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ISSN 1011-6702 Mode of citation: 37 J.W.T.6

Journal of World Trade **37(6)**: 997–1030, 2003.

How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?

Questions of Jurisdiction and Merits

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The recognition that public international law, including non-World Trade Organization (WTO) treaties, has a role to play in the WTO has gained momentum. However, what does it mean in practice for litigants before a WTO Panel? Is one just paying lip service to other non-WTO treaties to enhance the legitimacy of the WTO or can a WTO Member actually win or lose a dispute by pleading this other law? That is the question examined in this essay. Put differently, can the defendant before a WTO Panel successfully fence off a WTO complaint based on other treaties or rulings from other courts or tribunals? Two types of cases are discussed: First, cases where non-WTO law may lead a Panel to decline jurisdiction; Second, cases where non-WTO law may effectively justify, on the merits, what would otherwise be a breach of the WTO treaty.

INTRODUCTION

It has become standard practice for WTO Panels and the Appellate Body to use non-WTO law when *interpreting* the *meaning* of terms in the WTO agreement. Such interpretation can, for example, lead to broader GATT exceptions, as in *US—Shrimp*, where the Appellate Body interpreted the words "exhaustible natural resources" in GATT Article XX(g) with reference to certain environmental treaties.[1] It may also *narrow* the scope of GATT rules or exceptions, as shown in the ICJ *Case Concerning Oil Platforms*, where a treaty provision similar to GATT Article XXI(b)(iii) on essential security interests was interpreted restrictively with reference to rules of general international law prohibiting the use of force.[2] In addition to treaty interpretation, non-

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[1] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ("*US—Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras 128–132. On the process of interpreting the WTO treaty with reference to non-WTO law, see Gabrielle Marceau, *A Call for Coherence in International Law—Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 J.W.T. (1999), 87; and Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), pp. 244–274 (Treaty interpretation as a conflict-avoidance tool).

[2] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, at <http://www.icj-cij.org/icjwww/idocket/iop/iopjudment/ioptocjudgment(s).htm> discussed *infra*.

WTO law is commonly referred to also to fill largely procedural gaps in the WTO agreement: the WTO agreement is silent on questions such as burden of proof, standing, representation before Panels, the retroactive application of treaties or error in treaty formation; as a result, reference has been made to rules of general international law addressing those questions, essentially custom or general principles of law binding on all states.[3] As important as those two processes of reference to non-WTO law may be, it is unlikely that they determine the substantive outcome of a WTO dispute: the process of treaty interpretation stops there where the words in the relevant WTO provision are unambiguously clear (interpretation *contra legem* is prohibited); applying the largely procedural rules of general international law may eventually decide a case, but hardly influences its substantive merits.

This article takes the relevance of non-WTO law before WTO Panels a step further. It examines instances where non-WTO law constitutes an independent defence against claims of violation of WTO law. Elsewhere,[4] I have set out a conceptual framework that permits WTO Panels to take account of such independent defences under non-WTO law (summarized in Section I below). In this article, the main objective is rather to offer real-life examples where non-WTO law can play this role based, first, on specific disputes that have most recently come before WTO Panels or other tribunals and, second, on newly negotiated treaties with a trade component (ranging from the Kimberley process on conflict diamonds[5] to the WHO Framework Convention on Tobacco Control[6]).

In this exercise, it is useful to distinguish two types of cases: First, cases where the invocation of non-WTO law may lead a Panel to find that it has no jurisdiction (Section II); Second, cases where non-WTO law may effectively justify what would otherwise be a breach of WTO rules (Section III). By way of conclusion, the essay summarizes the different alternatives available to WTO Panels faced with defences under non-WTO law, as well as some of the practical consequences and policy concerns that they entail.

[3] For an overview of relevant case law, see J. Cameron and K. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 I.C.L.Q. (2001), 248–298; and Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 A.J.I.L. (2001), 563. See also Meinhard Hilf, *Power, Rules and Principles—Which Orientation for WTO/GATT Law?*, J.I.E.L. (2001), 111–130. For an increasingly isolated critique, see John McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, Northwestern Law and Economics Research Paper No. 03-09, p. 36, at <http://papers.rsrn.com/so13/papers.cfm?abstract_id=421661>. ("I would not interpret the WTO to permit it to be ... supplemented by emerging customary international law ... The WTO represents a comprehensive code for the overriding purpose of expanding trade. Therefore, it is not amenable to supplementation by other rules with other objectives that will detract from this purpose"): It is difficult to see, however, how WTO Panels could operate outside of general international law and have to invent from scratch, for example, rules on burden of proof, good faith, state responsibility etc.; nor is it easy to square Professor McGinnis' view with the Vienna Convention rules on treaty interpretation, explicitly confirmed in Article 3.2 of the DSU and numerous Appellate Body decisions

[4] Pauwelyn, as note 1 above, at pp. 440–478; and Pauwelyn, as note 3 above, at 559–565.

[5] The text of the Kimberley Process Certification Scheme is at <http://kimberleyprocess.com>.

[6] Adopted unanimously by the 56th World Health Assembly on 21 May 2003. The final text is in World Health Assembly Resolution 56.1, available at <http://www5.who.int/tobacco/page.cfm?sid=96>.

To date, WTO Panels and the Appellate Body have been able to avoid the question of whether defendants can win a WTO dispute based solely on non-WTO law. In the not so distant future, they will no longer be able to hold off this boat: First, because of the ever increasing interaction between WTO law and other branches of international law, be it regional trade agreements or other treaties or regimes with a trade component (such as the Cartagena Biosafety Protocol[7] or recommendations by the International Labor Organization (ILO) in respect of Myanmar[8]); Second, because of the growing willingness of WTO Members to explicitly rely on these other sources of law even before a WTO Panel, inspired largely by the compulsory nature of WTO dispute settlement: Any trade-related policy of all WTO Members can now be challenged at the WTO without the possibility for defendants to block the process. Defendants are, therefore, more likely to invoke all possible defences, including those to be found under non-WTO law.

If and when the occasion arises, it is crucial that the Appellate Body realizes the centrality of this question both for the WTO and the wider system of international law (indeed, questions of overlapping rules of international law arise not only at the WTO, but increasingly also before the International Court of Justice, the World Bank and the IMF,[9] UNCLOS and investment-related arbitrations[10] as well as regional institutions such as the courts of the European Union[11] and the European Court of Human Rights[12]). After all, the question is crucial not only when formally raised before a WTO Panel, it is decisive also when national parliaments and administrations are considering the adoption of new policies—ranging from trade embargoes to the adoption of a new treaty with a commercial impact—and raise the question of whether a proposal, based on non-WTO rules of international law, would pass muster before a WTO Panel. In this sense, offering legal predictability to national decision-makers is as important as resolving the systemic questions concerning the interaction between WTO law and other rules of international law.

[7] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 39 I.L.M. 1027.

[8] See note 96 below.

[9] In particular, an increasing number of overlaps arise between the rules of the World Bank and the IMF, on the one hand, and UN-related rules and decisions, on the other hand. This overlap is complicated by the stated non-political nature of the Bank and the IMF (set out in Articles IV, section 10 and III, section 5(b) of the Bank's Articles of Agreement and Articles I (v) and V, section 3 of the IMF's Articles of Agreement). See, also, the role of, e.g., international human rights standards before the World Bank's Inspection Panel in cases such as "Chad: Petroleum Development Project", discussed in World Bank, *The Inspection Panel 10 Years On* (Washington, D.C.: World Bank, 2003), p. 96. Also see the recent *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, at <http:www.icj-cij.org/icjwww/idocket/iop/iopjudgment/ioptocjudgment(s).htm>

[10] In respect of UNCLOS, see notes 18, 62, 66 and 73 below. For a glimpse of potential overlaps in investment disputes, see Gaetan Verhoorsel, *The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, J.I.E.L. (2003), 493–506; and the ICSID case *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* 40 ILM 426 (2001), and 41 ILM 1135 (2002), discussed in notes 36, 49, 53, 57, 67 and 70 below.

[11] See, e.g., *Opel Austria v. Council*, CT-115/94, REC. 1997, 11–39; and *Racke GmbH v. Hauptzollamt Mainz*, C-162/96 [1998] ECR I-3655.

I. Why and How Can WTO Panels Apply Non-WTO Law?

It is undisputed that WTO Panels have jurisdiction only to decide on claims under WTO covered agreements. Under Article 1.1, the DSU[13] applies only to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the [DSU]", i.e., the so-called WTO covered agreements. The question here is, rather, whether in the examination of such WTO claims, non-WTO law can offer an independent defence or justification that precludes a Panel from finding a breach of WTO law. This question relates to the scope of the applicable law before a WTO Panel, a matter to be distinguished clearly from that of the jurisdiction of WTO Panels.[14] The difference between jurisdiction and applicable law is well known and accepted in other international courts and tribunals,[15] though often neglected at the WTO. Making an analogy with the limited jurisdiction of the International Court of Justice (ICJ), the *Lockerbie* cases decided by the ICJ perfectly illustrate the difference between jurisdiction and applicable law: There, the ICJ had jurisdiction to consider Libyan claims only under the Montreal Convention. However, this did not stop it from also examining other international law, in particular UN Security Council Resolution 748 invoked in defence by the United Kingdom and the United States, as part of the applicable law.[16]

The question of applicable law before WTO Panels is addressed in DSU Article 7. It instructs Panels to examine the matter referred to them "in the light of the relevant provisions" of the covered agreement(s) cited by the parties to the dispute and to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". This provision imposes an obligation on Panels to address and possibly apply certain WTO rules. At this juncture, two possibilities arise: One either considers this reference to WTO rules as an exhaustive list of all rules that WTO Panels can possibly

[12] See, e.g., Lucius Caflisch, *The Rome Statute and the European Convention on Human Rights*, 23 Human Rights L.J. (September 2002), 1–12.

[13] Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Marrakesh Agreement (DSU).

[14] Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J.W.T. 3 (June 2001), 499; and Pauwelyn, as note 1 above, at pp. 443–472.

[15] As most recently noted by an Arbitral Tribunal under Annex VII of UNCLOS: "The Tribunal agrees ... that there is a cardinal distinction between the scope of its jurisdiction ..., on the one hand, and the law to be applied by the Tribunal ..., on the other hand" (*Mox Plant* case (*Ireland v. United Kingdom*), Order No. 3 of 24 June 2003, at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf>, p. 6, para. 19). In the same vein, see the investor-state dispute settlement mechanism under Chapter 11 of NAFTA: Articles 1116–17 of NAFTA entitled "Claim by an Investor of a Party ..." limits the *jurisdiction* of NAFTA arbitration tribunals to *claims of violation* of Section A of NAFTA Chapter 11 and NAFTA Articles 1503(2) and 1502(3)(a); in contrast, Article 1131 of NAFTA, entitled "Governing Law" sets out the broader scope of the *applicable law* to be considered in examining the validity of those enumerated NAFTA claims ("A Tribunal established under this Section shall decide the issues in dispute in accordance with *this Agreement* [that is, *all* NAFTA provisions] *and applicable rules of international law*"; emphasis added).

[16] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. US*), Provisional Measures, ICJ Reports 1992 114, para. 42 (14 April).

apply,[17] Or one holds the view that confirming the relevance of some rules—*in casu* those that WTO Panels will most commonly be asked to apply, i.e. WTO rules—does not preclude that WTO Panels may apply also other, non-WTO rules in particular circumstances. In my opinion, the latter view must prevail, for several reasons.

