FROM HEAVEN TO EARTH: PUBLIC INTERNATIONAL LAW IN THE WORLD TRADE ORGANIZATION[1]

Ernesto Corzo

I. INTRODUCTION

Donald McRae in his lectures to the Hague Academy of International Law touched upon the debate that occurred at the beginnings of the 1970's at the doors of the Société Française de Droit International, commonly known as the Colloque d'Orléans.[2] The question being contemplated by some of the most distinguished international law exponents was whether international economic law formed an autonomous discipline apart from international law. Although it may seem that the inquiry is settled – international economic law is part of international law– the discussion about the application of the rules of general international law to the World Trade Organization (WTO) follows the same rationale that was debated 35 years ago but in a more sophisticated way. While Article 3.2 of the Dispute Settlement Understanding (DSU) provides the basis for application of public international law to WTO law, the border of its relevance remains shadowy and vague.

It is against this background that this article seeks to make a contribution. Though it takes the position that panels and the Appellate Body (AB) have been mindful about the rules outside the WTO system, it accepts that there could be situations in which these organs may apply rules of international law not covered in the agreements and not diminishing or adding any obligations that the parties already contracted. Indeed, it suggests that the application of international law via interpretation maintain its purposes of keeping a judicial dialogue between the WTO and the international system united. And this is because, like most international courts and tribunals, panels and the AB are motivated by a sense towards the international legal community.

The suggestion made in this article is therefore that the application of international law might follow from the inherent powers that the panels and the AB have as international tribunals immersed in the phenomenon of fragmentation of international law. The article proceeds as follows. Section II describes how WTO relates to international law. The AB and the panels are mindful about international law rules and they have in some cases embraced such rules through interpretation mainly in procedural matters. However, it is worth noticing that when dealing with substantive rules, the WTO is reticent to incorporate them. Section III deals with the phenomenon of fragmentation of international law and the role that the WTO plays. This section highlights and focuses on the report that the International Law Commission issued last year when it dealt with the

[1] I would like to thank Jane Bradley, Chris Parlin, Victor Corzo, Anneliese Fleckenstein and Joost Pauwelyn for their valuable comments and specially to John H. Jackson for discussing, directing and reviewing this article.

[2] Donald McRae, The Contribution of International Trade Law to the Development of international Law, Recueil des Cours, Vol.260, (1996), pp.121-122.

study of the phenomenon. Section IV studies the perspectives of the WTO, immersed in the system of international law, the characteristics of its judicial tribunals and the implications that arise there from. Section V concludes.

II. ACTUAL STATE OF AFFAIRS: INTERNATIONAL LAW AND WTO AT THE MOMENT

So far there are three ways in which Panels and the AB may apply general international law to WTO law, some less controversial than others. First, international law may be incorporated by reference to other treaties in the Uruguay Round Texts. Second, Article 3.2 of the DSU specifically authorizes panels and AB to interpret the agreements according to public international law. Third, and the most controversial of them, international law may be relevant by direct application without any explicit mention in the Agreements. So far, the first two have been endorsed by the adjudicatory bodies of the WTO and are *lex lata*, while the third still remains *lege ferenda*. This section will briefly examine the three of them in order to provide a picture of the relationship between general international law and WTO law.

A. INCORPORATION BY REFERENCE INTO THE TREATY

The Legal Texts of the Uruguay Agreements incorporate by reference a substantial set of rules that are prescribed in non-WTO law. This type of legal tool not only encompasses rules, but also requirements that must be fulfilled in order to comply with the norms established in the WTO Agreements. This tool seeks to provide members of the panels and AB with sufficient means to decide a specific dispute. By seeking an answer outside the WTO realm, the system maintains its completeness and deals effectively with the gaps in the WTO treaty itself.

For example the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) incorporates some prescriptions from the Berne Convention,[3] the Paris Convention[4] and the Rome Convention.[5] The Agreement on Agriculture calls for compliance with the Food Aid Convention to ensure no less concessional treatment when providing food aid.[6] The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) promotes the use of guidelines by the bodies that operate within the

[3] *Berne Convention for the Protection of Literary and Artistic Works*, of September 1886. Completed at Paris on May 4, 1896, Revised at Berlin on November 13, 1908, Completed at Berne on March 20, 1914, Revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, amended on October 2, 1979. See TRIPS articles 1(3), 2(2), 3(1), 4(b), 9, 10(1), 14(3) (6), 70(2).

[4] *Paris Convention for the Protection of Industrial Property* (of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979). See TRIPS articles 1(3), 2(1) (2), 3(1), 15(2), 16(2) (3), 62, 63(2).

[5] *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, done at Rome on October 26, 1961. See TRIPS articles 1(3), 2(2), 3(1), 4(b), 14(6).

[6] *Food Aid Convention*, done at London, 13 April 1999. See Agriculture Agreement article 10(4)(c).

framework of the International Plant Protection Convention.[7] Another example relates to the Agreement on Subsidies and Countervailing Measures (SCM) in its Annex I (k) second paragraph which inserted an exemption from the prohibition of export subsidies (red light subsidies)[8] for practices that conform to the interest rate provisions of certain international undertakings on export credits – the so called 'safe harbour' clause. It calls for its conformity with the Organization for Economic Cooperation and Development (OECD) Arrangement on Guidelines for Officially Supported Export Credits.[9]

Non-WTO law is introduced not only through explicit reference from the WTO treaty. Also, in an indirect way and as exemplified by the AB in the *Bananas* case, the interpretation and consideration that was given to the requirements of the Lomé Convention was introduced via a waiver with the same name.[10]

Among all the Agreements, the only provision that is incorporated in the GATT, GATS and TRIPS that acknowledges the superiority of other non-WTO norms are those that deal with security exceptions. It states that "[n]othing in this Agreement shall be construed… to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."[11] This opens the door for WTO members to comply with Security Council resolutions under Chapter VII of the UN Charter without violating WTO treaty texts.[12]

B. APPLICATION OF NON-WTO NORMS THROUGH INTERPRETATION

It has been a long time since GATT/WTO regarded international law as an alien intrusion. The ruling in *US – Gasoline*,[13] recognizing that WTO law cannot be applied in clinical isolation from public international law, marked the beginning of a more serious relationship with general international law. What can be considered obvious now was not so considered thirty years ago. But does that mean that the WTO Covered Agreements

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[7] *International Plant Protection Convention*, done at Rome, 6 December 1951. See Sanitary and Phytosanitary Agreement, articles 3, 12 and Annex A (3)(c).

[8] *Subsidies and Countervailing Measures Agreement* (SCM Agreement), Part II, articles 3 & 4.

[9] *Ibid*, Annex I(k) second paragraph provides that: "… if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1January 1979 (or a successor undertaking which has been adopted by those original Members)… an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement." Later the AB acknowledge that "[t]he OECD Arrangement is an 'international undertaking on official export credits' that satisfies the requirements of the provision in the second paragraph in item (k), see Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, 2 August 1999, para.181.

[10] Appellate Body Report, *European Communities – Regime for the Interpretation for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, paras.164-188.

[11] GATT article XXI(c), GATS article XIV bis 1(c), and TRIPS article 73(c).

[12] *See, e.g., United Nations Charter*, Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." See also article 25 establishing that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[13] Appellate Body Report, *United States – Standards of Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 20 May 1996, p.16.

should be interpreted and applied in a vacuum? At least as a matter of interpretation, the answer must be absolutely not.

Article 3.2 of the DSU is well known as the article that sets out the rules for interpretation of the WTO covered agreements. In its second sentence it provides that the WTO Panels and AB serve "to clarify the existing provisions of [WTO Covered Agreements] in accordance with customary rules of interpretation of public international law." In other words, what article 3.2 of the DSU refers to is what the AB, in *Japan – Alcoholic Beverages*,[14] has recognized as the application of the customary rules incorporated in Article 31 and 32 of the Vienna Convention on the Law of the Treaties (VCLT).[15]

Claus-Dieter Ehlermann, a member of the first AB, indicated that not only did the AB recognize, in its very first cases, the interpretative method that would be followed thereafter[16] but by following the textual approach it also vested the DSB with a legitimizing effect.[17] It is not surprising to observe that adjudicators, especially in international law, prefer a textual approach to interpretation when deciding cases. The scope of application and interpretation of a specific rule is easier where the terms are clear. In other words, where the text and the rules prescribed are so detailed and so clear they must necessarily prevail over the purported intentions of the parties, whatever they could have been. Article 31 of the VCLT reflects this idea when it calls for the interpretion of an international agreement according to the 'ordinary meaning to be given to the terms of the treaty'. In this way the panels and the AB operate somehow as '*bouche de la loi*'.

