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# *Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO*

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## **Abstract**

*International lawyers have in recent years expressed much unease about the perceived fragmentation of their legal system. In truth, however, international law has always been fragmented without losing its ability to operate. A threat, rather, arises from the ongoing proliferation of special regimes endowed with strong institutional frameworks and an ability to set new international norms. This expansion begs an uncomfortable question: What if such – seemingly independent – entities were to claim autonomy and challenge the validity of general international law? A salient feature of this debate is the preoccupation with 'self-contained regimes' and their status under international law. In a recent report to the International Law Commission, for instance, Martti Koskenniemi concluded that no such regime can be created outside the scope of general international law. Drawing on a particularly controversial example, this article therefore reviews the law and practice of the World Trade Organization to determine how that body has positioned itself in the debate. While its judiciary has recognized that the rules on world trade do not exist in isolation of general international law, a closer look at actual case law unveils a far more ambivalent picture. The chimera of self-contained regimes, in other words, is not easily dispelled.*

## **1 Introduction**

It has become fashionable to claim that international law is becoming increasingly fragmented, and that its supposed unity as a decentralized system of rules is threatened by an expanding scope and a multiplicity of international judicial bodies. As proponents of this view would argue, we are currently endangered by too much law,

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with a growing number of specific rules giving rise to conflicting decisions which may undermine the coherence of jurisprudence. In recognition of this widely held concern, the fragmentation of international law has been included in the agenda of the International Law Commission (ILC) since 2000,<sup>1</sup> with a special Study Group on the Fragmentation of International Law established in 2002.<sup>2</sup>

Obviously, international law has been more or less fragmented since its inception, and that need not only be perceived as a drawback. The specialization it occasioned has permitted a quick deployment of international law in numerous new fields. As a result, we have witnessed sweeping developments in various areas of law, such as environmental law, human rights law, the law of the sea, or world trade law. At the same time, however, it has contributed to the emergence of new institutional settings and judicial bodies with limited mandates dealing with highly specific questions within their respective fields of law. And indeed, the ensuing diversity of rules and institutions can invite serious difficulties, at least whenever they fail to abide with international law at large. As a result, questions regarding the relationship between general international law and more specific areas of law must invariably arise.

The ILC addressed this issue under the supervision of Martti Koskenniemi, Chairman of the Study Group on Fragmentation, at its session in 2004, focusing on the role of *lex specialis* and self-contained regimes.<sup>3</sup> In his report, Koskenniemi suggests that no such entities as self-contained regimes exist, and that no specialized international legal regime can be created outside the framework of general international law. In effect, he claims that the notion of self-contained regimes ‘is simply misleading’ and that ‘there is no support for the view that anywhere general law would be fully excluded’. He goes on to suggest that ‘special regimes’ are a more appropriate term.<sup>4</sup>

In fact, few would nowadays claim that the World Trade Organization (WTO) – being a prime example for such ‘special regimes’ – is entirely self-contained, existing in isolation from international law.<sup>5</sup> It is likely understood more aptly as a set of rules and institutions similar to other international regimes, such as human rights law, space law, and environmental law. Even then, however, a challenging question arises as to its relationship with other areas of international law. This article is an attempt to identify that relationship, analysing the extent to which the WTO dispute settlement mechanism has been willing to accept general international law as a consideration in its decisions.

<sup>1</sup> Report of the International Law Commission, UN Official Records of the General Assembly, 55th session, Supp. 10, UN Doc. A/55/10 (2000), para. 729.

<sup>2</sup> Report of the Study Group on Fragmentation of International Law, UN Doc. A/CN.4/L.628 (2002), paras. 4–6.

<sup>3</sup> M. Koskenniemi, *Study on the Function and Scope of the Lex Specialis Rule and the Question of ‘Self-Contained Regimes’*, UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (2004).

<sup>4</sup> *Ibid.*, at para. 134.

<sup>5</sup> Different views on this issue are presented below, 7.

Unlike other areas of international law, the set of rules currently administered by the WTO was not initially envisioned as a special regime. The General Agreement on Tariffs and Trade (GATT)<sup>6</sup> began as a form of economic cooperation with a very pragmatic approach to disputes, identifying economic measures which were not in harmony with GATT policies. With its focus on essentially technical issues, the GATT remained largely untouched by outside influences. At a time when the social and political ramifications of the regime are virtually ubiquitous and subject to intense public scrutiny, however, this isolation has become increasingly difficult to uphold. The creation of the WTO and its dispute settlement mechanism – which is based on rules of procedure unique in their sophistication – must be seen at least in part as a response to new external pressures. And yet, resistance against this process of 'juridification' has remained widespread among WTO delegates, the Secretariat, and other internal players, a resistance which has also found its reflection in the practice of the WTO judicial bodies.<sup>7</sup> As it were, several views are currently enmeshed in an extended conflict, giving rise, among other things, to ardent discussions on the role of general international law within the WTO.

Neither the rules on world trade nor international law at large conclusively establish their mutual relationship. Various approaches to their reconciliation have thus been suggested, each supporting a different outcome. These will be outlined first, providing an essential background for the later assessment of actual disputes. Consideration will then be given to whether the WTO dispute settlement mechanism may take into account rules of general international law and, if so, to what extent. As for the interaction between different regimes, two questions seem of particular interest: What type of rules of general international law may be applied by the panels and the Appellate Body, and what type of rules have or have not been applied?

## 2 International Law and World Trade: Cornerstones of a Debate

Rumour has it that the negotiators of the world trading system did not even '*think* of public international law when drafting the WTO treaty'.<sup>8</sup> A narrow focus on issues of free trade may, in itself, reveal an underlying tendency of the WTO to claim a privileged status in international law. The transition from mere doctrine to actual law, however, is less likely to occur in the deliberation of selected diplomats as in the settlement of disputes through the WTO dispute settlement mechanism. Only there may one find expressed in legal terms the prevailing conception

<sup>6</sup> General Agreement on Tariffs and Trade (GATT), 55 UNTS (1947) 188.

<sup>7</sup> Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *J World Trade* (2001) 193.

<sup>8</sup> Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *AJIL* (2001) 538 (emphasis in the original); this assessment is shared by Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime', 96 *AJIL* (2002) 98.

of international law and its position in the world trading system, at least among its representatives.

Dispute settlement, in other words, is likely to serve as the best measure for assessing the relationship of trade rules and international law at large. This section will therefore contain a brief outline of the dispute settlement system, with particular attention devoted to the question of its jurisdiction and the law applicable to disputes, and will conclude with an assessment of alternative perspectives encountered in the process. Although case law will also be considered, the focus will initially rest on matters of doctrine.

