

Can Panels Save WTO?

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Abstract

WTO is facing an unprecedented crisis, without an effective legislator or judiciary, and without negotiation results agreed. Moreover, multilateralism and international cooperation have crashed, not only because of a virus or a possibly bipartisan policy shift in Washington. Can WTO panelists don their strait jackets designed by the 'automatic' dispute settlement system of a non-supranational trade organisation, in order to find a 'positive solution' without rulemaking? This working paper posits that the WTO's 'free trade bias' prevents globally coherent solutions in trade disputes. However, the present WTO impasse offers a surprising avenue for panelists to apply peremptory international non-trade law and customary law principles (*ius cogens*). This window is open right now – thanks to the automatic adoption of adjudicator findings, such as what is known as *non-violation* rulings. Emerging case law and the work of forward-looking academics show how to address measures with deleterious social and eco-dumping effects, unacceptable to the body politic at large. Complaints against trade-distorting human and labour rights violations, and perhaps even against measures causing excessive global warming, might lead future adjudicators to answer the repeated call of the presently defunct Appellate Body for a 'holistic' reading of WTO rules, extending global system security across the fragmented international legal framework. WTO's reputation would regain lost ground where it matters, namely in constituencies looking for better international governance and a level-playing field.

A Introduction

'Automaticity' is the key to what is called the 'Crown Jewel', because it avoids the supra-nationality stigma of 'foreign judges.' This working paper tries to show the limits of the brilliantly crafted WTO dispute settlement rules, when adjudicators are unable to find 'positive solutions' without rulemaking. The ambiguity lies in the clear prohibition of rulemaking, despite the equally clear commitment to the multilateral rules framework. It reflects the intent of the drafters to ensure rulings while preventing adjudicator 'overreach' or 'judicial activism.' This was particularly important for the interpretation of WTO agreements and rules implementation, breaking new ground with the GATT 1947.¹

Particular problems arise when rulings remain entirely within WTO Law, even when the violation of trade rules is only a collateral damage in the

¹ General Agreement on Tariffs and Trade (GATT) 1994, 55 UNTS 194

implementation of a legitimate societal concern. A paralysed WTO trying first and foremost to save its very existence is unlikely to reinterpret rules or to adopt changes or exceptions within a foreseeable time. A way out of this quandary is difficult – unless ‘automatic’ adjudicators (and the new MPIA arbitrators) having the ‘last word’ show the way.

1 Disclaimer

First questions first: what are the limits to the present ‘automatic’ ruling delivery? Where did WTO rulings fail to respond to legitimate non-trade concerns? What can we learn from the almost secret workings of adjudicators over the last 25 years?

After 25 years as a panelist a number of insights could provide certain answers to these questions. However, all deliberations in all WTO panels are confidential and must remain so ‘even after the panel process and its enforcement procedures, if any, are completed.’² This explains why the story of panel deliberations looking for ‘positive solutions’ in the sense of Art 3.7 of the *Dispute Settlement Understanding* (DSU) must remain closed for eternity.

Hence, this working paper could easily disappoint outsiders interested in questions like ‘how did you get elected?’ or ‘who held the pen?’ or ‘which outside pressure had which impact?’ For the same reasons I will not comment on the importance of the WTO Secretariat’s role portrayed as a problem in the US ‘overreach’ argument. (Pauwelyn, J and Pelc, K, 2019)³ Neither will this working paper offer any comments on the numerous proposals for the reinstatement of the Appellate Body (AB)⁴ or on the

² Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1, 11 December 1996)

³ This article has been heavily criticized in a 10 November 2019 guest post by Pieter Jan Kuijper, Emeritus Professor of the Law of International (Economic) Organizations, University of Amsterdam, in International Economic Law and Policy Blog, downloaded on 13 January 2021 at https://ielp.worldtradelaw.net/2019/10/guest-post-some-remarks-on-who-writes-the-rulings-of-the-world-trade-organization-a-critical-assessm.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielp+blog+%28International+Economic+Law+and+Policy+Blog%29

⁴ Like others, Mary Footer saw a vote – the ‘nuclear option’ – as a way out of the consensus blocking of new AB members by the US, foreseen if not prescribed by Article IX:1 of the WTO Agreement. (Footer, 2018, p 22)

Ernst-Ulrich Petersmann considered that the ‘Crown Jewel’ had been stolen by US trade diplomats, without any intention of giving it back. (Petersmann 2018)

sometimes-acrimonious debate about its functioning during the last 20 years.⁵

In the present stalemate most debates about the fault lines in WTO negotiations as well as in dispute settlement, is held *de lege ferenda* ('they should'). Hence, my *de lege lata* contribution ('yes we can') might be of some interest.

2 Structure

The remainder of this working paper is organised as follows. The 'Crown Jewel' has a negotiating history trying to define the fine line between protection and protectionism, and the issues around 'automaticity.' (B) This explains some of the quandaries which adjudicators face in their deliberations, when they must read unclear texts on the fuzzy borders between WTO Law, International Economic Law (IEL), and non-trade law. (C) The *research question* therefore is whether the orthodox approach prevailing in most rulings – the prohibition of rulemaking, and the ivory tower of what is wrongly called 'case law' – prevent genuine answers to IEL challenges and non-trade concerns. (D) I will then discuss two instances where grave and systematic labour rights violations, or excessive global warming, can modify conditions of competition – without WTO even starting to discuss whether and how to counteract such challenges to international governance. (E) Some contributions from forward-looking scholars on governance, labour rights, and climate change mitigation, could show a way forward. (F) As long as WTO's General Council fails to agree on adequate reinterpretations, changes, or waivers, adjudicators finding rules incoherence for party claims might look for relevant rules under *Public International Law* (PIL) or *Customary International Law* (CIL). (G) My *research hypothesis* is therefore 'yes, but' ONLY for *ius cogens* (red lines), and where litigants make such claims based on binding international standards. At the end of the day, however, only a brave panel will be able to answer AB calls for 'holistic' rules interpretation and, where necessary, look beyond WTO Law now that the fear of 'overreach' has become even stronger. Such unfavourable circumstances notwithstanding, my conclusions

⁵ In his study of the first 20 years of dispute settlement, Joost Pauwelyn criticises Rob Howse's thesis of the 'Appellate Body "distancing itself" from WTO members or the Geneva-based trade policy elite' and argues that 'panels and the Appellate Body have, for the most part, skilfully read, reflected and responded to underlying and evolving WTO member country preferences.' According to Pauwelyn, this is not (as Howse posits) a 'True Court of World Trade'; rather, it is 'judicial minimalism' and 'the subtle, informal symbiosis' which 'bolsters the internal legitimacy and makes the overall system digestible to WTO members.' (Pauwelyn, 2016)

treat the present WTO crisis as an opportunity, because 'automaticity' also means that panels and arbitrators now have the 'last word' (H).

B Who Crafted the Crown Jewel?

The Uruguay Round negotiators were civil servants mostly hailing from Trade Ministries, or trade experts in specialised Foreign Affairs agencies. Trade scholars played an essential role too. When rules enforcement was on their agenda, the aim was to solve international trade disputes with international trade law – never mind non-trade concerns. Somewhat surprisingly, considering the weak performance under GATT 1947, the result seemed to work well in the new WTO: compliance was the rule, with only a few nontransparent 'Mutually Agreed Solutions' (MAS) as exceptions. The Ivory Tower rejoiced, in concert with the erstwhile and much of the present scholarship. For the first time in history, a multilateral but not supranational intergovernmental organisation had set up a dispute settlement system with binding and enforceable rulings: "if you step on my foot, I can get WTO to make you lift it."

True, not all respondents, big and less big, always complied with all DSB rulings. But disagreements on rulings like for 'zeroing' or 'national security' became a prime divisive issue much later. Some out-of-court settlements do look like face-saving devices or outright dirty deals where third parties sometimes wonder whether the MAS had properly reestablished their own market access rights. Non-compliance affects the balance of rights and obligations even when governments are unwilling or unable to convince their legislative arm to modify an incriminated legal provision. When 'retaliation' also fails to induce the modification, this is a systemic problem where neither the adjudicator nor the arbitrator can find a solution.

Overall, however, virtually every case ended with the withdrawal of the incriminated measure, or a new balance between rights and obligations. Mysterious terms like 'non-trade concerns' or 'sustainability' (appearing in WTO provisions only for trade in agriculture, and in the Doha Round Agenda) were never assessed by a panel.

The first systemic cracks appeared when trade measures and subsidies came as a response to societal objectives (instead as producer support instruments).

Trade pundits were surprised to find that protecting ethnic minorities seemed to require trade-distorting measures. Adolescent smokers of perfumed cigarettes, cute baby seals and adult dolphins, and nearly

extinguished sea turtles outside territorial waters lined up for protection on the shores of Lake Geneva. Regulations prescribing plain cigarette packaging, unhealthy food labelling, or the indication of cow and pig origins, claimed consumer information without a trade barrier.

Subsidy wars reached new heights with large civil aircrafts, even though everybody knows that thousands of jobs as well as national security interests loom behind every airplane. Food security became a non-negotiable catch-all phrase for many farm, stockpiling and food processing subsidies, as well as for export credits and international food aid.

All that before the US-China trade war, and before Covid-19 hit the regulatory screens...

1 What's Protection got to do with WTO?

Adjudicators must interpret treaty texts without changing them, even when, for reasons discussed below, some such texts are far from being crystal-clear.

Similarly, accession protocols asserting the 'inherent right to regulate trade to promote fundamental non-trade objectives [...] in a WTO-consistent manner' do not confer any additional rights to a Member, notwithstanding incantations by litigants and panelists (eg AB Report, *China – Publications and Audiovisual Products*, para 221).

