HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS

Edited by
MARTIN SCHEININ
European University Institute, Florence

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108499736
DOI: 10.1017/9781108584623

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Scheinin, Martin, editor.
Title: Human rights norms in "other" international courts / edited by Martin Scheinin, European University Institute, Florence.
Description: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2019. | Series: Studies on international courts and tribunals | Includes index.
Identifiers: LCCN 2019011019 | ISBN 9781108499736
Subjects: LCSH: International law and human rights. | International Court of Justice. | International courts. | International criminal law.
Classification: LCC KZ1266 .H863 2019 | DDC 341.4/8–dc23
LC record available at https://lccn.loc.gov/2019011019

ISBN 978-1-108-49973-6 Hardback

Cover image photo credit: Communication Service, European University Institute

CONTENTS

7

International Human Rights Law and Dispute Settlement in the World Trade Organization

HOLGER HESTERMEYER*

1. Introduction

For a brief moment, 'human rights and the World Trade Organization (WTO)' was amongst one of the most discussed topics of public international law.[1] Other issues have since taken the spotlight – yet the debate on

* Shell Reader in International Dispute Resolution, King's College London. Comments are welcome at: holger.hestermeyer@kcl.ac.uk.

[1] The debate received a significant impulse from a preliminary report by the Sub-Commission on the Promotion and Protection of Human Rights stating that 'for certain sectors of humanity – particularly the developing countries of the South – the WTO is a veritable nightmare'. The report became known as the 'nightmare report': J. Oloka-Onyango and D. Udagama, The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights, UN Doc. E/CN.4/Sub.2/2000/13, 15 June 2000, para. 15. Some of the notable contributions to the debate from those days (in chronological order): E-U. Petersmann, 'The WTO Constitution and Human Rights', *Journal of International Economic Law*, 3 (2000), 19–25; A.-C. Habbard and M. Guiraud, 'L'OMC et les droits de l'Homme', *Fédération Internationale des Ligues des Droits de l'Homme (FIDH) Rapport*, 320 (2001), available at www.fidh.org/IMG/pdf/omc320f.pdf; P. Ala'i, 'A Human Rights Critique of the WTO: Some Preliminary Observations', *George Washington International Law Review*, 33 (2001), 537–53; H. Lim, 'Trade and Human Rights: What's at Issue', *Journal of World Trade*, 35 (2001), 275–300; E.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', *European Journal of International Law*, 13 (2002), 621–50; R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', *European Journal of International Law*, 13 (2002), 651–9; G. Marceau, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, 13 (2002), 753–814; P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law*, 13 (2002), 815–44; M. Hilf and S. Hörmann, 'Die WTO – Eine Gefahr für die Verwirklichung von Menschenrechten?' *Archiv des Völkerrechts*, 43 (2005), 397–465; H. Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford: Oxford University Press, 2007);

the topic never ceased entirely. This chapter will use the opportunity to soberly re-examine the role of human rights in the WTO, focusing on the dispute settlement function of the WTO, the world's principal international organisation dealing with trade. The WTO, set up by the 1994 Marrakesh Agreement,[2] as of 29 July 2018, has 164 members,[3] including most nations of the world[4] and all of its major trading powers. This chapter will, in section 2, briefly introduce the dispute settlement mechanism of the WTO and the role of that mechanism in the wider sphere of international dispute resolution. It will then (section 3) describe the normative framework, under which human rights law can or cannot be relied on in WTO dispute settlement. Section 4 will examine the reality of the use of human rights law in WTO dispute settlement. In that regard, we will have to distinguish between the application of substantive human rights law, such as the right to health or the right to food, and inspiration drawn from procedural human rights obligations, such as due process. While case law on the former is notable for its absence, due process is alive and well in the WTO. As only WTO members (almost all of them States) have standing in WTO dispute settlement, the latter is not an instance of applying human rights law, however, and the Appellate Body, the WTO's highest judicial organ, is hesitant to refer to sources outside of WTO law to support its arguments. The chapter thus *concludes* on a critical note concerning the role of human rights law in WTO dispute settlement.

2. Dispute Settlement in the WTO

2.1 The Dispute Settlement Mechanism

Administering a dispute settlement mechanism for the WTO Agreements is one of the most significant functions of the

J. Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford and Portland, OR: Hart, 2007). See, in retrospect, S. Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011).

[2] Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 154. See also J. Jackson, '*History of the General Agreement on Tariffs and Trade*', in R. Wolfrum, P.-T. Stoll and H. Hestermeyer (eds.), *WTO – Trade in Goods* (Leiden: Martinus Nijhoff, 2011), pp. 22 et seq.

[3] A list of current members is available on the WTO website: www.wto.org.

[4] The WTO is open not only to States, but also to 'separate customs [territories] possessing full autonomy in the conduct of [their] external commercial relations and of the other matters provided for in [the WTO] Agreement'. See Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 154, Article XII:1 (WTO Agreement).

WTO.[5] The WTO Agreements are akin to the world's trade constitution. They include, amongst others, the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[6]

Dispute settlement is conducted under the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (DSU).[7] Under these rules, the dispute settlement process is administered by the Dispute Settlement Body (DSB), which is a political institution,[8] namely the General Council of the WTO consisting of representatives of all WTO members in its guise a dispute settlement institution.[9] The DSU provides for a range of dispute settlement options, including good offices, conciliation, mediation and arbitration open to all WTO members.[10] The cornerstone (and most common process) of WTO dispute settlement is a judicial means of dispute settlement by ad hoc panels with the possibility to appeal to an Appellate Body. To understand this dispute settlement mechanism of the WTO, it is helpful to provide a short (and admittedly very cursory) overview over the procedure.[11]

After attempting to settle a dispute through consultations, a complainant can make a request to the DSB to establish a panel.[12]

[5] WTO Agreement, Article III:3. This is all the more true nowadays, when discussions on further trade liberalisation in the WTO have almost come to a halt. Of course, the dispute settlement system of the WTO is currently under severe pressure due to the US blocking all appointments to the Appellate Body.

[6] See the Annexes to the WTO Agreement: GATT, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 187; GATS, Marrakesh, 15 April 1994, in force 1 January 1995, 1869 UNTS 183; TRIPS, Marrakesh, 15 April 1994, in force 1 January 1995, 1869 UNTS 299.

[7] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, 15 April 1994, in force 1 January 1995, 1869 UNTS 401.

[8] As opposed to the political institution of the DSB. K. Kaiser, 'Article 2 DSU: Administration', in R. Wolfrum, P.-T. Stoll and K. Kaiser (eds.), *WTO – Institutions and Dispute Settlement* (Leiden: Martinus Nijhoff, 2006), p. 279.

[9] DSU, Article 2; WTO Agreement, Articles IV:2, IV:3.

[10] DSU, Articles 5, 25.

[11] Summaries of the procedure are provided in World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, 2nd ed.) Cambridge: Cambridge University Press, 2017); R. Mackenzie et al., *Manual on International Courts and Tribunals* (Oxford: Oxford University Press, 2010), pp. 72 et seq.; P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text. Cases and Materials*, 4th ed. (Cambridge: Cambridge University Press, 2017), pp. 164 et seq.

