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SOURCES OF INTERNATIONAL LAW IN THE DISPUTES SETTLEMENT OF WTO

Master thesis

Supervisor:
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TABLE OF CONTENTS

ABBREVIATIONS

CITES	Convention on International Trade of Endangered Species
DSB	Dispute Settlement Body
DSU	Dispute Settlement of Understanding (Annex II to WTO Agreement)
EC	European Communities
ICJ	International Court of Justice
ILC	International Law Commission
GATT	General Agreement on Tariffs and Trade
MEA	Multilateral Environmental Agreement
PCIJ	Permanent Court of International Justice
PPMs	Process and Production Methods
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

INTRODUCTION

One of the most complicated questions arising in contemporary international law is the question of the interrelationship of the so called self-contained regimes law and the international law. Arguably among the most sophisticated self contained regimes is that of the World Trade Organization.[1]

The World Trade Organization established upon the conclusion of decade lasting Uruguay Round and signing Marrakesh Agreement[2] in 1994 (succeeding GATT 1947)[3], now accounting membership of 153 parties[4] is the most powerful organization dealing with number aspects of international trade laid down in some 60 international agreements under one umbrella. These agreements regulate such areas as trade of goods, including tariffs, customs, quotas (GATT Agreement), trade of services (GATS Agreement), subsidies (Subsidies Agreement) labeling standards (TBT Agreement), intellectual property rights (TRIPS Agreement), sanitary and phytosanitary measures (SPS Agreement) etc. Moreover Annex II to the WTO Agreement - Dispute Settlement of Understanding[5] establishes principles of dispute settlement process and defines applicable law, as well as regulates WTO retaliation (countermeasures) system. Based on the

[1] International Law Commission in its recent report has qualified WTO being a self-contained regime. Report on Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006 [therein after – ILC Report on Fragmentation]. See p. 72.

[2] Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments – Results of the Uruguay Round, Annex 2, 33 I.L.M. 1197 (1994) [hereinafter – WTO Agreement].

[3] General Agreement on Tariffs and Trade (opened for signature 30 October 1947, provisionally entered into force on 1 January 1948), 55 U.N.T.S. 187 [hereinafter – GATT 1947]. It should be mentioned that GATT 1947 supposed to operate only on provisional basis, as an interim agreement until the establishment of International Trade Organization (ITO), yet ITO Agreement was never ratified by the US and ITO was never established, thus GATT 1947 operated until 1995, when the WTO Agreement was signed. Consequently in 1995 GATT 1947 was succeeded by GATT 1994, General Agreement on Tariffs and Trade 1994, signed 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 4187, 33 I.L.M. 1153 [hereinafter – GATT 1994]. See Narlikar, A. *The World Trade Organization: A very short introduction*. Oxford: Oxford University Press, 2005, pp. 10-15.

[4] WTO Trade Profiles 2008, WTO Secretariat, 2008, available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226.

abovementioned considerations some support the view that WTO is a completely closed regime[6].

Yet virtually it is impossible to avoid legal situations when application of the WTO law falls under force, influence of or in the collision with other sources of international law, be it international human rights law, environmental law, competition law etc.

A vivid example is a clash between trade regulations and rules regarding environmental protection. As pointed out by one author, "[t]he pursuit of trade and environment is inherently divisive. Most nations are keen to pursue goals in both areas. However they are likely to do so in way that differ from other nations depending on varying preferences, available resources and other factors. Hence, disputes are likely to arise between nations pursuing different strategies."[7] The same is pertinent with regard to applicable sources of international law. WTO party enacting environmental measure which possibly violates WTO law may be eager to claim justification under favourable rules of non-WTO international law. Opposing WTO party may be willing to claim either invalidity of those sources of non-WTO international law or since WTO disputes are decided in the dispute settlement[8] bound by WTO rules, challenge applicability of that law in front of the judiciary.

Consequently the **object of the thesis** is the WTO regime and its dispute settlement system in international law.

The subject of the thesis is international law applicable in the disputes settlement of the WTO. WTO dispute settlement is the ring in which the law applied, be it WTO law or other

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[6] See Bello, J. The WTO Dispute Settlement Understanding: Less is More. *American Journal of International Law*, No. 90, 1996, p. 416.

[7] Trish, K. *The Impact of the WTO: Environment, public health and sovereignty*. Edward Elgar Publishings, 2007, p. 2.

[8] Term "Disputes settlement system of WTO" as it is used in the thesis refers to disputes settlements performed by dispute panels and Appellate Body of WTO (for the matter of convenience author will also call dispute panels and Appellate Body using common term "WTO judiciary"). In fact when legal differences occur between WTO parties, they are required to establish consultations and mediation attempting to solve the matter. If parties fail to settle dispute peacefully within 60 days, then dispute panel is established. Dispute panel upon examination of the dispute issues report (recommendation), which may be appealed to the Appellate Body – panel of appellate instance.

Yet, in order to become legally binding the report (recommendation) of the panel or if appealed of the Appellate Body has to be approved by the Dispute Settlement Body. The Dispute Settlement Body is a session of the General Council of the WTO: all of the representatives of the WTO member governments. In the WTO, adoption process requires that the ruling of the panel (that might have been amended by the Appellate Body) should be adopted "unless" there is a consensus of the members against adoption. Virtually it means automatic adoption of all panels\ reports since winning party of the dispute has no reason to object. The GATT 1947 had an inverse order and required all members consensus for adopting report.

international law, manifestly appears. Arguably the law accepted and applied in the disputes by WTO panels and Appellate Body is the law that may be legitimately applied by WTO parties all the time.

The aim of the thesis is to provide comprehensive understanding what sources of non-WTO international law and how they are or might be applied in the disputes settlement of WTO.

Thesis of the work is that all sources of non-WTO international law are applied in the dispute settlement system of WTO despite WTO inherent status of self-contained regime.

Actuality of the topic is illustrated by the fact that virtually every aspect of economic affairs is affected by the WTO legal rules at least indirectly, if not actually, and it's coverage already amounts to more than 93 percent of world trade and 87 percent population.[9] In the international plane these rules also affect or regulate areas that are regulated by non-WTO international law thus we have a number of potential clashes between obligations under WTO law and obligations under other sources of international law. If WTO parties fail to negotiate solution on one's adopted measures promoting environmental protection, human rights or other values established in various sources of international law at the expense of trade commitments embraced in WTO law, then parties submissions are examined in the dispute settlement of WTO. Hence understanding, what is the role of non-WTO international law enshrining those relevant values (environmental protection, human rights, etc.,) in the disputes of WTO is of paramount importance.

As for **the novelty of the topic**, in the words of eminent Professor John H. Jackson referring to the WTO: '[T]he changes legal systems currently face are enormous, whether compared with previous decades or with previous centuries.'[10] Consequently despite of recently increasingly growing volume of researches in this field, due to unparalleled developments in international law related with such areas as environmental protection and human rights, the scarcity surrounding extents to which general international law may play role in the contemporary WTO regime is more than controversial.

With respect to the **scope of the thesis**, regarding limited space, author's analysis is mainly devoted to the WTO – environmental protection area and studies of relevant GATT/WTO panels/Appellate Body reports as well as scholarly writings. Arguably high number of disputes

[9] 2002 International Trade Statistics Yearbook. United Nations, vol. II, 2004, p. 467; 2004 World Development Indicators. World Bank , 2004, p. 38.

[10] Jackson, J. H. *Sovereignty, the WTO, and Changing Fundamentals of International Law*. Cambridge: Cambridge University Press, 2006, p. 12.

and mounting environmental concerns echoed by heavily growing environmental law show that this is one of the most topical fields in the contemporary state of international law.

As for the **structure of the thesis,** it consists of 6 chapters.

The first chapter is aimed to address the mechanics of the WTO legal regime, analyze arguments for the WTO law independence from other sources of international law as well as arguments for 'green light' application of non-WTO international law in the disputes settlement of WTO.

The subsequent chapters sequence is influenced by the model of sources of international law enshrined in Article 38(1) of the Statute of the International Court of Justice[11]. It provides that:

"[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

As eminent professor Brownlie states these provisions 'represent the previous practice of arbitral tribunals, and Article 38 is generally regarded as a complete statement of the sources of international law'.[12]

Consequently the second chapter is devoted to analyze role of international customary law in the disputes settlement of WTO. Primarily these are international customary rules of interpretation equating provisions of Article 31 and Article 32 of Vienna Convention on the Law of Treaties.[13] Author also elaborates on the status issues of the so-called precautionary principle/approach as have occurred in the *EC-Hormones* case.

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[11] Statute of the International Court of Justice, entered in force in 24 October 1945, 59 Stat. 1031, T.S. No. 993.

[12] Brownlie, I. *Principles of Public International Law*. Oxford: Oxford University Press, 2008, 7th ed. p. 5.

[13] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331.

The third section examines role of non-WTO international treaty law. This is done by analyzing multilateral environmental agreements (MEAs).

Fourth part deals with the questions of applicability of general principles of international law. In WTO disputes settlement these can be linked with the good faith and equity.

Fifth chapter argues that WTO disputes settlement is also open for application of judicial decisions within the meaning of Article 38 (1)(d) of the ICJ Statute.

Sixth part succinctly elaborates on other possible sources of international law: teachings of the most qualified scholars and even "mysterious" role of the so-called soft law.

Methodology of the thesis: due to particularity of the chosen topic author in writing of the present thesis employs traditional theoretical methods[14]: abstraction, analysis, analogy, generalization, deduction, induction, etc. The research is based on examination of GATT 1947/WTO panels and Appellate Body reports, as well as respective researches and writings of leading and less known scholars.

As for **thesis practical significance,** being able to identify the degree of the WTO regime's and disputes settlement system openness to other sources of international law would make several outcomes. Generally it would mean that WTO agreements cannot be applied in a manner ignoring provisions of other sources of international law. Thus a validity of a particular measure (law, regulation, order, conduct triggering legal consequences, etc.) designated within the WTO would depend not only on the qualifications embraced in the WTO law but also upon the rules of sources of non-WTO international law. This would mean that the WTO cannot ignore developments in international law, especially in such sensitive areas as environmental protection and human rights. By the same token thesis could bring more clarity in explaining the logic, how WTO panels and Appellate Body themselves understand the role and content of non-WTO international law they examine and employ in the disputes settlement. This may help to forecast future developments in law application process in the disputes settlement of WTO as well as the whole regime. Arguably knowledge of applicable international law would entitle any WTO party before enacting potentially inconsistent WTO measure to make a prior assessment on its legality, based not only on the WTO law, but also taking into consideration applicable international law and prevent rise of otherwise likely (defeat in a) WTO dispute.

