124] See chapter 3.3.7 of this study.

[125] Pauwelyn 2001, p. 538.

environmental law and human rights law.[126] The scope of WTO law beyond the WTO Agreement and covered agreements has been discussed by academics.

Some argue that the WTO instruments do not provide a clear and contained definition on the limits of WTO law.[127] Pauwelyn uses the term 'WTO rules' to all rules of law created in the context of the WTO, including but not limited to covered agreements and incorporated agreements. According to Palmeter and Mavroidis, international law established in the ICJ Statute, customary law, principles of international law and the subsidiary sources listed in the ICJ Statute 38(d) are also part of WTO law.[128] According to Van den Bossche, WTO law includes, in addition to covered agreements, the dispute settlement reports, acts of WTO bodies, agreements concluded in the context of WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists and finally the negotiating history of covered agreements.[129]

Qureishi counts practice under GATT, including reports of GATT dispute settlement panels, WTO practice, particularly reports of dispute settlement panels and the Appellate Body, custom, the teachings of highly qualified publicists, general principles of law and other international agreements as WTO law.[130] Alvarez lists three types of general sources of public international law, which have been applied in the WTO dispute settlement: international agreements apart from WTO covered agreements, customary international law and judicial opinions.[131] Most academics distinguish the Vienna Convention as a core instrument for treaty interpretation in the WTO. However, for example Qureshi argues that the Vienna Convention should have a restricted role in WTO dispute settlement in order to make room for WTO's own, specific principles and practices of treaty interpretation.[132]

[126] See eg. Marceau 2002 and Pauwelyn 2001. This topic is reviewed in detail in chapter 4 of this study.

[127] Pauwelyn 2001, footnote 1.

[128] Palmeter and Mavroidis, p. 399.

[129] Van den Bossche, p. 44.

[130] Qureishi, p. 58.

[131] Alvarez, p. 491.

[132] Qureishi, p. 59. If the elaborate and concordant use of the Vienna Convention by the panels and the Appellate Body is taken into account as evidence of the primacy of the Vienna Convention, such argument holds little validity.

Although the academic discussion fails to draw clear borders for WTO law, there are some internal sources in the WTO to provide guidance. The Dispute Resolution Understanding is the key document determining the applicable law in the panels and the Appellate Body. The DSB organs have invoked public international law various times in interpretation of the covered agreements. Countering argument is that the use of PIL has mostly taken place in an interpretatitive or supplementary capacity. Furthermore, since *stare decisis* is excluded from public international law and WTO law, even the relevant case law of the panels and the Appellate Body cannot be classified as a primary source of WTO law. It can be established that the primary, binding sources of WTO law are the WTO Agreement and covered agreements including the incorporated agreements. However, in order to establish coherence, one must not only listen to progressive academia or worship Article 3.2 of the DSU, but also review the massive bulk of WTO case law and accept it as judicial activism.

3.3 The Dispute Settlement Understanding – Jurisdiction and Applicable Law

3.3.1 Article 1 of the DSU

The jurisdiction of the Dispute Settlement Body is compulsory and exclusive. According to Article 1.1 of the Dispute Settlement Understanding, the Dispute Settlement Body shall handle complaints on disputes arising between the WTO Members under the WTO Agreement or the covered agreements.[133] This provision limits the jurisdiction of the DSB to complaints based on WTO law – no claims based solely on international law other than WTO can be brought before the DSB. Article 1.1 DSU provides that:

> 1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning theirs rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the

[133] Article 1.1. DSU. Access to the WTO dispute settlement system is restricted to WTO Members. The Appellate Body stressed the restriction in *US – Shrimp*, WT/DS58/AB/R, para 101: 'the access is not open to individuals or international organizations, whether governmental or non-governmental.'

"WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

There are various types of complaints in each of the covered agreements. The GATT 1994 Article XXIII (a) – (c) sets out the specific circumstances in which a WTO Member is entitled to a remedy.[134] The most common complaint is the violation complaint. According to GATT Article XXIII:1(a), the violation complaint requires the failure of another contracting party to carry out its obligations under the GATT 1994. The second type of complaint in GATT 1994 is the non-violation complaint of GATT Article XXIII:1(b), developed in GATT 1947 practice.[135] Such complaint can be used when a benefit of a Member is nullified or impaired due to any measure of an other Member, whether or not the measure in question conflicts with the provisions of GATT 1994. Non-violation complaints have been rarely used.[136]

The third type of a complaint under GATT 1994 is the situation complaint contained in GATT 1994 III:1(c). It provides a basis for a complaint in the existence of any other situation which does not fall in the previous two categories of complaints. Situational complaints have never been raised in the DSB.[137] GATS Articles XXII and XXIII include complaint provisions similar to those of the GATT 1994.[138] There has also been a case where a complaint was based on the WTO Agreement itself and another where the complaint was based on the DSU.[139]

The request of an establishment of a panel determines the terms of reference in the examination of the complaint.[140] According to Article 6.2 DSU the request for an establishment of a panel requires a 'brief summary of the legal basis of the complaint sufficient to present the problem clearly'. The legal basis shall be the relevant provisions of

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[134] WTO Dispute Settlement Handbook, p. 29.

[135] Jackson 1998 p. 174.

[136] WTO Dispute Settlement Handbook, p. 30. Non-violation claims can be said to be ambiguous, since they do not require any violations of treaty provisions to be brought. See e.g. Larouer pp. 109 - 113. Larouer states that the exceptional nature of the non-violation remedy has caused mistrust in WTO Members and that the remedy has *de facto* been available to few WTO Members.

[137] WTO Dispute Handbook, p. 30.

[138] There are differences in the requirements of a violation complaint. GATS does not include a situational complaint.

[139] *US - Section 301 Trade Act*, WT/DS152/R and *US - Certain EC Products,* WT/DS165/AB/R respectively.

[140] Article 7.1 DSU.

the WTO Agreement and covered agreements, including the incorporated agreements.[141] According to DSU Article 6.2 the complainant must identify the measures at issue in addition to the legal basis of the complaint. According to the Appellate Body the concept of 'measure' deserves a wide interpretation. In case *Guatemala – Cement I*, the AB extracted a meaning for 'measure' from GATT 1947 practice, stating that 'a measure can be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government'. The AB added, citing various DSB cases, that 'a measure can also be an ommission or a failure to act on the part of a Member.'[142]

The complaint can challenge a positive measure taken by a WTO Member in violation of a prohibition under a covered agreement. Oppositely, the inactivity of a Member may trigger the complaint if the covered agreement in question requires positive measures and the measures are not taken by the Member. The measure must be taken by the government of a Member. In case *Argentina – Bovine Hides* the Panel required that the actions at issue, cited in the terms of reference of the case, shall be proved to be properly attributed to the government of the defendant.[143] The case dealt with an alleged state sponsored cartel which had trade implications.

The particular limit of the jurisdiction of the Dispute Settlement Body does not seem to limit the applicable rules to the WTO Agreement and covered agreements.[144] In other words, the panels and the Appellate Body shall have the power to apply supplementary sources of law, namely customary international law of treaty interpretation and general principles of law. Article 3.2 of the DSU will be discussed in detail in the following section.

3.3.2 Article 3.2 of the DSU

The *raison d'être* of the Dispute Settlement Body is to provide security and predictability to the multilateral trade system. The Appellate Body stated in *Japan – Alcoholic Beverages II*, that

[141] Palmeter and Mavroidis, p. 399.

[142] *Guatemala – Cement I,* footnote 47.

[143] *Argentina – Bovine Hides*, WT/DS155/R, para 11.51. For details see chapter 2.3.8 of this study.

[144] Article 3.2 DSU. See Palmeter and Mavroidis 1998, pp. 338 – 339, Pauwelyn 2001 pp. 554 – 556 and Marceau 2002, pp. 757 – 765.

‘WTO rules are reliable, comprehensive and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world.’[145] On a less poetic note, in *US – Section 301 Trade Act* the AB stressed the importance of the Dispute Settlement Understanding to the object and purpose of the preamble of the WTO Agreement. According to the AB, ‘Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators.’ According to Article 3.2 of the DSU,

> Members recognize that (The WTO Dispute Settlement System) serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 3.2 DSU is the key article for the application of public international law in WTO dispute settlement. However, the dispute settlement organs do not have a *carte blanche* in applying any rules of public international law of their choosing. In case *US – Wool Shirts and Blouses*, the Appelate Body made clear, that although DSU 3.2 provides for the use of treaty interpretation along the Vienna Convention in WTO dispute settlement, the Panels or the Appelate Body should not view the article as a means to make law outside of the dispute in question.[146] Jackson addressed the question of the ambiquity of DSU Article 3.2 as early as in the year 1998. According to Jackson, Article 3.2 of the DSU can be viewed as a limitation of judicial activism and as a manifestation of judicial restraint.[147] Van den Bossche notices, that the WTO dispute system has a contentious, not an advisory jurisdiction; it can only clarify WTO law in a dispute.[148]

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[145] *Japan – Alcoholic Beverages II,* WT/DS11/AB/R, p. 31.

[146] *US – Wool Shirts and Blouses*, WT/DS33/AB/R, p. 20.

[147] Jackson 1998, p. 172.

[148] Van den Bossche p. 190.

The term DSU 3.2 term 'clarify' was interpreted in *Argentina – Poultry*. The case was about the effect of a ruling of a non-WTO dispute resolution body, a MERCOSUR protocol *ad hoc* Arbitrary Tribunal, in the WTO panel. The violation in question was the imposition of anti-dumping measures by Argentina on imports of poultry from Brazil. Brazil complained that Argentina had acted inconsistently with the Anti-Dumping Agreement, a covered agreement, and thus the correct venue for the dispute would have been a WTO panel. Argentina referred to Vienna Convention Article 31(3)(c) in support of the inclusion of the MERCOSUR tribunal award to the terms of reference of the panel. For the previous ruling in the matter, issued by the MERCOSUR *ad hoc* tribunal, the panel stated that Argentina 'failed to point out any element of the MERCOSUR ruling that would require the Panel to interpret specific provisions of the WTO agreements in a particular way'.[149] The panel went further to conlude that Argentina's request for the panel to *rule* according to the MERCOSUR report would exceed the panel's mandate to *interpret* WTO law.[150]

The panel is not even bound to follow its own adopted reports or Appellate Body reports.[151] International tribunals are not organised in a hierarchical order.[152] Ulfstein recognises three kinds of problems with the fragmentation of the international judiciary: risk of overlapping judiciaries running the same cases, *res judicata* between previous and subsequent rulings in different tribunals and forum shopping by the disputants.[153] Such problems seem unlikely to appear in the DSB. DSB has a limited judiciary, *res judicata* is clearly ruled out by the DSU and DSB practice and forum shopping is unlikely to occur since the DSB has exclusive jurisdiction to handle complaints based on the covered agreements.

