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WTO Law, Precedents and Legal Change

I. Introduction

Peaceful settlement of disputes over interpretation and application of rules has always been a core function within the framework of the General Agreement on Tariffs and Trade of 1947. This system evolved on the basis of diplomatic dispute resolution, making use of working parties. Later, panels of experts, normally three trade officials acting in an independent capacity, were employed. These panels, with the assistance of the secretariat, increasingly adopted legal reasoning. The system, however, remained to be based on a "power-oriented technique" of modern diplomacy, and its dispute resolution could still be characterised as diplomatic rather than legal.[3] The main feature of the dispute settlement procedure was that the establishment of a panel or the outcome of a panel's deliberations could be blocked by the defendant or losing party, respectively, as the establishment and the adoption of a panel report required consensus among all parties involved in the dispute. It was not until the Uruguay Round and the coming into force of the WTO that a more "rule-oriented" technique of modern dispute resolution prevailed.[4] Since then, the nature of dispute settlement within the GATT/WTO system has in fact fundamentally changed; it is no longer possible under the Dispute Settlement Understanding (DSU) to block the establishment of a panel. A losing party may reject the adoption of a panel report by appealing it to the Appellate Body. But it is not possible to block the adoption of the Appellate

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3 *John H. Jackson,* The World Trading System, 1997 (2nd ed.), p. 109; for the ECJ's view on the GATT 1947 see, for instance, case C-469/93, *Administratione delle Finanze dello Stato v. Chiquita Italia SpA*, [1995] ECR I-4533, para. 25; and for the ECJ's view on the WTO see, for instance, case C-149/96, *Portugal/Council*, [1999] ECR I-8395.

4 For a survey see *Thomas Cottier*, Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union, CMLRev. 1998, p. 325-378; *Ernst-Ulrich Petersmann*, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, 1997; *Ernst-Ulrich Petersmann* (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, 1997; *Pierre Pescatore/William J. Davey/Andreas F. Lowenfeld*, Handbook of the WTO/GATT Dispute Settlement, loose-leaf, 1998.

Body report. The DSU provides for the automatic adoption of reports by the Dispute Settlement Body (DSB), unless there is consensus among all Member States present in the meeting of the DSB to the contrary, and thus including the winning party. As a result, panel and Appellate Body reports as adopted by the DSB amount to legally binding decisions. Indeed, the creation of the Appellate Body is the most significant step in the process of *juridification* of dispute settlement in the field of international trade regulation.[5] Members of the Appellate Body are by law persons with a legal background and experience, hearing appeals in panels of three. The appellate stage forms an integral part of the system, and it further reinforces the legal nature and qualities of consistency, predictability and legal security.

Indeed, the reports so far produced leave no doubt that the approach taken by the panels and the Appellate Body is of an essentially legal nature. The authority and legitimacy of their decisions depend on the law and the power to convince Member States that the results firmly flow from the law, and are consistent with the law. It requires the panels and the Appellate Body to reason their findings thoroughly in the light of findings and precedents set by former reports. The WTO two-tier system of dispute resolution ranges among the most sophisticated and efficient tools on offer in contemporary international law, and it may be of interest to observe the relative importance of precedents and principles in the WTO legal regime. In part II, we analyse the role which precedents play within this two-tier system of panels and the Appellate Body. The WTO dispute settlement mechanism also affects the role of domestic and regional courts and may even have direct implications before a national judge. In part III, we turn to the *legal value* of WTO law and its precedents and judicial decisions within domestic legal systems. Last, we need to look at the relationship between WTO law and the wider notion of international law. In part IV, we examine this relationship and the increasing incorporation of international trade law into the general international law system, putting particular emphasis on precedents and principles created or accepted as customary international law or general principles of (international) law by panels and the Appellate Body.

II. WTO Precedents within the two-tier System of Panels and the Appellate Body

The WTO legal regime has effectively adopted the *system of de facto precedential effect* of prior decisions similar to that as required by Article 38(1)(d) of the Statute of the International Court of Justice and as consequently developed by

[5] See Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), in: The Results of the Uruguay Round of the Multilateral Trade Negotiations: the Legal Texts, Geneva 1995, p. 404 (hereinafter: The Legal Texts). These texts, as well as all panel and Appellate Body reports, including reports issued under GATT 1947, can be found at www.wto.org.