First, as a practical matter, WTO case law shows that WTO Panels and the Appellate Body have not limited themselves to the four corners of WTO covered agreements: they have referred to general principles of law, customary international law and even other, non-WTO treaties.[18] Second, DSU Article 3.2 explicitly confirms that WTO covered agreements must be clarified "in accordance with customary rules of interpretation of public international law". Article 31(3) of the Vienna Convention on the Law of Treaties, part of the rules of interpretation thus referred to, directs that in interpreting a treaty, account must be taken not only of the treaty itself (*in casu*, the WTO treaty), but also of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", as well as "any relevant rules of international law applicable in the relations between the parties". The WTO treaty thereby explicitly frames itself in the wider context of public international law, including other non-WTO treaties. Third, and most importantly, the WTO agreement is a treaty part of public international law. By definition, and even without the explicit confirmation in DSU Article 3.2, the WTO agreement cannot, therefore, be applied in isolation from other rules of international law. Just as private contracts are automatically born into a system of domestic law, so treaties are automatically born into the system of international law. Much the way private contracts do not need to list all the relevant legislative and administrative provisions of domestic law for them to be applicable to the contract, so treaties need not explicitly set out rules of general international law for them to be applicable to the treaty (e.g., the text of the Vienna Convention does not have to be attached to the new treaty for general international law rules on the law of treaties to be applicable to it and also see the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003). The same applies as regards other, non-WTO treaties: the WTO treaty was created next to other pre-existing treaties and, in turn, continues its existence in a framework where other,

[17] See, e.g., Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 Harvard Int'l L.J. (1999), 333, at 342 (stating that the explicit language in the DSU "would be absurd if rights and obligations arising from other international law could be applied by the DSB", and that "... with so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable").

[18] See the case law summarized in the references at notes 2, 3 and 14 above. As a matter of fact, Panels had little choice but to apply certain rules of general international law. Or should they have re-invented from scratch rules on, e.g., burden of proof, good faith, *pacta sunt servanda*, etc.? As stated in a recent award under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention):

> "It should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*. Even then, it must defer to a relevant *jus cogens* with which the Parties' *lex specialis* may be inconsistent" (Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v. United Kingdom*), Final Award, 2 July 2003, para. 84 at <http://www.pca-cpa.org/PDF/OSPAR%20Award.pdf>).

new treaties are created next to it. True, unlike Article 293 of the UN Law of the Sea Convention (UNCLOS), Article 1131 of NAFTA and Article 38 of the ICJ Statute—which explicitly include other rules of international law as part of the applicable law—the DSU does not explicitly confirm its creation and existence in international law. However, given the nature of the WTO agreement as a treaty under public international law, there was no need for the DSU to do so. On the contrary, the principle is that all other international law continues to exist next to the WTO treaty unless the WTO treaty explicitly deviates or contracts out of this other law.[19] In other words, there was no need for Article 7 of the DSU to explicitly include also other rules of international law as part of the applicable law before WTO Panels; to the extent that those other rules were not deviated from in the WTO treaty, this is automatically the case.

Finally, an oft-cited provision in support of the alleged obligation on WTO Panels to contain themselves to WTO covered agreements, is DSU Article 3.2 which provides: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".[20] Should this provision be read as saying that WTO Panels, the Appellate Body, and the DSB cannot ever add to

[19] Confirmed in the WTO by the Panel Report on *Korea—Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, para. 7.96 ("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") and the Appellate Body Report on *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 60 and footnote 40 ("We observe that the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention apply to any treaty, in *any* field of public international law, and not just to the WTO agreements"; "It might be possible for the parties to a treaty expressly to agree that the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention do not apply, either in whole or in part, to the interpretation of a particular treaty. Likewise, the parties to a particular treaty might agree upon rules of interpretation for that treaty that differ from those rules of interpretation in Articles 31 and 32 of the Vienna Convention. But this is not the case here"). For a confirmation by other courts and tribunals: *Georges Pinson* case, Franco-Mexican Commission (Verzijl, President), A.D. 1927-8, No. 292, para. 50 ("Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way"); *Chorzow Factory* (Merits), PCIJ, Ser. A, no. 17, 29 (1928) ("Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, ICJ Reports 1971, 16, para. 96 ("it would be necessary to show that the mandates system ... excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties"); *Elettronnica Sicula S.p.A (ELSI)* case, ICJ Reports 1989, 42, para. 50 (in respect of the obligation to exhaust local remedies, "the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so"); and Permanent Court of Arbitration, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, Final Award quoted in note 18 above.

[20] A provision repeated in Article 19.2 of the DSU.

or diminish the rights and obligations explicitly set out in WTO covered agreements?[21] For the reasons set out above, this author thinks not. But what is then the purpose of DSU Article 3.2? In my view, it does not limit the applicable law before WTO Panels, nor does it deal with the relationship between WTO covered agreements and all past and future law. Rather, it confirms the rather obvious limits a WTO Panel must observe in interpreting WTO covered agreements. The phrase directly follows the one quoted earlier, incorporating rules of interpretation of public international law. In exercising this judicial function of interpretation, WTO Panels may clarify the meaning of WTO covered agreements, but they may not "add to or diminish the rights and obligations provided in the covered agreements". To put it differently, as judicial organs, WTO Panels may not create new rights and obligations; they must apply those that WTO Members agreed to. However, stating what the judiciary can do with the law differs greatly from stating what the legislature (i.e., WTO Members) has done, or can do, with the law. Article 3.2 specifies that the WTO judiciary, like any other judiciary, cannot "change" the WTO treaty. However, that does not limit the extent to which WTO Members may conclude or have concluded other treaties that can influence their mutual WTO rights and obligations. As important as the distinction is between Panel jurisdiction (WTO claims only) and applicable law (potentially all international law), so too is the distinction between interpreting WTO rules (and the prohibition to add or detract from those rules in the process) and examining WTO claims in the context of other applicable international law (where the expression of state consent and conflict rules of international law must decide the outcome).

The only remaining question relates then to the conditions that non-WTO rules of international law must meet to be applicable before a WTO Panel in the examination of WTO claims.

First, and most obviously, these other rules must be binding on both disputing parties (and be invoked by either of them). If either of the two parties is not so bound, these other rules cannot be held against it. In technical terms, this means that one either applies other rules binding on the disputing parties as part of the applicable law on the

[21] In support of this position, see, e.g., McGinnis, as note 3 above. For Professor McGinnis, WTO rules can only be affected by amendment, interpretation and waiver procedures in the WTO treaty itself; not by other international rules, created outside the WTO, even if those rules have been agreed to and are binding on the disputing WTO Members. He thus posits the WTO treaty as a completely self-contained regime, de-linked from other treaties and custom, and obscures the fact that treaty relations between states cannot only be affected pursuant to, for example, the amendment procedures in the particular treaty, but also by the conclusion of other treaties which (though not amending the prior treaty) may modify it as between the parties to the new treaty (Vienna Convention on the Law of Treaties, Articles 41 and 58, see notes 23 and 24 below). He does so based on arguments that the WTO treaty has more legitimacy and "greater broad consensus" (p. 42). Although this may be true when comparing the WTO treaty to custom (see note 107 below), it does not apply to the interaction between the WTO treaty and other, non-WTO treaties. Rather than preserve the sovereign will of WTO Members, not to give affect to such other treaties would undermine state sovereignty and the democratic legitimacy of WTO rules. It would transform the WTO into a trade-only safe heaven, unaffected by other, equally valid expressions of state will enshrined in, for example, international human rights or environmental treaties (making available an exit option not only amongst branches of international law, but also from domestic law). However, this may well be the very objective of Professor McGinnis' position when he states (at p. 36) that "... the WTO represents a comprehensive code for the overriding purpose of expanding trade. Therefore, it is not amenable to supplementation by other rules with other objectives that will detract from this purpose."

ground that the WTO agreement, as a treaty under public international law, must be applied in the context of such other treaties; or that one interprets the relevant WTO rules in the context of such other treaties based on, for example, Article 31.3(c) of the Vienna Convention referring to "any relevant rules of international law applicable in the relations between the parties". The advantage of the latter approach is that DSU Article 3.2 offers an explicit link to Article 31.3(c) of the Vienna Convention. The disadvantage of this approach is, however, that one risks giving too broad a meaning to the term interpretation. Indeed, what one is effectively doing when dis-applying a WTO norm to the advantage of another, non-WTO norm agreed upon only by the disputing parties (or even when applying a rule of general international law to solve a question on which the WTO treaty itself remains silent) is not so much interpreting WTO terms in the light of other norms agreed upon by WTO Members. Rather, one is then applying WTO norms together with such other norms as they are binding (only) in the relationship between the disputing parties. The discussion amongst commentators on whether the reference to other rules in Article 31.3(c) of the Vienna Convention includes only other rules expressing the common intentions of all WTO Members or also rules that are binding on just the disputing parties, expresses this dilemma of which technique to use to refer to non-WTO rules. This author considers it more appropriate to draw a line between interpretation with reference to other norms and application of other norms. Others end up with the same result—that is, a Panel can refer to non-WTO rules binding only on the disputing parties—based solely on a wider notion of treaty interpretation under Articles 31 and 32 of the Vienna Convention.[22]

Second, for WTO Panels to apply non-WTO rules in their decision on WTO claims, such other rules must be both valid and legal. Most importantly, their very conclusion may not be prohibited in the WTO treaty (an example would be an agreement on voluntary export restraints explicitly prohibited in Article 11 of the WTO Safeguards Agreement[23]). Moreover, these other rules may not affect the rights or obligations of third parties (an example would be a bilateral agreement in which a trade concession is explicitly reserved to the other party to the agreement, in breach of

[22] Marceau, as note 2 above; Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties*, 35 J.W.T. 6 (December 2001), 1081–1131; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 E.J.I.L. 4 (September 2002), 753; David Palmeter and Petros Mavroidis, *The WTO Legal System: Sources of Law*, A.J.I.L. (1998), 398–413; and Lorand Bartels, *The Human Rights Clause in the International Agreements of the European Community*, doctoral thesis, April 2002, p. 366, footnote 723 (on file with the author).

[23] A distinction must be made, however, between, on the one hand, an agreement whose conclusion is explicitly prohibited in the WTO treaty (such as voluntary export restraints under Article 11 of the Safeguards Agreement) and, on the other hand, non-WTO rules that simply contradict rules in the WTO treaty (say, an agreement in which the right of appeal is waived, contrary to Article 17 of the DSU or an agreement permitting trade restrictions otherwise not permitted under GATT Article XX). The former agreement is "illegal" (Article 41.1(b) of the Vienna Convention does not permit the *inter se* modification of a multilateral treaty if such modification is "prohibited by the treaty") and cannot, therefore, be applied in any event; the latter rules are "legal" but conflict with WTO rules and the question is then which of the two rules—the WTO norm or the other norm—prevails in the specific circumstances of the case.

the MFN rights of other WTO Members).[24] In addition, a treaty altering WTO rights or obligations as between its parties only, may not be concluded by coercion, fraud or corruption nor be based on error; if not, it is invalid.[25] In this respect, the risk of powerful WTO Members "imposing" bilateral treaties on weaker states is real. It could even be an argument against WTO Panels taking account of non-WTO treaties altogether. Nonetheless, this risk is a reality inherent in the process of international law making. It is present even in the conclusion of WTO agreements (where the risk of powerful states pressing their views on weaker states is as serious as it is in other multilateral fora). Though Panels ought to remain sensitive to this reality, it should not become a scapegoat for neglecting non-WTO rules altogether.