### **A Jurisdiction of the WTO Dispute Settlement Mechanism**

With a standing Appellate Body, elaborate procedural rules laid down in a Dispute Settlement Understanding (DSU),<sup>9</sup> and the adoption of decisions by way of negative consensus,<sup>10</sup> the WTO dispute settlement mechanism operates ‘in an entirely independent and law-based fashion’,<sup>11</sup> affording it the status of a regular judicial tribunal with compulsory jurisdiction for relevant claims. When discussing the applicability of international law within the WTO dispute settlement mechanism, however, attention must first be drawn to the distinction between jurisdiction and applicable law. In this regard, a compelling argument has been made to the effect that jurisdiction and the law applicable to disputes need to be seen in strict separation.<sup>12</sup>

As it were, the DSU contains fairly straightforward guidance on matters of jurisdiction. It outlines the functions and purpose of WTO dispute settlement, which, coupled with the standard terms of reference,<sup>13</sup> all clearly limit the jurisdiction of respective panels and the Appellate Body to the multilateral instruments listed in Appendix 1 of the DSU, the so-called ‘covered agreements’.<sup>14</sup> It follows that only disputes involving some issue of trade within the ambit of those agreements may be referred to the WTO for settlement. Article 23.1 of the DSU further clarifies this restriction:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

<sup>9</sup> Dispute Settlement Understanding (DSU), 33 ILM(1994) 1144.

<sup>10</sup> See Arts. 16(4) and 17(14) of *ibid.*

<sup>11</sup> Pauwelyn, *supra* note 8, at 553.

<sup>12</sup> Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings’, 35 *J World Trade* (2001) 501; and, more recently, J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), at 460–463.

<sup>13</sup> See Arts. 1(1), 3(2), 7(1), and 11 of the DSU, *supra* note 9.

<sup>14</sup> As the Appellate Body summarized in *Brazil – Measures Affecting Desiccated Coconut*, WTO Doc. WT/DS22/AB/R (1997), at 11, [t]he “covered agreements” include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the DSU (italics in the original).

It has, of course, been argued that the powers derived from its nature as a judicial body by way of implication grant the dispute settlement mechanism a competence to determine its own jurisdiction.<sup>15</sup> Accordingly, it would be conceivable for panels and the Appellate Body to either restrict or expand their jurisdiction.<sup>16</sup> Still, such a competence would only affect the scope of jurisdiction and, by extension, the subject matter of admissible claims. To which law this body may apply is a question left unanswered.

## B Applicable Law in WTO Dispute Settlement

Often, the claims referred for settlement to the WTO are also or largely sustained by rules other than those contained within the covered agreements. The contested measures, held to be in violation of free trade by one party, may well have been adopted by the other in performance of an obligation or some other rule under international law. Naturally, then, the question will arise whether other sources of international law apply to trade issues, and – if so – to what extent.<sup>17</sup> With the increased authority bestowed on the new dispute settlement mechanism and the growing number of disputes referred to it, this question becomes particularly urgent.

As stated earlier, however, no provision in the rules on world trade identifies or limits the law that ultimately should apply to disputes. While jurisdiction is mostly limited to the covered agreements, no similarly explicit statement can be found with regard to the sources of applicable law. As with any other treaty, however, it is widely acknowledged that the agreement instituting the WTO was born into the wider body of international law.<sup>18</sup> From this assumption, it would normally follow that the multilateral trading system continues to be governed by the precepts of public international law, at least to the extent that these have not been contracted out, deviated from, or otherwise replaced.<sup>19</sup> Several reports of the Appellate Body

<sup>15</sup> *Compétence de la compétence*, suggested by the Appellate Body in *United States – Anti Dumping Act of 1916*, WTO Doc. WT/DS136/AB/R (2000), at para. 54 note 30.

<sup>16</sup> Legal grounds for refraining from substantive jurisdiction have been provided by the principle of judicial economy, referred to in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*, WTO Doc. WT/DS33/AB/R (1997), at 19; similarly, as the panel in *United States – Sections 301–310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (2000), at para. 7.43, chose to interpret Art. 23(1) of the DSU, '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', referring to the same provision as an 'exclusive dispute resolution clause'.

<sup>17</sup> 'Applicable', in this context, refers to direct validity when determining the merits of a claim, interpreting the covered agreements, and establishing evidence of facts: see Bartels, *supra* note 12, at 510–511, who provides ample references; the mere consideration of international law as part of the interpretation of trade rules is not at issue here, given the express reference in Art. 3(2) of the DSU: see *infra*, notes 21 and 33.

<sup>18</sup> See, *inter alia*, J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1997), at 25.

<sup>19</sup> On this fundamental doctrine of international law, see A. D. MacNair, *The Law of Treaties* (1961), at 466; this view has also been upheld, *inter alia*, by the Permanent Court of International Justice in *Case Concerning the Factory at Chorzów* [1928] PCIJ Series A, No. 17, 29, and the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, at para. 96.

and various panels<sup>20</sup> as well as some passages in the agreements which establish the standard terms of reference for trade disputes<sup>21</sup> have actually referred to general international law as a pertinent consideration. One panel, moreover, raised a general presumption that states negotiating a treaty have prior commitments in mind and will continue to abide by them unless explicit wording to the contrary reflects a different intent.<sup>22</sup>

Despite this seeming indication that public international law should continue to apply when an issue falls within the scope of the world trading system, both academic scholars and some previous case law of the WTO dispute settlement mechanism have suggested otherwise, contending either that trade rules should apply exclusively or at the very least enjoy some form of priority over other rules of international law. Current opinion is, accordingly, spread across three main views, endorsing either full, partial or no applicability of international law at large to trade disputes. With each finding some measure of support in scholarship or case law, it is not easy to identify a mainstream view. A cautious and more detailed analysis of the reasoning applied, however, might help identify the most compelling argument, although it can already be surmised that no obviously superior conclusion will be found.

### *1 The WTO as a Closed Legal System<sup>23</sup> in International Law*

A fairly restrictive view on the issue of applicable law has been adopted by a group of authors who draw their support from the wording of several articles in the DSU, all of which contain reference to the covered agreements mentioned earlier.<sup>24</sup> As the jurisdiction and substantive mandate of panels and the Appellate Body are strictly limited to claims under those agreements, they hold, so should the law these bodies apply when

<sup>20</sup> In *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (1996), at 17, the Appellate Body acknowledged that ‘the General Agreement [GATT] is not to be read in clinical isolation from public international law’; similarly, in *Korea – Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R (2000), at para. 7.96, the panel established that ‘[c]ustomary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it’.

<sup>21</sup> Art. 3(2) of the DSU, for instance, establishes the relevance of ‘customary rules of interpretation of public international law’, which has been held by the Appellate Body in *United States – Reformulated Gasoline*, *supra* note 20, at 17, to refer to Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS (1969) 331.

<sup>22</sup> See *Indonesia – Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS54/R 23 (1998), at para. 14.28 and note 649.

<sup>23</sup> The widely used expression ‘self-contained regime’ is misleading: see Koskenniemi, *supra* note 3, at para. 134; for additional discussion, see Simma, ‘Self-Contained Regimes’ [1985] *Netherlands Yearbk Int'l L* 111–136. See also *Case concerning the United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 41, and *Case of the SS ‘Wimbledon’* [1923] PCIJ Series A, No. 1, at 23–24.