this Court in its case law.[6] According to that, "judicial decisions" shall be applied as subsidiary means for the determination of the law. Strictly speaking, the International Court of Justice itself does not observe a doctrine of precedent,[7] and is not bound by a doctrine of *stare decisis*. Nevertheless, it essentially refers to and takes into account prior decisions, and departs from them only if change is imperative by carefully balancing legal certainty vs. the rule of law. The same holds true for adopted panel and Appellate Body reports within the GATT/WTO system and the previous GATT 1947; they are short of legally binding force except for the particular dispute, but have nonetheless *strong persuasive power*.[8] Direct reference to Article 38(1)(d) and 59 of the Statute of the International Court of Justice can be found in the case law of panels and the Appellate Body, and the latter explicitly held that decisions "create legitimate expectations among WTO members" in the sense that these rulings will be followed in the future.[9] They thus have to be taken into consideration by following panels dealing with the same or a similar issue. The case law so far in fact reveals that rulings and precedents set by panels and the Appellate Body are followed quite strictly, and *considerable* reliance on the value of previous decisions is readily discernible. *Jackson* concluded that "a common-law lawyer would find himself very much at home in GATT legal discussions!"[10] We add that today the same, by and large, is equally true for continental lawyers. In practice, officials who have participated in dispute settlement deliberations under GATT 1947 as well as in WTO panel and Appellate Body proceedings have always been very influenced by precedents and have often explicitly mentioned them in some detail. Nevertheless, panel and Appellate Body reports do not "constitute a definitive interpretation"[11] of an agreement. This power is only vested in the Ministerial Conference.[12] Nor is there, albeit not yet explicitly affirmed by the Appellate Body, a doctrine of *stare decisis*.

The only reports for which explicit provision can be found with regards to the *value* as precedent are adopted panel reports under GATT 1947. Article XVI(1) of the WTO Agreement stipulates that "the WTO shall be guided by the decisions, procedures and customary practices followed by the contracting parties

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6 See *David Palmeter/Petros C. Mavroidis*, The WTO Legal System: Sources of Law, AJIL 1998, p. 400; *John H. Jackson*, The World Trading System, 1997 (2nd ed.), p. 122.

7 *Ian Brownlie*, Principles of Public International Law, Oxford 1998 (5th ed.), p. 21; see also *Jan Klabbers*, Looking for Precedent: Politics and Public International Law, in this volume.

8 *David Palmeter/Petros C. Mavroidis*, The WTO Legal System: Sources of Law, AJIL 1998, p. 401.

9 Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body report, para. 5.6 and fn. 30.

10 *John H. Jackson,* The World Trading System, 1997 (2nd ed.), p. 122. See also *John H. Jackson*, The Jurisprudence of GATT and the WTO, Cambridge 2000, particularly Part IV.

11 Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/, Appellate Body report, para. 5.4.

12 Article IX(2) of the Marrakesh Agreement Establishing the World Trade Organization, in: The Legal Texts, p. 11.

to GATT 1947 and the bodies established in the framework of GATT 1947."[13] The panel in *Alcoholic Beverages* explicitly qualified adopted panel reports as "judicial decisions" within the meaning of the above quoted Article, but the Appellate Body reversed this finding cautiously stating that they are "an important part of the GATT *acquis*."[14] According to *Palmeter* and *Mavroidis*, the Appellate Body might have feared the importation of rigid *stare decisis* into the WTO dispute resolution.[15] Unadopted panel reports, on the other hand, have without any doubt *no* legal status in either GATT 1947 or the WTO system. Yet, they are not without any significance; rather, it is established in case law that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report."[16] There are good reasons to submit that panels and the Appellate Body have an *obligation* to take into account prior unadopted panel reports too, and, in order to give due respect to the principle of legal certainty, they may be obliged to articulate particularly good and convincing reasons when departing from a previously developed line of argumentation and reasoning.

III. WTO Precedents and the Role of Domestic and Regional Courts

Obligations to honour commitments of WTO law and decisions of its dispute settlement mechanism essentially are a matter of domestic and regional authorities. It is up to them to adjust their laws, regulations and practises and to implement rulings and precedents accordingly. This is an emanation of the principle of pacta sunt servanda, and failure to do so invokes State responsibility under WTO law. To the extent that the governments and parliaments fail to honour WTO commitments, we need to examine how the WTO dispute settlement system and its precedents affect the role of domestic and regional courts. Rulings and precedents, in this respect, may play a prominent part in a twofold manner. Firstly, courts may be confronted with issues already adjudicated by panels or the Appellate Body, and such decisions may thus have direct implications before a national judge. The issue here is the implementation of Dispute Settlement decisions into domestic legal systems. Secondly, courts may also be confronted with issues where no specific decision has previously been adopted on, and arguments exclusively rely upon treaty language, doctrine and precedents. In both circumstances, precedents can gain enormous weight as to the potential impact on the domestic legal sphere. The fundamental question is as

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13 Id, at p. 17. In Article 1.(b)(iv) of GATT 1994, similar reference is made with special regard to GATT 1994 which „shall consist of ... and other decisions of the Contracting Parties to GATT 1947."

