

**NON-TRADITIONAL PATTERNS OF GLOBAL REGULATION:****IS THE WTO ‘MISSING THE BOAT’?**

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## I. INTRODUCTION

This paper questions whether the toolbox of traditional public international law is equipped to address today's global socio-economic needs. It focuses on two of the main features of the traditional international legal system:

- (i) international law's dichotomy between legally binding norms ('hard law') and non-binding declarations or statements of principle ('soft law'), where, in principle, only the former (hard law) can be normatively held and enforced against states<sup>1</sup>;
- (ii) the focus of international law (other than human rights and international criminal law) on states as the subjects of rights and obligations.

The first feature (focus on hard law or international law's 'legal positivism') logically derives from the second (focus on states): Since states are the subjects of rights and obligations, and states are considered as sovereign and equal, norms of international law only emerge when states, in one way or the other, have consented to those norms as legally binding (be it in the form of treaties, custom or general principles of law).

The WTO legal regime exemplifies these two features of *hard law* centered on *states*. It is probably at the apex of what traditional international law aspires to: with a quasi-universal membership of close to 150 states, the WTO imposes disciplines on state conduct through legally binding obligations that are enforced by a compulsory, state-to-state dispute settlement mechanism (panels and the WTO Appellate Body).

Against this background of hard law centered on states, as operationalized in the WTO, the broader reality of normative patterns governing today's socio-economic affairs looks, however, quite different: First, if and when states do manage to cooperate (other than at the WTO), it increasingly takes the form of soft law; Second, non-state actors emerged both as creators *and* potential subjects of global norms.

The paper starts off with an overview of these 'non-traditional' *sources* and *players* on the global legal scene (Section II). They have, however, been described and commented upon earlier.<sup>2</sup> What this paper tries to add then is an assessment of the extent to which these new sources and players are taken into account in the more traditional WTO legal regime. More broadly, it questions, firstly, whether international law takes sufficient cognizance of those non-traditional sources and players when resolving a specific international legal question or dispute (or whether it limits itself to *hard law* created by states) and, secondly, whether international law is equipped, in turn, to control, legitimize

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<sup>1</sup> Peter Hulsroj, *Three Sources – No River, A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and General Principles of Law*, 54 *Zeitschrift für Öffentliches Recht* 219-259; Prosper Weil, *Towards Relative Normativity in International Law?* *AJIL* (1983) 413-442.

<sup>2</sup> See, for example, Shelton, *supra* note 8 and Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 11 *Yale L. J.* 443 (2001).

and, as the case may be, regulate those new sources and players (or whether its scope is limited to control and discipline *state* conduct).

This inquiry proceeds from two different angles.<sup>3</sup> A first angle (set out in Section III) is concerned about whether the hard law, state-to-state WTO regime takes sufficient account of the new (softer) normative sources outlined in Section II, including those created by non-state actors. This angle worries about a certain WTO supremacy -- i.e., a risk of *over-inclusion* of WTO obligations -- fearing that the non-traditional sources of non-WTO law would play no or not a sufficient role in the resolution of trade disputes. Is the WTO 'missing the boat' by finding, for example, that a domestic measure is in violation of trade rules whilst that very same measure is justified or even imposed by other, newer forms of social regulation (be it an environmental declaration, or a private or semi-private international standard) outside the four corners of traditional WTO law?

A second angle (elaborated in Section IV) worries not about the impact of non-traditional sources and players in the WTO, but about the WTO itself and whether the WTO may not be running behind realities in covering only state conduct and hard, state-to-state norms, without control over today's new sources and players on the international economic scene (i.e., a risk of *under-inclusion* of WTO obligations). Is the WTO thereby 'missing the boat' and tolerating norms and conduct (such as codes of good practice, NGO boycotts or semi-private standards) that may restrict trade as much as, or even more than, traditional tariffs or state imposed quantitative restrictions?

## II. NEW SOURCES AND PLAYERS IN GLOBAL REGULATION

### 1. Hard law *versus* soft law: A "partially globalized" world?

Where states do cooperate (other than at the WTO) such cooperation increasingly takes the form of soft law declarations, codes of conduct or weakly enforceable treaties. When states decided, for example, to do something about the trade in so-called conflict diamonds (that is, diamonds mined by rebel groups and sold to fund internal wars, possibly even global terrorism), they did so in the form of the Kimberley Process Certification "scheme", that is, a set of precise rules that were explicitly stated as *not* legally binding but which states promised to implement domestically.<sup>4</sup> Germany has even made it official foreign policy that if international cooperation can be achieved through soft law, German negotiators should not conclude a legally binding treaty.

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<sup>3</sup> A third angle, not pursued in this paper, is whether the WTO itself ought to move away from its hard-law-only approach and start regulating trade also in softer forms, be it by non-binding declarations or obligations not subject to the strict DSU (but monitored, for example, under a compliance mechanism focused on carrots and plans of action, rather sticks and trade sanctions). For a suggestion in this respect, see Kenneth Abbott, *International action on bribery and corruption: Why the dog didn't bark in the WTO*, in DANIEL KENNEDY AND JAMES SOUTHWICK (EDS.), *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, ESSAYS IN HONOUR OF ROBERT HUDEC* (2002), 177.

<sup>4</sup> Joost Pauwelyn, *WTO Compassion or Superiority Complex: What to Make of the WTO Waiver for "Conflict Diamonds"*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW (2003:4), 1177-1207.

In other non-WTO areas, such as the Cartagena Biosafety Protocol or the WHO Framework Convention on Tobacco, states did conclude a legally binding treaty, but unlike the WTO treaty, did not back it up with a credible enforcement mechanism. In yet other fields, states failed to cooperate at all (as in, for example, the Kyoto Protocol, not ratified by the USA and Russia) or created regimes that are not seen as sufficiently complied with (such as, for example, ILO labor or UN human rights conventions).

When compared to the strictly enforced trade obligations at the WTO, this lack of international cooperation in fields other than the economic one, led commentators to term today's world as a "partially globalized world"<sup>5</sup> or to find a "global governance deficit of considerable magnitude".<sup>6</sup> In my recent book, I spoke of a "two class society" of international law norms.<sup>7</sup> It is, indeed, quite a paradox that in those areas that we would domestically frame as constitutional (such as human rights) *less* (enforceable) international cooperation takes place than in areas that we would domestically portray as of mere commercial value (such as trade rules).

At the same time, plausible reasons can be found for this discrepancy (other than the argument that governments care more about trade than about human rights or the environment). First, trade cooperation is hugely facilitated because it is essentially a win-win situation where all participants stand to gain by the reciprocal exchange of market openings. In addition, because of the reciprocity inherent in trade deals, WTO rules are relatively easily enforced based on the threat of reciprocal withdrawals in case a country reneges on the deal ('if you unjustifiably close-off your market for my products, I will do the same for yours'). This logic of reciprocity is absent both in the creation and the enforcement of, for example, human rights or environmental rules (it is no credible threat to say that 'if you torture your nationals, I will reciprocate by torturing mine'). Put differently, because of reciprocity, the collective action and free-rider problem that traditionally stalls international cooperation is far less prominent in the field of trade than it is in other fields.

Second, hard law backed up by a state-to-state dispute mechanism and trade sanctions is not necessarily the most efficient compliance tool for all regimes. Whilst it may work for trade rules, monitoring and a combination of sticks and carrots may be more efficient to achieve, for example, environmental objectives.<sup>8</sup>

Third, while trade law is essentially about making money and enhancing material welfare, the economic liberties that it ensures have, in and of themselves, a human rights

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<sup>5</sup> Robert Keohane, *Governance in a Partially Globalized World*, in David Held and Anthony McGrew (eds.), *Governing Globalization* (2002), 325.

<sup>6</sup> Gary Gereffi and Frederick Mayer, *Making Globalization Work*, February 2004 (paper on file with author), 2.

<sup>7</sup> JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* (2003), 441.

