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ESSAY

WTO Dispute Settlement and Sustainable Development: Legitimacy Through Holistic Treaty Interpretation

JEFFREY LAGOMARSINO*

1. INTRODUCTION

Globalization, technological development, and the growing awareness of issue linkages pose dynamic challenges to the relationships of international law's distinct rule-systems. Within the increasingly fragmented realm of international law, the World Trade Organization ("WTO") holds a contentious position because of the relative extent to which it has been successful in advancing its mission of multilateral trade liberalization. Much of this success is a result of the institution's effective and binding dispute settlement system. However, the WTO's ability to reconcile multilateral trade liberalization with other, sometimes conflicting, public values, is a central concern to the institution's legitimacy and is, therefore, vital to further advancing free trade and to realizing its many benefits. By those who feel the WTO has an obligation or self-interest to address such issues as trade and labor or trade and environment (hereafter 'trade and' issues), generally one of two governance models is advocated — constitutionalization or global subsidiarity.[1] As the European

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1. *See generally* Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16 GOVERNANCE 73 (2003), *available at* http://www.blackwell-synergy.com/doi/abs/10.1111/1468-0491.00205 (arguing forcefully for a global subsidiarity approach). *But cf.* Ernst-Ulrich Petersmann, 3 J. INT'L ECON. L. 19, 19-25 (2000) (arguing for constitutionalization).

Union has demonstrated, these models are not necessarily mutually exclusive. Regardless of the merits or flaws of the constitutionalization of 'trade and' norms within the WTO treaty system, this approach has proven elusive and its realization remains unlikely in the short term. Thus, WTO adjudicators have been left the ambiguous task of reviewing the extent to which the policy-balancing of diverse values done at the domestic level is consistent with the superior legal norms of the WTO Agreement.[2] Public international law at times plays a role in this adjudication, given that it may fill normative gaps in the WTO treaty and provide a context for treaty interpretation.

While there are several phenomena permitting WTO adjudicators to incorporate public international law,[3] the customary rules of treaty interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties[4] are of particular importance. These rules not only guide adjudicators in treaty interpretation, but they permit adjudicators considerable access to general principles and substantive norms beyond the WTO treaty. The extent and nature of the incorporation of public international law into WTO dispute settlement is highly contentious. Some fear that the trend of considering non-WTO rules of international law will lead to 'mission creep' and judicial overreaching, thus constituting a threat to the multilateral trade regime's legitimacy.[5] Others argue that the use of such rules is

2. Howse & Nicolaidis, *supra* note 1, at 81; *see also* Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 757-60 (1999), *available at* http://ssrn.com/abstract=803745.

3. *See* Jose Alvarez, *The Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 611, 612-22 (Merit E. Janow et al. eds., 2008) (describing the following four factors that both "drive and constrain" the incorporation of general international law: (1) the principles of competence de la competence and of effectiveness; (2) fears of non-liquet; (3) the self-perceived role of international judges and the "common law" of international tribunals; and (4) The Vienna rules of treaty interpretation).

4. Vienna Convention on the Law of Treaties arts. 31-32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

5. *See* José E. Alvarez, *The WTO as Linkage Machine*, 96 AM. J. INT'L L. 146, 146-58 (2002); *see also* CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 38-45 (Am. Enter. Inst. Press 2001); *see also* John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the*

necessary for the WTO's legitimacy in terms of 'trade and' issues.[6] This analysis proposes how a full embrace of the general rule of treaty interpretation found in Article 31 may mitigate certain threats to legitimacy by incorporating international law in a manner that permits deference, rather than leading to 'mission creep.'

2. CHALLENGES TO LEGITIMACY AND REASONS FOR HOLISTIC TREATY INTERPRETATION

Following the failed creation of the International Trade Organization ("ITO"), the resulting General Agreement on Trade and Tariff ("GATT") treaty came to exist in great isolation from the greater corpus of international law that was developing simultaneously.[7] The transformation of the GATT regime into the much more legalistic WTO regime in 1994, with the signing of the Marrakesh Agreement, occurred within the framework of international law. Article 3.2 of the Dispute Settlement Understanding ("DSU") makes the critical recognition that the customary rules of interpretation of public international law apply to the provisions of the WTO Agreement.[8] The Appellate Body has since recognized that Articles 31 and 32 of the Vienna Convention on the Law of Treaties are customary rules of interpretation.[9] Article 31(3)(c), which permits the contextual use of "any relevant rules of international law applicable in the relations between parties," has potentially great implications as it allows WTO adjudicators to reach well beyond WTO law to apply

WTO, 44 VA. J. INT'L L. 229, 262-66 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=421661.

6. *See* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 577-78 (2001); *see also* Martti Koskenniemi, Address in Frankfurt, Germany: Global Governance and Public International Law 23 (Feb. 9, 2004), in 37 KRITISCHE JUSTIZ 241, 263 (2004), *available at* http://www.helsinki.fi/eci/Publications/MFrankfurt.pdf.

7. *See generally* Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615 (1970).

8. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 U.N.T.S. 154 [hereinafter DSU].

9. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 26, 1996).

substantive international norms. Thus, the question facing the WTO adjudicators is not whether international law is applicable in WTO cases, but rather what the nature of the complex relationship between WTO *lex specialis* and public international law is.

The seemingly benign acknowledgement that WTO law is a part of public international law has unavoidably profound implications on the mandate of trade liberalization—implications that negotiators of the Uruguay Round could not have fully considered as they painstakingly bargained a momentous mandate for specific trade reforms. The minds of the negotiators were understandably shaped by the relatively discreet and self-contained world of the GATT regime. Likewise, the future developments of public international law itself were less clear at the time. It is therefore with similar naivety that the founders also included in the WTO preamble the bold yet vague language promoting "general welfare," "sustainable development," and "optimal use of the world's resources." Multilateral trade liberalization is thus acknowledged as a means to higher societal aims, rather than an end itself. Accordingly, the WTO preamble is often embraced by environmental and human rights advocates as a grand opportunity for the incorporation of substantive norms of other branches of international law.

In response, ardent free trade advocates often pose three arguments against the application of environmental and human rights norms within the WTO dispute settlement system: *(i)* the relatively weak scope and enforcement mechanisms of other international legal regimes—mainly environmental and human rights—reflect a deliberate state desire for such, and the WTO has no authority or institutional interest to change this; *(ii)* the greater incorporation of international law threatens the regime's effectiveness on trade promotion; and *(iii)* it opens adjudicators to charges of overreach, and creates a systemic risk of mission creep contrary to the intentions of founders.

The first argument, essentially a realist interpretation, fails to account for the perspectives of the many civil society actors within states and transcending states, which represent different interests and values than the leaders of member states and many of the most powerful lobbying groups that heavily influence those

leaders. Although still lacking the domestic agenda-setting power of lobbying giants, national and transnational civil society groups have proven themselves capable of creating a legitimacy crisis for the WTO regime, as made evident at the 1999 Seattle ministerial meeting. Civil society groups promoting 'trade and' issues, such as environment and human rights, are here to stay, and in a digital age they will increasingly find new avenues to exert pressure on states and international organizations to live up to higher environmental and human rights norms—most of which states have already acknowledged and even committed themselves to through other treaties.

While it is easy to focus on the more ridiculous and uninformed demands of these actors and dismiss them all accordingly, this ignores the reality that there are significant negative environmental and human rights externalities to trade liberalization, and the calls to account for them will only increase. It is equally important to note that the interests of NGOs of the Global North are often pursued in conflict with the interests and development needs of member states and NGOs of the Global South.[10] While the northern NGOs are quite capable of having their voices heard, they represent only segments of global civil society. On the whole, actors from organized civil society will play an increasingly vital role—if still not a democraticly accountable one—in the formation and empowerment of the public sphere as a deliberative medium between citizenry and international institutions such as the WTO.[11] This phenomenon, in effect, flattens the traditional hierarchy on which international law was created, and thereby adds significant complexity to WTO legitimacy beyond 'state intention.'

From a member state perspective, it is the inherently sensitive nature of environmental and human rights norms and the resulting divergent approaches to them that make strong

10. This was the case in *Shrimp-Turtle*. *See infra* Part 3.1; *see also* Walden Bello, *The "Shrimp-Turtle Controversy" and the Rise of Green Unilateralism*, FOCUS ON TRADE (Bangkok), July 1997, http://focusweb.org/publications/1997/The%20Shrimp-Turtle%20 Controversy%20and%20the%20Rise%20of%20Green%20Unilateralism.htm.

11. *See* Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39 GOV'T & OPPOSITION 314, 320-24, 647-50 (2004). This role is becoming increasingly institutionalized at the international level itself.

multilateral regimes on these matters so difficult to achieve. This deficiency of enforced international agreements means that members are naturally more likely to rely on domestic policy to pursue such goals; and this domestic policy is likely to be highly variable in strength and scope, based on social values and economic interests. WTO adjudication that ignores these realities is likely to be viewed by members as illegitimate infringement on state sovereignty.

The second argument flows from the idea that liberalizing trade is always more economically beneficial than not liberalizing, and therefore to forego any progress in trade liberalization is to hinder the net benefits to society from trade. This view is well articulated by Jagdish Bhagwati, who states that:

> For instance, they [critics] argue that free trade is not sufficient for growth; we also need other supportive policies. By and large, yes; and every serious scholar of trade has understood this from as long ago as the 1960s when the trade policies of the developing countries were being studied. But then again, it does *not* follow that freeing trade is no better than not freeing it.[12]

The policy implication of this argument is that the WTO mission should remain as trade-focused as possible, and interpretation of WTO law should be accordingly narrow. In this sense, there cannot be too much of a good thing (i.e. an ever growing and powerful legal regime promoting multilateral trade liberalization). This reasoning is lacking for the fact that the general welfare created by liberalizing trade through the WTO is, at some point, offset by the negative externalities of a powerful legal regime that has at times hindered the realization of environmental and human rights norms—both of which are also essential to the high societal aims noted in the WTO preamble.