14 Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body report, paras. 5.3-5.4. The same holds true for panel reports under the WTO: "In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.", id, para. 5.6.

15 *David Palmeter/Petros C. Mavroidis*, The WTO Legal System: Sources of Law, AJIL 1998, p. 401.

16 Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, panel report, para. 6.10, confirmed by the Appellate Body, id, para. 5.8.

to what *legal value* WTO precedents shall be granted in domestic legal systems. We briefly address the doctrines of direct effect and consistent interpretation before turning to the issue of domestic implementation of panel and Appellate Body decisions.[17]

a) The Doctrine of Direct Effect

The impact of WTO law as such, independently of specific decisions, relates, of course, to the issue of direct effect (self-executing nature) of WTO rules. Generally speaking, criteria for direct effect are a matter of constitutional or statutory law, and in most countries the basic two requirements in principle are that i) the provision in question must be part of the law of the land, and ii) it must be appropriate to confer rights on individuals.[18] The problem is well known; in essence, approaches based on direct effect compete with traditions of reciprocal and balanced trade relations, decoupling national and international obligations.[19]

The WTO does, at the present stage, not impose direct effect to its Members as a matter of treaty law, albeit its rules are of significant importance to individual actors in international trade.[20] Arguably, there is one exception. Article XX(2) of the Agreement on Government Procurement prescribes judicial review on the basis of that agreement.[21] Whether or not WTO law deploys direct effect, therefore is a matter for national or regional law. Presently, direct effect of WTO law is generally denied in the US as well as in the EC. The former clearly bars it by explicit statutory legislation, whereas in the latter, the ECJ constantly held that GATT 1947 could not be granted direct effect, and

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17 This chapter is based on a previous article written by one of the authors: *Thomas Cottier*, Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union, CMLRev. 1998, p. 367-75.

18 *Trevor C. Hartley*, The Foundations of European Community Law, Oxford 1998 (4th ed.), p. 188-89. For a comprehensive analysis of the doctrine in Swiss law and a critique see *Thomas Cottier/Alberto Achermann/Daniel Wüger/Valentin Zellweger*, Der Staatsvertrag im schweizerischen Verfassungsrecht, Berne 2001.

19 The literature on direct effect of WTO rules is legend, yet the problem is still unresolved. For a comprehensive analysis see in particular *John H. Jackson*, Status of Treaties in Domestic Legal Systems: A Policy Analysis, AJIL 1992, p. 310; *Meinhard Hilf*, The Role of National Courts in International Trade Relations, Mich. J. Int'l Law 1997, p. 321, 337-45; *Thomas Cottier/Krista Nadakavukaren Schefer*, The Relationship between World Trade Organization Law, National and Regional Law, JIEL 1998, p. 83-122, and the references therein.

20 In US – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, 22 December 1999, para. 7.72, the panel stated: "Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals." In a footnote thereto, it added: "We make this statement as a matter of fact, without implying any judgment on the issue. ..."

21 It provides: „Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest."

it has been continuing this line also vis-à-vis WTO law.[22] The rationales in favour of this mercantilist approach generally found in the case law of the ECJ are the "great flexibility of the provisions", the fact that both GATT 1947 and the WTO are still "based on diplomacy rather than the rule of law" and the "lack of reciprocity".[23] The ECJ only recently confirmed this long standing practice by explicitly stating that "the provisions of TRIPs are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law."[24]

In essence, this attitude and approach amounts to a strategy of combining the utmost effect of WTO law abroad with a view to foster market access rights while leaving traditional constitutional allocations of power at home as unimpaired as possible by preserving de facto the predominance of national and regional rules in a domestic context by rules which, as many fear, are too functional and do not sufficiently take into account other and equally legitimate policy goals. Yet, from a strictly legal point of view, and applying traditional tests for direct effect, many provisions of the covered WTO agreements (as of the GATT 1947 before) could easily be qualified as being "appropriate to confer rights on individuals", as they are drafted in a clear and unambiguous way and do not lack the necessary degree of precision. Interestingly enough, the protectionist attitudes as prevailing in the US and the EC are not necessarily shared by governments of smaller-sized trading nations. Swiss courts, for instance, have perhaps been generally more willing than other nations' judiciaries to recognize treaty provisions as self-executing. They, too, have not yet explicitly granted direct effect either to GATT 1947 or to WTO law, but it is not unlikely that many provisions of the WTO agreements will be recognized as self-executing in Swiss courts.[25]

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22 Moreover, this approach is consistent with the view of the political branches of the Community; preambular language in the *Council Decision Implementing the Uruguay Round* explicitly qualifies WTO law as unfit for direct effect.