<sup>8</sup> For reasons why soft law is sometimes the preferred and better approach than hard law, see DIANA SHELTON, *COMMITMENT AND COMPLIANCE, THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (2000).

quality (economic freedoms).<sup>9</sup> In addition, through the welfare that they create, trade rules are instrumental in the achievement of non-economic goals (such as environmental or human rights protection, public health or social justice) depending, of course, on how national governments redistribute this wealth. At the same time, those positive features of a liberal market do not obliterate the need for non-economic regulation, be it nationally or globally, so as to correct so-called negative externalities (e.g. environmental harm not sufficiently calculated into the cost of goods or services) or to ensure fair competition (e.g. through anti-trust law). Liberalized markets must go hand in hand and can only be maintained and flourish when combined with a minimum of government intervention. In this sense, the world does remain “partially globalized” and in a “global governance deficit”.

## 2. Non-state actors as sources *and* subjects of global regulation

Besides a move away from the traditional international law focus on hard law, legal patterns of global cooperation have also expanded beyond the state: non-state actors – in particular NGOs and multinational corporations (MNCs) – have become crucial players both as norm-creators/enforcers *and* as potential subjects of international legal discipline.

### a. *NGOs and MNCs as sources and enforcers of global regulation*

Confronted with what they perceive as insufficient or ineffective state-to-state agreed rules on social policy, NGOs have started to monitor those rules themselves (e.g. Human Rights Watch or Oxfam’s ‘Make Trade Fair’ campaign) or created their own rules or codes of conduct for *states* (e.g. Transparency International) as well as *MNCs* (e.g. Social Accountability International (SAI) or Fair Trade Labeling Organizations International).

MNCs, in turn, faced with increasing pressure from NGOs and consumers to conduct business in a socially responsible manner wherever they operate (even in the absence of government-imposed disciplines), have embraced the notion of Corporate Social Responsibility (CSR). MNCs adopted their own company-specific codes of conduct (e.g. the corporate codes of Wal-Mart, the Gap or BP) or industry wide norms on human rights, environmental protection, labor standards etc. (e.g. the ‘Equator Principles’ adopted by financial institutions or the work of the World Business Council for Sustainable Development).

Finally, states, NGOs and MNCs increasingly cooperate to construe and agree on collectively formulated norms (e.g. the UN’s Global Compact, a partnership between the UN and private companies, or semi-private standardization bodies such as the International Standardization Organization (ISO) or the International Accounting Standards Board). They have also joined forces to monitor compliance with state-agreed norms (e.g. the role of NGOs in the implementation of the Kimberley Scheme on conflict

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<sup>9</sup> For a view taking this point a step further qualifying basic WTO obligations as human rights, see Ernst-Ulrich Petersmann, *Time for a UN “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations*, *European Journal of International Law* (2002), 621-650.

diamonds<sup>10</sup> or the role of SAI in the monitoring of compliance with the 8 core ILO labor codes under the 2002 Belgian Law to Promote Socially Responsible Production<sup>11</sup>).

This cross-actor cooperation may enhance coherence in the different standards enacted and bolster the credibility and effectiveness of those standards (in particular through independent, third-party monitoring). The participation of NGOs or private standardization/monitoring bodies in state-created norms is also thought to increase the legitimacy of those norms and may lighten the financial and human resource burden on states in the process of norm implementation.

*b. NGOs and MNCs as subjects disciplined by global regulation*

Besides creators, monitors and enforcers of global norms, NGOs and MNCs have also become subjects of such norms in their own right. Most clearly, MNCs are the subjects of many of the codes of conduct referred to. With increased power and influence for MNCs on the world scene (which, through globalization, cannot always be controlled by national governments), should come increased responsibilities, the argument goes.

In some instances (such as the self-imposed company-specific or industry-wide codes of good practice), MNCs are both the lawmaker and the subject of the law, or both party and judge (which has raised the question of whether companies have genuinely embraced CSR or merely use it as a straw-man to fence off criticism and increase profits). In other cases, the norms are created and monitored by NGOs (such as SAI) or, a novelty in international law, negotiated by states and imposed directly under international law on MNCs (as in the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights approved in August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights).

MNCs have also become the subject of international law enforcement before *national* courts, in particular US federal courts under the 1789 Alien Torts Claim Act (e.g. the *Unocal* case pitting Burmese nationals against the California oil company Unocal, for Unocal's alleged involvement in forced labor and torture in a Burmese pipeline project).

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<sup>10</sup> To monitor the implementation of the Kimberley scheme, a Working Group on Monitoring was established. Interestingly, this Working Group consists of eight countries and the European Community as well as two NGOs (Global Witness and Partnership Africa Canada) and one industry organization (World Diamond Council). The Working Group makes its recommendation to the Chair of the Kimberley scheme who, in the end, is left with the final decision whether or not to expel a Participant from the scheme. On 9 July 2004, the Republic of Congo (Congo-Brazaville) was removed from the scheme following the Working Group procedures (including a site visit by an expert team). See <http://www.kimberleyprocess.com:8080/site/>.

<sup>11</sup> Under the Belgian law, SAI is the organization that selects and accredits audit firms abroad which are entitled to certify compliance with SAI's own SA8000 human workforce standard which, in turn, is regarded as equivalent to the criteria set out in the Belgian law. Note, however, that since the entry into force of the Belgian social label (on 1 September 2002), only one single company requested and obtained the label, namely the Belgian insurance company Ethias and this only for one of its services, its "Home Comfort Plus", a home insurance policy. The link between a social label and inducing compliance with minimum labor standards abroad is, in that case, quite strained.

The reach of the Alien Torts Claim Act was, however, recently restricted by a landmark US Supreme Court opinion in *Alvarez-Machain* (discussed below in Section IV).

Note further that MNCs not only face *obligations* under modern international law, they have also been granted specific *rights* under a long series of regional and bilateral investment treaties. Those rights are, in most cases, of a hard law nature (unlike MNCs obligations in codes of conduct) that MNCs can directly enforce at the international level in compulsory investor-state dispute mechanisms (such as Chapter 11 of NAFTA). In other words, while MNCs may increasingly carry rights *and* obligations under international law, MNC rights remain of a more precise and enforceable nature than MNC obligations.

NGOs, in turn, have faced criticism of a lack of accountability matching their power and influence in the market place (this influence is readily apparent in successful NGO instigated consumer boycotts against, for example, Coca Cola, Nestle or apartheid South Africa; Oxfam's alleged influence in the failure of the WTO meeting in Cancun as well as its role in the fight against rich countries' export subsidies<sup>12</sup> or Nestle's backing down in an investment claim against Ethiopia because of NGO triggered consumer outrage). As a result, new mechanisms have recently emerged with a view to checking the operation and financing of NGOs so as to increase their accountability to members, contributors and consumers at large (see, for example, the American Enterprise Institute's [ngowatch.org](http://ngowatch.org) or One World Trust's Global Accountability Project rating the transparency and accountability of both states and NGOs).

### III. NON-TRADITIONAL PATTERNS OF GLOBAL REGULATION AND THE WTO

#### 1. Are WTO trade obligations *over-inclusive*?

Notwithstanding the complexities of today's world economy, the standard work of a WTO panelist seems remarkably simple and confined. All he or she can and must do, it is generally believed, is to decide whether a given WTO member has violated one of the WTO rules agreed on in the 1994 Final Act. It is, indeed, tempting for international trade lawyers to perceive the world of trade, and the legal patterns that govern it, as limited to what the WTO covers and regulates. This cosy and comforting perspective, limited to the four corners of the hard law set out in the so-called WTO covered agreements, has however one major risk: the marginalization of the WTO as an appropriate forum for the settlement of complex trade disputes touching on a broad range of societal questions (from public health to the environment, from worker protection to the protection of minors).

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<sup>12</sup> At the time of writing Oxfam has, for example, a web-page rolling where it enables supporters to send a direct email to US President Bush urging him (in a pre-set text) to implement the WTO ruling condemning US cotton subsidies. See <http://www.maketrade-fair.com/en/index.htm>.