Third, for non-WTO rules to justify an otherwise WTO inconsistent measure, the other rule must prevail over the contradictory WTO rule pursuant to conflict rules of international law. This may be so because it is stated explicitly in the WTO treaty itself or in the other, non-WTO treaty, or because the non-WTO rule is later in time (*lex posterior*) or more specific to the circumstances (*lex specialis*) as compared to the WTO rule.[26]

I next examine specific instances where WTO Panels may thus be called upon to apply non-WTO rules in a way that can lead the defendant to win a WTO dispute: first, for lack of jurisdiction (Section II); second, on the merits (Section III).

II. Because of Non-WTO Law, the WTO Panel has no Jurisdiction

In April 1994, WTO Members agreed to submit their disputes under WTO covered agreements to the compulsory jurisdiction of WTO Panels and the Appellate Body. Does this mean that since then all disputes between WTO Members that have the slightest trade component must necessarily be decided at the WTO? This would be hard to imagine. A variety of reasons exist why WTO Members may, by common agreement, decide not to go to the WTO: they may prefer to settle a dispute amicably without resort to third-party adjudication; they may consider that regional trade disputes are best settled before regional tribunals[27]; they may agree that certain disputes are better decided by non-trade tribunals, etc. In the event that two WTO Members have thus agreed not to settle a particular dispute at the WTO, can a WTO Panel simply ignore this agreement? Or should it take cognizance of it and, as the case may

[24] Article 41.1(b)(i) of the Vienna Convention on the Law of Treaties prohibits the *inter se* modification of a treaty in case it "affect[s] the enjoyment by the other parties of their rights under the treaty or the performance of their obligations". The general principle of *pacta tertiis nec nocent nec prosunt* is stated in Article 34 of the Vienna Convention.

[25] Articles 48–52 of the Vienna Convention.

[26] On those conflict rules of international law, see Pauwelyn, as note 1 above.

[27] On the interaction between WTO dispute settlement and dispute settlement under regional trade agreements, see Gabrielle Marceau and Kyung Kwak, Overlaps and Conflicts of Jurisdiction between the WTO and RTAs, *Conference on Regional Trade Agreements*, WTO, 26 April 2002, at p. 8, to be found at <http://www.wto.org/english/tratop_e/region_e/sem_april02_e/sem_april02_reading_e.htm>; and Joost Pauwelyn, *Going Global or Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with Other Jurisdictions in particular that of the WTO*, Minnesota J. Global Trade (2004, forthcoming).

be, find that it has no jurisdiction to decide the case? In my view, the latter approach is the correct one. As a result, a defendant can effectively win a WTO dispute with reference to non-WTO law, *in casu* other agreements or treaties that take away the jurisdiction of WTO Panels or the Appellate Body for certain cases.

Crucially, in this respect, a WTO Panel, like all international tribunals, has the competence—even the obligation—to decide the question of its own jurisdiction.[28] This is part of the so-called incidental jurisdiction of all international tribunals and need not be conferred explicitly to Panels in the DSU. As a result, a Panel is not only entitled, it must examine whether its own jurisdiction remains intact or has been undermined by some other agreement between the disputing parties. If the latter, the Panel must decline jurisdiction. This incidental jurisdiction of the *competence de la competence* provides a useful legal basis on which to justify the examination of other agreements. Yet, the underlying principle remains the same as that applicable when a Panel applies non-WTO law on the merits (Section III): in the examination of its own jurisdiction/of the merits of the WTO claims before it, the applicable law before a WTO Panel ought not be limited to WTO covered agreements, it should include also other relevant international law. The only difference between the effect of non-WTO law on Panel jurisdiction and on the merits of a WTO dispute, is that when it comes to Panel jurisdiction, a WTO Panel may have to check at its own initiative whether non-WTO law undermines its jurisdiction (even if none of the parties themselves refer to this non-WTO agreement); when it comes to the merits of the dispute, in contrast, the Panel is subject to the principle of *non ultra petita*, i.e., it can only examine defences that have been raised explicitly by the defendant itself (the Panel cannot itself add defences).

Let us illustrate the potential effect of non-WTO law on Panel jurisdiction with reference to a number of examples that have arisen in practice either at the WTO itself or before other international tribunals. This section deals, in turn, with (1) a bilateral agreement not to appeal a WTO Panel; (2) a bilateral agreement not to invoke WTO dispute settlement; (3) a treaty conferring exclusive jurisdiction to another tribunal; (4) a treaty providing for choice of forum but making any choice exclusive; (5) a treaty providing for compulsory (but not exclusive) jurisdiction to another tribunal; and (6) the related question of *res judicata* effect of rulings by other courts or tribunals.

[28] That WTO Panels as well as the Appellate Body have the jurisdiction to decide on their own jurisdiction is firmly established. The Appellate Body referred to the "widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it" (Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, footnote 30). In the Appellate Body Report on *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, adopted 21 November 2001, at para. 37), it was stated that Panels must check the question of their own jurisdiction at their own initiative ("Panels cannot simply ignore issues which go to the root of their jurisdiction ... Rather, Panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed".

A. A BILATERAL AGREEMENT NOT TO APPEAL A WTO PANEL

Subsequent to the adoption of the original Panel report on *Australia—Leather*, the United States and Australia agreed on how to proceed with the dispute under Articles 21 and 22 of the DSU. Point 4 of this bilateral agreement reads, "Both Australia and the United States will unconditionally accept the review Panel report [pursuant to Article 21.5 of the DSU] and *there will be no appeal of that report*" (emphasis added).[29]

The review Panel report then found in favor of the United States. Australia did not appeal the report, but the following question arises: Had Australia nonetheless decided to appeal the review Panel report, could the United States have relied on the bilateral agreement in which both parties gave up their right to appeal? In other words, should the Appellate Body have declined to decide the appeal on the ground of this bilateral agreement, an agreement that is not a WTO covered agreement? In my view, the answer must be in the affirmative: both the United States and Australia agreed not to appeal; they did not thereby affect third party rights; hence, the Appellate Body must respect this agreement and decline jurisdiction. By thus applying the bilateral agreement, the Appellate Body would *not* expand its jurisdiction beyond WTO claims; rather, it would expand the applicable law before it and on that basis decline to exercise its limited jurisdiction.

B. A BILATERAL AGREEMENT NOT TO INVOKE WTO DISPUTE SETTLEMENT

In the case of *India—Quantitative Restrictions*, complaint by the EC, the parties reached a mutually agreed solution and notified this solution to the DSB pursuant to Article 3.6 of the DSU.[30] In this bilateral agreement between India and the EC, dated 12 November 1997, the following was agreed:

> "... the European Communities *will refrain from action under GATT Article XXII or Article XXIII* as regards those restrictions [maintained by India on import of industrial, agricultural and textile products] during the phasing-out period as defined below, as long as India complies with its obligations under this exchange of letters" (emphasis added).

Subsequent to this agreement, but before the end of the relevant phasing-out period, the EC initiated the dispute on *India—Autos*. Before the Panel, India argued that this "new" *India—Autos* dispute is covered by the bilateral settlement in *India—Quantitative Restrictions* and that, therefore, the EC is precluded from invoking WTO dispute settlement procedures on this matter.[31] In other words, in that case the question arose whether a bilateral settlement can take away the jurisdiction of a WTO Panel. The EC response was that the *India—Autos* dispute was not covered by the earlier

[29] *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU*, WT/DS126/8, 4 October 1999.

[30] *India—Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products, Notification of Mutually Agreed Solution*, WT/DS96/8, 6 May 1998.

[31] Panel Report, *India—Measures Affecting the Automotive Sector* ("*India—Autos*"), WT/DS146/R and Corr.1, WT/DS175/R and Corr.1, adopted 5 April 2002, at para. 4.30.

settlement and that, in any event, the bilateral settlement was not a WTO covered agreement so that it could not be relied on by India before a WTO Panel.[32] The Panel was able to avoid the systemic question of whether India could rely on the bilateral settlement by finding that, as a question of fact, the settlement did not cover the matter in the *India—Autos* case. Hence, even if India could rely on the bilateral settlement, the *India—Autos* case was in any event not covered by the EC's promise in this settlement not to invoke WTO dispute settlement. The Panel did note the following, however:

> "At the very least, the Panel sees merit in India's argument that the issue in this respect is not solely whether the mutually agreed solution is a covered agreement, but rather, what effects it may have on the exercise of procedural rights under the DSU in subsequent proceedings."[33]

Indeed, had the new *India—Autos* dispute been covered by the EC promise in the bilateral settlement not to invoke WTO dispute settlement procedures, in my view, any WTO Panel would have been under an obligation to respect this agreement and to declare that by agreement of the parties it does not have jurisdiction to examine the case.

Other instances where particular WTO Members may agree *not* to rely on WTO dispute settlement can be imagined. Taiwan and, especially, China, for example, have sent out signals that they do not intend to resort to WTO dispute settlement to resolve trade disputes between mainland China and Taiwan.[34] If a bilateral agreement or even a binding unilateral declaration to this effect can be detected, then a WTO Panel ought to respect it and apply it as against the Member who made such commitment.

C. A TREATY CONFERRING EXCLUSIVE JURISDICTION TO ANOTHER TRIBUNAL

Article 292 of the EC Treaty confers exclusive jurisdiction to the European Court of Justice and other EC bodies as follows:

> Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided therein.

Similar provisions occur in other contexts, such as the Andean Community[35] and investment disputes.[36] Does Article 292 prevent an EU member from challenging other EU members before an international tribunal other than the European Court of

[32] Ibid., para. 4.32, and note 71 below.

[33] Ibid., para. 7.116.

[34] See Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes Between China and Taiwan?*, J.I.E.L. (2002), 747–758, at 755.

[35] Article 42.1 of the Cartagena Agreement establishing the Andean Community—which is made up of Bolivia, Colombia, Ecuador, Peru and Venezuela—states the following:

> Member countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court, arbitration system or proceeding whatsoever except for those stipulated in this Treaty.

[36] See, in particular, the exclusive jurisdiction clause often included in investment or concessions contracts in favour of the domestic courts of the host state and how such clauses may play out against the compulsory jurisdiction of international arbitration tribunals granted under an investment treaty, discussed, *inter alia*, in the ICSID case *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, 40 ILM 426 (2001), and 41 ILM 1135 (2002), at para. 98: "In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the [international] tribunal will give effect to any valid choice of forum clause in the contract".

Justice?[37] Obviously not if the dispute does *not* concern also "the interpretation or application of the [EC] Treaty". But what if the dispute raises questions under both the EC Treaty and another treaty, say the WTO agreement or the United Nations Convention on the Law of the Sea (UNCLOS)?

