

THE ROLE OF INTERNATIONAL LAW IN THE DEVELOPMENT OF WTO LAW

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ABSTRACT

As a new branch of international law, WTO law consists of the rules which particularly regulate the transactions concerning trade in goods, trade in services, investment and trade-related intellectual property rights among WTO Members. To be more specific, WTO law is referred to as the ‘single package’ results of the Uruguay Round of multilateral trade negotiations (1986–1994). Basically, WTO law is no different from other branches of international law. The general principles, customary rules and the way of interpretation of international law all apply to the operation of WTO law. Notwithstanding this, WTO law still has its unique characteristics which are sufficient enough to distinguish it from other branches of international law. These differences can normally be perceived from their institutional statuses and dispute settlement mechanisms. The influence between international law and WTO law is mutual. While general international law determines the basic structure of WTO law, the creation of WTO law has also changed the landscape of international law.

INTRODUCTION

The creation of the World Trade Organization is one of the most important events in the international law sphere during the last decade of the twentieth century. The combined membership of this new institution consists of both sovereign States and separate customary territories. The unified trade rules made in the Uruguay Round negotiations are binding to all WTO Member governments. A new dispute settlement mechanism with the compulsory effect of the adopted rulings and recommendations distinguishes the WTO from many other international institutions on the governance of world trade. All these features are fascinating many international lawyers in their research on the WTO legal system. Furthermore, this legal system is not static, but evolutionary. On the one hand, it will change with the development of general international law. On the other hand, the development of WTO law will also

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play a positive role upon international law. This mutual relationship brings a significant impact to the enhancement of the WTO legal system and general international law as well.

I. WTO LAW IS NOT A CLOSED SYSTEM

After the initial practice of the World Trade Organization and its dispute settlement mechanism, it is now generally accepted that ‘WTO rules are part of the wider corpus of public international law’.¹ Created and developed on the cognizance of those general international law rules, WTO law is no more than a new branch of public international law. In the dispute *United States – Standards for Reformulated and Conventional Gasoline* (hereinafter as *Gasoline*), the Appellate Body stressed that ‘the general rule of interpretation set out in Article 31 of the *Vienna Convention on the Interpretation of Treaties* has been relied upon by all contesting parties and third parties in the WTO dispute settlement procedures, although not always in relation to the same issue’. That general rule of interpretation ‘has attained the status of a rule of customary or general international law’. As such, it forms part of the ‘customary rules of interpretation of public international law’ which the WTO dispute settlement bodies including panels and the Appellate Body have been directed, by Article 3(2) of the *Dispute Settlement Understanding*, to apply in seeking to clarify the provisions of the WTO agreements.² In doing so, the Appellate Body has demonstrated that WTO law is not a self-closed regime,³ which lies outside the general body of international law rules. In other words, the Appellate Body in the *Gasoline* case has pointed out the relevance of the GATT/WTO law to the rest of international law rules and imposed on future panels and the Appellate Body itself the obligation to interpret the WTO agreements in a way that is applicable to any other international treaty, thereby putting an end to what Kuyper has termed ‘GATT Panels’ ignorance’⁴ of the basic rules of treaty interpretation.

A number of factors support the conclusion that WTO law is not a closed system. Firstly, the dimension regulated by the World Trade Organization is much wider, compared with that of its predecessor, the GATT. The existence of environmental, health, social, security and other exceptions to WTO obligations has linked WTO law with other systems of law and policy. The

¹ See Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95(535) *American Journal of International Law* (2001), at 538. See also generally Donald M. McRae, ‘The WTO in International Law: Tradition Continued or New Frontier?’, 3 *JIEL* (2000); and ‘The Contribution of International Trade Law to the Development of International Law’, 260 *Recueil des Cours* (1996).

² WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, at 17 (original note omitted).

³ The original words in the Appellate Body Report are ‘the *General Agreement* is not to be read in clinical isolation from public international law’. *Id.*, at 17.

⁴ P.J. Kuyper, ‘The Law of the GATT as a Special Field of International Law’, *N.Y.I.L.* (1994), at 227.

fact that these exceptions such as Article XX of GATT 1994 fail to provide WTO Members, panels and the Appellate Body adequate criteria for judging those subtle issues does not permit them to avoid their responsibility to adjudicate upon these issues.⁵ As it is recognized by the Appellate Body in the dispute *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter as *Shrimp*):

*Pending any specific recommendations by the CTE (Committee on Trade and Environment) to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of GATT 1994 and the WTO Agreement generally, we must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX.*⁶ (emphasis added)

Obligated to adjudicate disputes arising between WTO Members, even when involving the interpretation of the most obscure provisions of the WTO agreements, and to do so in an ‘objective manner’,⁷ WTO panels and the Appellate Body have no alternative other than to look for information that will lead them to the reasonable and objective meaning of the terms of the treaty that they must ultimately interpret, apply and enforce. The scarcity of information within the WTO agreements, such as when dealing with those health and environment issues, necessarily obliges the honest and objective interpreter to take into account any relevant information, even those outside the WTO agreements.

Secondly, Article 3(2) of the *Dispute Settlement Understanding* (DSU) requires that the WTO agreements should be interpreted with the ‘customary rules of interpretation’, and as the Appellate Body stated in the *Gasoline* case that these agreements must not be interpreted ‘in clinical isolation from public international law’, the reference to the massive body of rules existing in public international law cannot be denied. These rules will include the general

⁵ See J. Bourgeois, ‘WTO Dispute Settlement in the Field of Anti-Dumping Law’, 1(1) JIEL (1998), at 259. As noted by Jacques Bourgeois, a distinction here must be made between concepts that were left vague by WTO negotiators and those that were left unregulated. Only the latter would permit a panel or the Appellate Body to refuse jurisdiction on the basis of a *non-liquet* (i.e., issue not accessible to legal adjudication due to the absence of law on the matter or for other reasons such as political impediment). The existence of Article XX, and exceptions elsewhere in the WTO agreements, implies that panels and the Appellate Body are charged with a duty to balance international trade and national interests, even in the presence of significant uncertainty about how the relevant WTO provisions apply. *Id.*, at 271.

⁶ WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, distributed on 12 October 1998, para 155.

⁷ Article 11 of the *Dispute Settlement Understanding* requires that ‘a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...’. See the legal texts of the World Trade Organization: *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press (1999).

principles of law, and the rules on the resolution of conflicts of law as well. In the dispute *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (hereinafter as *Bananas*), the Panel stated that the Lome Waiver⁸ should be interpreted so as to waive not only compliance with the obligations of Article I:1, but also compliance with the obligations of Article XIII of GATT 1994. The Appellate Body, despite the fact that it recognized the Lome Waiver as part of GATT/WTO law, considered that the Panel's conclusion was difficult to reconcile with the limited GATT practice in the interpretation of waivers,⁹ the strict disciplines to which waivers should be subjected under the *WTO Agreement*,¹⁰ the history of the negotiations of this particular waiver¹¹ and the limited GATT practice relating to granting waivers from the obligations of Article XIII of GATT 1994,¹² then, concluded that 'the Panel erred in finding that "the Lome Waiver waives the inconsistency with Article XIII:1 to the extent necessary to permit the EC to allocate shares of its bananas tariff quota to specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the EC"'.¹³ This deliberation implies that WTO dispute settlement

⁸ The relevant paragraph of the Lome Waiver reads as the following: 'Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the *General Agreement* shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treaty for products originated in ACP (African, Caribbean and Pacific) States as required by the relevant provisions of the Fourth Lome Convention'. See *The Fourth ACP-EEC Convention of Lome*, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.