[14] Tidikis, R. Socialinių Mokslų Tyrimų Metodologija. Vilnius: Lietuvos teisės universiteto Leidybos centras, 2003, p. 369.

1. International Law in the Disputes Settlement of WTO: Two Approaches

As already mentioned there are two dominant views in academic plane and in fact practice of the GATT 1947/WTO disputes settlement: one denying application of non-WTO international law and another arguing the opposite way. For the convenience author called the former – "red-light" approach and the latter – "green-light" approach. It is impossible to explore applicability issues of international law in the WTO without understanding the basic ideas of these discrepant approaches. In order to understand the mechanics of the law application within the GATT 1947/WTO disputes settlement we first need to realize how the GATT 1947/WTO and their respective dispute settlement systems are perceived to function and operate with its own sources of law.

1.1. Red-light Approach on Application of Sources of non-WTO International Law

Specificity of the WTO in the International Law: Self-Contained Regime

The first thing that makes application of the sources of international law complicated is WTO's status of self-contained regime (special regime)[15] within international law. International Law Commission defines self-contained regime as a subcategory of lex specialis within the law of State responsibility.[16] Hence self-contained regime covers the case where a special set of secondary rules claims priority over the secondary rules in the general law of State Responsibility.

Yet, generally, International Law Commission distinguishes two separate uses for the notion of "self-contained regime". In a narrow sense, the term is used to denote a special set of secondary rules under the law of State responsibility that claims primacy to the general rules concerning consequences of a violation[17]. In a broader sense, the term is used to refer to

[15] ILC Report on Fragmentation proposes to use term "special regime", see p. 72.

[16] Id., p. 66.

[17] Example could be *ICJ Hostages* case, where the Court identified diplomatic law as a self-contained regime precisely by reference to the way diplomatic law had set up its own "internal" system for reacting to breaches. See *Case concerning the United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran) 1980 I.C.J. Reports., p. 41, para. 86.

interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law[18]. In this wider sense, self-containedness fuses with international law's contractual bias: where a matter is regulated by a treaty, there is normally no reason to have recourse to other sources.[19] In the latter case special rules and techniques of interpretation and administration are thought to apply.[20]

Arguably GATT 1947 (and to great extent the WTO) and their disputes settlement systems were thought to operate in this way.

First, generally GATT 1947 and later on the WTO agreements is comprised of special rules regulating a very specific field - international trade. Precisely, WTO agreements being international treaties are aimed at creating new (or self-contained) type of rules on international trade for mutual conduct which was arguably previously neither regulated to such extent by the international customary law, neither by general principles or other sources of international law.[21] In this sense WTO law can claim status of lex speciallis over the rest of international law.

Secondly, WTO law determines techniques and rules of interpretation and application. Dispute Settlement of Understanding limits disputes scope to the legal issues identified by the parties to the dispute.[22] Moreover, application of law is limited to the covered agreements of the WTO, which itself have to be interpreted in accordance to customary rules of interpretation of public international law.[23] Finally, WTO disputes settlement system excludes unilateral determinations of breach or countermeasures outside the "specific subsystem" of the WTO-regime, what is contrary to the general principles of states responsibility.[24] Thus it seems that in case of dispute there is no possibility for WTO party to rely on other sources of international law

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[18] See *S.S. Wimbledon case* of the PCIJ on the status of Kiel Canal that was created under Treaty of Versailles. S.S. "Wimbledon", P.C.I.J. Series A, No. 1 (1923), p. 23-24.

[19] ILC Report on Fragmentation, p. 68.

[20] Id.

[21] The dominant academic position is that WTO is not based on customary law and it is hard to find contra-arguments.

[22] Article 1.1 DSU.

[23] Article 3.2 DSU.

[24] Article 23 DSU. Also see ILC Report on Fragmentation, p. 128.

neither when unilaterally determining breach, using countermeasures or building legal position in the dispute settlement system.

Thirdly, some authors argue that general international law should not be applied in the administration of WTO treaties as the latter differ fundamentally in their general orientation from the orientation of regular public international law: where the latter is based on State sovereignty, the former derives its justification from the theory of comparative advantage. Thus even in case of interpretation the principles of interpretation inspired by the latter may often be in complete contrast with those inspired by the general international law.[25]

The law applied by the Panels in GATT 1947 era case law perfectly demonstrates most of these features.

Practical illustration (1): Applicable Law in the Disputes Settlement under GATT 1947

GATT 1947, which was regulated issues on trade of goods and has remained in force until 1995, Article XXIII conferred jurisdiction on panels only in respect of claims under the GATT, not in respect of claims under any other norm of international law[26]. Yet, the outcome of interpretation and application of such regulation was equating category "jurisdiction" with category "applicable international law" in the disputes settlement.

In the 1984 panel report on *Canada – Administration of the Foreign Investment review Act*, the United States challenged the GATT consistency of Canadian investment legislation. At the subsequent GATT Council meeting, many parties have expressed 'doubts whether the dispute . . . was one for which the GATT had competence since it involved investment legislation, a subject not covered by the GATT'.[27] In response, the US contended it was attempting merely to challenge 'the two specific trade-related issues mentioned in the terms of reference' of the panel. Canada replied that 'the terms of reference ensured that the examination would touch only on trade matters within the purview of GATT'. Consequently the GATT Council decided that 'it be

[25] Dunoff, J. The WTO in Transition: Of Constituents, Competence and Coherence. *George Washington International Law Review*, vol. 31, 2001, p. 991-992.

[26] Pauwelyn, J., *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press, 2003, p. 456.

[27] Panel Report, adopted on 7 February 1984, L/5504, BISD 30S/140. P. 141, para. 1.4.

presumed that the Panel would be limited in its activities and findings to within the four corners of GATT'.[28]

In the 1984 panel report on *United States – Imports of Sugar from Nicaragua*, the US stated that 'it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms'.[29] The US argued that its reduction in Nicaragua's sugar imports 'was not taken for trade policy reasons' and 'was fully justified in the context in which it was taken'. It went to further state that 'attempting to discuss this issue in purely trade terms within the GATT, divorced from the broader context of the dispute, would be disingenuous' and that it 'did not believe that the review and resolution of that broader dispute was within the ambit of the GATT'.[30] However the panel responded, that US measures 'were but one aspect of a more general problem' and that, pursuant to its terms of reference, it would examine those measures 'solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute'.[31]

In the 1988 panel report on *Canada – Measures Affecting Exports in Unprocessed Herring and Salmon*, the panel concluded at the end of its report that:

> "Canada referred in its submission to international agreements on fisheries and the Convention on the Law of the Sea. Panel considered that its mandate was limited to the examination of Canada's measures in the light of the relevant provisions of the General Agreement. This report therefore has no bearing on questions of fisheries jurisdiction."[32]

Hence the law applied by "red-light" approach GATT 1947 panels - was precisely limited to the 'four corners of GATT'. Yet, in 1995 upon establishment of the WTO which succeeded GATT 1947, renewed rules of dispute settlement and perception of applicable law were introduced. In order to better understand how it is still possible to continue sticking to the "red-light" approach in disputes settlement of WTO, author provides one more succinct hypothetical example as an illustration and basis for further discourse.

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[28] Id., confirmed by the panel at p. 157, para. 5.1.

[29] Panel Report, adopted on 13 March 1984, BISD 31S/67, L/5607, p. 72.

[30] Id.

[31] Id., p. 73, para. 4.1.

[32] Panel Report, adopted on 22 March 1988, BISD 35S/98, L/6268, p. 115, para. 5.3.

Practical illustration (2): Hypothetical Dispute of Environmental Protection v. Trade in the WTO (GATT 1994)

The dependency upon special rules in disputes settlement of WTO is embraced in the Dispute Settlement of Understanding, which Article 3.2 provides that WTO panels are obliged **'**to *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements [emphasis added]'. It should be emphasized that pursuant to Article 7 DSU "covered agreements" means all of the agreements annexed to the WTO Agreement, including GATT 1994 which formally replaced GATT 1947.[33]

The scope of applicable law is also dependant upon scope of identified legal issues and legal basis. Article 1.1 DSU requires parties to identify the legal issue of the dispute, and Article 6.2 DSU to identify the legal basis, that is specific provisions of a particular agreement, in order to make a request for the establishment of a panel.

Envisage that one member state of the WTO called Ecoland designates a law which seeks to reduce green house emissions in order to:

1) Fulfill obligations of that state under a recently concluded fictional Convention on Global Climate Change, which requires every member state to reduce green house emissions (GHE) by 25 % till 2020.
2) Protect it's human, animal, plant life and health and prevent extinction of valuable species listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[34] for raising temperature of climate is believed to cause draught of mountain rivers that are the main source of pure drinking water and prerequisite for Ecoland species to sustain their existence.

Ecoland law charges all meat of cattle produced in the non eco-farms with additional 50 % tax. The rationale for the measure is recent scientific researches that have determined that possibly one of the most important contributors to raising global warming in the region is

[33] There are some 30 covered agreements under the WTO umbrella.

[34] Convention on International Trade in Endangered Species of Wild Fauna and Flora, (opened for signature 3 March 1973, entered into force 1 July 1975) 993 U.N.T.S. 243.

agriculture, primarily methane gas created by the cattle.[35] The GHE may be neutralized if the cattle are stored in eco-farms, which collect all methane gases produced.[36]

Key issues

Clearly Ecoland's law *prima facie* violates GATT 1994 obligations regarding national treatment rule (Article III GATT 1994)[37]. Consequently one of the cattle meat importer states – WTO party Emitant objects to the law and upon failing negotiations between disputants on the validity of the Ecoland measures, establishment of the dispute panel is instituted. Since *prima facie* WTO law (Article III GATT 1994) is violated (legal identification of the issue and basis pursuant to Articles 1.1 and 6.2 DSU). Generally Ecoland in order to legitimately justify it's law (50 % higher taxes to Emitant imported cattle meat) has to prove its law consistence with WTO law, more specifically requirements of Article XX (b) or (g) GATT 1994.