This tension between EC courts and other international tribunals materialised most recently in the *Mox Plant* case (*Ireland v. United Kingdom*). In that dispute, Ireland submitted claims of violation under UNCLOS concerning discharges into the Irish sea of radioactive waste by a new processing plant (the so-called MOX plant) set up by the United Kingdom close to the Irish border. In an Order on Provisional Measures dated 3 December 2001, the ITLOS found that there was *prima facie* jurisdiction under Article 288.1 of UNCLOS.[38] The Arbitral Tribunal constituted subsequently under Annex VII of UNCLOS (to decide on the merits of the case) decided, in contrast, to suspend its proceedings by Order of 24 June 2003. It did so in response mainly to arguments by the United Kingdom that the dispute falls within the exclusive jurisdiction of EC courts pursuant to Article 292 of the EC Treaty. The Arbitral Tribunal was of the view that the question of whether and what aspects of the UNCLOS dispute fall under the exclusive jurisdiction and competence of the European Communities is a question "to be decided within the institutions of the European Communities, and particularly by the European Court of Justice".[39] Hence, the Arbitral Tribunal considered it inappropriate to continue its proceedings "in the absence of a resolution of the problems referred to" within the context of the EC.[40] Interestingly, the Order did so "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States" and noted that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties".[41] Unless otherwise agreed or decided, the Arbitral Tribunal will resume its proceedings not later than 1 December 2003, in the hope that by then the dispute will be dealt with by the European Court of Justice.[42]

This Order to suspend UNCLOS proceedings based on provisions in another agreement (here, the EC Treaty) is in line with the approach that this author would

[37] On the general question of overlapping jurisdictions, see Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003); Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 Australian Yearbook of International Law (2000) 1, at 13, and the references at note 27 above.

[38] Order of 3 December 2001, at <www.itlos.org>, Case No. 10.

[39] Order No. 3 of 24 June 2003, at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf>, p. 8, para. 26. The European Commission actually initiated infringement procedures under the EC Treaty against Ireland claiming that Ireland's initiation of the *Mox Plant* case under UNCLOS (as well as the OSPAR Convention) violates Ireland's obligations under the EC Treaty (*Ireland Threatened over Sellafield Row*, The Independent, 29 June 2003).

[40] Order No. 3 of 24 June 2003, p. 9, para. 28.

[41] Ibid.

[42] Ibid., p. 9, para. 30. Note, in contrast, the Award under the OSPAR Convention (quoted in note 18 above) where jurisdiction *was* found, notwithstanding overlaps with EC treaties and directives. However, in that case the United Kingdom did not press its defence under EU law as hard as it did in the UNCLOS *Mox Plant* dispute. Yet, in my view, the OSPAR Tribunal, as well, should, like the UNCLOS Tribunal, have suspended its proceedings until further clarification was offered by EC institutions on the matter of overlap with EU law and potential exclusive competences of the EC.

suggest for WTO Panels. WTO Panels, as well, ought to take cognizance of other agreements in which the disputing parties may have taken away the jurisdiction of a WTO Panel to deal with particular cases. When it comes to disputes between EU member states that raise questions under both EU law and WTO law, two problems must be distinguished.

First, pursuant to Article 133 of the EC Treaty, the EC's common commercial policy falls within the exclusive competence of the EC. This means that individual EU member states no longer have the competence to act in this field.[43] As a result, individual EU members not even have the legal capacity to invoke WTO dispute settlement procedures,[44] at least not in respect of WTO matters falling within the exclusive powers of the EC (for certain GATS and TRIPS matters the competences remain shared between EU member states and the EC).[45] The resulting lack of capacity to bring a WTO complaint applies not only for disputes between EU members, but also for procedures initiated by an EU member against WTO Members that are not members of the EU. Consequently, in case the complaining EU member thus lacks the legal capacity to submit a WTO complaint, any WTO Panel ought to recognize this and decline to exercise jurisdiction, even if this lack of capacity results from EU law, not WTO law. As between EU members, the ECJ could then decide the dispute; a WTO complaint by an EU member against a non-EU member could then be re-initiated at the WTO by the EC itself (the EC being a WTO Member in its own right).

Second, a WTO dispute between EU members may also activate Article 229 of the EC Treaty. On the premise that the WTO provisions relied on by the complainant are a matter of exclusive EC competence, any rights that the complainant thus asserts against another EU member exist—and are a matter of EC law.[46] Consequently, even if the complainant could frame its complaint exclusively in terms of a violation of WTO rules, the WTO dispute—insofar as it raises a matter within the exclusive competence of the EC—is necessarily also "a dispute concerning the interpretation or application of [the EC] Treaty" which only the ECJ can resolve.[47] The subject matter of the WTO dispute is then covered fully also under EC law; as a matter of fact, under EC law as it

[43] See Case 22/70, *Commission v. Council (ERTA)*: "... each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules" ([1971] ECR 263, para. 17).

[44] Ibid., at para. 18: "As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations toward third countries affecting the whole sphere of application of the Community legal system".

[45] See Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, [1994] ECR Page I-05267.

[46] Every international agreement entered into by the EC becomes, from its entry into force, an integral part of EC law (Case 181/73, *Haegeman v. Belgium,* [1974] ECR 449, at para. 5; and Opinion 1/91, [1991] ECR I-6079, at para. 37.

[47] Crucially in this respect, WTO Panels, like all other international tribunals, have the incidental jurisdiction "to interpret the submissions of the parties" in order to "isolate the real issue in the case and to identify the object of the claim" (*Nuclear Test cases*, ICJ Reports 1974, 262, para. 29, and 466, para. 30 and *Fisheries Jurisdiction case* (*Spain v. Canada*), ICJ Reports 1998, 437). Based on these powers, the WTO Panel may find that the dispute is not only one under WTO covered agreements, but also one "concerning the interpretation or application of [the EC] Treaty".

applies between EU members, it is then an internal question only of EU law, not one of WTO law. In that event, a conflict would arise between Article 292 of the EC Treaty, reserving exclusive jurisdiction to EC bodies to resolve the dispute, and Article 23 of the DSU, stating with equal force that "[w]hen [WTO] Members seek the redress of a violation of obligations ... under the covered agreements ..., they *shall have recourse to* ... the rules and procedures of this Understanding" (emphasis added). The question is then which of those two norms prevails? In my view, if such genuine conflict does arise, it ought to be Article 292 of the EC Treaty that prevails as the more specific norm or *lex specialis* (both in terms of membership and subject matter) and arguably even as the later norm in time or *lex posterior* (the EC treaty was most recently re-concluded in Nice in 2001). Consequently, a WTO Panel ought, in those circumstances, to decline jurisdiction. It would then be for the parties, or the European Commission, to re-initiate the dispute before the European Court of Justice. The ECJ could then examine the dispute in terms of EU law as such, or even find violations of WTO obligations given that the WTO treaty is an integral part of the EU legal system and can be relied on directly before the ECJ by the Commission or an EU member in a dispute against another EU member.[48]

In most WTO cases, the existence of exclusive EC/ECJ competences will be clear so that a WTO Panel can apply relevant EC law directly without much interpretation, based on unambiguous EC treaty provisions and ECJ case law. Note, in this respect, that reserving exclusive jurisdiction to EC courts for certain disputes under EC law (as Article 292 does) should not prevent other courts or tribunals—here a WTO Panel—from applying relevant rules of EC law in the examination of their own jurisdiction.[49] In cases where the situation under EC law is less clear (say, in respect of certain GATS and TRIPS matters for which EU members and the EC share competences), it may be wise for the WTO Panel to suspend its proceedings—much like the UNCLOS Arbitral Tribunal did in the *Mox Plant* case—in the hope that the parties themselves sort out the EC questions before the competent EC bodies. The UNCLOS Tribunal did so based on Article 8 of its Rules of Procedure, providing that "... subject to these Rules, the Arbitral Tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case". Arguably, a WTO Panel, as well, is given sufficient flexibility to suspend its own

[48] This issue of the enforcement of WTO obligations by the ECJ as between two EU members (or at the request of the Commission against an EU member)—confirmed in, e.g., *Commission v. Germany*, C-61/94, Jur., 1996, I-3989, r.o. 52—must be distinguished from the general lack of direct effect of WTO law as it can be invoked before the ECJ by private parties or against the EC (*Portugal v. Council*, 1999 ECR I-8395).

[49] In support: Decision on annulment in *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, 41 ILM 1135 (2002), at para. 105: "it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucuman by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT".

proceedings, even without the agreement of the complainant,[50] pursuant to Article 12.1 of the DSU, stating that "... Panels shall follow the Working Procedures in Appendix 3 unless the Panel decides otherwise after consulting the parties to the dispute".

D. A TREATY PROVIDING FOR CHOICE OF FORUM BUT MAKING ANY CHOICE EXCLUSIVE

Whereas Article 292 of the EC Treaty reserves exclusive jurisdiction to EC courts, Article 1.2 of the 2002 Olivos Protocol—the most recent dispute settlement mechanism set up within MERCOSUR, replacing the earlier Brasilia Protocol—provides a choice of forum in respect of disputes that can be referred to both the WTO and MERCOSUR:

> Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the Mercosur State Parties may have entered into, *may be referred to one forum or the other, as decided by the requesting party*. Provided, however, that the parties to the dispute may jointly agree on a forum. (emphasis added)

Article 1.2 of the Olivos Protocol continues, however, as follows:

> Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora ...

Chapter 20 of NAFTA sets out a similar regime. Where a dispute regards a matter arising under both NAFTA and the WTO, in principle, the choice of forum is left to the discretion of the complaining party[51] (although for certain types of disputes, such as those related to environmental or health protection, the defendant can insist that the dispute be decided under NAFTA[52]). However, once a forum is chosen, it must be used to the exclusion of all others.[53]

For present purposes, the question arises what a WTO Panel should do in case a WTO Member first pursues its complaint under MERCOSUR or NAFTA and thereafter re-submits it to the WTO, in violation of the MERCOSUR/NAFTA exclusion provision referred to above.

[50] The suspension of WTO Panel proceedings at the request of the complainant is dealt with in Article 12.12 of the DSU.

[51] NAFTA Article 2005, para. 1 (entitled "GATT Dispute Settlement") reads: "Subject to paras 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade*, any agreement negotiated thereunder, or any successor agreement (GATT), *may be settled in either forum at the discretion of the complaining Party*" (emphasis added).

[52] Ibid., paras 3–5.

[53] Ibid., para. 6: "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, *the forum selected shall be used to the exclusion of the other* unless a Party makes a request pursuant to paragraph 3 or 4" (emphasis added). See also the so-called "fork in the road" provision in many bilateral investment treaties, offering a choice to investors to either submit disputes to the domestic courts of the host state or international arbitration, but stating explicitly that once an avenue is chosen, it is to the exclusion of the other (see, e.g., *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, 40 ILM 426 (2001), and 41 ILM 1135 (2002), in particular, at paras 55, 60 and 113).

This type of situation arose recently before the WTO Panel on *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*. In that dispute, Brazil invoked WTO dispute settlement procedures, after it had unsuccessfully relied on MERCOSUR arbitration (a MERCOSUR arbitration Panel had rejected Brazil's claims of violation in respect of the very same anti-dumping measure imposed by Argentina). In that case, however, the old Brasilia Protocol was still applicable. The Panel noted that this earlier Protocol "imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure".[54] However, the Panel also went on to note the following:

> "We note that Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure."[55]

These considerations indicate a willingness on behalf of the WTO Panel to apply exclusion clauses in other, non-WTO treaties. Indeed, if such non-WTO rules could not ever play a role before a WTO Panel then surely the Panel would not have bothered explaining and assessing their impact.

If the MERCOSUR dispute had been dealt with under the Olivos Protocol and the MERCOSUR exclusion clause would thus have been triggered, a WTO Panel should, in my view, give effect to this exclusion clause. A WTO Panel must examine its own jurisdiction. MERCOSUR parties agreed to take away this jurisdiction when two conditions are fulfilled: (i) the dispute is one "falling within the scope of application of [the Olivos] Protocol that may also be referred to the dispute settlement system of the [WTO]"; and (ii) the dispute is, or has been examined already by a MERCOSUR Panel.[56] Consequently, if both of these conditions are met, any WTO Panel must come to the conclusion that—by agreement of the disputing parties—it does not have jurisdiction to re-examine the dispute.[57]

[54] Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on 19 May 2003 (not appealed), para. 7.38.