23 See, in particular, cases 21-24/72, *International Fruit Company*, [1972] ECR 1219; C-149/96, *Portugal/Council*, [1999] ECR I-8395.

24 Joined cases C-300/98 and C-392/98, *Dior SA v TUK Consultancy BV and Assco Gerüste GmbH*, judgement of the Court of 14 December 2000 (not yet reported), para. 44. The court went on that in a field in respect of which the Community has not yet legislated, it is up for the member states to decide whether provisions of TRIPs should have direct effect in the domestic legal order, paras. 45-48. It is interesting to observe that this statement implies recognition of potential direct effect of the TRIPs Agreement. The main arguments of the Court, denying in principle direct effect of WTO rules due to lack of specifity, thus no longer applies. Justification for denial needs to be found on other grounds, in particular the lack of reciprocity or the position of the Court in the system of checks and balances of the EC, as applied in the field of external economic relations.

25 In a decision of the Swiss Supreme Court from 14 July 1997, *A. SA v. Federal Office for Agriculture* (not officially published, reprinted in *Jörg Paul Müller/Luzius Wildhaber*, Praxis des Völkerrechts, 3rd ed., Berne 2001, p. 938), the court in fact examined the compatibility of Swiss domestic law with WTO provisions in order to address the claim arguing in part that a national regime for auctioning import licenses was a violation of Article 4 of the Agreement on Agriculture. The court explicitly refrained from deciding *obiter dictum* whether the WTO agreements are to be considered directly effective in Switzerland. For support of direct effect of GATT and WTO rules in Switzerland see *Daniel Thürer*, WTO – Teilordnung im System des Völker- und Europarechts, in: *Daniel Thürer/Stefan Klux* (eds.), GATT 94 und die Welthandelsordnung, Zürich 1996, p. 41, 50-58; *Thomas Cottier*, Die Bedeutung des GATT im Prozess der europäischen Integration,

The debate on direct effect does not depend on the existence and effectiveness of the WTO dispute settlement mechanism. Yet, increasing numbers of adjudicated issues and precedents on the international level render the possibility of direct effect more feasible to the effect that national courts may find guidance in precedents and obtain assistance in applying the rules. Risks of diverging interpretations diminish as case law grows and a system of precedents and principles develops. The WTO dispute settlement system, in other words, may therefore facilitate direct effect step by step in coming years. It should be supported by addressing the matter in future negotiations with a view to bring about a balance of rights and obligations among Members to the WTO. Given the impact of direct effect, it will be necessary to proceed at arms' length, at least among major trading partners, and gradually design jointly those areas where courts may grant direct effect. Needless to say that this is a long-term aspiration in the process of global constitution building. For the time being, courts need to define themselves the provinces of direct effect within a given legal framework, and in the light and context of their respective constitutional standing and authority.

b) The Doctrine of Consistent Interpretation

WTO law deploys considerable effects in the context of the doctrine of consistent interpretation. According to this important rule, where a national rule allows for different interpretations, national or regional law has to be construed *as far as possible* in accordance with international obligations. Jurisprudence in both the US[26] and Switzerland[27] generally adhere to the principle of consistent interpretion. In the EC, it was explicitly applied to GATT law and WTO law.[28] The same holds true implicitly for the Swiss Supreme Court.[29] In most instances, conformity in interpretation allows bridging alleged divergences between international and domestic law. As WTO rules often are more detailed than

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in: *Olivier Jacot-Guillarmod/Dietrich Schindler/Thomas Cottier* (eds.), EG-Recht und schweizerische Rechtsordnung, ZSR Beiheft 1990, p. 139, 171-80.

26 *Charming Betsy*, 2 Cranch 64 (1804).

27 The landmark case was BGE 94 I 669, 678 (*Frigerio*); cf. also BGE 122 II 234, 239; BGE 117 Ib 367, 373.

28 Case C-61/94, *Commission/Germany*, [1996] ECR I-3989. Joined cases C-300/98 and C-392/98, *Dior SA v TUK Consultancy BV and Assco Gerüste GmbH*, judgement of the Court from 14 December 2000 (not yet reported), para. 47: "In a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgement in Hermes, in particular paragraph 28 thereof, that the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs."

29 See the landmark decisions of the Swiss Supreme Court in which it decided that the principle of international exhaustion applies to trademarks and copyrights, but not to patents for which it only recognized national exhaustion: BGE 122 III 469 (*"Chanel"*), BGE 124 III 321 (*"Nintendo"*), BGE 126 III 129 (*"Kodak"*). The Court took explicit recourse, *inter alia*, to the respective Articles of the TRIPs Agreement.

national provisions, they provide ample guidance as to the proper interpretation of national law. Moreover, interpreting domestic laws in conformity with GATT/WTO provisions avoids dualist or statutory prohibitions on courts to base decisions on international law. The concept can assist all members of the WTO alike irrespective of their domestic concept vis-à-vis international law, be it a monist or dualist approach. The doctrine, on the other hand, finds its limitation in constellations where the wording and purpose of domestic law cannot be found compatible with international obligations. It is here that the issue of direct effect will come into play.