[12] The first such request can be blocked by the respondent; however, at the second DSB meeting at which the request is tabled, the panel is established unless the DSB decides by consensus not to do so. DSU, Article 6.1.

The complainant must, in its request, identify the specific measure of the respondent at issue and provide a brief summary of the legal basis of the complaint.[13] The DSB will then establish a panel, which has its own terms of reference and is composed ad hoc of usually three panelists, proposed by the WTO Secretariat.[14] The working procedure of a panel has to be decided at the beginning of each case, but it usually follows Appendix 3 to the DSU.[15] The procedure entails written submissions by complainant and respondent as well as hearings and thus closely resembles court proceedings. The panel sets out its findings and recommendations in a report, which undergoes an interim review, allowing the parties to comment on a draft of the descriptive part of the report as well as to review precise aspects of the panel's interim report (and the panel to react to these comments). The report is then adopted automatically by the DSB, unless one of the parties to the dispute appeals to the Appellate Body, or the DSB by consensus decides not to adopt the report.[16]

The Appellate Body is, unlike the panels, a permanent judicial body – a court in anything but name. It is composed of seven persons (although at the time of writing membership is reduced to three),[17] three of whom, selected by rotation, rule on a case (the other members exchange views with the three members serving on the case to ensure consistency).[18] The Appellate Body is empowered to hear appeals on the law only.[19] It has adopted and from time to time amended its own Working Procedures.[20] The appeal process starts with the notification of the appeal, which must also briefly state the alleged errors, to the DSB and the Appellate Body Secretariat.[21] It then proceeds to written submissions and an oral hearing. Finally, the Appellate Body issues its report, which becomes binding upon adoption by the DSB, which, much like with regard to panel reports, can be prevented only by negative consensus.[22] Where the final binding panel or Appellate Body report concludes that a measure is inconsistent with WTO law, it recommends that the member bring its

[13] DSU, Article 6.2.
[14] DSU, Articles 8.5, 8.6, 7.1.
[15] DSU, Article 12.
[16] DSU, Article 16.4.
[17] The United States, at the time of writing, has been blocking all new appointments to the Appellate Body.
[18] DSU, Article 17.1.
[19] DSU, Articles 17.6, 17.13.
[20] DSU, Article 17.9.
[21] Rule 20 working procedure for appellate review.
[22] DSU, Article 17.14.

measure into conformity with its obligations.[23] The DSB is tasked with maintaining surveillance of the implementation of the recommendations and may, ultimately and upon request, authorise suspension of concessions and other obligations to induce compliance.[24]

2.2 *The Role WTO Dispute Settlement Plays in International Dispute Resolution*

The WTO occupies a particular position in the increasingly complex collage that is international dispute resolution. Four features of WTO dispute settlement in particular deserve to be emphasised here, as they affect the discussion on the interplay between human rights and WTO dispute settlement.

The first – and essential – characteristic of WTO dispute settlement[25] is that it is *judicial* in nature. The WTO Appellate Body is, for all intents and purposes, an international court.[26] Style, methodology and arguments are those of a court and the Appellate Body has built a consistent case law.[27] The fact that panel and Appellate Body reports only become binding upon adoption by the DSB, and hence a political organ, does not change the judicial nature of the process. As the DSB can only reject a report by consensus, such an outcome is merely a theoretical possibility.[28] This has not always been the case. The WTO system has built on and improved the GATT dispute settlement system, in which, in contrast to today's system, panel reports had to be adopted by consensus in the political organ, the GATT Council,[29] which meant that the reports ended up looking more like political compromises than judicial rulings to ensure their adoption. It is no secret that the United States, the world's largest economy,[30] has grown disenchanted with the current dispute

[23] DSU, Article 19.1.
[24] DSU, Article 2.1.
[25] The reference to WTO dispute settlement should be read as referring to the most common dispute settlement procedure provided for by the DSU – dispute settlement via panels and the possibility of an appeal to the Appellate Body.
[26] See also the treatment of WTO dispute settlement in the chapter on global courts in Mackenzie et al., 'Manual on International Courts', p. v.
[27] To the extent, of course, that case law is consistent.
[28] Van den Bossche and Zdouc, 'Law and Policy', p. 210.
[29] Van den Bossche and Zdouc, 'Law and Policy', pp. 165 et seq.; R. E. Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', *Journal of World Trade*, 4 (1970), 615 et seq.
[30] See, e.g., International Monetary Fund, World Economic Outlook Database 2017, available at www.imf.org/external/pubs/ft/weo/2017/02/weodata/index.aspx.

settlement system.[31] Instead of a court system, developing a body of law, the current US Trade Representative seems to prefer a return to the old, diplomatic process under the GATT.[32]

Second, the WTO dispute settlement mechanism is of *considerable strength*. It is both compulsory for WTO members and exclusive when members seek redress for the violation of WTO Agreements.[33] What is more, however, is that it can result in the authorisation of the suspension of concessions, leading to an exceptional rate of compliance with WTO reports.[34] Commentators have emphasised time and again the extraordinary success of the system,[35] and it is not surprising that it is one of the most prolific systems of dispute resolution in international law.[36]

The third characteristic of WTO dispute settlement is that unlike the International Court of Justice, WTO dispute settlement has limited jurisdiction ratione materiae. Under Article 1.1 of the DSU, WTO dispute settlement only deals with disputes brought pursuant to the WTO

[31] 'From the Board: The US Attack on the WTO Appellate Body', *Legal Issues of Economic Integration*, 45 (2018), 1 et seq.

[32] 'U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative', Center for Strategic and International Studies, 18 September 2017, available at www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative. Note in that regard also the United States argument that Appellate Body reports exceeding the ninety-day time limit for such reports imposed by Article 17.5 of the DSU are not to be deemed Appellate Body reports for purposes of the negative consensus rule. See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 22 June 2018, p. 20, available at https://geneva.usmission.gov/wp-content/uploads/2018/06/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf.

[33] DSU, Article 23.1. See A. Steinmann, 'Article 23 DSU: Strengthening of the Multilateral System', in Wolfrum, Stoll and Kaiser, '*WTO – Institutions*', pp. 557–62.

[34] Van den Bossche and Zdouc state that in more than 80 per cent of the 'disputes in which the respondent had to withdraw (or modify) a WTO-inconsistent measure, it has done so'. Van den Bossche and Zdouc, 'Law and Policy', p. 165.

[35] C.-D. Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization', in F. Ortino and E.-U. Petersmann (eds.), *The WTO Dispute Settlement System, 1995–2003* (The Hague: Kluwer Law International, 2004), p. 529; J. H. Jackson, 'International Economic Law: Jurisprudence and Contours', *Proceedings of the Annual Meeting (American Society of International Law)*, 93 (1999), 102; E.-U. Petersmann, 'From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System', *Journal of International Economic Law*, 1 (1998), 183; A. F. Lowenfeld, *International Economic Law*, 2nd ed. (Oxford: Oxford University Press, 2008), p. 160.