The relevant text of Article XX GATT 1994 reads as follows:

"*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 Member of measures:*

(b) necessary to protect human, animal or plant life or health;[38]

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[35] Rosenthal, E. From hoof to dinner table, a new bid to cut emissions. *International Herald Tribune*, 4 December 2008: 'Producing a pound of beef creates 11 times as much greenhouse gas emission as a pound of chicken and 100 times more than a pound of carrots'.

[36] Id.

[37] National treatment rule prohibits discrimination between domestic and imported goods that favors the former at the cost of the latter. The relevant Article III GATT 1994 states:
"1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amount or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products.
3. The products of the territory of any contracting party imported into territory of any other contracting party shall not be subjected, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 (…).
4. The products of the territory of any contracting party imported into the territory of any contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their international sale, offering for sale, purchase, transportation, distribution or use."

[38] Emphasis should be given to the fact that there used to be attempts to question environmental nature of Article XX paragraph (b). i.e. Shrybman, S. International Trade and the Environment: An Environmental Assessment of the

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

What does it imply? As far as we have been talking about these issues, we remained under the legal framework of the WTO. But is it really possible to avoid application of other sources of international law, for instance Convention on Global Climate Change which could entitle states to take trade restrictive measures against states producing elevated quantities of green house gases, like Emitant or CITES which allows restrictions in order to protect some threatened species?

Scholar who continues arguing for a negative answer in contemporary disputes settlement system of WTO, Javier Pons characterizes the rationale of sole application of the WTO rules in the disputes in a following way:

> "[b]eyond a panel's particular findings, other rules of international law (…) could justify certain behavior in contrast to the special GATT/WTO rules. In such a case, the value of a Panel/Appellate Body report would be characterized by its relativity, since the 'losing' party could continue to invoke other international law rule, in relation to which it had not operated a third party adjudication, so as to legitimate its conduct."[39]

However as invalidated by Professor Pauwelyn, this is exactly the 'ostrich' approach'.[40] There is no need for the WTO treaty explicitly to incorporate such non-WTO justifications, nor for the defendant to go to another tribunal to see this non-WTO law applied.[41]

1.2. Criticism on non-use of non-WTO International Law in Disputes Settlement

The fallacy of "red-light" approach is extensively scrutinized in the lengthy research of Professor Pauwelyn presented in "Conflict of Norms in Public International Law: How WTO

General Agreement on Tariffs and Trade. *The Ecologist,* no. 20, 1990, p. 34. Arguably, after recent Appellate Body's ruling in *Brazil-Retreated Tyres* (*Brazil – Measures affecting imports of retreated tyres*, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R), where Appellate Body mentioned environmental protection as such being implicitly included in the "protection of animal or human or plant life or health" provision of Article XX (b) GATT, this academic debate has became vain.

[39] Pons, F. J. Self-Help and the World Trade Organization, in Mengozzi P. (ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Milan: Dott A. Giuffre Editore, 1999, p. 102.

[40] Pauwelyn, J. *Conflict of Norms in Public International Law*, p. 459.

[41] Id.

Law Relates to Other Rules of International Law". Here he concludes that panels' limitation of examination in terms of treaty interpretation and validity of GATT claims to GATT provisions only is erroneous for the reason panels do not differentiate ***between jurisdiction and applicable law.***[42]

As already said the WTO panels have jurisdiction only to decide on claims under WTO covered agreements. Article 1.1 of DSU applies merely to the 'disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in the Appendix 1 to the [DSU]', so called WTO covered agreements. However arguably the scope of the applicable law is a matter distinguished from the jurisdiction of the WTO judiciary. Analogy can be found in renowned international cases.

In the ICJ *Advisory Opinion on Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the World Court held:

> "[a] rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a winder framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration."[43]

Identical approach was employed in the *Lockerbie cases*, whereas the ICJ had jurisdiction to consider Libyan claims only under the Montreal Convention, yet this did not prevented the World Court from examining other sources of international law, in particular UN Security Council Resolution 748 invoked in defence by the United Kingdom and US, as a part of the applicable law.[44]

Thus faced with the argument that an allegedly WTO inconsistent trade restriction is justified under an environmental treaty, human rights treaty or international customary law,

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[42] See Pauwelyn, J. *Conflict of Norms in Public International Law,* p. 456-463.

[43] 1980 I.C.J. Reports 73, p. 76.

[44] Pauwelyn, J. Human Rights in WTO Dispute Settlement, in *Human Rights and International Trade*, (Cottier T., Pauwelyn J., Burgi E. eds.) Oxford: Oxford University Press, 2005, p. 212; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. US), Provisional Measures, 1992 I.C.J. Reports, p. 114, para. 42.

WTO panels cannot disregard these sources of international law or act in a clinical isolation of it[45] on the basis the law of the question is not related with the law determining panel's jurisdiction. Otherwise in the rephrased words of ICJ *Advisory Opinion on Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, WTO panel's legal reply (solution) would be subject to lack of pertinence and efficiency.

It should be pointed out that critics of Pauwelyn writes that nevertheless 'the default rule for international law is auto-interpretation, and states are not held under international law to have accepted mandatory jurisdiction of international tribunals to apply law without their consent'.[46] However a strong contra-argument can be found in ILC Report, which concluded that "[I]f a legal subject invokes a right based on "special law", then the validity of that claim can only be *decided by reference to the whole background of a legal system* that tells how "special laws" are enacted, what is "special" about them, how they are implemented, modified and terminated."[47] WTO is the international organization and it's regime including disputes settlement system is created via international law itself, thus WTO cannot disallow background nurture of its "Majesty Creator – International Law" whether in settling legal disputes or as a whole.

Though there are more interesting academic arguments against "red-light" approach, "the jurisdiction-applicable law" rationale and ILC comments seems to be sufficiently persuasive to turn on "green – light" approach at least in theory.

1.3. Issues of Green-light Approach on Application of non-WTO International Law

Even if we admit application of non-WTO international law in disputes settlement of WTO, one may nevertheless doubt what does the term "non-WTO international law" cover? According to Pauwelyn there are five types of possible relationship of the "WTO rules - other rules of international law", but only two of them refer to other-sources of international law that may modify applicable WTO law:

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[45] United States – Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body) [hereinafter - *Reformulated Gasoline*, AB], p. 18.

[46] See Trachtman, J. Review of J. Pauwelyn's Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, American Journal of International Law, vol. 98, 2004, pp. 855-61 in Lester, S.; Mercurio B., *World Trade Law: Text, Materials and Commentary*. Hart publishing 2008, p. 114-115.

[47] ILC Report on Fragmentation, p. 65.

- Non-WTO rules that already existed when the WTO treaty was concluded (April 15, 1994) and that are (a) relevant to and may have an impact on WTO rules; and (b) have not been contracted out of, deviated from, or replaced by the WTO treaty. . . general international law… other treaty rules that regulate. . . the trade relations between states (such as environmental conventions . . . conventions. . .);
- Non-WTO rules that are created subsequent to the WTO treaty . . . and (a) are relevant to and may have an impact on WTO rules; (b) either add to or confirm existing WTO rules or contract out of, deviate from, or replace aspects of existing WTO rules; and (c) if the latter is the case, do so in a manner consistent with the interplay and conflict rules in the WTO treaty and general international law.[48]

Is this list reasonable? We may test this the concept by identifying possibly applicable sources of international law in a hypothetical Emitant/Ecoland case.

Despite a legally identified situation under WTO law – GATT Article III violation and probable GATT Article XX (b) and (g) justification (basis for WTO panel's jurisdiction), **first,** Ecoland's trade restrictive law may be a sequence of obligations stemming out of other source of international law – i.e. the Convention on Global Climate Change. Since Ecoland's law aims to discourage use of non-eco farms for producing cattle meat in order to reduce level of GHE emissions as undertaken by the Convention and provides for trade restrictions against states non-complying with certain standards, this law may be justified referring to WTO relevant legal obligations, which contract out of, deviate from, or replace aspects of existing WTO rules. Hence we have applicability issue of non-WTO international law rules that are created subsequent to the WTO treaty (GATT 1994), relevant to it and potentially having an impact on WTO rules (See chapter 3).

Secondly, the relevance and role of the Convention on Global Climate Change can be determined only via rules of interpretation of international law (arguably these are non-WTO rules that already existed when the WTO treaty was concluded). This is legitimized by the WTO law itself, accepting application of customary rules of interpretation of public international law (Article 3.2 DSU). By the same token**,** Ecoland may will to justify its trade restrictive law on a precautionary basis which is recognized neither as a legal concept/principle nor a source of law

[48] Pauwelyn, J. *The Role of Public International Law in the WTO*, p. 540-541.

within the WTO, but has firm roots in the international environmental law and possible status of custom. Thus we have applicability issues of non-WTO customary rules (See chapter 2).

Thirdly, Ecoland may seek to rely on general principles of law and even invoke more sources of international public law: favourable judicial decisions of international tribunals, teachings of the most qualified scholars, even soft law instruments (See chapters 4-6).

As far as we consider Pauwelyn's concept it seems that the latter sources of law do not belong to it. However, Pauwelyn's topic in the research is. . . hierarchy between legally binding norms.[49] Since judicial decisions, teachings of qualified scholars, soft law, also to some extent general principles of law are not legally binding norms per se, they do not fall under Pauwelyn's concept.

Yet, as Rosalyn Higgins expressed in the first two sentences of her 'General Course on Public International Law': 'International law is not rules. It is a normative system. . . harnessed to the achievement of common values'.[50] For the abovementioned reasons in author's view potentially applicable source of non-WTO international law in the disputes settlement is any sources contributing to the creation of normative system of international law: customary law, treaty law, general principles of international law, judicial decisions of international tribunals, doctrine (all Article 38 of the ICJ Statute sources of public international law) and even soft-law.