This risk is one of *over-inclusion* of WTO trade obligations. It is the risk that WTO obligations are found to be violated in the confined universe of trade law, even though in the wider corpus of global legal patterns the conduct in question may be perfectly legal or justified (because permitted, or even called for, in another treaty or norm). If and when this risk materializes it would hardly be correct to state that disputes are genuinely “settled” at the WTO; at best, they would then be offered *one* outcome limited to trade law; at worst, this outcome would be meaningless since contradicted under another set of global norms, thereby seriously tarnishing the legitimacy and enforceability of WTO rulings. In this sense, it would then be more appropriate to talk about “confined” or “within-the-box” adjudication rather than genuine “dispute settlement” that brings closure to a case.

a. *Non-WTO norms legally binding on the disputing parties*

Panels and the Appellate Body have realized this first threat of ‘missing the boat’ and have, unlike panels operating under GATT 1947, construed WTO rules in the wider context of international law (with references to rules of public international law on questions such as treaty interpretation, burden of proof, private counsel, *amicus curiae* or the proportionality of countermeasures, as well as other non-WTO treaties, in particular, multilateral environmental agreements (MEAs)).<sup>13</sup>

Although it has now become common practice for panels and the Appellate Body to *interpret* WTO rules with reference to other rules of international law and to apply *general rules* of treaty law, state responsibility and dispute settlement, what remains to be decided is whether a violation of the WTO treaty can be justified, independently, by another norm of international law binding on the disputing parties (for example, even if a trade restriction violates GATT and cannot be justified under the exceptions of GATT Art. XX, can another rule, say, an MEA or ILO declaration, that is binding on the disputing parties, still offer a valid defense on the basis of which a WTO panel can decline to find a violation of WTO rules)?

In my view, this is an extra step that must be taken and one that can be perfectly justified under traditional principles of international law, distinguishing the limited *jurisdiction* of WTO panels (*in casu*, limited to finding violations of WTO obligations) from the *law* that WTO panels can apply in the exercise of their limited jurisdiction, i.e., in their examination of WTO claims (*in casu*, any valid rule of international law binding on the disputing parties that does not affect the rights of third parties).<sup>14</sup>

b. *Soft law agreed to by the disputing parties*

While the above ‘extra mile’ would avoid situations where a WTO panel finds a violation even though another (legally binding) treaty explicitly agreed upon between the parties

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<sup>13</sup> See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 95, July 2001, 535-578.

<sup>14</sup> See Joost Pauwelyn, *How to Win a WTO dispute based on non-WTO law: Questions of Jurisdiction and Merits*, JOURNAL OF WORLD TRADE (2003:6) 997-1030.



requires or permits the conduct, would the suggested approach also give sufficient deference to the non-traditional, softer law referred to earlier (e.g. the Kimberley Scheme, a non-binding declaration in which states commit themselves to ban trade in conflict diamonds)? In my view, it could.

Soft law can, first of all, play a crucial law in the *interpretation* of flexible WTO provisions (as discussed below). When it comes to soft law that genuinely *contradicts* hard WTO law, much will depend on how one construes the definition of conflict between two norms, e.g. between a WTO rule and a Kimberley scheme provision. Should, as was implied by earlier Appellate Body case law, a conflict only be found in the event of two mutually exclusive obligations, i.e., when a state cannot possibly comply with both provisions at the same time?<sup>15</sup> In my view, this definition of conflict is too restrictive. As implied in the more recent Appellate Body ruling on *EC – GSP*, conflict between two norms also includes the situation where one norm *prohibits* that what another norm explicitly *permits*.<sup>16</sup> In other words, even though, in that situation, both norms can be complied with at the same time (by not invoking the permissive norm and simply complying with the prohibition), a conflict still arises because the permissive norm cannot be given its effect in the face of the prohibition. Under this broader definition of conflict, a conflict does arise in case GATT were, for example, to prohibit a ban on conflict diamonds (a fact that is far from clear<sup>17</sup>) while the Kimberley scheme explicitly permits such ban (even though, as a non-binding scheme, it does not legally

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<sup>15</sup> Appellate Body report on *Guatemala - Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico*, complaint by Mexico (WT/DS60/AB/R, adopted on 25 November 1998, at para. 65):

In our view, it is only where the provisions of the DSU and the specific or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. 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” (underlining added).

<sup>16</sup> In that case, the potential for conflict was one between GATT Article I (*prohibiting* discrimination between foreign trade partners member of the WTO) and the Enabling Clause (*permitting* tariff preferences to be awarded only to developing countries). By finding a potential for conflict between such prohibition (GATT Article I) and permission (Enabling Clause), the Appellate Body confirmed that an obligation can, indeed, conflict with a right:

...the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made (*European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004), para. 101).

<sup>17</sup> See *supra* note 4.

impose an *obligation* to do so).<sup>18</sup> In this sense, the soft law Kimberley scheme could provide a valid defense against a claim of WTO violation, albeit only as between two WTO members that agreed to the scheme.<sup>19</sup>

*c. Legal Patterns not binding on the disputing parties*

The above-suggested steps (that is, accepting non-WTO norms *agreed to by both parties* as a possible justification for WTO violation) – though still seen by many as revolutionary -- may not be enough to placate the concerns of WTO ‘marginalization’ described earlier. It leaves out norms that were not consented to by the disputing parties (such as the Cartagena Biosafety Protocol in the US-EC dispute over GMOs because the US did not sign the Protocol, or international Codex Alimentarius standards on hormones not accepted by the EC), as well as norms created by non-state actors (be it NGO or MNC codes of conduct or standards enacted in (semi-) private bodies). This begs the question, of course, whether it is at all appropriate for a WTO panel to refer to such sources, in particular, given the traditional international law rule that a state cannot be held by law that it did not consent to.

*International standards referred to in the SPS and TBT agreements*

One major avenue to incorporate at least some of those non-traditional sources is now offered in the SPS and TBT agreements. Those agreements explicitly refer to international standards adopted outside of the WTO as a safe-haven from WTO discipline. In other words, when a WTO member “conforms to” (for TBT purposes, when the measure is “in accordance with”) any of those international standards it cannot be found to violate SPS/TBT rules. Crucially, this safe-haven applies even though the standard is *not* legally binding in and of itself nor must it be adopted by consensus or binding on the disputing parties in the WTO dispute.<sup>20</sup>

There are, however, notable differences between the safe-haven offered in SPS as opposed to that set out in TBT.

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<sup>18</sup> If, based on the non-binding nature of the Kimberley scheme, also “rights” under that scheme were held to be of no normative force, the scheme could, however, have the same effect of justifying the measure pursuant to the principles of good faith and/or estoppel (for a country to first agree to the Kimberley scheme and then to sue another scheme participant for WTO violation is arguably against the principle of good faith; such WTO complaint could also be said to be estopped by means of the complainant’s very agreement to the Kimberley scheme).

<sup>19</sup> This line of thinking was confirmed when in May 2003 all WTO Members agreed to grant a waiver for trade restrictions imposed on non-participants in the Kimberley Scheme on condition that such restrictions were consistent with that scheme. In other words, WTO Members implied that *as between participants* to the scheme no waiver was needed. There, the Kimberley Scheme itself could justify the trade restriction, even before a WTO panel; only restrictions on non-participants needed a waiver (WTO General Council, *Proposed Agenda*, WT/GC/W/498 (13 May 2003) Item VI. The text of the waiver can be found in the revised waiver request WTO Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Communication*, G/C/W/432/Rev.1 (24 Feb. 2003).

<sup>20</sup> SPS Article 3.2; TBT Article 2.5. The *Explanatory note* to TBT Annex 1.2, defining the term “standard”, explicitly states: “This Agreement covers also documents that are not based on consensus”.

In SPS, the international standards referred to are currently limited to “standards, guidelines and recommendations” established by the Codex Alimentarius Commission and those developed under the auspices of the International Office of Epizootics or the International Plant Protection Convention.<sup>21</sup> All three organizations are *inter-governmental* bodies (none of them is of the semi-private or private nature discussed earlier, in contrast to TBT, see below). Moreover, no explicit provision is included that the standards be of a voluntary, non-binding nature (in contrast to international standards referred to in TBT, see below).

In TBT, the range of possible standards that can offer a safe-haven is much broader. As the panel on *EC - Sardines* found, for TBT purposes, “international standards are standards that are developed by international bodies”.<sup>22</sup> This, of course, begs the question of how to define the terms “standard” and “international body”.

