

## CAPÍTULO UNDÉCIMO

### INTER-REGIME RELATIONS BETWEEN THE WTO, ENVIRONMENTAL AND HUMAN RIGHTS LAW

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SUMMARY: I. *Introduction*. II. *About dispute settlement in the WTO, environmental law and human rights law*. III. *International law in WTO dispute settlement*. IV. *WTO law in international dispute settlement*. V. *Coordination*. VI. *Concluding remarks*.

#### I. INTRODUCTION

Generally, the WTO is understood to be the success story of public international law. It has, with over 160 parties, nearly universal global coverage, relatively efficient structures and decision making processes, but especially an effective, flexible dispute settlement system. Since the foundation of the WTO this dispute settlement system has been used on about 500 occasions, far more than in any other system of global dispute settlement.<sup>1</sup>

However, the WTO is also the subject of great criticism because of its indifference in relation to other areas of international law. It is undoubted that the law of the World Trade Organization forms part as a specialized regime of public international law. Nevertheless, the question to what extent general public international law is applied within this framework of world trade law must be strictly separated from this.<sup>2</sup> Especially the application of environmental law and human rights law within the WTO is widely discussed in the academic literature.

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<sup>1</sup> The International Court of Justice (ICJ) has decided 161 since 1945, the International Tribunal for the Law of the Seas (ITLOS) 23 since 1996.

<sup>2</sup> Böckenförde, Markus, "Zwischen Sein und Wollen-Über den Einfluss umweltvölkerrechtlicher Verträge im Rahmen eines WTO-Streitbelegungsverfahrens", *Zeitschrift für allgemeines öffentliches Recht und Völkerrecht*, 2003, p. 974.

International environmental law and international human rights protection have emerged alongside world trade law as specialized key regimes within public international law. They are the most important examples of a specialization of public international law which is increasingly carrying out tasks in substantive, international administrative law.

This article analyses the relationship between the regimes of the WTO, environmental protection and human rights law. I will focus on the characteristics of dispute settlement in the WTO and the other regimes and show how external law is incorporated into WTO law and how WTO jurisprudence is used by other dispute settlement regimes. I will argue that the WTO establishes a hegemony, which is based on the characteristics of its dispute settlement system and its general reservations to other areas of international law. On the other hand, I will claim that human rights law establishes a primacy over the WTO regime based on substantive law and the special characteristics of human rights litigation.

Finally, I will turn to the question of what coordination between these regimes should look like. I will argue that neither the United Nations nor the Vienna Convention on the Law of the Treaties (VCLT) are capable of effectively coordinating specialized regimes. However, I will show that customary international law on the harmonious interpretation between several international regimes seems to be emerging and suggest that regime coordination should rather be based on the rule of *lex specialis* than *lex posterior*.

## II. ABOUT DISPUTE SETTLEMENT IN THE WTO, ENVIRONMENTAL LAW AND HUMAN RIGHTS LAW

The history of the WTO, which was founded in 1995, dates back to 1947. Due to the political situation in the United States, the foundation of an International Trade Organization (ITO) was inconceivable, and as a consequence the General Agreement on Tariffs and Trade (GATT) was adopted provisionally as a mere commercial treaty and without any institutional background. Therefore, all decisions within the GATT had to be based on consensus between the contracting parties.<sup>3</sup> Despite the fact that a dispute settlement mechanism based on independent panels had already been established in the GATT 1947, its establishment, composition and even the adoption of the panel report had to be approved by consensus in the GATT Council. In

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<sup>3</sup> In the GATT 1947, Contracting parties was intentionally written in capital letters to show the unity between the participating states.

the end, even the losing state had to agree to the panel report,<sup>4</sup> and in this context it is not surprising that judicial dispute resolution had only played a minor role. After all, GATT 1947 was an “organization”<sup>5</sup> based on political decisions, not judicial interpretation.

This institutional philosophy and way of working changed radically with the foundation of the WTO in 1995. The GATT, together with the new GATS and TRIPS, is still one of the cornerstones of the WTO’s substantive law. However, the most important element of the WTO is the fundamentally reformed dispute settlement system.<sup>6</sup> Generally, the WTO dispute settlement system is considered to be fast, flexible and effective through quasi-judicial procedures in panels. After all, reversing the rule of the GATT 1947, all WTO panel reports are considered as accepted unless they are not unanimously rejected by the WTO parties. As even the prevailing party had to agree to such a rejection, all dispute settlement reports are accepted, which led to a more legal and less politicized process. In general, the WTO is now governed by a rule-based legal approach.<sup>7</sup>

The dispute settlement procedure is governed by the Dispute Settlement Understanding (DSU).<sup>8</sup> According to its article 1.1 and its annex 1, the DSU is applicable to the WTO Agreement,<sup>9</sup> the GATT,<sup>10</sup> GATS,<sup>11</sup> TRIPS,<sup>12</sup> the DSU itself and according to a decision of the respective contracting parties also to the WTO’s plurilateral trade agreements. The main objective of the dispute settlement mechanism is to effectively resolve the conflict, whereby article 3.7 DSU expressly prefers a consensual resolution. In cases where a consensus is not possible, article 3.7 DSU provides for the withdrawal of the measures, compensation, and, as a last resort, suspending the application of concessions or other obligations under the covered agreements as possible

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<sup>4</sup> Weiß, Wolfgang *et al.*, *Welthandelsrecht*, München, C. H. Beck, 2007, p. 124.

<sup>5</sup> As already mentioned, technically it was a treaty.

<sup>6</sup> Steinmann, Arthur, “Article 23: Strengthening of the Multilateral System”, in Wolfrum, Rüdiger *et al.* (comps.), *WTO-Institutions and Dispute Settlement. Max Planck Commentaries on World Trade Law*, Leiden, Martinus Nijhoff, 2006, pp. 557-562.

<sup>7</sup> Weiß, Wolfgang *et al.*, *op. cit.* pp. 125 y 126.

<sup>8</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401.

<sup>9</sup> Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154.

<sup>10</sup> General Agreement on Tariffs and Trade 1947 (GATT), 55 U.N.T.S. 194; General Agreement on Tariffs and Trade 1994 (GATT), 1867 U.N.T.S. 187.

<sup>11</sup> General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183.

<sup>12</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299.

consequences of a violation of WTO law. The general objective is not to establish penalties for non-complying parties but to re-establish a situation according to the law.<sup>13</sup>

The organization of WTO dispute settlement is carried out by the Dispute Settlement Body, which constitutes a separate organ within the WTO but is in practice and its composition identical to the WTO's general council. Generally, the DSB decides by consensus between all parties.<sup>14</sup> The dispute settlement procedure itself is divided into two instances. The DSB establishes for each dispute a panel of three independent and external experts which decide according to article 7.1 DSU on the basis of the facts presented by the parties and the agreements cited by the parties. The Appellate Body (AB) acts as second instance, and appeals are limited to questions of law. The AB is composed of seven members and is, in contrast to the ad-hoc appointed panels, a permanent institution.