Moreover, there is an increasing trend in the WTO disputes for parties seek more and more rely on international law. Professor Pauwelyn to some point even radically concludes that:

> "To date, WTO panels and the Appellate Body have been able to avoid the question whether defendants can win a WTO dispute based solely on non-WTO law. In the not so distant future, they will no longer be able to hold off this boat: firstly, because of the ever increasing interaction between WTO law and other branches of international law (…) secondly, because of the growing willingness of WTO members explicitly to rely on these other sources of law even before a WTO panel, inspired largely by the compulsory nature of WTO dispute settlement: Any trade-related policy of all WTO members can now be challenged at the WTO without the possibility for defendants to block the process. Defendants are, therefore, more likely to invoke all possible defences, including those to be found under non-WTO law".[51]

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[49] Pauwelyn, J. *The Role of Public International Law in the WTO*, p. 7

[50] Higgins, R. '*General Course on Public International Law*'. Recuiel des Cours, Volume 230, 1991, p. 23.

[51] Pauwelyn, J. Human Rights in WTO Dispute Settlement, in *Human Rights and International Trade*, p. 210-211.

Thus in conclusion the need for application of international law in the WTO dispute settlement system is inevitable. We may now turn to examination of international law already invoked and issues of application touched in the WTO disputes settlement to substantiate and shed some clarity to the 'green-light' approach towards application of non-WTO international law as well as to draw some prognosis for possible future developments.

2. International Customary Law in WTO disputes settlement

Custom is the oldest and the original source of international law as well as of law in general.[52] A treaty may be displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conduct of the parties.[53] Thus it can be stated that virtually a custom recognized as law by the parties has a force of potential application at any time in any aspect of international regulation, not excluding the WTO. However such presumption does not necessarily apply to full extent in WTO disputes settlement system. Only partial intervention of international customary law in the disputes settlement of WTO is legitimated by the WTO law. As already mentioned the Dispute Settlement of Understanding establishes that covered agreements are to be interpreted in accordance with the customary rules of interpretation of public international law. At the same token the *EC-Hormones* case in which the EC argued for invocation of precautionary principle/approach as international law custom, clearly signalizes that other type of international customary law also pretends to play some role.

2.1. Customary rules of interpretation of public international law

In *United States – Standards for Reformulated and Conventional Gasoline* the Appellate Body held that Article 31 and Article 32 VCLT which lay down rules for interpretation of treaties codify customary international law.[54] The rationale for applying norms of the customary rules of interpretation can be explained by a very simple fact that neither panels nor Appellate Body can "invent the wheel" for interpretation of the GATT/WTO law. Depiction by one US Senator some more than half century ago that '*[A]nyone who reads GATT is likely to have his sanity impaired*'[55] accurately illustrates the crux. GATT 1947 and subsequent WTO agreements are international treaties with sophisticated lengthy legal texts. Thus the most convenient tool for slicing GATT/WTO law is rules of interpretation already having universal acceptance and

[52] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. p. 25 [hereinafter – Oppenheim's International Law].

[53] Brownlie, I. *Principles of Public International Law*, p. 5.

[54] *Reformulated Gasoline*, AB, p. 16. See also ICJ's confirmation in the *Indonesia/Malaysia* case, 2002 I.C.J. Reports, para. 37; *Qatar v. Bahrain* case, 1995 I.C.J. Reports, p. 6-18.

[55] Senator Eugene Millikin on GATT, at the Hearing on Reciprocal Trade Agreements Expansion Act of 1951, before the Senate Committee on Finance, 82d Congress, 1st Sess. 92 (1951).

recognition. However the declaration that you rely on a particular rule does not reflect the way you apply it. Thus how are customary rules of interpretation interpreted in the disputes settlement of WTO?

How do Panels/Appellate Body apply Article 31 VCLT?

The content of the Article 31 VCLT (General rule of interpretation) is the following:

> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

The World Court in the *Competence of the General Assembly for the Admission of a State to the United Nations* held that 'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their natural and ordinary meaning in the context in which, they occur.'[56]

The most comprehensive statement on application of Article 31 VCLT in the WTO can be found in *United States – Sections 301-310 of the Trade Act of 1974*, whereas the panel had

[56] *Competence of the General Assembly for the Admission of a State to the United Nations,* Advisory Opinion, 1950 I.C.J. Reports, p. 4-8.

extensively scrutinized the interpretive methodology under Articles 31 VCLT it had used in the WTO legal context:

> "Text, context and object-and-purpose correspond to well established textual, systemic and theological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties. For pragmatic reasons the normal usage, and we will follow this usage, is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in *its context* and in the light of treaty's object and purpose. However, the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Context and object-and-purpose may often appear simply to confirm an interpretation seemingly derived from the "raw" text. In reality it is always come context, even if unstated, that determines which meaning is to be taken as "ordinary" and frequently it is impossible to give meanings, even "ordinary meaning", without looking at object-and-purpose. As noted by the Appellate Body: "Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: "interpretation must be based above all upon the text of the treaty". It adds, however, that "[t]he provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions".[57]

The wording of the panel equates the text of the Commentary of the International Law Commission, which affirms that Article 31 (originally Article 27 in the draft) is a single combined operation as the heading "General Rule" shows.[58] Yet, in *Japan-Alcoholic Beverages* referring to the *Unites States – Standards for Reformulated Gasoline*, the Appellate Body held that:

> "A fundamental tenet of a treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (ut res magis valeat quam pereat). In *United States – Standards for Reformulated Gasoline*, we noted that

[57] *United States – Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R, (1999) (Report of the Panel), para. 7.22.

[58] Draft Articles on the Law of Treaties with commentaries. Yearbook of International Law Commission, Vol. II, 1966, [hereinafter - ILC Draft Articles on the Law of Treaties with commentaries] p. 219-220.

> "[o]ne of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (footnotes omitted).[59]

Hence the important feature of the application of Article 31 VCLT in WTO is a reliance on a rule of effective interpretation. It should be mentioned that this rule was not included in a separate provision into VCLT[60]. Brownlie concluded that the ICJ has generally subordinated principle of effective interpretation to the textual approach.[61] Yet, it is essential to stretch that WTO judiciary by considering principle of effectiveness as one of the corollaries of the general rule of interpretation at the end of interpretation also applies it as a part of the textual approach.[62] Thus generally not only the rules of non-WTO international law applied but also interpretation of the rules in the disputes settlement of WTO is consistent with the views of the ILC and ICJ. The following chapters more specifically deal with the application of separate provisions of Article 31 VCLT in the disputes settlement of WTO.

Use of Article 31 (1) VCLT

The first part of Article 31 VCLT requires that the ordinary meaning be given to the terms of the treaty in their context and in the light of its object and purpose. As pointed out by one author dominant approach taken by the Appellate Body has been first to examine the context of the provision in which the language is expressed, then proceed to examine the context of the particular agreement in which the provision is found and lastly to examine the context of the WTO agreements as a whole.[63]

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[59] *Japan – Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/10/11/AB/R (1996) (Report of the Appellate Body) [hereinafter - *Japan – Taxes on Alcoholic Beverages*, AB] p. 13.

[60] ILC Draft Articles on the Law of Treaties with commentaries, p. 219.

[61] Brownlie, I. *Principles of International Public Law*, p. 635.

[62] See more examples: *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO, Doc. WT/DS98/AB/R, (1999) (Report of the Appellate Body), para. 81; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS/AB/R, AB-1998-4 (1998) (Report of the Appellate Body) [herein after – US - *Shrimp*, AB], para. 121.

[63] See Condon, B. J. *Environmental Sovereignty and the WTO: Trade Sanctions and International Law*, Transnational Publishers, 2006, p. 20-21.

The way panels apply Article 31(1) VCLT is exemplified by the *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* case, whereas the Appellate Body provided examination of term "like products" in the context of all paragraphs of Article III GATT in order to determine how should be this provision interpreted in fourth paragraph of Article III GATT (National treatment rule)[64]**.**

Use of VCLT Article 31(2): WTO Preamble as Context. Role of Sustainable Development

WTO Agreement preamble lays down the object and purpose of all WTO trade agreements, including GATT 1994 and postulates an overall context in which interpretation of all WTO law must take place. Appellate body has already referred to the WTO Preamble to interpret WTO law.[65] In order to demonstrate panels' interpretative approach towards Article 31(2) VCLT author deems practicable invocation one of the provision of the WTO Agreement preamble. That provision embodies one of the objectives specifically related or at least influenced by other source of international law:

> "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development [emphasis added]."[66]

The concept of sustainable development is the crux of international environmental law[67]. The term 'sustainable development' was brought into common use by the Brundtland Commission in its 1987 report '*Our Common Future',* which states that sustainable development

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[64] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (2001) (Report of the Appellate Body).

[65] *US-Shrimp*, AB, para. 129.

[66] Preamble of the WTO Agreement.

[67] See Anupam, G. *The WTO and International Environmental Law: Towards Conciliation.* New Delhi: Oxford University Press, 2006, p. 43; See also Sands, P. Principles of International Environmental Law. Cambridge: Cambridge University Press, 2003 (2nd ed.), p. 252-266.

is development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs.[68] According to the Brundtland Report the concept of sustainable development is comprised of two inner concepts:

(i) the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and

(ii) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[69]

However some observers and authors cynically believe that the WTO Agreement preamble establishes a hierarchy of objectives and order of appearance of objectives evidences that environmental protection is secondary to the objective of raising incomes through trade liberalization.[70] Likewise, objective of environmental protection is drafted in a distinct wording, for seeking environmental protection only means making an effort in this regard, thus 'sustainable development, it is more closely integrated into economic objectives set out in the Preamble'.[71] Nevertheless the overwhelming importance of the principle of the sustainable development in author's view shows great potential to be invoked in any environmental dispute. WTO practice confirms this view.

First, in the *Shrimp* case, Appellate Body noted that the preamble to the WTO Agreement explicitly acknowledges 'the objective of sustainable development', and characterized it being a concept which 'has been generally accepted as integrating economic and social development and environmental protection'.[72]

Second, in the same case the Appellate Body stated that "[W]hile Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of

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[68] Brundtland Commission 1987 report '*Our Common Future'*, available at <http://www.worldinbalance.net/agreements/1987-brundtland.php>.