First, the word “standard” is defined in TBT Annex 1.2 as: “Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not mandatory*” (emphasis added). Hence, the fact that, for example, the Kimberley scheme requirements are not mandatory could make them “standards” in the TBT sense and, ironically, somewhat more important for TBT purposes than, for example, legally binding MEAs since only compliance with international “standards” offers a presumption of TBT conformity.<sup>23</sup>

Second, the word “international body” is defined in TBT Annex 1.4 as: “Body or system whose membership is open to the relevant bodies of at least all Members”. Crucially, such “international body” setting standards could be inter-governmental (such as, arguably, the Kimberley scheme)<sup>24</sup> or semi-private (such as ISO) since the “relevant bodies” of WTO members referred to can either be governmental or non-governmental. At the same time, “non-governmental body” is restrictively defined in TBT Annex 1.8 as a “[b]ody other than a central government body or a local government body, including a non-governmental body *which has legal power to enforce a technical regulation*”. As a result, private standardizing bodies or NGOs setting codes of good practice, even those open to national NGOs from all WTO members (pursuant to TBT Annex 1.4), are unlikely to be accepted as setting “international standards” for as long as the national NGOs have not been granted “legal power to enforce a technical regulation”. This “legal

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<sup>21</sup> Annex A, para. 3 to the SPS Agreement.

<sup>22</sup> WTO Panel Report, *European Communities - Trade Description of Sardines*, WT/DS231/R, para. 7.63 (2002).

<sup>23</sup> The fact that non-binding international standards, not even consented to by the disputing parties, can therefore be held against WTO members is another reason why *a fortiori* legally binding rules of international law should be permitted to operate as a defense before a WTO panel.

<sup>24</sup> The inter-governmental Kimberley scheme, for example, explicitly states: “participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that scheme” (Section VI.8 of the Kimberley scheme). As a result, membership in the Kimberley Process “is open to the relevant bodies of at least all [WTO] Members”. Consequently, Kimberley requirements could well qualify as “international standards” triggering a presumption of TBT conformity.

power” is the link that must exist between an NGO and the WTO member in question before the NGO activity can be relevant for (or, for that matter, be subject to, see below) the TBT agreement.

Importantly, whilst international standards under SPS all relate to specifications inherent in the physical characteristics of the product itself (e.g., maximum hormone residues in meat or the species of fish to be called sardines), the international standards under TBT may relate to the product itself as well as to the *process or production method* by which the product was produced (arguable including also whether it was produced in conformity with certain labor standards, a point that remains, however, strongly debated).<sup>25</sup>

Note further that the presumption of conformity in TBT is only triggered for technical regulations, not for standards (see TBT Annex 3, para. E), nor for conformity assessment procedures (see TBT Article 5.4), although in both cases a similar presumption of compliance could be implied from the obligation (in those respective TBT provisions) to base national standards and conformity assessment procedures on international standards. Note also that the presumption of compliance in SPS Article 3.2 applies in respect of *all* SPS provisions *and* GATT 1994, whereas that in TBT Article 2.5 is limited to a presumption that the national measure does not create “an unnecessary obstacle to international trade”, i.e., meets the obligation set out in TBT Art. 2.2. Finally, the TBT presumption is explicitly defined as “rebuttable”, the SPS presumption is silent on whether it can be rebutted.

Most relevant for present purposes, the above-summarized SPS and TBT references to international standards imply that a number of non-WTO norms can be taken into account in the settlement of trade disputes, even though

- (i) they were never consented to by the disputing parties (in particular the defendant, as was the case in *EC – Hormones*); and
- (ii) they were created by semi-private bodies (such as ISO) or inter-governmental bodies where non-state actors (ranging from scientific experts, business associations and, to a lesser extent, NGOs) have a major impact.

Although this may placate some of the concerns expressed earlier about the role of non-traditional sources and players in WTO dispute settlement, it raises two new problems.

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<sup>25</sup> TBT Annex 2.2, defining “standards”, includes a reference to “products or *related processes and production methods*” (in contrast to the definition of “technical regulation” in TBT Annex 2.1, it does not include the word “their” before “related”). Moreover, TBT Annex 2.2 adds: “[The term standard] may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, *process or production method*”. In an *Explanatory Note* Annex 2.2 also specifies that TBT does not apply to services standards, but “only” to technical regulations, standards and conformity assessment procedures “related to products or *processes and production methods*”.

First, although the SPS/TBT references thus avoid the strictures of the traditional international law rule of state consent<sup>26</sup>, the question remains, however, whether the collective action problem grounded in the consent rule has not simply migrated from the WTO to the standardizing bodies themselves, that is, whether *because of the SPS/TBT references*, standard-making in, for example, Codex or ISO will not be chilled or become deadlocked (indeed, knowing that standards are no longer voluntary but at least partially enforceable at the WTO, countries may be wary to issue new standards).

Second, whilst the SPS reference is clearly circumscribed to three other organizations, one could question whether the open TBT reference to “standards that are developed by international bodies” is not overly broad. Would it be enough, for example, for 10 or 20 or even 2 WTO members to set up a standardizing body, issue trade restrictive standards on a product that they want to protect (say GMOs) and open that standardizing body to all other WTO members (knowing too well that the countries with whom they have a trade dispute over the product concerned will never join), for the standard to offer a safe-haven from WTO violation, even as against WTO members that decided *not* to join the body? Moreover, what happens in case conflicting “international standards” get developed by different “international bodies”? Is conformity with either standard sufficient to trigger the presumption of SPS/TBT compliance or must the WTO decide which of the two is most “relevant”?

Third, if the international standards referred to are, indeed, partly created at the demand and under the pressure of non-governmental bodies, including businesses, how can the WTO ensure that those standards are legitimate, unbiased and sufficiently supported by all interested parties, including consumers? So far, panels and the Appellate Body have refused to examine the transparency, due process and other procedural qualities of international standards invoked. Instead, they blindly accepted any standard that meets the technical, source-based definitions in the SPS and TBT agreements.<sup>27</sup> Joanne Scott, for example, has recently argued that the Appellate Body ought to examine the procedural appropriateness and legitimacy of international standards before giving deference to them, pleading to make international standards (as well as MEAs) contingent or contestable, not absolute.<sup>28</sup> At the same time, once such procedural requirements of transparency, due process, openness, impartiality etc met, she would advise the Appellate Body to refer to the norm or standard in question even though it does *not* meet the SPS/TBT international standard definition *and* does not constitute a

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<sup>26</sup> As Robert Howse terms it in his paper outline for this conference, the SPS/TBT references are “a unique and extraordinary mechanism for the effective creation of new international law”.

<sup>27</sup> At the same time, the Appellate Body has considerably *reduced* the harmonization pull of the SPS/TBT compliance presumptions by finding that (i) national regulations must “conform to” (not simply be “based on”) international standards to benefit from the presumption and (ii) deviation from an international standard does *not* shift the burden of proof to the defendant. See *infra* note 29. This led Joanne Scott to say that “the AB has been notably diffident in according authority to such [international] standards, conscious perhaps of the disputed legitimacy of the bodies responsible for them”, going as far as concluding that the “authority [of international standards] within the WTO would seem, at present, to be modest in the extreme” (Joanne Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 EJIL (2004) 307, at 310 and 330).

<sup>28</sup> Joanne Scott, *supra* note 27, at 311-2 and .

legally binding norm consented to by the disputing parties. In this sense, Scott's approach would trump the consent rule even beyond what is currently the case in SPS/TBT and in respect of other, non-WTO treaties go far beyond my proposal, outlined earlier, of applying non-WTO rules before a WTO panel as long as they are *binding* on the disputing parties.