<sup>24</sup> See Arts. 3(2) (‘providing security and predictability to the multilateral trading system’ and preserving ‘the rights and obligations of Members under the covered agreements’), 3(3) (protecting the ‘benefits accruing to it directly or indirectly under the covered agreements’ and maintaining the ‘proper balance between the rights and obligations of Members’), 7(1) and (2) (especially calling for examination of the matter ‘in the light of the relevant provisions’ of the covered agreements, and obliging panels to ‘address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute’), and 11 (panels serve the function of assessing ‘the applicability of and conformity with the relevant covered agreements’) of the DSU.

resolving any disputes.<sup>25</sup> In a similar vein, an effort has been made to harness the adage of *expressio unius est exclusio alterius* as an indication of the desire to contract out from all rules of international law not expressly confirmed or included by the parties.<sup>26</sup> These attempts to contain the influence of international law by resorting to an overstated attitude of legal positivism have, however, been described as 'self-defeating',<sup>27</sup> and, indeed, it appears difficult to give credence to arguments based less on clear and precise treaty language than on what may seem a very contingent interpretation of specific rules.

## 2 The WTO as a Privileged Legal System in International Law

A more balanced view suggests that the covered agreements should, if not replace, at least take precedence over other applicable international law,<sup>28</sup> resulting in a privileged status that would generally become manifest in case of conflict. This view has been inferred from the text of Articles 3.2 and 19.2 of the DSU, the former stating that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. Accordingly, proponents argue that the covered agreements should prevail against any attempt to introduce new rights or duties on behalf of other international rules. Whether such an understanding adequately reflects the intention of the drafters, or whether they merely wanted to rule out any legislative activity by the dispute settlement mechanism, is, in the end, a matter of interpretation. Another effort to justify the supremacy of trade law has led to descriptions of the world trading system as a constitutional order based on juridical and moral *Grundnormen*,<sup>29</sup> but, as even supporters of this theory concede, actual evidence for the existence of such a hierarchy or conflict clause has remained problematic.<sup>30</sup>

As a result, attention has also been drawn to the question of whether conflicts are likely to arise in the first place, and, if so, whether these might be resolved more suitably by the pertinent rules of general international law. For one, it has been held that any conflict, as a situation where 'adherence to the one provision will lead to a violation of the other provision',<sup>31</sup> should be resolved preferably by way of

<sup>25</sup> See, notably, Canal-Forgues, 'Sur l'interprétation dans le droit de l'OMC', 105 *Revue Générale de Droit International Public* (2001) 11; Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *Recueil des Cours* (1998) 219; Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement', 33 *J World Trade* (1999) 110.

<sup>26</sup> See, for instance, Trachtman, 'The Domain of WTO Dispute Resolution', 40 *Harvard Int'l LJ* (1999) 342; this appears fairly questionable in view of the reasoning in *Korea – Government Procurement*, *supra* note 20, at para. 7.96, note 753: '[w]e should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law'.

<sup>27</sup> Howse, *supra* note 8, at 106.

<sup>28</sup> Bartels, *supra* note 12, at 506–509.

<sup>29</sup> Petersmann, 'The WTO Constitution and Human Rights', 3 *J Int'l Economic L* (2000) 19.

<sup>30</sup> Bartels, *supra* note 12, at 508–509.

<sup>31</sup> *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R (1998), at para. 65; more generally, see S. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (2003), at Ch. 1 ('The Concept of Conflict').

interpretation.<sup>32</sup> And, indeed, the broad and open-textured rules contained both in relevant trade provisions and in other areas of law, such as environmental protection and human rights, would seem to allow for a satisfactory solution by means of legal exegesis. But even where interpretation alone might fail, the conflict rules of general international law – which apply to trade disputes under the express reference in Article 3.2 of the DSU and are, according to a consensus even among trade lawyers, reflected in the Vienna Convention on the Law of Treaties (VCLT)<sup>33</sup> – could govern the determination of any conflicts between the covered agreements and other international law.

As proponents of a more open conception of world trade law will quickly point out, however, the continuous development, constant application, and renewed confirmation of most international treaties, customary law, and general principles virtually rule out a determination *ratione temporis* pursuant to the doctrine of *lex posterior* contained in Article 30(3) VCLT.<sup>34</sup> Likewise, with the multilateral trading system being neither clearly more specific – its scope having become so broad as to cut across almost all other areas of international law<sup>35</sup> – nor necessarily more general, as it relates specifically to matters of free trade, the doctrine of *lex specialis* fails to provide a satisfactory solution.<sup>36</sup> In either case, it can be assumed that efforts to derive a supremacy of trade law from interpretation and the conflict rules of international law are likely to fail.

### 3 The WTO as an Integral Part of International Law

Faced with the risks and political consequences of such isolation, a growing number of authors has recently chosen to view the relationship between public international law and trade rules on a mutually more even basis.<sup>37</sup> Arguing on the assumption that, with the possible exception of *jus cogens*, no *a priori* hierarchy exists in international

<sup>32</sup> What is more, the existence of a general presumption against conflict in international law has been proposed: see, for instance, R. Jennings and A. Watts, *Oppenheim's International Law*, vol. 1: *Peace* (1992), at 1275; and indeed, positivist theorists such as H. Kelsen would altogether deny the possibility of conflict in a legal system, describing them, instead, as 'sham contradictions' to be resolved by means of legal interpretation: *Principles of International Law* (1952), at 426.

<sup>33</sup> Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS (1969) 331; the position that Art. 3(2) directly invokes the VCLT was already held by negotiators in the Uruguay Round and is widely accepted: see Croley and Jackson, 'WTO Dispute Procedures, Standards of Review, and Deference to National Governments', 90 *AJIL* (1996) 200, at note 34.

<sup>34</sup> Pauwelyn, *supra* note 8, at 545.

<sup>35</sup> Jackson, 'Fragmentation or Unification Among International Institutions: The World Trade Organization', 31 *NYU J Int'l L and Pol* (1999) 824.

<sup>36</sup> For an in-depth assessment of the failings of these doctrines, see Koskenniemi, *supra* note 3.