WTO dispute settlement is characterized by its speed and flexibility; procedures rarely last longer than a year including appeals. The dispute settlement process must start with thirty days of consultations between the parties, followed by the establishment of a panel by the DSB. The panel works according to quasi-judicial rules and procedures. However, their meetings are principally private, and even the parties to the dispute may only participate by invitation of their respective panel.<sup>15</sup> The panel submits its report to the parties, which may appeal within sixty to ninety days to the AB. The dispute settlement between the parties is concluded with a formal adoption by the DSB; however, the Panel or AB reports are adopted unless they are unanimously rejected by the DSB, which does not occur in practice.

A key provision of the WTO dispute settlement system is article 23 DSU, whose first paragraph stipulates the obligation of WTO members to resolve their conflicts according to the rules and procedures of the DSU. While article 23.1 DSU does not contain an expressly general prohibition of using other mechanisms of settling disputes, it is generally understood and accepted that the WTO Dispute Settlement process shall enjoy exclusivity.<sup>16</sup> In other words, according to the WTO, law WTO members may not recourse to methods of dispute settlement from other regimes of international law, as the WTO panel laid down in the case *US-Section 301*

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<sup>13</sup> *Ibidem*, p. 131.

<sup>14</sup> See art. 2.4, DSU.

<sup>15</sup> Weiß, Wolfgang *et al.*, *op. cit.* p. 142.

<sup>16</sup> Steinmann, Arthur, *op. cit.*, p. 559.

*Trade Act*: “In these circumstances, members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call «exclusive dispute resolution clause», is an important new element of Members’ rights and obligations under the DSU”.<sup>17</sup>

Other dispute settlement systems are more flexible in this regard. Article 33 UN Charter contains a comprehensive list of possible forms of peaceful settlement and states specifically that states can use “other peaceful means of their own choice”. Also the United Nations Convention for the Law of the Seas (UNCLOS), which was negotiated about the same time as the WTO, leaves in its article 280 the choice of means of dispute settlement to its member states.

The regime of international human rights protection is based mainly on the complaints of individuals against states, and therefore follows a different dynamic in its main aspects. However, most regional and universal agreements also contain the possibility of state-to-state complaints.<sup>18</sup> While every treaty contains its own rules and procedures, several methods, including negotiations and external judicial settlement e.g. via decisions by the ICJ, can generally be used.<sup>19</sup> Due to the absence of established dispute settlement institutions there are no specific rules on how states shall settle their conflicts in international environmental law. After all, in practice arbitration and in some cases recourse to the ICJ have proven to be the most common methods.<sup>20</sup>

Consequently, dispute settlement in environmental law is more diverse and heterogeneous than in WTO or human rights litigation. Both the ICJ

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<sup>17</sup> WTO, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, Panel Report, adopted 27 January 2000, DSR 2000:II, p. 815.

<sup>18</sup> It is important to note that these procedures have been used only very sporadically.

<sup>19</sup> Office of the High Commissioner for Human Rights, “Human Rights Bodies-Complaints Procedures”, available at: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate>.

<sup>20</sup> See inter alia, Trail Smelter Arbitration, (*United States vs. Canada*) 16.4.1938 and 11.3.1941; Indus Waters Kishenganga Arbitration (*Pakistan vs. India*), PCA Case no. 2011-01, Award 20.12.2013; South China Sea Arbitration (*Philippines vs. People’s Republic of China*), PCA Case no. 2013-19, Award 12.7.2016; International Court of Justice, Case concerning the Gabčíkovo-Nagymaros Project (*Hungary vs. Slovakia*), Judgment of 25.9.1997, I.C.J. Reports, 1997, 7; International Court of Justice, Case concerning Pulp Mills on the River Uruguay (*Argentina vs. Uruguay*), Judgment of 20. 4. 2010, I.C.J. Reports, 2010, 14; International Court of Justice, Case concerning Whaling in the Antarctic (*Australia vs. Japan: New Zealand intervening*), Judgment, Judgment of 31. 3. 2014, I.C.J. Reports 2014, 226.

and the ITLOS have their own chambers for environmental law cases which, however, have not been used so far and most probably never will be used in the future.<sup>21</sup> Typically, environmental law cases have points of contact with other area of international law like world trade law, human rights, law of the sea or general law of treaties. It is for this reason that states involved in environmental disputes prefer to rely on general rather than highly-specialized dispute settlement bodies.<sup>22</sup> It seems that the regime of environmental law is more accustomed to taking several different regimes and points of view into account. In simple terms: they seem less selfish and rely more on general international law than human rights and especially the WTO regime.

Most of the environmental cases are decided by arbitration, but in *Gabčíkovo-Nagymaros*, *Kasikili/Sedudu Island*, *Legality of the Threat or Use of Nuclear Weapons* and *Pulp Mill*, a number of cases decided by the ICJ also made strong references to international environmental law.

While other regimes in international law are flexible regarding the choice of the dispute settlement forum, the flexibility of the WTO is based on the rules and procedures within its own dispute settlement system. According to article 5 DSU, the parties may settle their disagreements at any stage of the dispute, even during the process at an already established panel, via good offices, conciliation and mediation. However, a condition is that this must be done within the framework of the WTO. Recourse to external means of dispute settlement is not allowed.

We can therefore summarize that the WTO dispute settlement system is characterized by a high degree of exclusivity. In this way, the WTO achieves a high level of uniformity in the interpretation of its own legal framework. On the other hand, however, it complicates the relationship with external regimes. Ultimately, many situations can be considered from a trade, human rights or environmental perspective. This claim to exclusivity and the resulting fragmentation must ultimately be seen as a struggle for hegemony by the WTO against other regimes in international law.<sup>23</sup>

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<sup>21</sup> Boyle, Alan, "Environmental Dispute Settlement", in Wolfrum, Rüdiger (comp.), *The Max Planck encyclopedia of public international law*, Oxford-New York, Oxford University Press, vol. 3, 2012, pp. 561-571.

<sup>22</sup> *Ibidem*, p. 564.

<sup>23</sup> Koskenniemi, Martti, "The Fate of Public International Law: between Technique and Politics", *The Modern Law Review*, vol. 70, no. 1, 2007, pp. 1-30.