⁹ There is little previous GATT practice on the interpretation of waivers. In the Panel report of the dispute *United States – Sugar Waiver*, the Panel stated: 'The Panel took into account in its examination that waivers are granted according to Article XXV:5 (of GATT 1947) in "exceptional circumstances", that they waive obligations under the basic rules of the *General Agreement* and that their terms and conditions consequently have to be interpreted narrowly'. Adopted on 7 November 1990. BISD 37S/228, para 5.9.

¹⁰ Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care. See above n 7.

¹¹ With regard to the history of the negotiations of the Lome Waiver, we note that the GATT CONTRACTING PARTIES limited the scope of the waiver by replacing 'preferential treatment foreseen by the Lome Convention' with 'preferential treatment required by the Lome Convention'. This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lome Waiver. (Emphasis added)

¹² From 1948 to 1994, the GATT CONTRACTING PARTIES granted only one waiver from Article XIII of GATT 1947. This is 'Waiver Granted in Connection with the European Coal and Steel Community'. Decision of 10 November, 1952, BISD 1S/17, para 3. In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver which does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lome Waiver, they would have said so explicitly.

¹³ WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, distributed on 9 September 1997, para 188.

bodies, including panels and the Appellate Body, should not be prevented from seeking outside sources when the provisions of the covered agreements are obscure or ambiguous. In other words, they may still proceed to deduce a rule that will be relevant, by analogy from already existing rules or practices, or even from the general principles of law that guide this legal system. Such a situation is perhaps more likely to arise in the WTO because of the underdevelopment of its legal system in relation to the needs with which it is faced.

Thirdly, it can be argued that Article 32 of the *Vienna Convention of the Law of Treaties*, in terms of the WTO dispute settlement, requires any interpreting body, such as panels and the Appellate Body, to use or to take into account 'supplementary means of interpretation' and outside legal materials when interpreting those WTO obligations. In the view of the author of this article, 'supplementary means of interpretation' should be understood to refer to not only the contents of interpretation, but also the method of interpretation. In the dispute *European Communities – Measures Concerning Meat and Meat Products* (hereinafter as *Hormones*), the European Communities considered that the Panel, in seeking information from experts individually rather than from an expert group, violated Article 11(2) of the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*¹⁴ and Article 13(2) of the DSU.¹⁵ The Appellate Body did not accept this claim of the European Communities and stated: 'in disputes involving scientific or technical issues, neither Article 11(2) of the *SPS Agreement* nor Article 13 of the DSU prevents panels from consulting individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.'¹⁶ Here, the difference in the views of the European Communities and the Appellate Body is obvious. The former based its argument on a strict reading of Article 11(2) of the *SPS Agreement*, while the latter used any possible means for the interpretation of WTO agreements and counted on the actual suitability of using outside experts. It should be noted that some of the WTO agreements are very technical and complicated, therefore, recourse may be had to supplementary means of interpretation

¹⁴ Which states: 'In a dispute under this Agreement involving scientific or technical issue, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel *may, when it deems it appropriate*, establish an advisory technical experts group, or consult the relevant international organization, at the request of either party to the dispute or on its own initiative.' (Emphasis added) See above n 7.

¹⁵ Which states: 'Panels may seek information from *any relevant source and may consult experts* to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to the dispute, a panel *may* request an advisory report in writing from expert review group . . .' (Emphasis added) See above n 7.

¹⁶ WTO Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, distributed on 16 January 1998, para 147.

when the provisions of these agreements ‘leave the meaning ambiguous and obscure’.

Fourthly, the *WTO Agreement* Preamble commits WTO Members to the ‘optimal use of the world’s resources in accordance with the objectives of sustainable development’. The objective of sustainable development can only be understood in light of contemporary law and policy that defines and supports this goal. In this context, it may be worth noting the *Marrakesh Decision on Trade and Environment*¹⁷ in which the WTO Members have taken note of the *Rio Declaration on Environment and Development*,¹⁸ *Agenda 21*,¹⁹ and ‘its follow-up in GATT, as reflected in the statement of the Chairman of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in 1992...’.²⁰ Although all these international declarations and policy statements contained in the *Marrakesh Decision* are not legally binding on WTO Members, they have provided a widely accepted parameter for the concept of sustainable development. In practice, the *Gasoline* case and the *Shrimp* case have already made us realize that international trade might have an impact upon environmental protection, and vice versa.

Finally, if interpreted and developed in isolation from the rest of international law, WTO law would risk ‘conflicts’ with other international law rules, contrary to the general international law presumption against conflicts and for effective interpretation of treaties. More significantly, if WTO law cannot update itself with the social development, it will obstruct the flow of international trade, and eventually, fall into being disregarded and discarded by the WTO Members. In the *Hormones* case, before deciding whether the SPS (sanitary and phytosanitary) measures maintained by the European Communities are based on a risk assessment required by Article 5(1) of the *SPS Agreement*,²¹ the Appellate Body needed, first of all, to consider what factors were included in carrying out a risk assessment. The Panel intended to exclude all the matters ‘not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly

¹⁷ See above n 7.

¹⁸ Principle 3 of the *Rio Declaration on Environment and Development* states: ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’ Principle 4 states: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’ UN Doc. A/CONF. 151/5/Rev.1, 13 June 1992, 31 *International Legal Materials* 874.

¹⁹ *Agenda 21* is replete with references to the shared view that economic development and the preservation and protection of natural resources should be mutually supportive. Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1, 1992.

²⁰ Preamble of the *Decision on Trade and Environment*. See above n 7.

²¹ Article 5(1) of the *Agreement on the Application of Sanitary and Phytosanitary Measures* provides: ‘Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or death, taking into account risks assessment techniques developed by the relevant international organisations.’ (Emphasis added) See above n 7.

associated with the physical sciences'.²² The Appellate Body, however, disagreed and stated: 'There is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5(2) (of the *SPS Agreement*)²³ was intended to be a closed list.'²⁴ This approach sounds persuasive, as the risk that is to be evaluated in a risk assessment under Article 5(1) of the *SPS Agreement* is not only the risk which is ascertainable in a science laboratory operating under strictly controlled conditions, but also the risks in our human society as they actually exist. In other words, all the actual and potential factors leading to adverse effects on human health should be considered if we need to make a risk assessment.

Since WTO law is no different from any other branch of public international law, the role of international law upon WTO law is ascertainable. In many respects, WTO law is derived from the general body of international law rules. Therefore, with the development of international law, WTO law also needs an enhancement.

II. WTO LAW NEEDS DEVELOPMENT

Compared with its predecessor the GATT, the World Trade Organization, through the successful settlement of the *Gasoline* dispute and the *Shrimp* dispute, has taken a giant step forward on the subtle issue *trade and environment*. Under the GATT's jurisdiction, a number of cases, including *Salmon-Herring*,²⁵ *Thai Cigarettes*²⁶ and *Tuna-Dolphin*,²⁷ were referred to

²² WTO Panel Report, *Hormones*, WT/DS26/R/USA, para 8.107; WT/DS48/R/CAN, para 8.110.