[55] Ibid. On Argentina's claim that Brazil was estopped from bringing the same matter to the WTO after bringing it to MERCOSUR, see text at note 81 below.

[56] Interestingly, in this respect, the Japan–Singapore Economic Partnership Agreement (JSEPA) adds a third condition to be fulfilled before the invocation of one procedure excludes the other (not present under either NAFTA or MERCOSUR), namely the exclusion does not apply "if substantially separate and distinct rights or obligations under different international agreements are in dispute" (Chapter 21, Article 139.3). This may, indeed, be a wise addition in order to avoid exclusion in case the substantive claims under both procedures are markedly different. At the same time, it adds a complexity in that it will then be for the second Panel or tribunal to decide whether the procedure before it raises "substantially separate and distinct rights or obligations".

[57] Along the same lines, see *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, 40 ILM 426 (2001), and 41 ILM 1135 (2002), at para. 113, referred to in note 53 above.

E. A TREATY PROVIDING FOR COMPULSORY (BUT NOT EXCLUSIVE) JURISDICTION TO ANOTHER TRIBUNAL

Instead of reserving exclusive jurisdiction to, for example, the ECJ or offering a choice of forum between NAFTA/MERCOSUR and the WTO, which once decided upon becomes exclusive, other, non-WTO treaties may also confer compulsory (though not exclusive) jurisdiction to another tribunal to resolve certain disputes with a WTO component. A dispute may, for example, raise questions under both the WTO treaty and a regional trade arrangement with compulsory (though not exclusive nor exclusionary) jurisdiction.[58] It may also concern a question of maritime delimitation for which jurisdiction has been conferred to the ICJ and raise trade questions under the WTO agreement for which a WTO Panel can be established (witness the *Case concerning Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*,[59] the trade aspect of which was brought also before a WTO Panel[60]). A dispute can also raise questions under both UNCLOS and the WTO agreement, witness the WTO case on *Chile—Measures Affecting Transit and Importation of Swordfish*,[61] brought also before the International Tribunal for the Law of the Sea (ITLOS).[62]

Should the fact that a dispute, or part of a dispute, can be brought also to compulsory dispute settlement procedures under another agreement, prevent a WTO Panel from examining the WTO claims before it? In my view, not necessarily so. Rather, in most cases it will be possible to split up the WTO component of the dispute from the ICJ/UNCLOS component of the dispute so that the former be decided by a WTO Panel and the latter by the ICJ/ITLOS. Examples of cases where the court or tribunal separated the different aspects of a dispute, finding that although it had no jurisdiction to look at one aspect, it continued to have jurisdiction to examine another, are:

(i) the *Nicaragua* case, where the ICJ declared that it did have jurisdiction over certain claims under customary international law even though the United States had not accepted ICJ jurisdiction in respect of "disputes arising under a multilateral treaty, unless ... all parties to the treaty affected by the decision are also parties to the case before the Court" and the relevant multilateral treaty rules largely overlapped with the customary law;[63]

[58] See, e.g., the dispute settlement mechanism under the Protocol on Trade of the Southern African Development Community (SADC), discussed in Pauwelyn, as note 27 above.

[59] See the records of this ongoing case at <http://www.icj-cij.org/icjwww/idocket.htm>.

[60] *Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WTO documents WT/DS188/2 and WT/DS202/1 (although a Panel was established on this matter, its proceedings have been suspended by mutual agreement).

[61] WTO document WT/DS193 (suspended by mutual agreement on 23 March 2001).

[62] *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Com.)* (15 March 2001), at <http://www.un.org/Depts/los/ITLOS/Order1_2001Eng.pdf> (currently suspended on the basis of a provisional arrangement).

[63] Jurisdiction and Admissibility, ICJ Reports 1984, para. 73, and Merits, ICJ Reports 1986, para. 175.

(ii) the ICSID Award in *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, where the Tribunal accepted jurisdiction over certain claims under a bilateral investment treaty between France and Argentina, even though these claims overlapped with claims under a concession contract for which exclusive jurisdiction had been reserved to domestic Argentine courts;[64] and

(iii) Order No. 3 of the Arbitral Tribunal constituted under Annex VII of UNCLOS in the *Mox Plant* case (*Ireland v. United Kingdom*), finding that a concurrent proceeding before an OSPAR[65] tribunal limited to claims under the OSPAR convention in relation to the same MOX plant, did not prevent the UNCLOS tribunal from having jurisdiction over the UNCLOS claims in dispute.[66]

Such splitting-up or "salami-slicing" of the dispute, though possible in most cases, may be unwarranted in others. First, in exceptional circumstances, the WTO dispute may be so similar to the ICJ/UNCLOS dispute, both in terms of subject matter and substance and scope of the applicable rules, that the two disputes are, in effect, but one and the same.[67] A conflict may then arise between, on the one hand, the rule conferring jurisdiction over the dispute to the ICJ/UNCLOS and, on the other hand, the DSU conferring jurisdiction over substantially the same dispute to the WTO. In the absence of explicit conflict clauses in either treaty[68], the resolution of such conflict should then depend on normal conflict rules, in particular the principles of *lex posterior* and *lex specialis*. If, but only if, based on those rules, the DSU must give way to the other, non-WTO provision, then the WTO Panel should find that it has no jurisdiction to examine the dispute.

A second reason not to split the dispute into a WTO and an ICJ/UNCLOS component may be that the dispute not genuinely concerns WTO claims (even though

[64] 40 ILM 426 (2001), at paras 53–54.

[65] OSPAR refers to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).

[66] The Tribunal explained its approach as follows: "[T]he Tribunal does not consider that this [relevance of the OSPAR Convention] alters the character of the dispute as one essentially involving the interpretation and application of the [UNCLOS] Convention. Furthermore, the Tribunal is not persuaded that the OSPAR Convention substantially covers the field of the present dispute" (Order No. 3 of 24 June 2003, at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf>, p. 6, para. 18). Subsequently, the OSPAR Tribunal issued its own Final Award, notwithstanding the concurrent UNCLOS proceeding, see note 18 above.

[67] This situation was acknowledged, for example, in the Decision on Annulment in *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*. Faced with a situation that gave rise to claims under both a bilateral investment treaty (for which ICSID had jurisdiction) and a domestic concession contract (for which domestic courts had exclusive jurisdiction), the Committee found as follows, at paras 98 and 101:

> "In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the [international] tribunal will give effect to any valid choice of forum clause in the contract. ... On the other hand, where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state ... cannot operate as a bar to the application of the treaty standard."

[68] UNCLOS Article 282 does, for example, provide for a conflict rule, making UNCLOS jurisdiction subject to certain dispute settlement procedures under other treaties.

such claims can technically be made) but, rather, other rules of international law that the WTO claims are inextricably linked to and that these WTO claims are dependent on to be decided.[69] In such extreme cases it could then be submitted that the history, prior procedures, and substantive content of the dispute indicate that the real issue of the case (i.e., the genuine object of the claim) is related to non-WTO claims as to which a WTO Panel does *not* have jurisdiction.[70] On these grounds, the WTO Panel could then decide that it does not have substantive jurisdiction over the dispute based on the compulsory jurisdiction conferred to another tribunal.[71]

The following are examples of cases where it was found that a dispute cannot be split in two and, as a result, the tribunal declined to exercise jurisdiction:

(i) the ICJ *Fisheries Jurisdiction case* (*Spain v. Canada*), where the ICJ "re-defined" Spain's complaint relating to Canada's "lack of entitlement to exercise jurisdiction on the high seas" into a dispute "arising out of or concerning conservation and management measures" for which Canada had made a reservation to its grant of jurisdiction to the ICJ. On that basis, the Court found that it did *not* have jurisdiction to hear the case[72]; and

(ii) the UNCLOS Arbitration Award on *Southern Bluefin Tuna*. In the latter case, the tribunal found that the dispute "while centred in the 1993 [trilateral Convention for the Conservation of Southern Bluefin Tuna], also arises under [UNCLOS]". It continued, nonetheless, by saying that "[t]o find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the [1993 Convention] would be artificial".[73] Since the tribunal later declared not to have jurisdiction over the 1993 Convention part of the dispute, it automatically declined jurisdiction also over the UNCLOS part (notwithstanding the compulsory jurisdiction in Part XV of UNCLOS) on the ground of its "single dispute" theory.

[69] Imagine that the complainant makes a non-violation complaint under GATT Article XXIII:1(b) arguing that the defendant has nullified its tariff concessions on, for example, the import of footballs, by suddenly no longer complying with the ILO prohibition on child labor in its domestic production of footballs (making it harder for the complainant to compete). Can the complainant rely on these non-WTO rules even if this would imply that the WTO Panel would first have to find a violation of ILO obligations before it could accept the complainant's non-violation case under WTO rules? Here, the WTO complaint could be said to no longer concern WTO claims but rather ILO claims so that the Panel could find that it has no jurisdiction to hear the case.

[70] See note 47 above on the power of international tribunals to "re-define" a dispute. It was on these grounds that the ICSID Tribunal in *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (40 ILM 426 (2001), at p. 3 of the Award), though having accepted jurisdiction over Vivendi's claims, refused to make findings on the merits:

> "... the nature of the facts supporting most of the claims presented in this case make it impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the contentious administrative courts of Tucumán. Accordingly, and because the claims in this case arise almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the Concession Contract, the Tribunal holds that the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the contentious administrative courts of Tucumán as required by Article 16.4 of their Concession Contract".

This Tribunal finding was, however, subsequently (and, based on the facts, in my view correctly) overruled by the Annulment Committee (41 ILM 1135 (2002), at paras 115 and 105, quoted in note 49 above).

[71] Advocating that WTO Panels decline jurisdiction in certain cases where non-WTO rules are at stake, see Marceau, as note 22 above, 1081. Note the difference between this second reason to reject jurisdiction (no jurisdiction to begin with, since no WTO claims at issue) and the earlier, first reason to reject jurisdiction (a conflict between two rules conferring jurisdiction to different tribunals decided, as the case may be, in favor of the non-WTO tribunal).

[72] ICJ Reports 1998, 437.

F. RES JUDICATA EFFECT OF RULINGS BY OTHER COURTS OR TRIBUNALS

Finally, a WTO Panel may have to decline jurisdiction based on an earlier ruling by another court or tribunal on the same matter (say, based on a Panel under the Southern African Development Community (SADC), which does not have an exclusion clause similar to the one in NAFTA or the Olivos Protocol discussed earlier[74]). As a result, the defendant can win a WTO dispute, not so much with reference to another, non-WTO treaty, but based on the so-called *res judicata* effect of a judgment or ruling by another court or tribunal. There are, however, three conditions for the principle of *res judicata* to apply. They are:

(1) identity of parties;
(2) identity of object or subject matter (it must be the very same issue that is in question); and
(3) identity of the legal cause of action.[75]

It is undisputed that WTO Panel and Appellate Body reports, once adopted by the DSB, have binding legal effect as between the parties to the particular dispute. The Appellate Body recently confirmed the above three conditions in respect of WTO Panel reports when it stated as follows:

> "... in our view, an unappealed finding included in a Panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim".[76]

The Appellate Body also confirmed the principle of *res judicata* in respect of its own reports.[77]

Obviously, for a WTO Panel to give *res judicata* effect to another WTO Panel or Appellate Body report is one thing; to give the same effect to a ruling or report by another court or tribunal (say, a SADC Panel), is quite another. Two hurdles must be

[73] *Southern Bluefin Tuna* case (*Australia and New Zealand v. Japan*, Jurisdiction and Admissibility), Arbitral Tribunal constituted under Annex VIII of UNCLOS, posted at <www.worldbank.org/icsid/bluefintuna/main.htm>, paras 52 and 54.