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[14] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p.10-12.

[15] *Vienna Convention on the Law of the Treaties*, 23 May 1969. The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties.

[16] *See* Panel Report, *European Communities – Custom Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, 5 February 1998, para.8.21; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998, para.81; Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, 1 December 2003, para.7.79; Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, 3 May 2002, para.7.76; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, para.159; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada*, WT/DS257/AB/R, 19 January 2004, para.58; Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, para.7.44; Panel Report, *Canada – Term of Patent Protection*, WT/DS170/R, 5 May, 2000, para.6.13.

[17] Claus-Dieter Ehlermann, Reflections on the Appellate Body of the WTO, 6 (3) Journal of International Economic Law 695 (September 2003), p.699. On this point Professor Ehlermann stresses that, at the beginning, among the three criteria mentioned in Article 31 of the Vienna Convention the Appellate Body attached the greatest weight to the ordinary meaning of the terms of the treaty with the objective of not adding to or diminishing the rights and obligations provided in the covered agreements. The Appellate Body believed that this type of interpretation was more faithful to the intentions of the parties to the treaty.

Notwithstanding that the preferred interpretative method relies heavily upon the text of the treaty,[18] Panels and the AB can seek interpretative guidance, as appropriate, from the general principles of international law.[19] Article 31(3)(c) of the Vienna Convention indicates that "[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."[20] It is presumed that Panels and the AB will normally be capable of interpreting and applying their own terms and context. But it is clear, also, that this interpretative tool is a way of supplementing the three criteria mentioned in Article 31 of the VCLT (ordinary meaning of the terms of the treaty; context; object and purpose). Read together with article 3.2 of the DSU, this provision seems to be the 'back door' by which international law may be applied throughout WTO judicial proceedings.[21]

In *EC – Biotech Products*, the Panel acknowledged that article 31(3)(c) "is sufficiently broad to encompass all generally accepted sources of public international law".[22] Within those rules it includes: international conventions and treaties; customary international law; and recognized principles of international law.[23] As far as treaties are concerned, the *US – Shrimp* case is illustrative of attempts by the AB to apply not the treaty itself directly but as means of ascribing significance to some concepts. In dealing with the issue whether sea turtles could be considered to be 'exhaustible natural resources' under Article XX paragraph g, the AB found that such turtles met the requirements of article XX(g), noting that the turtles were recognized in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as threatened with extinction.[24]

This same rationale is demonstrated in the *US – Line Pipe* Safeguards where the AB, in determining the extent of the US safeguard as a countermeasure, relied on the customary rules of state responsibility dealing with proportionality.[25] It found that the US line pipe

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[18] Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, para.7.22; Panel Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, 14 August 2003, para.7.44; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para.171.

[19] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para.158.

[20] *Vienna Conventional on the Law of the Treaties, supra* note 14, article 31(3)(c).

[21] *See* Campbell McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 Int'l & Comp. L. Q. 279, (April 2005), p.280-281. In this interesting article Campbell argues that the principle incorporated in Article 31(3)(c) has the status of a constitutional norm within the international legal system.

[22] Panel Report, *European Communities – Measures Affecting the Approval and Marketing on Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, para.7.67.

[23] *Ibid*.

[24] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para.131-132.

[25] Appellate Body Report, *United States – Definitive Safeguard Measure on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 Feb. 2002, para.259. See also Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 Oct. 2001, para.120. In both cases the AB focused on article 51 of the Draft Articles of State Responsibility by the International Law Commission dealing with countermeasures. Although it

measure went beyond what was necessary to prevent or remedy serious injury and to facilitate adjustment.[26]

Other principles of international law also have been applied by the AB and Panels.[27] Of the various principles utilized by the adjudicatory bodies of the WTO –such as *res judicata*,[28] principles related to the burden of proof[29] and judicial economy[30]– good faith is amongst the most quoted principles in AB and Panel reports[31] and it is a principle that controls the exercise of rights by states.[32] When considering the powers of an investigating authority in antidumping cases, in the *US – Hot-Rolled Steel from Japan* the AB deemed that the principle of good faith informs not only the provisions of the Antidumping Agreement but also the provisions of other covered agreements.[33] In *EC – Subsidies on Sugar*, linked together with the principle of good faith, the principle of estoppel was invoked before the DSB, but because of the language of the AB it is not clear whether it is pertinent to the WTO dispute settlement mechanism.[34] In its report the AB, after considering 'highly divergent views on the concept itself and its applicability' by the parties, endorsed the Panel's reasoning by ruling that even if the principle of estoppel were to be applied, it is constrained by the narrow parameters of the DSU and the principle of good faith.[35]

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recognized that the Draft Articles are not legally binding by itself, they crystallized international customary law.

[26] *Ibid*, para.263.

[27] *See, e.g.*, Cameron, James & Kevin R. Gray, Principles of International Law in the WTO Dispute Settlement Body, 50 International & Comparative Law Quarterly 248, (2001).

[28] See Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, 21 Dec. 2001, para.7.103. The panel did not seek to rule on whether the doctrine could potentially apply to WTO Dispute Settlement.

[29] As a general rule, the burden of proof falls on the party 'asserting the affirmative of a particular defense' or exception. See Appellate Body Report, *US – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, 23 May 1997, at 335 & 337; Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, 22 Sept. 1999, para.136; Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 20 May 1996, para. 6.20.

[30] *See, e.g.*, Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*, WT/DS294/AB/R, 18 April 2006, para.223-225; Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, 2 Nov. 2005, para.178; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 Nov. 2004, para.6.442.

[31] *See, e.g.*, Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, 16 Jan. 2003, paras.295-299; Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/RW, 29 Nov. 2002, para.6.91; Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, 21 November 2001, para.47.

[32] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para.158.

[33] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001, para.101.

[34] *See* Appellate Body Report, *European Communities, Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 28 April 2005, para.309.

[35] *Ibid*, para.307 & 310. Although the AB and the panel recognized that the principle of estoppel has never been applied before by any panel or the AB, they ruled that it is far from clear whether the principle of

Notwithstanding the foregoing, article 31 (3)(c) of the VCLT only applies to interpretation and does not constitute WTO law applicable by a Panel.[36] This view is exemplified in *Argentina – Poultry*, where the Panel rejected Argentina's argument that a previous MERCOSUR Tribunal ruling served to interpret and to apply certain WTO rules in a particular way. In the Panel's view there is no basis in Article 3.2 of the DSU, or any other norm, to suggest that "[the Panel is] bound to rule in a particular way, or apply the relevant provisions of the WTO in a particular way. [The Panel] noted that [it is] not even bound to follow rulings contained in adopted WTO Panel reports, so [it] sees no reason at all why [it] should be bound by the rulings of non-WTO dispute settlement bodies."[37] While this remains true,[38] the Panel took its ruling further:

> "Even if Argentina had relied on the MERCOSUR Tribunal ruling to argue that particular provisions of the WTO Agreement should be interpreted in a particular way, it is not entirely clear that Article 31.3(c) of the Vienna Convention would apply. In particular, it is not clear to us that a rule applicable between only several WTO Members would constitute a relevant rule of international law applicable in the relations between the "parties"."[39]

The same approach was taken by the Panel in *EC-Biotech Products* where it concluded that only agreements to which all WTO members were parties could be taken into account under article 31 (3) (c) in the interpretation of the WTO agreements.[40] This interpretation could pose some problems and it may lead some to consider the multilateral agreements as not permitting any use of regional or other particular implementation agreements.[41] This may somehow appear to be contrary to what the International Court of Justice (ICJ) held in the *Right of Passage* case when it recognized that:

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estoppel applies to the WTO. The AB did not decide on the issue because it found that it cannot be inferred that the parties were estopped by bringing a case before the DSB under article 3.10 of the DSU.

[36] *See* Trachtman, Joel, The Domain of WTO Dispute Resolution, 40 Harvard Int'l L. J. 333, (1999), p.343. Noticing that in *EC – Poultry* the AB did not apply the Oilseeds Agreement itself as law, the AB only allowed it as a supplementary means of interpretation.