²³ Which states: 'In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.' (Note added) See above n 7.

²⁴ See above n 16, para 187.

²⁵ GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* (hereinafter as *Salmon-Herring*), GATT BISD 35th Supplement (1989), adopted on 22 March 1988, p 98. In *Salmon-Herring*, the Panel upheld the United States' claim that Canada's ban on unprocessed herring and salmon exports violated the prohibition on quantitative restrictions in Article XI:1 of GATT 1947 and rejected Canada's argument that, as part of a fisheries management programme, its export ban was permissible under GATT Article XX (General Exceptions).

²⁶ GATT Panel Report, *Thailand – Restrictions on Importation of and International Taxes on Cigarettes* (hereinafter as *Thai Cigarettes*), GATT BISD, 37th Supplement (1991), adopted on 7 November 1990, pp 200–28. In *Thai Cigarettes*, the Panel upheld a challenge by the United States to Thailand's restrictions on the import of cigarettes under Article XI:1 of GATT 1947. It also determined that Thailand's excise, business and municipal taxes on cigarettes were inconsistent with the national treatment obligations under Article III:1 and Article III:2 and that the trade restrictions could not be justified under Article XX(b) of GATT 1947 as a measure 'necessary to protect human... life or health'. The Panel noted that the requirement of 'necessity' would only be met if 'there was no alternative measure consistent with the *General Agreement*, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives'. Id, at para 75. The Panel went on to note that 'A non-discriminatory regulation implemented on a national basis in accordance with Article III:4 (of GATT 1947) requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the *General*

GATT Article XX exceptions. However, the GATT panels generally adopted fairly conservative interpretations of the Article XX exceptions. They were reluctant to use external sources of law, including other treaties and general principles of international law, to assist in the interpretation of GATT provisions. Neither were they able to adjudicate upon those issues beyond trade with the limited mandate.

The World Trade Organization has expanded the GATT's mandate. Meanwhile, the modified objective of this new institution has brought a change in our approach to some issues like the relationship between trade and environment. A number of factors may be invoked to account for this change. Firstly, the drafters of the WTO agreements have replaced the reference of 'full use of the world's resources' in the GATT Preamble with a new undertaking of 'optimal use of the world's resources in accordance with the objective of sustainable development' in the *WTO Agreement* Preamble. The emergence of the concept 'sustainable development' indicates that people have realized the importance of preserving the world's resources and protecting the global environment. Secondly, the Uruguay Round negotiators decided to expand the dimension of the multilateral trade system to such new areas like intellectual property rights and services, and to add new disciplines over national laws in a number of areas including health and technical regulations. This, in turn, has increased the need for a careful balance to be struck between WTO disciplines and Members' national laws and policies. Thirdly, the Uruguay Round negotiations occurred alongside the United Nations Conference on Environment and Development (UNCED), which reflected a growing international concern over the increasing and unsustainable impacts of human society on the Earth's ecosystems and the growing inequality in the patterns of development. Finally, the Appellate Body, after receiving the comprehensive acceptance from the WTO Members for its initial work, has acquired enormous power in clarifying WTO law and, eventually, in developing WTO law.

Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objective it now pursues through an import ban on all cigarettes whatever their ingredients.' *Id.*, at para 77.

²⁷ GATT Panel Report, *United States – Restrictions on Imports of Tuna* (hereinafter as *Tuna I*), BISD 39S/155, distributed on 3 September 1991, but not adopted; *United States – Restrictions on Imports of Tuna* (hereinafter as *Tuna II*), DS29/R, distributed on 10 June 1994, but not adopted. The unadopted panel decisions in *Tuna I* and *Tuna II* addressed the vexed process and production method (PPM) issue when the panels examined the United States' ban on tuna imports caught by methods that endangered dolphins. In *Tuna I*, the Panel determined that because the GATT is concerned with trade in products, any regulatory distinction not reflected in the physical characteristics of products (for example, a distinction based on the manner in which tuna was caught) was incompatible with Article III of GATT 1947. It stated: 'Article III:4 (of GATT 1947) calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product...' *Tuna I*, at para 5.15. *Tuna II*, at para 5.27.

In the appellate review of the *Gasoline* dispute, the Appellate Body upheld the Panel's decision that the US measures, i.e. the baseline establishment rules, ultimately failed to qualify for the protective application of GATT Article XX, but used a different legal reasoning. Whereas the Panel found that the US measures were not justified under GATT Article XX(b),²⁸ (d)²⁹ or (g),³⁰ the Appellate Body allowed the measure under Article XX(g) and went on to examine the consistency of the measure with the Article XX chapeau.³¹ According to some scholars,³² this is the first thorough examination of the Article XX chapeau in the 50-year GATT/WTO dispute settlement history. The Appellate Body concluded that the US measure did not satisfy the chapeau requirements, in that it was applied in a discriminatory and abusive manner, and constituted a disguised restriction on trade.³³ By examining the chapeau of Article XX, the Appellate Body noted the need to balance the market-access commitments embodied in the substantive GATT provisions against the right of WTO Members to invoke the Article XX exceptions, which will lead to the application of WTO law in a more coherent way.

After the *Gasoline* case, the next WTO trade dispute concerning GATT Article XX is the *Shrimp* case. This dispute arose from a challenge by some developing countries to a US import ban on shrimp products from countries without certain national policies to protect endangered sea turtles from drowning in shrimp trawling nets. On this occasion, the Appellate Body considered that the US measure was based on a policy covered by GATT

²⁸ 'necessary to protect human, animal or plant life or health'.

²⁹ 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices'.

³⁰ 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

³¹ The chapeau functions *de facto* as the precondition for the following exceptions, which states: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures. . .'. See above n 7.

³² For example, Gabrielle Marceau, 'A Call for Coherence in International Law', 33(5) *Journal of World Trade* (1999), at 96.

³³ The Appellate Body gave its legal reasoning for examining the chapeau of Article XX as the following: The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clause of Article XX is generally the prevention of 'abuse of the exceptions' of (what was later to become) Article XX. This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. See above n 2, at 22.

Article XX(g), but then determined that the law was inconsistent with the language of the Article XX chapeau on the basis that it was applied in a manner that led to an arbitrary and unjustifiable trade discrimination.³⁴ The legal reasoning of the Appellate Body to support this conclusion marks the most complete discussion of GATT Article XX so far, and therefore deserves careful consideration. It demonstrates that the Appellate Body is aware of the realities in different Members when they are implementing the WTO rules. Meanwhile, the Appellate Body in this case made extensive reference to other sources of international law when interpreting GATT 1994,³⁵ thereby reinforcing its conclusion in the *Gasoline* case that the *WTO Agreement* must not be interpreted in clinical isolation from public international law.