[74] See Pauwelyn, as note 27 above.

[75] See Vaughan Lowe, Res Judicata *and the Rule of Law in International Arbitration*, 8 African J. Int'l L. (1996), 38, at 40.

[76] Appellate Body report on *EC—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, 8 April 2003, para. 93. For a discussion of the *res judicata* effect of WTO Panel reports, see also the Panel Report on *India—Autos*, as note 31 above.

[77] Appellate Body report on *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, 22 October 2001, paras 92–96.

passed in this respect. First, WTO Panels must recognize that *res judicata* is a principle of general international law that WTO Panels must apply irrespective of whether the earlier ruling in question comes from within or outside the WTO. In my view, this hurdle is easy to pass: the applicable law before WTO Panels includes general principles of law and it is widely accepted that *res judicata* is such a principle.[78] Second, the ruling or report by the other court or tribunal must meet the three conditions referred to earlier. In other words, the parties, subject matter and legal cause of action before the other court or tribunal must be the same as those before the WTO Panel. Even if another tribunal may have dealt with the same subject matter as between the same parties (say, a SADC Panel may have decided a safeguards dispute between South Africa and Mozambique), it is unlikely that it will have examined the matter under the same cause of action, that is, as a question of violation of WTO rules: the SADC Panel will have examined claims of violation of SADC safeguard rules; the WTO Panel will be asked to examine claims of violation of the WTO safeguards agreement.

Does this mean that WTO Panels will never have to give *res judicata* effect to other courts or tribunals? Not necessarily so. In case both the SADC and the WTO provision under which the respective claims are made, are in substance the same (say, both raise a violation of the MFN principle in respect of safeguard measures), the argument could be made that the doctrine of "issue estoppel" or "collateral estoppel" applies. The English law requirements for issue estoppel have been explained as follows:

> "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel is final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies".[79]

In other words, in English law, the requirements for issue estoppel are the same as those for the traditional *res judicata* principle to apply, minus the requirement of identity of legal cause of action. In US law, a similar doctrine is known as collateral estoppel:

> "*Collateral estoppel* extends the res judicata effect of a judgment to encompass the same issues arising in a different action ("*issue preclusion*") and even to different parties where the issue has been determined in prior litigation with adequate opportunity to be heard for the party to be precluded".[80]

As a result, if the principle of issue estoppel were applied also before a WTO Panel, then a WTO Panel could preclude a SADC member from bringing, for example, a safeguards claim at the WTO in case substantively the same claim was previously decided upon by a SADC Panel, as between the same parties. A WTO Panel could also apply the principle of issue estoppel to the determination of specific facts or the legal characterization of facts by the previous SADC Panel (or vice versa). The US doctrine of collateral estoppel could even go further and give *res judicata* effect also to a previous SADC Panel finding on the same issue even if that Panel was constituted at the request

[78] See Lowe, as note 75 above.
[79] *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] A.C. 853 at 935 (per Lord Guest).
[80] E. Scoles *et al.*, *Conflict of Laws* (3rd edn: Westgroup, 2000), p. 1141.

of another SADC member, different from the one now challenging the same measure at the WTO, in the event the former SADC member had "adequate opportunity to be heard" before the original SADC Panel.

Note, however, that in a recent Panel report, the Panel refused to apply the basic principle of estoppel in respect of a claim by the defendant Argentina that the same measure had earlier been decided in MERCOSUR arbitration. In *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, Argentina argued, indeed, that the fact that Brazil had challenged the same measure previously before MERCOSUR estopped Brazil from bringing the case again before the WTO.[81] Argentina explicitly refused, however, to invoke the principle of *res judicata*.[82] Although the Panel refused to decide on whether or not the principle of estoppel can apply before a WTO Panel,[83] it used the following three conditions for estoppel to be activated: "(i) a statement of fact which is clear and unambiguous, and which (ii) is voluntary, unconditional, and authorized, is (iii) relied on in good faith".

When applying the first condition, the Panel did not consider "that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings. ... This is especially because the Protocol of Brasilia [unlike the Olivos Protocol discussed earlier], under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure".[84] On these grounds, the Panel refused to apply the principle of estoppel and continued to examine Brazil's claims.

It is worth noting, however, that rather than applying WTO-like anti-dumping rules, the earlier MERCOSUR arbitration Panel found that no specific anti-dumping rules applied to the contested measure.[85] As a result, it was, indeed, hard to say that the earlier MERCOSUR ruling dealt with substantively similar claims as those raised before the subsequent WTO Panel. Hence, even under the wider notions of "issue estoppel" or "collateral estoppel", Brazil should not have been precluded from submitting the WTO case.

III. Because of Non-WTO Law, a WTO Violation is Justified

In section II, I examined instances where non-WTO law may lead a Panel to decline jurisdiction. In this section, I assess how non-WTO law may, on the merits,

[81] Panel report on *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted on 13 May 2003 (not appealed), paras 7.37 ff.
[82] Ibid., footnote 53.
[83] Ibid., footnote 58.
[84] Ibid., para. 7.38.
[85] Award by the *Ad Hoc* MERCOSUR Tribunal (*Brazil v. Argentina*) concerning the Application of Anti-dumping Measures on the Export of Poultry from Brazil, 21 May 2001, at <http://www.mercosur.org.uy/pagina1esp.htm>.

prevent a finding of violation of WTO rules. As mentioned in the introduction, we are concerned not with cases where non-WTO law may simply influence the interpretation of WTO terms be it by expanding, or limiting the scope of WTO rules or exceptions. Rather, I focus on the exceptional case where a harmonious interpretation of WTO rules and other rules is not possible and the non-WTO rule offers an independent defence for what would otherwise be a violation of the WTO treaty.

When it comes to the substantive evaluation of WTO claims, two DSU provisions imply the power of WTO Panels to apply and make findings under other rules of international law (in addition to the other reasons stated in section I in support of a broad notion of applicable law). First, the obligation in Article 11 of the DSU for Panels to make an "objective assessment of ... the applicability of ... relevant covered agreements" may require a Panel to refer to and apply other rules of international law; these other rules may show that the relevant WTO rules do not apply and have therefore not been violated; in contrast, failure to look at these other rules would preclude an "objective assessment of ... the applicability of ... the relevant covered agreements". Second, the Panel's mandate in Article 7.2 of the DSU 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)", further acknowledges that WTO Panels may need to resort to and apply rules of international law beyond WTO covered agreements as long as it assists the DSB in resolving the WTO claims before it.

It may be useful to distinguish four types of situations where a non-WTO defence can be raised on the merits of a WTO claim, of increasing order of complexity (in that each time it becomes more difficult to justify why a WTO Panel should accept the defence): (1) defences under non-WTO law explicitly incorporated into the WTO legal system; (2) measures allegedly violating the WTO treaty but specifically permitted (or even imposed) pursuant to the dispute settlement provisions of another treaty; (3) measures that a WTO Member must enact (or is explicitly permitted to enact) pursuant to the provisions of another treaty; (4) measures normally in breach of WTO rules but permitted under another treaty on condition that the WTO Panel finds that this other treaty is respected/violated.

A. Non-WTO defences explicitly incorporated into the WTO legal system

Several avenues exist where WTO law itself explicitly refers to or incorporates defences under non-WTO rules. First, WTO treaty provisions sometimes incorporate non-WTO defences: (i) the SPS and TBT agreements refer to certain international standards adopted outside the WTO (such as *Codex Alimentarius* standards on hormones[86]); if the measure challenged conforms to such a standard, the measure

[86] See, e.g., Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

will be presumed to be consistent also with WTO rules; (ii) the TRIPS agreement not only incorporates obligations under other, WIPO conventions; it also incorporates certain exceptions to be found in these conventions[87]; (iii) under the Subsidies agreement an export credit practice is not considered a prohibited export subsidy if it is in conformity with the interest rate provisions of the OECD Arrangement on Guidelines for Officially Supported Export Credits[88]; (iv) Article XXI of GATT and Article XIV*bis* of GATS explicitly permit "any action in pursuance of [a WTO Member's] obligations under the United Nations Charter for the maintenance of international peace and security"; if, therefore, the UN Security Council, acting under Chapter VII of the UN Charter, imposes economic sanctions on a WTO Member, the relevant Security Council resolution—an instrument not part of WTO covered agreements—can be used in defence of a WTO complaint that the target of the sanctions would submit before a WTO Panel.

Second, waivers adopted by the WTO Ministerial Conference (or General Council) pursuant to Article IX:3 of the Marrakesh Agreement may authorize a WTO Member to adopt otherwise WTO inconsistent measures with reference to non-WTO rules. The waiver granted to the EC in respect of its import regime for bananas, for example, refers to the Lome Convention and permits the EC "to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lome Convention".[89] The more recent waiver on conflict diamonds permits measures "necessary to prohibit the export [and import] of rough diamonds to [and from] non-Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme".[90] Neither the Lome Convention nor the Kimberley scheme (or the WTO waiver, for that matter) are WTO covered agreements. Still, they can, and have been,[91] referred to, interpreted and applied by a WTO Panel in defence of an alleged violation of WTO rules.

When non-WTO rules are explicitly incorporated into the WTO legal system, WTO Panels and the Appellate Body will feel rather comfortable to apply those rules (even if, in the case of waivers, the link to those rules—i.e., the waiver decision itself—is, strictly speaking, not part of a WTO covered agreement).[92] Yet, the basis for referring to those rules is the same as that for referring to other rules not explicitly incorporated: the consent of the WTO Members involved to accept what could

[87] See, e.g., Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000 (not appealed).

[88] See, e.g., Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002 (not appealed).

[89] The Fourth ACP-EEC Convention of Lome, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.

[90] Waiver decision, WTO document G/C/W/432/Rev. 1, dated 24 February 2003, referred to in the Decision by the WTO General Council at its meeting on 15–16 May 2003 (WTO document WT/GC/W/498, dated 13 May 2003, Item VI), adopted by consensus. See also Joost Pauwelyn, *What to Make of the WTO Waiver on Conflict Diamonds: WTO Compassion or Superiority Complex?*, Michigan J. Int'l L. (2003, forthcoming).

[91] See the Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* ("*EC—Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591.

[92] Ibid.

otherwise be violations of the WTO treaty. Whether this consent was given within or outside the WTO should not matter. To the contrary, quite often the consent given inside the WTO will be less explicit and direct than that given outside the WTO: for example, the international standards referred to in the SPS and TBT agreements include those objected to by WTO Members in the relevant standard-making bodies[93]; the reference to the OECD arrangement is an ongoing one which permits OECD members to create safe-havens never accepted by WTO Members not party to the OECD[94]; the WTO waiver on conflict diamonds exempts trade restrictions consistent with the Kimberley scheme that are imposed on non-participants to this scheme, that is, WTO Members not having any influence on how this scheme develops.[95]

B. WTO VIOLATIONS PERMITTED (OR EVEN IMPOSED) PURSUANT TO THE DISPUTE SETTLEMENT PROVISIONS OF ANOTHER TREATY

As explained in section I, when WTO Panels examine the validity of WTO claims, they should not limit themselves to WTO covered agreements, nor to non-WTO rules explicitly referred to in the WTO treaty or WTO waiver decisions. The easiest situation for Panels to thus apply non-WTO rules would be where a measure is inconsistent with WTO rules, but specifically imposed or permitted by a decision under the dispute settlement mechanism of another treaty.