Clearly, the fine line between protection and protectionism means that the assessment of a measure under WTO Law can only be made separately for each case.

Tariffs are the only legal instrument protecting domestic producers at the border. Hence the need for schedules, for trade in goods (and services). Subsidies, obviously, require rules against excessive trade distortions. However, health measures may sometimes serve domestic constituencies at the expense of foreign suppliers. The cost of a mandatory label may affect foreign and domestic products differently. But looking at, say, the import prohibition of genetically modified animal feed, one may wonder where protectionism comes in, especially if that prohibition means that your own farmers pay more for domestic feed than their competitors on the world market.

2 The Problem with Automaticity

The near-total automaticity enshrined by the DSU ensures the establishment of a panel, a panel report, and a DSB ruling – even if the trade element is

minimal. Initially though, adjudicators were quite content to apply the covered agreements in order to draw the fine line between protection and protectionism.

In times of crisis, when the very existence of multilateralism and dispute settlement is at risk, it is of utmost importance to read international trade rules in accordance with current regulations and values. Without the 'holistic approach' demanded by the AB, the often-claimed higher moral ground of multilateralism becomes moot.

Even so, there are cases where clinging to automaticity produces counterintuitive rulings which the drafters of the DSU wanted to avoid. Trade must remain a means. Free trade is not the objective of WTO.

Can panelists innovate despite their standard terms of reference acting like a strait jacket?

C Deliberation Quandaries

The life of a panelist is not always easy. Though it can be. Rumours have one panelist boasting on a Geneva golf course with the number of unread case folders, and claiming he just signed off the Secretariat's draft without ever having read a single line. (Needless to say that this person never served on another panel.) Others are too happy to follow the suggestions made by the Secretariat, not only when they like to renew their assignments. The ever-increasing number of preceding cases, which only a computer-assisted brain can see clearly, seems to prevent all departures from the path of orthodoxy. I am glad to say that this, in my own recollection, is a small minority. Most panelists actually over-invest, despite their relatively small remuneration in comparison with arbitration under the *International Centre for Settlement of Investment Disputes* (ICSID). Yet, as we will see, panelist efforts do not often lead to innovation.

In my experience, panels may face three types of rule interpretation difficulties: what is a 'positive solution'? How to avoid 'rule making'? And how to stick to WTO Law when non-trade concerns are at stake?

1 Finding Positive Solutions with Unclear Texts

'The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.' (DSU-Art 3.7 Second sentence) Clear and simple, right? Hence, the standard terms of reference adopted by the *Dispute Settlement Body* (DSB) are to 'find a positive solution' regardless of the clarity or ambiguity of the legal texts. The fact that no panel ever failed to

produce a report without a positive solution means that all interpretation quandaries had disappeared on the day of signature. The panel, or the AB, simply claimed to have found the original intention of the different negotiators.

Now we all know that texts agreed at the end of one of those infamous 'last nights' might lack clarity. Some negotiating stories have left their traces in a Note by the WTO Secretariat, or in the preamble to an agreement. Also, the calculation of a tariff reduction formula can be a confidential item, entering the public domain much later. Hence, claims of 'dirty tariffication' in a tariff schedule inevitably fail.

Regrettably, perhaps, for the search of legislators' intent, there are no publicly available negotiating session records or draft texts. Unlike national legislators whose parliamentary deliberations and drafts are in the public domain, most WTO treaties, tariff reduction formulas, and other provisions, are simply gavelled through at the exit of a sometimes-dark tunnel. When a government submits a treaty for acceptance by its legislator, it naturally claims that its own views and priorities largely prevailed.⁶

When unclear texts demand interpretation, adjudicators may look for the objectives of a treaty and ask the parties for their opinion. They do so because haruspicy is not an ordinary attribute of a desperate adjudicator looking for 'jurisprudence' and 'case law'. Hence, they cannot read in the entrails of WTO legal texts the meaning of terms absent from the DSU, or customary international law (Kolb, 2016).

Now that 'case law' and other such terms are formally banned from the WTO user handbook, the life of arbitrators in the new MPIA will be even more difficult. (WTO, JOB/DSB/1/Add.12 dated 30 April 2020) In practice, however, both the arbitrators and the parties are likely to continue invoking WTO jurisprudence.

⁶ For example, a somewhat whimsical Article 14 in the Agreement on Agriculture (AoA), consisting of just one lonely sentence in the whole of Part VIII, consisting of just one article (entitled 'Sanitary and Phytosanitary Measures'), posits that 'Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.' This pleonastic affirmation also appears in the AoA-Preamble. It seems the US Government demanded and then invoked it when it assured Congress, in 1994, that WTO would end the 'hormone-beef war' with the EC. Until today, however, growth hormones are prohibited in Europe, and the EU will not knowingly import meat or dairy produced with *Somatotropin*. For the same reason *Ractopamine*, a growth hormone for pigs narrowly accepted by *Codex Alimentarius*, may soon reach the Dispute Settlement Body (DSB).

2 Rule Interpretation without Rulemaking

Adjudicators trying to read unclear texts face several difficulties. This working paper addresses four of them.

First, WTO Law is a *Lex Specialis* – regardless of whether negotiators had common or codified law in mind. This means that text interpretation must follow, first and foremost, WTO legislator intent. Hence, as we will see later, even references to procedural law in other than WTO treaties can be problematic.

Secondly, disagreements between panelists occur quite naturally, given their varied background. When such discrepancies appear as dissenting opinions (always anonymously), they can hardly claim to be a real contribution to a coherent reading of treaty texts, let alone a prelude to a change in jurisprudence. In my opinion, they are simply a failure in panel governance.

The third and perhaps the biggest hurdle is the search for a standard of review. This is as old as the GATT. Negotiations in various formats, including by reference to the Doha Development Agenda, and considerations in panels and in the AB, have not resulted in an agreed general WTO Standard of Review or a specific standard, such as for trade remedies. Without a formal decision by the DSB or the General Council in respect of standard of review, however, panelists regularly face the dilemma in their interpretation quandaries, between deference and intrusiveness. This is also true for health and environmental disputes. Lukasz Gruszczynski argues that 'the investigation of the WTO panel remains intrusive when assessing the objectivity and coherence of the reasoning included in a contested risk assessment. The same is true with respect to the permissible inquiry into underlying methodology.' (Gruszczynski 2013, p 757)

Just looking at the literature discussing the major SPS cases it becomes clear that a standard of review defining regulatory autonomy remains out of reach, even though Markus Wagner, a renowned SPS expert, considers that the AB has made the limits for standard of review and for deference absolutely clear: 'panels are not to perform *de novo* reviews and enter into a substantive investigation of a WTO member's measure [but] panels do not need to be fully deferential to the decisions of domestic agencies'. (Wagner 2016)

Ross Becroft has also studied the various standard of review principles and options. He proposes a new standard of review applying not simply to all obligations in a uniform fashion, but to specific (WTO) obligations. Using the

SPS Agreement as an example, he argues that the obligation to apply sanitary or phytosanitary measures 'only to the extent necessary to protect human, animal or plant life or health' (Art 2.2) contrasts with the specific obligation to carry out a risk assessment before taking such a measure (Art 5.1) (Becroft, p 187).

The fourth difficulty relates to rulemaking. Suppose the adjudicators agree on the correlation (or absence thereof) between objective(s) and measure(s), and on the legal nature of the incriminated measure. Their search for a positive solution will remain constrained by the unambiguous prohibition of rulemaking in the DSU: 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.' (DSU-Art 3.2 *in fine*)

Adjudicators try to make good use of the interpretation rules codified in the *Vienna Convention on the Law of Treaties* (VCLT).⁷ For good measure, the AB frequently calls for a 'holistic approach'. (AB Report *EC – Chicken Cuts*, para 176; AB Report *US – Continued Zeroing*, para 268; AB Report, *China – Raw Materials*, para 307) The VCLT hence appears as a useful road for rule interpretation without rulemaking.

Yet, if we look very carefully at the instances when the AB or a panel refer to the VCLT, it appears that these adjudicators use the interpretation rules of the Convention merely as a kind of reading aid, namely to apply the definitions found in the *Shorter Oxford English Dictionary*.

There are very few exceptions to the default pusillanimity of adjudicators.

For instance, the Biotech Panel had to address the precautionary principle in the context of the Biosafety Protocol. (Preamble to the Cartagena Protocol on Biosafety, 2226 UNTS 208 (2000)) Many authors have faulted this (un-appealed) ruling, especially in this respect. (e.g., Eliason 2009) However, the panel did recognise that treaties and general principles of law could constitute 'rules of international law.' It thereby rejected a defence raised by the United States when it ruled that it did have the discretion to consider such rules as 'context' to determine the 'ordinary meaning' under Article 31.1 VCLT. (Van Damme, p 369)

Ilona Cheyne finds a similar scenario where panelists looking at policy objectives in context defer to PIL and public policy exceptions as a measure of last resort. In reference to the dolphins and shrimps cases, she concludes

⁷ 1155 UNTS 331 (1980); also, in 8 *International Legal Materials* 679. The VCLT was adopted on 22 May 1969.

that 'even the most hostile panel has seemed reluctant to reject the acceptability of the policy underlying a measure.' (Cheyne, p 48)

This being, we are yet to find a smart algorithm spitting out a ruling based on the (admissible) claims and counterclaims, incriminated measures, and the materials of a given case. In two instances, despite all the support by the parties and by the WTO Secretariat, including an impressive number of high-quality interns, we found that even document management was a huge challenge: it was not possible (i) to list all measures forming the 'banana regime' of the European Communities, or (ii) to count the number of documents submitted on hundreds of CD-ROM in the course of the Biotech Panel.