[36] Between 1 January 1995 and 1 October 2016, the Appellate Body issued 127 reports. In that period, the International Court of Justice published 65 judgments and 5 advisory opinions. Van den Bossche and Zdouc, 'Law and Policy', p. 165.

agreements. The WTO dispute settlement process does not have jurisdiction over claims of human rights violations. The next section will look at this aspect of WTO dispute settlement in more depth.

The impression of the WTO as a specialised system removed from the general context of international law is further strengthened by the fact that the *WTO is not formally integrated into the United Nations (UN) system*. Things were supposed to be different. When the post-war economic system was conceived, the idea was to create an International Trade Organization (ITO) as a specialised agency of the UN alongside the World Bank and the International Monetary Fund.[37] However, the ITO Charter never entered into force and for almost fifty years the GATT – originally envisaged as a specific agreement within the institutional ITO framework – became the world's trade constitution.[38] When the WTO was set up in 1995, a conscious decision was taken to not establish formal institutional links between the WTO and the UN and instead to establish cooperative ties with the UN and other international organisations, which effectively continued the relationship already established in the times of the GATT.[39]

3. Human Rights in WTO Dispute Settlement: The Normative Framework

Before we can proceed to look at how the Appellate Body has dealt with human rights law in practice, it is worthwhile to examine the normative framework in which it operates to determine to what extent it is permitted to take account of international human rights law. The first observation in this regard must be that the WTO Agreement itself does not contain human rights obligations, nor does it refer to them or integrate them explicitly. Some WTO obligations might resemble fundamental rights obligations (e.g., WTO law contains strong non-

[37] 'The GATT Years: From Havana to Marrakesh', WTO, available at www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[38] An excellent account of the history of the GATT can be found in J. H. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Indianapolis: Bobbs-Merrill, 1969).

[39] Arrangements for Effective Cooperation with other Intergovernmental Organizations: Relations Between the WTO and the United Nations, WT/GC/W/10, 3 November 1995. Note that the UN and a large number of its specialised agencies have observer status at the WTO. For a list, see 'International Intergovernmental Organizations Granted Observer Status to WTO Bodies', WTO, available at www.wto.org/english/thewto_e/igo_obs_e.htm.

discrimination obligations),[40] but the WTO system is an intergovernmental system in which generally only the members are subjects of WTO law. Like all legal regimes, the norms contained in WTO law ultimately do benefit individuals, but such an effect is indirect and differs fundamentally from human rights. One might want to argue that things are different with regard to the TRIPS Agreement, as it guarantees the protection of intellectual property rights, concerns that seem to be echoed by Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[41] However, General Comment No. 17 of the Committee on Economic, Social and Cultural Rights explicitly emphasises that the rights protected by Article 15 of the ICESCR differ substantially from intellectual property rights.[42] What remains, then, is the somewhat weak link to human rights that the TRIPS agreement forces members to protect (intellectual) property – though falling short of actually granting individual rights.

When analysing how the normative framework of WTO dispute settlement deals with human rights in the absence of the explicit integration of such rights in the WTO legal system, three sets of rules are decisive: the *jurisdiction ratione materiae* of WTO dispute settlement, which was already mentioned in the previous section; the *applicable law* in WTO dispute settlement; and, finally, the *method of interpretation* used in WTO dispute settlement – namely the extent to which Article 31 of the Vienna Convention on the Law of Treaties (VCLT)[43] allows the use of human rights law as a matter of systemic integration. As the dividing lines between the latter two issues are not always neatly separated, they will be treated together.

3.1 Jurisdiction Ratione Materiae

As stated previously, the jurisdiction of WTO dispute settlement is limited to disputes brought pursuant to the WTO Agreements under

[40] See, e.g., Articles I and III of the GATT on most-favoured-nation and on national treatment.

[41] ICESCR, New York, 16 December 1966, in force 3 January 1976, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3.

[42] General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, paragraph 1(c) of the Covenant), Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/17, 12 January 2006, paras. 1 et seq.

[43] VCLT, Vienna, 23 May 1969, in force 27 January 1980, UN Doc. A/Conf.39/27; 1155 UNTS 331.

Article 1.1 of the DSU. These agreements provide for claims where a respondent has violated or otherwise nullified or impaired benefits arising from specific provisions of WTO law. In practice, complaints of violations of WTO law are by far the most common. So-called 'non-violation complaints' are extremely exceptional.[44] Claims of violations of rights and obligations that are not provided for in the WTO Agreement – at least by reference – can accordingly not be brought to WTO dispute settlement.[45] This includes claims of violations of human rights.[46] This impression is confirmed by Article 19.1 of the DSU, according to which the remedy that panels and the Appellate Body can grant where they conclude that 'a measure is inconsistent with the covered [i.e., WTO] agreements' consists of a recommendation 'that the Member concerned bring the [attacked] measure into conformity with that agreement'. Claims of violations of a non-WTO agreement could hence not be remedied.[47] The Appellate Body itself recognised its limited jurisdiction in *Mexico – Taxes on Soft Drinks* and held: 'We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes.'[48]

3.2 Referring to Human Rights Law in WTO Dispute Settlement

Does the limited jurisdiction of WTO dispute settlement imply that human rights play no role whatsoever in WTO dispute settlement, that WTO dispute settlement is a system apart, a self-contained regime? It is well-known that international law allows states to opt out of general rules of international law (with the exception of jus cogens rules) and create regimes that contain their own rules for enforcement, reacting to breaches, settling disputes and modification and amendment of the rules (at times referred to as self-contained regimes, even though the

[44] World Trade Organization, 'Handbook', p. 46 et seq. A third category of complaints, 'situation complaints', have never been raised. One might consider constructing a non-violation complaint based on a violation of international human rights law. However, this would appear an obvious and misguided attempt to circumvent the limited jurisdiction of WTO dispute settlement. See also Marceau, 'WTO Dispute Settlement', 768.

[45] World Trade Organization, 'Handbook', p. 6; Hestermeyer, 'Human Rights', pp. 212 et seq. Pauwelyn argues that parties can agree to enlarge the jurisdiction of panels to include non-WTO claims by mutual consent. J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', *American Journal of International Law*, 95 (2001), 554. In light of Article 1.1 of the DSU this seems doubtful and has remained theoretical.

[46] See also Marceau, 'WTO Dispute Settlement', 763.

[47] Ibid., 764.

[48] *Mexico – Taxes on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006, para. 56.

vagueness of the term tends to hide more than it reveals).[49] Given that the vast majority of WTO members have ratified the International Covenant on Civil and Political Rights (ICCPR),[50] the ICESCR or both, however, it would seem counterintuitive for them to set up a trade regime intended to be utterly divorced from human rights law. An analysis of the provisions of the DSU proves enlightening in this regard.