A case in point is the Resolution of the International Labor Conference recommending action against Myanmar for grave breaches of the ILO's Forced Labor Convention.[96] There, the conclusion that ILO rules had been breached was made by an independent Commission of Inquiry set up under the ILO Constitution. The subsequent ILO recommendation was the very first case where sanctions were called for under Article 33 of the ILO Constitution since the ILO's creation in 1919. A number of WTO Members have imposed trade embargoes on Myanmar since that ILO resolution.[97] If Myanmar—a Member of the WTO—were now to challenge those embargoes, could the WTO Member imposing the embargo not rely on the ILO recommendation so as to justify any potential WTO violations? In my view, this should be possible: Myanmar, as all ILO members, agreed to the ILO dispute settlement mechanism; this mechanism found that Myanmar had breached ILO rules and

[93] See Appellate Body Report on *EC—Hormones*, as note 86 above.
[94] See note 88 above.
[95] See note 90 above.
[96] The ILO recommended that ILO members "review, in the light of the conclusions of the Commission of Inquiry [which had found the serious violations of the Forced Labor Convention], the relations that they may have with the member State concerned [Myanmar] and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations made." Resolution of the International Labour Conference (88th session, 2000) at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#II>.
[97] In the United States, see the Burmese Freedom and Democracy Act 2003, H.R. 2330, 108th Congress (2003).

recommended action against it; although it is hard to say that other ILO members where thereby obliged to impose a trade embargo on Myanmar, in case those other members are "good ILO citizens" and do what the ILO is explicitly calling for, then who is the WTO to question the validity of ILO decisions? In that event, a conflict may arise between WTO rules (prohibiting the embargo[98]) and the ILO recommendation (calling for an embargo). As the later and more specific norm, the ILO recommendation should then prevail over the WTO prohibition.

A similar situation could arise when two WTO Members agree in an economic co-operation agreement that in case either violates fundamental human rights, the other may impose trade sanctions.[99] If such violation of human rights were now impartially determined either by a human rights court or a tribunal or commission set up under the co-operation agreement and the other Member imposes trade sanctions, can the perpetrator of the human rights violation go to the WTO and obtain a ruling that the trade sanction is illegal? In my view, not. The WTO Panel should then apply not just WTO covered agreements, but also take cognizance of the ruling where breach of human rights was found *and* of the provision explicitly permitting trade sanctions in such event.

Turning the tables around, for a WTO Panel to thus recognize the outcome of dispute settlement procedures under other treaties would be very similar to a situation where the World Intellectual Property Organization (WIPO) refuses to find a violation of the Berne Convention when such violation was explicitly authorized by the WTO as a countermeasure under Article 22.6 of the DSU. A case in point is the DSB authorization obtained by Ecuador to suspend the protection of EC copyrights under WIPO conventions in response to prior WTO violations by the EC's import regime for bananas. In contrast, for a WTO Panel *not* to take account of ILO recommendations would be the same as WIPO finding a violation under its conventions notwithstanding an explicit WTO authorization to engage in those violations.

C. WTO VIOLATIONS PERMITTED (OR EVEN IMPOSED) PURSUANT TO THE PROVISIONS OF ANOTHER TREATY

When another court, tribunal or commission has previously found that a trade measure is justified under another treaty, it is relatively easy for a WTO Panel to give effect to such ruling: the justification under non-WTO law is then decided upon not by the WTO Panel, but by the actors in charge of the other treaty. The WTO Panel then only gives effect to a ruling very specific to the parties and subject matter in dispute, which is simply the result of a procedure explicitly agreed upon by both parties in another international organization or under another treaty.

[98] Even if the case can be made also that the embargo is justified already under GATT itself (e.g. under GATT Artsicles XX and/or XXI).
[99] The EC, e.g., often includes such provisions in its agreements with third states, see Bartels, Human Rights Clause, as note 22 above.

The slightly more difficult situation may arise also where a measure is prohibited under WTO rules, but prescribed or explicitly permitted under the self-standing provisions of another treaty (or even customary international law[100]). In that event, it would be for the WTO Panel itself to interpret the non-WTO treaty provision and to decide for itself whether this provision justifies the measure in question.

Examples of such situation are trade measures that violate WTO rules but which a WTO Member must take (or has an explicit right to take) under a multilateral environmental or health agreement that is binding on both disputing parties (such as the Cartagena Protocol on Biosafety or the recent WHO Framework Convention on Tobacco Control[101]), the UN Charter (say, Article 51 confirming the right to self-defence thereby justifying certain use of force that may incidentally restrict trade—see footnote 2 above) or even under a bilateral agreement in which two WTO Members agreed on the imposition as between them of otherwise WTO-inconsistent measures.[102] Although in most cases measures under these other conventions will be justified also under the WTO exceptions related to health and the environment, in exceptional situations a genuine conflict may arise.[103] A WTO Panel should examine whether this is, indeed, the case and may thereby have to interpret the provisions of the other treaty. If it finds a conflict, it should then decide also which of the two norms prevails under conflict rules of international law. If it is the WTO norm, then it should find a violation of WTO covered agreements. If it is the other norm, then the Panel should accept the justification under non-WTO law and not find a WTO violation.

Already now, WTO Panels regularly interpret non-WTO rules. Although in most (though not all) of those cases there is an explicit reference to these rules in WTO provisions themselves, Panels and the Appellate Body have shown that they have the qualifications and impartiality to properly interpret "foreign" rules.[104] Interpreting and applying non-WTO rules not explicitly referred to in the WTO treaty would, indeed, take it a step further but not inherently change a function that WTO Panels already exercise at the present day.

One particular reference to non-WTO law may, however, cause additional concerns, namely the application by WTO Panels of rules of general international customary law.

[100] See, however, the caveat below at note 105.

[101] See notes 6 and 7 above.

[102] Imagine that the United States and Malaysia had settled the *Shrimp-Turtle* dispute and agreed, among other things, that the United States can continue the imposition, as against Malaysia, of otherwise WTO inconsistent measures. Should a WTO Panel, subsequently constituted at the request of Malaysia to strike down these very US measures, not take account also of this bilateral settlement and on that basis decline to find a WTO violation? In my view, it should. This position implies the qualification of WTO obligations as essentially bilateral obligations, see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations, Are WTO Obligations Collective or Bilateral in Nature?*, E.J.I.L. (2003, forthcoming).

[103] On the definition of "conflict", see Pauwelyn, as note 2 above.

[104] See the Panel and/or Appellate Body interpretations of (i) the Lome Convention in *EC—Bananas*, as note 87 above; (ii) the Berne Convention in *US—Copyright*, as note 87 above; (iii) international *Codex Alimentarius* standards in *EC—Hormones*, as note 86 above; and especially in *European Communities—Trade Description of Sardines*, WT/DS231/R and AB/R, adopted on 23 October 2002; (v) the OECD arrangement on export credits, in *Canada—Export Credits*, as note 88 above; (v) environmental conventions and declarations in *US—Shrimp*, as note 2 above; and (vi) the precautionary principle in *EC—Hormones*, as note 86 above.

While other, non-WTO treaties agreed upon by the disputing parties are the product of deliberative and explicit state consent, international custom derives from "a general practice accepted as law".[105] As a result, when it comes to defining and interpreting custom, WTO Panels have less explicit guidance and may feel inhibited, in particular, to decide on whether WTO treaty provisions have been altered by an allegedly supervening custom. In *EC—Hormones*, for example, the Appellate Body was extremely hesitant when addressing the EC claim that the precautionary principle as a rule of customary law ought to supplement the provisions of the SPS Agreement.[106] This trepidation is justified and WTO Panels ought, indeed, be extremely careful and on solid grounds before concluding that a new rule of custom has emerged. At the same time, the risk of new custom overruling prior WTO provisions is extremely limited. Although it is generally accepted that no inherent hierarchy exists between treaties and custom,[107] in practice, it is rare for custom to, first of all, emerge notwithstanding the continuing existence of a contradictory treaty norm: it is not as if custom can be established over night; custom requires a general and consistent practice of states, including the (at least) tacit consent of those who concluded the pre-existing treaty (persistent objectors cannot be bound by it). Moreover, even if new custom does emerge in the face of a treaty dealing with the same subject matter, given the often vague and general nature of custom, a genuine conflict between custom and treaty is exceptional: in most cases it will be possible to interpret the treaty in line with the new custom. Finally, in those cases where a genuine conflict does arise, the treaty is most likely to prevail as *lex specialis* based on its often more specific and explicit expression of state will.[108] In sum, the fear expressed by some authors[109] that for WTO Panels to apply custom risks high-jacking the contractual, consent-based nature of the WTO is unwarranted: WTO Members can only be held to custom if the strict rules for its emergence are met (states who explicitly and consistently objected to the custom cannot be bound by it); moreover, even if custom was explicitly or tacitly consented to, it is unlikely to prevail over the WTO treaty.

[105] Article 38.1(b) of the Statute of the International Court of Justice.

[106] Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)* ("*EC—Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at para. 123: "The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question". For a critique, see Pauwelyn, as note 3 above, at pp. 569–570 and as note 1 above, at 481–482.

[107] See, e.g., Nancy Kontou, *The Termination and Revision of Treaties in the light of New Customary International Law* (New York: Oxford University Press, 1994); and the references in Pauwelyn, as note 3 above, pp. 94–97. *Contra*: McGinnis, as note 3 above, arguing that "... global multilateral agreements should dominate customary international law because they rest on a more certain consensus and have fewer agency costs" (p. 42) and even "skeptical that [the] substantive aspects [of custom that is part of *jus cogens*] should have priority over global multilateral treaties" (note 137). While this author has previously argued (see note 106 above and note 108 below)—and hence agrees with Professor McGinnis—that, in practice, and in the particular context of the WTO, it will be extremely rare for subsequent custom to overrule WTO treaty provisions, this should not, however, mean that the starting principle of absence of hierarchy between treaty and custom in the wider field of public international law is no longer valid.

[108] For a full discussion, see Pauwelyn, as note 3 above, at pp. 131–143.

[109] See, in particular, McGinnis, as note 3 above, discussed also at notes 21 and 107 above.

D. WTO VIOLATIONS PERMITTED UNDER ANOTHER TREATY ON CONDITION THAT THE WTO PANEL FINDS THAT THIS OTHER TREATY IS RESPECTED/VIOLATED

Undoubtedly the most controversial use of non-WTO law would be for a Panel to accept a defence under another treaty even if that defence—say, an explicit right to impose a trade restriction—is conditional on prior breach of the other treaty by the complaining party (or conditional on simultaneous compliance of the other treaty by the defendant itself).