[37] Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, 22 April 2003, para.7.38.

[38] For discussion on precedents *see* John Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge: 2006, p. 177; Panel Report, *United States - Relating to Zeroing and Sunset Review*, WT/DS322/R, 20 September 2006, para. 7.99, fn. 733.

[39] Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, 22 April 2003, footnote 64.

[40] Panel Report, *European Communities – Measures Affecting the Approval and Marketing on Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, para.7.68-7.70.

[41] Marttii Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the International Law Commission, UN GAOR, 58th Session, A/CN.4/L.682, 13 April 2006, para.471. The ILC supports the same conclusion as that by the ICJ. It noted that "the risk of divergence in interpretation would be mitigated by making the distinction between 'reciprocal' or 'synallagmatic' treaties (in which case mere "divergence" in interpretation creates no problem) and 'integral' or 'interdependent' treaties (or treaties concluded *erga omnes partes*) where the use of that other treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted."

"Where therefore the Court finds a practice clearly established between two states which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules."[42]

C. APPLICATION OF NON-WTO NORMS THROUGH OTHER MEANS

Although the WTO has recognized that it forms part of the realm of international law, there has been a continuous debate as to whether public international law applies directly to WTO law. There have been voices that call for the WTO to deal also with ancillary substantive claims, associated mostly with human rights[43] and environmental issues, and not exclusively with trade related matters. While the AB and the Panels are mindful of the relationship and do not remain hostile to international law, they are largely self-contained to a certain extent. WTO adjudicatory bodies have applied international law in their reasoning, as noted in the previous section, but such rules are mainly of a procedural nature and easily adaptable to different legal orders in order to aid the enforcement of substantive norms.[44] In the following paragraphs, without being exhaustive, we provide some examples of the attempts that some states have made in trying to apply substantive international law rules to the WTO 'empire'.

i. Jus cogens or Preremptory Norms

Norms that conflict with preremptory norms or *jus cogens* are invalid by virtue of articles 53 and 64 of the Vienna Convention on the Law of the Treaties.[45] These norms are supposed to be at the peak of all international law and their application overrides other agreements.[46] At least in theory, if WTO law conflicts with any of the preremptory

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[42] *Case concerning the Right of Passage over Indian Territory* (Portugal v. India) (Merits), ICJ Reports, 1960, p.6 at 44.

[43] *See, e.g.*, Cottier, Thomas, Trade and Human Rights: A Relation to Discover, 5 JIEL 111, (2002), p.112.

[44] Lindroos, Anja & Michael Mehling, Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO, 16 Eur. J. of Int'l. L.857, (2005), p.876.

[45] Articles 53 & 64 of the *Vienna Convention on the Law of the Treaties*, 23 May 1969. The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. Article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Article 64: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[46] We could consider that Article 103 of the UN Charter somehow takes precedence when it conflicts with other agreement. Article 103 states that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". In the same sense a rule of conflict is incorporated in article XXI(c) on Security Exceptions of the GATT. It provides: "Nothing in this Agreement shall be construed… to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." The same language is reproduced exactly in GATS, article XIV bis: 1(c) and TRIPS article 71(c).

norms, there is a clear hierarchy in which the WTO provision would be overridden. In this sense, at least as far as *jus cogens* is concerned, there is a hierarchy in *strictu senso* and not simply a rule of precedence.[47] But it is not entirely clear whether this rule of precedence would encounter problems in its application within the WTO. To consider the debate about the incorporation of public international law into WTO law as if it had to do only with theory in the abstract is to be mistaken about what is actually at stake. Let me explain:

> Let's assume Country X is a developed state that has a close commercial relationship with Country Y, a developing country. Country Y is largely dependant on imports of steel from Country X mainly for manufacturing all sorts of steel artifacts that in turn Country Y exports to other states. Machetes are among its most requested artifacts due to a special technique in crafting the blade that prevents it from rusting and makes it endure for years. Recently there have been tensions with the main ethnic groups in Country Y who fight for supremacy. Such troubles escalated because of a Country Y sponsored plan which, as some NGO's narrate, has as main goal to exterminate the opposing ethnic group not in power. It is well documented that the instruments people use in Country Y to perpetrate or commit such crimes are the machetes which they produce after the steel is exported from Country X. The United Nations Human's Rights Commissioner widely sought the support of the international community to pressure and stop what the Commissioner identified as 'genocide practices' in Country Y. This action concluded in a General Assembly and Security Council chapter VI resolution condemning such practices and in the announcement of an investigation of high officials in Country Y by the Prosecutor of the International Criminal Court. Country X is internationally known as one of the chief states that supports human rights. Thus, the prime minister of Country X publicly announced that if Country Y does not prevent or help to ameliorate the situation, they were going to order an immediate export restriction of steel to Country Y. One month later, after the situation started getting worse, the prime minister declared that Country X was not going to be an accomplice of genocide, and as a result he imposed a ban on steel exports to Country Y. Both countries are parties to the Genocide Convention[48] and the WTO. Country Y requested the establishment of a panel to challenge Country X's actions that go against WTO law, in particular article XI of the GATT and article 11 of the Safeguards Agreement.

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[47] This follows from Article 71(1) of the Vienna Convention on the Law of the Treaties. See Marttii Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the International Law Commission, UN GAOR, 58th Session, A/CN.4/L.682, 13 April 2006, para.365. (Koskenniemi Report: Fragmentation of International Law). The report notices that there is wide agreement regarding this issue. Furthermore, the effect of the conflict will be that the norm in conflict with the higher norm (i.e. *jus cogens*) would give rise to no legal consequences and will be rendered wholly void. This could be one of the main distinctions between *jus cogens* and article 103 of the United Nations Charter.

[48] *Convention on the Prevention and Punishment of the Crime of Genocide*, Adopted by Resolution 260 (III)/A of the United Nations General Assembly on 9 December 1948, entry into force: 12 January 1951.

At first glance, if the AB and the Panels continue with the same policy of disregarding everything that is not within the WTO treaties, they would encounter an easy case. Article 11 of the Safeguards Agreements provides that a "[m]ember shall not seek… any voluntary export restraints… on the export or the import side".[49] Clearly, there is a violation of the Agreement. The treaty undoubtedly prohibits any voluntary export restraints such as the one imposed by Country X. But does this mean that Country X's measure would still be found inconsistent and in violation of the WTO Agreements and international law?

The prohibition of genocide, accepted and recognized by the international community as a peremptory norm,[50] was largely codified by the Genocide Convention of 1948 requiring that states undertake to prevent and punish such crime.[51] This position was endorsed by the ICJ when, in its *Advisory Opinion on Reservations to the Genocide Convention*, it held that the prohibition of genocide is a *jus cogens* norm that cannot be reserved or derogated from.[52] In the 1996 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the ICJ went further, stating that "the rights and obligations enshrined in the Genocide Convention are rights and obligations *erga omnes*".[53] With this judgment the ICJ expanded the scope of *erga omnes* obligations from the prohibition of genocide to all rights and obligations enshrined in the Genocide Convention, including obligations to prevent and to punish acts of genocide. Under international law, Country X is entitled to take every measure it has in its power (without violating international law) to prevent the continuation of the genocide in Country Y. Moreover, if the panels and the AB find Country X to be in violation of the Agreement and call for the withdrawal of the measure, Country X would violate international law for its responsibility in aiding or assisting Country Y in the commission of an internationally wrongful act.[54] If Country Y takes the case to the DSB, according to

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[49] Agreement on Safeguards, article 11(b).

[50] *Prosecutor v. Kambanda*, Judgment and Sentence, Case No.ICTR 97-23-S (Trial Chamber 4 September 1998), para.16; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (May 28); *Case Concerning Barcelona Traction, Light and Power Co.* (Belgium v. Spain), 1970 I.C.J. 3, 32 (Feb. 5); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia v. Yugoslavia), 1993 I.C.J. 325, 440 (Sept. 13) (separate opinion of J. ad hoc Lauterpacht); *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR: ICTR-96-4-T (02/09/1998), para 494; R. Lemkin, *The Axis Rule of Occupied Europe* (1973), 79; W. A. Schabas, *Genocide in International Law* (2000),151-2; Scharf, M., *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 Law & Contemp. Probs. 67, 80 (2001); El Zeidy, M., *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 946-47 (2002); Bassiouni, M.C., *The Sources and Content of Internaitonal Criminal Law: A Theoretical Approach*, in 1 International Criminal Law: Crimes 3, 39 (Bassiouni ed., 2d ed. 1999).

