

The Role of Public International Law in the WTO

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SUSTRA

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It is with deep regret that due to the North Carolina ice-storm (the worst in decades, they assured me) I will not be able to make it to Berlin. What follows are the speaking notes of the talk that I was planning to give.

I. WTO law *is* public international law

The title of this paper is somewhat misleading. Public international law and WTO law are not two distinct notions so that one can genuinely discuss the role of the former in the latter. The WTO treaty is a full-fledged part, just *one branch*, of the bigger tree of public international law. The WTO is *not* some purely economic construct or private club where trade concessions are exchanged. The WTO, and the disciplines it imposes on its Members, is based on an international treaty. This treaty is, in and of itself, and like all other treaties between states, part of public international law.

That WTO law is part of public international law does obviously not preclude that WTO rules have, indeed, a number of special features that are different from many other rules of public international law. One could think, in particular, of four such “special features”:

- As the accession process of China showed, one does not become a WTO Member by simply accepting WTO treaties. On top of that, an “entry fee” must be paid in the form of a package of trade concessions (tariff reductions, commitments in trade in services, etc.). For membership to be granted, this additional entry fee must be accepted by existing WTO Members as balancing the benefits that the newcomer will get through WTO membership.
- Although WTO disciplines are legally binding rules as between states, there do exist many safeguards, exceptions and possibilities to re-negotiate concessions in a way that allows WTO Members to deviate from WTO disciplines (thereby making WTO disciplines somewhat “soft”).
- Although WTO disciplines are backed-up by an automatic and compulsory dispute settlement mechanism (in this sense at least, making WTO law “hard law” that can be enforced), in the end of the day, “wrongdoers” do not have to pay any damages for past inconsistencies; and prevailing parties, faced with a persistent wrongdoer, can only be authorized to

retaliate to an extent that simply re-balances the scale of trade concessions, nothing more.

- The WTO construct is largely a process of “negative integration”, setting out negative prohibitions (“thou shalt not” discriminate, impose quotas, etc.). The WTO does *not* generally impose positive obligations on its Members, for example, to grant a certain amount of market access, to have certain policies in place or to achieve certain minimum standards (with the notable exception of the TRIPS agreement). This makes ensuring compliance with WTO rules (basically, prohibitions to do certain things) easier than ensuring compliance with many other rules of public international law where a positive obligation of result or achieving certain minimum standards is imposed.

II. Accepting that WTO law is just a branch of public international law, does this WTO branch interact with the other branches of public international law? And if so, how and to what extent?

The WTO treaty, as a mere branch of public international law, undoubtedly interacts with other branches of that law. The only question is, to what extent? More particularly: only to the extent that the WTO treaty *explicitly refers* to other rules of public international law or should one go beyond that?

A. *EXPLICIT REFERENCES* IN THE WTO TREATY TO OTHER RULES OF PUBLIC INTERNATIONAL LAW

At least three types of such references can be found in WTO treaty provisions:

1. The Agreement on Trade-related Intellectual Property Rights (TRIPS) explicitly incorporates a number of provisions set out in other treaties dealing with intellectual property rights (the Berne Convention on Copyright, the Paris Convention, etc.). These foreign rules of public international law thereby become a full part of the WTO treaty and claims under these rules can, therefore, be enforced before a WTO panel.
2. Other WTO treaty provisions explicitly refer to other branches of public international law stating, essentially, that if WTO Members comply with these other rules, they will be presumed to be safe also under WTO rules. The WTO agreements on Sanitary and Phytosanitary Measures (SPS), on Technical Barriers to Trade (TBT) and Subsidies, all include such provisions. They refer, respectively, to standards (1) in Codex Alimentarius (a WHO/FAO body), the Office of International Epizootics (OIE) and the International Plant Protection Convention (SPS); (2) *any* standards developed by a world-wide body (such as Codex Alimentarius, ISO, etc.) (TBT); and (3) OECD export credit rules (Subsidies). Although compliance with these foreign rules may offer all WTO Members a safe-haven under WTO disciplines, none of these foreign rules have become WTO rules in the sense that claims under these rules can be enforced

before a WTO panel. Although compliance with a Codex standard on, say, hormone residues in beef, triggers a presumption of consistency with SPS rules, no WTO Member can be sued before a WTO panel for non-compliance with these Codex standards as such. In that sense, the foreign rule does not become a genuine WTO rule (the way TRIPS works); only a reference point in checking compliance with WTO provisions.

3. Finally, Art. 3.2 of the WTO's dispute settlement understanding (DSU) explicitly directs panels to clarify WTO provisions "in accordance with customary rules of interpretation of public international law". In other words, the WTO treaty explicitly incorporates those rules of public international law (in practice, Arts. 31 and 32 of the Vienna Convention on the Law of Treaties), for those rules to apply also to the interpretation of WTO provisions.