### III. INTERNATIONAL LAW IN WTO DISPUTE SETTLEMENT

#### 1. *Theoretical concepts*

The relationship of substantive general international law to the regime of the WTO and its inclusion in it is the subject of an extensive academic theoretical debate, but has, however, not been resolved so far in practice. As the most extreme and isolationist position it is argued that the WTO represents a so called self-contained regime. Generally, self-contained regimes are understood as those areas of law, which via a peaceful dispute settlement, enforcement, rules of modification and reforms exclude general public international law partly or totally.<sup>24</sup> While the WTO regime might hypothetically fulfill this definition, it is illusory to think that it can exist even partially in isolation from general international law. While this would be theoretically possible, at its formation member states had to actively opt-out of general international law. However, neither state practice in the formation of the WTO nor in the subsequent practice can be understood in this regard.<sup>25</sup> In this same sense, the Appellate Body stated in the case US—Reformulated Gasoline, that the WTO agreement shall “not be read in clinical isolation of international law”.<sup>26</sup>

According to Koskenniemi, chairman of the Working Group on the Fragmentation of International Law, general international law fulfils at least two tasks. Firstly, it acts as a normative background under which a specialized regime can develop itself. Secondly, general international law serves as a backup in case the specialized regime fails. Accordingly, the WTO may not be seen as a self-contained regime and must therefore be considered under the rules of *lex specialis*.<sup>27</sup>

<sup>24</sup> Klein, Eckart, “Self-Contained Regime”, in Wolfrum, Rüdiger (comp.), *The Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2012, vol. 9, pp. 97-103; please also compare the usage of the term by the ICJ in Teheran-Hostage Case and the Nicaragua Case. International Court of Justice, case concerning the United States Diplomatic and Consular Staff in Tehran (*United States of America vs. Iran*), Judgment of 24. 5. 1980, I.C.J. Reports 1980 p. 41; International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua vs. United States of America*), Judgement of 27.6.1986, I.C.J. Reports, 1986, p. 14.

<sup>25</sup> Pauwelyn, Joost, “The Role of Public International Law in the WTO: How Far Can We Go?”, *The American Journal of International Law*, vol. 95, no. 3, 2001, pp. 535-578.

<sup>26</sup> WTO, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Appellate Body Report, adopted 20 May 1996, DSR 1996:I, pp. 3-17.

<sup>27</sup> Klein, Eckart, *op. cit.*, p. 99; Koskenniemi, Martti, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN, 2006.

How and to what extent general international law is applicable within the WTO dispute settlement procedures is still the subject of an extensive academic debate.<sup>28</sup> So far the majority view is that the WTO has minimal connections to general international law. Public international law serves only to clarify and specify certain terms within the WTO legal system. It is therefore limited to means of interpretation.<sup>29</sup> A similar position in the literature, but which goes slightly further, admits international law in general, but argues on the basis of article 3.2 and 19.2 DSU a primacy of WTO over general international law. The dispute settlement bodies could therefore apply international law, but could not in this way limit existing WTO law.<sup>30</sup> Pauwelyn has argued that international law should be generally applicable within the WTO; the dispute settlement bodies might also give external law primacy over WTO law. In the most open and receptive position, Petersmann suggests *de lege ferenda* to use the effective WTO dispute settlement system to effectively enforce human rights via its connection to international trade.<sup>31</sup>

So far, the comprehensive theoretical debate has not achieved any clarification regarding the application of general international law within WTO law. The respective practice in WTO dispute settlement mainly reflects the restrictive academic positions. As is expressly foreseen in article 3.2 DSU and in accordance with the customary rules of interpretation of public international law, general international law within the WTO has only been used for interpretative purposes and to clarify and specify the existing terms and provisions within WTO agreements. These general rules of interpretation are codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), which, despite by having been ratified by only 114 states so far, can be considered to be universally applicable to all states.<sup>32</sup>

<sup>28</sup> Hermann, Christoph *et al.*, *Welthandelsrecht*, Munich, 2007, p. 157.

<sup>29</sup> Trachtman, Joel P., “The Domain of WTO Dispute Resolution”, *Harvard International Law Journal*, vol. 40, no. 1999, pp. 333-377; Palmeter, David and Mavroidis, Petros C., “The WTO Legal System: Sources of Law”, *American Journal of International Law*, vol. 92, no. 1998, pp. 398 *et seq.*

<sup>30</sup> Bartels, Lorand, “Applicable Law in WTO Dispute Settlement Proceedings”, *Journal of World Trade*, vol. 35, no. 3, 2001, pp. 499 *et seq.*

<sup>31</sup> Petersmann, Ernst Ulrich, “Human Rights and the Law of the World Trade Organization”, *Journal of World Trade*, vol. 37, no. 2, 2003, pp. 241-281; Critically, Alston, Philip, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, *European Journal of International Law*, vol. 13, no. 4, 2002, p. 815.

<sup>32</sup> International Court of Justice, Fisheries Jurisdiction Case (*Federal Republic of Germany vs. Iceland*), I.C.J. Reports, 1973, 49; International Court of Justice, Case concerning the Gabčíkovo-Nagymaros Project (*Hungary vs. Slovakia*), *op. cit.*, para. 24 and 36; for a more detailed view see also, Aust, Anthony, “Vienna Convention on the Law of Treaties (1969)”,



The DSB uses the general rules of interpretation in an effective and contextual manner and has without any doubt contributed to their general development. Obviously, the WTO panels and particularly the permanent AB have developed their own characteristics and techniques of interpretation that take into account the specific circumstances of legal dispute settlement within the WTO. However, this practice does not apply to substantive, but rather to procedural rules, which constitute the normative background of international law.<sup>33</sup> The use of these general rules and background is generally accepted and has not led to any controversies within the WTO. In this very sense, the Panel in India —Measures Affecting the Automotive Sector has stated that “It is certainly true that certain widely recognized principles of international law have been found to be applicable in WTO dispute settlement, particularly concerning fundamental procedural matters”.<sup>34</sup>

## 2. *Environmental law and human rights law in WTO jurisprudence*

The WTO dispute settlement body has been very reluctant to apply external substantive law within its own legal regime and its dispute settlement process.<sup>35</sup> The majority view regarding the incorporation of substantial law is that WTO disputes must be resolved according to WTO law. In other words, the WTO establishes a supremacy in the application of its own legal system over other areas of public international law. This is, however, not a particularity of the WTO and is ultimately immanent to any specialized regime. Article 293 UNCLOS establishes that a tribunal having jurisdiction “shall apply this Convention and other rules of international law not incompatible with this Convention”.<sup>36</sup> Also the courts and supervising organs of the system of the international human rights protection apply only their own legal regimes and do not contain any references to norms of general public international law.<sup>37</sup> In other words, each specialized regime operates

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in Wolfrum, Rüdiger (comp.), *The Max Planck Encyclopedia of Public International Law*, Oxford-New York, Oxford University Press, vol. 10, 2012, pp. 709-714.

<sup>33</sup> Damme, Isabelle Van, *Treaty interpretation by the WTO Appellate Body*, Oxford-New York, Oxford University Press, 2009, pp. 379-386.

<sup>34</sup> *WTO-India—Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, Panel Report, adopted 5 April 2002, DSR 2002:V, p. 1827.