<sup>37</sup> Pauwelyn, for instance, has suggested that world trade law is nothing but a branch of international law, given that states cannot altogether contract out of the system of international law: *supra* note 12, at 25–40; this conclusion is generally shared by Bartels, *supra* note 12, at 499; and Palmetter and Mavroidis, 'The WTO Legal System: Sources of Law', 93 *AJIL* (1998) 399. While this issue has not yet been addressed specifically in a dispute before the WTO, the Appellate Body has generally stated that 'nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration': see *European Communities – Measures Concerning Meat and Meat Products (EC-Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (1997), at para. 156.

law,<sup>38</sup> these scholars have instead maintained that international law should as a rule continue to apply in the context of WTO dispute settlement. Given the sovereign equality among states, they contend, the law of free trade is by necessity embedded in the system of international law, meaning that it cannot enjoy a special status unless other applicable law has been expressly opted out from.<sup>39</sup>

More importantly, however, proponents of this view point out that none of the provisions on jurisdiction and mandate outlined earlier contain an explicit statement as to the question of which law should apply.<sup>40</sup>

Instead, several provisions – such as Articles 3.2, 7.1 and 11 of the DSU – can rather be interpreted as an implicit recognition of, and reference to, public international law. Moreover, with the reference to 'customary rules of interpretation of public international law' in Article 3.2 commonly understood as an invocation of the Vienna Convention,<sup>41</sup> all 'relevant rules of international law applicable in the relations between the parties' should become part of the interpretation and thus the application of trade law by virtue of Article 31(3)(c) of that convention. Finally, and this merits particular consideration, the dispute settlement bodies have themselves freely referred to public international law in numerous cases, drawing both on customary law and rules derived from treaties.<sup>42</sup>

Those few incidences where the covered agreements derogate certain tenets of international law, such as particular aspects of state responsibility,<sup>43</sup> would not seem sufficient as an indication that the contracting parties chose to opt out from all remaining law. A more practical argument against overly restrictive views has, however, been based on the risks they may harbour for the unity of international law. By establishing

<sup>38</sup> This being, of course, the general consensus in international legal scholarship and practice: see I. Brownlie, *Principles of Public International Law* (1998), at 3; Akehurst, 'The Hierarchy of the Sources of International Law', 47 *BYIL* (1974–75) 273; see also Arts. 53 and 64 VCLT.

<sup>39</sup> And, as Koskenniemi has pointed out, it is not possible to contract out of the *pacta sunt servanda* principle itself, unless, of course, parties wish to create a regime without any legal effects: *supra* note 3, at para. 157.

<sup>40</sup> Indeed, the one provision one might understand as somewhat restricting the scope of applicable law, Art. 7(1) of the DSU, which lays down the standard terms of reference and requires panels to 'examine, in the light of the relevant provisions in [the covered agreements], the matter referred to the DSB', was interpreted by the panel in *Korea – Government Procurement*, *supra* note 20, at para. 7.101, note 755, as follows: '[w]e do not see any basis for arguing that the terms of reference are meant to exclude reference to the broader rules of customary international law'.

<sup>41</sup> On Art. 3(2) of the DSU see *supra* notes 21 and 33.

<sup>42</sup> Such cases have included *Brazil – Desiccated Coconut*, *supra* note 14, at 15, regarding non-retroactivity of treaties; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R (1997), at paras 6.16, 10, 133, and 164–167, regarding representation, legal standing, countermeasures, and the application of waivers and the Lomé Convention; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (1998), at para. 65, regarding the status of municipal law; *Korea – Government Procurement*, *supra* note 20, at para. 7.123, regarding treaty formation; *United States – Shirts and Blouses*, *supra* note 16, at 14 and 19, regarding burden of proof and judicial economy; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (1998), regarding *amicus curiae* briefs; *US – Anti Dumping*, *supra* note 15, at para. 54 note 30, regarding judicial competence.

<sup>43</sup> See Art. 22 of the DSU ('Compensation and the Suspension of Concessions'), *supra* note 9.

an artificial barrier between the world trade system and other areas of international law, such approaches could threaten the rule of law in the relations between Member States, first by undermining the effectiveness and thereby the validity of current international commitments,<sup>44</sup> second by lowering the likelihood that a decision will be enforced,<sup>45</sup> and third by increasing the incentive for simultaneous referral of the same dispute to alternative fora in breach of the *ne bis in idem* doctrine.<sup>46</sup>

### C Dwelling in the World of Myth: Doctrinal Ambivalence

It has already been observed that trade disputes are occasionally viewed as an “internal” affair ... to be resolved (“settled”) as quickly and smoothly as possible within the organization'.<sup>47</sup> As was shown, however, the arguments enlisted in support of a privileged or autonomous position of world trade law suffer from numerous conceptual inconsistencies and find little basis in the text of the actual agreements or even in recent case law. Against this background, the proposition that international trade law is neither self-contained nor should possess a stronger title to adherence than any other rule of international law might appear the most compelling.

Still, the matter is likely to remain one of interpretation, and charges of an inevitable entry into the wide realm of politics remain a truism best embraced.<sup>48</sup> The differences of opinion outlined earlier are likely to withstand reconciliation for some time in the future. Accordingly, whether international law may serve as an equal source of law in trade disputes is, in the end, a question which can only be answered conclusively by those shaping the actual policies and rulings of the world trade regime. With that in mind, the following section will address the foregoing issues with a focus on particular areas of case law.

## 3 General International Law and World Trade: Case Studies

Since its establishment, the WTO dispute settlement mechanism has brought forth an ample volume of case law. While the majority of cases has centred on provisions of free trade, the panels and Appellate Body have also touched upon several rules of general international law. Three questions will, accordingly, be raised in the following

<sup>44</sup> See generally Tucker, ‘The Principle of Effectiveness in International Law’, in G. A. Lipsky (ed.), *Law and Politics in the World Community* (1953), at 33.

<sup>45</sup> With reference to the legitimacy of judicial decisions as a condition of their successful enforcement see Howse, ‘The Turtles Panel – Another Environmental Disaster in Geneva’, 32 *J World Trade* (1998) 99.

<sup>46</sup> For instance, Art. XVIII (2) of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), 993 UNTS (1976) 243, whose ambit may clearly overlap with the rules on free trade, refers to the Permanent Court of Arbitration in The Hague as the body for hearing disputes arising under that convention; on the risk of ‘forum shopping’ such concurrent jurisdiction may entail see Crowley and Jackson, *supra* note 33, at 194, and generally Charney, *supra* note 25, at 219.

<sup>47</sup> Weiler, *supra* note 7, at 195.

<sup>48</sup> As Howse has contended, the divergent positions encountered in this section are a reflection of the challenges currently faced by the embedded ideology of the world trading system – designated ‘embedded liberalism’ – and its proponents, with politics, largely excluded hitherto, entering anew by contingent determinations of the trade experts and ‘insiders’: *supra* note 8, at 98.

sections: To what extent have rules of treaty interpretation been channelled towards trade disputes? Have other rules of treaty law found application? And, finally, has general international law otherwise guided the decisions taken by the dispute settlement mechanism? Although not exhausting the available case law, the following sections will draw attention to a wide selection of disputes where these issues have been addressed.