[51] *Genocide Convention*, *supra* note 48 , article VIII: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

[52] *Advisory Opinion of the International Court of Justice on Reservations to the Genocide Convention*, ICJ Reports, (May 28, 1951), at 15.

[53] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), 11 July 1996, para 31.

[54] *See* Draft Articles on State Responsibility, Article 15 and its commentary, in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), p. 357. It states that "[a] State which

the foregoing, Article 11 of the Agreement on Safeguards would be rendered void in this case, according to article 53 of the VCLT and article 26 of the Draft Articles on State Responsibility, for clashing with a *jus cogens* norm.[55]

How feasible would it be for the AB or the panel to receive these kinds of arguments? It would depend on whether the AB and the Panels see themselves as trade courts or as international tribunals.

ii. Customary international law and principles of international law

The International Court of Justice in the *Nicaragua* case stated that customary international law and treaty law retain a separate existence from each other:

> "It will therefore be clear that customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content".[56]

To exclude the applicability of customary international law there has to be a *lex specialis* that opts out from general international law. The intention of the parties to apply different rules to special circumstance has to be evident. This kind of *lex specialis* is what the ICJ labeled, in the *Teheran Hostages* case, as 'self-contained regimes'.[57] A self-contained regime designates a particular category of subsystem within international law, namely those that embrace a full, exhaustive and definitive set of secondary rules such as special rules and techniques of interpretation and administration.[58] The principal characteristic of a self-contained regime is its intention to exclude the application of the general legal consequences of wrongful acts, in particular the application of countermeasures by an

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aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

[55] Draft Articles on State Responsibility, article 26: "Compliance with preremptory norms: Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. *See* also Vazquez, Carlos, Trade Sanctions and Human Rights – Past, Present, and Future, 6 JIEL 797, p.802.

[56] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports, para.178-179. The Court also indicated that: "A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that States regards as desirable institutions or mechanism to ensure implementation of the rule."

[57] *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports, 1980, para.40: "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious."); *The Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A.Ch., 2 October 1995, para.11. "In international law, every tribunal is a self-contained system (unless otherwise provided)".

[58] *See* Pulkowski, Dirk, Narratives of Fragmentation International Law between Unity and Multiplicity, European Society of International Law, (2005), p.1.

injured State.[59] It is clear that WTO falls within this category by virtue of Article 23 of the DSU.[60] Thus, while WTO member states decided to apply specific rules and interpretations to their relations, undoubtedly international trade law still remains part of the broader system of international law. It is obvious that treaties, in particular the WTO covered agreements, are themselves creatures of international law.[61] And by this means the application of international law continues to be relevant. In Professor Fitzmaurice's words:

> "It is obvious that international law must be basically one, and basically single. If in different [areas], different varieties of international law were applied… this could only be because international law itself, and as an integral whole, permitted it, and provided for it."[62]

The ICJ ruling on the Nicaragua case is somehow replayed in *Korea – Government Procurement*, where a WTO panel stated that:

> "We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."[63]

To the extent that customary international law does not trump any of the rights and obligations set out in the WTO covered agreements, it will be applied by WTO Panels and by the AB. If there is conflict, priority should be given to the special law, in this case the WTO covered agreements. In this sense, a government trying to apply customary international law to a case: first, has to prove that there has been a rule that has crystallized into customary international law; and second, that there is no rule in the

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[59] Simma, Bruno, Self-Contained Regimes, 16 Neth. Y.B. Int'l L. 111, 135 (1985).

[60] Article 23 (1) of the *Dispute Settlement Understanding*: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

[61] *See e.g.* Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003, pp.25-40.

[62] Although Professor Fitzmaurice referred to regionalism, by analogy we can affirm the same as to self-contained regimes. See Fitzmaurice, Gerald, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des Cours, The Hague, (1957), p.96.

[63] Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, 19 January 2000, para.7.96.

WTO covered agreements that proscribes it; if it is regulated it has to argue that there is no conflict between the two of them.

For example, in the *EC – Beef Hormones* case, Canada and the United States, in April of 1996, brought a complaint against the European Communities (EC) for its prohibition on importation and placing on the market of meat and meat products that had been treated with hormones.[64] The EC, in justifying its measures, relied largely on the SPS Agreement, which incorporates the disputed precautionary principle.[65] The EC argued that its measures were precautionary in nature and thus satisfied the requirements set out in the SPS Agreement.[66] Although the Panel and the AB did not rule on whether the precautionary principle crystallized into customary international law, they decided that even if it did "the precautionary principle does not, by itself, and without clear textual directive to that effect… override the provisions of SPS Agreement Articles 5.1 and 5.2".[67]

By request of the United States in July of 2004, the Dispute Settlement Body (DSB) established a Panel to examine Mexico's measures on the imposition of certain tax measures on soft drinks and other beverages that use any sweetener other than cane sugar. The Panel concluded,[68] and subsequently the Appellate Body upheld,[69] that the taxes imposed by Mexico treated US products less favorably than domestic products and thus violated article III of the GATT, and also that such measures could not be justified under Article XX(d) as measures necessary to secure compliance by the United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994. What seemed to be novel was that Mexico tried to seek a preliminary ruling requesting the Panel to decline the exercise of its jurisdiction in favor of an Arbitral Panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA).[70] Mexico based its request on the fact that the US blocked its efforts to resolve the dispute through the NAFTA institutional mechanisms five years before the dispute was brought to the WTO. Echoing the US some 60 years ago in the *US – Sugar Quota* case before the GATT, Mexico believed that the review and resolution of the dispute was not within the

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[64] Panel Report, *European Communities – Measures Affecting Livestock and Meat (Hormones)*, WT/DS24/R, WT/DS48/R, 18 August 1997, para.2.4

[65] Sanitary and Phytosanitary Agreement, art. 5.7 and the sixth paragraph of the preamble and in Article 3.3. For a study of the precautionary principle see e.g. Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001 (extract form the Report of the International Law Commission on the work of its Fifty-Third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. V. E.2, p.412-418. The Draft Articles are more realistically viewed as developing international law, rather than codifying it.

[66] Appellate Body Report, *European Communities – Measures Affecting Livestock and Meat (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para.26.

[67] *Ibid*., paras.29-30; Panel Report, *European Communities – Measures Affecting Livestock and Meat (Hormones)*, WT/DS24/R, WT/DS48/R, 18 August 1997, paras.8.157-8.158 & 8.160-8.161; Appellate Body Report, *European Communities – Measures Affecting Livestock and Meat (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, paras.29-30.

[68] Panel Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, 7 October 2005, p.162-163.

[69] Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R, 6 March 2006, pp.35-36.

[70] Panel Report, *Mexico –Soft Drinks*, para. 4.102.

ambit of the WTO.[71] Relying on the so called principle of "unclean hands" reflected in the ruling of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case,[72] Mexico sought to defer the jurisdiction of the Panel. The AB and the Panel, recalling the language in Article 3.2 of the DSU, rejected Mexico's argument and concluded that "accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements."[73] In sum, it stated, it did not see how the PCIJ's ruling in *Factory at Chorzów* "supports Mexico's position in this case."[74]

III. THE WTO IN A TIME OF FRAGMENTATION

On the eve of the discussion about the possible substantive and procedural fragmentation of international law, the International Law Commission appointed Professor Martii Koskenniemi as chairman of a study group to issue a Report about the function and scope of the *lex specialis* rule and the question of 'self-contained regimes'. All the discussion about this phenomenon started to be updated and discussed largely in the academic spheres after the speeches of the presidents of the International Court of Justice before the General Assembly[75] about the proliferation of international tribunals. Judge Guillaume warned that "[t]he proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations".[76] The study of the phenomenon of fragmentation and proliferation of international courts and tribunals is somewhat chaotic, as Professor Jennings points out in the following statement:

> "There is no kind of structured relationship between most of them. There is not even the semblance of any kind of hierarchy or system. They have appeared as need or desire or ambitions promoted yet another one. In this particular respect, contemporary international law is just a disordered medley. Suffice it to say that it

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[71] *Ibid*., para. 4.104. (Quoting the *US – Sugar Quota* case in which the US argued: "The United States was of the view that attempting to discuss this issue in purely trade terms within the GATT, divorced from the broader context of the dispute, would be disingenuous. The resolution of that dispute was certainly desirable, and would also result in the lifting of the action which Nicaragua had challenged before the Panel, but the United States did not believe that the review and resolution of that broader dispute was within the ambit of the GATT.")