To close the discussion on SPS/TBT references to international standards, an important question remains whether those standards operate only as a tool to *loosen-up* national regulations that go beyond international standards (as in *EC – Hormones* or *EC – Sardines* where EC regulations were found to be too strict) or whether those standards could also be invoked to *tighten* national regulations against countries that fall below the minimum of the international standard. Put differently, do the international standards operate only as a common *ceiling* or maximum (beyond which countries will have to offer specific justifications) or also as a *floor* or minimum under which WTO members cannot go? If the international standards would also have the latter (floor) effect, the SPS and TBT agreements would have a strong harmonizing pull. If not, the incentive to harmonize is limited to the safe-haven offered by conforming to the standard.<sup>29</sup>

SPS Article 3.1 provides as follows

To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members *shall base* their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, *except as otherwise provided for in this Agreement, and in particular in paragraph 3.*

Now, if an international standard does exist, the only two alternatives to “basing” measures on it (as required in SPS Art. 3.1<sup>30</sup>) are

- (i) to more fully “*conform to*” the standard (in which case WTO consistency is presumed under SPS Art. 3.2), or
- (ii) to introduce a measure “which results in a *higher* level of sanitary or phytosanitary protection than would be achieved by measures *based on*” the standard *and* to offer scientific justification for it.

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<sup>29</sup> Note, however, that deviating from the standard by means of a stricter national measure is not punished in Appellate Body case law. In *EC – Hormones*, the Appellate Body reversed the panel on burden of proof under SPS Article 3.3, finding that even when a member deviates from an international standard, it remains for the complainant to prove that the measure is *not* scientifically justified (or at least to establish a presumption or *prima facie* case to this effect). Intriguingly, the subsequent Panel on *EC – Sardines* reverted to the *panel* approach in *EC – Hormones* (shifting the burden of proving TBT consistency to the EC because it had deviated from the Codex standard) but was once again reversed by the Appellate Body (finding that it remains for Peru, the complainant, to prove TBT violation even in cases of deviation from an international standard).

<sup>30</sup> The Appellate Body in *EC – Hormones* found, however, that compliance with SPS Article 3.1 does *not* presume SPS conformity. All other SPS requirements remain to be checked even if a measure is “based on” an international standard.

In other words, no ground can be found in the SPS agreement to deviate from the SPS Art. 3.1 obligation to base measures on international standards by means of a measure that results in *lower* levels of sanitary or phytosanitary protection. Under this reading, the SPS agreement (in particular Art. 3.1) could then, indeed, be used to force a WTO member to *ratchet-up* its national measures to the minimum level of an international standard. The odd result of this is that the WTO would then essentially grant a request to restrict trade *more* (that is, ask the defendant to impose *stricter* SPS measures).<sup>31</sup>

The obligation in TBT Art. 2.4 to “use” relevant international standards “as a basis” for national technical regulations can be deviated from under somewhat broader language, namely in case the international standard would be “an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems”.<sup>32</sup> Although this could possibly be read to grant a right to also go *below* the floor of the international standard, TBT Art. 2.4 remains focused (much like SPS Art. 3.3) on deviations that *exceed* the level of fulfillment achieved by the international standard. If the latter is correct, then also the TBT agreement could be used to *ratchet up* (rather than down) domestic technical standards. Given the broad scope of relevant international standards under the TBT agreement, such reading could transform the WTO from an organization worried about technical standards that are *too strict*, to one that forces countries to comply with the minima set out in non-binding standards developed in other fora, ranging from ISO to the Codex Commission, possibly including even MEAs and the Kimberley Scheme on conflict diamonds (recall, in this respect, the problem of conflicting international standards: if the WTO is to enforce a minimum ceiling, which of two divergent standards should it then enforce?). This logical conclusion may well be a strong argument to distinguish the permitted deviations under SPS (explicitly stated to include only deviation by *higher* standards) from those under TBT (including both higher *and* lower standards, as long as the international standard is proven to be “ineffective or inappropriate”). If, in the alternative, the Appellate Body were to permit only deviations by *higher* standard also under TBT, Joan Scott’s argument for the Appellate Body to exercise closer scrutiny over the procedural qualities and legitimacy of international standards would gain all the more force. In any event, the very definition of “international standards” under TBT ought then be more carefully circumscribed than it has been to date.

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<sup>31</sup> Note, indeed, that for the SPS agreement to apply in the first place, the defendant measure have some form of measure that “directly or indirectly, affect international trade” (SPS Art. 1.1) and falls within one of the definitions of an SPS measure (set out in Annex A.1).

<sup>32</sup> Similar language is provided for domestic “standards” deviating from international standards pursuant to TBT Annex 3.F (permitting deviation whenever the international standard “would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems”). In respect of conformity assessment procedures, the exception is even broader, namely deviation is tolerated whenever the standard is “inappropriate for the Members concerned” (TBT Art. 5.4).

*Legal Patterns that are not binding on the disputing parties, nor “international standards” under SPS/TBT*

This leaves us with non-traditional sources of global regulation that are not binding on the disputing parties, nor incorporated in the SPS or TBT agreements. Is there any scope for WTO panels to take account of such sources, notwithstanding the rule of state-consent?

Quite surprisingly, whilst my proposal for panels to apply non-WTO rules that were *agreed on* by the disputing parties has met fierce resistance<sup>33</sup>, the actual practice of the Appellate Body has, in certain respects, gone even beyond what I propose.<sup>34</sup> The Appellate Body has, indeed, referred to other international treaties that were not even agreed to by the disputing parties. In my view, those instances raise more questions of legitimacy and state consent than my, less ambitious, proposal for panels to apply rules that the parties have explicitly agreed to in the first place.

Two Appellate Body cases come to mind. Firstly, in *US – Shrimp* the Appellate Body read the terms “exhaustible natural resources” in GATT Article XX

in the light of contemporary concerns of the community of nations.

It found expression of those concerns in a series of treaties that were not even binding on the disputing parties (in particular, MEAs and UNCLOS not binding on the US).

Similarly, in *EC – GSP* the Appellate Body interpreted the terms “development, financial [or] trade need” in the Enabling Clause with reference to

broad-based recognition of a particular need, set out in ... multilateral instruments adopted by international organizations.<sup>35</sup>

Once again, whether or not those non-WTO instruments were binding on the disputing parties was not discussed. In that case, the instruments in question were “several international conventions and resolutions that have recognized drug production and drug trafficking as entailing particular problems for developing countries”.<sup>36</sup> No question was raised whether India, the complainant, was a party or bound to any or all of these instruments.

How could those references to norms not binding on the disputing parties be justified? In my view, it is possible to interpret Article 31.3(c) of the Vienna Convention sufficiently

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<sup>33</sup> See the forthcoming Proceedings of the 2004 ASIL Meeting in Washington D.C. (critique by Joel Trachtman and Debra Steger).

<sup>34</sup> For another surprising critique of sovereignty and the consent rule it entails (from one of the original founders of the academic discipline of GATT/WTO law), see John Jackson, *Sovereignty-Modern: A nEw Approach to an Outdated Concept*, 97 AJIL (2004) 782-802.

<sup>35</sup> Appellate Body report on *EC – GSP*, para. 163.

<sup>36</sup> *Ibid.*, footnote 335.



broadly so as to call those norms “rules of international law applicable in the relations between the parties“ (that is, part of the rules which WTO panels must refer to when interpreting the WTO treaty pursuant to Art. 3.2 of the DSU).

Elsewhere<sup>37</sup>, I have expressed the view that it is not *sufficient* for an Article 31.3(c) rule to be binding only on the disputing parties (“parties” in the Vienna Convention is defined not as parties to a particular dispute but as the parties *to the treaty*<sup>38</sup>), nor is it, in my view, *necessary* that the rule is *legally binding* on *all* WTO members, in the strict sense that it confers rights or obligations on *all* WTO members (reference is made to rules “applicable in the relations between the parties”, not rules “*legally binding on all the parties*”).<sup>39</sup> In my opinion, it suffices that the rule reflects the common intentions or understanding of WTO members as a whole regarding the meaning of a particular WTO term.

The process of treaty *interpretation*, at least the way I understand it, is a fairly limited one. A word or string of words in a WTO provision – be it “exhaustible natural resources” or “necessary” in GATT Article XX, or “development, financial and trade need” in the Enabling Clause -- is not entirely clear and must be given meaning. In the process of *defining* those specific terms, must a panel limit itself to outside material that is *legally binding* on all WTO members? I do not think so. Rather, it suffices that those outside sources reflect a definition or provide a meaning that is *commonly understood* by all WTO members. After all, interpreting a WTO term with reference to other sources is *not* adding legally binding rights or obligations to the WTO term, but a rather technical, linguistic exercise of defining the very meaning of the WTO term. Indeed, the very first outside source that panels and the Appellate Body consistently refer to is surely one that is *not* legally binding on all WTO members, namely: the *Oxford English Dictionary* where traditionally “ordinary meaning” is found. Equally so, in my view, the distinguishing factor for rules under Article 31.3(c) ought not be that they are legally binding on all WTO members, but rather that they reflect a common understanding between WTO members.