[69] Id.

[70] See Condon, B. *Environmental Sovereignty and the WTO.* p. 24-25.

[71] Id. p. 25.

[72] *US - Shrimp*, AB, para. 129, at n. 107 and the accompanying text. The view is supported by reference to numerous international conventions: para. 130, citing Article 56(1)(a) of the 1982 United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3. See also the Opinion of Advocate General Leger in Case C-371/98, *R.* v. *Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd.* [2000] ECR I-9235, who notes that sustainable development 'emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled'.

environmental protection as a goal of national and international policy".[73] Consequently, the Appellate Body regarded 'sustainable development' in the preamble to the WTO Agreement as adding: color, texture and shading to interpretation of the agreements annexed to the WTO Agreement, including GATT 1994 and it's Article XX.[74]

Arguably sustainable development as a contextual element in which the dispute has been examined turned Appellate Body to conclude that sea turtles are an 'exhaustible natural resource' (within the meaning of Article XX (g) of the GATT 1994).[75]

It should be mentioned that some authors already argue that sustainable development has achieved status of customary law,[76] yet others referring to the dicta of Gabcikovo Nagymaros case doubt[77].

Whatever is the current stance, arguably in disputes settlement, application of Article 31(2) VCLT rules opens WTO law (most often primarily Article XX GATT) interpretation for intervention of principle of sustainable development. Hence we have an interesting system of application of non-WTO law: first in performing consideration of particular WTO inconsistent measure, a customary rule of interpretation referring to the WTO preamble which embodies certain environmental values – sustainable development may be used. Then secondly, sustainable development itself may be interpreted in the light of the concept/principle as it stands in the environmental law. Thirdly this may affect the final evaluation of validity of WTO inconsistent measure in the dispute settlement.

VCLT Article 31(3)(b): Subsequent Practice

In *Shrimp 21.5* the Panel had attempted to elaborate on the meaning of Article 31(3)(b) VCLT in the following way:

"Insofar as [the 1996 Report of the Committee on Trade and Environment] can be deemed to embody the opinion of the WTO Members, it could be argued that *it records*

[73] *US - Shrimp*, AB, para. 129.

[74] *Id.* para. 153.

[75] Id. para. 129.

[76] See Anupam, G. *The WTO and International Environmental Law,* p. 49-61.

[77] See Boyle, A. E. The Gabcikovo-Nagymaros Case: New Law in Old Bottles, in *Symposium: The Case concerning the Gacykovo Nagymaros Project*. Yearbook of International Environmental Law, no. 8, 1997, p. 18.

> *evidence* of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" . . . and as *such should be taken into account in the interpretation of the provisions* concerned. However, even if it is not to be considered as evidence of a subsequent practice, it remains the expression of a common opinion of Members and is therefore relevant in assessing the scope of the chapeau of Article XX."[78]

In *Japan-Alcoholic Beverages*, the Appellate Body found that "subsequent practice" requires a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties to a treaty regarding its interpretation.[79]

In *United States – Internet Gambling*, the Appellate Body has updated meaning of "subsequent practice" by stating that it involves two elements:

> "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and
>
> (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision (emphasis in original)."[80]

Not each and every party to the treaty must have engaged in a particular practice for it to qualify as common and concordant practice.[81] The agreement of parties that have not engaged in the practice can be established from their affirmative reaction or, in some situations, from a party's lack of reaction to a practice that it has been made aware of.[82]

As can be seen panels do not hesitate not only to rely on VCLT Article 31(3)(b) but also to go further on to interpret customary rules of interpretation in the context of WTO itself.

VCLT 31(3)(c): Rules of International Law

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[78] *United States – Import of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc. WT/DS58/RW (2001) (Report of the Panel) [hereinafter – *US – Shrimp (Article 21.5)*] para. 5.56.

[79] *Japan – Taxes on Alcoholic Beverages*, AB, p. 13.

[80] *United States – Internet Gambling*, WTO Doc. WT/DS285/AB/R (2005) (Report of the Appellate Body, para. 192.

[81] *European Communities – Customas Classification of Frozen Boneless Chicken Cuts*, WTO Doc. WT/DS269/AB/R WT/DS286/AB/R (2005) (Report of the Appellate Body), para. 259.

[82] Id. para. 272.

In *Tuna II* the panel adopted the negative view about possibility to take into account other international agreements in interpreting the provisions of GATT, because they were:

> "not concluded among Contracting Parties to the General Agreement and (…) did not apply to its interpretation of the General Agreement or the application of its provisions (…) practice under [the other treaties] could not be taken as practice under the General Agreement, and therefore could not affect the interpretation of it."[83]

Yet, this report has never been adopted. 7 years later panel in *Shrimp 21.5* took completely different view:

> "[t]he Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted by the parties to the dispute. Article 31.3 (c) of the Vienna Convention provides that (…) there shall be taken into account, together with the context, "any relevant rule of international law applicable to the relations between the parties." We note that, with the exception of the Bonn Convention (…) Malaysia and the United States have accepted or are committed to comply with all the international instruments referred to by the Appellate Body in paragraphs 168 of its Report."[84]

Thus the Appellate Body in prior *Shrimp* case has gone far beyond the immediate context of the WTO Agreements to consider the provisions of relevant multilateral environmental agreements (MEAs) and principles expressed in documents such as the Rio Declaration.[85]

As pointed by one writer, a '[c]onsideration of the relationship between WTO law and other branches of international law is not an optional exercise, but rather as essential part of interpreting WTO law.'[86]

This is generally consistent with the practice of the World Court, for it once has asserted that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[87]

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[83] *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (1994), 33 I.L.M. 839 (Report by the Panel not adopted), para. 5.19.

[84] *US – Shrimp Article 21.5*, Panel, para. 5.57.

[85] *US – Shrimp*, AB, paras. 129-134.

[86] Condon, B. *Environmental Sovereignty and the WTO,* p. 33.

[87] *Namibia* (Legal Consequences) (Advisory Opinion) 1971 I.C.J. Reports. 31.

How do Panels apply Article 32 VCLT?

Article 32 VCLT (Supplementary means of interpretation) states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

In the sense of significance, Article 32 VCLT provides a meaning of interpretation only when interpretation via Article 31 is inadequate. Given powerful tools of Article 31 VCLT, panels in fact have almost never used Article 32 VCLT. The main reason is that panels prefer give their trust to "contemporary agreements, practice and law" enshrined in Article 31 (3) VCLT to interpret provision instead of relying on preparatory work and historical circumstances envisaged in Article 32 VCLT.

This could be demonstrated by Appellate Body's reasoning in *Shrimp* with respect to the interpretation of Article XX (g) GATT, a provision drafted over 50 years ago:

> "The words of Article XX (g), "exhaustible natural resources," . . . must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment . . .[88]

As spotted by Bradly Condon '[I]n contrast to the historical context laid out in Article 32, Article 31(3) emphasizes the importance of the subsequent evolution of the law. Thus, the contemporary legal context may have greater influence than the historical context surrounding the creation of treaty obligations'.[89] Thus the mere usage of Article 31 VCLT rules of interpretation by the WTO judiciary has so far guaranteed that the meaning of provision is not ambiguous, obscure, or interpretation under Article 31 VCLT does not lead to a result which is manifestly absurd or unreasonable. Consequently it seems that Article 32 VCLT in disputes

[88] *US – Shrimp*, AB, paras. 129-130. The Appellate Body cited Namibia (Legal Consequences) Advisory Opinion 1971 I.C.J. Reports. 31, in which the ICJ stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent developments of law".

[89] Condon, B. *Environmental Sovereignty and the WTO*. P. 35-36.

settlement of WTO does not play real role, yet this does not prevent its application should such a need occur.

2.2. Other Rules of International Customary Law: Attempts to rely on Precautionary Principle/Approach

In the *EC-Hormones* case the EC argued that the precautionary principle that had been included in the 1992 Rio Declaration should influence the assessment of the justifiability of the EC prohibition of the importation of certain meat and meat products treated with artificial hormones from the US.

Principle 15 of the Rio Declaration provides that: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[90] The principle finds its roots in number of environmental agreements[91], declarations[92] and more interestingly in the 1992 Maastricht Treaty[93] amending Article 130r(2) of the EC Treaty so that the EC action on the environment 'shall be based on the precautionary principle', and the 1997 Amsterdam Treaty[94] further amending the EC Treaty to apply the principle to Community policy on the environment (Article 174(2)).[95] As spotted by Sands, the precautionary principle aims to provide guidance in the development and application of international environmental law where there is scientific

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[90] Rio Declaration on Environment and Development, available at: <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=78&ArticleID=1163>.

[91] On an overview of treaties see Sands, P. *Principles of International Environmental Law*, p. 266-267.

[92] 1984 Ministerial Declaration of the International Conference, on the Protection of the North Sea; The Ministerial Declaration of the Second North Sea Conference (1987); The 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region noted in Sands, P. *Principles of International Environmental Law,* p. 266.

[93] Treaty on European Union (Maastricht Treaty), (adopted 1 February 1992, entered into force 1 November 1993), 31 I.L.M. 247.

[94] Amsterdam Treaty (entered into force 1 January 1999), 37 I.L.M. 56.

[95] In 2000 the European Commission published Communication on the precautionary principle which outlines the Commission's approach to the use of the principle, establishes guidelines for applying it, and aims to develop understanding on the assessment, appraisal and management of risk in the face of scientific uncertainty. Available at <http://europa.eu.int/comm/dgs/healthconsumer/library/pub/pub07en.pdf>. The Communication considers that the principle has been 'progressively consolidated in international environmental law, and so it has since become a full-fledged and general principle of international law'.

uncertainty.[96] The principle has been recognized in *Southern Bluefin Tuna* cases[97] and advocated by ICJ Judge Weeramantry[98].