[72] As the Permanent Court of International Justice observed in the Chorzów Factory (Merits) Case: "[O]ne party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." *Case Concerning the Factory at Chorzow*, PCIJ, Series A, No.17, p.29. This principle was also taken into account in Military and Paramilitary Activities in and against Nicaragua, p.272 D.O.Schwebel; *Mavrommatis Palestine Concessions case*, P.C.I.J., Series A, page 50; *Legal Status of Eastern Greenland* case, P.C.I.J., Series A/B, No. 53, page 95; *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980.

[73] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006, para.56.

[74] *Ibid*.

[75] Speeches addressed before the General Assembly of the United Nations by the presidents of the International Court of Justice Stephen Schwebel in 26 Oct de 1999; Guilbert Guillaume 26 Oct 2000, 27 Oct 2000, and 31 Oct 2001. Available at http://www.icj-cij.org/icjwww/ipresscom/iprstats/htm.

[76] *Ibid*. Speech of Guilbert Guillaume on 30 October 2001

> is very difficult to try to make any sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes difficult to find out what is going on, much less to study it."[77]

In April 2006, at the fifty-eighth session of the International Law Commission, the consolidated report of the study group called 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law'[78] was made public. But where does the WTO stand in this discourse? The Study Group finds that there are two major positions concerning the applicable law within the WTO. First, there is the view that considers the WTO as part of international law, operating within the general system of international law rules and principles.[79] A second position focuses on the provisions of the DSU that require the Panels and the AB neither to add to nor to diminish the obligations under the covered agreements.[80] The Study Group sees no difficulty in reconciling the two positions. It recognized that nowadays one can hardly claim that the WTO is completely cocooned outside international law.[81] While the WTO operates in a sense of *lex specialis*, it does not provide all the conditions of its operation. General law provides resources for this purpose, not because it has been incorporated into the system, but because it follows from international law's systemic nature.[82]

The Report recognizes that international law is mainly dispositive and that WTO members can apply a special law to clarify, update, modify or set aside general international law.[83] But there are cases in which the general law would prevail and the *lex specialis* presumption may not apply: when the application of the special law might frustrate the purpose of the general law; or when the balance of rights and obligations, established in the general law would be negatively affected by the special law.[84] It concluded that the role of general law in special regimes such as the WTO is relevant when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted.

The Report also endorses what Pauwelyn convincingly argues in his book, *Conflict of Norms in Public International Law*: "the fact that the substantive jurisdiction of the WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered

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[77] Jennings, R. The Judiciary, International and National, and the Development of International Law, Int'l & Comp. L.Q., Vol.45, (Jan 1996), p.5.
[78] Marttii Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the International Law Commission, UN GAOR, 58th Session, A/CN.4/L.682, 13 April 2006. (Koskenniemi Report: Fragmentation of International Law)
[79] *Ibid*., para.169.
[80] *Ibid*.
[81] *Ibid*., para.176.
[82] *Ibid*., para.194.
[83] Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN GAOR, 58th Session, A/CN.4/L.702, 18 July 2006, conclusion 8.
[84] *Ibid*., conclusion 10.

agreements."[85] While noting the difficulty that this may present in reality, and therefore abstaining from reaching a conclusion in this particular point, the ILC acknowledges:

> "It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromis*. But if all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say "other" international law."[86]

Although the work of the International Law Commission is not *per se* binding upon the parties, international tribunals such as the ICJ[87], WTO Panels[88] and the AB[89] have relied frequently on it. It would not be surprising if, in the coming years, the AB and Panels were to refer to this report and its conclusions.

IV. SYSTEMIC POSTULATE BETWEEN WTO AND GENERAL INTERNATIONAL LAW

It is undisputed that the law of the WTO constitutes a special set of rules that have contracted out, in some instances, from general international law. In other words, WTO law is *lex specialis*[90] and its application is always conditioned by the context of the judicial system to which it belongs. This is inferred because the rule of *lex specialis* operates with the presumption that behind international law there is a rational legislator. This idea is difficult to conceive mainly because treaties and custom result from 'bargains

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[85] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, 2003, pp.460.

[86] Koskenniemi Report: Fragmentation of International Law, *supra* note 82, para.423.

[87] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. USA), Merits, Judgment of 27 June 1986, (1986), ICJ Rep., p.14 at p.127, para.249; *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), (1997), ICJ Rep., p.7 at p.220.

[88] Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000, para.6.45; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, para.6.76, 6.128; Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, 30 May 2005, P.7.299;

[89] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, para.259; Appellate Body Report, *United States – Countervailing Duty Investigation or Dynamic Random Access Memory Semiconductors (DRAMS) From Korea*, WT/DS296/AB/R, 27 June 2005, p.116, fn.188; Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan*, WT/DS192/AB/R, 8 October 2001, para.120, fn.90.

[90] *Right of Passage over Indian Territories Case*, (Portugal v. India), Merits, Judgment, ICJ Reports, 1960, p.44. According to the ICJ: "[i]t is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties".

and package deals' that emerge from conflicting motives and objectives that in some circumstances contradict each other.[91] As a result, the belief in an objective and intrinsic systematization of a set of norms turns into a question of faith in a harmonious legislator not bound by time, which, as in all matters of faith, is difficult to justify.

The most important consequence of considering a set of norms as a system is that there cannot be incompatible norms within it.[92] In practice it is difficult to maintain the system without incompatible norms. That is why auxiliary tools, such as the *lex specialis* rule, must be used to resolve these inconsistencies. The specific prevails over the general because the specific law regulates the subject that constitutes its object of study in an efficient and effective way; the utility of the *lex specialis* rule derives from the fact that the specific rule better reflects the will of the parties. That is why WTO law largely remains skeptical of general international law. But since WTO law is part of a larger system international law, general international law is relevant to the WTO.[93]

The phenomenon of fragmentation of international law takes its force from the potential conflicting rules and the peculiarities of the system. In turn, a legal system that aspires to effectiveness cannot, in the long run, tolerate serious inconsistencies.[94] Every legal system tries to achieve a certain degree of consistency in the application of the same law to the same facts since continuity and consistency are valuable attributes for any juridical system.[95] This is especially important in the realm of international law, where there is a lack of centralized police force that requires States to follow the decisions of tribunals and courts. The effectiveness of the system depends on the willingness of each member state to disregard or not a particular decision. That is why international tribunals, by creating legitimate expectations through their decisions,[96] should be mindful of other tribunals in order to maintain a certain amalgam throughout the international legal order. But the WTO has managed to evade one of the core challenges that the phenomenon of fragmentation tries to solve, namely the solution of conflicts between substantive norms of different regimes.[97]

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[91] Koskenniemi Martti, *Fragmentation of International Law: The function and scope of the lex specialis rule and the question of 'self-contained regimes': An outline*, Report of the International Law Commission on the work of its fifty-fifth session, chapter X, UN Doc. A/CN.4/L.644, para.28.

[92] Ezquiaga, Francisco, *Argumentos Interpretativos y el Postulado del Legislador Racional*, en *Interpretación Jurídica y Decisión Judicial*, Fontamara, México, 2001, p.176-179.

[93] *See* Koskenniemi Report, *supra* note 82.

[94] Helfer, Lawrence & Slaughter, Ane-Marie, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.Y. (1997) 273, 374-375.

[95] David Palmeter & Peter Mavroidis, The WTO Legal System: Sources of Law, 92 American Journal of Int'l Law 398, (1998), p.402. The authors argue that the increasing quantity together with the overall quality of the WTO reports will eventually contribute to the development of public international law. However, this might not be true from public international law to WO law.

[96] Panel Report, *Japan – Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, (Report of the Panel adopted 10 November 1987), para. 19.