External international law has at least two basic functions in the DSB. Firstly it acts as a tool for interpreting provisions in the WTO covered agreements. Secondly it fills gaps in procedural matters when WTO law does not provide for them.[154] These matters can relate to, inter alia, burden of proof, judicial equity and representation in the proceedings.[155] Apart

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149 *Argentina – Poultry*, WT/DS241/R, para 6.6.

150 *Ibid.*

151 *Argentina – Poultry*, WT/DS241/R, para 7.41. See also WTO in Ten, Francioni, p. 153.

152 Klabbers – Peters – Ulfstein, pp 135 - 142.

153 *Ibid.*

154 Pauwelyn 2003, p. 998.

155 Cameron and Grey, p. 252. Pauwelyn 2003, p. 998. For details see chapter 2.3.7 of this study.

from treaty interpretation and procedural matters, public international law is said to have even a wider impact in the WTO.[156] From a practical point of view WTO law may overlap with many other sets of international rules, such as multilateral environmental agreements or human rights law. Although the field of trade law is specialised and WTO does restrict the basis of claims in the DSB to WTO covered agreements only, there is at least a theoretic possibility of non-WTO law intruding the WTO regime.[157]

However, the starting point for the introduction of external international law in a panel or Appellate Body case according to core WTO documents and case law of the panels and the Appellate Body is the application of rules of treaty interpretation and general procedural principles of law. There seems to be no conclusion on the application of other substantial rules of international law, e.g. rules of other specialised regimes of international law especially in a manner which they would be overriding WTO rules.[158] The lack or resolve in this matter is a challenge to coherence. The hidden crisis is discovered and addressed in chapter 4.2 of this study.

3.3.3 Articles 31 and 32 of the Vienna Convention

The fundamental source of customary international law for interpreting covered agreements in the panels and the Appellate Body is the Vienna Convention on the Law of Treaties, especially articles 31 – 32.[159] The WTO Agreement and all covered agreements fall under the scope of VCLT as international treaties.[160] The use of VCLT as a general legal framework in assessing individual regimes of international law is generally supported by the findings of the International Law Commission and specifically in terms of WTO law.[161] Since all WTO members, such as United States, have not joined the Vienna Convention, there remains ambiquity of the universal application of the provisions of the convention. To affirm the status of the Vienna Convention among WTO Members, the Appellate Body has declared the general

[156] See Pauwelyn 2003. Pauwelyn researches the possibility of relying purely on non-WTO law in arguing a case against WTO law. It remains unclear how far this interpretation of WTO law can be taken.

[157] For analysis of conflicts of rules, see chapter 4 of this study.

[158] ILC Fragmentation Report, para 167.

[159] Jackson 2004, p. 111

[160] Article 2.1 VCLT, Cameron and Grey p. 252.

[161] ILC Fragmentation Report, para 168 at 89.

rules of treaty interpretation in the Vienna Convention to be codified customary or general international law.[162] It can be claimed that other provisions of the Vienna Convention would not share the same fundamentional status as customary international law until they are elevated as such by the DSB.[163] The International Court of Justice has given the VCLT Articles 31 and 32 customary international law status in case *La Grand*.[164]

The Dispute Settlement Body, in this case the Appellate Body, applied the Vienna Convention first time in *US – Gasoline.*[165] The case was about trade restricting measures taken by United States in import of petroleum products. US was imposing stricter standards on the chemical characteristics of imported fuels than on domestically produced fuels. The restrictive measure was a suspected breach of GATT Article III on the principle of national treatment. The possibility of exeption from the principle on grounds of environmental protection was examined by the panel.

The *US - Gasoline* was appealed from the panel to the Appellate Body. The Appellate Body ruled that the panel had overlooked a fundamental rule of treaty interpretation, expressed most authoritatively and succintly in the Vienna Convention on the Law of Treaties, Article 31:[166]

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

[162] *Japan – Alcoholic Beverages II,* WT/DS/11/R, p. 10.

[163] See e.g. Lindroos and Mehling, p. 867.

[164] *La Grand* [2001] ICJ Reports 466, para 99.

[165] *US – Gasoline,* WT/DS2/AB/R.

[166] *Ibid.* at 16.

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty

3. There shall be taken into account, together with the context:

   (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

According to the AB, the general rule of interpretation had been relied upon by all of the participants to the dispute and thus attained the status of a customary rule of international law. The Vienna Convention was applicable as 'part of the customary rules of interpretation of public international law which the Appellate Body has been directed by the DSU Article 3.2 to apply in seeking clarification to the WTO Agreement and covered agreements'.[167] The AB conluded that WTO law 'was not to be read in clinical isolation from public international law'.[168] According to the AB, one of the corollaries of this general rule of interpretation was that the interpretation of a term must give meaning and effect to all terms of the WTO Agreement.[169] The textual examination was pointed as a primary method of treaty interpretation.[170] The first component of the Vienna Convention Article 31 provides that the terms are to be interpreted according to their *ordinary meaning* in the light of the object and purpose of the treaty.

The use of Vienna Convention in interpreting WTO covered agreements as provided in *US – Gasoline* was reiterated in *India – Patents (US)*. The panel chose to use the contextual approach of treaty interpretation, where a single provision shall give meaning and effect to

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[167] *US – Gasoline,* WT/DS2/AB/R, p. 16

[168] *Ibid.* at 18. The meaning of 'not to be read clinical isolation' is, at best, ambiguous. It is a sort of a jurisprudential mirror for legal scholars – others see activism, others constraint.

[169] *US – Gasoline*, WT/DS2/AB/R, p. 23.

[170] Jackson 2004, p. 111

the object and purposes of the whole treaty.[171] In *Japan – Alcoholic Beverages II* the Appellate Body had maintained, that textual approach is the preferred method of treaty interpretation. According to the AB, 'Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: interpretation must be based above all to the text of the treaty and that the provisions of the treaty are to be given their ordinary meaning in their context.'[172] Some academics have expressed worry over the extended possibilities of interpretation of the panels and the Appellate Body.[173] For example the *travaux preparataires* of a treaty are a common source for research in to the object and purpose of a treaty, and thus considered by some as a strictly secondary or subordinant a source to the text of the treaty.[174] During the drafting of the Vienna Convention the United States proposed an amendment to combine Articles 31 and 32 in order to remove the hierarchy of Article 31.[175]

The Panel interpreted DSU 3.2 further in *Korea – Procurement*.[176] Initially invoking the VCLT Articles 31 and 32 of treaty interpretation, the Panel further endeavoured to interpret the non-violation claim of the covered agreement in terms of the 'principles of customary international law.' The Panel formulated, that the 'non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law.'[177] The principles invoked by the Panel included *pacta sunt servanda*, i.e. expectations of good faith and also principles concerning error in treaty negotiations, formulated by the Permanent Court of International Justice and the International Court of Justice and codified in the VCLT Article 48.[178]

According to the text of the decision, 'Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent

[171] *India – Patents (US)*, WT/DS50/R, para 6.17.

[172] *Japan – Alcoholic Beverages II,* WT/DS/11/R, p. 12.

[173] Jackson 1998, p. 113.

[174] Jackson 2004, p. 111

[175] Brownlie, p. 603.

[176] *Korea – Procurement*, WT/DS162/R.

[177] *Ibid.*

[178] Article 48 VCLT, Error in treaty negotiations.

that the WTO treaty agreements do not 'contract out' from it.'[179] The formulation seems to expand the scope of public international law relevant to WTO law from treaty interpretation rules such as VCLT to all public international law which is not in conflict with the covered agreements. It has been duly noted that some WTO rules contract out of public international law, such as state responsibility.[180] It can be argued, that when a treaty regime contracts out of one rule of public international law, it does not mean that it contracts out of all rules of public international law.[181] The panel's determinations were performed out of necessity in a situation where WTO law did not contain codified principles of good faith or error in treaty negotiations. The result of *Korea – Procurement* was controversial although the DSB adopted it without appeal. A progressive observer would treat the noble wording of *Korea – Procurement* as coherence-enchancing behavior on the part of the panel.

In *US – Shrimp* the AB began the interpretation of GATT 1994 from a specific article, rather than from the object and purpose of the treaty. AB reaffirmed the primacy of the textual method in the ruling by stating that 'a treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted.'[182] In *US – Section 301 Trade Act* the Panel noted that treaty interpretation uses systematic and teleological methods in addition to textual analysis. Therefore the Panel viewed the contents of VCLT Article 31 – text, context and object-and-purpose as well as good faith – as a holistic rule. According to such interpretation the textual approach would not be the definitive starting point of treaty interpretation. The Panel in *US – Section 301 Trade Act* flaunts the DSB Panels and the Appellate Body to be one of the richest source of interpretation of Articles 31 and 32 of the Vienna Convention in recent years.[183]

In case Japan – *Alcoholic Beverages II*, the Appellate Body reaffirmed the status of VCLT Article 31 as rule of 'customary or general international law' and proceeded to give the same status to VCLT Article 32:[184]

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[179] *Korea – Procurement*, WT/DS163/R, para 7.96.

[180] Pauwelyn 2001, p. 539.

[181] *Ibid.*

[182] *US – Shrimp*, WT/DS58/AB/R, para 114.

[183] *US – Section 301 Trade Act*, WT/DS152/R, para 7.21.

[184] *Japan – Alcoholic Beverages II,* WT/DS/11/R, page 10.

ARTICLE 32

Supplementary means of interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result, which is manifestly absurd or unreasonable.

The panels and the Appellate Body have found the negotiation history of the instrument under interpretation, the customs classification practice of WTO members, bilateral agreements between the parties to the dispute and working documents of the GATT Secretariat to be subsidiary means of interpretation within the meaning of Article 32 of the VCLT.[185]

According to the Appellate Body *EC – Computer Equipment*, Article 32 shall be applied in interpretation, 'if after the application of Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.'[186] The negotiation history of the Uruguay Round tariff negotiations was permitted to be taken into account as part of the circumstances during the conclusion of the agreement under interpretation.[187] The VCLT Article 32 was also invoked in *EC – Poultry*, where the AB considered that the negotioation history of a bilateral agreement between the parties in dispute constituted historical background within the meaning of Article 32 VLCT.[188]

VCLT Article 32 was further used in *Canada – Dairy* when Canada claimed that the negotiation history of the Agreement on Agriculture was a subsidiary means of interpretation of the agreement. Initially the panel disagreed with Canada about the negotiation history belonging

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[185] WTO Analytical Index on the DSU, <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_e.htm> (visited 5 May 2011)

[186] *EC– Computer Equipment,* WT/DS68/AB/R, para 86.