### A *The Rules of Treaty Interpretation in the Practice of the WTO Judicial Bodies*

The basic rules of treaty interpretation are laid down in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.<sup>49</sup> Both treaties contain identical rules of interpretation.<sup>50</sup> The former limits its scope of application to treaties concluded with states in written form and governed by international law,<sup>51</sup> making no distinction between different types of treaties.<sup>52</sup> Article 5 VCLT, moreover, clarifies its applicability to constituent treaties of international organizations. Clearly, therefore, the rules laid down in the Vienna Convention also apply *per se* to the WTO Agreement.<sup>53</sup>

International treaties are binding on their parties only. Since not all Members of the WTO are also parties to the Vienna Convention,<sup>54</sup> the latter will only apply unconditionally to the extent that it reflects international custom. A wide consensus supports the customary nature of many provisions contained in the Vienna Convention, including Articles 31 and 32. In the *La Grand* case, for instance, the International Court of Justice (ICJ) affirmed the customary nature of these rules when it proceeded to interpret Article 41 of its Statute 'in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the Law of Treaties'.<sup>55</sup> Many other international tribunals have endorsed this status in their own practice,<sup>56</sup> including, as will be shown, the WTO.

<sup>49</sup> Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, UN Doc. A/Conf. 129/15 (1986).

<sup>50</sup> B. Simma *et al.*, *The Charter of United Nations. A Commentary* (1994), at 27; as both treaties contain identical provisions, reference throughout the text will be made to the VCLT.

<sup>51</sup> Arts. 1 and 2(a) VCLT.

<sup>52</sup> Art. 2(a) VCLT provides a wide definition of the term 'treaty'. As concerns the nature of the treaty, the VCLT establishes no general limitation for the application of the Convention except for the requirement of written form. No distinction is drawn between whether the treaty is of a contractual or law-making nature, whether it is bilateral or multilateral, and whether it is a constitutional instrument.

<sup>53</sup> This view is, for instance, supported by Cameron and Gray, 'Principles of International Law in the WTO Dispute Settlement Body', 50 *ICLQ* (2001) 252, and Pauwelyn, *supra* note 12, at 28–29.

<sup>54</sup> On 16 Feb. 2005, the WTO had 148 members, while on 23 Mar. 2005, the VCLT had 100 parties.

<sup>55</sup> *La Grand Case* [2001] ICJ Rep 466, at para. 99. See also, e.g., the *Case Concerning the Territorial Dispute Libya v Chad* [1994] ICJ Rep 6, at para. 41. For further references on the customary law status of both Vienna Conventions see, e.g., Simma *et al.*, *supra* note 50, at 30.

<sup>56</sup> Charney, *supra* note 25, at 139–188.

It should be noted, however, that parties may – with few exceptions, such as *jus cogens* – ‘contract out’ of rules of international law. The ICJ expressed it as follows: ‘[i]t is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties’.<sup>57</sup> In such a case, the customary rule is replaced by a treaty rule with a different content, which may then be applied between the parties to the treaty. Still, it is somewhat unclear how explicit such an agreement must be.<sup>58</sup> Since the WTO panels and the Appellate Body have already endorsed certain rules of international law, however, including rules of the Vienna Convention, there is no need to presume that the adoption of the DSU was meant to incur a departure from the rules of treaty interpretation expressed in the Vienna Convention.<sup>59</sup> Recently, moreover, Koskeniemi affirmed that no existing treaty regime is ‘self-contained in the sense that the application of general international law would be generally excluded’.<sup>60</sup> As he went on to clarify, there can be no assumption that general law does not apply beyond the special provisions.<sup>61</sup> He further proceeded to argue that both practice and literature support the view that ‘Articles 31 and 32 of the VCLT are always applicable unless specifically set aside by other principles of interpretation’.<sup>62</sup>

As stated earlier, the validity of customary rules of treaty interpretation is also confirmed by Article 3.2 of the DSU, which states that:

The Members recognize that the dispute settlement system of the WTO serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

The purpose of the dispute settlement system is, thus, to clarify the rights and duties of the Members under the covered agreements, but not in separation of customary rules of interpretation. This assumption has also been backed by the WTO panels and Appellate Body, refuting the earlier position of GATT panels and their reluctance to consider external sources of treaty interpretation, including the Vienna Convention.<sup>63</sup>

In the judicial practice of the WTO dispute settlement mechanism, it has been clearly recognized ‘that the Vienna Convention on the Law of Treaties expresses the basic rules of treaty interpretation’.<sup>64</sup> The WTO panels and Appellate Body have

<sup>57</sup> *North Sea Continental Shelf Case* [1969] ICJ Rep 4, at 42, para. 472.

<sup>58</sup> With a view to world trade law, Pauwelyn has suggested that – in the absence of explicit contracting-out – a tacit acceptance of rules of general international law should be presumed: Pauwelyn, *supra* note 8, at 541–543.

<sup>59</sup> Pauwelyn, for instance, contends that the exclusion of some rules of general international law by the members of the WTO ‘does not mean that they have contracted-out of all the rules of general international law’: *ibid.*, at 537.

<sup>60</sup> Koskeniemi, *supra* note 3, at para. 153.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, at para. 155.

<sup>63</sup> Charney, *supra* note 25, at 145.

<sup>64</sup> *United States – Restrictions on Imports of Tuna*, GATT Doc. DS 29/R (1994), 33 ILM 839 (1994), para. 5.18.

further verified that Articles 31 and 32 VCLT, in particular, codify customary rules of interpretation of public international law. For instance, in *US – Reformulated Gasoline*, the Appellate Body stated that the 'general rule of interpretation' in Article 31(1) VCLT had attained 'the status of a rule of customary or general international law'.<sup>65</sup> Moreover, the Appellate Body affirmed it had been directed by Article 3.2 of the DSU to apply these rules 'in seeking to clarify the provision of the General Agreement and other "covered agreements" of ... the WTO Agreement. That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.'<sup>66</sup> Beyond confirming the customary nature of Articles 31 and 32 VCLT, several panels and the Appellate Body have engaged in lengthy deliberations on the correct application of these rules.

Evidently, the customary rules of treaty interpretation reflected in Articles 31 and 32 VCLT apply to WTO dispute settlement. Against that premise, one may also ask whether Article 3.2 of the DSU can be interpreted to include other rules of general international law. As such, Article 3.2 of the DSU refers to 'customary rules of interpretation of public international law'. By itself, this wording would seem to allow the application of other rules of treaty interpretation than those stipulated in Articles 31 and 32 VCLT. And, indeed, such principles have been applied, including the principles of effectiveness,<sup>67</sup> *in dubio mitius*,<sup>68</sup> legitimate expectation,<sup>69</sup> and *lex specialis*,<sup>70</sup> all of which are not contained in the Vienna Convention as such.<sup>71</sup> Although not expressly invoked by the wording of Article 3.2, these principles can be accommodated within its substantive scope. One may conclude, then, that the Appellate Body and WTO panels are entitled to apply customary rules of treaty interpretation by virtue of the DSU.

## B The Rules of Treaty Law in the Practice of the WTO Judicial Bodies

Beyond the rules on interpretation, treaty law is not, strictly speaking, covered by the wording of Article 3.2 of the DSU. Still, the judicial practice of the WTO contains frequent reference to other passages of the Vienna Convention, such as Article 28 on

<sup>65</sup> *US – Reformulated Gasoline*, *supra* note 20, at 16.