[97] *See e.g.* Lindroos, Anja & Michael Mehling, Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO, 16 Eur. J. of Int'l. L.857, (2005), p.877.

A. ARTICLE 3.2 AND 19.2 OF THE DISPUTE SETTLEMENT UNDERSTANDING

Articles 3.2 and 19.2 of the DSU provide that "[r]recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".[98] Some argue that this provision prevents panels and the AB from applying rights and obligations arising from other international law.[99] However, reading it plainly, this article may appear to be a "warning against judicial activism."[100] This makes sense in a world where international law (rights and obligations) is determined exclusively and solely by states.[101] The act of interpretation the adjudicatory bodies perform is – in relation to its subjective character- always more or less arbitrary and might lead to *ultra vires* application. This view is reflected in article 38 of the Statute of the ICJ, which provides that judicial decisions are subsidiary means for the determination of rules of law. Article 38 suggests that judges are not capable of creating new rules of law.[102] Nobody can doubt that interpretation in fact entails a creative element when adapting the norms to the specific case.[103] However, every modification and development has to be

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[98] DSU, article 3.2. & 19.2.

[99] *See* Trachtman, Joel, The Domain of WTO Dispute Resolution, 40 Harvard Int'l L. J. 333, (1999), p.342. According to Trachtman the language of the DSU provides sufficient specific reference to the covered agreements as the law applicable in WTO dispute resolution. He affirms that the existence of article 3.2 of the DSU would be absurd if international law would be applied. See also Bartels, Lorand, Applicable Law in WTO Dispute Settlement Proceedings, 35 Journal of World Trade 499, (2001), p.507. Bartels, although considering that international law apply to the WTO, argue that the same provision amounts to a conflicts rule with the purpose of ensuring that the covered agreements prevail over any other norm to the extent of any inconsistency.

[100] Jackson, John, Sovereignty, the WTO, and Changing Fundamentals of International Law, Cambridge, 2006, p.196.

[101] Jennings, R. *The Judiciary, International and National, and the Development of International Law*, Shahabuddeen, Mohamed, *Precedent in the World Court*, Cambridge University Press, Cambridge, 1996, p.3; Henkin, Louis, International Law: Politics, Values and Functions, 216 Recueil des Cours 46, The Hague, 1989, vol.4. According to Henkin: "[s]*tates make law by consent, by agreement. Inter-State law is made, or recognized, or accepted, by the 'will' of States. Nothing becomes law for the international system from any other source.*"

[102] League of Nations, Committee of Jurist on the Statute of the Permanent Court of International Justice, Minutes of the Session held at Geneva, March 11th-19th, 1929, (Geneva, 1929), p.24. in Shahabuddeen, *supra* note 99, p.228. This idea is exemplified in the view of the Committee of Jurist of the PCIJ: "*The Court of Justice was a judicial body, and its task was no to attempt the scientific solution of legal questions, but to judge disputes between States and decide upon their cases and claims. It would be for the experts in doctrine, by a study and analysis of the judicial decisions, to extract from them general principles, and subsequently, by a synthetic study, to elaborate universal rules of international law*."

[103] Jennings, *The Judicial Function and the Rule of Law in International Relations*, in Shahabuddeen, *supra* note 82, p.232. In Jennings words: "*[t]he Court must – and this is perhaps the most important requirement of the judicial function – be seen to be applying existing, recognized rules, or principles of law. Even where the court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate reasonably and logically from existing and previously ascertainable law. A court has no purely legislative competence. Naturally the court in probably most difficult cases – and for the most part it is only difficult cases that are brought before international tribunals – may have to make a choice between probably widely differing solutions. It may even choose a course which has elements of novelty. But whatever juridical design it decides to construct in its decision, it must do so, and be seen to do so, from the building materials available in already existing law. The design may be an imaginative artifact, but the bricks used in its construction must be recognizable and familiar.*"; Kovacs, Peter, *Developments and Limits in International Jurisprudence*, 31 Denv. J. Int'l L. & Pol'Y 462, (2004).

inside the parameters of permitted interpretation. Otherwise, judges would lose their primary source of authority. Thus, interpretation plays a definitive role in the process of creation in the judicial system: the adjudicatory body, in deciding the meaning of the judicial language that it applies, decides the subsequent course of the law. For these reasons, Article 3.2 of the DSU serves as a signal to the Panels and the AB that international law is exclusively created by states and not by judges.

B. JURISDICTION

The DSU is primarily concerned with the settlement of disputes that involve an infringement of an obligation assumed under one or more of the WTO agreements. Parties bringing a complaint have to demonstrate that there has been a nullification or impairment of a benefit provided by the covered agreements. However, the mere violation of a disposition of any of the WTO texts establishes a *prima facie* nullification or impairment of a trade benefit accruing to other WTO Members.[104] Basically, article 1.1 of the DSU prescribes the basis for the jurisdiction of the DSB. It says: "[t]he 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."[105] Article 1.1 of the DSU does not in any case limit the law applicable to the cases. Panels and the AB, as international tribunals, are entitled to apply various sources of law in deciding the disputes that are within their jurisdiction.

C. WTO PANELS AND APPELLATE BODY AS JUDICIAL INSTITUTIONS IMMERSE IN INTERNATIONAL LAW

The role of international courts and tribunals has always been linked with promoting peace through the settlement of disputes. This was the main goal of the dispute settlement mechanisms available at the beginning of the XX century.[106] Articles XXII and XXIII of GATT, in this respect, were not different from their contemporary *fora*. The methods designed for the settlement of disputes at the birth of the GATT were closely related to mediation, in which the negotiation of a solution to the dispute was strongly favored. Times changed and so did the needs of the international community.[107] No longer did

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[104] US – Taxes on Petroleum and Certain Imported Substances, GATT B.I.S.D. (34th Supp.), at 5.1.3 (1988).

[105] Article 1.1 of the *Dispute Settlement Understanding*.

[106] The birth of the principle of pacific settlement of disputes emerges from the Hague Convention of 1899 and 1907. Latter on, this principle was set forth as treaty-based in the United Nations Charter, the Declaration of Friendly Relations and the Manila Declaration on pacific settlement of Disputes. Finally, this obligation was crystallized as customary international law as recognized by the International Court of Justice in the Nicaragua Case. *Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports (1986), pp.14, 145 (para.290. *Vid.* Tarassov, Nikolaï, *Introduction to the Peaceful Settlement of Disputes* in Bedjaoui, Mohammed, *International Law: Achievements and Prospects*, Martinus Nijhoff UNESCO, Paris, 1991, pp.501-509. *Vid*. McWhinney, Edward, *Judicial Settlement of Disputes, Jurisdiction and Justiciability*, 221 Recueil des Cours, Vo.II, The Hague, (1990), pp.9-194.

[107] The shift from coexistence to cooperation started dramatically by the end of the Cold War. See Dupuy, Pierre-Marie, International Law: Torn between Coexistence, Cooperation and Globalization General Conclusions, 9 European Journal of International Law 278 (1998), p.283; Brunno Simma, *From Bilateralism to Community Interest*, 250 Recueil des Cours, Vol.VI, The Hague, (1994), pp.229-235.

international courts serve only to maintain peace; they evolved into mechanisms capable of serving complementary purposes.[108]

Indeed, the evolution of the GATT dispute settlement system and its judicial policy since its establishment can be summed up in its tendency towards increasing institutionalization and its direction of "rule orientation", to a more "juridical" approach.[109] The culmination of this process is the establishment of the Dispute Settlement Body of the WTO in the Uruguay Round Agreements in 1995. The DSB was established as 'a central element in providing security and predictability to the multilateral trading system'.[110] But what does 'multilateral trading system' mean? Does it mean that the DSB should try to maintain a certain consistency within its boundaries, i.e. within the context of the Uruguay Round Agreements? Or should we consider the multilateral trading system to encompass a set of treaties besides those of the WTO? The multilateral legal system is not composed only of international trade rules, but also of general international law. International trade rules draw nourishment from international law because international law provides the background for their application. Without international law, the 'multilateral trading system' would not stand on solid ground. International trade is a branch on the tree of international law.