From the trade and environment perspective, regardless of whether the Appellate Body's approaches in the aforementioned cases are welcomed by the WTO Members, it is now open to the membership to define which measures are permitted as valid environmental actions, and which actions should be prohibited as disguised protectionism pursuant to GATT Article XX. The Appellate Body in the *Shrimp* dispute noted that the standards of the chapeau projected both procedural and substantive requirements.³⁶ However, as a practical matter, the Appellate Body has provided national governments of WTO Members with little guidance about what is required before a measure is invoked under GATT Article XX. What kinds of production and process methods (PPMs) are permitted under GATT Article XX? To what extent, for example, must the WTO Members engage in multilateral discussions, provide financial and technical assistance or exhaust other options before implementing trade sanctions? What kinds of special efforts must be made to the rights of developing countries? What other disciplines should be placed on unilateral action to ensure that powerful countries do not

³⁴ The Appellate Body stated in its report:

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members. See above n 6, para 164.

³⁵ The Appellate Body examined the use of the term 'natural resources' in a number of international conventions, including 1982 United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122, 21 International Legal Materials 1261, original footnote 110; Convention on Biological Diversity, done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div/N7-INC5/4, 31 International Legal Materials 818, original footnote 111; Resolution on Assistance to Developing Countries, adopted in conjunction with Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 29 August 1979, 19 International Legal Materials 11, at 15, original footnote 113; and Convention on International Trade in Endangered Species of Wild Flora and Fauna, done at Washington, 3 March 1973, 993 U.N.T.S. 243, 12 International Legal Materials 1085, original footnote 117. See above n 6, paras 130–32.

³⁶ See above n 6, para 160.

use it as a way of transferring the cost of environmental protection to the weaker members of the international community of nations?³⁷

Among these unresolved issues are two other pressing issues that are the choice of forum and conflicts of law. Presumably, three situations may occur in the WTO dispute settlement. Firstly, in the event of a dispute which arises between WTO Members who are simultaneously parties of another multilateral agreement, both the WTO dispute settlement institutions (panels and the Appellate Body) and the judicial body designated by that multilateral agreement should have jurisdiction over the dispute. Generally, the disputing parties may agree on their choice, which may be the judicial body designated by that multilateral agreement. For example, Article 280 of the *United Nations Convention on the Law of the Sea* (UNCLOS) provides that 'Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice'.³⁸ Article 3(7) of the DSU can be deemed as a similar provision, which partly states: 'A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'. But problems may arise if the disputing parties cannot agree on the dispute settlement body. This situation occurred in the *Swordfish* dispute between the European Communities and Chile. Although the disputing parties have reached a provisional settlement and agreed to suspend their respective claims in the International Tribunal for the Law of the Sea and the World Trade Organization,³⁹ the fundamental issue as to how to avoid the practice of 'forum-shopping' in future disputes is still untouched. If both parties in the *Swordfish* case had insisted on their litigation in different tribunals, then the WTO dispute settlement mechanism would have become the more suitable choice as the jurisdiction of the WTO is compulsory, i.e., the WTO dispute settlement procedures may be initiated by the complaining party without the need to reach an agreement with the respondent party. Furthermore, the rulings and recommendations made by WTO panels and the Appellate Body (after they are adopted by the Dispute Settlement Body) have the binding effect on both parties. This distinguishes the WTO dispute settlement mechanism from the generally operational jurisdiction of many other international judicial bodies.⁴⁰ Article 3(7) of the

³⁷ See above n 32, at 105.

³⁸ See the UN website.

³⁹ See Int-Fish Bulletin, 'EC and Chile reach agreement on 10-year swordfish dispute', cf. <http://www.oceanlaw.net/bulletin/sample/focus/0102c.htm>

⁴⁰ Although, under Article 94(1) of the *Charter of the United Nations*, the rulings of the International Court of Justice are generally binding on the disputing parties, and the ICJ has some elements of compulsory jurisdiction, the dispute settlement procedures in the ICJ are much more prolonged than that in the WTO. Furthermore, there is no clear procedure in the ICJ as how to implement the ICJ decisions, and what kind of remedy system is available. If the losing party fails to implement the ICJ decision, the winning party has to refer this issue to the UN Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the decision.

DSU only requires a complaining party 'to exercise its judgement as to whether action under these procedures would be fruitful'.⁴¹

Secondly, if the disputing parties are both WTO Members and parties of another multilateral agreement which provides for exclusive jurisdiction, the situation of 'forum-shopping' seems unavoidable when both parties insist on litigation in different tribunals. An example of this kind of multilateral agreement is the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (Convention). Article 64 of the Convention states: 'Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement'.⁴² As noted above, the WTO provides a compulsory jurisdiction and the DSB may adopt binding rulings and recommendations. But neither the *WTO Agreement*, nor the DSU, contains relevant provisions for the resolution of these 'forum-shopping' issues. There is thus no assumption that a particular dispute must be settled by any particular tribunal. Insofar as the specific expertise of the tribunal is a relevant factor, a disputing party may choose the tribunal which is available to it. As a practical way, the parties to a dispute had better negotiate over the choice of tribunal. Pursuant to the Convention, the International Centre for Settlement of Investment Disputes (ICSID) provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. If the disputing parties (the investors through their governments as individuals cannot bring their complaints to the WTO) agree to conciliation or arbitration through the WTO, then the WTO will have jurisdiction on this dispute.

Thirdly, in the case when a dispute arises between two WTO Members, but only one of them or none of them is a party of another multilateral agreement, then, the WTO will provide the only possible forum for resolving the dispute and, relevant WTO provisions will be invoked. But this does not mean that other multilateral agreements are irrelevant in the WTO dispute settlement process. In the *Shrimp* case, the Appellate Body referred to the UNCLOS, the *Convention on Biological Diversity*, and *Agenda 21* when they interpreted the

In contrast, the DSU has clear provisions on these issues. Therefore, it seems unlikely, at least at the moment, that WTO Members would bring their trade disputes to the ICJ. See *Basic Documents in International Law*, 4th edn, I. Brownlie (ed.) (Oxford University Press, 1995).

⁴¹ See above n 7.

⁴² See the World Bank website at www.worldbank.org/icsid. Another such example is Article 29 (*Complaints and Disputes*) of the *International Tropical Timber Agreement*, which states: 'Any complaint that a member has failed to fulfil its obligations under this Agreement and any dispute concerning the interpretation or application of this Agreement shall be referred to the Council for decision. Decisions of the Council on these matters shall be final and binding.'

term 'natural resources'.⁴³ Generally, there are two categories of multilateral agreements which may become relevant in the WTO jurisdiction: pre-1994 multilateral agreements and post-1994 multilateral agreements. Obviously, whereas general international law is binding on all WTO Members, any of those non-WTO agreements with which the WTO agreements freely interact only has effect as between those WTO Members which both have accepted these agreements (*pacta tertiis nec nocent nec prosunt*). In the event of conflict, those non-WTO agreements either give way to WTO rules or prevail over them, depending on the applicable conflict rules. According to Joost Pauwelyn, those conflict rules can be found in three different places: (a) the non-WTO agreements; (b) the WTO agreements; (c) general international law.⁴⁴ If the WTO agreement conflicts with the provision of another multilateral agreement, which is incidentally a peremptory norm of general international law, the provision of that other agreement prevails.⁴⁵ Since there are no clear provisions which regulate the conflicts of WTO agreements and those post-1994 multilateral agreements, the *Vienna Convention on the Law of Treaties* becomes relevant when WTO Members have to modify obligations between each other. Article 41(1) of the *Vienna Convention* provides that

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty, or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Since there are no clear prohibitions on such modifications in the WTO agreements, WTO Members are free to contract out of the WTO agreements after 1994 provided that these modifications are compatible with the minimum obligations incumbent on each WTO Member and are not incompatible with the general principles of WTO law. For example, WTO Members may form free-trade areas or customs unions under GATT Article XXIV and provide more preferential treatment to the members of these regional agreements. As for the conflicts between WTO agreements and those pre-1994 multilateral agreements, Article 30 of the *Vienna Convention* is relevant in the resolution of such conflicts, which provides that 'When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier

⁴³ See above n 6, paras 48–49.