Therefore, contradictory to both challenges above, WTO law must evolve in a manner more cognizant of its own advanced development relative to environmental and human rights law. It is not difficult to understand how sustainable development and

12. *See* Jagdish Bhagwati, *Reshaping the WTO*, FAR E. ECON. REV., Jan./Feb. 2005, *available at* http://time.dufe.edu.cn/wencong/bhagwati/ FEERFinal.pdf.

general welfare could suffer from negative externalities that would result from the lopsided and parochial growth of any of the different international legal regimes—one must only imagine a theoretical reversal in the development of international trade law and international environmental law. In this case, the externalities of the environmental treaties and enforcement mechanisms would in some ways inhibit the agenda of trade liberalization. Naturally, many environmental advocates would claim that environmental protection is unequivocally good, no matter the extent to which it out paces trade liberalization. Likewise, it would be expected that in such a circumstance free trade advocates would feel slighted by the lack of consideration afforded trade matters in the international environmental legal regime, be it via limitations to national sovereignty on trade matters or ignoring international trade norms. Given that trade liberalization is a key means to achieving economic gains, general welfare would be hurt by the unwillingness of environmentalists to give ample consideration to important interests beyond their particular cause. In this sense, there *can* be too much of a good thing if pursued in an ardently parochial manner.[13]

Third, ardent trade enthusiasts fear that giving meaning to the WTO preamble through the greater incorporation of international law will inevitably lead to mission creep, which is detrimental to the institution's legitimacy on trade. This alarm is exaggerated. WTO adjudicators have proven themselves acutely aware of these fears, as well as the restricting language in DSU Article 3(2), which expressly states that the "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[14] DSU Article 7 again confirms that WTO tribunals "are not courts of potentially general jurisdiction."[15]

13. Human rights are the possible exception, but even policies advocating human rights are commonly pursued in a manner far too parochial.

14. DSU, *supra* note 8, art. 3.2.

15. Gabrielle Marceau, *A Call for Coherence in International Law*, 33 J. WORLD TRADE 87, 113 (1999); DSU, *supra* note 8, art. 7. Pursuant to Article 7, the mandate of panels is to examine claims made under any of the "covered agreements." *Id.* This infers the mandate of adjudicators and does not include non-WTO agreements.

Concerns of judicial overreach were similarly voiced after the panel in *Japan-Film* established the principle of non-violation claims.[16] Since then, panels and the Appellate Body have rejected most all non-violation claims. Moreover, the WTO has already shown itself more prone to mission creep via the incorporation of non-trade issues in the negotiation rounds at the behest of powerful interest groups in developed countries. The TRIPS Agreement is a prominent example, as the Uruguay Round would likely have failed without the support of the United States if it were not for this inclusion of intellectual property rights.[17]

Even accepting that over a decade after its conception the WTO's institutional legitimacy requires that greater adjudicative consideration be given to preambular goals, the task remains to define a modernized interpretation of the relationship between the preamble and the rights and obligations of the WTO Agreement. Guidance can be found in Article 31(1) of the Vienna Convention, which confirms that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(2) explicitly states "the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes. . ." To the detriment of their own argument, many advocates of the higher goals outlined in the WTO preamble fail to appreciate that the *raison d'etre* of GATT, and subsequently the WTO, is trade and not sustainable development, general welfare, or any other aims. Despite how advanced the WTO is relative to other international regimes, it has bureaucratic and legal limitations such that it can provide little public utility if its adjudicators are charged with becoming the guardians of environmental and human rights law. Rather, the operational assumption of the WTO is that increasing the

16. *See generally* Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998).

17. *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 [hereinafter TRIPS].

benefits from trade is the single, yet valuable, contribution to sustainable development and general welfare that WTO offers.

The subtle point here is that it is not inconsistent with this fact to say that WTO adjudication, which permits trade that is contrary to the goals in the preamble, is misguided according to Article 31. In this sense, the preamble does much more than "add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement" as the Appellate Body stated in *Shrimp-Turtle*.[18] Specifically, with regard to the role of WTO adjudicators, the preamble does not demand the advancement of environmental and human rights norms; it only obstructs interpretation of WTO rights and obligations from impairing achievement of the highest goals that all major international regimes (environmental, human rights, and trade) claim to promote, namely sustainable development and general welfare. This is more than a semantic distinction; it is one that significantly limits the judicial principles of *competénce de la competénce* and of "effectiveness" with respect to claimants evoking non-WTO law. Pauwelyn argues that as this limitation on jurisdiction was upheld in *EC-Poultry*, adjudicators would presumably have greater latitude with respect to *competénce de la competénce* and of effectiveness in the event that non-WTO law was evoked by a member in defense.[19] This nuanced understanding of the Appellate Body's jurisdiction protects adjudicators from the perception of overreaching and mission creep.