The Appellate Body, however refrained by stating that while it may have 'crystallized into a general principle of customary environmental law', it was not clear that it had become a part of general customary law.[99] There is a sturdy academic criticism to this concept[100] pointing out that cantoning the principle as one of "customary environmental law" left it open, of course, under what circumstances it might have become applicable under "international trade law"? Yet, the conclusion is clairvoyantly manifest: WTO dispute party – the EC had invoked portion of arguments based on the existence of (or pretension to) customary rule which deviates WTO obligations. The fact that WTO judiciary have considered those arguments, arguably confirms possibility of application of customary law other than rules of interpretation in the disputes settlement.[101]

2.3. Concluding Remarks

As concluded in one authoritative treatise, customary rules of interpretation are, so far, the only portions of customary international law to have found their way meaningfully into WTO dispute settlement.[102] Yet it is a vivid example how non-WTO international law may intervene

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[96] Sands, P. *Principles of International Environmental Law*, p. 266.

[97] *Southern Bluefin Tuna* cases, I.L.R. 117, p. 172, p. 179-80, p. 186-7.

[98] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand *v.* France) Case, Dissenting Opinion of Judge Weeramantry, 1995 I.C.J. Reports, p. 342-344.

[99] In fact the Appellate Body have chosen another way to deal with the EC submission pointing out that the principle 'finds reflection in Article 5(7) of SPS Agreement', which requires a proper risk assessment and more scientific study to support the measure. See European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS48/AB/R and WT/DS26/AB/R (AB-1997-4) [hereinafter – *EC - hormones case, AB*], para. 124.

[100] Dupuy, P. M. Formation of Customary International Law and General Principles in *The Oxford Handbook of International Environmental Law*, (Bodansky D., Brunnee J., Hey E. eds.), Oxford: Oxford University Press, 2007. p. 451-455.

[101] Another interesting example could have been panel report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, where the panel noted that its terms of reference did not allow it to examine the consistency of the US Superfund Act with the polluter-pays principle as a principle of customary law. See p. 162, para. 5.2.6. This could have not prevented the panel from taking account of this principle, for example in the interpretation of GATT treaty terms to the extent this principle was part of international customary law.

[102] Matshushita, M; Mavroidis, P.; Schoenbaum, T. *The World Trade Organization*. Oxford: Oxford University Press, 2003. p. 64.

WTO disputes settlement. The content of the WTO rules applied itself is dependent upon rules of interpretation created outside WTO. Generally WTO panel's interpretation and application of these rules is consistent with the language of the Commentary of ILC and practice of ICJ.

Moreover, as could be seen, thanks to the use of Article 31 VCLT the content of a WTO law may change due to developments in international law and relations. Hence, Article 31 VCLT brings into operation other sources of non-WTO international law in the disputes settlement. A conspicuous example is the concept/principle of sustainable development in the preamble of WTO Agreement, which content is described by the environmental law. At the same time WTO judiciary's firm trust on Article 31 VCLT diminishes usage of Article 32 VCLT.

Moreover customary law shows an unexplored capacity for application in the disputes settlement of WTO. As stated in the beginning of this chapter a treaty provision may be displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conduct of the parties. Customary law is binding upon all WTO parties. The fact that the EC had unsuccessfully relied on precautionary principle as customary international law in the *EC-Hormones* case, does not prevent WTO parties to come back to the same issue in the future or as the *United States – Taxes on Petroleum and Certain Imported Substances* case shows to invoke other rules of customary international law to neutralize or soften application of WTO law. On the other hand the safety-catch from wider acceptance of customary law in the disputes settlement of WTO might be frames of Article 3.2 DSU imposing obligation upon the DSB, which adopts WTO panels recommendations and rulings 'not to add to or diminish the rights and obligations provided in the covered agreements'.

Consequently, the WTO panels/Appellate Body may be reluctant to acknowledge responsibility for declaring one or another set of international rules as customary law, until respective developments have not manifested in international law.

3. International Environmental Law Treaties: MEAs

As stretched in Oppenheim's International Law '[treaties are] developed as the means whereby states could give to rules for their mutual conduct a greater particularity than was provided by custom.'[103] At the same token nothing prevents states from concluding treaties which creates absolutely new rules of law or treaties which in itself could give to rules for their mutual conduct a greater particularity than was provided by the prior treaties. The greatest potential for application of non-WTO international treaty law in the disputes settlement of WTO rests in the environmental treaties, so called - multilateral environmental agreements (MEAs).

3.1. Relevance of MEAs to the WTO law

Basically there is an increasing volume of academic researches and reports on MEAs' impact and relationship with WTO law. There is no legal unified definition of MEA within the WTO, because as noted by the EC 'the WTO would exceed its competence if it were to aim to define an MEA in general'.[104] Nevertheless author considers MEA in the sense of definition presented by the EC in 4th Session of the WTO Ministerial in Doha:

> "MEA is a legally binding instrument between at least three parties the main aim of which is to protect the environment and which is open to all countries concerned from the moment negotiations begin. In the context of the WTO, an MEA should also be relevant to the aims set out in sub-paragraphs (b) or (g) and the head-note of GATT Article XX. To avoid lacunae, relevant regional agreements, such as fisheries-organisations, should also be covered, provided that countries concerned outside the region are not prevented from participating."[105]

Being a legally binding instrument between at least three parties (whether states or international organizations) implies it is an international treaty as established in Article 2 VCLT[106] and a source of international law.

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[103] Oppenheim's International Law, p. 31.

[104] Multilateral Environment Agreements: Implementation of the Doha Development Agenda, 2002, WTO Doc. TN/TE/W/1, p. 4. Available at <http://trade.ec.europa.eu/doclib/docs/2003/september/tradoc_111168.pdf>.

[105] Id. p. 4.

[106] Article 2 VCLT states:
For the purposes of the present articles:
(a) "Treaty" means an international agreement concluded between States in written form and governed by

The following MEAs have an overlapping regulation with the WTO law:

1. **International Convention for the Conservation of Atlantic Tunas**[107]:

   The Resolution by ICCAT and Action plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, 1994, Article f, recommends non-discriminatory trade restrictive measures; other recommendations relate to the import ban of specific products or products from specific countries - violation of Article XI GATT, quantitative restrictions.[108]

2. **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**[109]:

   1) Bans trade between parties and non-parties – discrimination between nations. Violation of Article I:1 GATT (Most favoured nation (MFN) clause);[110]
   2) Bans trade in species listed in Appendix I – extraterritorial action;
   3) Provides for export and import permits and quotas for species in other appendices – Article XI of WTO Agreement prohibits quantitative restrictions;
   4) Provides for national export quotas for trade in sustainably managed populations in specific geographic areas – defines the process and

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international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[107] Opened for signature 14 May, 1966, entered into force 21 March 1969. T.I.A.S. 6767.

[108] Article XI GATT on quantitative restrictions states that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[109] Opened for signature 6 March 1973, entered into force 1 July 1975. 993 U.N.T.S. 243.

[110] Article I:1 GATT defines MFN clause in a following way:
"With respect to customs duties and charges of any kind imposed on or in the connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

production methods (PPMs)[111] of the product and discrimination between nations;

5) Provides for national export quotas for trade in ranched wild animals from specific populations – Defines PPM and discriminates between nations.[112]

3. Convention on the Conservation of Antarctic Marine Living Resources[113]:

Entitles tracking trade flows of certain species.

4. Montreal Protocol on Substances that Deplete the Ozone Layer[114]:

1) Sets limits on the quantum of trade in Ozone-Depleting Substances (ODS) – introduces quantitative restrictions on trade;
2) Sets limits on the quantum of trade of products containing ODS – defines PPMs;
3) Bans trade between parties and non-parties – discrimination between nations; extraterritorial action.[115]

5. Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel)[116]:

1) Provides for Prior Informed Consent (PIC) – introduces restriction on trade;
2) Provides for rights of countries to ban imports of hazardous waste – restriction on trade and discrimination between nations;
3) Bans hazardous waste from industrial to developing countries – discrimination between nations;
4) Bans trade between part and non-party – discrimination between nations.[117]

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[111] The common problem of national treatment rule with respect to environmental protection in the WTO disputes is the question of production and process methods (PPMs) - whether the likeness of product could be related with producing cycle and process. Though a particular product can be "like product" if considered in isolation from the circumstances it was made, there used to be attempts to contest "likeness" due to differences in the production cycle of the product. For example one product can be made by using environmentally unfriendly technologies, while another identical product is made in an environment friendly way. Yet, the latter state may will to consider the former state's product as not "like" and exclude it from the application of national treatment rule.

[112] Anupam, G. *The WTO and International Environmental Law,* P. 130.

[113] Opened for signature 29 May 1980, 19 I.L.M. 837.

[114] Opened for signature 16 September 1987. U.K.T.S. 19.

[115] Anupam, G. *The WTO and International Environmental Law,* P. 131.

[116] Opened for signature 22 March 1989, entered into force 24 May 1992. U.N. Doc EP/IG.80/3, 28 I.L.M. 649.

[117] Anupam, G. *The WTO and International Environmental Law, P*. 131.

6. Convention on Biological Diversity[118]:

1) Article 10(b) requires parties to adopt "measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity", but parties are free to choose the specific measures they will use and they are not required to use trade measures.
2) Article 22 provides that the Convention on Biological Diversity shall not affect the rights and obligations of any party under existing international agreements, except when those rights and obligations would cause serious damage or threaten biological diversity. This provision could be interpreted as permitting trade restrictive measures.

7. Cartagena Protocol on Biosafety[119]:

Regulates procedures for the trans-boundary movement of Living Modified Organisms, without changing the rights and obligations of parties under other international agreements, including the WTO.

8. United Nations Framework Convention on Climate Change[120]:

Does not require trade restrictive measures, but they might be used to implement the agreement. Article 3.5 provides that "measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade", which mirrors the language in the Preamble (chapeau) of GATT Article XX.

9. Kyoto Protocol[121]:

Does not require trade restrictions, but provides for emissions trading and requires parties to implement policies and measures to minimize adverse effects on trade.

10. International Tropical Timber Agreement[122]:

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[118] Opened for signature 5 June 1992, entered into force 29 December 1993 UNEP/bio.Div./CONF/L.2, 31 I.L.M. 818.

[119] Opened for signature 29 January 2000, entered into force 23 October 2003. UNEP/CBD/ExCop/1/3 available at <http://www.biodiv.org/biosafe>.

[120] Opened for signature 4 June 1992, entered into force 21 March 1994. 31 I.L.M. 849.