Recall the example of an economic co-operation agreement where two Members agree that in case either of them violates fundamental human rights, the other may impose trade sanctions.[110] Now, if such prior breach of human rights has not been independently determined by a court, tribunal or other competent commission, can the WTO Member who is of the view that its partner has, indeed, committed such breach, unilaterally decide that this breach occurred and, consequently, impose trade sanctions? If so, what happens if the victim of the sanctions challenges them before a WTO Panel? Can the Member who enacted the sanctions justify its conduct based on the co-operation agreement? A similar situation would arise in case a participant in the Kimberley scheme against conflict diamonds is of the view that another participant to that scheme does not abide by the restrictions imposed on conflict diamonds. As a result, that Member could impose import restrictions on diamonds coming from this other participant (the Kimberley scheme only permits trade in certified conflict-free diamonds and the Member concerned is convinced that diamonds from this other participant are, in fact, conflict diamonds). Now, if the target of those trade restrictions were to challenge them before a WTO Panel, could the WTO Member imposing the restrictions rely on the Kimberley scheme in defence of what it is doing?[111]

A slightly different yet similar situation would arise also when two WTO Members conclude a bilateral settlement of a WTO dispute in which they agree that the defendant can maintain a WTO inconsistent measure for a certain period of time for as long as it conforms to the other provisions in the settlement.[112] If the complainant were, thereafter, to challenge this WTO inconsistent measure, notwithstanding the agreement that it can be maintained, should the defendant be allowed to rely on the bilateral settlement in its defence, even if the validity of this defence depends on whether the defendant itself has implemented the other provisions of the settlement?

Although, in all three examples, the applicable law should, in my view, include also defences under the co-operation agreement, the Kimberley scheme or the bilateral settlement (all of which were, after all, accepted by the complainant), any WTO Panel would then be faced with an additional hurdle: for the defence to be valid, either the

[110] See note 99 above.

[111] Recall, in this respect, that the WTO waiver on conflict diamonds can be invoked only for trade restrictions on non-participants; it does not operate in the WTO relationship as between two participants to the scheme. See note 99 above.

[112] See, e.g., the bilateral settlement in *India—Quantitative Restrictions*, as note 30 above.

parties ought to agree that human rights/Kimberley certification requirements had, indeed, been breached or the WTO Panel itself must decide that such breach has, indeed, occurred (in respect of the bilateral settlement, parties would have to agree, or the Panel itself would have to find, that the defendant had otherwise complied with the settlement). Put differently, the WTO Panel would then not simply apply other rules "as it finds them" in other treaties, with minimal interpretation by the Panel, but actually have to decide first whether or not these other rules have been breached/complied with. As noted several times, however, WTO Panels have jurisdiction only to examine claims of violation under WTO covered agreements. In the examination of those WTO claims—and even accepting the argument made here that the applicable law to conduct this examination can include also other rules of international law—are WTO Panels permitted to go as far as making prior findings of violation of (or compliance with) non-WTO rules?

In my view, this power for Panels to make prior findings of violation under non-WTO rules should not be easily accepted and may depend on the circumstances of each case. At that juncture, the dividing line between, on the one hand, substantive jurisdiction to decide on certain claims of violation (WTO claims only) and, on the other hand, the applicable law to decide on the validity of those claims (potentially all international law), becomes rather blurred. If the required finding of violation or compliance with obligations under non-WTO rules is both legally and factually straightforward, a Panel may decide to move forward. Especially if no compulsory dispute settlement mechanism exists under the other treaty, a Panel may be more inclined to decide the issue itself. After all, even if it finds a violation under the other treaty, it would only permit the consequential trade sanction and reject the WTO complaint. It would, in other words, simply confirm the *status quo*. If, in contrast, there is a special dispute settlement procedure available to determine violation of those non-WTO obligations—and the resolution of this matter is intricately linked to, and decisive for the outcome of, the WTO claims—then a Panel may be wise to suspend its proceedings so as to give the parties the chance to first obtain a ruling under the other treaty.[113]

Yet, in other cases the additional task thus put on the Panel may take it outside of its limited substantive jurisdiction. If so, the question is then how the Panel should decide the case? It could simply disregard the non-WTO defence at issue and find a violation of the WTO treaty (even if it could later turn out that the violation is actually justified under the other treaty); Or the Panel could decide that the dispute not genuinely concerns WTO claims (even though such claims can technically be made) but, rather, claims under another treaty to which the WTO claims are inextricably linked and for which the Panel does *not* have substantive jurisdiction (*in casu*, the co-operation agreement, the Kimberley scheme or the bilateral settlement). The Panel could, on that basis, decide that it does not have jurisdiction over the dispute and, thereby, for all practical purposes, reject the WTO complaint. If the defence under

[113] See text at note 50 above.

non-WTO rules is serious enough, in my view, the latter approach (decline jurisdiction) should be the preferred one, albeit (i) to avoid conflicting rulings and a fragmentation of international regimes and (ii) to provide an incentive to the parties to resolve the non-WTO questions amicably, after which they can always come back to the WTO for a resolution of the remaining dispute.

IV. Conclusion

This article analyses the different situations where non-WTO law can constitute an independent defence against claims of violation of WTO law. These situations are summarized in Table 1.

TABLE 1: SITUATIONS WHERE NON-WTO LAW CAN CONSTITUTE AN INDEPENDENT DEFENCE AGAINST CLAIMS OF VIOLATION OF WTO LAW

Other treaties/rulings undermine the jurisdiction of the WTO Panel	Other treaties/rulings undermine the merits of the WTO complaint
1. Bilateral agreement not to appeal; not to invoke the DSU	1. Other treaties/standards explicitly referred to in the WTO treaty
2. Another treaty with exclusive jurisdiction	2. Rulings/recommendations under another treaty specifically imposing/permitting the measure at issue
3. Another treaty with choice of forum but making any choice exclusive	3. Another treaty imposing/permitting the measure at issue
4. Another treaty with compulsory (though not exclusive nor exclusionary) jurisdiction	4. Another treaty imposing/permitting the measure at issue on condition that this other treaty is violated/complied with
5. *Res judicata* effect of other rulings	

In conclusion, and taking some distance from the specific solutions advocated here, it may be useful to sum up the alternatives available to Panels when faced with non-WTO defences, as well as some of the practical consequences and policy concerns that they entail.

A. The Panel Completely Disregards the Defence Under Non-WTO Law

Be it in response to a defence that may undermine the jurisdiction of the WTO Panel or one that may change the substantive outcome of the WTO complaint, the WTO Panel could simply disregard the applicability of other rules of international law:

- Not to apply other international rules consented to by the parties amounts, in the first place, to a disregard for the sovereign will of the disputing parties.
- To limit the resolution of the dispute to WTO rules, there where other rules are also applicable, does not resolve the dispute. At best, it resolves the dispute only partially; at worst, it leads to conflicting rulings and WTO countermeasures in response to something that is perfectly legal under international law.
- To resolve WTO complaints within the four corners of WTO covered agreements portrays the WTO as a self-contained regime and the field of public international law as a fragmented system with sealed-off compartments. It puts fuel on the argument that the WTO is only concerned about economic welfare; not about other values that may be expressed with equal force in other treaties.

B. The Panel Declines Jurisdiction on the Ground of Non-WTO Law

Based on an agreement not to submit a certain dispute to a WTO Panel or to submit it rather elsewhere, a WTO Panel may decide that, by agreement of the parties, it does not have jurisdiction to decide the case. The Panel may also decline jurisdiction on the ground that the dispute is in fact not genuinely a dispute under WTO rules, but raises rather claims under non-WTO rules for which it has no jurisdiction:

- In all of these cases, the *status quo* is confirmed in that the WTO does not condemn nor condone the measure that was challenged.
- The dispute can subsequently be brought before another court or tribunal, either because the parties had agreed earlier to resolve it there or because in substance the dispute is one under another treaty. In the latter case, any remaining WTO aspect of the dispute can then be referred back to a WTO Panel, which should, in turn, take account of any rulings made under the other treaty.
- Declining jurisdiction because the dispute is too intricately linked to non-WTO claims (and requires, for example, the making of findings of violation under another treaty) in a situation where no compulsory dispute settlement mechanism is available under the other treaty, amounts in practice to the continuation of the allegedly WTO inconsistent measure (the WTO complainant cannot go anywhere, for example, to confirm that it is not violating human rights so that it should not be subjected to trade sanctions). This result—though regrettable in case the WTO complainant is in the right—ought to provide an incentive for states to ameliorate the enforcement mechanism under other treaties.

C. The Panel Takes Account of a Substantive Defence Under Non-WTO Law

For a Panel to take account of a defence under non-WTO law is not the same as accepting that defence. The WTO Panel may find that the non-WTO rule does not require nor permit the challenged measure. Moreover, even if the opposite is true and a conflict arises between a WTO prohibition and an obligation or explicit right under another treaty, the conflict may still be decided in favor of the WTO provision. If, but

only if, the other treaty norm prevails, the only consequence is that no finding of violation under the WTO treaty can be made (in other words, *status quo*).

- Irrespective of the legal arguments made earlier, are members of WTO Panels and the Appellate Body capable of interpreting non-WTO treaties and applying them to the facts? What is the WTO's legitimacy when deciding questions under, for example, environmental or human rights treaties? Does it risk tainting those treaties with an inherent trade-bias?

From the perspective of the drafters, enforcement agencies and other stakeholders under other, non-WTO treaties, the situation may boil down to choosing between two evils: either (1) the WTO completely ignores those treaties—thereby disregarding the sovereign will of the disputing parties as expressed in those other treaties—and prohibits something called for under another treaty; or (2) the WTO takes account of these other treaties with the risk that it misinterprets or waters down the other treaty. In my view, the latter solution constitutes, by far, the lesser evil (an evil that the WTO is, after all, engaging in already now when it regularly interprets, with competence and impartiality, non-WTO rules[114]). Moreover, this potential evil can be minimized or prevented relatively easily:

First, as is already happening to date, members of the Appellate Body can be selected based not only on their trade expertise, but also on their broader knowledge of public international law or even domestic law generally speaking. Of the seven individuals currently on the Appellate Body at least four are not specialized in trade.[115] When it comes to Panels as well, room can be (and has been) made to have generalists and specialists in non-trade fields serving as Panel members. Second, when applying non-WTO rules, WTO Panels and the Appellate Body can seek expert advice not only from the disputing parties, third parties and the staff of the WTO secretariat, but also from other international organizations or even other international tribunals.[116] To this effect, WTO Panels could even suspend their proceedings.[117] In this sense, they could adopt what is called in EU law the doctrine of *acte claire*[118]: if the meaning and application of the non-WTO rule offers no complication, a WTO Panel could apply it without much need for expert advice or input from other sources. If, in contrast, the non-WTO rule offers ambiguity, then advice or even decisions from other bodies could be sought, not only to help the WTO in reaching the correct and most legitimate decision, but also to preserve the uniform interpretation of the other treaty.

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[114] See note 104 above, and recall, in this respect, the position expressed in the text at note 49 above.

[115] These four are: Abi-Saab (expert in public international law, especially international human rights and international criminal law); Tanaguchi (expert in civil procedure); Lockhart (former judge in Australia); and Sacerdoti (public international law, focusing on international investment).

[116] See Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 I.C.L.Q. (2002), 325.

[117] As done by the UNCLOS Arbitration Tribunal in the *Mox Plant* case, as note 14 above, discussed at notes 39 and 50 above.

[118] See Article 234 of the EC Treaty, setting out the procedure under which national courts can request preliminary rulings from the ECJ on matters of EU law. A national court must thus refer to the ECJ "if it considers that a decision on the question [under EU law] is necessary to enable it to give judgment".