Moreover, the interpretive obstruction performed by the preamble holds true even where clear international norms are absent on 'trade and' matters, so long as there is significant intellectual consensus upon which states base their decisions, or

18. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 153, WT/DS58/AB/R (Oct. 8, 1998) [hereinafter *Shrimp-Turtle*].

19. Appellate Body Report, *European Communities –Measures Affecting the Importation of Certain Poultry Products*, ¶ 156, WT/DS69/AB/R (July 13, 1998) (*adopted* July 23, 1998). For analysis, see Pauwelyn, *supra* note 6, at 568 (discussing how the Appellate Body rejected the claimants request to consider the Oilseeds Agreement; stating that the Appellate Body is not a court of general jurisdiction, but a dispute resolution body of limited jurisdiction).

"common intentions"[20] amongst WTO members. Nowhere does the WTO Agreement state that preambular goals are legitimate only to the minimum extent provided by public international law.

Alvarez advises the "self proclaimed 'progressives'" that "customary international law developments are not limited to the possible rise of the precautionary principle or the elucidation of economic and social rights."[21] He further warns that the International Court of Justice's judgment in *Oil Platforms* should give progressives concern that similar use of the principle of effectiveness by WTO adjudicators could mean applications of customary rights to own property and new definitions of "fair and equitable" and "non-discriminatory" with regard to foreign investors and traders.[22] However, there seems no valid reasoning by which self-proclaimed progressives who advocate multilateral trade liberalization should not generally support these applications of Article 31(3)(c) as long as they do not cannibalize Article 31(2).

Given that all norms have some degree of negative externalities, there is no avoiding that these externalities must be weighed in the adjudication processes to determine what application of the law is most consistent with the preamble.[23] It is for this precise reason that allowing *amicus curia* briefs was, although risky, a necessary step for the WTO dispute settlement system. Far greater steps must be taken to institutionalize scientific and other intellectual expertise in the WTO adjudication process in order to help determine whether domestic policies are justifiable protections or disguised trade restraints.[24]

20. *See* Pauwelyn, *supra* note 6, at 575-76.

21. *See* Alvarez, *supra* note 3, at 629.

22. *Id.*

23. In *Shrimp-Turtle*, both critics and proponents of the AB ruling could claim their interpretation is more consistent with sustainable development. In this author's opinion, careful analysis shows that the Appellate Body's ruling was correct in this regard. The Appellate Body would do its public image well to give more detailed explanation of its rulings in light of the preamble.

24. For such recommendations, see Siobán D. Harlow, *Science-Based Trade Disputes: A New Challenge in Harmonizing the Evidentiary Systems of Law and Science*, 24 RISK ANALYSIS 443, 446-47 (2004).

3. METHODOLOGY FOR A "GLOBAL SUBSIDIARITY"[25] APPROACH TO TREATY INTERPRETATION

Merely justifying the incorporation of international law in the adjudication of WTO disputes does not adequately describe how it may address legitimacy critiques, nor does it give guidance to adjudicators who bear the heavy responsibility of jurisprudence. The preceding discussion identified the complexities that an increasingly powerful public sphere poses to the WTO dispute settlement system, but does not imply that adjudicators ought to tailor their rulings to please civil society. Not only would this be impossible to achieve, but it would cause irreparable damage to the institutional legitimacy as perceived by member states. Rather, adjudicators, in recognition of their own tenuous legitimacy, should provide greater deference to democratically accountable national authorities, which may then serve as a buffer for many of civil society's demands. Article 31 is then a critical judicial tool for WTO adjudicators as it permits "horizontal subsidiarity"[26] by which they may defer to other international norms beyond WTO law in the many instances where the WTO treaty is ambiguous. This holistic approach to treaty interpretation also permits vertical subsidiarity, as it allows national authorities greater deference on many 'trade and' issues, particularly environment, health, and human rights. Deference to the policy balancing of democratic member states does not deny WTO adjudicators their superior competence on substantive norms like nondiscrimination or procedural norms such as transparency and due process.[27] This methodology of jurisprudence not only fosters legitimacy in the short term, it also helps to mitigate normative conflicts inherent in a fragmented international legal system, which is critical to the long-term success of the international trade regime.[28] A look at the history

25. *See generally* Howse & Nicolaidis, *supra* note 1.

26. *Id.* at 75.

27. *Id.* at 87.

28. *See generally* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005) (giving a detailed discussion of systemic integration as implied in Article 31(1)(c)).

of WTO case law shows that the Appellate Body's jurisprudence has evolved towards this less mechanical and more holistic approach to treaty interpretation.[29]

There are several judicial principles pertinent to the holistic approach to treaty interpretation found in Article 31 of the Vienna Convention. WTO case law reveals that adjudicators have regularly resorted to the principle of judicial restraint—the so-called 'passive virtues'—based on the practice of U.S. judges. Alvarez aptly describes the traditional understanding of judicial restraint within the context of international law:

> International adjudicators share other characteristics that are likely to pull them away from the mainstream and back to demarcated rulings of *lex specialis*. . . . Common canons of construction to promote judicial restraint include the principle of judicial economy that dictates issuing an opinion on the narrowest possible ground or the principle of *non ultra petita* that requires judges not to decide matters except those raised by the parties.[30]