Does the VCLT bridge, except as a reading aid, lead into the void? Does the interpretative process have to stop at WTO Law, waiting forever for a self-interpretation by the General Council (based on Article IX:2 of the Marrakesh Agreement)? If WTO adjudicators stop at interpretation, is there not a risk of encroachment into other PIL and CIL that lack the stringent enforcement mechanisms of WTO Law? What about *pacta sunt servanda*? (Kolb 2016 p 129)

3 The Need for Fuzziness

The automaticity of WTO dispute settlement procedures, a cornerstone for the whole multilateral trading system, means that adjudicator reports do not require full consensus for the 'positive solutions' they propose to the DSB. The statements made by the parties and other Members when these reports are adopted, without a vote, indicate that adjudicators had to use all their skills to avoid any obvious misreading of the legal provisions. Only 'cogent reasons' can compel an adjudicator or an arbitrator to depart from previous treaty readings. Hence, the grey zones required for difficult rulings are a corollary of automaticity!

Nonetheless, some creative ways out of these quandaries do exist. The adjudicators in the Tuna-Dolphin case found a very creative solution when they decided that the US measure was 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans. According to the AB, the regulatory distinctions in this case did not amount to arbitrary or unjustifiable discrimination, and thus complied with the

requirements of Article 2.1 of the TBT Agreement. Unsurprisingly, the US Ambassador on this occasion did not accuse the AB of 'overreach'⁸

D Public International Law vs WTO Law

This working paper posits that, if the DSU disallows the direct application of CIL and/or PIL, the WTO becomes a free trade fortress unable to find positive, holistic, coherent solutions. This matters especially today, when new risks are recognised by big and growing constituencies as a 'common concern of humankind' requiring different trade rules. The Crown Jewel faces not only a systemic crisis. If it cannot deal with non-trade concerns, it may become irrelevant – and prevent trade from making its contribution to sustainable development.

When WTO only sanctions non-tariff barriers or allows antidumping, whilst it has neither the will nor the power to deal with trade-related sustainability, freedom of association, deforestation and other issues, the attention of policymakers in search of a level-playing field will shift to other fora. Regional Trade Agreements (RTA) now contain elaborate sustainable development chapters, some of them subject to substantive review procedures and specific dispute settlement.

Worse, unilateralism is rearing its ugly head again – not only for steel, cars, and solar panels. There is nothing new in 'America First' actions. Just think of the thousands of 'Voluntary Export Restraints,' whether negotiated or not in the early GATT years, 'undermining the GATT prohibitions of discrimination and quantitative restrictions.' (Petersmann p 107)

What looks new though, for instance in the European Union, are standards imposed in the name of (self-defined) good governance, human rights, or sustainability. So far, sanctions against infringements did not touch any MFN commitments. But there are a few trade sanctions consisting in withdrawals of tariff preferences under the General System of Preferences (GSP) – regardless, incidentally, of this being compatible with the *Enabling Clause*. Nevertheless, in the absence of complaints by the government accused of violating core labour standards, for instance, there is no chance for adjudicators to investigate the WTO-compatibility of such unilateral actions.

⁸ AB Report, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by the United States / Second Recourse to Article 21.5 of the DSU by Mexico (WT/DS381/AB/RW/USA and WT/DS381/AB/RW/2), circulated 14 December 2018

Will WTO remain relevant when facing *forum shopping* for 'good' causes, and unilateralism proposed by 'good governance' advocates? Has the Crown with the Jewel' become a 'Crown of Thorns'? (Creamer 2019) Can the fortress damage international governance?

Other entries in this Encyclopedia discuss the survival chances of WTO dispute settlement, as we know it. They propose solutions for the selection of the AB members and for other stages of the proceedings. Personally, I trust that the epistemology of the DSU will eventually guide the reform attempts in a way that will maintain the strength of its healthy features, such as the automaticity, appeal, and the establishment of an amended balance of rights and obligations between litigants without impairing the rights of other Members. This may not sound overly ambitious, but it is. A precious asset is case law: nowhere mentioned in the DSU, differently handled by continental and common lawyers – and now threatened by accusations of 'overreach.' Right now, it is difficult to imagine how future treaty text readings will handle the *de iure* disappearance of jurisprudence.

Initially, however, all went well in the trading world and behind the walls of the WTO judiciary power.

In the 1990ies trade expanded rapidly. Most DSB rulings were complied with. The wafts of teargas at the Seattle Ministerial 1999 were dispelled when the conference following the 9/11 tragedy adopted the Doha Development Agenda in Doha, Qatar, and welcomed China and Taipei into a still rapidly growing world trade body. That was in November 2001 – with bombs falling less than 1'000kms away on the presumed masterminds of the destruction of the Twin Towers in Manhattan/NY. Ranks closed behind the multilateral agenda, and the trade community at large continued to ridicule or ignore the anti-globalisation demonstrations accompanying big conferences in Washington, Davos, Montreal, Barcelona, Genoa, Cancún, Hamburg, Hong Kong, London, and Pittsburgh – to name only a few.

Before we can proceed, we must answer the question of the negotiators' intent in respect of panelist independence and self-restraint. Does automaticity imply orthodoxy? How free are adjudicators to look at PIL and CIL? Can they transgress fuzzy borders or will WTO Law always prevail? And what did negotiators mean by 'jurisprudence' when they decided not to use the term in the DSU?

1 Home-made Orthodoxy

The negotiators of the DSU seem to have wanted insider panelists:

'Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.'

'Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience'.

(Excerpts of DSU-Art 8, emphasis added)

My personal reading of these provisions, based on my experience as a WTO panelist for 20 years, is that the first quality panel members must have is a lot of insider knowledge. A dispute settlement system with possible 'retaliation' (ie punitive tariffs) for non-compliance could convince domestic constituencies only if these 'foreign judges' were carefully selected from within the fold. The 'indicative list of governmental and non-governmental individuals' referred to in DSU-Article 8.4 was one way to ensure allegiance (cf WTO-Document WT/DSB/44/Rev.48 dated 13 January 2020). Without a quality check of the submitted CVs, this unwieldy list, presently over 18 pages long, never really served its purpose.

Panelist selection is not a kind of co-optation system or the recruitment of adjudicators with specific skills or abilities. Rather, it remains one of the totally opaque stages in dispute settlement. Acceptance of this new system benefitted from the expectation that this would function well if it produced orthodox rulings based on IEL or, preferably, WTO Law.

No surprise for the second quality required of all panelists, 'independence.' The irksome question here would be 'Independence from Whom?'

Article 8 then adds a third requirement, namely 'a sufficiently diverse background and a wide spectrum of experience.'

For the composition of the AB, geographical distribution had always been the main selection criterion. For panels, in the first 16 years of WTO dispute settlement history, 244 different individuals from 52 different countries had served as panelist individuals. Of these countries, 24 were developed, while 28 were developing. 20 New Zealanders and 19 Canadians topped the list of

developed country panelists, while among the developing countries, Chile and South Africa provided 12 and 10 panelists, respectively.⁹

Ironically, very few qualified EU (and US) nationals could serve in panels, simply because their governments were the main DSU users. Perhaps for this reason, in 1998 and again in 2002, the EU proposed a 'more permanent' Panel Body of 15 to 24 members.¹⁰

Concerned that 'emphasis on geography rather than expertise is unwise when panels are hearing complex and often highly technical matters', the International Trade Committee of the New York City Bar Association proposed a panel roster of around 75 well-qualified individuals who the membership believes can put geographic bias aside. (ABCNY 2005)

Lack of experience can be remedied with upfront adjudicator education. However, while à la carte in-house training is now offered to new adjudicators, Geneva-based WTO Missions apparently rejected proposals for a systematic *extra muros* training programme.

Various other DSU reform attempts failed, coming from outside specialists and as a minor component of the 2001 Doha Development Agenda.

In the new *Multi-Party Interim Arbitration Arrangement* (MPIA) mechanism described below in Section D1, each member can nominate one arbitrator. As of 3 August 2020, all of the 10 nominations were of senior trade dispute experts. (WTO, 2020) Arbitrators are not AB judges, even though their findings may look very similar to AB reports. But specialists interested in a potential application of PIL/CIL will find in Sub-Section G2, Footnote 29 a very interesting possibility of MPIA arbitrators to make 'recommendations' in case of a nonviolation complaint.

Until today, several other elements appear to still ensure an orthodox interpretation and administration of WTO Law, even though issues such as transparency of deliberations and assignments for report drafting, do not seem to be a top priority. This may frustrate outside academics and pundits. The original 'firewall' between the Legal and Rules Division on the one side, and the Appellate Body Division on the other side, has fortunately broken down. However, the secrecy of proceedings still prevents more coherent

⁹ Source: WTO Dispute Settlement Body developments in 2011, Speech delivered 13 March 2012, at https://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm#_ftnref1 accessed 15 February 2021

¹⁰ WTO Doc. TN/DS/W/1 (13 March 2002)

rulings in comparable cases running concurrently, for instance in the AB decisions on the 'TBT Trilogy' adopted in 2012. (Meltzer and Porges, 2013)

At one point, even a 'friendly insider blog' proposal was rejected, showing a bias where more transparency would enhance WTO's reputation in non-trade communities. Veteran staff in the Legal Division take pride in the number of panels they had served without a reversal by the mighty AB. Public hearings are often difficult to organise, let alone by online streaming like in other international courts. (Covid-19 put a temporary end to public participation.) Notwithstanding the secrecy surrounding legal proceedings, even the over-protection of adjudicators and staff did not prevent Members obtaining Secretariat allocation changes from one SPS case to another, or the transfer of the Director of the Appellate Body Division in July 2020.