Where do the Panels and the AB stand in the constellation of international courts or tribunals? It is not clear whether one can assert that, at the international level, there is a "judicial system" as this term is understood in domestic law.[111] Every tribunal has to be a judicial system in itself fulfilling all the functions of a judicial system,[112] because of the lack of formal relationships and the anarchical way in which international courts have developed. What can be agreed is that there is a common feature that binds these

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[108] As time passed, courts helped to unify Europe, to protect fundamental human rights, solve controversies related to the release of vessels, to name a few. To more see Posner, E. & Yoo, J., *A Theory of International Adjudication*, The Chicago Working Paper Series Index, (2004), p.2. Available at http://www.law.uchicago.edu/Lawecon/index.html; Romano, Cesare, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 NYUJ Int'l L. & Pol., 709 (1999).

[109] Jackson, John, *The World Trading System*, Ch.4. (1989); Peter Sutherland, Jagdish Bhagwati, Kwasi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer and Thierry de Montbrial, The Future of the WTO: Addressing Institutional Challenges in the New Millennium Report by the Consultative Board to the Director-General Supachai Panitchpakdi (Geneva: World Trade Organization, 2004), hereafter 'the Report'.

[110] *Dispute Settlement Understanding*, article 3.2.

[111] Some commentators state that there is an increase tendency towards the judicialization of international law via the proliferation of international courts. See Lowenfeld, Andreas, *International Economic Law*, Oxford University Press, New York, (2002), pp.135-196; Baudenbacher, Carl, Judicialization and Globalization of the Judiciary: Foreword: Globalization of the Judiciary, 38 Tex. Int'l L.J. 397, (2003); Alford, Roger, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance, 94 Am. Soc'y Int'l L. Proc. 162, (2000). Alvarez, Jose, The New Dispute Settlers: (Half) Truths and Consequences, 38 Tex. Int'l L. J. 405, 411-414 (2003). Alvarez argues that the so called "judicialization" of the disputes is a myth due to the fact that most of the international disputes still remain being settled through political channels.

[112] *See The Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A.Ch., 2 October 1995, para.11. See also Connie Peck & Roy S. Lee, *Increasing the Effectiveness of the International Court of Justice, Proceedings of the ICJ/UNITAR, Colloquium to Celebrate the 50th Anniversary of the Court*, Martinus Nijhoff Publishers/UNITAR, The Hague, 1997, p.204. (Quoting Georges Abi-Saab).

institutions together—they all belong to the same branch of law (general international law).

The importance of characterizing the Panels or the AB as entities with judicial overtones is that commonly courts are bearers of a conscious duty owed to the international legal community.[113] This can be distinguished from arbitration, where the arbitrators are inclined to follow more faithfully the intention of the parties to the dispute. The question now turns to considering the nature of the WTO Panels and the AB. Literature in this respect leans towards approaching and considering the *ad hoc* WTO dispute settlement Panels and the AB as judicial institutions.[114] However, are they really judicial?

What does the term 'court' mean? Can WTO dispute settlement Panels and the AB be characterized as judicial bodies? There is no generally accepted definition of what an international court, tribunal or judicial organism is. However, there have been efforts by many scholars to try to clarify the concept.[115] It is not surprising that different conclusions may be reached depending on the specific definition. In this regard, it is useful to consider Christian Tomuschat's five basic criteria to determine whether an entity should be considered to qualify as an international judicial organ.[116]

- First, they must pronounce their *decisions on the basis of law*, especially on international law.[117] Nobody disputes that the results of the Uruguay Round are considered international law and that they are subsumed by the general spectrum of public international law.[118] Article 7 specifies that the terms of reference for

[113] Wald, Patricia, The Judicial Evolution of the WTO Appellate Body, WTO at 10 Conference, April 2006.
[114] Footer, Mary, An Institutional and Normative Analysis of the World Trade Organization, Martinus Nijhoff Publishers, 2006, p.38; Matsushita, Matsuo, Thomas Schoenbaum & Petros Mavroidis, The World Trade Organization, Oxford University Press, 2006, p.104; Iwasawa, Yuji, WTO Dispute Settlement as Judicial Supervision, Journal of International Economic Law, (2002), p.291; Pauwelyn, Joost, The Role of Public International Law in the WTO: How Far Can We Go? Am. J. Int'l. L. Vol.95:547, (2001), p553; J.G. Merrills, *International Dispute Settlement*, Cambridge University Press, p.217, 1998.
[115] Romano, Cesare, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 New York University Journal of International Law & Politics, 709, 712 (1999). Romano differentiates between the concepts of 'international tribunal' and 'international court'. The term' international court' designates only the permanent judicial forum. While the term 'international tribunal' is more suitable in designating *ad hoc* or transitory institutions, with the exception of the International Tribunal for the Law of the Sea (ITLOS). *See* also Kelsen, Hans, *Principles of International Law*, The Lawbook Exchange, Ltd., Clark, New Jersey, 4 ed., (2004), pp.377-380; Hudson, Manley, *International Tribunals, Past and Future*, Kraus Reprint Co., 1972, pp.17-31; Rosenne, Shabtai, *The Perplexities of Modern International Law*, Recueil des Cours, Vo.291, pp.88-89, (2001).
[116] Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrecht, 1974, p.290-312. Tomuschat makes an emphasis that the criteria is based under inter-State disputes in the classical sense. The report is not devoted to the protection of individuals, but to the rights of States. See also Romano, Cesare, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 New York University Journal of International Law & Politics, 709, 713 (1999). For Romano, Tomuschat's report study the problem in an holistic way, instead of focusing on a specific court.
[117] Tomuschat, pp.290-294.
[118] *United States – Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body Report, WT/DS2/AB/R, adopted 29 April 1996, p.16.; Schwarzenberger, Georg, *The Principles and Standards of International Economic Law*, Recueil des Cours, Vol.87 (1996-1), p.1.; McRae, Donald, *The Contribution*

panels shall be "[t]o examine, in the light of the relevant provisions in (… the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB" and "to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[119]

- Second, it must be previously *established by an international legal instrument*. The WTO Agreement, the annexed Multilateral Trade Agreements and the Tariff Schedules of Specific Commitments are the legal instruments which make up the results of the Uruguay Round. They constitute a single body of law which was negotiated and is applied among all Members as a treaty under the terms of the VCLT.[120] The DSU provides the framework for the establishment of both the Panels and the AB respectively in article 6 and in article 17.

- Third, the members of the adjudicatory body must be composed by an impartial mechanism enjoying independent status from governments.[121] Under this criterion what is trying to be avoided is that the "final decision rests with a body of persons politically responsible to the States appointing them".[122] In this sense the DSU established many safeguards to avoid this problem. Article 8 of the DSU provides that "panel members should be selected with a view to ensuring the independence of the members."[123] And in Article 17, the DSU determines that the members of the AB "shall be unaffiliated with any government" and "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."[124]

  This criterion is linked with the idea that judges should not have to be appointed on an *ad hoc* basis.[125] They must be *permanent*. In other words, their existence must not be constituted *ad hoc* to deal with a specific case. The AB is a standing body consolidated by the DSB according to article 17.1 of the Dispute Settlement Understanding.[126] Not so the Panels.[127] Article 6 of the DSU states that 'if the

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of International Trade Law to the Development of international Law, Recueil des Cours, Vol.260, (1996), pp.119-123.

[119] *Dispute Settlement Understanding*, article 7.

[120] Article 2(1)(a) of the Vienna Convention on the Law of the Treaties, 23 May 1969. "Treaty means an international agreement concluded between States in written form and governed by international law". See also Nichols, Phillip, GATT Doctrine, Virginia Journal of International Law, Vol.36, p.390, (1996). Nichols notes that the GATT was not considered as a treaty by the members but as a simple agreement that each country acceded to by means of the Protocol of Provisional Application.

[121] Tomuschat, p.294.

[122] *Ibid*.

[123] Article 8.2, DSU.

[124] Article 17.3, DSU.

[125] Tomuschat, p.307. See also Romano, Cesare, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 New York University Journal of International Law & Politics, 713 (1999).

[126] Article 17.1 of the DSU.