In the context of the WTO dispute settlement system, this notion of judicial restraint has led to interpretations of *lex specialis* that have been at times so narrow and textual as to infringe on state sovereignty beyond what members intended, particularly in cases of 'trade and' issues.[31] Such parochial legal reasoning may inhibit states from the legitimate pursuit of policies that promote non-trade agendas, as well as their legal responsibilities under other facets of international law. It is with great risk to their legitimacy that democratically unaccountable WTO adjudicators assume the task of restraining domestic policy based on contentiously narrow interpretations of WTO law. Nevertheless, in the tradition of domestic judges, WTO

29. Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique*, 9 J. INT'L ECON. L. 117, 120 (2006) (claiming that the Appellate Body diverged from its holistic trend in their ruling on *US-Gambling*).

30. Alvarez, *supra* note 3, at 619.

31. Several important WTO Panel rulings have committed such fault, including *Shrimp-Turtle*, *EC-Asbestos, EC-Hormones*, and *EC-Biotech*. Fortunately, the Appellate Body reversed or modified several panel findings in the first three of these cases.

adjudicators have often chosen to err towards 'dictionary jurisprudence,' albeit to a much lesser extent than GATT panels. Vast differences between mature, coherent domestic legal systems and the fragmented international legal system, coupled with an increasing understanding of issue linkages, make the application of traditionally passive virtues yield different and, at times, dubious results at the level of international adjudication. The residual effect of such narrow legal reasoning is to further aggravate the fragmented international legal system, particularly when it is done by the WTO, which has the most powerful adjudicative body of any international legal regime.

All international adjudicators are to some extent norm entrepreneurs far beyond their domestic counterparts. Treaties are less complete and their political contexts are often much more complex. The methodology herein suggests redefining judicial restraint and the so-called 'passive virtues' at the international level in a manner that is more appropriate given the fragmentation of international law and the democratic deficit of adjudicators. WTO adjudicators ought to show a judicial restraint that is more akin to the deference described above. This recognizes that in the case of international law, 'overreaching' does not just occur to the extent that adjudicators go beyond their mandate, but also to the extent that they mechanically interpret treaty text in a parochial manner. By taking the recommended approach, WTO adjudicators would be more 'passive' and less likely to be viewed by civil society and member states as overreaching.

The doctrine of margin of appreciation, most notably used in the European Court of Human Rights ("ECtHR"), is useful for the above methodology. Margin of appreciation is the principle by which an international tribunal may evaluate the application of international norms by national governments.[32] The two basic, yet intertwined, principles of the doctrine are judicial deference and normative flexibility, which together allow for a degree of discretion to be granted to national authorities as the primary appliers and interpreters of norms. Normative flexibility

32. *See generally* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2006) (giving a detailed discussion of the doctrine).

specifically applies to international norms that lack universal interpretation. These principles are implicitly recognized in WTO Agreements, as well as numerous instances of WTO case law. Consistent with margin of appreciation, Article 17.6 of the Anti-dumping Agreement states:

> In examining the matter referred to in paragraph 5:
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[33]

This notion of standard of review applies only to antidumping, and its inclusion came after great negotiation.[34] Ministers at the Marrakesh Conference decided that in three years this notion of deference would be reassessed to determine if it should be made more generally applicable.[35] Both the growing fragmentation of international law and the need for WTO law to balance diverse values require that Article 17.6 not only be made

33. Multilateral Agreements on Trade in Goods: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 17.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Anti-dumping Agreement].

34. *See generally* Steven Crowley & John Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, *in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 231 (Charlotte Ku & Paul F. Diehl eds., 2003) (giving a detailed analysis of the standard of review).

35. World Trade Organization, Ministerial Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/40-dadp2_e.htm [hereinafter Decision on Art. 17.6].

generally applicable, but that it have a practical effect. While Article 17.6 may currently be interpreted as an instance of WTO law contracting out of Articles 31 and 32 of the Vienna Convention, which repeatedly imply that treaty interpretation must be based on a single meaning of the text, this semantic conflict should be clarified via the Doha negotiations. Specific guidance should be incorporated in Article 17.6 that permits multiple interpretations in circumstances where there is a conflict of trade and non-trade norms, as well as when the issue relates to preambular goals.

A look at WTO case law shows that member states are permitted leeway given their relative preferences on certain matters. By way of one example, in *EC-Asbestos*, the Appellate Body held that "it is undisputed that WTO members have the rights to determine the level of protection of health that they consider appropriate in a given situation."[36] Similar declarations were made in *US-Tuna*,[37] *Shrimp-Turtle*, and *EC-Hormones*.[38] In addition to permitting a greater margin of appreciation, the methodology for legal reasoning proposed above specifically requires "operationalizing."[39] Article 31(3)(c) of the Vienna Convention, states that, "[t]here shall be taken into account, together with the context . . . (c) any relevant rules of international law applicable in the relations between the parties." Campbell McLachlan has suggested that Article 31(3)(c) implies a principle of "*systemic integration* within the international legal system" and that it serves as the international adjudicator's

36. Appellate Body Report. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 168, WT/DS135/AB/R (Mar. 12, 2001) (*adopted* Apr. 5, 2001).