While the doctrine relates to rules and principles as such, it is evident that a growing body of reports produced by panels and the Appellate Body provides additional and more detailed guidance in the application of the principle of consistent interpretation.

c) Domestic Implementation of WTO Dispute Settlement Decisions

We now turn to possible direct implications of *specific* WTO decisions in domestic law.[30] This is different from issues relating to the role of precedents, of direct effect or consistent interpretation where the role and legal value of precedents has remained controversial in domestic law. Adopted decisions of panels and the Appellate Body are clearly legally binding upon the parties to the dispute. In this context, the issue is not merely a matter of applying rules in accordance and in the light of rules and precedential reports. The question is whether governments, parliaments and courts should honour and implement specific decisions on the consistency of specific domestic laws and regulations. The courts are thus faced with the issue whether an individual shall be permitted to invoke a WTO decision in order to set aside domestic legislation. The issue is controversial in domestic jurisprudence. The ECJ and the CFI, for instance, recently had an opportunity to focus on the status of panel and Appellate Body reports in the EC legal order,[31] but both took a very careful position, "as if they were reluctant to open a Pandora's box filled with unanswered questions."[32] So far, the ECJ and CFI have not yet been prepared to accept any binding legal force emanating from panel or Appellate Body reports in cases brought before them.

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[30] See, on this particular question, *Thomas Cottier*, Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union, CMLRev. 1998, p. 372-75; *Geert A. Zonnekeyn*, The Legal Status of WTO Panel Reports in the EC Legal Order, JIEL 1999, p. 713-22; *J. M. Beneyto*, The EU and the WTO. Direct Effect of the New Dispute Settlement System?, EuZW 1996, p. 295; *A. Weber/F. Moos*, Rechtswirkungen von WTO-Streitbeilegungsentscheidungen im Gemeinschaftsrecht, EuZW 1999, p. 229; *P. Eeckhout*, The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, CMLRev. 1994, p. 11, 51-55.

[31] Cases C-104/97, *Atlanta*, [1999] ECR I-6983, and T-254/97, *Fruchthandelsgesellschaft*, [1999] ECR II-2743, respectively.

[32] *Geert A. Zonnekeyn*, The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance, *The Banana Experience*, JWT 2000 (2), p. 93.

Members to the WTO are bound by dispute settlement decisions as a matter of international law (pacta sunt servand). Taking into account the legalization of the WTO dispute settlement mechanism and its guarantees of due process and fairness, it is submitted that domestic authorities and courts should also be bound by panel and Appellate Body decisions as a matter of domestic law. In principle, they should be implemented, and the courts should refrain from applying domestic rules found be inconsistent with the decision. As with direct effect, it may be objected that a principle of compliance – in essence the rule of law – potentially upsets reciprocity and the balance of powers with major trading partners which deny a domestic law principle of compliance and leave implementation entirely to the political process. It should be noted, however, that compliance with WTO decisions operates under safeguards. It is open to considerations of a political question's doctrine in the light of the options under WTO law to temporarily grant mutually agreed compensation or even to take into account retaliation under Article 22 of the DSU.

Upon adoption of a report, implementation of the decision is a prime responsibility of the political branch of government. It is in principle up to the executive and the legislator to act in accordance with their respective competence. Decisions need to be made as to the adoption of legislation to remedy, fully or partially, the violation of WTO law, or whether compensation shall be offered. A last option consists in completely ignoring the report, fully or partially, and to take into account the threat and execution of potential sanctions in accordance with Article 22(2) and (3) of the DSU.

Judicial policies of the courts need to take these options under the DSU into account. One of the authors of this paper has suggested an approach as to how the political and judicial avenues can be interfaced.[33] In short, the role of the courts needs to be examined separately in the following constellations: Firstly, whether courts should be bound by new implementing legislation designed to address a WTO decision or whether they should be entitled to review it in the light of the decision. This is arguably the most difficult constellation; it goes to the heart of the matter and concerns the proper role of domestic courts vis-à-vis political branches in international economic relations. Secondly, whether courts should suspend any findings based on a WTO decision for the period for which the parties have succeeded in negotiating compensation. Thirdly, whether courts should respect the political will to ignore the findings of a panel or the Appellate Body, not to offer compensation and thus to deliberately deny compliance with international law.