<sup>35</sup> Böckenförde, Markus, *op. cit.*, p. 992.

<sup>36</sup> *Ibidem*, p. 974.

<sup>37</sup> Art. 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; Art. 62 American Convention on Human Rights 1144 U.N.T.S. 123.

principally under its own laws and uses external sources primarily to the extent necessary to close legal gaps.

WTO Panels and the AB rely quite frequently on general international law in order to clarify their own legal provisions as in Article XX GATT and Article 2.2 TBT. However, this does not include the external agreements themselves as part of the WTO regime, but rather the underlying rules and considerations of the protection of animal and plant health.<sup>38</sup> It is therefore an application of the principle of interpreting its own WTO regime harmoniously with general international law.<sup>39</sup>

Specifically, the Panel in *US-Import Prohibition of certain shrimp and shrimp-products* recognized that external agreements like the 1992 Rio Declaration, the Agenda 21 or the Convention on Biological Diversity might be used to interpret terms of WTO law.<sup>40</sup> In *Brazil-Measures Affecting Imports of Retreaded Tyres*, the AB recognized the tensions between World Trade on the one hand and questions of public health and environmental protection on the other. It also recognized that several types of policy measures might be necessary to achieve one policy objective.<sup>41</sup> The most recent case is the restriction of Chinese exports of rare earths. China has justified its restrictions, among other things, with the argument that the extraction of rare earths was harmful to the environment and human and animal health.<sup>42</sup> The WTO Panel acknowledged that mining rare earths might in principle be harmful to the environment, but finally concluded that the Chinese measures were not taken in order to protect life and the environment but rather because of protectionist trade purposes.<sup>43</sup>

One of the best known examples are the Tuna Cases between the USA and Mexico. Essentially, they deal with national US legislation which requires a “Dolphin Safe Label” for importing tuna, which is to ensure that no dolphins are killed as by-catch in commercial fishing. The normative background is the WTO agreement on technical trade barriers (TBT). Mexico

<sup>38</sup> Hermann, Christoph *et al.*, *op. cit.*, p. 166.

<sup>39</sup> Damme, Isabelle Van, *op. cit.*, p. 357-360.

<sup>40</sup> WTO Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821.

<sup>41</sup> WTO-*Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, Appellate Body Report, adopted 17 December 2007, DSR 2007:IV, p. 1527.

<sup>42</sup> Panel Reports, *China-Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R.

<sup>43</sup> *Ibidem*, para. 7.171 and 7.172-7.179.

did not meet the strict national US criteria but has, however, ratified together with the USA and other states the Agreement on the International Dolphin Conservation Program (AIDCP), which establishes its own less restrictive dolphin safe label. The main question in the last tuna case, which was issued in 2012, was the legal standing of the external AIDCP within the WTO regime. According to Article 2.4 TBT, WTO members shall use international standards where they exist. On this basis, Mexico won the case in first instance at the WTO panel, but finally the USA prevailed before the Appellate Body. According to the AB, the AIDCP does not establish an “international standardizing body” in the sense of Art. 2.4 TBT. In the AB’s view, an “international standardizing body” must be a subsequent agreement to the WTO in the meaning of Article 31 para. 3 VCLT and must be open to all WTO members.<sup>44</sup> This is nearly impossible to fulfill. Alongside 158 independent states, the independent customs territories of Hong Kong, Taiwan and the European Union<sup>45</sup> are also members of the World Trade Organization. However, environmental and other international agreements are normally not open to customs territories.

By this type of interpretation, the WTO establishes a kind of hegemony due to several reasons. WTO panels and the AB are bound by the DSU. The main objective of the DSU is not to establish a harmonious interpretation of general international law but rather to resolve a trade dispute and to harmoniously interpret between contradicting interests within the WTO regime. Consequently, both the non-permanent WTO panels and the permanent AB are composed of experts on international trade. According to Article 8.1 DSU, panel members must not even be (international) lawyers. Article 17.3 DSU requires that the seven members of the permanent AB have a “demonstrated expertise in law, international trade and the subject matter of the covered agreements generally”. Obviously, expertise in or knowledge of environmental, human rights or general international law is not required. As the WTO in general and the DSU in particular are also quite reluctant to incorporate general international law, it seems obvious that both the Panels and AB stick to what they know: interpreting the

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<sup>44</sup> WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna Products*, WT/DS381/AB/R, Appellate Body Report, adopted 13 June 2012, DSR 2012:IV, p. 1837; Shaffer, Gregory, “United States Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products”, *American Journal of International Law*, vol. 107, no. 1, 2013, pp. 192-199. Please see also art. 104 of NAFTA, which recognizes expressly several environmental and conservation agreements, even if they were not ratified by the NAFTA parties.

<sup>45</sup> The EU takes a special position, as it carries out its tasks within the WTO together with its 28 members, which are also members to the WTO.

WTO agreements. In the end, it is trade experts deciding to what extent certain environmental agreements are applicable in WTO dispute settlement. They decide whether the Chinese measures were indeed about protecting the environment and it is up to them, not the AIDCP, to protect dolphins in Mexican waters.

All this leads to what Hestermeyer has called a de facto hierarchy of regimes.<sup>46</sup> The WTO has developed a WTO-first policy, which is based principally on procedural rules, the effectiveness of the WTO dispute settlement system and a restrictive interpretation of external, non-WTO sources.

### 3. *Human Rights Law*

The incorporation of international human rights law into the WTO regime differs significantly from environmental law. In contrast to environmental protection, no general exceptions or mentioning of human rights can be found within the WTO agreements. In general, both the political and the academic debate regarding the relationship between trade and human rights are more emotional and controversial.

Some authors, most remarkably Marceau, argue that the WTO has a reluctant relationship to human rights law. Marceau proposes that a WTO panel or the AB should interpret the WTO provisions by taking into account relevant human rights law. The intention should be to avoid conflict<sup>47</sup> between human rights and trade law and guarantee a harmonized interpretation between the different regimes. However, in cases of true conflict, where such a harmonized interpretation between human rights law and WTO law is not possible, WTO law shall prevail.<sup>48</sup>

The main proponent of the counter position is Pauwelyn. According to him, commitments that states have undertaken within the WTO are of a reciprocal, bilateral nature. If both parties in a WTO dispute are also part of a relevant human rights treaty, then these provisions must be directly applicable in WTO dispute settlement. Where not all parties are part of relevant human right treaties, human rights obligations, which are in general of an integral, collective character, must prevail.<sup>49</sup>

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<sup>46</sup> Hestermeyer, Holger, *Human rights and the WTO: the Case of Patents and Access to Medicines*, New York, Oxford University Press, 2007, p. 193-197.

<sup>47</sup> Marceau, Gabrielle, "WTO Dispute Settlement and Human Rights", *European Journal of International Law*, año 13, no. 4, 2002, pp. 753-814.