37. Panel Report, *United States – Restrictions on Imports of Tuna*, ¶ 3.73, DS21/R - 39S/155 (not adopted, *circulated* on Sept. 3, 1991) [hereinafter *US-Tuna*].

38. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 253(g), WT/DS26/AB, WT/DS48/AB/R (Jan. 16, 1998). Here the Appellate Body rejected the panel's interpretation of Articles 3.1, 3.2, and 3.3, and thereby essentially allowed a margin of appreciation with regard to Member States' harmonization of international sanitary and phytosanitary measures. *See generally* Jenny Martinez, *Towards an International Judicial System,* 56 STAN. LAW REV. 429 (2003).

39. Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 102 (1998).

"master-key which permits access to all of the rooms" of international law.[40] For WTO adjudicators, operationalizing Article 31(3)(c) entails applying international law as needed to permit states the margin of appreciation necessary on 'trade and' matters, particularly in order to give meaning to the broad preambular goals.

3.1 *Shrimp-Turtle*

The landmark *Shrimp-Turtle* case brought the Appellate Body's ability to resolve trade externalities to center stage as it dealt with the competing values of environmental protection and trade liberalization. Specifically, the Appellate Body defined its task as "the delicate one of locating and marking out a line of equilibrium between the right of a member to invoke an exception under Article XX and the rights of the other members under varying substantive provisions . . . of the GATT 1994."[41] The "line of equilibrium," according to the Appellate Body, must safeguard that "neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the members themselves in that Agreement."[42]

In evaluating the United States' ban on the importation of shrimp caught without turtle excluder devices under Section 609 of the Endangered Species Act, the Appellate Body referred extensively to international environmental law in order to interpret the vague terms of Article XX, which offers an exemption to GATT obligations.[43] Article XX states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

40. *See* McLachlan, *supra* note 28, at 280-81.
41. *Shrimp-Turtle*, *supra* note 18, ¶ 159.
42. *Id.*
43. *Id.* ¶ 125-45.

> . . .
> (b) necessary to protect human, animal or plant life or health;
> . . .
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . .[44]

The Appellate Body specifically sought clarification from Article 56 of the UN Convention on the Law of the Sea ("UNCLOS"),[45] Agenda 21 of the Rio Declaration on Environment and Development,[46] and the Convention on the Conservation of Migratory Species of Wild Animals[47] to determine that natural resources constitute both living and non-living resources. Further, the Appellate Body referred to Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")[48] to conclude that, because they are listed as endangered, sea turtles are in fact "exhaustible."[49] Thus, the Appellate Body first found Section 609 to be qualified under Article XX(g), and subsequently turned to determine if it also met the standards of the chapeau.[50] The Appellate Body stated that the chapeau of Article XX was "but one expression of . . . good faith," which it recognized as a general principle of international law.[51] Article 31(1)(c) was then explicitly evoked to "interpret the language of the chapeau, seeking interpretive guidance, as appropriate, from the general principles of international law."[52] The Appellate Body found, accordingly, that

44. *Id.* ¶ 113.

45. *See* United Nations Convention on the Law of the Sea, art. 56, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

46. *See generally* Report of the U.N. Conference on Env't and Dev., June 3-14, 1992, U.N. DOC. A/CONF.151/26 (1992).

47. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, UNEP/CMS (entered into force Nov. 1, 1983), *available at* http://www.cms.int/documents/convtxt/cms_convtxt.htm.

48. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), App. 1, *opened for signature* Dec. 31, 1974, 27 U.S.T. 1087 (entered into force July 1, 1975).

49. *Shrimp-Turtle*, *supra* note 18, ¶ 25.

50. *See id.* ¶¶ 123, 134.

51. *Id.* ¶ 158.

52. *Id.*

Section 609 violated the chapeau by failing to allow for multilateral negotiations regarding the ban and instead was unilateral in nature, amounting to unjustifiable and arbitrary discrimination.[53]

First, by recognizing that Section 609 qualified under the language of Article XX(g) as a general principle of international law, the Appellate Body rejected the complainant's argument that the "exhaustible natural resources" only included mineral and other such non-living resources, a decision contrary to what was agreed upon at the time of GATT negotiations.[54] This demonstrated precisely the manner in which references to international law can permit adjudicators to modernize the meaning of WTO language in accordance with the preamble. This aspect of the *Shrimp-Turtle* Appellate Body Report was a critical step toward a more sustainable international trade regime and equally important for the legitimacy of the WTO in environmental matters.