Crucially, the rules thus explicitly referred to in the WTO treaty can be invoked also by WTO Members that are *not* bound by these non-WTO rules. For example, also non-OECD members can invoke the OECD arrangement on export credits as a justification for certain export subsidization practices normally outlawed in the WTO.

Finally, the different methods above to make reference to non-WTO rules of public international law can be a guideline also for how, for example, MEA rules, labor standards or investment rules could be referred to in future WTO treaties: either through explicit incorporation (as in TRIPS) or through a reference stating that compliance with, for example, certain MEAs shall preclude a violation of WTO rules (or be presumed to fulfill the GATT Art. XX exception).

B. THE ROLE OF OTHER RULES OF PUBLIC INTERNATIONAL LAW NOT EXPLICITLY REFERRED TO IN THE WTO TREATY

According to many trade experts, rules of public international law that were *not* explicitly referred to in the WTO treaty have no role to play in the WTO. In their view, it was for WTO negotiators to *explicitly include* those other rules in the WTO treaty; in case they did not do so, these other rules must be *presumed to have been excluded*.

This view goes against the practice of WTO panels and the Appellate Body who did make reference to a large number of rules of public international law that were *not* explicitly referred to in the WTO treaty. In my opinion, this narrow view on the interaction between WTO law and other rules of public international law also goes against a general principle of public international law, confirmed in a series of cases decided by the International Court of Justices and other international tribunals, which goes like this: rules of general international law apply to a treaty (including the WTO treaty), unless that treaty has excluded their application. This principle (the opposite of the narrow view set out earlier), leads to the following conclusion:

for rules of general international law to apply to the WTO treaty, there is no need for WTO negotiators to explicitly say so; on the contrary, these rules

apply automatically unless the WTO negotiators explicitly excluded their application.

This principle was confirmed in the panel report on *Korea – Government Procurement* and, albeit less broadly, the Appellate Body report on *US – Cotton Yarn*.

At least three types of situations can be identified where other rules of public international law can play a role before a WTO panel, even if those rules were *not* explicitly referred to in the WTO treaty.

1. non-WTO rules as reference material to **interpret** WTO provisions

Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (explicitly incorporated in DSU Art. 3.2), in turn, refer to non-WTO rules for purposes of interpreting WTO provisions. The two most interesting instances are the following:

- a good faith interpretation in accordance with the “ordinary meaning” of a term may allow for a reference to non-WTO rules. This was done by the Appellate Body in *US – Shrimp* when interpreting the term “exhaustible natural resources” in GATT Art. XX(g). To interpret these words, reference was made to a dictionary, but also to certain MEAs not binding on all WTO Members (not even on all disputing parties). These MEAs were found to express “common concerns of nations” leading the Appellate Body to construe “exhaustible natural resources” so as to include also living things.
- Art. 31.3(c) directs the interpreter to take account also of “*any relevant rules of international law applicable in the relations between the parties*”. This allows for reference to rules of general international law (that is, rules that are in principle binding on all states). Many examples can be found in WTO jurisprudence referring to Vienna Convention rules other than those on treaty interpretation (such as the non-retroactivity of treaties), general rules on state responsibility (such as countermeasures) or general principles such as due process or good faith. In my view, the reference in Art. 31.3(c) includes also rules binding on all WTO Members; but not rules binding only on a limited number of WTO Members (say, the disputing parties only). Only the one who made the WTO treaty can interpret it (*ejus est interpretare legem cuius condere*).

One should be mindful, however, of the limitations of interpretation:

- (1) Interpretation is limited to giving meaning to terms explicitly mentioned in the WTO treaty;
- (2) Interpretation cannot overrule explicit WTO terms; and
- (3) Only material binding or somehow agreed upon (be it implicitly) by all WTO Members can be referred to. The Appellate Body in *LAN – Equipment* made it clear that to interpret WTO terms the *common*

intentions of all WTO Members counts; not those of a few Members only.

2. non-WTO rules as a full part of the **applicable law** to resolve a dispute

The two remaining questions are this: can other rules of public international law still play a role before a WTO panel even if

- (1) these non-WTO rules deal with an issue not addressed in the WTO treaty (silence or gap in the WTO treaty); or
- (2) these non-WTO rules, binding on the disputing parties, contradict an explicit WTO rule and can, therefore, not exert influence in the process of treaty interpretation (since interpretation cannot overrule WTO provisions).

In my view, the answer should, in both cases, be “yes”.