<sup>48</sup> *Ibidem*, pp. 762-795.

<sup>49</sup> Pauwelyn, Joost, *op. cit.*, p. 545.

The relevant practice in WTO dispute settlement and of WTO members mainly reflects the position of Marceau, which can, again, be summarized as WTO first. However, until now conflicts between human rights and WTO law have played only a minor role in WTO dispute settlement. In contrast to environmental law, human rights law has not been applied directly by panels or the AB so far.<sup>50</sup> Human rights arguments have been brought forward only occasionally in some disputes. In *US-Hormones Beef*,<sup>51</sup> the European Union argued the precautionary principle in questions of public health. In *US-Massachusetts Myanmar Legislation*, dispute settlement proceedings were initiated, as due to human rights reasons Massachusetts excluded all bidders which had relations to Myanmar from public procurement procedures.<sup>52</sup> However, the law was repealed by the US Supreme Court before a WTO panel could be established.<sup>53</sup>

The best-known example regarding the relationship between WTO law and human rights protection is access to essential medicines, where there is a conflict of interests between the protection of patents and intellectual property according to the WTO and the TRIPS on the one hand and the human right to health and to enjoy the benefits of scientific progress and its applications, according to articles 12 and 15(b) International Covenant on Economic, Social and Cultural Rights (ICESCR). When Brazil compulsorily licensed medicines in order to fight HIV/AIDS, dispute settlement proceedings at the WTO were initiated by the USA. However, the dispute was settled amicably before a judicial decision of the case could be issued by a WTO panel.<sup>54</sup> Ultimately, the conflict was settled via a waiver<sup>55</sup> which grants the possibility to issue compulsory licenses and is therefore the result of a political compromise.<sup>56</sup> For that reason, the standing of human rights within WTO dispute settlement still lacks legal clarification within

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<sup>50</sup> Joseph, Sarah, *Blame it on the WTO? A Human Rights Critique*, New York, Oxford University Press, 2011, p. 50.

<sup>51</sup> WTO, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Appellate Body Report, adopted 13 February 1998, DSR 1998:I, p. 135.

<sup>52</sup> WTO-United States-Measure Affecting Government Procurement, WT/DS88 and WT/DS95, Authority for panel lapsed.

<sup>53</sup> US Supreme Court, *Crosby vs. National Foreign Trade Council*, 530 U.S. 363 (2000); See also Weiß, Wolfgang *et al.*, *op. cit.*, p. 514.

<sup>54</sup> WTO-*Brazil-Measures Affecting Patent Protection*, WT/DS199, settled or terminated (withdrawn, mutually agreed solution) on 5 July 2001.

<sup>55</sup> See also the Doha Ministerial Declaration. WTO-Declaration on the TRIPS agreement and public health, WT/MIN(01)/DEC/2.

<sup>56</sup> Harrison, James, *The Human Rights Impact of the World Trade Organization*, Oxford-Portland, Hart, 2007, pp. 165-171.

dispute settlement. Nevertheless, and taking into account previous practice of WTO settlement, anything other than a reluctant position towards human rights law on the part of the WTO would be a surprise.

#### IV. WTO LAW IN INTERNATIONAL DISPUTE SETTLEMENT

So far, dispute settlement organs of other regimes in international law have made references to WTO case law on about 150 occasions.<sup>57</sup> This demonstrates that the WTO, beside its success and internal effectiveness, also exerts a relatively great influence on other regimes in international law. However, if one analyses these cases in more detail it can be seen that references to the WTO have been made almost entirely in the areas of protection of investment, regional trade agreements or in the field of intellectual property. Accordingly, 42 references to the WTO were made by the Andean Community Court of Justice, 31 by NAFTA chapter 19, 20 by the ICSID, 12 by NAFTA chapter 11, 9 by the Mercosur and 8 by the WIPO Arbitration and Mediation Center.<sup>58</sup> The reasons for dispute settlement organs of other regimes to take recourse to WTO jurisprudence lie on the one hand in a wish to clarify their own legal terms, and on the other hand to ensure a coherent and harmonious interpretation of their own legal system with WTO rules.<sup>59</sup> It is generally noteworthy that, as far as can be seen, no dispute settlement system of either related or non-related areas to the WTO contains an obligation to take WTO jurisprudence into account.<sup>60</sup>

It is therefore a kind of consideration that has no positive normative basis in either the respective agreements nor the VCLT.<sup>61</sup> It is rather a consideration comparable with the “single undertaking approach” of the World Trade Organization, which is intended to guarantee a harmonious and integrated interpretation between the various agreements within the WTO.<sup>62</sup> We can assume that similar customary law regarding a harmonious interpretation is currently emerging for cases between other regimes and the WTO.

<sup>57</sup> Marceau, Gabrielle *et al.*, “The WTO’s Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation”, *Journal of World Trade*, vol. 47, no. 3, 2013, pp. 481-574.

<sup>58</sup> *Ibidem*, pp. 484 and 531.

<sup>59</sup> *Ibidem*, p. 489.

<sup>60</sup> *Ibidem*, p. 532.

<sup>61</sup> Petersmann, Ernst-Ulrich, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, Martinus Nijhoff, 1997, p. 48.

<sup>62</sup> See art. II. 2 and 3 of the WTO Agreement.

However, until now the influence of WTO jurisprudence has remained limited to its own commercial and trade law regime and other related areas. International environmental protection lacks effective dispute settlement institutions; an influence of the WTO cannot occur already from that point of view. Other, non-related international regimes contain only very few references to WTO jurisprudence. In international human rights law, neither the European, American, African nor the universal human rights systems have made any references to world trade law within their judicial and quasi-judicial decisions. Only in the area of general international law have the Permanent Court of Arbitration in 7 cases, the ICJ in 4 cases and the ITLOS in one case made references to the WTO.

In its Nicaragua Case the ICJ used Art XXI GATT to interpret the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States.<sup>63</sup> A similar reasoning was used by Judge Rigaux in his separate opinion in the Oil Platforms case.<sup>64</sup> In the Pulp Mills on the River Uruguay case, the judges Al-Khasawneh and Simma in their dissenting opinion pointed out that in the case the ICJ had lost an opportunity to involve external experts in its decision-making process, a practice which has been used by the WTO in a variety of its decisions.<sup>65</sup>

In his separate opinion in the Gabčíkovo-Nagymaros case, Judge Weeramantry pointed out that development must be carried out in harmony and accordance with the environmental principles of public international law. This principle of sustainable development is part of several international agreements, declarations, general state practice and of several founding treaties of international organizations, including the WTO.<sup>66</sup>

Generally it can be observed that the regime of international human rights protection acts more self-confidently than other specialized regimes. Discussions regarding the relationship to other areas of international law, especially regarding the WTO, normally do not take place in human rights law. In this sense, the Committee on Economic, Social and Cultural Hu-

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<sup>63</sup> International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua vs. United States of America*), para. 221 and 222.