The Appellate Body's interpretation of the chapeau of Article XX also exemplified the janus-faced nature of Article 31 of the Vienna Convention, which affirms that the primary means of treaty interpretation is based on the "ordinary meaning" of the terms in the treaty.[55] The Appellate Body determined that the ordinary meaning of "arbitrary or unjustifiable discrimination" was that members must attempt serious multilateral negotiations prior to taking unilateral actions.[56] In this manner, the policy-balancing goal of the United States was assessed via the incorporation of international law, but its implementation was still subject to the higher norms of WTO *lex specialis*. One would be remiss to underestimate the substantial impact of this opinion on the field of public international law. The finding that the United States was at fault because of its failure to negotiate multilaterally before taking unilateral action boldly asserts a notion of state responsibility to cooperate, which has implications

53. *Id.*

54. The Appellate Body pointed out that this 1947 definition of "exhaustible natural resources" is debatable itself, as the migratory fish species had already been considered such under two adopted GATT rulings. *Id.* ¶¶ 127-31.

55. *See* Alvarez, *supra* note 3, at 620-21.

56. *See Shrimp-Turtle*, *supra* note 18, ¶¶ 171-72.

far beyond WTO law.[57] Despite striking down Section 609, the Appellate Body's ruling was consistent with sustainable development, which requires coordinated and mutually supportive environmental and trade polices amongst states.[58] This concerted multilateral effort is particularly necessary to prevent the harm that "green protectionism" could likely have on developing countries. While developing countries often support environmental aims of developed countries, they need assistance in meeting these higher standards that unilateral protectionist policies do not unusually contain.[59] Moreover, the Appellate Body recognized that should multilateral negotiations fail—as they undoubtedly will at times—member states have every right to take unilateral action under Article XX.

The international trade of biofuels represents a foreseeable environmental concern that will require unilateral trade measures as a "stop gap" until a multilateral agreement is achieved.[60] Howse argues that according to the Appellate Body's second ruling in *Shrimp-Turtle*, not even multilateral negotiations are required before unilateral action, so long as the member taking the action adequately accounts for the different conditions in the different countries that will be affected by the policy.[61]

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57. *See* Alvarez, *supra* note 3, at 632-33.

58. As the Appellate Body noted, this approach is explicitly supported in Principle 12 of the *Rio Declaration on Environment and Development*. *See Shrimp-Turtle*, *supra* note 18, ¶ 41

59. BELLO, *supra* note 10, at 174-75.

60. *See generally* Stephanie Switzer, *International Trade Law and the Environment: Designing a Legal Framework to Curtail the Import of Unsustainably Produced Biofuel*, 6 J. INT'L TRADE L. & POL'Y 30 (2007).

61. According to Howse:

> The importance of negotiation to the operation of environmental trade measures is not discussed or even referred to in the AB's second ruling. This is apparently because the AB found, in its second ruling, that the U.S. was able to build into unilateral operation of its scheme sufficient flexibility, by certifying countries that had a program comparable in environmental effectiveness, even if it worked differently than the domestic U.S. regulation.

Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 509 (2002).

3.2 *EC-Biotech*

The legal reasoning of the panel in the *EC-Biotech* dispute is an example of an unnecessarily parochial approach taken by WTO panels and has raised questions as to the legitimacy of the dispute settlements system. The panel dealt specifically with whether the EC's regulatory approach to genetically modified organisms ("GMOs") based on the precautionary principle is permitted under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").[62] While Article 31(1)(c) permits access to all sources of international law "applicable in the relations between the parties," the panel in *EC-Biotech* unfortunately reiterated the reasoning of the GATT panel in *US-Tuna*, which declined to consider treaty law, except that which was binding on all 149 members of the WTO, thereby subsequently disallowing the vast majority of treaty law and limiting the adjudicators to customary international law.[63] Conversely, Pauwelyn correctly suggests that in the context of applying non-WTO law via Article 31(1)(c), the non-WTO law must reflect the "common intentions" of all WTO members. This does not infer that all WTO members must be bound by the non-WTO law, but rather that they are at least implicitly tolerant of it.[64] The dynamic nature of international norms makes this distinction of particular concern as it is critical that WTO adjudicators remain, to some extent, open to normative developments in other branches of international law.[65] According to the suggestion of Pauwelyn, the panel for *EC-Biotech* should have considered the *Cartagena Protocol on Biosafety*, on which the EC based its precautionary stance to GMOs.[66] Currently, sixty eight WTO members have ratified the *Cartagena Protocol*

62. Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products,* 1, WT/DS291,292,293/R (Sept. 29, 2006) (*adopted* Nov. 21, 2006) [hereinafter *EC-Biotech*].

63. *See id.* at 10-11; *cf. US-Tuna*, *supra* note 37, ¶ 4.27.

64. For further discussion, see Pauwelyn, *supra* note 6, at 575–76.

65. Caroline Henckels, *GMOS in the WTO: A Critique of the Panel's Legal Reasoning in EC — Biotech*, 7 MELBOURNE J. INT'L L. 278, 286-88 (2006).