2 The Force of 'Jurisprudence'

Rule of Law is paramount for trade security. This includes jurisprudence. After more than 30 years and 500 cases, the volume of jurisprudence has become difficult to handle, despite the huge real-time efforts undertaken by the authors of the *World Trade Law Net* (<http://www.worldtradelaw.net/index.php> last accessed 14 January 2021). Is it because 'jurisprudence' does not appear in the DSU? Who has the last word when the holder of the grail seems to have become invisible even to Parsifal, not to mention three mere-mortal panelists? Who can read rulings with more than 1'000 pages? (*EC – Biotech* and *EC – Measures Affecting Trade in Large Civil Aircraft*) The power of precedent applies, without the DSU saying so, arguably because of the sheer number of previous rulings, which even the AB finds difficult to depart from.

The question for this working paper is whether WTO Law, including case law, is sufficiently resilient to accommodate new non-trade concerns.

Good news first: the past has shown a surprising dynamism for a system designed to prevent 'judicial activism' and out-of-the-box thinking.

When sea turtles became 'natural resources' quite unlike the original GATT 1947 definition, environmental observers rejoiced over the dynamic evolution of WTO adjudication. The same goes for the right to invoke public morals pursuant to GATT-Article XX(a) as a justification for breaking WTO rules and disciplines of any kind – although this right never took precedence in a DSB decision over the non-discrimination rules enshrined in the chapeau

as a most powerful qualifier to that Article XX enticingly entitled 'General Exceptions'.¹¹

Evan J. Criddle and Evan Fox-Decent seem to trust national judges more than governments, and even parliaments. They argue that '[T]he mixed record thus shows that judges can play a meaningful role upholding the rule of law in the face of legislative or executive resistance. Even at the limit, where the resistance is extreme and reinforced by unambiguous legislation, the role of the judge in legal order is still to uphold the rule of law, so judges are duty-bound to decry its subversion.' (Criddle, p 77s, emphasis added)

The auto-pilot mode has narrow limits. In the next section it becomes clear that, when poor international governance meets home-made inconsistency, all attempts to claim 'harmonious reading' may not allow consideration even of mandatory PIL and CIL in dispute resolution.

My view is that when WTO Law allows no exceptions to the prohibition of discrimination, precedent and case law offer even less help to adjudicators trying to take non-trade concerns on board. The true challenge the multilateral trading system has to face, both in negotiation and litigation, lies in the consistency of the solutions needed for an increasingly diverse and dynamic economy. This has become even more difficult when trade wars and unilateralism threaten to topple the delicate balance between policy space and market access.

The Covid-19 pandemic showed the weak resilience of the intergovernmental institutions, long before non-discrimination rules could apply to trade restrictions and subsidy wars. When the dust has settled, will the old rules again let trade contribute to improved asset allocation for the satisfaction of all five basic human needs? Where is the red line beyond which substandard production measures constitute (never defined) *social dumping* or *eco-dumping* in violation of PIL? How to measure footprint when performance according to principles of the *United Nations Framework Convention on Climate Change* (UNFCCC) is 'nationally determined' ie governments are free to take the measures they consider fit for footprint reductions? Can trade ministers react in isolation to the next pandemic, or to the foreseeable effects of global warming, with less speed but much more might? What if this requires a reassessment of the trade rules, in order to take into account

¹¹ The Final Ruling in the first ever bilateral EU trade dispute, dated 11 December 2020, has an innovative GATT-Article XXb finding on plant health, when perhaps for the first time an Article XX(b) defence passed the chapeau test in a case concerning certain Ukrainian export restrictions on wood. See <https://www.me.gov.ua/Documents/Detail?lang=en-GB&id=f0f93763-6ea1-4c22-9520-7a86264931fc> downloaded 14 January 2021.

the specific character of mitigation measures? How can resource-poor farmers reduce their carbon footprint when their small or inexistent exports produce more GHG per unit of output than the meat or milk of their competitors?

E Two Dead-end Rows for WTO Adjudicators

Interpreting rules without rulemaking often looks like Mission impossible. Yet, it is a temptation of the kind also faced by Homer's Ulysses. Are adjudicators ever to be torn between the Scylla of DSU automaticity, transforming panelists into foreign judges, and the Charybdis of 'overreach' accusations becoming a vortex in which WTO itself might drown? Can WTO judges recognise – let alone assess, weigh and balance – the seriousness of non-trade concerns?

The true impossibility of the mission lies elsewhere: if free trade rules cross preemptory red lines of non-trade law, it is incoherence at the national level, combined with the failure of international governance, which could produce worse results.

This section discusses two examples where in my opinion even 'harmonious readings' by adjudicators may not be able to bridge the gap between trade law and PIL/CIL, as prescribed by the Vienna Convention.

1 Forced Labour: no Red Lines?

Social concerns and labour rights are the source of a lot of PIL and CIL. Slavery is one of the few well-defined and uncontested forms of human rights violations. The protection of plantation workers was the objective of one of the first Conventions of the International Labour Organization (ILO). Today, one million children are reported to work on plantations in Côte d'Ivoire which supplies 40% of the world's cocoa. Despite evidence of trade impacts, not one case ever made it through a WTO dispute. Notwithstanding the empty claims of numerous politicians as to 'mutual supportiveness' and inter-organisational cooperation in the form of events and speeches, the subject of Trade and Labour remains taboo for negotiators and litigators alike.

Reports of scandalous violations of PIL are frequent: forced labour, 'sea slaves' (ie 'undocumented' workers from Bangladesh, Cambodia, Myanmar and the Philippines trying to reach South East Asia but forced to work for years on fishing ships) and inhuman working conditions in plantations, vegetable farms and slaughterhouses without labour safety inspections

during Covid. When such cases go viral in social media, processors and retailers have to react. Not so the world's #1 trade organisation. No discussions in committees or in Trade Policy Reviews. Where there is no complainant, the DSB and its adjudicators sit idle.

This seems strange, because 'freer trade' without accompanying measures can easily clash with human rights, association and trade union liberties, safety at work, and working conditions. Couched in WTO language, labour standards can impact on conditions of competition, and distort trade. But 'Social Dumping' is a term unknown to WTO lawyers.

Is there no red line? Is this an area of contention with only two bilateral dispute rulings on record? Both examples show how the US and the EU, the two largest economies with strong social concerns, pursue what they consider as human rights or labour violations.¹²

So far, only one dispute involving peremptory labour standards violations did appear on the agenda of the DSB - without ever reaching a ruling.

When the US State of Massachusetts banned companies doing business in or with Myanmar from government procurement contracts, the European Commission, together with Japan, lodged a complaint in the WTO to protect EU and Japanese business interests. (European human rights concerns and parliamentary resolutions were ignored. So were the furious calls by trade unions and NGOs for the imposition of economic sanctions against Myanmar.) In the 'consultations' pursuant to DSU rules, the EU did not deny the existence of human rights atrocities happening in Myanmar. But, together with Japan, it claimed US violations of non-discrimination

¹² The only two bilateral dispute rulings available were initiated by the USA and the EU, respectively:

- (1) On 14 June 2017, a Panel in the matter of *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* found, in my opinion correctly, albeit for the wrong reasons, that the United States had failed to demonstrate that Guatemala's labour policies had the effect of profiting competitors in tradeable sectors in Guatemala. (Source: USTR Website <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr> last accessed on 15 January 2021)
- (2) On 21 January 2021, a Panel of Experts published its Report on the *Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement* which incorporates the fundamental labour rights included in the ILO's 1998 Declaration on the Fundamental Principles and Rights at Work. The Panel found that Korea's labour laws and practices were not compatible with the ILO principles, and that Korea needed to 'swiftly' continue the process of ratifying four ILO conventions in order to comply with the bilateral trade agreement. (Source: Press Release by DG Trade dated 25 January 2021, downloaded on 15 February 2021 at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238>)

obligations under the WTO Agreement on Government Procurement. When these consultations did not lead to a solution, the DSB established a panel on 21 October 1998, to examine these complaints.¹³

The relation between WTO law and human rights raised in this case might have found an answer, in the existence of *ius cogens*, for interpreting WTO rules. Unfortunately, after a US federal court struck down the relevant Massachusetts State Law on constitutional grounds, the case was suspended *sine die*. No chance for panelists to stick their necks out.

Are labour rights an *aporia* in WTO (ie, in philosophical terms, a dead-end road)?

Perhaps not. Interestingly, a kind of standard was within reach. Based on Article 33 of the ILO Constitution (to secure compliance with recommendations), the *International Labour Conference* as the highest ILO organ recommended on 14 June 2000 that governments, employers and workers 'in the case of Myanmar take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour'; this only ILO resolution of its kind was to be implemented 'unless the Myanmar authorities promptly take concrete action.'¹⁴

It is far from being clear whether this resolution – the first since the establishment of the ILO in 1919 – would have allowed a WTO panel to decide which trade restrictions are 'necessary' and hence WTO-compatible under GATT-Article XX (and/or Art. XXI). Such a panel would also have to consider whether 257 votes in favour, 41 against, and 31 abstentions, could constitute 'a norm accepted and recognized by the international community of States as a whole' (Art. 53 VCLT). Interestingly though, the US Congress referred precisely to this ILO resolution when it enacted the *Burmese Freedom and Democracy Act 2003* restricting trade with Myanmar.¹⁵

¹³ Myanmar was not a party in that case, but Burma was a founding member of the WTO. At the Second WTO Ministerial Conference in Geneva (18 and 20 May 1998) Major General Kyaw Than, Minister for Commerce, expressed the view that the WTO had no mandate to enforce core labour standards, through trade sanctions, nor call into question the comparative advantage of low-wage countries, and that labour standards should not interfere with globalisation of free trade nor become bargaining chips for protectionist forces.