<sup>64</sup> International Court of Justice, Oil Platforms (*Islamic Republic of Iran vs. United States of America*), Judgment of 6 November 2003, *Separate Opinion of Judge ad hoc Rigaux*, I.C.J. Reports 2003, 362.

<sup>65</sup> International Court of Justice, Pulp Mills on the River Uruguay (*Argentina vs. Uruguay*), Judgment of 20 April 2010, *Joint dissenting opinion Judges Al-Khasawneh and Simma*, I.C.J. Reports, 2010, 108.

<sup>66</sup> International Court of Justice, Case concerning the Gabčíkovo-Nagymaros Project (*Hungary vs. Slovakia*), Judgment of 25.9.1997, *Separate Opinion of Vice-President Weeramantry*, I.C.J. Reports, 1997, 88, para. 28, pp. 92 and 93.

man Rights has observed that all states must take their obligations regarding the International Covenant on Economic, Social and Cultural Rights into account when they conclude international treaties or join an international organization.<sup>67</sup>

So far, no human rights body has made reference to WTO jurisprudence. However, the European Court of Human Rights in particular has developed in its jurisprudence a tendency to monitor the acts and omissions of international organizations with regard to human rights violations. In its Kadi cases, the European Court of Justice reserved its right to review sanctions issued by the UN Security Council under Chapter VII of the Charter.<sup>68</sup> A similar case, although not with the same level of clarity as the one at the European Court of Justice, was decided by the UN Human Rights Committee in *Nabil Sayadi and Patricia Vinck v. Belgium*.<sup>69</sup> In the Eurocontrol,<sup>70</sup> European Patent Office<sup>71</sup> and European Space Agency cases,<sup>72</sup> the ECtHR and the German constitutional court have requested human rights standards within several international organizations. In its Solange decisions, the German Constitutional Court requested adequate protection of fundamental rights comparable to German Law.<sup>73</sup>

Given this emerging jurisprudence, no reasons can be seen why in a comparable case human rights law would not also be applicable against the WTO.<sup>74</sup> While it is true that the WTO, like any other international organization, is not a member of any human rights treaty, there are no doubts that

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<sup>67</sup> Joseph, Sarah, *Blame it on the WTO? : A Human Rights Critique*, Oxford-New York, Oxford University Press, 2011, p. 54.; UN Committee on Economic, Social and Cultural Rights, Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights, General Comment no. 14 (11.8.2000), E/C.12/2000/4.

<sup>68</sup> European Court of Justice, *Yassin Abdullah Kadi y Al Barakaat International Foundation vs. Council and Commission*, (Kadi I), C-402/05P, Judgement of 3.9.2008; European Court of Justice, *Yassin Abdullah Kadi y Al Barakaat International Foundation vs. Council and Commission*, (Kadi II), C-584/10P, Judgement of 18.7.2013.

<sup>69</sup> *Nabil Sayadi and Patricia Vinck v. Belgium*, Communication no. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008).

<sup>70</sup> Bundesverfassungsgericht (German Constitutional Court), *Eurocontrol*, BVerfG, 23.06.1981-2 BvR 1107/77, 1124/77, 195/79.

<sup>71</sup> Bundesverfassungsgericht (German Constitutional Court), *case Rechtsschutz gegen Maßnahmen des Europäischen Patentamts*, BVerfG, 2 BvR 2368/99.

<sup>72</sup> European Court of Human Rights, *case of Beer and Regan vs. Germany* (Application no. 28934/95), 1999; European Court of Human Rights, *case of Waite and Kennedy vs. Germany* (Application no. 26083/94), 1999.

<sup>73</sup> Bundesverfassungsgericht (German Constitutional Court), *case Solange I*, BVerfGE 37, 271 ss.

<sup>74</sup> Joseph, Sarah, *op. cit.*, p. 54.



the member states can be held subsidiarily liable for human rights violations of the WTO, based on their national human right commitments. Possible exceptions to human rights obligations are very restrictive and normally only permitted under specific exceptional circumstances like in a state of emergency. It is unthinkable that a state could excuse its human rights obligations because of its incompatible, human rights obligations. In other words, while it is arguable and debatable that human rights might limit TRIPS (and other WTO obligations) in WTO dispute settlement, it is impossible that TRIPS would limit to access to essential medicines in a human rights judicial forum.

The influence of material human rights litigation can also be observed on a series of measures undertaken by the South African government in the struggle against HIV/AIDS, including, as in Brazil, the compulsory licensing of essential medicines. With the diplomatic support of the US government, forty pharmaceutical enterprises filed a claim at the Pretoria High Court because of violations of the South African Constitution and the TRIPS.<sup>75</sup> In addition to the effect of public pressure, the pharmaceutical enterprises also withdrew their claims because the right to public health is very well and strongly incorporated into the South African constitution and the South African Constitutional Court has already ruled in several occasions in favor of economic and social human rights.<sup>76</sup> Finally, and as in the case with Brazil, the issue was resolved at a political level via the Doha Declaration and subsequent waivers and exceptions.

From all the foregoing, we can observe that at judicial procedures before an international human rights body, human rights would prevail over trade in almost all cases. That means that beside the theoretical equality between the different sources of public international law, human rights law seems to have precedence within its own regime.<sup>77</sup> This establishes, as within the WTO regime, a factual hierarchy. However, it seems that unlike within the WTO, in human rights law this hierarchy is not based on procedural, but rather on material and substantive law and the exceptional objective of human rights law.

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<sup>75</sup> Harrison, James, *op. cit.*, p. 158; Pharmaceutical company lawsuit (forty two applicants) against the Government of South Africa (ten respondents) NOTICE OF MOTION IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) Case number: 4183/98.

<sup>76</sup> *Ibidem*, p. 163.

<sup>77</sup> Joseph, Sarah, *op. cit.*, p. 54.

## V. COORDINATION

So far, very few conflicts of the WTO with other regimes have occurred. Cases related to environmental law were able to be resolved within the WTO, while cases with contact to the human rights regime were resolved at a political level. On the other hand, WTO law has not played a significant role in human rights or environmental law jurisprudence until now. However, it can be expected that such conflicts, though not large in numbers, will evolve in the future to the legal stage, raising questions of how these regimes interact in international law. Therefore, some kind of coordination must be provided by international law.