⁴⁴ See Joost Pauwelyn, above n 1, at 544.

⁴⁵ As Article 53 of the *Vienna Convention on the Law of Treaties* states: '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 recognised 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.' See above n 40.

treaty applies only to the extent that its provisions are compatible with those of the later treaty'. (Article 30(3)) 'When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations'. (Article 30(4))⁴⁶

It has become clear that WTO law will continue to develop with the expansion of this institution's membership and regulated dimension. WTO law, like general international law, does not reflect a once-and-for-all expression of consent. As Joost Pauwelyn noted: 'It would be absurd and inconsistent with the genuine will of States to "freeze" such rules into the mould of the time to, say, April 15, 1994'.⁴⁷ Therefore, to keep WTO law workable, we may borrow the Appellate Body's concept of a 'line of equilibrium'⁴⁸ as it reinforces the need for a delicate balance to be struck between WTO obligations and the right of WTO Members to pursue their own policies. However, to define the 'line of equilibrium' is no easy task. The challenge for future WTO law will be to establish this balance in a way that promotes multilateral co-operation, predictability and the rule of law, and that ensures the coherence of international trade and national policies.

To refer to other international agreements in the situations where WTO agreements are not clear or even silent is just one way to develop WTO law; while to refer to the decisions of other international tribunals is another meaningful way, through which the WTO dispute settlement bodies may deduce some relevant conclusions notwithstanding that these decisions have no legally binding effect on WTO dispute settlement.

III. THE RELEVANCE OF THE DECISIONS MADE BY OTHER INTERNATIONAL TRIBUNALS

Before discussing the relevance of the decisions made by other international tribunals to the WTO dispute settlement, we first need to clarify one important issue, i.e., the relationship of WTO law with those

⁴⁶ See above n 40.

⁴⁷ See Joost Pauwelyn, above n 1, at 546. (Original note omitted) As the author explained in original n 32, the term 'State', in the context of WTO agreements, should include separate customs territories. See also Article XII:1 of the *WTO Agreement*. See above n 7.

⁴⁸ In the *Shrimp* case, the Appellate Body noted that: The task of interpreting and applying the chapeau (of GATT Article XX) is, hence, essentially the delicate one of locating and marking out a line of *equilibrium* between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ. (Emphasis as original.) See above n 6, para 159.

other legal sources including the decisions of other international tribunals. Since the WTO agreements have established rules which are expressly recognized by the contesting parties, it is only natural, when a dispute arises, to apply the rights and obligations from these agreements binding on both parties to the dispute.⁴⁹ However, this rule of priority does not exclude the considerations of other legal sources. In practice, the ICJ judges tend to make an extensive reference to other sources of law in their decisions. The situation in the WTO is different from that of the ICJ. There are no clear provisions in WTO law like Article 38 of the ICJ Statute. Therefore, it is generally perceived that there are no legal obligations for the WTO panellists and Appellate Body members to apply legal sources outside WTO law. The 'covered agreements' have laid the core foundations for the WTO dispute settlement system. All the interpretations of law should begin from here. It is only through the decisions of panels and the Appellate Body that decisions of other tribunals and publicists' teachings are taken into account 'as subsidiary means for the determination of rules of law'.⁵⁰ Therefore, the proper interpretation of the WTO agreements for a panel or the Appellate Body is, 'first of all, a textual interpretation'.⁵¹

Despite the fact that the 'covered agreements' constitute the basic framework of WTO law, it is still possible that there might be some law lacunae in the resolutions of some specific disputes, or some particular aspects of a dispute. Furthermore, it should be recalled that the WTO dispute settlement mechanism does not contain a remanding system,⁵² nor does it permit the respondent party to raise its counter-complaint in the same dispute settlement proceeding.⁵³ In other words, a WTO panel or the Appellate Body has to make its recommendations and rulings on any dispute if it is raised. Under these circumstances, recourse to the sources outside the WTO agreements has to be possible. There are no clear provisions in the WTO agreements as to which international tribunals might be considered of their

⁴⁹ Article II:2 of the *WTO Agreement* states that WTO-covered agreements are 'binding on all Members'. Article 7(1) of the DSU provides that the terms of reference of a WTO panel (unless the parties to the dispute agree otherwise) is 'to examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)'. Article 17(6) of the DSU limits an appeal in the appellate review to the 'issues of law covered in the panel report and legal interpretations developed by the panel'. See above n 7. Therefore, the main task of the WTO dispute settlement bodies is to clarify the rights and obligations of the parties to a dispute through the provisions of the covered agreements.

⁵⁰ Article 38(1)(d) of the ICJ Statute. See *Basic Documents in International Law*, above n 40.

⁵¹ WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, distributed on 4 October 1996, at 18. (Emphasis added)

⁵² See David Palmeter, 'The WTO Appellate Body Needs Remand Authority', 32(1) *Journal of World Trade* (1998).

⁵³ Article 3(10) of the DSU partly states: 'It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked'. See above n 7.

decisions. As a practical matter, WTO panels and the Appellate Body have often referred to the decisions made by the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ).

In the first appellate review of the WTO dispute settlement history, the *Gasoline* appeal, the Appellate Body adopted the 'general rule of interpretation' of the *Vienna Convention on the Law of Treaties*, which has been reinforced by the ICJ in several of its decisions,⁵⁴ and stated that 'interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'⁵⁵ In the dispute *Japan – Taxes on Alcoholic Beverages*, the Appellate Body, following the mandate applied in its appellate review of the *Gasoline* case, repeated that the interpretation of Article 31 of the *Vienna Convention on the Law of Treaties* 'must be based above all upon the text of the treaty'.⁵⁶ The provisions of the treaty are 'to be given their ordinary meaning in their context'.⁵⁷ The object and purpose of the treaty are also 'to be taken into account in determining the meaning of its provisions'.⁵⁸ In the words of the Appellate Body, 'A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness.'⁵⁹

⁵⁴ The ICJ decisions which the Appellate Body referred to include: *Corfu Channel Case* (1949), I.C.J. Reports, p 24; *Territory Dispute Case (Libyan Arab Jamahiriya v Chad)* (1994), I.C.J. Reports, p 23. See above n 2, at 22, original note 45. In original note 34, the Appellate Body referred to two relevant decisions made by other tribunals: *Golder v United Kingdom*, European Court of Human Rights, ECHR, Series A (1995); *Restrictions to the Death Penalty Cases* (1986), Inter-American Court of Human Rights, International Law Reports, No. 70, p 449. See above n 2, at 17.