3.2.1 The Understanding on Rules and Procedures Governing the Settlement of Disputes

Such an analysis indicates, first of all, that WTO law has not evolved into an entirely separate, sui generis system, divorced from everything but jus cogens rules. Article 3.2 of the DSU states that it is the function of WTO dispute settlement to preserve the rights and obligations of members under WTO law and 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. Thus WTO law cannot, as the Appellate Body stated, 'be read in clinical isolation from public international law'.[51] At the same time, however, the provisions of the DSU also indicate that there are limits to the relevance of non-regime-specific norms. This is already demonstrated by the terms of reference panels operate under. Standard terms of reference,

[49] E. Klein, 'Self-Contained Regime', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2008). If the term 'self-contained regime' is understood to describe a regime that contains the rules for consequences of breaches of the law of the regime and opts out of the general rules of State responsibility in that regard, the WTO system should be regarded as largely self-contained – that is, opting out at least of some of the general consequences of breach under the law of State responsibility. See International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, 2001, vol. 2, Part Two, Art. 55, specifically para. 3 of the commentary; P. J. Kuijper, 'The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?', *Netherlands Yearbook of International Law*, 25 (1994), 252; Note that this does not imply a similar level of contracting out of the rule of attribution. For an analysis of the relevance of the ILC Draft Articles on State Responsibility for the interpretation of attribution under the Agreement on Subsidies and Countervailing Measures, see *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 11 March 2011, paras. 304 et seq.; for a systematic discussion of attribution in WTO law, see G. Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge: Cambridge University Press, 2015), pp. 31 et seq.

[50] ICCPR, New York, 16 December 1966, in force 23 March 1976, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171.

[51] *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17.

provided for in Article 7.1 of the DSU, task panels with the examination of the matter referred to them 'in the light of the relevant provisions' of the cited WTO Agreements.[52] Panels shall, according to Article 7.2 of the DSU, 'address the relevant provisions in any covered agreement' (i.e., essentially the WTO Agreements). While a panel should make an 'objective assessment of the matter before it', this objective assessment, when it comes to the law, implies an assessment of the 'applicability of and conformity with the relevant covered agreements'.[53] Even more categorically, the DSU provides that neither the DSB (Article 3.2 of the DSU) nor a panel or the Appellate Body (Article 19.2 of the DSU) can, in their recommendations and rulings, 'add to or diminish the rights and obligations provided in the covered agreements'.

3.2.2 Interpretation of WTO Law: Systemic Integration

Scholars have reached different conclusions as to the impact that non-WTO law can have in WTO dispute settlement. The first – and uncontested – conclusion is that other international law must be taken into account when interpreting WTO law. Dogmatically, this is the consequence of the application of customary rules of interpretation of public international law under Article 3.2 of the DSU. These customary rules are contained in Articles 31–33 of the VCLT, which state, amongst others, that treaties shall be interpreted in their context and that together with the context 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account. This latter obligation is contained in Article 31(3)(c) of the VCLT, which gained much prominence through the International Law Commission's work on the fragmentation of international law. Koskenniemi argued that the provision allows for 'systemic integration', implementing a presumption that parties 'refer to general principles of international law for all questions' they do not resolve in a treaty and that they do not intend to act inconsistently with their obligations under international law when setting up a new regime.[54]

[52] Article 7.3 of the DSU permits non-standard, 'special terms of reference'. These have been agreed in one case only: *Brazil – Measures Affecting Desiccated Coconut*, W/DS22/AB/R, 21 February 1997, p. 22. See G. Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement', *Journal of World Trade*, 33 (1999), 87 et seq.

[53] DSU, Article 11.

[54] M. Koskenniemi, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and

The Appellate Body has since its inception recognised and applied the methodology of treaty interpretation under Articles 31–32 VCLT.[55] In this regard, WTO dispute settlement has adopted a conservative approach, thereby positioning itself in the mainstream of public international law as one of many more international law institutions of international dispute resolution.[56] Both Appellate Body and panels have also applied Article 31(3)(c) of the VCLT[57] and thereby strengthened the systemic integration of WTO law into the body of general international law. However, they have developed a strict interpretation of the provisions. While the Appellate Body deems the term 'rules of international law' to encompass any rule from any source of international law under Article 38(1) of the Statute of the International Court of Justice,[58] it has

Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 465. See also ibid., paras. 479 et seq.

[55] See, e.g., *US – Gasoline*, p. 17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 10; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (US)*, WT/DS50/AB/R, 19 December 1997, pp. 17 et seq.; *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, paras. 11 et seq.; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, 13 October 1999, paras. 131 et seq.; *Canada – Term of Patent Protection*, WT/DS170/AB/R, 18 September 2000, para. 53; *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002, paras. 204, 213 et seq.; *US – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, 16 January 2003, para. 276; *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, paras. 175 et seq.; *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, para. 160; *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012, para. 258; most recently: *EU – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, 6 October 2016, para. 6.53.

[56] J. Pauwelyn, 'Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence', in C.-E. Côté et al. (eds), *Proceedings of the Québec City Conference on the WTO at 20* (Presses de l'Université de Laval, 2018, forthcoming).

[57] The most relevant cases in this regard are: *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006; *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paras. 841 et seq.; *US – Anti-Dumping and Countervailing Duties*, WT/DS379/AB/R, paras. 304 et seq.; *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015, paras. 5.100 et seq. Note also footnote 157 in *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 as well as *US – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)*, WT/DS58/RW, 15 June 2001, para. 5.57.

[58] *US – Anti-Dumping and Countervailing Duties*, WT/DS379/AB/R, para. 308.

applied a restrictive interpretation of when such a rule is 'relevant' – namely it requires the rule to 'concern the same subject matter as the treaty terms' the interpretation of which is at issue.[59] Thus in *Peru – Agricultural Products* the Appellate Body found that a rule explicitly permitting a certain tariff regime was not relevant to interpret terms such as 'variable import levies' or 'minimum import prices', which would have been prohibited under the WTO agreements.[60] It is also not entirely clear how the term 'in the relations between the parties' should be interpreted, after the Panel in *EC – Approval and Marketing of Biotech Products* read the term to refer to all WTO members,[61] which, given the particular structure of WTO membership, would have prohibited recourse to any rule of international law not from the WTO system.[62] The Appellate Body has corrected this overly restrictive interpretation, stating that the purpose of the interpretative process is establishing the common intention of the parties to the WTO Agreement, and thus while caution has to be exercised when referring to an agreement to which not all members are parties, this should not prevent striving for systemic integration.[63] While human rights law thus arguably can be considered to apply in the relations between the parties, the provision to be used for interpretative purposes would also have to be relevant.