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<sup>37</sup> JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW (2003), 253-272.

<sup>38</sup> Vienna Convention Article 2(1)(g).

<sup>39</sup> In contrast, Article 31.2(a) refers to “any agreement relating to the treaty which was made *between all the parties* in connexion with the conclusion of the treaty (emphasis added).” In this Article, the word “all”, qualifies the phrase “between the parties”. This suggests that the absence of the word “all” to qualify the phrase “between the parties” in Vienna Convention Article 31(3)(c) means that not all the parties to the WTO need to be parties to the rule of international law. Similarly, Article 31.3(b) refers to “any subsequent practice in the application of the treaty which establishes the agreement of *the parties* regarding its interpretation”. The commentary to Article 31.3(b) states as follows:

The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties’. By omitting the word ‘all’ the Commission did not intend to change the rule. It considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole’. It omitted the word ‘all’ merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice” (Rauschnig, Dietrich, *The Vienna Convention on the Law of Treaties, Travaux Préparatoires* (1978), 254).

Crucially, such reading of Article 31.3(c) could then include

- (i) rules that are not necessarily binding on *all* WTO members, as well as
- (ii) rules or broader legal patterns developed by non-state actors

*for as long as they can be said to represent a common understanding of a particular term as between the WTO membership as a whole* (and this irrespective of the time of enactment of those other rules, be it before or after the conclusion of the WTO treaty in 1994<sup>40</sup>).

A similar result could be reached, following the same line of argument, under Article 31.1 of the Vienna Convention calling for an interpretation of WTO terms “in good faith in accordance with the ordinary meaning to be given to the terms”.

At the same time, this approach (be it under Art. 31.3(c) or Art. 31.1) begs the question of how to decide when and whether a particular norm or legal pattern reflects the common understanding of all WTO members and/or offers a good faith meaning in line with ordinary meaning (and whether this is a task that can be safely put in the hands of the judiciary<sup>41</sup>). The least that the Appellate Body could, however, do is to give some explanation as to why the instruments it referred to in *US – Shrimp* and *EC – GSP* meet its threshold of relevance.

Finally, non-traditional sources of global regulation could also play a role as *factual* references or benchmarks (much like comparative analysis of domestic laws in other WTO members) for panels to decide, for example, whether a country acted in a non-discriminatory manner (as the Appellate Body did in *US – Shrimp 21.5*, referring to the Inter-American Convention on turtle protection), whether a stated concern can be seen as “legitimate” or a measure or standard can be termed as “necessary” or “appropriate”. For legal patterns to play such factual role there is no need that they are binding on the disputing parties nor that they necessarily reflect the common understanding of WTO members as a whole or even be state-created norms (NGO or MNC codes of good conduct could also be referred to). Still, while panels may (and actually must) refer to interpretative tools under the Vienna Convention at their own initiative, panels can, in principle, only refer to other rules as facts when the disputing parties themselves have invoked such facts. Moreover, the weight of rules relied on by panels as legally binding norms or interpretative references will generally be higher and of a more decisive nature than rules simply referred to as facts.

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<sup>40</sup> This evolutionary approach to treaty interpretation was explicitly confirmed by the Appellate Body in *US – Shrimp*. Note, in addition, that the *Oxford English Dictionary* referred to by the Appellate Body is always the most recent version, not the one prevalent in 1994.

<sup>41</sup> Note, in this respect, Joanne Scott’s statement that “[a] commitment to textual fidelity will not buy interpretative peace of mind” (*supra* note 27, 311).

d. *Conclusion*

The risk of trade obligations being *over-inclusive* -- because WTO panels cannot sufficiently defer to non-traditional patterns of global regulation -- seems limited. With some creativity, several avenues can be detected for WTO panels to give effect to non-WTO norms, both those that are binding on the disputing parties and those that are not, both hard law and softer law or “standards”, both inter-state norms and norms developed by, or with the input from, non-state actors.

Yet, these multiple forms of reference to outside sources imply different degrees of deference. Whilst under Vienna Convention rules on treaty interpretation non-traditional sources not binding on the parties can be of *linguistic/sociological* value (that is, shed light on how a given society gives meaning to a specific term), their role as *factual* references is limited to the process of how to apply pre-defined WTO law to the facts of a specific case. In contrast, when WTO panels apply other treaties that are *binding* on the disputing parties in defense of a claim of WTO violation, such other treaties have independent *legal/normative* value, transcending mere linguistic or factual relevance, and may eventually (depending on the relevant conflict rule) trump or overrule explicit provisions in the WTO treaty.

It is crucial to keep in mind these different shades of relevance. They make it possible for WTO panels to engage in a delicate balancing act between, on the one hand, taking cognizance of non-traditional sources – and thereby mitigate the risk of “confined” or “within-the-box” adjudication limited to the confines of hard WTO law – and, on the other, to respect the rule that no state can be *legally* held by a norm without its consent.<sup>42</sup>

The crucial issue, when accepting such roles for non-traditional sources, remains, however, their legitimacy both in the sense of how and by whom these new sources were created (raising questions of due process, procedural openness, etc.) and what they imply in terms of substance (raising questions of impartiality, scientific justification, technical accuracy, etc.). As pointed out earlier, these questions of procedural and substantive legitimacy are particularly acute for international standards broadly referred to in the TBT agreement. This brings us to the final section of this paper (Section III.2). It examines how new patterns of global regulation can be controlled and disciplined, in particular, whether they may, in and of themselves, become trade restrictions that need corrective action at the WTO (or national) level.

2. Are WTO trade obligations *under-inclusive*?

The previous section (Section III.1) tried to demonstrate that even under the current regime, and using traditional international law tools, the WTO is capable to take account of non-traditional sources of global regulation in the settlement of trade disputes. If the

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<sup>42</sup> In contrast, for example, to Joanne Scott’s suggestions (*supra* note 27) where, to her own admission, her proposals conflict with the rule of state consent.

proposals set out earlier are followed, the WTO could thereby significantly mitigate the risk of *over-inclusion* of trade obligations.

As pointed out in the introduction, however, new sources of global regulation also pose a risk of *under-inclusion* of trade obligations: non-traditional sources, and the non-state actors that make or enforce them, may constitute unjustifiable trade barriers that escape the state-focused reach of the WTO and traditional international law more generally. Does the WTO, thereby, risk ‘missing the boat’ by tolerating norms and conduct (such as codes of good practice, NGO boycotts or semi-private standards) that may restrict trade as much as, or even more than, traditional tariffs or state imposed quantitative restrictions?

This concern of *under-inclusion* is a real one. Although new patterns of global social regulation (ranging from NGO codes of conduct, to the UN Norms on the Responsibility of Transnational Corporations) are mostly well intended, there is a real and present danger that they restrict trade in a manner disproportionate to the extent that they achieve social objectives.<sup>43</sup> This trade distorting effect is particularly felt in developing countries which may have a harder time complying with social standards (especially if they are set from a rich world perspective) and may find it particularly costly to keep track of, and adjust to, conflicting and diverging sets of standards developed by a wide range of inter-governmental organizations, countries, MNCs and NGOs.<sup>44</sup>

Moreover, how to ensure that standards enacted by non-state actors are legitimate, based on good science, information or technology and/or represent the democratically supported wishes and concerns of consumers and the broader population? As much as governments are pushed toward protectionism by special interest groups with high political clout (explaining why we need a WTO in the first place), NGOs and MNCs may equally be driven by protectionist purposes: NGOs can be pressured by domestic workers adamant to keep out imports and foreign competition<sup>45</sup>; MNCs, in turn, may be focused on outpacing their foreign competitors by setting standards that only they can meet (or claim to meet) without much cost.