⁵⁵ See above n 2, at 22. This rule has been followed by the Appellate Body in its later rulings including the one in the dispute *Japan – Taxes on Alcoholic Beverages*, see above n 51, at 10.

⁵⁶ See above n 51, at 12, original note 18. Besides *Territory Dispute Case (Libyan Arab Jamahiriya v Chad)* (1994), *Judgement*, I.C.J. Reports, p 6, at 20, the Appellate Body also referred to the dispute *Maritime Delimitation and Territory Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgement* (1995) I.C.J. Reports, p 6, at 18.

⁵⁷ The Appellate Body here referred to the dispute *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admission Case)* (1950), I.C.J. Reports, p 4, at 8, in which the International Court of Justice stated: 'The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur'. (Quotation original) See above n 51, at 12, original note 19.

⁵⁸ That is to say, the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation. Here, the Appellate Body referred to *Competence of the ILO to Regulate the Personal Work of the Employer* (1926), P.C.I.J., Series B, No. 13, p 6, at 18; *International Status of South West Africa* (1962), I.C.J. Reports, p 128, at 336. See above n 51, at 12, original note 20.

⁵⁹ See above n 51, at 12. See also the similar words in Vol II of the 'Yearbook of International Law Commission' (1966), at 219: 'When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.'

In the *Bananas* case, the European Communities argued that the Panel infringed Article 3(2) of the DSU⁶⁰ by finding that the United States had a right to advance its claims under GATT 1994. The European Communities asserted that, ‘as a general principle, in any system of law, including international law, a claimant must normally have a legal right or interest in the claim it is pursuing’.⁶¹ Furthermore, the European Communities used the ICJ and PCIJ judgements to support its argument that the concept of *actio popularis* ‘is not known to international law as it stands at present’.⁶² The Appellate Body did not agree on this point, and stated: ‘We do not read any of those judgements as establishing a general rule that in all international litigation, a complaining party must have a “legal interest” in order to bring a case. Nor do these judgements deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty.’⁶³ In the view of the Appellate Body, the United States ‘has broad discretion in deciding whether to bring a case against another Member under the DSU’.⁶⁴ Since the United States is a producer of bananas, the potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world suppliers and world prices of bananas. Having taken into account all these considerations, the Appellate Body decided that the United States had its standing in the *Bananas* case.

The *Bananas* case, to a certain extent, reflects the attitude of the Appellate Body towards the decisions made by other international tribunals, particularly those made by the ICJ and the PCIJ. The Appellate Body pays deference to these decisions, but it does not mean that it is necessarily bound by them, particularly when the Appellate Body is still able to find some reasoning from the WTO agreements. After rejecting the EC’s arguments, the Appellate Body succeeded in drawing the legal reasoning from the chapeau of Article

⁶⁰ Which states: ‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law ...’ See above n 7.

⁶¹ *Bananas*, see above n 13, para 15.

⁶² The EC appellant’s submission in paras 9–10 referred to the ICJ and PCIJ Judgements in: the *South West Africa Cases* (Second Phase), I.C.J. Reports 1966, p 4; the *Case Concerning the Barcelona Traction, Light and Power Company Limited* (Second Phase), I.C.J. Reports 1970, p 4; the *Mavrommatis Palestine Concessions Case*, P.C.I.J. (1925) Series A, No. 2, p 1; the S. S. ‘*Wimbledon*’ Case, P.C.I.J. (1923) Series A, No. 1, p 1; and the *Case Concerning the Northern Cameroon*, I.C.J. Reports (1963), p 4. The complaining parties’ appellee’s submission, in para 364, also refers to the ICJ Judgement in the *South West Africa Cases*. See above n 13, pp 64–65, original n 66.

⁶³ See above n 13, para 133.

⁶⁴ *Id.*

XXIII:1 of GATT 1994⁶⁵ and Article 3(7) of the DSU⁶⁶ to uphold the Panel's conclusion that the United States had a legal right to advance its claims in this case.⁶⁷

Despite the fact that the WTO panels and the Appellate Body have much freedom in their selections of the decisions made by other tribunals, the ICJ is still the most authoritative judicial body at the contemporary international level. Established according to Article 92 of the UN Charter,⁶⁸ the ICJ makes its decisions which may involve not only the UN Members,⁶⁹ but also the non-Members of the United Nations.⁷⁰ In contrast, the World Trade Organization is only a technical organization⁷¹ which mainly deals with those trade issues among its Members.⁷² The WTO dispute settlement mechanism is only relevant to the Members.⁷³ Therefore, with its authoritative decisions and the coverage of affairs, the International Court of Justice will continue to play a major role in influencing other international tribunals which include WTO panels and the Appellate Body. Except for the ICJ decisions, the decisions made by other international tribunals have been, so far, rarely referred to. However, neither the *WTO Agreement*, nor its annexed agreements, exclude such possibilities. It is only a matter of time that future WTO panels and the Appellate Body will use the decisions made by other international tribunals than the ICJ to support their legal reasoning.

⁶⁵ Which states: 'If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded...' See above n 7.

⁶⁶ Which states: 'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful...' See above n 7.

⁶⁷ The Appellate Body concluded in its report as the following: 'Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case.' The last sentence reflected the prudence of the Appellate Body in its deliberations on this subtle issue. See above n 13, para 138.

⁶⁸ Which states: 'The International Court of Justice shall be the principal judicial organ of the United Nations.' See *Basic Documents in International Law*, above n 40.

⁶⁹ Id, Article 93(1) states: 'All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.'

⁷⁰ Id, Article 93(2) states: 'A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.'

⁷¹ The legal status of the WTO has been defined in Article VIII:4 of the *WTO Agreement*, which states: 'The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the *Convention on the Privileges and Immunities of the Specialized Agencies*, approved by the General Assembly of the United Nations on 21 November 1947.' See above n 7.

⁷² Id, Article II:1 of the *WTO Agreement* states: 'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.'

⁷³ Id, Article 3(3) of the DSU states: 'The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.'

The WTO was not created in a vacuum (it emerged in the context of general international law and other treaties), nor does its legal existence continue in a vacuum.⁷⁴ The influence in the inter-relationship of WTO law and general international law is mutual. On the one hand, international law has played its vital role in the formation and development of WTO law; while on the other hand, the emergence of WTO law has also altered the general landscape of international law.

IV. THE CONTRIBUTIONS AND IMPLICATIONS OF WTO LAW TO THE DEVELOPMENT OF INTERNATIONAL LAW

The *WTO Agreement* has laid the basis for a highly complex international treaty system which consists of some 20 multilateral trade agreements, with supplementary ‘Understandings’, ‘Protocols’, ‘Ministerial Decisions’, ‘Declarations’ and more than 30,000 pages of ‘Schedules of Concessions’ for trade in goods, and ‘Specific Commitments’ for trade in services. The legal complexity of WTO law is increased by its numerous references to other international agreements and general international law rules, such as the *Charter of the United Nations*;⁷⁵ international financial agreements such as the *International Monetary Fund Agreement*;⁷⁶ international environmental agreements such as the *International Plant Protection Convention*;⁷⁷ international ‘standards’ promulgated by other ‘relevant international organizations open for membership to all (WTO) Members’;⁷⁸ international service agreements on matters including air transport and telecommunications;⁷⁹ international agreements on the protection of intellectual property rights,⁸⁰ and the

⁷⁴ See Joost Pauwelyn, above n 1, at 547.