It is important to understand that it is ultimately not the legal technicalities that make harmonious co-existence between different regimes in public international law more difficult. It is rather the social divisions and incompatibilities that emerge more strongly when public international law carries out specialized administrative tasks. Social ruptures between the regimes of the WTO and human rights or international environmental law are quite natural, as they might have incompatible objectives in the same or similar situations. In contrast, in regimes with similar intentions and objectives to human rights, the maintenance of peace and security or humanitarian law, these kind of ruptures are not to be expected.<sup>78</sup> The same is true for the WTO; NAFTA and other regional trade regimes might even be different in content, but they are nevertheless trying to accomplish the same objective, the liberalization of trade. Their ruptures are therefore technical<sup>79</sup> and the existing jurisprudence focuses more on procedural issues. Between WTO law and human rights in environmental law there is, in other words, a collision of different rationalities within a globalized society.<sup>80</sup> It is therefore important to note that fragmentation takes place in a social context. The best that law can offer here is to mediate and conciliate between the several fragmented subsystems.<sup>81</sup>

In the end, such coordination can only be carried out by international constitutional law. However, a new concept of the reading and understand-

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<sup>78</sup> Fischer-Lescano, Andreas and Teubner, Gunther, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", *Michigan Journal of International Law*, vol. 25, 2004, pp. 999-1049.

<sup>79</sup> Gantz, David A., "Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties", *American University International Law Review*, vol. 14, 1998, p. 1025.

<sup>80</sup> Fischer-Lescano, Andreas and Teubner, Gunther, *op. cit.*, p. 1017.

<sup>81</sup> *Ibidem*, p. 1045.

ing of such coordination must be found. Over centuries, international law was dominated and carried out by nation states,<sup>82</sup> meaning that national law regulated national problems, while international law was limited to coordination and regulation between sovereign states. In contrast, modern international law is based on specialized regimes like the WTO, environmental and human rights law, and has direct regulatory implications within the concept of global administration and global administrative law. After all, international administration of this kind must be coordinated by an international constitution, not the other way round.<sup>83</sup>

Often, the Charter of the United Nations is called upon to be the constitution of public international law.<sup>84</sup> However, the constitutional authority of the United Nations lies mainly in its universal membership, integrating nearly all states in the world, and especially in its possibility to adopt coercive measures. In other words, the UN's authority is based principally on substantive material law within its own regime to maintain international peace and security. At the UN, a coordinating function between several regimes can only be carried out by the International Court of Justice. However, while the ICJ undoubtedly has great legal authority, it lacks coverage and acceptance between the states, as only 72 states unilaterally recognize its compulsory jurisdiction, and as it has decided in its seventy years of history a little more than about cases. Moreover, the ICJ lacks flexibility. According to article 34 of its statute it is only open to states and does not possess the mechanisms to incorporate other subjects of organizations specialized in international law like the WTO, or even individuals.

The international law of treaties has more coordinating authority, which is based mainly on the 1969 Vienna Convention (VCLT) and on customary law. Although so far the VCLT has only been ratified by 114 states and is still lacking the ratification of such important states as the USA and France. In general, in international law it seems to be undisputed that the VCLT reflects existing customary international law. However, the preamble and as well articles 3 (a) and 4 of the VCLT seem to suggest that the scope of customary law on treaties might go further than the rules contained in the Vienna Convention. A detailed analysis of the customary status of the VCLT would be beyond the scope of this contribution. Ultimately, the question

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<sup>82</sup> *Ibidem*, p. 1008; Kuo, Ming-Sung, "Between Fragmentation and Unity: the Uneasy Relationship between Global Administrative Law and Global Constitutionalism", *San Diego Int'l L J*, vol. 10, 2008, pp. 439 and 447.

<sup>83</sup> *Ibidem*, p. 440.

<sup>84</sup> Fassbender, Bardo, "The United Nations Charter as Constitution of the International Community", *Colum. J. Transnat'l L.*, vol. 36, 1998, p. 529.

whether a specific norm of the VCLT can also be qualified as customary international law must be answered case-by-case in a specific litigation.<sup>85</sup> Article 30 VCLT can be considered as a codification of the universally accepted maxims *lex posterior*, *lex superior* and *pacta terti*. There is no jurisprudence on the relationship between article 30 VCLT and customary international law in international legal practice. In the end, the customary status of article 30 VCLT depends from the scope and extent of these maxims in general international law.<sup>86</sup>

Article 30 VCLT regulates the application of successive treaties relating the same subject matter. Article 30 para. 3 VCLT covers the case when all parties to an earlier treaty are also party to a later, contradicting treaty. In this case, the later shall prevail. However, its application to the relationship of the WTO to other regimes of international law is not possible, as it is factually impossible for all members of the WTO to be signatories of another treaty. Article 30 para. 4 VCLT covers the similar case which occurs when not all parties of an older treaty are also parties to a new treaty. In this case, the newer treaty shall be applied between its members, while the older treaty still applies between the other states. It is, in short, a codification of the *lex posterior derogat legi priori* principle.

Pauwelyn describes such cases where two modern, concurring international regimes like WTO, human rights or environmental law enter into conflict as “hard cases”. These modern types of regimes are normally designed as framework agreements which can be adopted without formal treaty modification and are in a constant process of evolution.<sup>87</sup> It seems obvious that the *lex posterior* rules of articles 30 paras. 3 and 4 VCLT are not capable of resolving the problem effectively and cannot be applied in such conflicts, as this would make the harmonious coexistence of the different, constantly evolving regimes difficult.

According to article 31 VCLT, an international treaty shall be interpreted in good faith in accordance with the ordinary meaning of its context and purpose. It is this context that explains why different dispute settlement bodies interpret identical legal texts differently.<sup>88</sup> As is common within every dispute settlement institution, the WTO has also developed its own specific practice of interpretation under Article 31 VCLT. In general and within its

<sup>85</sup> Aust, Anthony, “Vienna Convention on the Law of Treaties (1969)”, *op. cit.*

<sup>86</sup> Orakhelashvili, Alexander, “Article 30 Convention of 1969”, in Corten, Olivier y Klein, Pierre (comps.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford-New York, Oxford University Press, 2011, pp.764-803.

<sup>87</sup> Pauwelyn, Joost, *op. cit.*, p. 545.

<sup>88</sup> Damme, Isabelle Van, *op. cit.*, p. 213.

own regime, the AB is characterized by having established a flexible style of interpretation<sup>89</sup> on a case by case basis, taking into account reasonable state parties.<sup>90</sup>

On the other hand, the WTO has been quite reluctant to incorporate external law via article 31 VCLT. In both the Biotech<sup>91</sup> case and the most recent Tuna case,<sup>92</sup> the dispute settlement body required that an external agreement must be open to all WTO members and, just like in article 30 VCLT, be subsequent to the formation of the WTO. As we have already noticed, it is nearly impossible to meet these conditions, and article 31 VCLT is therefore also inappropriate for coordinating effectively between the WTO and other regimes.