On the first question, again, for rules of general international law to apply to the WTO treaty there is no need to explicitly say so. On the contrary, for those general rules to be excluded an explicit provision in the WTO treaty is required. *Hence, in the event of silence in the WTO treaty, rules of general international law simply continue to apply.* This was confirmed, for example, when the Appellate Body applied rules of general international law on the issue of burden of proof, faced with a gap or silence on this matter in the WTO treaty.

On the second question, it should be recognized that other rules of international law may override even explicit WTO provisions. Generally speaking, there is no doubt that a later treaty in time may overrule an earlier one (including the WTO treaty), even if not all parties to the earlier treaty (ie all WTO Members) are bound also by the later treaty (see Art. 30 of the Vienna Convention). In that case, the later treaty obviously prevails only as between the parties bound by it (ie those WTO Members that agreed to the later, conflicting treaty). It is possible for drafters of a treaty to state that the new treaty will prevail over *earlier* rules of international law (but note that the WTO treaty did not do this!). In principle (and with the notable exception of Art. 103 of the UN Charter) it is not possible, however, for a treaty to state that it will prevail over all *subsequent* law. Of course, a treaty can say so, but in effect, any later expression of state consent can overrule such statement so that a conflict clause subjecting future law to existing law is rather futile.

In sum, I am of the view that a WTO panel can take account also of non-WTO rules that contradict WTO provisions *as long as those non-WTO rules are binding on the disputing parties.* These non-WTO rules then become part of the applicable law to resolve a WTO claim. This is not to say that such non-WTO rule should then necessarily prevail over the WTO provision. This will be an issue to be decided under conflict rules of public international law. But in principle it is possible for a panel to take account, for example, of an MEA agreed upon by both disputing parties that gives the right to the defendant to restrict trade, there were a WTO rule says that it cannot (in this sense, I defend a broad definition of conflict, including a contradiction

between an obligation/prohibition and an explicit right). Especially if the MEA is later in time and/or more specific than the WTO rule, it should then possibly prevail over the WTO provision and hence be a valid defense against a claim of violation of WTO rules.

This is not to say, of course, that this non-WTO rule (MEA) can be used as a basis to make a claim before a WTO panel (e.g., a WTO Member cannot complain to the WTO that another Member has not met its emission standards agreed upon in the Kyoto Protocol). Jurisdiction must be explicitly conferred upon an international tribunal and WTO panels only have jurisdiction to address WTO claims. But this should not prevent them from looking at other rules of international law (in particular defenses) that are not explicitly set out in the WTO treaty so as to properly examine the validity of those WTO claims (see Table on page 7).

3. non-WTO rules as **facts** in support of compliance with/violation of WTO rules

Finally, other than as legal rules as such, other rules of public international law may also constitute factual proof or a factual reference point in the application of WTO provisions. For example, an MEA banning trade in certain products, though not binding on all WTO Members or even both disputing parties, may constitute factual evidence that this particular product is harmful to the environment. In *US – Shrimp (Art. 21.5 compliance procedures)* the Appellate Body accepted an Inter-American treaty as constituting a factual point of comparison for checking US efforts in negotiating multilateral rules on turtle protection.

For more elaborate versions of my views on this topic, see:

1. Joost Pauwelyn, [The Role of Public International Law in the WTO: How Far Can We Go?](http://www.asil.org/ajil/pauwelyn.pdf), 95 *American Journal of International Law* 535-78 (2001) at <http://www.asil.org/ajil/pauwelyn.pdf>
2. Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, forthcoming 2003), preview at <http://us.cambridge.org/titles/catalogue.asp?isbn=0521824885>
3. Joost Pauwelyn, *The Nature of WTO Obligations*, Jean Monnet Working Paper No. 1, 2002, at <http://www.jeanmonnetprogram.org/papers/02/020101.html>

**WTO LAW AND OTHER INTERNATIONAL LAW
BEFORE THE WTO JUDICIARY**

	WTO Covered Agreements (including amendments)	Other WTO Law (e.g., agreements or declarations not part of covered agreements and acts of WTO organs)	General International Law and Norms Binding on All WTO Members or Reflecting their “Common Intentions”	Norms Binding on both Disputing Parties (not all WTO Members, nor reflecting their “common intentions”)	Norms Binding on only one of the Disputing Parties
JURISDICTION (to examine claims under these rules)	Yes	No	No	No	No
APPLICABLE LAW (to be applied in the examination of WTO claims)	Yes	Yes	Yes	Yes	No
Reference material for the INTERPRETATION of WTO Covered Agreements	Yes	Yes	Yes	No	No
Valid DEFENCE against a WTO claim	Yes	Yes	Yes	Yes	No
CLAIMS ENFORCED under these rules if they prevail as the applicable law	Yes	No	No	No	No