¹⁴ International Labour Conference, Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar. 88th session, Geneva 2000 (223, 318, 352).

¹⁵ Cf Cassimatis, A E, 'Human Rights Related Trade Measures under International Law: The Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations

The so-called 'race to the bottom' – a lowering of protection levels despite commitments in all recent RTA not to administer labour laws with a view to improving one's competitive position in trade or foreign direct investment (FDI) – has been shown to occur only in high income countries, and in RTA between such countries rather than with low or middle income countries (Häberli, Jansen and Monteiro, 2012).

With only two bilateral rulings, and in the absence of ILO or other social standards applying in a WTO case, the risk of unilateral measures inevitably increases.

Remarkably, and without asking the WTO or the ILO for permission, the US government applies government procurement restrictions against what it considers as labour rights violations.¹⁶ In respect of child labour, it regularly publishes a list of goods from countries where it has 'a reasonable basis to believe [these goods] might have been mined, produced, or manufactured by forced or indentured child labor.' Importers of such products 'must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items supplied.'¹⁷

When the Rana Plaza factory in Bangladesh collapsed, on 24 April 2013, killing 1'129 mostly female garment industry workers unprotected by national building regulations or international labour standards, the only 'sanction' from the developed world was a threat of GSP withdrawal, followed by a long and still lasting cooperation and monitoring project initiated by the EU under the auspices of the ILO. Actual GSP withdrawals by the EU for nontrade concerns did and do still happen, for instance in Belorussia and Myanmar – and significantly, in Cambodia (August 2020). As for the USA, the annual GSP renewal process is a recurring event celebrating parochial interests such as those of a domestic producer threatened by duty-free sleeping bags from Bangladesh. For reasons pertaining to social and labour rights, the US tried to suspend preferential tariffs in Guatemala and Peru (freedom of association), and in Honduras (child labour).

For both the EU and the USA, their WTO obligations under the *Enabling Clause* never seemed to play a role. But no MFN benefits were ever

under General International Law' International Studies in Human Rights, Volume 94, Martinus Nijhoff Publishers, Leiden/Boston 2007, p.436.

¹⁶ Executive Order 13126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

¹⁷ ILAB/DOL, List of Products Produced by Forced or Indentured Child Labor. The Report is available at <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-products> last accessed on 2 August 2020.

withdrawn for social rights violations, except for the so-called blood diamonds mentioned below (cf. Sub-Section F2), by way of a waiver authorising such sanctions.

Does unilateralism in pursuit of universal social objectives have its good sides? Trade restrictions may enhance *Corporate Social Responsibility (CSR)*. However, compatibility with present WTO rules – even a withdrawal of GSP! – remains unclear unless the trade community recognises ILO standards as mandatory PIL.

2 Climate Change Mitigation – a Call for Action

Environmental or animal welfare issues are a frequent item on the DSB menu. Yet, trade measures limiting global warming have never caused a WTO dispute. On the contrary, no renewable energy producer has successfully challenged a discrimination complaint by a foreign competitor.

Why is that so?

The UNFCCC ('Paris Agreement') unambiguously commits all its 169 parties to global warming mitigation.¹⁸ Unlike the predecessor agreement (Kyoto Protocol, 2007), it has no list of implementation measures. Yet, articles 2 and 3 prescribe product differentiation between otherwise identical products but with different carbon footprints.¹⁹

This raises the first major problem. The '*Common but Differentiated Responsibilities and Respective Capabilities*' (CBDRRC) enshrined in UNFCCC-Article 2.2 as previously agreed by Heads of State in Bali and Copenhagen, contrast with the discrimination prohibition in the multilateral trading system. Prominent and still unsolved examples are those infamous 'like products' with different (non-product-related) production and processing methods (ppm). Numerous WTO rules and disciplines prohibit like product discrimination by way of tariffs and other duties and charges, and by regulations depending on carbon footprint, or for a service/transport mode/type of energy used, or according to distance travelled. The same

¹⁸ Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC). UNTS 8 July 2016, Chapter XXVII-7-d, Registration Number 54113

¹⁹ Article 2, para 2: 'This Agreement will be implemented to reflect equity and the principle of *common but differentiated responsibilities and respective capabilities*, in the light of *different national circumstances*.'

Article 3: 'As *nationally determined contributions* to the global response to climate change, all Parties are to undertake and communicate ambitious efforts [...] with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.' (emphasis added)

goes for import restrictions, carbon taxes and other border adjustments. 'Climate-smart' subsidies raise difficult WTO compatibility questions as well.

For agrifood production, investment and trade, the Food and Agriculture Organization (FAO) discussed these instruments together with a review of their implementation under the Paris Agreement (FAO, 2018). While research, development, and extension policies rarely raise trade disputes, this is no longer the case for domestic subsidies, even though WTO does set some limits to trade distortions (never a RTA). The same goes for import quota management according to footprint. And so on. When we come to those border adjustment measures (BAM) favoured by most agricultural and mainstream economists, political scientists, and climatologists, such measures seem to conflict with many more WTO rules. (Häberli, 2018)

What happened in the WTO? Sadly, policymakers, trade diplomats and even trade scholars seem to ignore, or prefer to avoid a serious discussion on trade and investment implications of climate change mitigation – even within the intimacy of the multilateral trade community.

The WTO *Committee on Trade and Environment* merely looked at examples of climate-smart treatment of the 'non-product-related ppm' – without addressing the problems which WTO non-discrimination rules and disciplines represent for climate change mitigation.

The WTO *Committee on Agriculture* is yet to examine climate-related BAM, domestic subsidies, prohibitions, or restrictions. Some business practices have been improved by new technologies and by private sustainability standards. But no intergovernmental standards for climate-smart agriculture exist as a benchmark for assessing governmental measures as a type of 'climate green box', or on the contrary as a form of eco-dumping.

The second major problem lies in the way UNFCCC and WTO address the *Development Dimension*. The CBDRRC principle mandates development-friendly implementation (and financing). But it leaves parties free on how to take the development dimension into account in their '*Nationally Determined Contributions*' (NDC). This is so because all emissions, regardless of their origin, have a global impact.

In contrast, WTO takes a restrictively designed road to development. This has three implications.

1. The so-called *Special and Differentiated Treatment* (SDT), foreseen in all WTO agreements for developing country products and services, appears incapable of considering the fact that climate-friendly action can

exacerbate conditions of competition. As for subsidies, climate mitigation measures already opened a Pandora box for taxpayers in rich countries. No UNFCCC principles address the resulting race between the tortoise and the hare. Photovoltaic panels without state support instruments are a rarity. 'Climate-smart' farming proposals need protection against 'non-smart' imports – or subsidised self-discrimination for a few happy farmers in rich countries.

2. Beyond the usual deadline extension and lesser commitments, SDT only allows for limited climate-friendly measures, and only for all developing countries or all (UN-designated) least-developed countries (LDC) – regardless of their respective carbon footprints.
3. Finally, no SDT provision helps developing country exports to meet more stringent import standards in developed country markets, claiming climate-friendliness before being recognised as such in UNFCCC/COP.²⁰

There is no WTO case law. So far.²¹

Yet, three signs on the wall show no way forward for climate mitigation-related trade measures.

1. In over a dozen disputes, measures protecting or promoting renewable energies failed under WTO non-discrimination rules.²²
2. As for consumer information, the origin of meat and dolphin-safe tuna cans got into WTO troubles. Food health labels regularly raise 'specific trade concerns' in the *TBT Committee*. Hence, even labels signalling products with a smaller or bigger footprint may raise trade concerns by foreign suppliers.

²⁰ The Conference of the Parties (COP) is the supreme decision-making body of the UNFCCC. For details on the conferences COP3 – COP25, see <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> last accessed on 14 January 2021. Due to Covid, the COP26 UN climate conference will now take place between 1 and 12 November 2021 in Glasgow.

²¹ Even before a formal complaint was lodged in the WTO, the European Union had to 'suspend' its *Aviation Directive (2012)* whereby all airlines, regardless of their origin, had to acquire and 'surrender' to the European Union allowances for the CO₂ emissions of their aircrafts landing anywhere in the EU – depending on the distance travelled. Now, assuming the Global Market-Based Measure (GMBM) of the *International Civil Aviation Organization (ICAO)* adopted in 2016 turns out to be successful, together with the *Carbon Off-setting and Reduction Scheme for International Aviation (CORSIA)*, the chances for the new EU's 'Roadmap' published on 3 July 2020 serving to implement CORSIA appear largely improved.

²² India's Solar Panels (DS 456), Canada's Hydro-Energy (DS 412 and DS 426) and most other renewable energy programmes found problems with several WTO rules, for good and less good reasons. Nonetheless, more recent border adjustment measures are worth noting here. For instance, the USA plans to credit imports with the 'foreign cost of carbon' already paid, and with GATT-Article XX language built into the scheme.

3. For agriculture, there is no dispute, probably because not one of the NDCs already notified, mandatory under the Paris Agreement, has a commitment to reduce CO² or methane emissions in agriculture. (FAO, 2018)

Is this a second aporia?