It is worthwhile noting, however, that WTO dispute settlement has, at times, found ways around the strict limits it considers Article 31(3)(c) of the VCLT to contain when using non-WTO law as context to interpret WTO law. Most notably in *US – Shrimp*, the Appellate Body used a plethora of non-WTO law provisions and documents to interpret the GATT term 'exhaustible natural resources'.[64] In fact, even the Panel in *EC – Approval and Marketing of Biotech Products* that defined the conditions of Article 31(3)(c) of the VCLT so restrictively as to read it out of existence went on to consider other rules of international law to determine the 'ordinary meaning of treaty terms'.[65]

[59] *Peru – Agricultural Products*, WT/DS457/AB/R, para. 5.101; *US – Anti-Dumping and Countervailing Duties*, WT/DS379/AB/R, para. 308.
[60] *Peru – Agricultural Products*, WT/DS457/AB/R, para. 5.102 et seq.
[61] *EC – Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.68.
[62] Koskenniemi, 'Fragmentation', para. 450.
[63] *EC – Large Civil Aircraft*, WT/DS316/AB/R, paras. 844 et seq.
[64] *US – Shrimp*, WT/DS58/AB/R, paras. 130 et seq.
[65] *EC – Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.92 et seq. Note also the application of a public international law

Even where the conditions of Article 31(3)(c) of the VCLT are met, however, there is a limit to how far systemic integration under the provision can go. The provision governs the interpretation of treaties and accordingly concerns the exercise of discerning the meaning of the terms employed. As the Appellate Body Stated in *Peru – Agricultural Products*, it cannot be used 'to develop interpretations . . . that appear to subvert the common intention of the treaty parties'.[66]

3.2.3 Non-WTO Law as Applicable Law?

Some authors consider the normative framework of the DSU to go further than just allowing the use of non-WTO law for interpreting WTO law. The first question in this regard is whether general international law can be used to fill gaps of WTO law. The second question that arises is whether WTO dispute settlement can go beyond that and allow respondents to rely on non-WTO law as a defence in a violation complaint.

Dogmatically, the issue in this context is the question if and to what extent the mentioned provisions of the DSU allow for the application of non-WTO law in WTO dispute settlement. Using the 'applicable law' has to be distinguished from using non-WTO law for interpreting WTO law on the one hand and jurisdiction on the other, both discussed previously. Jurisdiction is a threshold issue that determines whether a court has the power to rule on a claim. Once a claim is admissible, the concept of applicable law informs a tribunal which provisions it can apply in its examination. Even if a tribunal cannot apply non-WTO law, but only WTO provisions, it can still be allowed to interpret these WTO provisions using non-WTO law as context in the sense of the VCLT. As to jurisdiction and interpretation of WTO law using non-WTO law, the previous sections clarified that jurisdiction of WTO dispute settlement is limited to claims of violations of WTO law and that non-WTO law may be used to interpret WTO law. What remains to be seen is whether non-WTO law is also part of the applicable law of WTO dispute settlement.

Opinions on the law applicable in WTO dispute settlement diverge. They roughly fall into three groups. Some scholars consider the applicable law to be limited to WTO law. They refer, amongst others, to the

presumption against conflict in *US – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000, para. 6.99.

[66] *Peru – Agricultural Products*, WT/DS457/AB/R, para. 5.94.

standard terms of reference of a panel in this regard.[67] A second group, in which Pauwelyn stands out, disagrees. For them, the DSU does not contain an explicit provision on applicable law, nor does it limit the applicable law implicitly: all of international law remains applicable. Consequently, where a respondent relies on a defence based on non-WTO law, the question whether the defence prevails over the WTO obligation depends on whether the WTO law rule or the non-WTO law rule prevails, which is regarded as a question of general international law.[68] Bartels has proposed an intermediate – third – solution: for him, the applicable law might not be limited, but where there is a conflict between WTO and non-WTO law, Articles 3.2 and 19.1 of the DSU resolve the conflict in favour of the WTO rule.[69]

The different technical approaches do not always result in different outcomes. When it comes to filling gaps, proponents of all three views appear to allow gap-filling when it comes to procedure, as the argument in favour of limiting the applicable law seems to be made with regard to substantive law exclusively.[70] In terms of substantive law, it is difficult to imagine how there can even be gaps to fill: any claim raised in WTO dispute settlement needs to be based on the allegation of a violation of WTO law. A substantive norm in support of an already existing claim of a violation of WTO law would not fill a gap. A substantive norm raised as a defence against that claim is not filling gaps, but raises the issue of the permissibility of raising non-WTO law defences in WTO dispute settlement. It is in this regard (i.e., when it comes to the question of whether non-WTO law defences can prevail over WTO law obligations) where the different views diverge in practice. For the second group, it is possible that a non-WTO law defence prevails over a WTO law obligation in WTO dispute settlement. None of the others would concede this.

A look at practice shows that the Appellate Body has long referred to concepts of general international law when it comes to filling gaps in the

[67] J. P. Trachtman, 'The Domain of WTO Dispute Resolution', *Harvard International Law Journal*, 40 (1999), 342 et seq.; Marceau, 'WTO Dispute Settlement' 773 et seq.; Hestermeyer, 'Human Rights', pp. 216 et seq.

[68] Pauwelyn, 'Role of Public International Law', 559 et seq.

[69] L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', *Journal of World Trade*, 35 (2001), 506.

[70] For those arguing that the applicable law in WTO dispute settlement is limited to WTO law, the legal basis to apply non-WTO law when it comes to procedure is the concept of inherent jurisdiction of international tribunals. A. D. Mitchell, 'The Legal Basis for Using Principles in WTO Disputes', *Journal of International Economic Law*, 10 (2007), 830 et seq.

procedural set-up of WTO dispute settlement and ancillary matters such as treaty interpretation. It has, for example, applied rules concerning the burden of proof as general principles of international law, pointing out that such rules were generally accepted and applied by international tribunals including the International Court of Justice,[71] and, as we shall see later on, developed a sophisticated jurisprudence on due process.[72] Articles 31 and 32 of the VCLT are applied as customary rules of public international law pertaining to the interpretation of treaties, as explicitly provided for in Article 3.2 of the DSU and discussed above. The Panel in *India – Autos* thus correctly observed 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'.[73]

Things are different, however, when it comes to substantive law – that is, when it comes to referring to non-WTO law as a defence to a charge of violation of WTO law. Such a defence has not been admitted. Panels have, at times, referred to Article 30 of the VCLT, which attempts to resolve conflicts between successive treaties, but the application remained limited to finding that WTO law prevailed over other provisions.[74]

One particular case of a possible conflict between WTO law and non-WTO law has recently raised eyebrows – namely the question whether and how countries can change WTO obligations inter se through bilateral free trade agreements. Such cases arise as claims of violations of WTO law in which the respondent relies on a bilateral agreement, arguing that the later bilateral agreement contains a permissible inter se modification of a multilateral treaty under Article 41 of the VCLT specifically permitting the derogation from WTO law. The Appellate Body ruled on this issue in *Peru – Agricultural Products*, in a ruling that disappointed critics hoping that a lack of progress in negotiations in the WTO could be compensated via bilateral agreements.[75] The Appellate Body concluded that the WTO system contains specific

[71] *US – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, p. 14.

[72] See in this regard the examples listed in Cook, 'Digest', pp. 107 et seq., 121 et seq.

[73] *India – Measures Affecting the Automotive Sector,* WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.57.

[74] *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, 30 June 2010, footnote 1906.

[75] Shaffer and Winters have convincingly criticised the ruling and proposed an alternative approach in G. Shaffer and L. A. Winters, 'FTA Law in WTO Dispute Settlement: Peru –

provisions addressing amendment, waiver or regional trade agreements, and it was those rules that a respondent must look to in formulating its defence in WTO dispute settlement, not Article 41 of the VCLT. Any departure from WTO obligations through a free trade agreement would, accordingly, have to rely on Article XXIV of the GATT and comply with strict requirements the Appellate Body set out in the case.[76] It should be noted, of course, that due to the structure of international law all of this should change where a rule that a defence is based on is jus cogens. Such peremptory norms of international law prevail in a conflict with other rules of international law and cannot be 'contracted out of'.[77] However, given the very limited set of provisions acknowledged to be jus cogens,[78] such a conflict remains theoretical in nature.