⁷⁵ Article XVI:6 of the *WTO Agreement* states: ‘This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.’ See above n 7.

⁷⁶ Id, Article III:5 of the *WTO Agreement* states: ‘With a view to achieving greater coherence in global economic policy-making, the WTO shall co-operate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.’

⁷⁷ Article 3(4) of the *SPS Agreement* states:

Members shall play a full part, within the limits of their resources, in the relevant international organisations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organisations operating within the framework of the *International Plant Protection Convention*, to promote within these organisations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures. (Emphasis added) See above n 7.

⁷⁸ Paragraph 3 of Annex A of the *SPS Agreement* states: ‘International standards, guidelines and recommendations (are referred to)... (d) for matters not covered by the above organisations, appropriate standards, guidelines and recommendations promulgated by other relevant international organisations open for membership to all Members, as identified by the Committee (on Sanitary and Phytosanitary Measures).’ See above n 7.

⁷⁹ Id, *Annex on Air Transport Services* and *Annex on Telecommunications* to the *General Agreement on Trade in Services*.

⁸⁰ Article 1(3) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) states: ‘Members shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property right, the nationals of other Members shall

‘customary rules of interpretations of public international law’ (Article 3[2] of the DSU). The WTO legal system is, thus, to consist of more ‘rules of law’ than any other international treaty system.⁸¹ It also requires each Member to ‘ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’ (Article XVI:4 of the *WTO Agreement*), thereby integrating WTO rules into the domestic law of Members.

In terms of the contributions of WTO law to the development of international law, several points can be made here: firstly, the decision-making mechanism provides an elaborate matrix of procedures to ensure that the implementation of WTO rules will be carried on in a more predictable way. In general, the WTO has followed the GATT practice of ‘consensus’ in making the decisions of the Ministerial Conference and the General Council. But the term ‘consensus’ was not defined in the GATT and the word ‘consensus’ was not used. As John Jackson pointed out: ‘The practice of consensus voting developed partly because of the uneasiness of governments about the loose wording of GATT decision-making powers, particularly that in GATT Article XXV’.⁸² In the *WTO Agreement*, however, ‘consensus’ is defined as the situation when the decision occurs and ‘no Member, present at the meeting when the decision is taken, formally objects to the proposed decision’ (Article IX:1). It should be noted that consensus is different from unanimity as the former does not need to take into account the views of those absent. This is a more efficient way. If consensus is not reached, a fall-back is the majority voting authority. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of votes cast. Decisions to adopt interpretations of the *WTO Agreement* including those multilateral trade agreements in Annex 1 and decisions to grant a waiver to a WTO Member shall be taken by three-fourths of the Members.⁸³ Amendments to the provisions of WTO agreements shall take effect for the Members that have accepted them by two-thirds or three-fourths of the Members and thereafter on each other Member upon acceptance by it.⁸⁴ What is significant in Article X of the *WTO Agreement* is that it authorizes the Ministerial Conference to

be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the *Paris Convention* (1967), the *Berne Convention* (1971), the *Rome Convention* and the *Treaty on Intellectual Property in Respect of Integrated Circuits*, were all Members of the WTO members of those Conventions...’ (Emphasis added) See above n 7.

⁸¹ See Ernst-Ulrich Petersmann, ‘How to Promote the International Rule of Law? Contributions by the WTO Appellate Review System’ (included in James Cameron and Karen Campbell (eds), *Dispute Resolution in the World Trade Organisation* (Cameron May, 1998), at 75).

⁸² John H. Jackson, *The World Trade Organization Constitution and Jurisprudence* (The Royal Institute of International Affairs, 1998), at 46.

⁸³ A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus. See n 4 of the *WTO Agreement*. See above n 7.

⁸⁴ Amendments of Articles IX, X of the *WTO Agreement*, Articles I and II of GATT 1994, Article II:1 of GATS, Article 4 of the Agreement on TRIPS shall take effect only upon acceptance by all Members.

decide by a three-fourths majority of the Members whether the Member, which has not accepted the amendment within a specified period, should withdraw from the WTO or remain as a WTO Member. This gives the Ministerial Conference extraordinary power to influence the WTO Members on their decisions, although it seems unlikely that the Ministerial Conference will exercise this power frequently. With regard to the voting system, Article IX:1 of the *WTO Agreement* states: ‘... At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote.’⁸⁵ This is an advantage to many small countries, particularly those small developing countries, as they can use their combined force to achieve the goals which their individual power is unable to do so.⁸⁶

Secondly, with the ‘judicialization’ of the dispute settlement mechanism, WTO panels and the Appellate Body, through the practice of these years, has developed a due process on these issues such as the opportunity of a complaining party and the responding party to make their case fully in a WTO dispute settlement proceeding, the share of burden of proof, and standard of review. Article 3(8) of the DSU states:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.⁸⁷

Normally, this provision can be understood in a two-tier way: (i) the fact of the breach of WTO obligations is sufficient enough for a claimant to raise a complaint;⁸⁸ (ii) it is the responsibility of the responding party to provide

⁸⁵ Article IV:1 of the *WTO Agreement* states: ‘... The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements...’. Article IV:2 states: ‘... In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council...’. Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the *Dispute Settlement Understanding*. See above n 7.

⁸⁶ Although whether the result will really benefit the developing countries remains debating, the recently finished Cancun Ministerial Conference has shown that developing countries have begun to use their combined force in the WTO to argue on some significant issues with the developed countries.

⁸⁷ See above n 7.

⁸⁸ The rule that it is up to the complaining party to prove the breach of WTO obligations it alleges was first explicitly confirmed in the panel report of the case *Japan – Taxes on Alcoholic Beverages*. When addressing the claim under GATT Article III:2, first sentence, the Panel noted that: ‘... complainants have the burden of proof to show first, that products are like and second, that foreign products are taxed in excess of domestic ones.’ (Emphasis added) When turning to the claim under GATT Article III:2, second sentence, the Panel made clear that: ‘... the complainants have the burden of proof to show first, that the products concerned are directly competitive or substitutable and second, that foreign products are taxed in such a way so as to afford protection to domestic production.’ (Emphasis added) See WTO Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted as modified by the Appellate Body on 4 October 1996, para 6.14 and para 6.28.

evidence and argument to rebut this complaint.⁸⁹ As regards standard of review, the WTO agreements, except the *Antidumping Agreement*, contain no explicit provisions on this issue. Article 11 of the DSU simply exhorts panels to ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements’.⁹⁰ This loose wording, however, cannot deny the fact that standard of review is essential to deliberating a qualified panel report. In the view of the Panel in the dispute of *United States – Restriction on Imports of Cotton and Man-made Fibre Underwear*, a policy of total deference to the findings of the national authorities could not ensure an ‘objective assessment’ as foreseen by Article 11 of the DSU. A review by the panel is not a substitute for the proceedings conducted by national authorities. Rather, the panel’s function should be to assess objectively the review conducted by the national authorities.⁹¹ As some scholars pointed out, the standard-of-review question ‘reflects a central problem for the future of the international trading system – how to reconcile competing views about the allocation of power between national governments and international institutions on matters of vital concern to governments, as well as the domestic constituencies of some of those governments’.⁹² The practice of panels on this issue will surely benefit the refinement of WTO law and international law as well.