Perhaps. But we won't know unless WTO embarks on, and contributes to, a comprehensive critical review of the climate-relevant trade and investment rules at the international level, namely involving energy, agriculture and trade regulators, supported by scientific, economic and legal expertise. Such a review could help avoiding that conflicting policies, measures and rules jeopardise the implementation of the Paris Agreement – without opening the door to unfettered producer protection. Climate mitigation and adaptation requires maximum policy space, without a negative impact on other countries, or unnecessary restrictions to trade and investment, especially in poor developing countries. This intergovernmental and inter-institutional review is urgent because the results should provide as quickly as possible the legal security necessary for regulators, negotiators, NDC developments and reviews, and international standard-setting processes.

The Corona pandemic may be but a rehearsal for a response to Climate Change. But climate is arguably a much bigger test to resilience of humankind than Covid-19 or child labour. In addition, mitigation of global warming may have a trade impact well beyond appeals to produce and buy face masks at home.

Whether any UNFCCC commitments can ever claim *ius cogens* status is a completely open question, especially in the absence of any measures, or standards, identified as fulfilling/implementing 'Paris obligations.' Admittedly, the length of the list of peremptory international law depends on who holds the pen. No adjudicator ever got close to even suggesting in an *obiter dictum* a possible recognition of commonly agreed crimes such as slavery. Arguably, however, global warming and its 'collateral catastrophes' – including the first human-induced mass extinction of animal species – may soon be considered as a *ius cogens* justification for certain mitigation measures.

The Paris Agreement acknowledges that climate change is a 'common concern of humankind'. In my opinion, this is a call for immediate action in the trade community. Adjudicators alone will not be able to stem the aporia. Before compliance becomes a legal issue in the DSB, it may be necessary for

the General Council to reinterpret, modify, or waive trade rules and disciplines.

F Emerging 'Holistic' Doctrines

Presently, the WTO impasse seems to prevent even a look beyond the atrium of the world trade body. But perhaps this opens the door for new avenues and creative solutions from the research community?

We will first look at the proposals for more equity and more governance as a response to the crisis, including procedural innovations, and then at the comments in respect of social/labour and environmental/climate concerns. All in a nutshell and focusing on the implications for adjudicators.

1 Trade, Equity and Governance

Thomas Cottier, one of the most senior and frequent GATT and WTO panelists, and a MPIA Arbitrator, posits that the 1948 Universal Declaration of Human Rights is the normative foundation for social and economic rights in the international economic order.²³ While the quest for justice and global equity predates this milestone treaty, Cottier agrees with Peter van den Bossche that equity 'did not play an important role in shaping the multilateral trading system.' The process, however, 'works towards greater coherence.' Hence, 'equity [...] makes an important contribution to maintaining and restoring trust in law and thus also in international economic law' (Cottier, *in* Prévost 2019, pp 121 and 137s)

Calling for 'Constitutional Justice' as the foundation of multilevel trade adjudication, Ernst-Ulrich Petersmann argues that the universal nature of human rights and of access to justice, 'consent by governments has become an insufficient justification for international adjudication' (*ibidem* p 111).

A rather positive view comes from Kristina Daugirdas, an international lawyer who recently moved from Geneva to Michigan. She acknowledges that the United States never accepted that international organisations could create CIL independently. Nevertheless, referring to the International Court of Justice (ICJ) in *Reparation for Injuries*, she considers that international organisations with 'powers which ... "are conferred upon [them] by necessary implication as being essential to the performance of [their] duties" can create' CIL directly when their practice and *opinio iuris* 'count separately

²³ Article 28 reads as follows: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'

and apart from the views of their member states' (Daugirdas, 2020, pp 202 and 207)

Even Gabrielle Marceau and Joel P. Trachtmann are quite positive in respect of the regulatory autonomy under the three defining WTO Agreements GATT, SPS and TBT. They describe the innovative approach by the AB when it decided – without defining 'protectionism' under GATT-Article III which 'only prohibits discriminatory treatment' – that what mattered was how a measure was applied, thereby rejecting the need for 'the "aims-and-effects" approach to the national treatment obligation, at least as a search for subjective intent.' (*Japan – Alcoholic Beverages II*, *EC – Asbestos*, and *Korea – Various Measures on Beef*) On the other hand, no innovation seemed to come forward for the definition of 'like products' under TBT-Article 2.1. (*US – Clove Cigarettes*) Marceau and Trachtmann also describe at length how WTO jurisprudence for the parameters of the 'necessity test' (and 'material contribution') changed the traditional GATT reading of Article XX. (*Korea – Various Measures on Beef*, *Thailand – Cigarettes (Philippines)*, *EC – Asbestos*, *Brazil – Tyres (2007)* and *US – Gambling*) Nevertheless, adjudicator innovation seems to end with WTO Law: 'The WTO adjudicating bodies do not have the capacity to determine rights and duties under non-WTO rules.' However, adjudicators must ensure that the 'interpretative process of dispute settlement will yield a degree of convergence.' (Marceau and Trachtmann, 2014)

More recently, Marceau reviews the 'evolutive interpretation' which international judges have been trying to apply for decades in their findings, when societal values have evolved since the adoption of the law. For WTO, she concludes that the AB is increasingly practicing this type of rules interpretation, and that this is covered like in other international fora, albeit in different ways, by Articles 31-33 of the VCLT. (Marceau 2018)

Maastricht, in the heart and at the cradle of Europe, has often been a venue for forward-looking lawyers and other thinkers. Two unrelated events focused on decision-taking to remedy the fragmentation of international law and to improve governance.

(1) A still optimistic, international conference 'In Search of Effective Global Economic Governance: The Case of the World Trade Organization' brought together academics, WTO officials, government representatives and trade diplomats, representatives of business associations and NGOs at the Faculty of Law of Maastricht University. On 4 and 5 February 2005, this conference developed a comprehensive research agenda for the institutional reform of the WTO. Participants agreed that the consensus requirement and practice

made decision-making in the WTO problematic. In Mary Footer's opinion, 'the most pressing issue is the break-down of the consensus decision-making process [...AB...] which threatens to undermine the effective functioning of the WTO dispute settlement'. (Footer, 2018, p 34) However, for different reasons no alternative emerged as a clear improvement, despite the failures of the Ministerial Conferences in Seattle (1999) and Cancún (2003), and the proliferation of RTAs. As for Secondary Law-making by WTO Bodies, the discussants acknowledged the development of rules and standards by WTO panels and the AB's *judicial rule-making* eg for burden of proof, due process and good faith. An appropriate comparative analysis of the WTO with other international organisations with respect to secondary rulemaking might help WTO to gain greater independence from its Members, and an enhanced role for the WTO Secretariat. As a result, more effective global governance would reflect the growing number and role of developing country Members and respond to the challenges by civil society to the legitimacy of the WTO and its rules. Finally, the Secretariat's role of servicing dispute settlement panels could be enhanced if a Permanent Panel Body was set up within the organization. (Van den Bossche and Alexovičová, 2005)

(2) The *International Commission of Jurists* has been debating extraterritorial obligations of states over several years. On 28 September 2011, the Maastricht Conference on Effective Global Economic Governance adopted the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*.²⁴ Two key conceptual foundations shape these principles:

'First, states, when conducting themselves in a way that has real and foreseeable effects on human rights beyond borders, must ensure that they respect and protect rights, as well as in some circumstances, fulfil rights. Second, international law, most pointedly for economic, social and cultural rights, demands prescriptively that states act to realise rights extraterritorially through 'international assistance and cooperation'. The task of the Principles is to enunciate the legal parameters in which these obligations are to be discharged.' (Salomon and Seiderman, 2012, p 458s)

A more prominent role of adjudicators might also be welcome for Pauwelyn & Pelc who had concluded their study on 'Who Writes the WTO Rulings?' by

²⁴ The Maastricht Principles on Extraterritorial Obligations of States were developed over a two-year period between 2009 and 2011 and subsequently adopted by a group of leading human rights experts at a meeting in September 2011 convened by Maastricht University and the International Commission of Jurists. They try to tackle the question of extraterritorial obligations in Economic, Social and Cultural Rights.

submitting that 'the Secretariat may thus have contributed to the very "overreach" that members like the US are lashing out against. Correcting this "overreach" and resolving the current crisis at the WTO may then, paradoxically, require a *greater* voice for adjudicators, and a *reduced* role for the Secretariat.' (Pauwelyn & Pelc, 2019, p 1; emphasis in the original)

2 Trade and Labour Rights: Yes but How?

With respect to labour rights, scholars offer different views. According to Jeroen Denkers, the (US) countermeasure in Myanmar was inappropriate because it was not a sanction against the (not un-contested) *ius cogens* violations, but against companies operating legally under the regulations both in their home (EU, Japan) and host states (Myanmar). He also points out that a right to derogate from WTO non-discrimination obligations may not automatically imply an obligation to do so with any type of countermeasures.