<sup>66</sup> *Ibid.*, at 16. This finding was confirmed, e.g., in *Brazil – Desiccated Coconut*, *supra* note 14, at para. 255, and in *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (1998), at para. 26.

<sup>67</sup> *US – Reformulated Gasoline*, *supra* note 20, at 21–22; see also Cameron and Gray, *supra* note 53, at 256–258.

<sup>68</sup> *EC – Hormones*, *supra* note 37, at para. 165, see also Cameron and Gray, *supra* note 53, at 258–260.

<sup>69</sup> *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R(1996), at para. 7.20; see also Cameron and Gray, *supra* note 53, at 260–263.

<sup>70</sup> See *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R (1999), at paras. 7.39–7.41; *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO/DS34/R (1999), at paras. 9.92–9.95; and *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (1998), at paras. 14.28–14.34.

<sup>71</sup> Whether these are interpretative principles or interpretative aids is subject to debate; see, for instance, I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 96–97, and A. Aust, *Modern Treaty Law and Practice* (2000), at 200–201.

non-retroactivity,<sup>72</sup> Article 30 on successive treaties,<sup>73</sup> Article 41 on modification,<sup>74</sup> Article 48 on error,<sup>75</sup> Article 59 on termination or suspension by conclusion of a latter treaty,<sup>76</sup> Article 60 on termination as a consequence of breach, and Article 70 on consequences of termination.<sup>77</sup> All of these relate more to treaty formation and application than to mere treaty interpretation.

A closer analysis of individual cases may help illustrate the manner in which reference to international law and practice has been made by the panels and the Appellate Body. For instance, in *Canada – Terms of Patent Protection*, the following conclusion was ‘supported by the general principle of international law found in the Vienna Convention, which establishes a presumption against the retroactive effect of treaties’: <sup>78</sup>

Article 28 of the Vienna Convention covers not only any ‘act’, but also any ‘fact’ or ‘situation which ceased to exist.’ Article 28 establishes that, in the absence of a contrary intention, treaty provisions do not apply to ‘any situation which ceased to exist’ before the treaty’s entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations do apply to any ‘situation’ which has not ceased to exist – that is, to any situation that arose in the past, but continues to exist under the new treaty. Indeed, the very use of the word ‘situation’ suggests something that subsists and continues over time; it would, therefore, include ‘subject matter existing & and which is protected’, such as Old Act patents at issue in this dispute, even though those patents, and the rights conferred by those patents, arose from ‘acts which occurred’ before the date of application of the TRIPS Agreement for Canada.<sup>79</sup>

In its analysis of customary international law, the report also relied on the preparatory work for the Vienna Convention submitted by the ILC and its special rapporteur.<sup>80</sup>

A further example is the discussion of Article 48 VCLT concerning error in *Korea – Government Procurement*, with an emphasis on its customary law status:

Error in respect of a treaty is a concept that has developed in customary international law through the case law of the Permanent International Court of Justice and of the International Court of Justice. Although these cases are concerned primarily with the question in which circumstances of error *cannot* be advanced as a reason for invalidating a treaty, it is implicitly accepted that error can be a ground for invalidating (part) of a treaty. The elements developed by the case law mentioned above have been codified by the International Law Commission in what became the Vienna Convention on the Law of Treaties of 1969.... Since this article has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law and we will apply it to the facts of this case.<sup>81</sup>

<sup>72</sup> *Canada – Terms of Patent Protection*, WT/DS170/AB/R (2000), at paras. 71–74.

<sup>73</sup> See, for instance, *EC – Poultry Products*, *supra* note 66, at para. 79; *Japan – Measures Affecting Consumer Photographic*, WT/DS44/R (1998), at para. 10.65; *EC – Hormones*, *supra* note 37, at para. 51.

<sup>74</sup> *Turkey – Clothing Products*, *supra* note 70, at para. 9.181.

<sup>75</sup> *Korea – Government Procurement*, *supra* note 20, at paras 7.123–7.126.

<sup>76</sup> *EC – Poultry Products*, *supra* note 66, para. 79.

<sup>77</sup> *Brazil – Export Financing Programme of Aircraft*, WT/DS46/ARB (2000), at para. 3.10.

<sup>78</sup> *Canada – Patent Protection*, *supra* note 72, at paras. 71–74; *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R (1996), at para. 279.

<sup>79</sup> *Canada – Patent Protection*, *supra* note 72, at para. 72.

<sup>80</sup> *Ibid.*, at para. 73.

<sup>81</sup> *Korea – Government Procurement*, *supra* note 20, at para. 7.123.

For a third and final example, one may refer to *Brazil – Export Financing Programme of Aircraft*, where Articles 60 and 70 VCLT were applied:

We note that Article 60 of the Vienna Convention provides for the 'termination' of a treaty by one party in response to a 'material breach' by the other party. Article 70 of the Vienna Convention nevertheless provides that the termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. We conclude that, even assuming that the Bilateral Agreement has been terminated by Brazil on 14 July 2000, the request by Canada under Article 4.10 of the SCM Agreement, to the extent it was made in accordance with the terms of the Bilateral Agreement, remains unaffected by the termination.<sup>82</sup>

These cases clearly evidence the wide application of treaty rules, relying on the practice of other international judicial bodies for their reasoning, such as the ICJ, the Permanent Court of International Justice (PCIJ), and the ILC. Undeniably, therefore, the rules expressed in the Vienna Convention have played a substantive role in determining issues faced during trade disputes. As the following section will show, moreover, the judicial bodies of the WTO have repeatedly gone beyond the rules contained in the Vienna Convention.

### C General International Law in the Practice of the WTO Judicial Bodies

The bearing of international law on the decisions taken by the WTO dispute settlement mechanism has not been limited to the rules of treaty law. Additionally, various panels and the Appellate Body have relied on rules and principles of general international law,<sup>83</sup> such as representation,<sup>84</sup> *la compétence de la compétence*,<sup>85</sup> burden of proof,<sup>86</sup> the treatment of municipal law,<sup>87</sup> the acceptability of *amicus curiae* briefs,<sup>88</sup> the authority to draw adverse inferences,<sup>89</sup> judicial economy,<sup>90</sup> state responsibility concerning countermeasures,<sup>91</sup> and attributability.<sup>92</sup> Again, closer analysis of pertinent case-law helps illustrate the willingness of judicial bodies in the WTO dispute

<sup>82</sup> *Brazil – Aircraft*, *supra* note 76, at para. 3.10.

<sup>83</sup> General international law as expressed by customary law and general principles of law; a distinction needs to be drawn between these sources and international treaties, since the latter require consent and apply only to the parties to a particular treaty.

<sup>84</sup> *EC – Bananas*, *supra* note 42, at 10.

<sup>85</sup> *US – Anti-Dumping Act*, *supra* note 15, at para. 54, note 30.

<sup>86</sup> *US – Wool Shirts and Blouses*, *supra* note 16, at 14.