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<sup>43</sup> For a blistering critique of Corporate Social Responsibility, arguing that corporations should stick to their profit making objective and that it remains for governments to intervene in the market place for non-economic, social ends, see DAVID HENDERSON, *THE ROLE OF BUSINESS IN THE MODERN WORLD, PROGRESS, PRESSURE AND PROSPECTS FOR THE MARKET ECONOMY* (The Institute of Economic Affairs, 2004).

<sup>44</sup> The World Bank, for example, imposes different standards for public as opposed to private lending. Public lending is governed by the World Bank’s own so-called ‘safeguard policies’ on environmental assessments, pollution abatement, indigenous people etc., there where private lending is governed by the rules of a separate arm of the World Bank, the International Finance Corporation (IFC). See Andrew Balls, *World Bank ‘weakening’ social safeguards*, Financial Times, 3 September, 2004.

<sup>45</sup> For an interesting example, see the recent efforts by China’s trade union authority (the All China Federation of Trade Unions (ACFTU), classified in China as a “social group” rather than a government organization) ensuring that foreign companies established in China, in particular Wal-Mart, comply with the right for workers to establish unions (James Kyngé, *Chinese body to probe companies’ failure to establish trade unions*, Financial Times, 1 September 2004).

Obvious improvements would be to seek the input from all countries and stakeholders when developing standards, adjusting certain standards to the needs of developing countries and reducing the discrepancies between standards emanating from different sources. Government involvement there where standards are really needed, as well as appropriate market responses and corrections that guide the content and implementation of codes of good practice (such as consumer feed-back and spending patterns in response to bogus standards or false statements by companies or NGOs regarding compliance with standards), can offer other ways of legitimization.

Yet, if the WTO is so adamant about striking down wasteful and unjustified trade distortions enacted by *governments*, why ought it tolerate with such equanimity similar trade distortions enacted or brought about by *non-state actors*? Given that traditional government-enacted tariffs and quotas have, in most sectors, been reduced to commercially insignificant levels, are those non-state sources of protectionism not destined to equal or even surpass the importance of governmental protectionism?

This is not the place to discuss whether the WTO ought to include competition or anti-trust policies, tackling distortions created by price-fixing or other agreements between *private* operators. For present purposes, the question is rather whether and how global social regulations themselves ought to be controlled, legitimized or checked to avoid that they translate into new forms of protectionism and thereby decrease, rather than increase, global welfare.

I first address potential controls at the international/WTO level and thereafter address some recent developments on the domestic legal scene, particularly in the United States.

*a. Control at the international/WTO level*

Unlike the relative openness of the WTO, and traditional international law more generally, to non-traditional sources in the settlement of trade disputes between states, the current legal system is virtually closed to complaints against *non-state* conduct. WTO obligations, in particular, only relate to government conduct (including limited obligations on states to tackle certain anti-competitive private behavior).

Two notable (though limited) exceptions must be pointed out. Both subject entities that are not strictly speaking governmental to WTO discipline on the ground that these entities have been granted special privileges by the government. In essence, they are anti-circumvention provisions to avoid that WTO members circumvent their obligations by exercising prohibited conduct through private bodies.

Firstly, Article XVII of GATT bans certain types of discriminatory conduct of State enterprises and enterprise that were granted exclusive or special privileges by the state.<sup>46</sup> Other provisions on so-called state-trading enterprises can be found, *inter alia*, in GATT Article II:4, the *ad Note* to Articles XI, XII, XIII, XIV and XVIII as well as in Article VI

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<sup>46</sup> See the recent Appellate Body Report on *Canada – Measures Relating to the Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, circulated 30 August 2004.

of GATT. The conduct of MNCs and NGOs at issue here would hardly qualify under those provisions, for lack of a sufficient nexus with the government. Yet, the problem raised by this new type of potentially trade distorting conduct reminds one of the *rationale* behind these, in 1947 negotiated, GATT provisions, namely: avoid that non-state entities engage in essentially the same conduct that the GATT prohibits when engaged in by states.

Secondly, the TBT agreement imposes disciplines on mandatory “technical regulations” and voluntary “standards” enacted by *non-governmental* bodies (TBT Articles 3, 4 and 8). However, as noted earlier, such non-governmental bodies are strictly defined in TBT Annex 1.8 as

a “[b]ody other than a central government body or a local government body, including a non-governmental body *which has legal power to enforce a technical regulation*.”

NGOs which have not been conferred such power by the state are not subject to the TBT agreement. Even NGOs which only have the power to enforce voluntary “standards” -- not “technical regulations” which are defined under TBT as mandatory -- would not seem to fall under the TBT agreement. This would seem to exclude, for example, Social Accountability International (SAI) which was granted the legal power to monitor compliance with criteria in the Belgian social label on the ground that the social label is only voluntary, not mandatory. Note, however, that the Belgian government itself remains subject to the TBT agreement for enactment of the social label, even if this label is purely voluntary. The label merely qualifies as a “standard”, not a “technical regulation”.<sup>47</sup>

Another exception in the WTO treaty subjecting conduct that is not strictly speaking governmental to WTO discipline is its obligations on state trading enterprises

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<sup>47</sup> This seems to be a fact disregarded by Belgium itself. See the website of the Belgian social label at [http://mineco.fgov.be/redir\\_new.asp?loc=/protection\\_consumer/social\\_label/home\\_nl.htm](http://mineco.fgov.be/redir_new.asp?loc=/protection_consumer/social_label/home_nl.htm) where the question is raised whether the social label is consistent with WTO rules. The response given is as follows (translated from Dutch):

No! This would only be the case if the law were to impose a social label on companies or in case it were to prohibit the sale in Belgium of products without a label. This is not the case: everything happens on a completely voluntary basis.

Obviously, anyone familiar with the TBT Agreement knows that even voluntary labels must comply with the Code of Good Practice (TBT Annex 3) and that voluntary labels may have a trade restrictive effect and hence fall also under GATT Article III. Although I think that the Belgian law could eventually be justified under the TBT Agreement (as a “necessary obstacle to international trade” in line with Annex 3.E), it is more doubtful whether it would pass the GATT test (GATT Art. XX does not explicitly list labor concerns). Even if such GATT violation were found, however, TBT prevails over GATT (General Interpretative Note to Annex 1A). In any event, rather than rejecting the application of WTO rules in the first place, regulating countries ought to engage in a discussion of why their initiatives meet specific WTO disciplines (see the TBT Committee meetings held in Geneva, G/TBT/M/23 and 24, where very strong criticism was raised, especially by developing countries, against the Belgian law).

In essence, it is only international criminal law that makes international legal obligations directly enforceable against non-state actors, in particular, individuals. Corporations have also been subjected to international law.<sup>48</sup> However, with the possible exception of the (yet to be adopted) UN Norms on the Responsibility of Transnational Corporations (where provision is made for *direct* UN monitoring of corporations, instead of states), these obligations are imposed only *indirectly* on corporations, that is, it is first for states to sign or agree to the convention or code of practice and then for the state to translate the convention or code into domestic law. In this sense, at the international level, the obligation rests on states, not on corporations.

Crucially, so far not a single inter-governmental instrument disciplines the conduct of NGOs. Notwithstanding the increased influence and power on the global scene of NGOs such as Amnesty International, Oxfam, Greenpeace or the Sierra Club, NGOs are *not* subject to any *global* regulation other than their own internal rules.

For corporations (and, even more so, NGOs) to be held directly by international law at the international level a true paradigm shift would be needed (recall, however, that MNCs do have *rights* under investor-state mechanisms such as NAFTA). In this context, the crucial question is whether there is a need -- and if so when precisely it arises -- to leapfrog the level of the state. In other words, when (if at all) should international law impose obligations directly on MNCs instead of getting a commitment from states that they will ensure corporate compliance under *domestic* law? Although jumping the level of the state may make corporations more directly accountable, it also does away with the main source of legitimization of international law, namely state consent and control.