For Francis Maupain, a leading labour expert, the isolation in which the US acted on the ILO Resolution may explain the 'marginal impact' it had on the prevalence of forced labour in Myanmar. Besides, it created an opportunity for India and China 'to expand bilateral trade and solidify their relationship with the regime then in power'. (Maupain 2013 p 157)

Joost Pauwelyn finds that the example from Myanmar is a case where panels could and should apply non-WTO rules and accept a WTO-inconsistent measure '*specifically* imposed or permitted' by a decision subject to the ILO dispute settlement mechanism: even if other States were not '*obliged* to impose a trade embargo on Myanmar [...] who is the WTO to question the validity of ILO decisions?' (Pauwelyn 2005 p 218s, emphasis in the original)

Similarly, Ilona Cheyne fully supports the idea that public policy can serve as a defence for discretionary use:

In sum, there appears to be significant convergence of practice in reviewing measures justified as public policy. The acknowledgement of a wide but not unlimited discretion is accompanied by the use of all five control techniques. However, the undefined character of the public policy justification highlights another strand – the concept of common or shared interests – as a method of setting boundaries on unilateral State discretion. The case law demonstrates that tribunals will employ the concept of shared interests as part of determining the appropriate standard of review and due deference even when those interests have not been expressed and refined through negotiated processes such as legislation. This idea of commonality finds its roots in a functional need, rather than an overriding normative source such

as human rights. It acts as a benchmark when assessing the legitimacy of public policy, including the extent and nature of its impact on other members of the group. (p 56)

We are not in real disputes here. However, no DSB ruling has ever privileged PIL over WTO Law. Moreover, intergovernmental coherence is even more elusive than national good governance. For instance, where human rights cases confront state immunity, CIL has not evolved so far as to categorically deny state immunity. The European Court of Human Rights recognised this when it looked at a ruling of the ICJ:

'the recent judgment of the ICJ in *Germany v. Italy* [...] – which must be considered by this Court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no jus cogens exception to State immunity had yet crystallised'

(*Jones and Others v the United Kingdom*, ECtHR, 14 January 2014)

3 Trade and Climate: Review Needed

The problem of interdependent but incoherent regimes is fully recognized: Panagiotis Delimatsis from Tilburg University argues that '[g]lobal challenges such as climate change, environmental degradation, protection of human dignity and public health need coordinated responses and cannot wait for long to be addressed.' (Delimatsis, 2015, p 23)

Prospects for a dispute settlement integrating environment and trade are still bleak. A solid and dynamic reading of the old GATT 1947 texts, described in Sub-Section D2 above, has allowed adjudicators in several cases to draw the line between environmental and producer protection. As already pointed out in Sub-Section E2, however, a dozen cases involving renewable energy projects failed to meet the WTO-compatibility test. 'Climate-smart' policies, at any rate, must first go through a WTO rules review. For climate mitigation, there is no intra-WTO awareness of the differentiation versus discrimination problem, let alone jurisprudence showing the way for adjudicators. Today, the complexity of the climate versus trade issues still extends beyond the reach of a new rules interpretation possibly available to WTO adjudicators.

Unfortunately, the same is true for the regulatory autonomy enshrined under GATT-Articles XX and XXI.

1. Jurisprudence on the often-celebrated Article XX does not seem to show a way forward for societal concerns such as public morals. Lorand Bartels is one of the fiercest critiques of the AB's 'ambivalent' and 'misunderstood'

chapeau interpretations, as shown in the reports for *US-Gambling*, *Brazil-Retreaded Tyres* and *EC-Seals* (Bartels, 2015). He argues that instead of enhancing the regulatory autonomy of WTO members, the application of this important general exceptions clause is far from being clear: 'These disputes have given the chapeau a high profile, and yet it is still not clear what it requires.'²⁵

2. Could 'national security' based on Article XXI apply to climate change mitigation measures? In his doctoral thesis elaborated with John H. Jackson, Michael Hahn described this "'vital interests" clause' as an instrument close to granting a *carte blanche* to the GATT Contracting Parties, 'to strip off any legal bonds imposed on them – leaving them free to apply the rules as they wish.' (Hahn, 1991, p 559). This freedom of the sovereign is not even subject to the conditionality in the chapeau of Article XX which 'reserved part of sovereignty' rights within a treaty based on national sovereignty 'in some core domestic subject matters' (Hahn, *ibid* p.558). Even if we disregard the recently renewed invocation by the US of this long-time dormant GATT 1947 provision, we would still need to establish that national measures, taken to reduce global warming, genuinely require exemptions from National Treatment or MFN obligations applying to transnational trade.

No good news either for applying climate-related non-WTO rules. In his study of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) Holger Hestermeyer points out the fragmented character of international law, without a hierarchy or a centralised court system. This will not prevent recourse to non-WTO Law if the parties to a dispute agree. Hestermeyer agrees with Petros Mavroidis as well as the above-quoted Lorand Bartels and Joost Pauwelyn 'that "the question whether a WTO Panel can consult sources of law other than the covered agreements [...] is not prejudged in a categorical manner by the DSU."' However, Hestermeyer reads Article 7 of the DSU as limiting the applicable law for the *objective assessment* panels must make of the 'relevant covered agreements' under DSU-Article 11. Hence, 'states cannot successfully invoke an obligation under the ICESCR as a defence against a claim of a violation of WTO obligations in WTO dispute settlement.' This would even apply to CIL,

²⁵ According to Bartels (*op cit* p 96), 'the European Union was permitted to prohibit seal products on public morals grounds, but because of certain exceptions in its measure, including an exception for seal products resulting from traditional indigenous hunts, it had discriminated arbitrarily and unjustifiably against seal products from Canada and Norway, including seal products hunted by Canadian traditional indigenous hunters.' (AB Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products. WT/DS400/AB/R, adopted June 18, 2014)

although not to *ius cogens* norms which WTO Law cannot exclude. Hestermeyer concludes that '[i]f the members bring up economic, social, and cultural rights, these will form part of the debate – if they do not mention the rights, they will simply not become an issue.' (Hestermeyer, 2014).

This seems to allow non-WTO Law only to 'seep into the interpretative process through several argumentative means' such as a customary 'presumption against conflict', or 'harmonious interpretation' (van Damme, 2009), or through the customary rules of interpretation of the VCLT.

This is definitely not a wide opening for brave adjudicators. The door seems even narrower under the MPIA which foresees in Article 13 that 'arbitrators may also propose substantive measures to the parties, such as an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU.' Footnote 9 ominously adds 'for greater certainty [that] the proposal of the arbitrators is not legally binding'.

Similarly, Delimatsis can only express the hope that '[a]s interdependent regimes will increasingly realize the *cul-de-sac* that a solitary stance leads to, they will be looking for reconciling strategies which have to be carefully designed, along with the relevant actors, to strengthen productivity and enhance aggregate consumer welfare.' (Delimatsis, *op cit supra* p.23)

Written in the year of the conclusion of the Paris Climate Agreement (UNFCCC), this was a legitimate hope – sadly contradicted by the non-implementation of important parts of UNFCCC until today (COP 21-25), not least because of the WTO-incompatibility of 'differentiation' of like products and countries (cf. Section E2 *supra*).

Given the incapacity or the unwillingness of the trade community to address the problem, this is clearly where much more research is needed before temperatures climb even higher, stopping all production and trade without air-conditioning.

G Reforms by Waivers or by Changes to the Rules? Non-Violation?

What went wrong with dispute settlement, let alone 'holistic' solutions? Did we throw away the key to the prison built by a water-tight enforcement of automaticity and non-discrimination? How long will WTO wait before it stops condoning child labour and cancelling carbon border adjustments? Is WTO doomed to fail, without negotiations, even in trade law administration? Or do

adjudicators have a duty to 'holistically' apply non-WTO Law when one party invokes PIL or CIL?

The need for reforms is, I believe, linked to the need to get WTO out of its present, existential crisis. Hence, the question as we move towards the conclusion, is rather 'by whom?'

1 Will the Membership Reform the WTO?

The conundrum of the General Council could be resolved in three ways: reinterpretation, or changes, of existing rules – both extremely rare – or a waiver conditionally dispensing from compliance for a certain period.

Perhaps, one day, we will remember how the Blood Diamonds movie earned Oscars before the General Council adopted the *Kimberley Waiver*, on 26 February, 2003?²⁶ To my knowledge, this was the only WTO decision ever taken allowing MFN violations rather than obliging importers to treat blood diamonds from civil war-torn Sierra Leone the same way as jewels from Botswana – incidentally the Southern African country with the highest Human Development Index in 2019. (UNDP, Human Development Report 2019)

A telling example of failed WTO diplomacy is the clumsy attempt to put labour rights on the young WTO's agenda by inviting the ILO Director General to the First Ministerial Conference in Singapore (1996). The cancellation of the invitation at the insistence of developing countries refusing to even listen to a non-WTO voice resulted in an embarrassment and in a still existing divide which inter-Secretariat cooperation and a couple of reports by ILO and WTO left substantially unaddressed.

Similarly, the WTO *Committee on Trade and Environment* enjoys what the Secretariat calls 'interesting' discussions, for instance on the Paris Agreement. But no member of a WTO Delegation or the Secretariat ever accepted to even discuss the fundamental issues described in this working

²⁶ The so-called *Kimberley Process Certification Scheme* (KPCS) mandates participating countries to set up a system of internal controls excluding 'conflict diamonds' from being traded, and not to accept non-certified diamonds regardless of origin. Since the establishment of the scheme in 2003, trade in diamonds between participants is permitted only on the basis of authentic KP 'conflict-free' certificates. The Kimberley Process (KP) website is at <http://www.kimberleyprocess.com/> last accessed 14 January 2021. The WTO General Council periodically extended the KPCS pursuant to Article IX:4 of the WTO Agreement, the last time on 26 July 2018, until 31 December 2024. (Council for Trade in Goods, Document G/C/W/753 dated 22 June 2018)

paper (cf. Sub-Section F2 *supra*). Even less to look at the shortcomings of the dispute settlement system as laid down during the Uruguay Round.

The present stalemate makes General Council negotiations and decisions on rules reforms even more difficult. Adjudicators and arbitrators to the fore!?

2 What can Adjudicators do?

In the absence of negotiations and without any dispute settlement reforms, perhaps adjudicators can use the grey zone in which they sometimes look for positive solutions. They might muster the necessary courage to stick their neck out if they can find their own path towards a positive solution. After all, no single panel or AB trio ever gave back their mandate to the DSB.