<sup>87</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (1998), at para. 65.

<sup>88</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (1998), at paras. 102–110.

<sup>89</sup> *Canada – Measures Affecting the Exports of Civilian Aircraft*, WTO Doc. WT/DS70/AB/R (1999), at para. 202.

<sup>90</sup> *US – Wool Shirts and Blouses*, *supra* note 16, Section VI, 21.

<sup>91</sup> On the proportionality of countermeasures see *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/ARB (1999), at para. 6.16; on the objective of countermeasures, see *Brazil – Export Financing Programme for Aircraft*, *supra* note 81, at paras. 3.44–3.45.

<sup>92</sup> *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (1999), at paras. 9.33–9.44.

settlement mechanism to consider and apply certain rules of general international law, while also relying on the reasoning of other international tribunals and bodies.

First, attention should be drawn to the *EC – Bananas* case, where representation by private council was confirmed with reference, *inter alia*, to customary international law and the practice of international tribunals:

[W]e can find nothing in the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings ... we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.<sup>93</sup>

Another interesting issue has arisen with regard to the treatment of municipal law, which was dealt with in *India – Patent Protection*, where the reasoning substantially relied on the *Certain German Interests in Polish Upper Silesia* case before the PCIJ:

In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations ... the Permanent Court of International Justice observed: ... From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. *The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention ...* the Panel was not interpreting Indian law ‘as such’; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the TRIPS Agreement. To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India’s obligations under the WTO Agreement. This, clearly, cannot be so.<sup>94</sup>

A final issue that has been discussed on several occasions is state responsibility.<sup>95</sup> In *Brazil – Export Financing Programme for Aircraft*, for instance, the objective of countermeasures was discussed with reference to the work of the ILC.

The first context of the term ‘appropriate’ is the word ‘countermeasures’, of which it is an adjective. While the parties have referred to dictionary definitions for the term ‘countermeasures’, we find it more appropriate to refer to its meaning in general international law and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures. We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law. When considering the definition of ‘countermeasures’ in Article 47 of the Draft Articles, we note that countermeasures are meant to ‘induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46’.

<sup>93</sup> *EC – Bananas*, *supra* note 90, at para. 10.

<sup>94</sup> *India – Patent Protection*, *supra* note 86, at paras. 65–66 (emphasis in original).

<sup>95</sup> *EC – Bananas*, *supra* note 90, at para. 6.16; *Brazil – Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/ARB (2000), at paras. 3.44–3.45 and *Turkey – Clothing Products*, *supra* note 90, at paras. 9.33–9.44.

We note in this respect that the Article 22.6 arbitrators in the EC – Bananas (1999) arbitration made a similar statement. We conclude that a countermeasure is 'appropriate' *inter alia* if it effectively induces compliance.<sup>96</sup>

These examples show a distinct reliance on rules of general customary law and also on decisions of other international tribunals, including the ICJ, the PCIJ, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACtHR), and the work of the ILC. In *US – Reformulated Gasoline*, in particular, the Appellate Body made frequent reference to decisions of the ICJ, the ECHR, and the IACtHR, as well as to writings of the principal jurists in international law.<sup>97</sup> Clearly, then, the judicial bodies of the WTO have not shied away from using general international law and applying it to disputes before them. What one might still ask, however, is on what legal basis the panels and Appellate Body have seen fit to apply these rules and principles of international law, and – if at all – whether such a mandate exists in clear legal terms.

#### D Cornering the Chimera: Judicial Determination

The extent to which general international law can be applied by the WTO judicial bodies has been an issue attracting much attention. As Section 2 argued, different answers to this question are conceivable and have been, in effect, suggested.<sup>98</sup> For international lawyers, it may appear evident that states are unable to contract out of the entire system of international law. As Koskenniemi has recently put it 'states cannot contract-out from the *pacta sunt servanda* principle – unless the speciality of the regime is thought to lie in that it creates no obligations at all.'<sup>99</sup> Similarly, Pauwelyn claims that the agreements instituting the WTO form part of the wider body of international law.<sup>100</sup> For political reasons, however, this answer is not entirely self-evident. A very restrictive approach to this issue has found support among those who wish to preserve the independent nature of the trade regime. A more balanced view, in turn, has the covered agreements taking precedence over other international law whenever a conflict arises. Given this disparity of views, the applicability of international law to trade disputes is obviously an issue that remains unresolved, notwithstanding the ample references to general international law in judicial decisions of the WTO.

All foregoing views claim to derive backing from various Articles of the DSU. Ironically, the very same Articles 3.2, 7, 11, and 19.2 of the DSU may be used to argue both in favour of and against a larger scope of applicable law in WTO dispute settlement.<sup>101</sup> In *Korea – Government Procurement*, for instance, the panel clarified that the purpose of Article 7 of the DSU lies in identifying the claims submitted by the parties

<sup>96</sup> *Brazil – Export Financing Programme for Aircraft*, WT/DS46/ARB, 28 Aug. 2000, para. 3.44.

<sup>97</sup> *United States – Reformulated Gasoline*, *supra* note 20, at 16–17.

<sup>98</sup> See *supra*, at 9–14.

<sup>99</sup> Koskenniemi, *supra* note 3, at para. 157.

<sup>100</sup> Pauwelyn, *supra* note 12, at 25–40, and, more recently, Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', 25 *Michigan J Int'l L* (2004) 903–916.

<sup>101</sup> See *supra*, at 9–14.

and ‘is not meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel’.<sup>102</sup> In the end, these articles cannot be drawn on for support of any single position outlined earlier.<sup>103</sup>

Clearly, the DSU contains no rule similar to Article 38 of the Statute of the ICJ<sup>104</sup> with its explicit catalogue of applicable sources of law. The provisions cited earlier can neither be relied on to expressly allow or forbid the application of international law.<sup>105</sup> Altogether, the WTO Agreement and the DSU remain silent or inconclusive on this issue, leaving a wide scope of discretion to the judicial bodies charged with their enforcement. The marked evolution of dispute settlement since the early days of the GATT merely underscores this assumption. Since the panels and the Appellate Body will tend to observe their earlier decisions,<sup>106</sup> the current body of case law provides some indication of the degree to which these bodies are willing to go in applying international law. With only a small number of questions raised so far before these bodies, however, the ambit of future developments has hardly been determined.

In several decisions, the WTO dispute settlement mechanism has analysed provisions of the DSU and their relation to international law, including, in particular, Article 3.2. As already mentioned, this provision contains the only express mention of international law in the DSU. Given this reference, it may be asked whether explicit acceptance also amounts to an exclusion of other rules of international law, limiting its application to the principles of treaty interpretation. In this matter, the panel ruling on *Korea – Government Procurement* argued against an *a contrario* inference by stating that:

We should also note that we can see no basis here for an *a contrario* implication that the rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that has arisen under the GATT to the effect that among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary law.<sup>107</sup>

Along the same vein, a strict interpretation of Article 3.2 was rejected:

[w]e take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in

<sup>102</sup> *Korea – Measures Affecting Government Procurement*, WT/DS163/R, 1 May 2000 para. 7.101, note 755; Bartels, ‘Applicable Law’, 35 *J World Trade* (2001) 502.