[121] Opened for signature 16 March 1998, 37 I.L.M. 22.

[122] Opened for signature 26 January 1994, 33 I.L.M. 1014.

While the agreement does not authorize trade restrictions, it has trade-related objectives.

11. **Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade**[123]:

Permits non-discriminatory import and export restrictions.

12. **Stockholm Convention on Persistent Organic Pollutants Convention**[124]**:**

Requires trade ban on prohibited substances. Violation of Article XI GATT, quantitative restrictions.

13. **International Plant Protection Convention**[125]:

Regulates the use of import restrictions related to phytosanitary requirements.

14. **U.N. Fish Stocks Agreement**[126]:

1) Permits regulations to prohibit landings and transshipments of fish catches that have been taken in a manner that undermines fish conservation and management).[127]

2) It discriminates between otherwise "like" products based on their country of origin, it imposes quantitative restrictions, and it may treat imported goods differently from "like" domestic goods.[128]

Hence the question is what is the status of MEAs within the WTO regime and disputes settlement and how may MEAs be applied if at all as a source of international law? In other words can Ecoland rely on the CITES, Global Convention on Climate Change or any other

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[123] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Opened for signature 10 September 1998, available at: http://www.pic.int/en/ViewPage.asp?id=104.

[124] Opened for signature 22 May 2001. 40 I.L.M. 532.

[125] International Plant Protection Convention, Rome (amended 1979). Opened for signature 6 December 1951, entered into force 4 April 1991. 150 U.N.T.S. 67.

[126] Entered into force 11 December 2001. Available at: http://www.oceansatlas.org/world_fisheries_and_aquaculture/html/govern/instit/intlagr/unfsa.htm.

[127] Matrix on Trade Measures Pursuant to Selected MEAs, WTO Doc WT/CTE/W/160/Rev. 2 (2003). Yet, this MEAs list is not exhaustive.

[128] Environment and Trade: Handbook, Manitoba: International Institute for Sustainable Development, 2005 (2nd ed.), p. 66.

multilateral agreement which would require preservation or protection of the environment at the expense of trade commitments under GATT/WTO regime?

3.2. Problem of MEAs in the WTO Regime and Disputes Settlement

Absence of status of MEA's in the WTO

In fact when considering the WTO law – MEA's relationship, the obvious fact is that there is nothing in the WTO law that makes reference to the MEAs. Yet, the fact that WTO parties have agreed to include the WTO-MEA relationship issues in the Doha Ministerial Declaration and the Doha Development Agenda evidences the actuality of the question. However paragraph 31 of the Declaration sets a very narrow mandate for negotiations on the relationship between WTO rules and Multilateral Environmental Agreements (MEAs) stating that:

"With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

> (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations *shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question*. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;"[129]

Nevertheless even in such limited mandate the Doha Development Agenda has not provided any fruits. The same can be said about failure since 1995 to achieve measurable conclusions in this field by the WTO Committee on Trade and Environment (CTE).[130] But failures of policy and law makers cannot leave WTO law and disputes settlement system in defiance of developments.

By the same token it is necessary to mention that direct application of MEAs has never been examined yet in the disputes settlement of WTO. Yet, as already said, question of MEAs application would likely arise in the future for number of reasons.[131] Arguably the collision of MEAs-WTO law has to be reconciled using available principles and techniques embodied in

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[129] Ministerial Declaration, Fourth Ministerial Conference, Doha, Qatar, Adopted Nov. 12, 2001, WTO Doc. WT/MIN(01)/DEC/1, 20 Nov 2001, para. 31, at http://wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[130] See Brack, D.; Gray, K.; *Multilateral Environmental Agreements and the WTO*. Manitoba: International Institute for Sustainable Development, 2003, p. 7.

[131] For instance, CITES listings increasingly cover economically important sectors such as fish and timber. See Brack, D. Environmental Treaties and Trade, in Sampsons, G.; Chambers, B. *Trade, Environment and the Millenium* UN University, 2001, 2nd ed, p. 14.

international law. At the same time no less importantly is common practice, when such collisions circumvent examination of the panel since the problem is solved among the WTO parties by accepting modification of WTO law.

Reconciliation issues

Based on relevant rules of international law and researches in the field it may be concluded that there are at least four ways how MEAs may affect or be applied in the WTO framework and with the exception of first in the disputes settlement of WTO.

First, a party to the MEA may simply abstain from challenging a trade restrictive measure of another MEA party in dispute settlement if that measure is connected with commitments under MEA. In addition MEA may contain conflicts clause, which entitles parties to solve their dispute under MEA regime. Thus there is no need to trigger WTO dispute settlement process and examine MEAs - WTO law collision. In this sense MEA cannot even play role of law in the disputes settlement, but this model explains why dispute settlement system of WTO has so far avoided direct MEAs application. However this does not refute the fact that MEA is applied as a source of international law in the WTO and in such a case MEA overrides and neutralizes the effect/application of the WTO law.

Second, if a similar case were brought to the WTO dispute settlement, the panel could determine whether the MEA is legitimately covered under the exception clause of Article XX GATT.

As up today there is only one case in the WTO that to some extent touched application of MEA in this sense - *Shrimp-Turtle* case. In 1996 India, Malaysia, Pakistan and Thailand challenged the US ban on shrimps and shrimp products import from countries that did not use turtle excluder devices in the nets for shrimps. The US claimed that the measure was necessary to conserve sea turtles, an endangered species protected under CITES. The panel have employed CITES when considering definition of exhaustible resources within Article XX (g) GATT and determined that turtles felt within Article XX (g) for it was listed as a specie threatened with extinction in the convention.[132]

However Article XX GATT does not expressly make distinction between measures applied under MEA and other measures and has a very sophisticated application underpinned by extensive panels/Appellate Body's reports, thus real application of MEAs may be nullified.

[132] *US - Shrimp*, AB, para. 129.

Third, given the very specific nature of MEAs it can be argued that MEAs form lex specialis. Thus a later law, general in character, does not repeal an earlier law which is special in character.[133] Consequently according to Pauwelyn's concept (see page no. 20-21) such MEAs would be non-WTO rules that already existed when the WTO treaty was concluded. At the same time MEAs could be non-WTO rules that are created subsequent to the WTO treaty but since they regulate certain area in a more specific way, they would maintain the status of lex speciallis over WTO law.

However the status of lex specialis is a matter of discussion. There are many writers who support this view in the MEAs-WTO law relationship, for they consider MEAs to be more specific treaties containing more specific measures applied to specific categories or products.[134] In theory under this principle MEAs-WTO law conflict cannot arise for MEAs provisions would override general international trade obligations under the WTO agreements. As up to day parties to the disputes have not yet submitted arguments based on lex specialis. Author is cautious that this concept could be easily respected in disputes settlement of WTO. The obstacle agains rests in the wording of Article 3.2 DSU that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Thus an award of claim based solely on lex specialis argument could prima facie violate this rule. Nevertheless argument of MEAs as lex specialis could be invoked in line with other arguments and consequently consideration of MEAs as a source of international treaty law by the panel would be legitimate.

Fourth, according to the VCLT when the treaties deal with the same subject matter, the later treaty is to prevail between parties to both agreements.[135] When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.[136] The earlier treaty would apply only to the extent that its provisions are incompatible with the later treaty. The complication of the application of such concept to MEAs and the WTO law is conditioned upon the fact that both are long-standing

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[133] Though the principle of lex specialis does not appear in the VCLT, it has been recognized as a principle of treaty interpretation by the Permanent Court of International Justice. See *Upper Silesia Minorities*, 1928 P.C.I.J. Ser A, No 15 (1928) and is widely accepted in the academic plane. See Verhoosel, G. Gabcikovo Nagymaros: The Evidentiary Regime on Environmental Degradation and the World Court, *European Environmental Law Review*, 1997, p. 252.

[134] See Brack, D.; Gray, K.; *Multilateral Environmental Agreements and the WTO*, p. 27.

[135] Article 30 (4) VCLT. So called principle of lex posteriori.

[136] Id.

regimes, with a number of subsequent instruments, amendments and new treaties.[137] Practice has not yet evidenced attempts by parties to rely on this concept, yet the reason might be that potential conflicts are likely to be rare, as in practice there are only a limited range of situations in which MEAs would mandate some action in direct violation of a WTO requirement[138] or potential conflicts are neutralized by first way mentioned therein above. If necessary arguably principle of lex posteriori may be successfully submitted to the panel implying it would need to consider non-WTO international treaty law.

However the problem may arise if dispute would occur between MEA party and MEA non-party. Application of environmental agreement saying parties can use trade restrictions against non-parties is potentially violating fundamental principle of *pacta tertiis nec nocent nec prosunt* (treaties can only bind their parties). Thus only second way of solution would be available in such dispute settlement – to incorporate MEA in the exception clause of Article XX GATT. In the alternative, though risky, contention for status of customary law for some applicable provisions of MEAs involved in the dispute settlement could be also reasonable option. Finally, MEAs may be taken into account subject to Article 31(3) VCLT.

3.3. Concluding Remarks

We have a large quantity of international treaty law, that may regulate the same area in collision with WTO law. MEAs – WTO law relationship is a vivid example, how obligations under different sources of international law may collide. Yet, no provision of MEA has ever been directly disputed in the dispute of WTO. Major reason may be that WTO parties, also parties to the MEAs abstain from challenging WTO restrictive measures in disputes settlement of WTO. However arguably there are possibilities to justify WTO inconsistent measure under MEAs should such a dispute occur.

Available options recognized in international law could be relying on principle of lex specialis or later treaties' prevail over prior treaties between parties. Yet this would not be a solution if some members are not parties to the actual MEA. In this regard it seems that the only available method in dispute settlement would be incorporation of MEA rules in the content of

[137] Caldwell, D. *Multilateral Environmental Agreements and the GATT/WTO Regime*. Washington, DC: US National Wildlife Federation, 1998.

[138] For a discussion see Brack D., Gray K., *Multilateral Environmental Agreements and the WTO*, p. 27-28.

exception enshrined in Article XX GATT. Otherwise party to MEA invoked could attempt to demonstrate against non-MEA party that rules of actual MEA are customary law.