We must be clear: there are strict limits in the DSU for panel deference to non-WTO Law. The security and predictability of rules interpretation is an asset of the DSU which must be preserved.

Nonetheless, present circumstances are not normal. The WTO crisis affects the functioning of all of its three 'powers': Ministerial Conferences are failures, or postponed *sine die*. The overfishing negotiating deadline mandate by the Heads of State in the UNGA has been miserably ignored by WTO. There is no Appellate Body. And nobody knows whether or how the new MPIA will function.

A trade organisation with clear rules for subsidies and antidumping should also be able to clarify the thin line between protection and protectionism when it comes to social and eco-dumping. Perhaps there is a way for adjudicators – *de lege lata* – against 'socio-dumping' as in the Myanmar case described in the previous section. Proponents of 'harmonious readings' between WTO Law and PIL think that DSU rules (and if need be, VCLT) will always be able to find a positive solution against child labour in violation of PIL.

Perhaps the grey zone implicitly available, albeit never officially granted to adjudicators, is the only place where the deadlock inside WTO between adherents and opponents of recognising certain 'non-trade concerns' can be solved. Another 'grey zone' path, almost never used, is a so-called *non-violation* claim which we will discuss here.

Gabrielle Marceau (and many others) considers that a *good faith* interpretation of WTO rules by adjudicators will allow in many cases for a coherent ('harmonious') reading of trade rules and human rights. (Marceau

(2006) In the absence of a complaint and a single DSB decision, this is still an assumption.

This working paper cannot discuss 'human rights' or the exact reference to PIL and CIL which may form the bridge in a trade dispute involving non-trade law. Samantha Besson may lead this discussion. She designs a map of ethical and political human rights theories and then refers to the 'legality of human rights' as a bridge between the two. On this basis she argues for a 'moral-political account of the nature of human rights [to explain] the intrinsic relationship between moral and legal human rights.' (Besson, 2012 p 218)

Alexia Herwig sees non-violation rulings – ie nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994²⁷, in the sense of GATT-Article XXIII:1(b) – as a way for finding different human rights violations in the WTO, such as the Right to Food enshrined in the ICESCR.²⁸ (Herwig, 2012)

The MPIA nominated by the EU, Joost Pauwelyn, argues that 'non-WTO rules may actually apply before a WTO panel and overrule WTO rule' (Pauwelyn 2016, p 577). In respect of child labour, he also offers non-violation as a possible ruling even in the absence of WTO Law (*ibid* p 559), with a fictional example of a country resorting to child labour after concluding a multilateral tariff negotiation, or a RTA. This could lead a complainant to make a non-violation claim against 'socio-dumped' imports.²⁹ Obviously, whether a WTO panel would actually make a non-violation finding remains, in the absence of any relevant case law, pure speculation. All too often, Article XXIII claims were left without so much as a ruling. For instance, despite the insistence by Canada in *US – COOL*, the Panel decided to follow judiciary tradition and to apply a more comfortable 'judicial economy.' However, it set out the

²⁷ Agreement Establishing the World Trade Agreement 1994, 1867 UNTS 154

²⁸ 993 UNTS 3. UNGA Res 2200 (XXI) 1966, entry into force 3 January 1976

²⁹ 'When we obtained your trade concession (duty-free access for our computers), we did so in the expectation that you would continue to respect international labor standards (in particular, not to employ children under the age of ten). Now you have violated these non-WTO rules (children under the age of ten assemble computers in your country). This violation of labor standards does not violate WTO rules as such, but it nullifies the trade value of your concession, a nullification that we could not have foreseen (you are now able to produce much cheaper computers than before and outsell our computers, which are produced with full respect for international labor standards). Therefore, in the WTO we should be compensated for this nullification under the heading of nonviolation.' (*ibidem*, p 539)

conditional, factual conclusions and legal interpretations in the event of an appeal.³⁰

It should also be pointed out that non-violation as a bridge for restoring the balance between market access rights and 'holistic' interpretations of the applicable law does not, under normal circumstances, allow for retaliation. This may have only slightly changed under the procedural provisions in the new MPIA.³¹

A second word of caution to 'holistic' adjudicators may be necessary. The *International Public Order* in the sense of this Max Planck Encyclopedia of Public International Law (MPEPIL) contains the substantive rules for the exercise of territorial jurisdiction. As Robert Kolb already pointed out in 2001, PIL is the material foundation ('materieller Kerngehalt') of the international constitution; as such, it is clearly different from the derogatory rules designated under the term of *ius cogens* which can be a PIL attribute 'qui régit leur portée spécifique dans un domaine special, celui de la derogation.' (Kolb 2001 p 173)

'Forum shopping' outside WTO is likely to continue where complainants hope to find 'holistic' adjudicators. This form of 'outcompeting WTO' (Pauwelyn) may lead to more satisfactory results in a bilateral dispute than in the multilateral DSU. So far, however, only two cases of labour rights claims were raised under a bilateral treaty. (cf. Sub-Section E1, Footnote 12)

In other words, new 'non-trade concerns' may still land as an *aporia* in the DSB. Even though the WTO never managed to even address the litigation issue, with the single exception of the above-mentioned rather bizarre

³⁰ Panel Reports, United States - Certain Country of Origin Labelling (COOL) Requirements, Recourse to Article 21.5 of the DSU by Canada and Mexico. WT/DS384, 386/R circulated 20 October 2014, Section 7.8, pp 187-203

³¹ Such a complaint could be based on DSU-Article 26 providing in relevant parts that where the provisions of paragraph 1(b) or 1(c) of Article XXIII of GATT 1994 'are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. [...] Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement [...], the procedures in this Understanding shall apply.' This working paper cannot go into the qualifications prescribed by the rest of Article 26. However, it has to be pointed out that in such a case, the respondent has no obligation to withdraw the measure: 'However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.'

Myanmar case: initiated and then suspended – and excluding Myanmar. (cf. Sub-Section F2)

H Conclusions

WTO is in an existential, double crisis: it lacks, first, a full-fledged litigation mechanism, and second, an answer to ecological and social dumping, and to climate change mitigation. Unexpectedly, thanks to the crisis, adjudicators and MPIA arbitrators could perhaps find an answer to both problems. They now have, as it were, the 'last word' and could hence make findings and recommendations without appeal – even in disputes where rules-interpretation is impossible without rulemaking. This working paper shows a few limited openings in trade-related cases where important societal concerns are at stake.

1. Social and labour issues with trade or investment impacts abound, but only the most dramatic ones such as blood diamonds have hit the screens with a potential to force WTO into action. This working paper argues that when millions of children are forced to produce cocoa, garments, or computer chips, the reputational damage may not only affect retail sales at the other end of the value chain. Provided a case with a clear violation of cogent law (*ius cogens*) reaches WTO, adjudicators with a holistic view could now address the distorted conditions of competition by reference to various sources of peremptory non-WTO law, where a complainant party links market access to internationally agreed good governance rules.
2. Environmental protection based on mandatory international standards now has a similar chance of constituting a valid defence against discrimination claims, provided the trade impact of the incriminated measures is 'calibrated' to the risks arising from violating those standards.

Climate change is a new, potential pandemic without clear mandatory mitigation measures or standards acting as *ius cogens*. This makes applying non-trade law by adjudicators forbiddingly difficult – even under the UNFCCC Climate Convention. Unlike for social or environmental issues, even the courage of three adjudicators may not suffice to find a creative way forward out of the quandary of rule interpretation without rulemaking. Unilateral GHG emission curbing measures may continue failing the non-discrimination test in a WTO dispute. Yet, global warming will not wait for a solution to WTO's present problems, nor will it accept those diplomatic claims about 'mutually supportive' energy and food policies, and trade rules. Perhaps a new series of 'climate-smart' mitigation measures will shake the ominous

passivity of much of the trade community into action, and allow for a waiver, or for negotiations re-establishing trade security compatible with pandemic prevention.

The present WTO stalemate is not propitious for negotiated or litigated positive solutions. The candidate for improvements, saving at the same time WTO's reputation, is hidden in the fuzzy zone of multilateral dispute settlement. Whether there is sufficient time for finding the lost crown jewel is another question. Governance, and leadership, may not be sufficient at national (and EU) levels, and this may prevent multilateral governance improvements. This, however, is a rather pointless blame game.

When all the big pieces on the chess board are held in check, might three pawns make the right move?

The argument here is that precisely in the absence of successful negotiations, or globally responsible litigants, panelists today have some liberty to move in specific cases. If WTO condones child labour or is unable to designate border adjustment measures as non-discriminatory, it could fail the test of relevance in many a non-trade constituency. (Would anyone care?) Before that, and unless the General Council decides to apply an open-ended waiver protecting such measures, adjudicators, and arbitrators (up to the AB and the MPIA) could take the cue from a respondent acting with 'not more than minimal' trade-distorting measures. The justification may fail GATT-Article XX, like so many renewable energy cases have failed the discrimination prohibition in the chapeau to that hardly ever successful defence. Still, 'non-violation' in the sense of GATT-Article XXIII might win the case – and satisfy public opinion at large when the complainant falls through a red line defined in cogent PIL (*ius cogens*).

This is not an easy path to follow for any adjudicators. But is there an alternative?

Child labour, unfortunately for the children but also for the reputation of chocolate manufacturers, may outlast WTO's crisis. Climate change, however, will not wait for WTO to get its act together. Meanwhile, adjudicators may take advantage of the 'last word' offered by 'automatic rulings' and outlaw measures with a serious social and eco-dumping impact raised in good governance cases. In so doing they would act in line with the essence of the multilateral trading system, allowing international trade to contribute to a world with more labour rights, more food security, and more climate change mitigation.

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