It seems impossible to draw a single conclusion valid for all the constellations. They are simply too different, and each of them may involve subtle deliberations by executive and legislative authorities which traditionally have had the last word in external economic relations. Perhaps, two straits may be distinguished. On the one hand, whenever political authorities articulate their will to address a WTO dispute settlement decision, and a deliberate decision is

[33] *Thomas Cottier*, Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union, CMLRev. 1998, p. 372-75.

made how to proceed, judicial branches should take such will into account and, in principle, refrain from applying a WTO decision. This option also includes the acceptance of surcharge tariffs in accordance with a WTO ruling. If, on the other hand, the outcome of an adopted WTO report is deliberately ignored, delayed and followed by political inaction without arriving at a policy decision one way or the other, courts indeed may play a crucial role in compelling political organs to deal thoroughly with the matter and come to a decision. This constellation may be described as remedying a flagrant violation of international law, and courts should protect citizens and operators from *denial of justice*. It is in such constellations that courts should no longer apply domestic rules and measures inconsistent with a WTO decision, and individuals should be allowed to rely on panel or Appellate Body reports before national judges.

The different options under the DSU for implementation clearly were not made with a view to domestic judicial enforcement of decisions. The role of courts, again, should be addressed in future negotiations, and the system of enforcement should consider their proper role. It should set out minimal standards for domestic review and address legitimate safeguards. As a basis, it would be necessary to reinforce a prime obligation of adjusting laws and practices found inconsistent with WTO obligations.

IV. WTO Precedents and their Relationship to General Public International Law

The relationship between international trade law and general public international law was largely buried throughout the life of the GATT 1947 which existed as a self-contained system. It was not integrated into the wider body of international law, and academic writings largely ignored this field of international economic law. The law of international trade regulation developed its own features to deal with legal problems. Indeed, it was only very seldom that panels made recourse to substantive and procedural contents of international law, and, albeit using interpretative methods common to international lawyers, panels were not inclined to make explicit reference to the Vienna Convention on the Law of Treaties when interpreting GATT provisions. Up to the first environmentally related disputes,[34] there were no serious implications for the wider corpus of international law by legal findings of GATT panels. Or, where they emerged, the adoption of the reports could be blocked. The common perception of the two systems simply was as not having particular implications for each other.

The expansion of subject-matter during the Uruguay Round and the coming into force of the WTO has changed the relationship. The interconnections between trade regulation and general international law is of an increasing significance.

[34] See, in particular, the two *Tuna/Dolphin* panel rulings: US – Restrictions on Imports of Tuna (1991), 30 I.L.M. 1594 (1991), and US – Restrictions on Imports of Tuna (1994), 33 I.L.M. 839 (1994). Both reports were not adopted.

a) Building a Stronger Relationship

The emergence of wider recognition and acceptance of the WTO system essentially depends on a threefold development: The expansion of coverage, the effective dispute settlement and the attraction of WTO law enforcement for linking trade and other regulatory issues.

Firstly, with the conclusion of the Uruguay Round, new subject matters have come under the umbrella of the WTO, and the body of international trade regulation has considerably expanded. The General Agreement on Trade in Services (GATS) has comprehensive coverage and comprises essentially all sectors, subject to a number of exceptions. For telecommunications, it introduced even first and sectoral standards on anti-trust.[35] Similarly, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), entailing the most advanced set of substantive and procedural standards for all forms of intellectual property rights, introduced a field into WTO trade regulation of a new quality: Other than traditional GATT rules, it prescribes positive standards which, moreover, are linked to agreements administered by another international organization (WIPO). In addition, Understandings and revised and new agreements have also expanded the scope of rights and obligations which resulted from the Tokyo Round. Particularly, we recall the Agreement on Agriculture, the Agreement on Textiles and Clothing, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards and the plurilateral Agreement on Government Procurement. In many fields, the rules have also grown more detailed and do not differ in normative quality from rules in domestic or European law. Secondly, it is the fully-fledged dispute settlement and enforcement mechanism under the WTO which has become a prime forum.[36] It is playing an active role in providing a basis for the development of international law, both procedural and substantive, through interpretation of international agreements and judicial refinement of general concepts and doctrines. Ample opportunity to do so exists. As of 1 February 2001, 223 requests for consultations (171 distinct matters) have been made, and 93 panels have been formally established (70 distinct matters) since the coming into force of the WTO in 1995.[37] Increasingly, panels and the Appellate Body are called upon to rule on trade-related issues. The mandatory nature of dispute settlement does not longer allow to avoid complex issues. Moreover, the expansion of coverage increasingly affects other areas of international law, and many would fear that what may be called a "fatal attraction" of WTO impairs the realization of other and equally important policy goals. The debate on trade and environment is a case in point. Finally, the effectiveness of WTO dispute settlement and enforcement tends to attract the inclusion of other areas and policy goals in order to improve effectiveness and enforcement. Trade regulation has become

[35] Article 5. of the Annex to the GATS on Telecommunications, in: The Legal Texts, p. 316-18.