Thirdly, the appellate jurisdiction distinguishes the WTO dispute settlement bodies from many other international tribunals. The transposition of the appellate function to the international arena is a relatively novel development.⁹³ There have been few examples of international tribunals exercising an appellate review over international judicial bodies. Even the International

⁸⁹ In the *Gasoline* case, the Panel found that a US gasoline regulation violated GATT Article III:4 by treating imported gasoline less favourably than domestic gasoline. The Panel then addressed the defences invoked by the United States under GATT Article XX(b), (d) and (g): ‘The Panel noted that as the party invoking an exception (*in casu* Article XX[b]), the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements...’. The Appellate Body in the same case elaborated on the burden of proof with respect to the general introduction (or ‘chapeau’) to GATT Article XX, which rests on the party invoking an exception under Article XX, as follows: ‘The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraph of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue’. WTO Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2, para 6.20. Report of the Appellate Body, see above n 2, at 22–23.

⁹⁰ See above n 7.

⁹¹ WTO Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R.

⁹² See Steven P. Croley and John H. Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 90 *American Journal of International Law* (1996), at 194.

⁹³ The other example is the *North American Free Trade Agreement*. See Article 1904.13 and Annex 1904.13.

Court of Justice was perceived only to be able to make a review rather than exercise an appellate function in respect of certain international administrative tribunals. As Elihu Lauterpacht pointed out, in the example of the UN Administrative Tribunal,

Initially, there was no appeal from this tribunal, though it was always possible, if the case aroused sufficient interest, for the General Assembly of the UN (or comparable organ of the Specialized Agencies) upon their own initiative to request an advisory opinion from the ICJ as to whether a specific question of jurisdiction or even of substance had been correctly dealt with by the Tribunal. This process has never been pursued. If it had been, it would not really have been an appeal. It could not have been initiated by either the staff member or the UN Secretariat at their sole options.⁹⁴ (Original notes omitted)

Since there is no general guidance in international law on such matters as the scope of the appellate function, the nature of appellate procedures and the role of appellate judges, the practice in the WTO appellate review is particularly contributory to the development of international jurisdiction.

Fourthly, the compensation mechanism in the WTO dispute settlement system is a fundamental factor to ensure the implementation of WTO rules. The practice to suspend the application of concessions and obligations to the offending party is not new in the WTO. Article XXIII of GATT 1947 permitted the CONTRACTING PARTIES to authorize a contracting party or parties to suspend GATT obligations as a sort of 'sanction'. Because of the contractual status of the GATT and lack of provisions on this issue, the formally authorized suspension in the GATT is rare.⁹⁵ The DSU, in contrast, has a series of clauses relating explicitly to enforcement and implementation. The compensation mechanism in the WTO dispute settlement works as a 'cross-retaliation' process, making the compensation available to the suffered party even from outside the field where its benefits have been impaired or nullified, or where the attainment of any objective of the 'covered agreements' has been impeded. The specific provisions for compensation are included in Article 22 of the DSU. Although whether or not this compensation mechanism is equally to benefit all WTO Members still awaits some time to see, the consequential fact is that this reform has helped WTO law to become more disciplined and authoritative. One possible effect is that such a mechanism will scare some potential Members who dare to breach the trade rules. With no doubt, this will bring a significant impact upon the rule-

⁹⁴ Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Grotius Publications Limited, 1991), at 106. The process that issues are brought to the ICJ from the Administrative Tribunal has now been abolished.

⁹⁵ According to John Jackson, the GATT formally authorized suspension in only one early case. See John H. Jackson: *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969), at 185.

orientation of WTO law, and a potential impact upon the development of international law.

The global integration of States requires a more effective 'international rule of law'. This can be achieved only by rendering international law more effective and by interpreting and integrating 'the national rule of law' and 'the international rule of law' in a mutually consistent manner. The unified WTO law and the requirement that Members' national laws, regulations and administrative procedures should be in conformity with WTO law have both served as models for the 'legalization' and 'judicialization' on the governance of international relations, although whether all Members in the organization have really benefited from this global governance remains debating. The practice of the Appellate Body, while interpreting WTO law in the light of general international law principles and with due regard to the jurisprudence of the ICJ, has enhanced legal security and consistency in the WTO legal system. Its case law, though still very limited, has already visibly strengthened the 'international rule of law', for instance by the regular adoption and implementation of its dispute settlement findings to date, and by inducing other WTO bodies (such as the Textiles Monitoring Body) and Member governments to apply international law more strictly. While the emphasis on literal interpretations of the WTO texts in the panel and Appellate Body reports so far is typical of the early jurisprudence for a new international tribunal, these developments have shown that WTO law is already an important part of international law.

WTO law has equally illustrated how important the 'international law of co-operation' has become in the modern world. Its focus on economic welfare is particularly important to many developing countries. Since World War II, the participants of interstate relations are no longer a small club of Western nations, but a much larger number of nations representing different civilizations. Correspondingly, a new dimension has been given to the concern of international relations with matters of welfare. This is the public concern with international economic development. States, despite all their differences of political ideology, have acknowledged it as their indispensable task to enhance the welfare of their people. This change of approach determines the change of structure of international law. As Wolfgang Friedmann pointed out, modern international law moves essentially on three different levels:

- (a) The international law of existence, i.e., the classical system of international law regulating diplomatic interstate relations, orders the coexistence of States regardless of their social and economic structure.
- (b) The universal international law of co-operation, i.e., the body of legal rules regulating universal concerns, the range of which is constantly extending, extends from matters of international security to questions of international communication, health and welfare.
- (c) Closely-knit regional groupings can proceed further with the common regulation of their affairs because they are linked by a greater degree

of community of interests and values, and usually also of regional proximity, than mankind at large. They can therefore act as pioneers in the transition from international to community law.⁹⁶

These changes have expanded the dimension of international law both horizontally and vertically, bringing about a further reflection of those fundamental issues such as the allocation of power in this world, about democracy and accountability, and most important of all, about the objective of international law.

CONCLUSION

Since its inception, modern international law has developed with the increasing of governmental co-operation. In the view of Patricia Birnie and Alan Boyle, the Congress of Vienna in 1815 and the series of international conferences that followed it were the precursors of the political co-operation in global terms. The creation of international bodies for functional, administrative purposes began with those innovative nineteenth-century public unions such as the Universal Postal Union and the International Telegraphic Union. The first major law-making conferences, the Hague Peace Conferences of 1898 and 1907, represented another major development in the institutionalization of international co-operation.⁹⁷ International organizations began to flourish in the post-World War II era. The representatives of them are the United Nations and the World Trade Organization. Although each of these organizations functions differently, they represent the two most important additions to the machinery of international co-operation.

⁹⁶ Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964), at 367.

⁹⁷ See Patricia W. Birnie and Alan E. Boyle, *International Environmental Law* (2nd edn, Oxford University Press, 2002), Chapter Two.