Finally, article 41 VCLT establishes the possibility that two parties to a multilateral treaty may modify the relevant provisions between each other, as long as this is not incompatible with the multilateral treaty as a whole. However, the main objective of the WTO Agreement is to liberalize trade on an integral, multilateral basis.<sup>93</sup> Additionally, the WTO system itself establishes the possibility of intensifying trade liberalization between the parties. It therefore seems unthinkable that such inter-se modifications according to article 41 VCLT would be permissible to the WTO agreement.

From all this it can be concluded that the VCLT is inappropriate for resolving inter-regime conflicts. Ultimately, the VCLT focuses too much on a temporal component based on the *lex posterior* rule. Additionally, if one consequently applies the Vienna Convention, article 18 VCLT regarding reservations must also be applied. This would result in a completely heterogeneous application of different legal regimes that could endanger the universality and coherence of the legal system of the WTO and other regimes.<sup>94</sup> It is ob-

<sup>89</sup> *Ibidem*, pp. 216 and 221.

<sup>90</sup> WTO, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, *cit.*, p. 18.

<sup>91</sup> WTO, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add. 1 to Add. 9 and Corr. 1 / WT/DS292/R, Add. 1 to Add. 9 and Corr. 1 / WT/DS293/R, Add. 1 to Add. 9 and Corr. 1, Panel Report, adopted 21 November 2006, DSR 2006: III, p. 847.

<sup>92</sup> WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, Panel Report, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012: IV, p. 2013.

<sup>93</sup> See, for example, the preamble to the WTO agreement, which sets as objectives of the WTO “to develop an integrated, more viable and durable multilateral trading system” and to “preserve the basic principles and to further the objectives underlying this multilateral trading system”.

<sup>94</sup> Böckenförde, Markus, *op. cit.*, p. 985.

vious that such a result was not intended by the parties when they founded the WTO.

It seems that the VCLT, which dates from 1969, does not have sufficient elements to deal with specialized regimes of modern international law. In other words: The VCLT still considers public international law as one homogenous legal system. This is, as Simma and Pulkowski also point out, a mistake.<sup>95</sup>

But what should effective coordination between different regimes look like? The WTO panel in *Indonesia-Certain Measures Affecting the Automobile Industry* has acknowledged that “[t]here is a presumption against conflicts in that parties do not normally intend to incur conflicting obligations”.<sup>96</sup> Accordingly, the WTO dispute settlement body uses external agreements to interpret its own legal provisions. In the *Gabčíkovo-Nagymaros* case, Judge Weeramantry —with reference to the WTO— was also of the opinion that (economic) development must be carried out harmoniously with environmental law.<sup>97</sup> In those cases where external dispute settlement mechanisms referred to WTO law, coherence between the different regimes was one of the most decisive motivations.<sup>98</sup> This coherence is done without any legal basis, and even in cases when they have to balance their own legal system against the WTO. It seems that dispute mechanisms particularly try to avoid inconsistent and contradictory decisions.<sup>99</sup>

Apparently, a customary international law moving towards a coherent harmonious interpretation of international law between different regimes is emerging. However, one will have to wait until sufficient practice occurs for this emerging custom to become a generally recognized part of public international law. How such coordination between courts will work in practice still remains unclear in its main elements. The only concrete example in practice is the *MOX Plant Case*, which dealt with Irish worries about British nuclear activities on the Irish Sea coast in Sellafield. In order to resolve the issue, judicial proceedings were initiated at three different fora: The

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<sup>95</sup> Simma, Bruno y Pulkowski, Dirk, “Of Planets and the Universe: Self-contained Regimes in International Law”, *European Journal of International Law*, vol. 17, no. 3, 2006, pp. 483-529.

<sup>96</sup> WTO, *Indonesia-Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr. 1 and Corr. 2, Panel Report, adopted 23 July 1998, Corr. 3 and Corr. 4, DSR 1998: VI, p. 2201.

<sup>97</sup> International Court of Justice, Case concerning the *Gabčíkovo-Nagymaros Project (Hungary vs. Slovakia)*, *Separate Opinion of Vice-President Weeramantry*, *op. cit.*

<sup>98</sup> Marceau, Gabrielle *et al.*, *op. cit.*, p. 490.

<sup>99</sup> *Ibidem*, pp. 492 and 493.

Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), the UNCLOS (both via provisional measures at the ITLOS and an Annex VII Tribunal) and the European Court of Justice. The case is remarkable because of UNLCOS' Annex VII Tribunal procedural measures. While it decided to uphold provisional measures issued by ITLOS, it suspended its own proceedings until it had a clearer picture of the issue regarding European Union law.<sup>100</sup> According to the Annex VII Tribunal, the European Court of Justice had a better view of this subject matter and consequently the case was decided by the European Court.

This means that the Annex VII Tribunal suspended its jurisdiction voluntarily because another dispute settlement institution had a better view of the case. In the end, this is an application of the *lex specialis* principle, which seems to be more suitable for resolving inter-regime conflicts.

## VI. CONCLUDING REMARKS

The WTO dispute settlement system is characterized by its speed, flexibility, efficiency and acceptance. Proceedings before the WTO panels and the AB rarely last longer than a year, but can also be settled amicable at any stage of the process. The downside of this success story is that via its rules and procedures the WTO has developed a kind of hegemony: it does not allow states a choice of forums or recourse to other means of dispute settlement.

The application of external international law within the WTO has not been resolved in detail. Nevertheless, the WTO has developed a very reluctant position, recognizing procedural rules of interpretation and substantive provisions only for clarifying its own WTO legal terms. An important and decisive motive is to guarantee the harmonious application and interpretation of public international law.

So far, external dispute settlement institutions have made reference to WTO jurisprudence on about 150 occasions. Here too, a coherent harmonious interpretation of public international law between different regimes was one of the most important motivations. However, nearly all practice is limited to WTO-related regimes, references of environmental law cases are limited to separate and dissenting opinions, and the regime of international human rights protection has not yet made any reference to the WTO.

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<sup>100</sup> Churchill, Robin R., "MOX Plant Arbitration and Cases", in Wolfrum, Rüdiger (comp.), *The Max Planck Encyclopedia of Public International Law*, Oxford-New York, Oxford University Press, vol. 7, 2012, pp. 403-410.

However, based on general human rights practice we can assume that in a human rights forum, human rights would prevail over WTO law.

Neither the UN via the ICJ nor the VCLT are appropriate to effectively resolve conflicts between coexisting legal regimes. The VCLT considers public international law to be one homogenous legal system and does not contain sufficient elements to resolve conflicts between specialized regimes.

A possible solution could be the emerging customary international law regarding a harmonious interpretation of international law. The MOX Plant Case, still the only example of coordination between several dispute settlement systems, demonstrates how this could work in practice. Specialized regimes could be coordinated by dispute settlement institutions by applying the rules of *lex specialis*. As a backup and on a subsidiary basis, these rules could also be invoked in dispute settlement bodies of general international law like the ICJ.