4. The Reality of Human Rights in the WTO Appellate Body

The previous section has shown that there are clear limits to the application of human rights law in WTO dispute settlement. Thus it is highly unlikely that a respondent can rely on human rights law alone in its defence. However, the previous section has also shown that the normative framework of WTO dispute settlement would clearly be open to referring to human rights law in WTO dispute settlement. In particular, universal human rights law could be used as context for interpreting WTO law and could be referred to as to procedural matters. This section will analyse the (sobering) reality of the application of human rights law by the WTO Appellate Body. Given the normative framework described previously, it appears to be useful to distinguish in this regard the use of WTO law as to the *substance* of a case and as to *procedure*.

4.1 Substantive Use of Human Rights Law

An analysis of the use of human rights law when it comes to the substance of a matter disappoints. However, it is important to note that this does

Additional Duty and the Fragmentation of Trade Law', *World Trade Review*, 16 (2017), 303 et seq.

[76] *Peru – Agricultural Products*, WT/DS457/AB/R, paras. 5.111 et seq.

[77] See VCLT, Article 53. See, in general, J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003).

[78] On the difficulties in determining such provisions see ILC, First Report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/693, 8 March 2016; ILC, Second Report on jus cogens by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/706, 16 March 2017.

not mean that the Appellate Body is oblivious to considerations that in other *fora* would be framed as human rights. We shall first look at a few cases that mentioned human rights. In a second step, it is worthwhile to demonstrate that the Appellate Body is nevertheless open to taking values into account and how it achieves this goal.

4.1.1 Cases Referring to Human Rights

Event though there is legal scope for using substantive human rights law in WTO dispute settlement, there is no case-law actually doing so. Neither has the Appellate Body allowed a defence based on human rights law, nor has it relied on human rights law to interpret WTO law. In fact, human rights have rarely been mentioned in WTO dispute settlement at all.[79] Things are, unsurprisingly, similarly bleak with regard to references to human rights courts: the Appellate Body did cite a decision by the European Court of Human Rights (ECtHR) shortly after the WTO was set up, but the decision was cited to support the notion that Article 31 of the VCLT has achieved customary international law status.[80]

In the few cases in which human rights were mentioned, this was done by parties to the dispute. Even then, parties generally mentioned them in an aside.[81] India seemed to take a different approach in the more recent matter of *European Union (EU) and a Member State – Seizure of Generic Drugs in Transit*. The case concerned the seizure of generic drugs from India en route to third countries in the Netherlands for infringing Dutch patents. In its request for consultations, India argued that the measures have a serious adverse impact on developing country members' ability to

[79] Regarding specifically economic, social and cultural rights, see H. Hestermeyer, 'Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Practice', in E. Riedel, G. Giacca and C. Golay (eds.), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014), pp. 260–85.

[80] *US – Gasoline*, WT/DS2/AB/R, footnote 34, referring to *Golder* v. *United Kingdom* (Appl. No. 4451/70), Judgment, 21 February 1975, Ser. A, No. 18.

[81] This was the case, for example, when Nicaragua mentioned that intellectual property was recognised in human rights documents, mentioning the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and the ICESCR. *US – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, 6 August 2001, paras. 5.5 et seq. Cuba argued the illegality of the Cuba embargo in a discussion of the case in the Dispute Settlement Body, relying on the right to self-determination. DSB, Minutes of Meeting, WT/DSB/M/271, 25 September 2009, para. 7. See also the EU mentioning case law of the ECtHR in *US – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, footnote 190, or the mention of Brazil's (national) right to health under Article 196 of the Brazilian Constitution in *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, Annex 1, para. 263.

protect public health and that the provisions of the TRIPS Agreement must be interpreted not only in light of WTO documents emphasising the need to act to protect public health,[82] but also in light of Article 12(1) of the ICESCR.[83] It appears, however, that the case will be resolved consensually and will not lead to a panel report. It is not certain that India's approach relying on human rights as an argument is followed by other members. Australia, for example, is defending its plain packaging laws in four WTO cases.[84] The cases clearly raise public health concerns, which Australia duly emphasised in its submissions. However, Australia apparently chose not to rely on the right to health.[85]

4.1.2 Non-Trade Values in WTO Case Law

Australia's arguments illustrate that the failure to mention human rights law should not be taken as an absence of relevant concerns from the world trading system or a failure by the Appellate Body to take such concerns into account. However, the Appellate Body has preferred to let those concerns enter the system of WTO law through the provisions of that regime itself as values rather than as human rights. Numerous provisions within WTO law can serve as entry points for non-trade interests. Pride of place in this regard takes the Preamble to the WTO Agreement, which not only lists economic goals of the world trade order such as 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand', but

[82] Namely, Declaration on the TRIPS Agreement and Public Health, Doha, 14 November 2001, WT/MIN(01)/DEC/2.

[83] Request for Consultations by India, 19 May 2010, WT/DS408/1.

[84] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras)*, WT/DS435/R, 28 June 2018; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Dominican Republic)*, WT/DS441/R, 28 June 2018; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Cuba)*, WT/DS458/R, 28 June 2018; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Indonesia)*, WT/DS467/R, 28 June 2018. In the fifth case, the authority for the panel lapsed on 30 May 2016: *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Ukraine)*, WT/DS434.

[85] See Integrated Executive Summary of Australia's Submissions in *Australia – Tobacco Plain Packaging*, WT/DS435/441/458/467, 23 March 2016, available at https://dfat.gov.au/trade/organisations/wto/wto-disputes/Documents/integrated-executive-summary-aus-submissions-tobacco-plain-packaging-ds435-441–458-467.pdf.

also mentions 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the parties'] respective needs and concerns at different levels of economic development'. The provision is by far not the only one recognising non-trade values in the trading system. Numerous other provisions, from Article 7 of the TRIPS Agreement, which stresses that intellectual property rights should contribute to social and economic welfare and to a balance of rights and obligations, to Article 20 of the Agreement on Agriculture, according to which non-trade concerns must be taken into account in ongoing negotiations for reducing support and protection, can be used as an entry point when trying to interpret WTO law within the wider framework of human interests and values. Perhaps the most noteworthy provision that serves this function, however, is Article XX of the GATT entitled 'General Exceptions'.

Article XX of the GATT allows members to take measures for various, explicitly listed, policy objectives that are exempted from complying with all GATT obligations if they meet the requirements imposed by that provision.[86] The test a measure has to meet is two-pronged: the measure must comply with one of the policy objectives listed and it must satisfy the requirements of the *chapeau* of Article XX of the GATT.[87] It is worthwhile to enumerate some of the specific policy objectives listed by Article XX: measures necessary to protect public morals (a); necessary to protect human, animal or plant life or health (b); relating to the products of prison labour (e); and relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (g).