[187] *Ibid.* at para 75.

[188] *EC – Poultry*, WT/DS69/DS/AB/R, para 83. See in detail chapter 2.2.2 of this study.

to the scope of interpretion. Taking an opposite stand to the panel, the Appellate Body agreed that the use of subsidiary means of interpretation within the meaning of VCLT Article 32 was necessary to resolve the conflict. The AB proceeded to review the negotiation history of the legal instruments in question.[189] Similar conclusions were attained in panel reports in cases *US – Export Restraints* and *Egypt – Steel Rebar.*[190] In *Mexico – Telecoms* the Panel found that an Explanatory Note issued by the GATT Secretariat was a subsidiary means of interpretation within the meaning of Article 32 VCLT.[191]

3.3.4 Articles 31(3)(b) and 31(4) of the Vienna Convention

The application of the principle of subsequent practice[192] of the WTO judiciary and Member States within the meaning of VCLT Article 31(3)(b) has been reviewed in the DSB. In *Japan – Alcoholic Beverages II* the panel ruled that previous adopted panel reports constitute subsequent practice in the sense of VCLT Article 31(3)(b). This was dismissed by the Appellate Body, which ruled that previous case law of the WTO jucidiary does not constitute subsequent practice since it is does not form a cohesive and concordant pattern of interpretation.[193]

As for the subsequent practice of the Member States, the Appellate Body took a similar approach in *Chile – Price Band System*[194]*.* The case was about price band systems on agricultural imports put in place by Chile which Argentina deemed in breach of, inter alia, GATT Article II:1(b). The price band systems regulated the import prices of various agricultural products, resembling an ordinary customs duties system, which no Member State should have had in place before the Uruguay Round. Chile claimed, that the price band system had not become an 'ordinary customs duty', whereas Argentina took the opposite view. The Appellate Body proceeded to interpret the status of the price band system as a rule within the meaning of the Vienna Convention Article 31(3)(b) on subsquent practice. The Appellate Body

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[189] *Canada – Dairy,* WT/DS113/AB/R, paras 138 – 139.

[190] *US – Export Restraints*, WT/DS194/R para 8.64 and *Egypt – Steel Rebar*, WT/DS211/R para 7.154.

[191] *Mexico – Telecoms*, WT/DS204/R, para 7.44.

[192] See Van den Bossche, pp 59 – 60. Van den Bossche counts 'the subsequent practice of the WTO, WTO organs or WTO Members' as a source of WTO law.

[193] *Japan – Alcoholic Beverages II,* WT/DS/11/R, p. 15.

[194] *Chile – Price Band System*, WT/DS207/AB/R.

found no evidence that the parties to the dispute had maintained an implied agreement on the interpretation of the WTO agreements considering the price band system.[195] Based on the findings of the Appelate Body in *Japan – Alcoholic Beverages II* and *Chile – Price Band System* it can be assumed that the position of the principle of subsequent practice is not permanently established in WTO law.

Article 31(4) of the Vienna Convention was applied by the Panel in case *Mexico – Telecoms*.[196] The case dealt with Mexico's domestic measures governing the supply of basic and value-added telecommunications services. The VCLT article provides, that 'A special meaning shall be given to a term if it is established that the parties so intended.' In the case the VCLT Article 31(4) was used to provide a spesialised meaning to certain telecommunications terms such as 'interconnection', 'linking' and 'telecommunications facilities'. Mexican telecommunications regulations provided, that international connections shall be routed through Mexican telecommunications facilities, which the Panel found to be too broad a definition in common language and thus a strict restriction on the supply of telecommunications services. the Panel deemed necessary to apply a more specialised, telecommunications-branch meaning to the term 'facilities' within the framework of VCLT Article 31(4).

3.3.5 Other Articles of the Vienna Convention

In addition to Articles 31 and 32, the DSB has quoted multiple other articles of the Vienna Convention in its rulings.[197] In case *Canada – Patents* the Panel applied Article 28 of the VCLT in determining the non-retroactivity of an agreement between the parties to the dispute. In this case the Panel found that the acts of the party were not to be construed to the effect of Article 28 VCLT. The scope of the VCLT Article 28 includes actions which have ceased before the conclusion of a treaty, and in *Canada – Patents* the Panel found that the actions had not ceased.[198] In case *EC – Poultry* the Panels applied VCLT 59(1) and 30(3) in determining the applicability of subsequent treaties on the same subject matter. However, the Appellate Body deemed the recourse to the Vienna Convention articles unnecessary on the basis that WTO

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[195] *Chile – Price Band System*, WT/DS207/AB/R, para 214.

[196] *Mexico – Telecoms*, WT/DS204/R.

[197] Lindroos and Mehling, pp. 869 – 870.

[198] *Canada – Patents*, WT/DS170/R, para 6.42.

documents and bilateral instruments under assessment resolved the issue of successive treaties on their own merit. The AB chose to rather apply VCLT 31 in resolving the issue.[199]

Article 33(4) of the Vienna Convention has been cited in multiple DSB rulings. The article deals with interpretational problems caused by plurilangual treaties. In *EC – Asbestos*, the Panel provided that in the WTO Agreements shall be interpreted within the scope of VCLT Article 33(4), since it is a treaty with authentic texts in three languages – English, French and Spanish.[200] In case *Chile – Price Band Systems* the Appellate Body found the Panel to have erred in judging a term to have a different meaning in French and Spanish than in English. The AB concluded that in the spirit of Article 33 VCLT, when the different language versions of the authentic text of the WTO Agreement disclose a difference in meaning, the meaning which best reconciles the texs shall be adopted.[201]

The case *Turkey – Textiles* contains important references to both the *Lomé Convention* and the Article 41 of the Vienna Convention. The Panel and the Appellate Body interpreted the effect of the Turkey – EU customs union to the WTO Agreement. Article 41 VCLT contains rules on interpretation in case of a modification of a multilateral treaty by two or more Members. In this case the the customs union forced Turkey to adopt all EC trade policies. The Appellate Body ruled, that such provision was not sufficient to exempt Turkey from its obligations under the WTO Agreement.[202] In *Korea – Procurement*, the Panel resorted to the principle of error in respect of a treaty, developed in customary international law through the case law of the Permanent International Court of Justice and the International Court of Justice.[203]

3.3.6 General Principles of Treaty Law

The rules of treaty interpretation employed by the panels and the Appellate Body are not limited to the Vienna Convention.[204] The WTO Analytical Index on the Dispute Settlement Understanding lists various principles not directly contained in the Vienna Convention as

[199] For details see chapter 3.1 of this study.

[200] *EC – Asbestos,* WT/DS135/R, para 8.29.

[201] *Chile – Price Band Systems*, WT/DS207/AB/R, para 91.

[202] *Turkey – Textiles*, WT/DS34/R, paras 9.180 – 9.1802.

[203] *Korea – Procurement*, WT/DS163/R, para 7.123.

[204] Cameron and Grey, p. 256; Lindroos and Mehling, p. 869.

sources of rules of treaty interpretation, as applied in the DSB. These include the concepts of *in dubio mitius*, the good faith requirement, legitimate intentions, the principle of effective treaty interpretation and the rule of *lex specialis*.[205]

In dubio mitius was used in *EC – Hormones* to defend State sovereignty.[206] The case concerned an article in the WTO Agreement on Sanitary and Phytosanitary Measures. According to the Appellate Body, it could not be lightly assumed that a State intended to assume itself a stricter obligation rather than a more lenient one when the interpretation of a treaty provision was inconclusive to point out the strenght of the obligation in question.[207] The AB maintained, that a treaty term with an ambiguous meaning shall be interpreted to cause less restrictions on the territorial and personal supremacy of a State or to have less general restrictions on the parties to the treaty.[208]

In *EC – Hormones* the Appellate Body also interpreted whether a certain principle was a certified principle of customary international law. The other party, European Community, claimed that the precautionary principle was a general principle of international law, while the other party disagreed, claiming that the principle had not yet been 'chrystallised' within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[209] The Appellate Body found, that the precautionary principle in question could not overrule a WTO covered agreement, and thus was not in the scope of DSU 3.2. The case was appealed from the Panel to the AB. Both the Panel and the AB were reluctant to go into deeper evaluations into the nature of a principle in terms of its status as a 'principle of customary international law' within the meaning of ICJ Statute Article 38.[210]

The good faith requirement has been cited in multiple DSB rulings. The ICJ maintained in *Certain Norwegian Loans*, that the obligation to act in accordance with good faith being a

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[205] WTO Analytical Index on the DSU, <www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_e.htm> (visited 5 May 2011)

[206] *EC – Hormones,* WT/DS48/AB/R, para 165.

[207] *EC – Hormones,* WT/DS48/AB/R, para 165.

[208] *Ibid.* Footnote 154 at 64.

[209] *EC – Hormones*, WT/DS48/AB/R.

[210] The application of general principles of law in the DSB is detailed in Section 2.3.6, see below.

general principle of law, is also part of international law.[211] The principle of good faith is also established in the UN Charter, as the Article 2.2 recognises, that 'all Members shall fulfil in good faith the obligations assumed by them in accordance with the present *Charter.*' The AB stressed the importance of good faith in *US – Cotton Yarns*. The AB concluded, that the 'general principle of *good faith* underlies all treaties'. [212] In *US – Shrimp*, the good faith requirement was said by the Appellate Body to contain the doctrine of *abus de droit*, which provides that States are prohibited to use their rights in an abusive manner.[213] According to the AB, a State which exercises its treaty rights abusively breaches the rights of other parties to the treaty in addition to violating its own obligations.[214]

The AB recognised that the good faith requirement and its component, Abuse of Rights (*abus de droit*), both belong to general principles of law and to general principles of international law.[215] *Abus de droit* includes at least three components that deal with international law. The first is component is the prohibition of a state to exercise its rights in a manner other than the manner intended to be exercised. The second component prohibits a state from exercising a a right in a way that impinges on a another state's enjoyment of its rights when the exercise of the right is not fair and equitable between the parties. The third component prohibits a state from exercising a discretionary right unreasonably, dishonestly or without due regard for the interests of others.[216] Good faith was also inflicted in cases *US – Hot Rolled Steel* and *US – Export Restraints*.[217] In addition to DSB case texts, good faith is cited in articles 3.10 and 4.3 of the DSU. According to Article 3.10 DSU,

> It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.