[36] See also *Donald M. McRae*, The WTO in International Law: Tradition Continued or New Frontier?, JIEL 2000, p. 30.

[37] For updates see at www.wto.org/english/tratop_e/dispu_e/stplay_e.doc.

a prime tool of foreign policy as other avenues are less effective or not available. Future and controversial linkages of trade and human rights again are an example in point. The combination of all this renders a full and mutual integration of WTO and other areas of international law indispensable.

According to Article 2 of the DSU, panels and the Appellate Body are granted competence to resolve disputes arising "under the covered agreements". This means that, unless specifically agreed to, jurisdiction to assess rights and obligations is limited to assess the WTO instruments, and the jurisdiction is essentially limited to interpret and apply the provisions of the covered agreements. It does not extend to fully interpret and apply rights and obligations outside this jurisdiction. However, there often is an obvious need to assess the scope and implications of legal provisions, general principles and doctrines which have their origin outside the WTO legal system. From the point of view of WTO law, they are taken into account on a different and auxiliary level and may only be interpreted incidentally. From the point of view of other fora in international law, on the other hand, the question arises whether such interpretations and decisions shall be respected, or whether they should be denied, from their perspective, any legal force at all. Is the WTO dispute settlement mechanism, acting through panels and the Appellate Body, authorized to create precedents in the field of general international law? We think so. Firstly, rulings and precedents are facts of life which are introduced into the body of international law by mere existence. Secondly, from a legal point of view, they are relevant in the process of interfacing different instruments. Case law shows considerable nuances to which we now turn.

b) Creation and Mutual Recognition of Precedents and Principles

Panels and the Appellate Body have a certain experience in reviewing the application and interpretation of other agreements. For instance, it was necessary to look into the U.S. Canadian Automobile Pact[38] and the Lomé Convention in order to make an objective assessment of rights and obligations under WTO law. With respect to the latter, the Appellate Body explicitly held that "we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver."[39] As in the examination of domestic and regional law, these sources of law may be treated closer to questions of fact than law.[40] Rather than interpreting such rules, it is a matter of asking whether a defendant party is in a position to provide sufficient evidence

[38] Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/R and WT/DS142/R, 11 February 2000.

[39] EC – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 9 September 1997, para. 167.

[40] With respect to judicial review of domestic law, see, for instance, *Thomas Cottier/Krista Nadakavukaren Schefer*, The Relationship between World Trade Organization Law, National and Regional Law, JIEL 1998, p. 86-87; US – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, 22 December 1999.

as to the proper interpretation and application of domestic rules.[41] It seems quite correct from a legal policy point of view that the appropriate standard of review in such cases is a rather deferential one, and Members and signatories shall be granted considerable leeway in interpreting their own law and other international agreements. Panels and the Appellate Body should respect the interpretation given and should only interfere in the process of unilateral interpretation of such an agreement by the defending party if its interpretation cannot be considered to be within reasonable bounds. This limited standard of review may coincide with the doctrine of abuse of rights. In this context, this doctrine serves to assure that national laws and other international agreements are not merely used to provide disguised economic protectionism to domestic producers short of pursuing a legitimate policy goal.

The approach and the standard of review is different when facing more universally valid agreements which belong to the core of international law. The Vienna Convention on the Law of Treaties is a prominent case in point. Articles 31 and 32 thereof express, and have attained the status of, rules of customary international law to which explicit reference is made in Article 3(2) of the DSU. Both panels and the Appellate Body constantly refer to the language of Articles 31 and 32.[42] Indeed, jurisprudence in this field is becoming quite extensive, and the Appellate Body has not hesitated to actively shape the methods and elements of interpretation.[43] In doing so, panels and the Appellate Body interpret these rules *de novo*, looking for guidance in the case law of other judicial bodies and particularly, of course, of the International Court of Justice. Vice versa, the growing body of jurisprudence of panels and the Appellate Body provides a rich source for other fora to look for guidance at and equally contributes to the further development of principles of treaty interpretation.[44]

Interfacing WTO law and other international agreements does not remain without potential conflicts. It does not take a legal mind to detect constellations in which it seems impossible to bring WTO law, at least at first sight, into compliance with other international agreements. Such constellations may happen, for instance, in the field of the protection of the environment. There are many Multilateral Environmental Agreements (MEAs) which make, and rightly so, use of trade instruments.[45] In essence, these agreements often authorise national or regional governments to impose import restrictions in a

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41 See India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, 19 December 1997.