The existence of Article XX of the GATT means that generally members do not have to rely on human rights to defend measures taken to advance human rights. A member that passes a law in breach of GATT obligations to protect human life and finds itself exposed to the charge of violating the GATT, for example, can invoke Article XX(b) of the GATT as a defence. It does not need to rely on the right to life. The previous section showed that this reflects the reality of WTO dispute settlement.

[86] R. Wolfrum, 'Article XX: General Exceptions [Introduction]', in Wolfrum, Stoll and Hestermeyer, 'WTO – Trade in Goods', p. 455.

[87] This is not the place to reproduce, in detail, the requirements Article XX of the GATT imposes on a measure to justify a violation of GATT obligations. See in this regard Van den Bossche and Zdouc, 'Law and Policy', pp. 554–6.

Members rely on the defences offered by GATT. They hardly ever refer to human rights law even to interpret these defences. The lack of reference to human rights law does not necessarily imply a lack of human rights awareness in WTO dispute settlement: a reasonable interpretation of Article XX of the GATT by the Appellate Body will permit states sufficient leeway to protect human life whether the Appellate Body refers to the right to life in its interpretative exercise or not.

One of the policy objectives listed in Article XX of the GATT seems to have a particularly large potential to justify measures taken to advance human rights law – namely Article XX(a) of the GATT, permitting members to take measures necessary to protect public morals. The provision deserves some additional comments, as its wording seems ample enough to import all relevant human rights considerations as values into GATT law. Despite (or, quite possibly, because of) its vague wording, Article XX(a) of the GATT has not been discussed in dispute settlement until relatively recently in *China – Publications and Audiovisual Products*.[88] Since then, it has been relied on as a defence in a handful of cases, so that the shape of the exception emerges through the decisions of the Appellate Body. The Appellate Body examines the justification of a measure under Article XX(a) of the GATT in two steps (not counting the analysis under the *chapeau*): a 'measure must be "designed" to protect public morals' and it 'must be "necessary" to protect such public morals'.[89] When it comes to the definition of 'public morals', dispute settlement organs have not taken a very strict approach. The common standard is still the one developed by the Panel in *US – Gambling*, which defined the term 'public morals' in GATS as 'standards of right and wrong conduct maintained by or on behalf of a community or nation'[90] and was cited approvingly in *China – Publications and Audiovisual Products, EC – Seal Products* and *Colombia – Textiles*.[91]

[88] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, 12 August 2009; Van den Bossche and Zdouc, 'Law and Policy', pp. 578–89. For a discussion of the case, see T. Broude and H. Hestermeyer, 'The First Condition of Progress? Freedom of Speech and the Limits of International Trade Law', *Virginia Journal of International Law*, 54 (2014), 295.

[89] *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, 7 June 2016, para. 5.67.

[90] *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, para. 6.465.

[91] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, para. 7.759; *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/

The level of scrutiny provided by the Appellate Body allows for a not insignificant level of discretion by members; in fact, the Appellate Body in *EC – Seal Products* considered that it was not necessary for the respondent member to identify the existence of a risk to public morals and that members are given some scope to define and apply the concept of public morals in their own system.[92] There clearly is leeway here for members to legislate in the pursuit of fulfilling human rights obligations, even where that might necessitate breaching GATT obligations. The 'public morals' exception is hardly a lifesaver, though, when it comes to including human rights considerations in WTO law. While human rights can be part of the values forming 'public morals', the concept is not limited to human rights and contains other, at times varying, considerations. Some concepts of public morals can and do clash with human rights, as is famously the case with regard to the freedom of expression, as illustrated by *China – Publications and Audiovisual Products*, in which China defended its content review rules under the public morals exception.[93]

4.2 Procedural Human Rights Obligations

When it comes to the substance of a dispute, WTO dispute settlement has thus shown significant reluctance to refer to human rights or even use human rights terminology. Things appear different with regard to procedure. This is most clearly visible when examining the use of the notion of due process in WTO dispute settlement. A significant caveat that needs to be made in this regard, however, is that WTO law only provides for State to State dispute resolution. Only members have standing under the DSU and members are, with the exception of autonomous customs territories and the EU, States.[94] Due process in the WTO might thus import human rights terminology, but it is not, strictly speaking, the application of a human right.

DS401/R, 25 November 2013, para. 7.380; *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R, 27 November 2015, para. 7.299. See also *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, para. 5.199; *Colombia – Textiles*, WT/DS461/AB/R, para. 5.67, footnote 155.

[92] *EC – Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, para. 5.198 et seq.

[93] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009, para. 7.

[94] WTO Agreement, Articles XI, XII.

The term 'due process' is not mentioned in the WTO Agreements, yet Cook counts more than 2,300 references to the concept in 189 different WTO reports, awards and decisions, most of them referring to the notion in the context of WTO dispute settlement, but also in the context of reviewing national procedures.[95] For the purposes of this chapter, it is worthwhile to look at how WTO dispute settlement derives the principle of due process and to give an overview over its content, even if – given the scope of the case law – a necessarily cursory and incomplete one.

4.2.1 The Source of Due Process

Due process is a well-known legal concept. However, it is multifaceted as to both its content and its source. Originating in national law, the notion of due process has found its way into international law. Aspects of due process (or notions similar to due process) are protected by human rights conventions,[96] as customary international law and as general principles of international law.[97] Indubitably, the provisions governing dispute settlement in the WTO were drafted with notions of due process in mind.[98] Several of the provisions implement central tenets of due process, such as the independence of panelists[99] or the maxim audi alteram partem.[100] However, WTO law does not mention the principle of due process (or an equivalent notion) itself. As the normative framework of dispute settlement allows WTO dispute settlement to both apply procedural human rights provisions and use them to interpret WTO law, there is prima facie ample space for WTO dispute settlement to fill gaps and interpret procedural provisions by relying on human rights law (bearing

[95] Cook, 'Digest', pp. 107–8.

[96] See ICCPR, Article 14; UN Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc. CCPR/C/GC/32, 23 August 2007; Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, ETS 5; 213 UNTS 221, Article 6; ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Civil Limb), 31 December 2017, available at www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf; ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb), 31 December 2013, available at www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

[97] A. D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge: Cambridge University Press, 2008), pp. 146–60.

[98] 'The procedural rules of WTO dispute settlement are designed to promote . . . the fair, prompt and effective resolution of trade disputes.' *US – Tax Treatment for 'Foreign Sales Corporations'*, WT/DS108/AB/R, 24 February 2000, para. 166.

[99] See DSU, Articles 8.2, 8.3, 8.6, 8.9, 17.3.

[100] See, e.g., DSU, Appendix 3.

in mind that WTO dispute settlement is State-State and that individuals are not parties to the proceedings) and to integrate WTO dispute settlement into the cross-fertilising judicial dialogue. The Appellate Body did not fully use these possibilities theoretically open to it.