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[211] *Certain Norwegian Loans* (France v Norway) (Jurisdiction), 1957, ICJ Rep 9, 53.

[212] *US – Cotton Yarn*, WT/DS192/R, para 81.

[213] *US – Shrimp,* WT/DS58/AB/R, para 158.

[214] *US – Shrimp,* WT/DS58/AB/R, para 158.

[215] *Ibid.*

[216] Mitchell, p. 350.

[217] WT/DS184/AB/R, para 101 and WT/DS194/R, para 8.18.

The good faith requirements contained in Articles 3.10 and 4.2 could be used in connection to a complaint. The complainant could claim that the respondent would have attended consultations without being willing to find a mutually agreed solution to the dispute.[218] In *EC – Computer Equipment* the AB maintained, that the good faith requirement is to be construed to promote the good common intentions of both the parties to a dispute.[219] Previously in the dispute the Panel had come to a conclusion that good faith correlated with the notion of legitimate intentions and thus had to be construed to the detriment of the opposing party to the dispute. According to the AB, this was a wrong interpretation of Article 31 of the Vienna Convention. The AB found, that legitimate intentions were a unilateral, subjective notion, which could not be used in analyzing the common good faith of the parties.[220]

Even a clear violation of a treaty provision does not necessarily lead to the assumption of *mala fide* on the part of the breaching party. In case *US – Offset Act (Byrd Amendment)* the Appelate Body maintained that even though a substantive provision is violated, there must be something more than a mere violation.[221] The Panel had regarded the United States not to have acted in good faith in enacting a certain non-permissible specific action against dumping or a subsidy contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *Agreement on Subsidies and Countervailing Measures*. The United States maintained on appeal, that 'there is no basis or justification in the WTO Agreement for a WTO dispute settement panel to conlude that a Member has not acted in good faith, or to enforce a principle of good faith as a substantive obligation agreed to by the WTO Members'.[222] The Appellate Body conluded, that on the basis of the Article 31(1) of the Vienna Convention the treaty interpreter shall include the principle of good faith in the task of interpretation alongside VCLT Article 26 on the principle of *Pacta Sunt Servanda.*[223] Consulting earlier DSB reports the AB maintained that there is a sound basis for the dispute settlement body to determine whether a Member has not acted in good faith.

[218] Mitchell, p. 352.

[219] *EC – Computer Equipment,* WT/DS68/AB/R, para 82.

[220] *EC – Computer Equipment,* WT/DS68/AB/R, paras 83 – 84.

[221] *US – Offset Act (Byrd Amendment)*, WT/DS234/AB/R, para 298.

[222] *Ibid.* at para 296.

[223] *US – Offset Act (Byrd Amendment)*, WT/DS234/AB/R, para 296.

Another principle often quoted by the dispute settlement bodies is the principle of effective treaty interpretation (*ut res magis valeat quam pereat*). The principle follows from the contextual analysis required under Article 31 of the VCLT.[224] The principle applies to a situation where there are two possible contadicting treaty interpretations. In this situation the interpretation should find a result which upholds the integrity of all the treaty provisions. The DSB case law is based on *US – Gasoline*, where the Appellate Body maintained the said principle to be 'one of the corollaries of the general rule of interpretation in the Vienna Convention'.[225] The AB formulated, that interpretation of a treaty must give meaning and effect to all the terms of a treaty and that the interpreter shall not be allowed to adopt a reading that would result in reducing the whole clauses or paragraphs of a treaty to redundancy inutility. In the footnote of the case text the AB quoted ICJ case law (the Corfu Channel Case and the Territorial Dispute Case involving the Libyan Arab Jamahiriya and Chad) and the Yearbook of the International Law Commission. The legal question in the case dealt with the application of a same standard of discrimination to two separate Articles of the GATT treaty.

A similar approach based on the principle of effectiveness was discovered in *Japan – Alcoholic Beverages II*, where the Appellate Body reiterated the status of effective treaty interpretation as a part of the general rule of interpretation of the Vienna Convention Article 31(1). The case dealt with the correct connection of Articles III:1 and III:2 of the GATT. The AB ruled, that 'Article III:1 constitutes part of the context of Article III:2 in the same way that it constitutes part of the context of each of the other paragraphs in Article III'.[226] Thus Article III:2 shall be intepreted in a manner similar to the other paragraphs, whereas an other interpretation of the provision would render Article III:1 meaningless and thereby violating the principle of effective treaty interpretation.

The context of treaty provisions in effective interpretation may include provisions in separate WTO agreements such as GATT, GATS and the WTO Agreement. The Panel applied these three instruments as a whole system in case *Canada – Periodicals*.[227] The Panel stated, that 'the

[224] Cameron and Grey, p. 256.

[225] *US – Gasoline*, WT/DS2/9, p. 23.

[226] *Japan – Alcoholic Beverages II*, WT/DS11/AB/R, p. 11.

[227] *Canada – Periodicals*, WT/DS31/R, para 5.17.

ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS co-exist and that one does not override the other.'[228] However, the Appellate Body found it unnecessary to take stance on the issue of potential overlaps between the GATT 1994 and the GATS. The issue at hand was fully contained in the provisions of GATT, since the measure under review clearly applied to goods, not services.[229] The reason for excluding the review of overlaps of GATT and GATS was based on the will of the parties to the case. In case *EC – Bananas III* the AB did look into overlaps of GATT ans GATS and conluded that there are no legal basis for an *a priori* exclusion of certain measures taken by EC from the scope of GATS merely because they involved goods and that the GATT 1994 and the GATS may overlap in application to a measure.[230]

In determining the relationship of various WTO agreements the DSB organs clearly envisioned the different agreements to exist together harmoniously and systematically. The systematic nature of WTO law can be seen to extend from effectiveness within a treaty to effectiveness of the whole trade regime.[231] In addition to substantive provisions in the WTO agreements, the DSB has also performed systematic analysis of procedural provisions in different agreements. In case *Guatemala – Cement I* the AB reviewed the relationship of dispute settlement procedures of the *Anti-Dumping Agreement* and those of the Dispute Settlement Understanding. The AB maintained, that the dispute provisions of the *Anti-Dumping Agreement* are special or additional to those of the DSU. However, they are only to be applied before the DSU in case of divergence. If there exists no conflict between the provisions, the agreements are to be applied together.[232]

3.3.7 General Procedural Principles of Law

In addition to customary and codified treaty law, the panels and the Appellate Body have invoked general principles of law which are not part of treaty law as such.[233] Such rules

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[228] *Ibid.*

[229] *Ibid.* at 19.

[230] *EC – Bananas III*, WT/DS27/AB/R, p. 107.

[231] For description of the structure of WTO law, see chapter 3.1 of this study.

[232] *Guatemala – Cement I*, WT/DS60/AB/R, p. 3.

[233] Lindroos and Mehling, p. 871; Cameron and Grey, p. 251.

include for example standing and representation, *amicus curae* submissions, the burden of proof and judicial economy. On the standing and representation the AB maintained that nothing in WTO law, customary international law or in the prevailing practice of international tribunals prevents a WTO Member from determining the composition of its delegation in the Appellate Body proceedings.[234] *Amicus curae* briefs are submissions to the dispute settlement process, which are made by other actors than the WTO Members directly involved in the case (these include the complainants, defendants and the so-called Third Parties).[235] The Appellate Body has established that it can obtain any information needed to investigate the case, including *amicus curae* briefs from non-governmental organizations.[236]

Burden of proof is a core concept inherent in all domestic and international legal systems. In WTO, the burden of proof of violation of GATT 1994 or other covered agreements is usually placed on the complainant.[237] The concept was formally introduced to the WTO dispute settlement process in *US – Shirts and Blouses*. The Appellate Body maintained that no system of judicial settlement could work without the incorporation of the requirement of burden of proof and that various international tribunals such as the ICJ have 'generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof'.[238] In *EC – Hormones* the Appellate Body maintained that 'under the *SPS Agreement* the burden of proof lies on the complaining party, which has to establish a prima facie case of inconsistency … of its SPS measure or measures complained about.' The AB added that 'when the prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.'[239] In conclusion, any complaint by a WTO Member under any covered agreement or agreements must include the proof of nullification or impairment of benefits resulting from the covered agreements.[240]

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[234] *EC – Bananas III*, WT/DS27/AB/R, para 10.

[235] See WTO in Ten, Weiss, pp 163 – 166.

[236] *US – Lead and Bismuth II,* WT/DS138/AB/R, para 39.

[237] Cameron and Grey, p. 276. The right to *determine* if a violation has taken place belongs to the panel.

[238] *US – Shirts and Blouses*, WT/DS33/AB/R, p. 14. The concept of due process has been introduced in a similar fashion in *Brazil – Desicatted Coconuts*, WT/DS/22/AB/R, p. 22.

[239] *EC – Hormones,* WT/DS26/AB/R and WT/DS48/AB/R, p. 35.

[240] Non-violation claims are the only exception where the burden of proof lies on the complainant. See e.g. Cameron and Grey, p. 278.

Judicial economy is addressed by the DSU Article 9.1 dealing with multiple complainants.[241] According to the Article, 'where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned.' The panels were intended to resolve trade disputes in a swift manner and carry a heavy case load, which requires the DSB to avoid overlaps of cases in the same subject matter. Judicial economy should not undermine the principle of legality. According to DSU Article 9.2, 'the single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired.' Furthermore, according to Article 9.3 DSU, 'if more than one panel is established related to the same matter, the same panelists shall serve as panelists in each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.' Another economical issue is the scope of the claims addressed by the complainants. The AB maintained in *EC – Poultry*, that the panel has the discretion to address only those (legal) arguments it deems necessary to resolve a particular claim, as long as a panel has reasonably considered a claim within the meaning of Article 11 DSU on the terms of reference.[242]

3.3.8 State Responsibility in WTO: An Anomaly in the Coherence of WTO law and PIL?

State responsibility governs the responsibility of States for internationally wrongful acts.[243] The Dispute Settlement Understanding governs the responsibility of WTO Members for violations of WTO law. When analysing state responsibility in the WTO it must be kept in mind that the WTO is deeply rooted in trade diplomacy. According to Article 19.1 of the DSU, 'Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.' The recommendations of panels and the Appellate Body are meant to be implemented; according to Article 21.1 of the DSU, 'Prompt compliance with

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[241] Cameron and Grey, p. 282.

[242] *EC – Poultry*, WT/DS69/AB/R, para 135.