The latter, gate-keeping and interest-aggregation role of states seems to be one of the core lessons learnt under NAFTA Chapter 11 where investors have invoked and enforced direct *rights* against states that were far removed from what NAFTA negotiators had in mind when drafting Chapter 11.<sup>49</sup> One view is to regard the direct investor *rights* granted to MNCs under investment treaties as of a temporary nature only. Indeed, one of the main reasons why investor-protection rights were included in treaties was a general mistrust of the domestic legal systems in developing countries (in NAFTA: Mexico) which, it was feared, could not be counted on to protect the rights of foreign investors in an unbiased way. Once these domestic failures are cured though (and, for example, the host state has a credible and impartial commercial code and court system of its own), the argument could be made that investment treaties should revert to the traditional state-to-state mode and MNCs themselves should focus once again on domestic law where, for example, US and Canadian companies can exercise their rights before Mexican courts and if they feel mistreated ought to convince *their government* to lodge a case against Mexico.

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<sup>48</sup> For a discussion, see Harold Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 JIEL (2004) 263.

<sup>49</sup> NAFTA members went as far as issuing an authoritative interpretation of crucial Chapter 11 provisions to limit their scope.

b. *Domestic control*

Besides international regulation of non-state actors, non-state actors can and are, obviously, controlled also under *domestic* law, be it commercial or anti-trust law for MNCs or general torts and contract law for MNCs and NGOs. As pointed out earlier, international regulation ought in principle only be necessary in case domestic regulation cannot achieve the objective, for example, when the global reach and activities of non-state actors can no longer be controlled by mere domestic law and international coordination is needed (or, in the case of trade and investment law, when domestic law cannot be ‘trusted’ for subject to protectionist pressures and governments must tie their hands to the mast of the WTO to avoid ‘beggar-thy-neighbor’ policies).

As was the case for international regulation, *domestic* control over NGOs remains, however, extremely limited. An important question for the future will be whether the activities of NGOs must be subjected to scrutiny and control (other than that by their own members, contributors and consumer at large in the market place) and, if so, to what extent and by what means.

In respect of domestic control, in particular over MNCs, two recent US cases are instructive: *Nike v. Kasky* and *Sosa v. Alvarez-Machain*. I deal with them in turn.

*Nike v. Kasky* (fair competition versus freedom of speech)

An interesting development in respect of domestic control over corporate social responsibility is the 2003 *Nike v. Kasky* case in the US.<sup>50</sup> This case tests the limits of domestic unfair competition and consumer protection laws as a means to control corporate social responsibility, in particular, to check whether MNCs are, indeed, complying with codes of good conduct or international norms when they claim to do so (with inaccurate statements MNCs could distort competition by falsely claiming to be good corporate citizens and attract consumers to the detriment of competitors who may be spending millions to comply with good practice).

The dispute pitted global sportswear giant Nike against a San Francisco anti-sweatshop activist Marc Kasky. Besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities, Nike responded by sending out press releases and letters as well as commissioning a report (by a former US Ambassador to the UN) on labor conditions in Nike production facilities. The report “commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers”. In response, Kasky sued Nike for unfair and deceptive practices under California’s Unfair Competition and False Advertising Law claiming that to maintain and/or increase sales Nike made a number of “false statements and/or material omissions of fact” concerning the working conditions under which Nike products are manufactured. As permitted under California law, Kasky brought the suit

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<sup>50</sup> See 539 U.S. Supreme Court (2003) No. 02-575.



“on behalf of the General Public of the State of California” without demonstrating any harm or damages regarding himself as an individual.

The trial court, as confirmed by the California Court of Appeal, dismissed the case holding that Nike’s statements “form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment”. On appeal, however, the California Supreme Court reversed and remanded for further proceedings, finding that

[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products ... [the] messages are commercial speech.

The case was subsequently dealt with before the US Supreme Court but the writ of *certiori* was ultimately dismissed as improvidently granted on procedural and jurisdictional grounds without entering into the substance of this intriguing conflict between, on the one hand, fair competition and advertising and, on the other, freedom of (corporate) speech. In sum, under US law (First Amendment), commercial speech is less protected than non-commercial (political) speech. If Nike’s statements were found to be commercial speech, the case would have tipped in favor of Kasky; if the statements were seen as political speech, however, it would have tipped in favor of Nike. Eventually, the case was settled out of court with Nike paying Kasky \$1.5 million, a sum that Kasky donated to the Fair Labor Association, a Washington-based NGO that monitors corporate labor practices abroad.

Whilst MNC social practices (or at least statements about them) may thus be held against domestic fair competition and advertising laws (although a general reluctance to do so can be detected in the US judiciary other than California’s Supreme Court), the question remains, however, how the accuracy of NGO statements and reports criticizing corporations can, in their turn, be controlled. Although NGOs are not as such selling goods as economic competitors (and would thus seem to escape competition laws) NGO statements about certain goods or companies may influence consumers even more than corporate statements (possibly leading to a consumer boycott of specific MNCs). MNCs will, indeed, often be inclined to settle any NGO complaint as soon as possible, even if unjustified, only to avoid the bad publicity.

*Sosa v. Alvarez-Machain* (international law under the Alien Torts Claim Act)

A hybrid form of control over the social conduct of MNCs is to enforce *international* legal obligations directly on non-state actors before *domestic* courts. This is most famously done in the US under the Alien Torts Claim Act where US federal courts enforce certain international norms against individuals and companies (and possibly also

NGOs). On June 29, 2004, the US Supreme Court issued its very first opinion on this more than 200 years old statute in the *Sosa v. Alvarez-Machain* case.<sup>51</sup>

Sosa had, at the demand of the US Drug Enforcement Administration (DEA), abducted Alvarez-Machain in Mexico to stand trial in the US for a DEA agent's torture and murder (both Sosa and Alvarez are Mexican). After his acquittal, Alvarez sued Sosa for violating the law of nations under the Alien Tort statute (ATS), a 1789 law giving district courts

original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The District Court accepted the claim and awarded Alvarez damages. The Ninth Circuit Court of Appeals affirmed the ruling. However, the US Supreme Court reversed it. It found that "the ATS is a jurisdictional statute creating no new causes of action". According to the Supreme Court, the only claims or causes of action that can be brought under the ATS are those originally intended in 1789, namely "offenses against ambassadors, violation of safe conduct, and piracy". As to post-1789 types of claims, the Supreme Court held that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering such a new cause of action". The Supreme Court decided, more particularly, that

federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18<sup>th</sup>-century paradigms familiar when [the ATS] was enacted.

This proved fatal for Alvarez's claim under the ATS which had invoked the "prohibition of arbitrary arrest". The Court implied, however, that the ATS does offer a cause of action for more established international law norms such as the prohibition of torture and slave trade (for torture there is also the more explicit Torture Victim Protection Act, 28 U.S.C. para. 1350a).

#### IV. CONCLUSION

The risk that the WTO 'misses the boat' of non-traditional patterns of global regulation is real. Softer forms of regulation and norms or standards created by, and for, non-state actors (in particular NGOs, MNCs and semi-private standardizing bodies) have gained importance, particularly so in the social field. (Section II). The WTO, in contrast, operates under a hard law, state-focused paradigm that only controls the conduct of governments.

At the same time, traditional international law does offer avenues to take account of these non-traditional sources of global regulation both those that are binding on the disputing parties and those that are not, both hard law and softer law or standards, both inter-state

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<sup>51</sup> See 539 U.S. Supreme Court (2003) No. 03-339.

norms and norms developed by, or with the input from, non-state actors. Such incorporation techniques range from a broader definition of the applicable law before WTO panels and explicit references to international standards in the SPS and TBT agreements, to novel approaches to treaty interpretation and construing non-traditional sources as factual evidence. If and when carefully construed these avenues – albeit with different shades of relevance and in a way that raises new questions of legitimacy -- can mitigate the risk of *over-inclusion* of trade obligations. (Section III).

In contrast, traditional international law at present offers very limited possibilities to discipline or control the conduct of non-state actors when exercising their new norm-creating and enforcing functions. These functions may distort trade as much as government conduct, yet generally fall outside the scope of WTO discipline. This entails a risk of *under-inclusion* of trade obligations. The fallback of control by domestic law is equally fragile, as illustrated by recent US cases that show a reluctance to subject MNC statements or conduct in the social field to the disciplines of unfair competition laws or the Alien Torts claims act. (Section IV).