The Appellate Body is clear, however, that the principle of due process applies to WTO dispute settlement.[101] Early on it emphasised that certain provisions in the DSU fulfil due process objectives.[102] Going a step further, it recognised that the demands of due process are implicit or inherent in the DSU.[103] In *Thailand – Cigarettes (Philippines)* the Appellate Body then explicitly stated that '[d]ue process is a fundamental principle of WTO dispute settlement', both informing and finding reflection in the DSU.[104] While the Appellate Body thus integrated the notion of due process into WTO law, its connection to the wider body of international law remains minimal. The Appellate Body did point out that 'the protection of due process is an essential feature of a rules-based system of adjudication',[105] but it carefully seems to formulate the principle it applies as a general principle of WTO law.

It should be mentioned that besides the principle of due process as applicable to WTO dispute settlement, the WTO system also imposes due process obligations on members in their administration of domestic laws. Such obligations are contained in a number of provisions, possibly most prominently by Article X of the GATT, which requires, amongst others, that certain laws, regulations, judicial decisions and administrative rulings of general application must be published promptly. These provisions, ultimately, benefit individuals, even if individuals are not given standing to defend their interests.

4.2.2 The Content of Due Process

While this is not the place to reproduce in detail the content of due process as a principle of WTO law, a short overview over its scope is

[101] *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, footnote 138; see also *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, 1 December 2003, para 7.8.

[102] *Brazil – Desiccated Coconut*, p. 22.

[103] *India – Patents*, WT/DS50/AB/R, para. 94; *Chile – Price Band*, para. 175; *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, 16 October 2008, para. 433.

[104] *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011, para. 147.

[105] *Canada – Continued Suspension*, WT/DS321/AB/R, para. 433.

helpful. The Appellate Body usefully described the principle in *Thailand – Cigarettes (Philippines)* as follows:

> Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. . . . As a general rule, due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. . . . At the same time, due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close.[106]

The case law on due process in WTO dispute settlement roughly reflects the emphasis of this statement by the Appellate Body. Cook usefully structures his presentation of the case law into sections on 'the right of response', 'compliance with established procedural requirements', the 'prompt and clear articulation of claims and defences', 'impartiality in the decision-making process' and 'issuing reasoned decisions'.[107] Of course, this list is not exhaustive, and is likely to grow as more occasions for developing its case law present themselves to the Appellate Body.

The scope of the WTO's case law on due process leaves little doubt that the Appellate Body is well aware of the need to follow procedural principles that are now the hallmark of a developed justice system. It is striking, however, that the Appellate Body does not seem to undertake an attempt to integrate its case law into the wider development of international dispute resolution.

5. Conclusion

Almost 2 decades after allegations that the WTO was a 'nightmare' for human rights caused a lively scholarly debate about the role of human rights within the WTO system, an analysis of the role of human rights law in WTO dispute resolution is sobering. While the Appellate Body follows considerations of human rights law – namely due process – when it comes to procedure, it largely does so without locating its case law in

[106] *Thailand – Cigarettes (Philippines)*, WT/DS371/AB/R, paras. 147, 150.
[107] Cook, 'Digest', p. 108

the body of human rights law or cross-citing to the case law of human rights courts and bodies, which finds justification in the nature of WTO dispute settlement as State to State. When it comes to substance, the WTO Appellate Body has largely failed to refer to human rights law at all. In fact, it seems that even the parties are reluctant to rely on human rights law. However, this does not mean that the WTO system has been blind to human concerns and values that are not trade-related. In fact, the Appellate Body did show respect and deference to such values when interpreting WTO law. It did, however, do so without referring to the international human rights regime. This state of affairs might seem perplexing for a number of reasons.

First, the analysis of the normative framework of WTO dispute settlement indicates that the Appellate Body could have chosen a different path. Even though the DSU might not permit respondents to base a defence on human rights law alone, the framework clearly allows for the use of human rights law to interpret WTO law and to apply human rights law in the area of procedure. The concept of 'interpretation' in practice is malleable and theoretically opens the door to a liberal use of human rights law.

Second, it is instructive to contrast the development in WTO dispute resolution to the development of the case law of the early years of the European Communities. Even though human rights were absent from the treaty framework of the European project, which focused on economic matters, the European Court of Justice found a way to integrate human rights law into the system. Strikingly, the Court decided to integrate human rights as general principles of European law.[108] While the approach of the Appellate Body to due process seems to resemble that of the European Court of Justice in this regard, the Appellate Body proved far less daring – indeed outright timid – when it comes to substantive human rights.

Third, the idea that the Appellate Body prefers to refer to (soft) values rather than (hard) rights sits uneasily with the narrative of modern human rights law, which taught us that the hardening of mere values to

[108] Case 29/69, *Erich Stauder* v. *City of Ulm*, ECLI:EU:C.1969:57, 12 November 1969; Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, 17 December 1970. The Court was under significant pressure by national courts to provide for the protection of fundamental rights; see German Constitutional Court, *Solange I*, 29 May 1974, BVerfGE 37, 271. See T. Tridimas, *The General Principles of EU Law*, 2nd ed. (Oxford: Oxford University Press, 2006), pp. 298–369.

rights strengthens the legal claim of the norm. The preference of values over rights seems, in this context, counterintuitive.

Upon closer inspection, however, the lack of references to human rights law by the Appellate Body can hardly be a surprise. It is indicative of the political economy and institutional identity of the WTO system, and of a backlash against international dispute settlement as such.

Even though world trade law has seen a significant judicialisation when the GATT system became the WTO, the WTO not only builds on the GATT system, but to some extent also continues its culture of a specialised trade regime. Appellate Body members shall be persons 'of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.[109] The qualifications required to become a member of a panel is knowledge on trade law or policy,[110] panelists – even more than Appellate Body members – are technicians of the international trade regime and cannot be expected to be trained in modern human rights law. Trade, not human rights, are in the genes of the WTO.

This alone, however, is not sufficient to explain the reluctance of the Appellate Body to refer to human rights law. The members of the Appellate Body are, after all, trained lawyers with particular knowledge in international law. Even though their expertise is in trade law, they are well aware of human rights law. The lack of references to human rights law responds to deeper, more profound institutional concerns. States have always shown reluctance to the often proclaimed 'constitutionalisation' of international law. They have chosen not to set up an international system in which human rights are explicitly endowed with superior normative force, a 'constitutionalised' international system. Recently, States show increasing reluctance to even accept the system-building function that international tribunals exercise. Fearing 'activist' courts, they instead prefer limiting the role of courts to applying the 'deal' inherent in the treaty a court was set up to enforce. As mentioned previously, the United States has expressed this policy preference with regard to the WTO more or less explicitly and seems to be actively pursuing a return to the old, more diplomatic system of dispute settlement of the GATT days. In such an environment, Appellate Body members who choose to import human rights law into the WTO regime risk being attacked for activism – an attack that might doom the

[109] DSU, Article 17.3.
[110] DSU, Article 8.1.

institution of the Appellate Body as such. Their preference to realise the values inherent in human rights without using the topos of rights in their argument might thus reflect a wise impulse to protect the institution they work for, while nevertheless realising the goals of human rights law. The risk of this approach consists in an increased fragmentation of international law and sloppy reasoning that categorises protected legal human rights as values. Even in that regard, though, WTO lawyers can find comfort in the will of States: after all, they decided to set up a fragmented system. They have to live with the inconsistencies that come with it.