[243] Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC A/56/10, 2001, General Commentary, Articles 1 – 2.

recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.' Article 23 of the DSU prohibits unilateral measures and countermeasures by WTO Members. Article 23.1 of the DSU also provides the WTO exclusive remedies for violations or other nullification or impairment of benefits under the covered agreements.[244] Some commentators have called for WTO to employ public international law rules on State responsibility to the detriment of the WTO remedies provided in the Dispute Settlement Understanding, stating that a move towards PIL remedies would increase efficiency.[245] Although the DSU provides an elaborate system of enforcement as described above, the DSU or the WTO Agreement do not include exclusive provisions which would provide an international law obligation to comply with the reports of the DSB.[246] It would seem that WTO law has opted out from the general international law of state responsibility. The position which would such behavior as strong proof of the self-containment of the WTO is a narrow, historical one.[247]

State responsibility has been examined in the DSB case law in two dimensions, in the attribution of a certain measure to a Member state and in determination of the relationship of domestic and international law.[248] A panel examined the first dimension in *Turkey – Textiles*. The case dealt with Turkey's quantitative restrictions on importation of textile and clothing products. The panel found, that Turkey's measures were inconsistent with GATT 1994 provisions XI and XIII. Turkey had formed a customs union with the EC in connection to the quantitative import restrictions assuming that such restrictions coincided with the customs union. The panel maintained, that the EC – Turkey customs union was not a Member of the WTO because it lacked a legal personality.[249] The panel, quoting two ICJ cases, maintained that in public international law, Turkey could be held responsible for the measures taken by the

[244] Marceau 2002, p. 760.

[245] See e.g. Nordblad, pp. 85 – 103.

[246] Jackson 2004, p 112. For critical analysis of the success of the DSB in enforcing WTO law, see e.g. Pauwelyn 2000 pp. 338 – 341.

[247] For details see chapter 2.2 of this study.

[248] Cameron and Grey, p. 293.

[249] *Turkey - Textiles*, panel report, WT/DS34/R, para 9.6.

EC – Turkey customs union because the measures were attributable to Turkey.[250] Such measures were the acts of a common organ between Turkey and the EC.[251]

Case *US – Section 301 Trade Act* clarified scope of measures attributable to State responsibility. The panel maintained according to Article 27 of the Vienna Convention that 'under traditional public international law a State cannot rely on its domestic law as a justification of non-performance.'[252] The panel maintained further, that 'legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and itself engage State responsibility.'[253] In other words, when treaties concern only the relation of States, State responsibility is invoked only when an actual violation takes place.

Article 32 of the DSU contracts out from the public international law of countermeasures.[254] A strict reading of Article 32 DSU in connection with Article 19 DSU seems to rule certain public international law countermeasures such as compensation out of the scope of WTO remedies. According to Marceau, the WTO system appears to be limiting remedies for WTO violations to DSU cessation, non-repetition and satisfaction.[255] According to Article 23(2)(c) of the DSU,

> Membres shall (…) follow the procedures set forth in Article 22 DSU to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obigations under the covered agreements in response to the failure of the Member concerned to implement the recommendation and rulings within that reasonable period of time.

In practical language, Article 22 prohibits WTO Members from committing countermeasures towards the Member in breach of the WTO rights and obligations. A WTO Member shall ask the DSB for an authorization for any countermeasures.

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[250] ICJ cases *Military and Paramilitary Activities in and Against Nicaragua* [1984] ICJ Reports, 392 (June 27) and *Certain Phosphate Lands in Nauru*, [1992] ICJ Reports, 240 (June 26).

[251] *Turkey - Textiles*, panel report, WT/DS34/R, paras 9.10 – 9.13.

[252] *US – Section 301 Trade Act*, WT/DS152/R, para 7.80.

[253] *Ibid.*

[254] Pauwelun 2001, p. 540.

[255] Marceau 2002, p. 769.

The proportionality of countermeasures was interpreted in *US – Cotton Yarn.*[256] The case concerned an application of a safeguard measure. Safeguard measures are temporary restrictions of imports of products taken in order to protect a domestic industry from an increase in imports of any products which is causing or threatening to cause serious injury to the domestic industry. The Appellate Body found support from the rules of general international law on state responsiblity when it stated why a comparative analysis was needed as part of the attribution of serious damages analysis under Article 6.4 of the *Agreement on Textiles and Clothing.* According to the AB, 'our view is supported by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations stipulates that the suspensions of concessions shall be equivalent to the level of nullification or impairment.' [257] In other words, WTO law does not allow punitive damages.

General international law on state responsiblity, spefically on proportionality of countermeasures, was also referred to in *US – Line Pipe*, a case which also dealt with safeguard measures*.* The Appellate Body referred to Article 51 of the ILC Draft Articles on State Responsibility.[258] According to Article 51, 'countermeasures must commensurate with the injure suffered, taking into account the gravity of the internationally wrongful act and the rights in question.' The AB found the ILC Draft Articles not to be legally binding as such, but a codification of a recognised principle of customary international law. The AB especially recognised that the defendant which had invoked the safeguard measure, the United States, had acknowleged the principle elsewhere.[259]

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[256] *US – Cotton Yarn*, WT/DS192/AB/R.

[257] *US – Cotton Yarn*, WT/DS192/AB/R, para 120. The AB also quoted Article 22.4 which requires the suspension of concessions or other obligations to be equivalent to the level of nullification or impairment.

[258] *US – Line Pipe*, WT/DS202/AB/R, para 259.

[259] *Ibid.*

4. Hidden Crisis: Regime Collisions in WTO Law

The previous chapter described how the panels and the Appellate Body had subscribed to external international law in the dispute settlement system of the WTO, exhibiting coherence between general and particular international law and the law of the WTO. While the DSB organs were generally concordant in their introduction of external international law, the study of the the covered agreements and the practice of the DSB revealed that WTO law has opted out of general international law of state responsibility. However, such perceived anomaly is constructed on a theoretical framework which might be too narrow to provide a final deathblow to the coherence of WTO law.

The threat comes from elsewhere: from substantial conflicts of rules of subsystems of international law resulting from the plurality of the values and rationalities such systems are founded upon. Fischer-Lescano and Teubner address the problem with the notion of 'regime collisions.'[260] According to the authors, regime collisions cannot be adequately resolved neither by the theoretic doctrine of unity, the theoretic doctrine of norm hierarchy nor the actual normative or institutional hierarchies in place in international law. An argument seems to follow: because regime collisions are inherently political, not only normative collisions, they shall be addressed in the political context by political discourse? [261]

The general observation of Fischer-Lescano and Teubner holds validity in the study of WTO law. The tension between WTO law and, for example, human rights law, cannot be exhaustively resolved by theoretic application of fragmentation[262]or hierarchy[263], or even by the actual institutional and normative systems of WTO law.[264] So its all about politics? Not at all, say Fischer-Lescano and Teubner. There is a potential middle way: a specific network logic of conflicts law. Through such logic 'weak normative compatibility of the fragments might be

[260] See Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (Vol. 25, 2004) pp. 999 – 1046.

[261] *Ibid.* p. 1003

[262] For details see chapter 2 of this study.

[263] For details see chapter 3.1 of this study.

[264] For details see chapter 4.2 of this study.

achieved'.[265] The authors abandon the quest to find complete legal hierarchy and proceed to promote 'mutual observance between network nodes'[266] and recognition of norm conflicts as foundational collisions between organizational principles of social systems.[267] Finally, Fischer-Lescano and Teubner focus their attention to the legal certainty of the international polycentric decisionmaking.[268] In practical terms, this approach views the possibilities for universal and specialized international tribunals, courts and dispute settlement organs to mutually observe each other's decisions.

For such is the way of the world: universal, supreme coherence is beyond the grasp of the teachings of the most highly qualified publicists of the various nations. The humble attempt of this study is to claim that there is some hope in the institutional function of the WTO Dispute Settlement Body, legitimized by a fragile reference to, inter alia, environmental protection of the WTO Agreement Preamble and to public international law in Article 3.2 of the DSU, to provide some means for legal resolve to regime collisions. Before the hidden threat is revealed and addressed, this study briefly describes the internal stucture of WTO law.

4.1 Conflicts of Rules within WTO Law

Based on the review of the sanctioned, enforceable substantive sources of WTO law applied in the panels and the Appellate Body, there seems to be little possiblity for conflicts of rules within WTO law. Four relationships of WTO rules can be addressed: [269]

1. Relationship between the WTO Agreement and other covered agreements;
2. Relationship between GATT 1994 and other covered agreements;
3. Relationship between covered agreements other than the GATT 1994 or the GATS; and
4. Relationship between GATT 1947 and WTO covered agreements.

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[265] Fischer-Lescano and Teubner, p. 1004.

[266] *Ibid.* at 1018.

[267] *Ibid.* at 1024.

[268] *Ibid.* at 1038.

[269] The term 'relationship' shall be used instead of 'conflict'. The use of wordings such as 'conflict of rules' or especially 'conflict of norms' entail the existence of a conflict.

The relationship between the WTO Agreement and other covered agreements is maintained by Article XVI(3): the WTO Agreement prevails over other covered agreements. Relationship between GATT 1994 and other covered agreements dealing with trade in goods is maintained by the *General Interpretative Note to Annex 1A of the WTO Agreement:* 'In case of conflict between GATS 1994 and another agreement of Annex 1A of the WTO Agreement, the provision of the other agreement prevails.' This only applies to the Multilateral Agreements in Annex 1A of the WTO Agreement.[270]

Annex 1B includes the GATS. The relationship between GATS and GATT 1994 was described in case *EC – Bananas III*. The Appellate Body stated, that the 'GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services.'[271] When the measures under examination do not fall under GATT 1994 as goods or under GATS as services, they can be examined under both GATT 1994 and GATS. However, is there are aspects in such measures which deal particularly with goods or services, they are to examined under the GATT 1994 or GATS respectively.[272] Whether a measure or a certain aspect of it falls under GATT 1994 or GATS is to be determined on a case-by-case basis.[273]

Annex 1C of the WTO Agreement includes the TRIPS. TRIPS does not concern trade or trade measures, which renders direct substantial conflicts of TRIPS and other covered agreements impossible.[274] Relationships between other covered agreements than GATT 1994 and GATS are resolved by treating them as 'single undertaking'. The multilateral agreements in Annex 1A cover specialied fields of trade in goods and are therefore unlikely to overlap. All multilateral WTO agreements are equally applied and equally bind all WTO Members.[275] However, the substantial provisions of Plurilateral Agreements in Annex 4 of the WTO

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[270] The presumption against conflict was reaffirmed in *EC – Bananas III*, WT/27/AB/R, paras 7.157 – 7.163. The case involved conflicting provisions in GATT 1994, the *Licensing Agreement* and the *TRIMs Agreement*. The latter two were covered agreements contained in the Annex 1A to the WTO Agreement.