66. *Id.* at 301.

and another thirty three have signed it.[67] This protocol deals specifically with the international trade of GMOs and the risks therein associated with biological diversity. The *Cartagena Protocol*, which was created with the explicit intention to be compatible with members' obligations to other international agreements,[68] certainly could have aided the panel in their interpretation of the terms of Article 5.7 of the SPS Agreement to determine the members' rights and obligations.[69] Moreover, the precautionary principle, while not explicitly stated in the SPS Agreement, is entirely relevant and sure to resurface in WTO disputes as *opinio juris* on the matter becomes increasingly clear. The panel therefore missed an important opportunity, regardless of the degree of its normative flexibility, to embrace the principle in a manner that would give clarity to Article 5.7.

3.3 Conclusion

The WTO finds itself in an uneasy position where much is expected of it as the dominant legal regime in a fragmented international legal system that lacks a hierarchy of norms. It has become a lightning rod for globalization's critics; it is upheld as having the potential to be a progressive transnational economic constitution; and ardent free traders wish to protect and advance trade in the narrowest manner. The first step to fostering greater WTO legitimacy is to diminish the drama and the expectations

67. *See* Convention on Biological Diversity, *Parties to the Protocol: Status of Ratification and Entry into Force* (Aug. 18, 2010), http://bch.cbd.int/protocol/parties; *see also* Marc Busch & Robert Howse, *A (Genetically Modified) Food Fight: Canada's WTO Challenge to Europe's Ban on GMProducts*, C.D. HOWE INST. COMMENTARY Sept. 2003, at 186 n.12, *available at* http://www.cdhowe.org/pdf/commentary_186.pdf. Howse and Busch note that the United States is the sole disputant not to have signed or ratified the *Cartagena Protocol*, although it has signed the *Convention on Biological Diversity*, to which the Protocol is a supplementary agreement. The United States did actively participate in the drafting of the *Cartagena Protocol* and conveyed that the precautionary principle was valid international law.

68. The *Cartagena Protocol* preamble reads: "*Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements." Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Preamble, *opened for signature* May 15, 2000, 2226 U.N.T.S. 208 (entered into force Sept. 11, 2003).

69. Henckels, *supra* note 65, at 301.

that have over the years become associated with this one organization. Permitting greater deference to the judgment of democratically elected national authorities is an important start in this regard. A methodology has been shown whereby this can be remedied via greater incorporation of international law into WTO jurisprudence.

While this paper has dealt primarily with the application of Article 31 in 'trade and' disputes relevant to the preamble, the interaction of WTO *lex specialis* and international law is even more complex, as it encompasses a wide range of procedural and substantive norms. Additionally, this interaction affects a variety of cases, from the landmark rulings involving 'trade and' matters like *Shrimp-Turtle* to the most mundane cases such as *EC-Chicken classification*.[70] Regardless of the law that members will negotiate into the WTO Agreement, it is clear that there are various factors both encouraging and restricting the proliferation of international norms considered in WTO dispute settlement.[71] Such organic growth is certainly not constrained to the WTO and proves that the international legal system has taken on a life of its own. Figuratively speaking, the normative ship that is international law has set sail and it has inevitably gone beyond what the member states originally intended.

Broad, yet common, goals such as sustainable development and general welfare, which all branches of international law purport to promote, require mutually supportive legal regimes. It can even be argued that the very long-term realization of the specific norms of each regime requires this same mutual support. To the contrary, however, legal parochialism remains a significant impediment. While there are many reasons for this reality, international adjudicators have the ability and, increasingly, the desire to abate some of this contention. Alvarez refers to this as "the self-perceived role of international judges and the developing 'common law' of international tribunals."[72] In a rapidly globalizing world, in which issues are increasingly

70. *See, e.g.*, Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005).

71. *See* Alvarez, *supra* note 3, at 612-22.

72. *Id.* at 618-20.

transnational and transsubstantive, most international adjudicators appreciate, at least implicitly, the desirability of systemic integration and the emergence of a functioning international judicial system based on common procedural rules and interpretation of norms. In the words of Jenny Martinez, this would serve "many values, among them, predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations."[73]

If this grand vision can be said to exist among international adjudicators, even vaguely, then at least the normative ship has direction. The impediments to the development of a coherent international judicial system are immense and approaching this end with zeal could likely do far greater harm than good. At a minimum, adjudicators should adopt a policy of "do no harm" in this regard. Martinez refers to this as "system-protective reasoning,"[74] whereby adjudicators "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."[75]

From the once self-contained era of GATT, the WTO Appellate Body has joined in a constructivist trend towards holistic treaty interpretation within the realm of public international law. Given the exceedingly difficult task of adjudicating international trade matters in accordance with terms as extraordinarily dynamic as "sustainable development," the Appellate Body should be praised for the cautious steps it has taken to evolve the WTO treaty via case-law. Nevertheless, WTO jurisprudence remains unacceptably far adrift from its preamble. WTO adjudicators must remain increasingly open to interpret trade law relevant to the ever-changing backdrop of public international law. In this sense, the ambiguities of the WTO treaty are perhaps a virtue, allowing adjudicators the creative license necessary in the context of their work.

73. For detailed analysis of the emerging international judicial system, see Martinez, *supra* note 38, at 429.

74. *Id.* at 528.

75. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 567 (1987).