<sup>103</sup> *Ibid.*, at 504–505.

<sup>104</sup> Statute of the International Court of Justice, annexed to UNCIO XV, 335; amendments by General Assembly Resolution in UNTS (1964) 557, 143/638, 308/892, 119.

<sup>105</sup> Arguing against a restriction see Pauwelyn, *supra* note 8, at 652; comparing Art. 7 of the DSU to Art. 38 of the ICJ Statute see Palmeter and Mavroidis, *supra* note 37, at 399.

<sup>106</sup> *Ibid.*, at 400–406.

<sup>107</sup> *Korea – Government Procurement*, *supra* note 20, at para. 7.96, note 753.

a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.<sup>108</sup>

It has been recognized without a doubt, thus, that the WTO Agreements interact with customary international law beyond the immediate scope of treaty interpretation laid down in Article 3.2 of the DSU.

A similar acceptance of customary law can also be discerned in *US – Reformulated Gasoline*, where the Appellate Body – in a much recited passage – stated ‘that the General Agreement is not to be read in clinical isolation from public international law’.<sup>109</sup> Both statements are strictly qualified, however. The latter, for instance, should be read with a focus on the wording ‘clinical isolation from public international law’. In common usage, clinical isolation refers to ‘strict’ or ‘total’ isolation. In other words, the Appellate Body merely recognized that WTO law does not exist in strict or total isolation from general international law. The former, in turn, confirmed the application of custom only to the extent that no conflict or inconsistency with the covered agreements occurs. Neither, however, establishes the extent to which general international law can be applied.

Apparently, then, customary law should be confined to a rather narrow area of application, with precedence given to the provisions of the WTO Agreement. In many ways, however, there has been a shift towards greater acceptance that the WTO is not a legal system operating in isolation from general international law – as the occasionally used designation ‘self-contained regime’ wrongly suggests.<sup>110</sup> And in principle, this amounts to an important recognition that general international law may indeed be applied. Still, only future decisions can determine how far the panels and the Appellate Body will eventually go; and, more importantly, to what extent they are unwilling to go.

## 4 Conclusions

As of late, the WTO has been under serious pressure to take into consideration new dimensions of free trade, such as environmental protection and human rights. Few will nowadays deny that the WTO has significant political, moral, ethical, and social ramifications, and that it is more than a mere technical regime dealing with trade issues. It can hardly surprise, therefore, that the rules on free trade are no longer seen in isolation from general international law. As the foregoing sections have shown, they interact with international law in many ways, their application relying on rules and principles, the case law, and even the legal reasoning of general international law. With its own approach to dispute settlement, the WTO has thus conceded that it is not a self-contained regime operating in complete isolation from international law.

<sup>108</sup> *Ibid.*, at para. 7.96.

<sup>109</sup> *US – Reformulated Gasoline*, *supra* note 20, at 17.

<sup>110</sup> Marceau, *supra* note 25, at 95.

And yet, the questions asked at the outset of this article have by no means become obsolete. Although the judicial bodies of the WTO have, indeed, drawn on general international law, their reliance has not been unconditional. Past reliance on international law has generally followed a distinct pattern. Referring to the Vienna Convention, for one, the dispute settlement mechanism has applied provisions on non-retroactivity, successive treaties, modification, error, termination or suspension by conclusion of a latter treaty, termination as a consequence of breach, and consequences of termination. These precepts commonly relate to questions of treaty formation and application. Next, several panels and the Appellate Body have applied rules and principles of general international law, such as representation, legal interest, *compétence de la compétence*, burden of proof, the treatment of municipal law, acceptability of *amicus curiae* briefs, *lex specialis*, and the authority to draw adverse inferences, and judicial economy, all of which are by nature procedural rules. Finally, in the area of general international law, the judicial bodies of the WTO have also referred to the rules of state responsibility.

Clearly, the first two categories consist of norms which, in the end, merely provide guidance as to the application of existing law. Not being substantive rules, they wield little influence as to the outcome of disputes. In fact, they arguably belong to a set of rules every legal system must, by necessity, incorporate to function properly. The final category regarding state responsibility, on the other hand, might seem to introduce some measure of substantive determination. It should not be overlooked, however, that the law of state responsibility solely serves to determine the consequences of illegal acts and their attribution to the violating state. As the PCIJ stated in the *Chorzów Factory* case, ‘it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation’.<sup>111</sup> Again, this suggests that the WTO has made reference to state responsibility not so much in an attempt to draw on the wider body of international law, but rather to derive essential features for the operation of its proliferating legal system – features which had been neglected in the drafting of the GATT and WTO Agreement.

With their largely procedural focus, such rules and principles are easily adapted to different legal orders, aiding the application and enforcement of substantive norms. In contrast, the rules created within different areas of substantive international law, such as environmental law or human rights law, do not lend themselves to easy adaptation and are more likely to cause normative conflicts. Predictably, these have been far less important in the judicial practice of the WTO. While this article cannot venture into an analysis of the countless sectoral issues affected by free trade, the ongoing debate on trade and the environment exemplifies the tensions arising when substantive rules of international law collide with provisions of the world trading order.<sup>112</sup> There, too, substantive aspects have, at best, been applied as part of the

<sup>111</sup> *Chorzów Factory* [1927] PCIJ Series A, No. 2, at 21.

<sup>112</sup> For an overview, see Shaw and Schwartz, ‘Trade and Environment in the WTO: State of Play’, 36 *J World Trade* (2002) 129.

interpretation and application of trade rules, with environmental concerns and the legal arrangements devoted to their solution merely justifying an exception from the principles of free trade.<sup>113</sup> As of now, no provision of environmental law has been applied side by side – or even overruling – the substantive law of the WTO.

While by no means a ‘self-contained regime’ operating in isolation from international law, the WTO has proven altogether reticent when applying substantive rules beyond the ambit of free trade. It has, accordingly, evaded one of the core challenges raised by the fragmentation of international law, namely the solution of conflicts between substantive norms of different regimes. Whatever choices the judicial bodies may take in this regard with their future decisions will be decisive for the acceptance and, by extension, the legitimacy of the WTO. As this article has shown, however, the chimera of ‘self-contained regime’ remains a phantom with no legal basis in international law, a notion which, despite its persistent appearance in jurisprudential debate, is best confined to the lively world of myth and fable.

<sup>113</sup> In a landmark case on this issue, the Appellate Body invoked several multilateral environmental agreements when interpreting Art. XX (g) of the GATT: see *US – Shrimp Products*, *supra* note 87, at para. 130; the closest an environmental treaty came to independent application, however, was through mention of its dispute settlement mechanism as a possible forum for the dispute: *ibid.*, at para. 171.