[271] *EC – Bananas III*, WT/DS27/AB/R, para 221 – 222.

[272] *Ibid.*

[273] *Canada – Periodicals*, WT/DS31/AB/R, p. 17.

[274] Van Den Bossche, p. 51.

[275] *Ibid.* at 46.

Agreements are only binding upon those WTO Members that are a party to these agreements.[276]

Finally, the relationship between GATT 1947 *acquis* and WTO law is resolved by the WTO Agreement Article XVI(1): the WTO Agreement and the covered agreements superseed the decisions, procedures and the customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947. Based on the findings above, a chart of the relationships of WTO instruments can be produced as follows:

Table 1, Structural Relationship of WTO instruments

1. The WTO Agreement
2. Multilateral Trade Agreements of Annex 1A of the WTO Agreement
3. GATT 1994 and GATS
(4. Plurilateral Agreements in Annex 4 of the WTO Agreement)
5. GATT 1947 decisions, procedures and customary practice

The structural relationship of WTO law has been examined in the panels and the Appellate Body. In case *Indonesia – Autos*, the panel recalled that the presumption against conflict exists in 'public international law'. Indonesia claimed that the *SCM Agreement*, a covered agreement contained in the Annex 1A of the WTO Agreement, was the only applicable law in the dispute due to its nature as *lex specialis*.[277] Indonesia's use of *lex specialis* presumed an existence of a conflict of rules between Article III of the GATT 1994, the TRIMS and the SCM Agreement. The panel ventured to discover the international law on the conditions of a conflict between two treaties in a footnote.[278] The panel found three conditions to a conflict. First the treaties concerned must have the same parties. Secondly the treaties must cover the same substantive subject matter and thirdly the provisions must conflict in the sense that the provisions must impose mutually exclusive obligations. Quoting the Encyclopedia of Public International Law

[276] Van Den Bossche, p. 46.

[277] *Indonesia – Autos,* WT/DS64/R, para 14.27.

[278] *Ibid.* at footnote 649.

and the British Yearbook of International Law the panel found that the presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence of the contrary.[279]

The panel found the conditions of a presumption against conflict to apply in *Indonesia – Autos*. Panel maintained, that 'All WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same WTO Members and in the same forum.'[280] The panel recalled the principle of effective treaty interpretation in order to 'approach allegations of conflicts with caution'.[281]

Finally the panel concluded that 'the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement.'[282] The finding of the panel means that the WTO Agreement and covered agreements are to be viewed as a single undertaking. Complaints cannot be based on the presumption that there is a conflict between the provisions contained in different covered agreements. The use of *lex specialis derogat legi generali* implies such conflict to exist and thus cannot be used to describe the relationship between covered agreements.

4.2 Conflicts of Rules between WTO Law and External Law

This study has shown, against the backdrop of the fragmented order of international law, an attempt by the DSB organs to provide coherence in WTO law. It can no longer be claimed that WTO law has the characteristics of a legal frankenstein lacking a basis in any kind of law. It is a subsystem of international law, anchored in general international law and coherent in its treatment of WTO covered agreements as international conventions. The most grave threat to coherence does not lie in the legal technicalities of treaty interpretation – they lie in the plurality of values of different particular systems of international law. This chapter will

[279] *Indonesia – Autos,* WT/DS64/R, footnote 649.

[280] *Indonesia – Autos,* WT/DS64/R, para 14.28.

[281] *Ibid.*

[282] *Ibid.*

attempt to reveal the deficiencies of WTO law in addressing these threats in legal terms, especially in the adjudication of the panels and the Appellate Body. The pinnacle of coherence of WTO law and other subsystems would be the direct application of the rules of other subsystems, say, human rights, in the Dispute Settlement Body of the WTO. The transformation of the World Trade Organization into a sort of a Fair Trade Organization would naturally have its own problematics, an example thereof would be the differentiation between different interpretative communities of the various areas of international law. Would trade lawyers have the skills to play in the environmental or human rights language game? Would the attempt fall apart when the law of one subsystem would try to claim a higher position in hierarchy?[283]

Since the panels and the Appellate Body have applied sources of law external to the covered agreements, let's assume *de lege ferenda* that there is a conflict between WTO law and other rules of international law. A conflict between multiple binding rules will result in the determination of which of the conflicting rules is applied to the detriment of the other.[284] However, since external rules are not legally binding upon the WTO Members *as substantive WTO law*, conflicts between external rules and WTO law shall be – in the noble pursuit of coherence – avoided at all cost. The fact that WTO law does not *contain* other rules of public international law does not mean that the WTO Members are not be bound by the obligations and rights contained in such rules. It just means that external rules shall not be in conflict with WTO law. According to Marceau, states acknowledge that all their international obligations shall be interpreted in coherence.[285] The inexistence of conflicts between WTO law and external law can be claimed to result from the fact that such a conflicts have never been addressed in the WTO Dispute Settlement Body.[286] Such an argument seems unconstructive. The famous case *US – Shrimp* did have an underlying tension of values: environmental protection and liberalization of trade.[287]

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[283] See Von Bodgdandy, p. 672. Von Bogdandy finds the intricacies of human rights argumentation alien to WTO law – WTO law should address its own deficiencies instead.

[284] Pauwelyn 2004, p. 5.

[285] Marceau 2006, p. 18.

[286] WTO in Ten, Franconi, p. 149 - 150. Franconi is a proponent of the 'influence of international law' in the WTO.

[287] *US – Shrimp*, WT/DS58/AB/R. For details see chapter 4.2.2 of this study.

The delimitations of WTO are clear in the core provisions of the covered agreements. The distinction between WTO law and external rules of law is made in DSU Article 1.1 on the jurisdiction of the panels and the Appellate Body. A panel shall be exclusively established only when WTO Members are in dispute due to breach of WTO law contained in the WTO Agreement and covered agreements. Neither the panels nor the Appellate Body possess powers to examine complaints based on external sources of law nor remedies to address their violations. However, the dispute organs have the power to *apply* external international law in support of the *interpretation* of WTO law in an individual case.

The jurisdiction limit is clear in Article 7.2 of the DSU. It provides that 'the Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. In *Korea – Procurement* the Panel maintained, that the terms of reference of an individual dispute may refer to 'broader rules of customary international law in interpreting a claim properly before the Panel.' Article 7.2 DSU, taken in connection with the DSU Article 3.2 DSU, provide for the application of rules of customary international law in examination of the case. However, said articles should not be thought of as an escape from the limited jurisdiction provided in DSU Article 1.1.[288]

Article 19.2 of the DSU supports the limitation. According to the 19.2 DSU, 'in their findings, the panel and the Appellate Body cannot add or diminish the rights and obligations provided in the covered agreements.'A review of relevant panel and Appellate Body case law makes it clear that the interpretative rules contained in Articles 31 – 33 of the Vienna Convention on the Law of Treaties can be used as primary or subsidiary means of interpretation alongside the general principles of international law. By their nature as interpretative provisions they are not able to conflict with substantive provisions in the covered agreements. Substantive provisions contained in external rules of international law can be taken into account in examining a case, but they shall be used strictly as supplementary means of interpretation without any binding legal status upon the panels, the AB, the parties to the dispute or other WTO Members.

[288] The language of *Korea – Procurement* recognises the function of PIL in interpretation of WTO provisions, not the application thereof.

The limit of jurisdiction contained in various articles of the Dispute Settlement Understanding has not limited academic research on the conflicts *de lege ferenda* between the rules of the WTO and external rules of public international law. The sources of potentially conflicting rules of international law have been found for example in the specialised regimes of environmental law and human rights law. Before analysing the potential conflicts of trade law with other subsystems of international law, the status of peremptory norms such as *jus cogens* and Article 103 of the UN Charter shall be addressed.

4.2.1 Peremptory Norms

International law is characterised by a limited or non-existent hierarchy of norms. The sources of international law are not subordinant to each other. Various treaties, customary international law and general principles do not form a legal system which has a structure comparable to domestic legal systems.[289] However, there have been serious considerations in the practice of international law on some norms which could potentially override other rules of law in situations of conflict. The ICJ stated in *Corfu Channel* (1949) that an obligation of a state to notice other states and actors about maritime mines in territorial waters of the state was based on 'certain general and well-recognised principles, namely : elementary considerations of humanity'.[290] Such finding was also made by the ICJ in the *Nuclear Weapons* case.[291] Affirming the reasoning in the *Corfu Channel* case, the ICJ ruled that the Hague and Geneva Conventions contain rules, which shall 'be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.'[292] A manifestation of hierarchy of treaties can be found in Article 103 of the UN Charter. According to Article 103, the obligations under the UN Charter shall prevail over the obligations of the Members under any other international agreement.

Jus cogens is a category of norms, distinguished by the ICTY in connection to the prohibition of torture, as peremptory to other rules of international law. According to ICTY, the prohibition of torture has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys higher

[289] ILC Fragmentation Report, para 324 at 166.

[290] *Corfu Channel* (1949), ICJ case (the United Kingdom v. Albania) I.C.J. Reports 1949 p. 22.

[291] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996

[292] *Ibid*. at 257 para. 79.

rank in the international hierarchy than treaty law and even 'ordinary' customary rules and that States cannot derogate from such rules through treaties or local or special customs or even general customary rules not endowed with the same normative force.[293] Articles 53 and 64 of the Vienna Convention have incorporated the status of peremptory norms as customary international law.[294] According to Articles 53 and 64 of the Vienna Convention, all international treaties incompatible with peremptory norms become void.

The obvious effect of the status of peremptory norms and UN Charter Article 103 in WTO law is that the WTO Agreement and covered agreements cannot contain provisions which are in conflict with peremptory norms or with the provisions of the UN Charter. WTO law which would be in conflict with the UN Charter cannot be created in the future, since the Article 103 of the UN Charter has an unlimited temporal scope.[295] The panels and the Appellate Body have never questioned the superiority of peremptory norms in relation to WTO law. Even the ICJ has been hesitant to refer to *jus cogens.*[296] Such finding can be taken both as inherent respect of peremptory norms or the shyness of legal actors to use them. The inactivity of international law-makers and tribunals in the face of breaches of *ius cogens* is one of the most grave threats to the coherence of international law.