42 See, for instance, US – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 April 1996, para. 3.12.

43 The Appellate Body, for instance, has endorsed the principle of effectiveness in interpreting treaties, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 12.

44 Cf. *Donald M. McRae*, The WTO in International Law: Tradition Continued or New Frontier?, JIEL 2000, p. 35-37. He also points out to areas in which differences are emerging between interpretative approaches taken by the International Court of Justice and those taken by the panels and the Appellate Body respectively.

45 See e.g. *Duncan Brack*, Multilateral Environmental Agreements: an Overview, in: *Halina Ward/Duncan Brack* (eds.), Trade, Investment and the Environment, The Royal Institute of International Affairs, 2000, p. 122-37.

field of particular goods. The Cartagena Protocol on Biosafety (BSP) may provide an illustrative example.[46] This Protocol essentially regulates importation and trade in genetically modified organisms. It provides ample powers and discretion to governments to enact trade restrictions in this field with a view to protect biodiversity. There are potential tensions with the TRIPs Agreement and the TBT Agreement, and potentially also with Article III of the GATT as production and process methods (PPMs as opposed to product standards) are not presently recognised within the concept of like products, and Article XX of the GATT. There are also potential overlaps and tensions with the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) as coverage of Living Modified Organisms cannot be excluded to the extent that they pose a risk to human, animal and plant health. With respect to the relationship between the SPS Agreement and the BSP, the precautionary principle may be of particular interest. Both agreements stipulate the principle; however, the respective requirements are termed in different manners.[47] Interfacing these instruments will not be easy. It is submitted that the Protocol should be respected under Article XX(g) GATT, subject to abused applications for the purpose of economic protectionism. As to more specialized agreements, it is likely to be necessary to review both the Protocol and these instruments in future and joint negotiations of the international organizations and fora concerned.

General principles of law and principles of international law, we are reminded by panels and the Appellate Body, are valid for the WTO and form the basis of the relations between and among WTO Members. The Appellate Body clearly stated: "The chapeau of Article XX [of the GATT 1947] is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states."[48] Therefore, beside interpreting international agreements and domestic and regional law, panels and the Appellate Body may be faced also with the question whether an invoked principle has attained the status of customary international law or that of a general principle of law as recognized by major legal systems. For example, it is still equivocal whether the precautionary principle has crystallized into a general principle of customary international law or not. The Appellate Body was in fact confronted with this question, but avoided to explicitly rule on the issue: "Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question."[49] Albeit the cautious language, there seems to be little doubt, at least in our view, that panels and the Appellate Body

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46 First Protocol to the UN Convention on Biological Diversity, adopted on January 29, 2000.

47 Cf. Article 11:8 of the BSP and Article 5.7 of the SPS Agreement.

48 US – Import Prohibition of Certain Shrimps and Shrimp Products, WT/DS58/AB/R, 6 November 1998, para. 158.

49 EC – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 123, with reference to the extensive literature.

will not deny their competence to rule on such an question if a specific dispute requires an explicit answer thereto. From a practical point of view, there will be constellations in which it will be necessary to rule as to whether an invoked principle has attained the status of customary international law or whether it is to be qualified as a general principle of law. Such a decision by a panel or the Appellate Body then will not only bind the parties to the dispute. It will consequently become part of WTO law and, moreover, have implications for the broader field of international law. The situation is not different from other major fields of international law, such as the law of the sea. And it is not different from other courts of international law, in particular the International Court of Justice, or regular or ad hoc courts of arbitration the findings of which add to the rich body of international law precedents.

V. Conclusions

The transformation of predominantly diplomatic dispute resolution under GATT 1947 into a fully-fledged system of legal and compulsory dispute settlement under the WTO has profoundly changed the role and impact of WTO law in international law. The relationship between WTO law, regional and national law still is left to traditional precepts and controlled by constitutional law. We observe the emergence of a common and widely shared doctrine of consistent interpretation. As to direct effect, and domestic implementation of adopted reports, Members to the WTO need to shape their own judicial policies. Yet, a broader and more comprehensive regulatory system will be necessary to be developed in future negotiations which interfaces global, regional and national levels of law and judicial control in a meaning and balanced manner. The expansion of WTO law both in coverage and effectiveness gives raise to a new and long overdue integration of international trade regulation into the body of general international law – and vice versa. The very fact of intensive dispute settlement activities within the umbrella of the WTO considerably adds to the body of international law and its evolution. A nuanced approach in case law is emerging with respect to mutual co-ordination of different international agreements, all pursuing legitimate policy goals. Recourse to general principles of law and customary international law principles will further assist in achieving the goal of developing a more coherent legal international order.