[127] See Romano, p.718. This requirement might be overcome by the suggestion of the idea to introduce a permanent set of panelist that might operate somehow like the Chambers of the International Court of Justice. For the analysis of such suggestions see Bourgeois, Jacques, Comment on a WTO Permanent Panel Body, 6 JIEL 211, (2003), pp.211-235; Cottier, Thomas, The WTO Permanent Panel Body: a Bridge Too Far? 6 JIEL 187, (2003), pp.187-202; Davey, William, The Case for a WTO Permanent Panel Body, 6 JIEL

complaining party so requests, Panels shall be established'. Every Panel is selected for each new dispute.[128]

- Fourth, the outcome of the *decisions must be binding*.[129] In this sense, the results arising from the procedures before the AB and the Panels are not binding *per se*; they only become binding when the DSB adopts them.[130] This requirement seems to be fulfilled by the negative consensus rule.[131] But are the reports of the AB and Panels binding in the traditional sense under international law? The DSU does not provide an explicit solution to the effect of AB or Panel decisions in the maner that article 59 of the Statue of the International Court of Justice does.[132] Without a similar provision inserted into the DSU can we argue that AB or Panel reports are not binding? The same issue arose a couple years ago with the Jackson-Bello debate.[133] In what appear to be the most accepted position,[134] in response to the

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177, (2003), pp.177-186; Shoyer, Andrew, Panel Selection in WTO Dispute Settlement Proceedings, 6 JIEL 203, pp.203-209.

[128] Pursuant to Article 8 of the DSU, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva: World Trade Organization, 1999), 411-412, panels are selected for each new dispute. .See Pauwelyn, Joost, The Role of Public International Law in the WTO: How Far Can We Go? Am. J. Int'l. L. Vol.95:547, (2001), p553. "At first glance, one may doubt whether the DSU actually provides for the judicial settlement of disputes. First, contrary to the Appellate Body, WTO panels are not standing bodies but ad hoc tribunals created pursuant to predetermined procedures in the DSU. Panels must be established ad hoc for each case by the WTO Dispute Settlement Body (they cannot be established by the mere will of the disputing parties). Still, their establishment is quasi-automatic pursuant to the negative consensus rule in DSU Article 6(1). In terms of their mode of establishment, panels could thus be qualified as encompassing a mixture between arbitration and judicial dispute settlement. Yet when it comes to their actual function and way of handling disputes, the DSU leaves no doubt that panels are judicial in nature."

[129] Tomuschat, p.300. "Unlike in the case of a mere recommendation or opinion, the parties are not merely informed of the legal situation, and left at liberty to accept or reject the correct legal solution, but are given a strict order which the successful party can insist be complied with, regardless of any further objections of the opposing party. Here again we see a certain lack of flexibility which clearly is bound to make any appraisal of the judicial settlement a question of conscience."

[130] See Article 16.4 and 17.14, DSU. Article 16.4 establishes that "within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting (7) unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report." Article 17.14 provides that "an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members." See also Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 1 Nov. 1996, para.108.

[131] Pauwelyn, Joost, The Role of Public International Law in the WTO: How Far Can We Go? Am. J. Int'l. L. Vol.95:547, (2001), p553. "Second, the legal findings and conclusions of both panels and the Appellate Body culminate only in "recommendations" to the defending party. These recommendations must still be adopted by the Dispute Settlement Body to obtain their legally binding force as between the parties to the dispute. Once again, this body takes its decision by negative consensus, i.e., quasi-automatically (under DSU Articles 16.4 and 17.14). At most, this procedure could mean that the WTO judiciary includes the WTO Dispute Settlement Body. In practice, however, both panels and the Appellate Body are established, operate, and reach their legal conclusions in an entirely independent and law-based fashion. They are judicial tribunals in the international law sense."

[132] Article 59 of the *Statute of the International Court of Justice*. It establishes that: "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case."

[133] *See* Judith Hippler Bello, Editorial Comment: The WTO Dispute Settlement Understanding: Less Is More, 90 AJIL 416, (1996); John H. Jackson, Editorial Comment: The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation, 91 AJIL 60, (1997).

assertion of Bello that the legal effect of an adopted report is not binding,[135] Jackson quotes 11 DSU provisions to support his argument concluding that an obligation to comply or to perform does exist.[136]

- Fifth, the activity of the entity must be regulated by a body of generally applicable procedural rules irrespective of the case concerned.[137] The *same procedure is applied to all disputes*.

According to the previous criteria, strictly speaking, Panels cannot be considered as a tribunal because the criterion for permanency is not met. Notwithstanding the fact that in essence the Panels do not embody the common elements of a traditional international court,[138] within the trade system, the AB in *US – 1916 Act*, acknowledged that Panels conduct themselves as international tribunals.[139]

Whenever a dispute is presented before the WTO DSB one should question whether it has the legitimacy to decide on issues not relying entirely on WTO law, such as environmental or human rights issues. The Panels or the AB as a tribunal, within the wider cosmos of international tribunals, are entitled to deal with issues related not only to WTO law but to international law also. As judicial bodies, they may embrace non-WTO legal rights or obligations to avoid fragmentation and ensure a degree of coherence. Political action by the member states is not necessary, Panels and the AB have the necessary tools to embrace, in a cautious way, non-WTO law.

When applying international law one may doubt the application or the taking into account by the WTO Panels or the AB of other rulings outside the system of international trade law. The practice shows that the AB and the Panels remain in constant dialogue with other international tribunals. For example, in *EC – Biotech Products*, in determining whether the precautionary principle applies in reality by way of customary international law, the Panel was aware of the decisions of other international tribunals.[140]

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[134] *See e.g.* Marco Bronkers, More Power to the WTO, 4 JIEL 41 (2002), p.60; Naboth van den Broek, Legal Persiasion, Political Realism and Legitimacy, 4 JIEL 411, (2001), p.433; Griller, Stefan, Judicial Enforceability of WTO Law in the European Union Annotation to Case C-149/96, Portugal v. Council, 3 JIEL 441, (2000), p.453.

[135] Bello, *supra* note 131, pp.416-417.

[136] Jackson, *supra* note 131, pp.63 who states that: "[i]t is true that once the 'binding' international law obligation to follow the recommendation of a panel report has been established, international law has a variety of ways of dealing with a breach of that obligation, and that, understandably, those methods are not always very effective. However, that is a different issue from the question of whether the 'WTO rules are… 'binding' in the traditional sense'. Certainly they are biding in the traditional international law sense."

[137] Tomuschat, p.311.

[138] *See* Romano, p.709, 718.

[139] *See* Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, 26 September 2000, para.54, fn.30. See also Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, 21 November 2001, para.36 & 53.

[140] Panel Report, *European Communities – Measures Affecting the Approval and Marketing on Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, para.7.88.

V. CONCLUSION

The WTO is not a closed legal system. The WTO is largely receptive to international law norms through article 3.2 of the Dispute Settlement Understanding, which provides for interpretation of the covered agreements according to the customary rules of interpretation, namely Article 31 and 32 of the Vienna Convention on the Law of the Treaties. Particularly, Article 31 (3)(c) of the Vienna Convention, the principle of systemic interpretation, as a constitutional norm, is the master key that opens the door for the norms of international law to apply in a specific context. Apart from that, WTO Panels and the AB do not permit the application of substantive public international law rules related to trade.

In an era of fragmentation, the International Law Commission sees that there might be a misunderstanding between the jurisdiction of the WTO Panels and the AB, and the applicable law to the dispute. This is because WTO law is not applied and interpreted in a vacuum. Taking into account its role as the main tribunal for the multilateral trading system, there is a central purpose for the DSU: to provide security and predictability. Under this goal, the application of such rules by the AB and Panels should be moved by a sense of duty owed to the greater legal community as a characteristic of its implied powers as an international court or tribunal. WTO law, as much as it is a self-contained regime and tries to regulate trade, is inherently incomplete. This follows from the systemic nature of the international law of which WTO law is a part. Necessarily, this incompleteness might lead to the application of non-WTO law to cover such insufficiencies. Despite the fact that Panels and the AB have sufficient tools to introduce non-WTO rules into the WTO system, they remain skeptical and prefer not to do so. With such reticence one might start to wonder whether the AB and Panels do not want to be considered either for having sought "to enlarge the judicial power beyond its proper bounds" or for having "feared to carry it to the fullest extent duty required."[141]

[141] Letter from Marshall to Story, October 12, 1831, quoted in 4 Beveridge, The Life of John Marshall, 522 (1919) in Mason, Alpheus Thomas, Judicial Activism: Old and New, Virginia Law Review, Vol.55, No.3. (Apr., 1969) pp.387.