In conclusion, *jus cogens* and UN Charter 103 have direct force over WTO covered agreements. However, since conflicts between said peremptory norms and WTO law should have been resolved in the conclusion of the covered agreements – and since it is very likely that they indeed are – such conflicts are not likely to come under the examination of the panels or the Appellate Body. It must be kept in mind, however, that the fact that such examination has not taken place yet does not meant that it could not take place in the future. It could be possible, that a WTO Member would invoke for example core labour norms such as prohibition of forced labour to justify import restraints from states which violate these norms or from WTO Members which belong to the constituents of violating states. Despite such possibilities, the current view of WTO law seems to dictate that if the DSB organs would find WTO law to

[293] *Prosecutor v. Anto Furundžija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, para 153.

[294] Tuori, p. 307.

[295] UN Charter, Article 64.

[296] ILC Fragmentation Report, para 378 at 191.

violate *jus cogens* or UN Charter 103, it would jeopardise the foundations of the legal instruments the dispute settlement organs are created upon.

4.2.2 Environmental and Human Rights Law

The relationship of WTO law and Multilateral Environmental Agreements has been researched from the perspective of conflicts of rules *de lege ferenda*.[297] There are hundreds of MEAs in existence and part of them include trade measures.[298] The WTO Agreement also contains environmental provisions. Preamble of the WTO Agreement concludes that trade should be conducted 'while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so'.[299] The text of the preamble signifies the position of environmental concerns in WTO. The Vienna Convention Article 31(2) refers to the preamble of a treaty as 'part of the context for the purpose of interpretation of the treaty'. A conflict could theoretically arise before the panel and the Appellate Body if a WTO Member would support a restrictive trade measure with a provision in a Multilateral Environmental Agreement.[300]

MEAs have never acted as basis for a complaint in the DSB.[301] However, a trade measure taken in conservation of sea turtles was been reviewed in *US – Shrimp* from the perspective of multiple MEAs. The Appellate Body did not directly apply the rules contained in MEAs, but rather as supplementary means of interpretation of the relevant GATT 1994 provision. If the AB would have discovered a conflict between the MEAs and the WTO Agreement and proceeded to rule in the conflict in detriment of the WTO Agreement it would have exceeded the limits of its jurisdiction and acted against the principle of presumption against conflicts in

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[297] Michael & Pauwelyn, 2010; Brack & Grey, 2003; WTO in Ten, Franconi, p. 150. According to Franconi, The WTO has not reached an understanding of the effect of environmental law on the political level, let alone on the legal level. Same conclusion applies to human rights (UN) and social rights (ILO).

[298] Brack and Grey, p. 5. The Kyoto Protocol has the growth potential of a large pink elephant in WTO law. See WTO in Ten, Franconi, p. 149.

[299] WTO Agreement, preamble, para 2.

[300] According to Van Den Bossche, p. 63, such a measure could be for example a quantitative import restriction obliged in an MEA which is simutaneously against GATT 1994 IX.

[301] Brack and Grey, p. 19.

international law. It can be academically argued that trade-related provisions in certain MEAs have created a specialised field (*lex specialis*) of environmental law within the regime of trade law, thus applicable before the WTO Agreement and covered agreements.[302] A pocket of environmental law within the WTO law would have to be codified as WTO rules. Such rules are not in yet existence. For the sake of coherence, justified by the protection of a social good such as the environment, the creation of a linkage provision would not be a dumbfounded project.

A technical argument can be created, according to codified customary law of treaties[303] and DSB practice, that conflicts between MEAs and WTO law should not come to existence. Chapter three of this thesis began with a brief overview of the use of concepts such as *lex specialis* in addressing conflicts of rules in international law. Such practice is not yet universally established.[304] According to the ILC Fragmentation Report, a choice between harmonious interpretation or definitive hierarchy shall be made in case multiple rules with the same subject matter apply to the same set of facts.[305] The WTO panels and the Appellate Body have chosen to avoid conflicts by harmonious interpretation. Recalling *Indonesia – Autos*, there is a presumption against conflict in public international law.[306] The presumption was reaffirmed in *EC – Bananas III*.[307] An example of harmonious interpretation and avoidance of conflict is found in the text of *US – Shrimp.* According to the Appellate Body report,

> The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of

[302] Ibid. Brack and Grey have found such specialised provisions in CITES, Montreal Protocol, Basel Convention, Kyoto Protocol, Convention on Biological Diversity, Cartagena Protocol, Stockholm Convention and in the Rotterdam Convention.

[303] Vienna Convention Article 30 on the application of successive treaties relating to the same subject matter. See Palmeter and Mavroidis 1998 p. 412 on the application of VCLT Article 30 in the relationship between MEAs and WTO law.

[304] ILC Fragmentation Report, para 487 at 246.

[305] ILC Fragmentation Report, para 36 at 25.

[306] *Indonesia – Autos,* WT/DS64/R, para 14.27.

[307] *EC – Bananas III*, WT/27/AB/R, paras 7.157 – 7.163.

> contemporary concerns of the community of nations about the protection and conservation of the environment.[308]

The method of the AB in *US – Shrimp*, taken with the rule on presumption against conflicts, provide little evidence of current irresolvable conflicts of rules between MEAs and WTO law. In a dispute involving overlapping and conflicting provisions in MEAs and covered agreement(s), the panel and the Appellate Body would most likely resort to harmonious interpretation using the terms in such MEAs as supplementary support. Furthermore, it must be kept in mind that MEAs cannot act as basis for a complaint since they are not covered agreements even through reference.[309] However, pure normativism – the application of the sources or the hierarchy doctrine – will not resolve the tension crated by the plurality of values embedded in the various subsystems of international law. At best, it can reveal that such plurality exists. It seems to be a matter of grave political choice and political will to advance beyond this position.[310]

In addition to MEAs and WTO law, the relationship of human rights law and WTO law has been discussed in academia.[311] The problematic relationship between trade and human rights is one of the most serious potential crises for both the coherence of WTO law and international law in general. One can think of at least two potential scenarios of the involvement of human rights law in the WTO dispute settlement. First scenario could develop from a conflicting interpretation of the same set of facts by the WTO DSB and a human rights

[308] *US – Shrimp*, WT/DS58/AB/R, para 129.

[309] Article 1.1 DSU. The practice of evolutionary interpretation can result in accusations of legal activism. See e.g. Kelly, J. Patrick: The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance. Kelly claims that the interpretation by the Appellate Body in case *US – Shrimp* was 'naturism' inconsistent with the delegated authority of the Appellate Body. For critique against claims of the AB's legal activism in *US - Shrimp* see Howse pp. 506 – 508. During the course of this study it has been argued that legal activism can contribute to coherence between subsystems of international law.

[310] Political will is a problematic concept. The use of such a concept will intentionally or unintentionally lead to the analysis of the distribution of, *inter alia*, economic, social and military power between nations and other actors. An example thereof is the North/South divide. In the trade – labour dispute, the position of the developed nations is to invoke global protection of the workforce in binding international core labour norms. The South has claimed that such binding norms are used to legitimize protectionism from states which do not employ Western standards of regulation.

[311] See e.g. Marceau 2002.

court. Problem of overlapping jurisdictions can be addressed by the principle of *lis pendence*. Such principle can be used both with overlaps of multiple international tribunals and overlaps of international tribunals and domestic courts.[312] Secondly a WTO Member could invoke a human rights defence against a complaint of the alleged violation of the covered agreements. The problem of overlapping jurisdictions is outside the scope of this thesis and shall not be discussed, because the construction of a theoretical scenario would require the construction of a theoretical dispute in an international tribunal outside the WTO. An additional problem is that such supposed rulings of a human rights court could not be applied or enforced in WTO since they are not WTO law.[313]

For the second scenario, the limit of DSB's jurisdiction can be claimed to apply to human rights law apart from *jus cogens*.[314] Independent from political considerations, the Dispute Settlement Understanding governs the dispute settlement in the WTO. DSU Articles 1.1, 3.2, 7 and 23 provide a coherent and systematic scope of jurisdiction of the DSB. The panels and the Appellate Body have been aware of the limit of their jurisdiction. Occasionally other international agreements apart from WTO covered agreements have been invoked to support the interpretation of individual provisions. In such cases the sources used have been treated as supplementary means of interpretation.[315] If the defence of a violation of WTO law would seek support from external human rights rules, the panels or the Appellate Body could in theory interpret such rules in harmony with WTO rules. However, the interpretation would still have to be performed in accordance with WTO law because 'recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.'[316]

In conclusion, the WTO adjudicating bodies do not currently have the competence to interpret whether a measure taken under the WTO Agreement or the covered agreements is compatible

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[312] Marceau, p. 755. See Brownlie, p. 18 and Klabbers – Peters – Ulfstein p. 135.

[313] See *Argentina – Poultry*, WT/DS241/R, para 6.6.

[314] See WTO in Ten, Franconi, p. 146 – 147. According to Franconi human rights norms of *jus cogens* nature include the most grave violations like genocide, torture, slavery, racial discrimination and violent suppression of core labour rights. However, Franconi maintains that neither the panels not the Appellate Body have not indicated which human rights rules belong to *jus cogens.*

[315] *EC – Poultry*, WT/DS69/AB/R, para 83.

[316] Article 3.2 of the Dispute Settlement Understanding

with human rights law.[317] There is simply no basis for a human rights complaint in the covered agreements, as the different types of complaints are thoroughly described in the covered agreements and they exclusively describe situations in which the WTO Agreement or covered agreements are breached. It seems that the applicable law in the DSB is limited the same way that the jurisdiction of the panels and the AB is limited.[318] Such reality may result from the fact that WTO Members as sovereign states do not have the will to transform a trade dispute settlement system with its obligatory jurisdiction and enforceable rulings into a forum which could be used to pursue various agendas under the cover of trade law.[319] Such a vision of a universal court was never present when the WTO Agreement was negotiated and it is certainly not precent in the rulings of the panels or the Appellate Body. Sadly the lack of coherence in this regard applies throughout the corpus of public international law. Tuori has noted, that public international law does not have institutional procedures which could ensure the primacy of human rights law over WTO law.[320]

4.2.3 Coherence of WTO law in Jurisprudence

Some academics have challenged the limit of applicable law by claiming that certain articles of the DSU enable introduction of all external international law in the panels and the Appellate Body. A claim has been made that all international law within the scope of VCLT Article 38 is applicable in the panels and the Appellate Body and that Article 7 of the DSU is the equivalent of Article 38 of the Vienna Convention.[321]Article 7 of the DSU specifies the terms of reference which the panel uses to examine a dispute brought before it. According to DSU Article 7.2,'Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'. It seems that the part 'or agreements cited by the parties' is taken to mean that parties may cite *any agreements* they wish, even outside the covered agreements.

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317 Marceau, p. 761.

318 *Ibid.* at 773.

319 See Binder, p. 3. According to Binder, basic tensions in the international society impede the efforts of states and international tribunals to resolve treaty conflicts.

320 Tuori, p. 309.

321 Palmeter and Mavroidis 1998, p. 399.

Article 31 of the Vienna Convention provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. If Article 7 of the DSU would be interpreted to enable the panel or the parties in dispute to draft the terms of reference upon non-covered agreements, such finding would be against the general rule of interpretation in Article 31 VCLT. The object and purpose of the Dispute Settlement Body is to 'preserve the rights and obligations of the Members under the covered agreements' and that 'recommendations or rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements'.[322] Article 3.2 DSU interpreted in connection with Article 1.1 DSU does not provide for an open interpretation of DSU Article 7.2 term 'agreements cited by the parties to the dispute'. In conclusion, the wording 'agreements cited by the parties to the dispute' shall be taken to mean any WTO covered agreements, being the plural from 'any covered agreements' mentioned in Article 7.2.[323] Unlimited application of public international law does not find support in DSB case law. The use of public international rules of law of treaty interpretation has been frequent, but limited to few sources such as the Vienna Convention on the Law of Treaties and certain general principles of law. In addition, some procedural principles have been introduced.[324] Non-covered treaties have been used by the panels and the Appellate Body purely as supplementary means of interpretation.[325]

Inside the WTO the jurisdiction of the DSB is limited to the WTO Agreement and covered agreements. The DSB cannot add or diminish the rights and obligations under the covered agreements and the rulings of the DSB do not have precedential effect. The view taken by certain authors is the view of conflicts of rules, probably inflicted upon them by a domestic view of jurisprudence.[326] In order for the conflicts of rules to be resolved in the traditional

[322] Article 3.2 of the Dispute Settlement Understanding.

[323] Article 7 of the DSU is not well drafted in this regard. The standard format of the terms of reference provided in the first paragraph of Article 7.1 uses the wording 'name of the covered agreement(s)' while the second paragraph uses the wording 'any covered agreement or argreements cited by the parties to the dispute'. The correct wording for Article 7.2 shall be 'any covered agreement(s) cited by the parties'. Such wording will remove the ambiguity of the provision.

[324] See chapter 3.3.7 of this study.

[325] See chapter 3.2.2 of this study.

[326] Trachtman notes that domestic law is thicker than international law. Domestic legal context is highly articulated and supplies a reliable and predictable mechanism to complete contracts. It is also notable that

way, a rule such as *lex specialis* or *lex priori* must be assumed to exist to address hierarchy. In international law there is no universally established inherent hierarchy between rules. The special cases of *jus cogens* and UN Charter Article 103 clearly fall outside the scope of applicable law in the DSB. The practice of the panels and the Appellate Body actually renders conflicts between rules inexistent. However, the WTO Agreement and covered agreements include an inherent structure of WTO instruments and it is respected by the DSB. Any hope for rule conflicts to appear in the DSB is crushed by the words of the panel, 'there exists a presumption against conflict in public international law'. According to Marceau, the DSB does not have the capacity to interpret, apply or enforce other treaties or customs. The panels and the Appellate Body are not courts of universal jurisdiction: their purpose and jurisdiction are well defined and limited. [327]

Some academics have proposed, that the directly applicable law in the DSB is limited to WTO law, which includes the covered agreements and nothing else.[328] In this view, external international law is applied in the DSB only in an interpretative function. Such view may be considered a too strict, since the panels and the Appellate Body have introduced, inter alia, certain general principles of law and external customary law in the examination of the disputes. These include principles of treaty interpretation beyond the Vienna Convention as well as general procedural principles not contained in WTO law.[329]

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domestic legal systems mostly lack a positive general instrument governing the interpretation of contracts. Public international law includes, at least to some extent, the codified customary law of treaty interpretation in the Vienna Convention on the Law of Treaties.

[327] Marceau 2002, p. 813.

[328] Trachtman, p. 30.

[329] See chapter 3.3.7 of this study.

5. Conclusions

The purpose of this study was to analyze the relationship between WTO law and external international law with the concepts of fragmentation and coherence. Fragmentation of international law was found to result from historical, functional and regional grouping of law-making treaties.[330] In contrast, coherence in WTO law was found to result from, inter alia, the nature of the WTO as an international organization and from the subscription of general international law by the WTO panels and the Appellate Body.

The WTO and its predecessor, the GATT 1947, were found to be subsystems of international law. The WTO has some unique values and principles in comparison other subsystems such as human rights law or environmental law. According to the ILC Fragmentation Report, the concept of self-containment was found to carry both a narrow and a broad meaning. In the narrow sense a particular set of international rules was self-contained if it had disposed from general rules of State responsibility. WTO was found to be self-contained in the narrow sense because it had disposed from such rules by Article 23 of the DSU.

Broad self-containment was found not to apply to WTO. Such view found very little support from WTO law, from panel and Appellate Body practice or from academic research. As Pauwelyn notes, 'In many respects WTO rules are *lex specialis* as opposed to general international law. But contracting out of *some* rules of general international law does not mean that one has contracted out of all of them, nor a fortiori that WTO rules were created completely outside the system of international law.'[331] However, it was noted that there were different levels of containment inside the concept of broad self-contaiment, such as *lex specialis* or 'interrelated subsystem', and the choice between such levels was found to co-incide with the qualification of public international law as a legal system.

The systemization of the whole corpus of public international law was found to be too burdensome a task. However, for the part of the WTO, it was concluded that WTO law has important characteristics of a specialized legal system, such as primary, secondary and

[330] Jenks, p. 403.

[331] Pauwelyn 2001, p. 539

procedural norms, a sophisticated dispute settlement system and a level of constitutionalization. The nature of WTO law as a subsystem does not mean that coherence between general or particular systems of international law does not or should not exist. The WTO Dispute Settlement Body has applied external international law continuosly and coherently. Review of the subscription to external international law by the Dispute Settlement Body began by invoking the doctrine of sources. WTO law consists of the provisions of the covered agreements annexed to WTO Agreement. The sources of public international law are described with authority in Article 38(1) of the Statute of the International Court of Justice. The fundamental finding was that the WTO Agreement and covered agreements are international conventions within the meaning of ICJ Statute Article 38(1)(a) and therefore binding instruments of public international law.

Article 3.2 of the Dispute Settlement Understanding confirms that public international law applies to the interpretation of the rights and obligations of the WTO Members under the covered agreements: 'The Members recognize that (The DSU) serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.' Article 3.2 of the DSU is the only reference to public international law in the covered agreements, including the WTO Agreement. Because the covered agreements do not include other rules on the relationship of WTO law and external international law, the study concentrated on reviewing the interpretation of Article 3.2. DSU in the panels and the Appellate Body.

Article 3.2 of the DSU was interpreted for the first time in *United States – Standards for Reformulated and Convention Gasoline*, where the Appellate Body stated that 'the *General Agreement* is not to be read in clinical isolation from public law.'[332] The Appellate Body recognised that Article 31 of the Vienna Convention on Law of Treaties includes the 'general rule of interpretation', which is part of the 'customary rules of interpretation of public international law.'[333] The panels and the Appellate Body have continuosly and coherently applied customary rules of treaty interpretation. In addition to Article 31 of the Vienna Convention, Article 32 and various other articles such as 28, 30(3), 33(4), 41 and 59(1) of the

[332] *US – Gasoline*, WT/DS2/9, Appellate Body and Panel Report, pp. 17 – 18.

[333] *US – Gasoline*, WT/DS2/9, Appellate Body and Panel Report, p. 17.

VCLT have been referred to by the panels and the Appellate Body. Textual interpretation has been the primary method of treaty interpretation under the Vienna Convention. According to the Appellate Body in *US – Shrimp,* 'A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted'.[334]

It would seem to follow from the wording of Article 3.2 DSU that public international law can be applied only to clarify the interpretation of WTO law. While the rules of treaty interpretation are the most frequently and coherently referred, they are not the only rules of international law introduced in the panel and AB reports.[335] Some WTO covered agreements have incorporated provisions of other international agreements. The panel found in case *Canada – Pharmaceutical Patents* these incorporated provisions to be part of the covered agreements, and thus part of WTO law.[336]

The status of non-incorporated international agreements remains contested. The Appellate Body invoked several Multilateral Environmental Agreements in *US - Shrimp* as supplementary means of interpretation of a term in a GATT provision because the term resulted from GATT 1947 and was clearly outdated.[337] Evolutionary interpretation can be, depending on the observer, viewed either as shyness to address hidden threats to coherence or as an actual exhibition of coherence. In addition to customary rules of treaty interpretation, the panels and the Appellate Body have applied general principles of treaty interpretation. Such principles have included for example *in dubio mitius*, good faith, legitimate intentions, effective treaty interpretation and *lex specialis*. Procedural principles and concepts such as burden of proof, standing and representation and *amicus curae* submissions have also been introduced.

The study of the sources of WTO law and practice of the dispute settlement system lead to the conclusion that WTO operated within the framework of public international law through Article 3.2 of the Dispute Settlement Understanding and through judicial activism of the panels and the Appellate Body. The Dispute Settlement Body has provided WTO law

[334] *US – Shrimp*, WT/DS58/AB/R, para 114.

[335] ILC Fragmentation Report, para 168.

[336] *Canada – Pharmaceutical Patents,* WT/DS114/R, para 7.14.

[337] *US – Shrimp*, WT/DS58/AB/R, paras 130 – 134.

considerable coherence with general international law and even limited coherence with particular international law such as international environmental regulation. The prospects for coherence of WTO law in the latter regard are challenged by the tensions between the different values, aims and principles inherent in the structure of the various branches of international law.

An irresolvable rule conflict of international law reveals the lack of coherence therein. In terms of WTO Law, conflicting rules have been found at least in environmental law, in human rights law and in international labour law. Review of relevant panel and Appellate Body reports did not provide evidence of current existence of such conflicts on a normative of functional level. In a case of a possible conflict, *US – Shrimp*, WTO law was interpreted with supplementary support form Multilateral Environmental Agreements.[338] Harmonious interpretation removed the conditions for conflict. The public international law rule of presumption against conflicts was found to apply to WTO law in *Indonesia – Autos.*[339] It is questionable if harmonious interpretation ultimately increases coherence between WTO law and other subsystems of international law. Perhaps it is the best the WTO can do at the moment – but by no means it is enough for the protection of social goods such as human rights, the environment or the global workforce.

[338] *US – Shrimp,* WT/DS58/AB/R, paras 129 – 134.

[339] *Indonesia – Autos,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, p. 355.