It is necessary to mention that many more MEAs are currently under negotiating process. Among most controversial and important are international forest regime, at the same token hopefully a new convention on fighting against global warming will be signed at the end of 2009. Given the fact of increasing number of MEAs, the need to reconcile WTO law with MEAs is undeniable and probability that a dispute in WTO on application of MEA may arise in the near future is very high. At the same time some authors propose for negotiating a specific WTO agreement which would lay down principles concerning MEAs status within the WTO or even establish the World Environmental Organization[139]. Yet, since in the current state such initiatives do not find sufficient support, the solution is at the disposal of judiciary and disputes settlement system will arguably remain the potential plane for intervention of MEAs as a source of non-WTO international treaty law.

[139] See Magnus, L. M.; Whalley, J.; Reviewing Proposals for A World Trade Organization, Blackwell Publishers Ltd 2002 and Whalley, J.; Zissimos, B. An Internalisation-based World Environmental Organisation, Blackwell Publishers Ltd 2002.

4. Judicial Decisions

4.1 Judicial Decision Generally as a Source of Law

Judicial decisions on the international plane are known as "subsidiary" sources of international law specified in Article 38(1)(d) of the ICJ Statute. As Oppenheim's International Law depicts, 'judicial decisions have became a most important factor in the development of international law, and the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally'.[140]

However contrary to the Article 38(1)(c) of the ICJ Statute, neither judicial decisions of any tribunals, neither reports of the WTO panels and the Appellate Body are established as a source of law in the disputes settlement of WTO. DSU is silent on the matter and since it's wording limits the sources of law to covered agreements, arguably judicial decisions have no status of a source of law. Yet, it is doubtful if we could find a legal system, and more specifically international legal system with operating judicial body which would not rely on previous practice. In the words of Shahabuddeen, 'though having the power to depart from them, [the Court] will not lightly exercise that power'.[141] Clearly the WTO dispute settlement system is not an exception. On the contrary some authors believe that the reported decisions of prior dispute settlement panels are an important source of law in WTO disputes settlement.[142]

Yet, since judicial decisions are not legally established as a source of law, what is a real status: (a) of the WTO judiciary reports[143]; (b) of other judicial decisions, such as of ICJ? In other words if Ecoland or Emitant in a hypothetical case for some reasons want to rely on case law of international tribunals, what weight could be given to it within the WTO?

As a matter of fact we can find all these types of "judical decisions" already invoked in the disputes of the GATT/WTO: reports of GATT 1947/WTO panels/Appellate Body and decisions of non-WTO judicial bodies.

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[140] Oppenheim's International Law, p. 41.

[141] Shahabuddeen, M. *Precedent in the World Court*. Cambridge: Cambridge University Press, 1996, p. 2-3.

[142] See Matsushita, M.; Mavroidis, P. *The World Trade Organization*, p. 58-62.

[143] Since 1995, all reports in the WTO were adopted.

4.2. WTO/GATT Judicial Decisions as a Source of Law

Though arguably reports of WTO panels and Appellate Body[144] is "an internal product" of WTO regime, author deems necessary inclusion of it in the scope of the research for two reasons: first, the role of reports of WTO panels and Appellate Body is not legitimized in the WTO law, thus in this sense, they do not belong to sources of WTO law; secondly, since they are created by international judicial tribunal either WTO panel or Appellate Body, they are de jure 100 percent pure subsidiary source of international law in the sense of Article 38(1)(c) of the ICJ Statute. However this does not automatically expose de facto status of such reports in the disputes settlement of WTO.

The starting point for discovery could be contention of some writers that WTO jurisprudence falls under VCLT Article 31(3)(b).[145] Where a panel report is adopted and results in the disputing parties conforming their practice to the conclusions and findings of the report, this provides evidence of practice establishing agreement regarding interpretation under the Vienna Convention.[146] This coincides with the ruling of panel in *Japan – Alcoholic Beverages*, whereas it contended that 'panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case' [147], the term 'subsequent practice' understood as provided in Article 31(3)(b) of the VCLT.

Yet, the Appellate Body in *Japan – Alcoholic Beverages* rejected the latter panel's dicta by holding that:

> "Adopted panel reports are an important part of the GATT *acqui*s. (…) However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[148]

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[144] As already mentioned in the introduction of the thesis in the sense of legal force there are two types of judicial decisions – adopted reports and unadopted reports in the WTO. Reports of the panels and Appellate Body are adopted by the DSB.

[145] Condon, B. *Environmental Sovereignty and the WTO,* p. 27.

[146] See id. p. 27-28.

[147] *Japan – Taxes on Alcoholic Beverages* (hereinafter *Japan – Taxes on Alcoholic Beverages, Panel Report*), Panel Report adopted on 1 November 1996, as modified by the Appellate Body Report, WT/DS8,10,11/R, para. 6.10.

[148] *Japan – Alcoholic Beverages*, AB, p. 108.

Furthermore, in *US – Shrimp (Article 21.5)* the Appellate Body held that its reasoning in *Japan – Alcoholic Beverages* on the GATT *acquis* applies to adopted Appellate Body Reports as well".[149]

In the same case, the Appellate Body agreed with the panel's finding that unadopted panel reports had no binding effects but could nevertheless serve as "useful guidance".[150]

Furthermore Appellate Body did not criticize panel's argument that adopted reports have no controlling effect, but rather is 'subsidiary' source of WTO law and 'have to be taken into account by subsequent panels dealing with the same or a similar issue'[151] and panel's view, that an adopted report does not 'constitute a definitive interpretation' of an agreement; it is simply a 'decision' that has to be considered – but not necessarily followed-by the panel.[152] This resounds Judge Shahabuddeen's invocation of Shabtai Rosenne famous formulation that '[P]recedents may be followed or discarded, but not disregarded'.[153]

Finally, the Appellate Body itself had indirectly confirmed the force of WTO reports and decisions as a source of law by stating that:

> "It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernable."[154]

A vivid example of WTO judicial reports/decisions operation in the disputes settlement could be so called WTO environmental disputes. Since 1995, the WTO has made rulings involving environmental and measures affecting gasoline, shrimp-turtles, hormones, asbestos, salmon, apples, other agricultural products, generic drugs, genetically modified organisms, retreated tyres. These environmental reports have laid down principles and guidelines which are expected to be invoked again once disputes of similar background arise. In fact WTO panels have developed lengthy and rich doctrine in interpreting Article XX GATT, which became the

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[149] *US – Shrimp Article 21.5*, para. 109.

[150] *Japan – Alcoholic Beverages*, Panel Report, para. 6.10 and Appellate Body Report, p. 108.

[151] *Japan – Alcoholic Beverages*, Panel Report, para. 6.10.

[152] Matsushita, M.; Mavroidis, P.; *The World Trade Organization*, p. 57.

[153] Rosenne, S. *The Law and Practice of the International Court*, 1985, 2nd. ed. quoted in Shahabuddeen, M.,; *Precedent in the World Court*, p. 131.

[154] *Japan – Alcoholic Beverages*, AB, note 30.

basis for argumentation in the upcoming disputes. Any party that faces application of Article XX GATT has to follow prior reports dealing with it. Likewise panels and Appellate Body have to consider prior rulings themselves. Hence prior rulings create a basis in a form of legal expectations. As we can see clearly WTO dispute settlement system accepts application of WTO judiciary reports as a subsidiary source of law.

4.3. Non-WTO Judicial Decisions

With respect to the other judicial bodies decisions, WTO panels/Appellate Body do not hesitate to refer to judicial decisions of the International Court of Justice[155]. This implies two conclusions. First, usage of judicial decisions of international tribunals evidences that WTO judiciary apply non-WTO international law. Second, WTO panels are careful no to disregard judicial decisions dealing with those rules of international law relevant in the disputes settlement of WTO.

4.4. Concluding Remarks

Given the fact that neither WTO judicial decisions nor decisions of other international tribunals are legitimized as a source of law in the disputes settlement of WTO, the extent to which they are used in practice is well developed.

Nevertheless it should be pointed out that the power of this source of law cannot be overestimated. As spotted in Oppenheim's International Law 'since judges do not in principle make law but apply existing law, their role is inevitably secondary since the law they propound has some antecedent source.'[156]

Leaving aside the particularities, one should not ignore the impact of WTO and non-WTO jurisprudence, for it may play an important role in determining content of rights and obligations of WTO parties in the disputes settlement. Thus to conclude judicial decisions, be it from WTO, or non-WTO jurisprudence, is a fully applicable source of international law in the disputes settlement of the WTO.

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[155] For instance see the Appellate Body citing *Namibia (Legal Consequences)* Advisory Opinion in *Shrimp*, AB, paras. 129-130.

[156] Oppenheim's International Law, p. 41.

5. General Principles of Law

5.1. Role of the General Principles of Law

The legal principles which find a place in all or most of the various national systems of law naturally commend themselves to states for application in the international legal system. Thus Article 38(1)(c) of the Statute of the International Court of Justice authorizes to apply, in addition to treaties and custom, 'the general principles of law recognized by civilized nations'.

According to Oppenheim's International Law acknowledgement of general principles of law as a source of international law enables rules of law to exist which can fill gaps or weaknesses in the law which might otherwise be left by the operation of the custom and treaty and provides a background of legal principles in the light of which custom and treaties have to be applied and as such it may operate to modify their application. [157] Moreover general principles of law, may not only have a supplementary role, but may give rise to rules of independent legal force.[158] In the WTO disputes settlement this source of law have materialized via principles of good faith and equity in environmental context (in other words so called principle of common but differentiated responsibility).

5.2. Good Faith as a Source of Law in the Disputes Settlement of WTO

Principle of a good faith has been often invoked by the ICJ. A conspicuous example of legalization of principle of a good faith is Article 2(2) of the UN Charter, which lays down that '[A]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter'[159]. Moreover the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States[160] refers to the obligations upon states to fulfill in good faith their obligations resulting from international law generally, including treaties.

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[157] Oppenheim's International Law, p. 39.

[158] Id.

[159] *Charter of the United Nations*. Entered in force 24 October 1945, 1 U.N.T.S. XVI, Article 2(2).

[160] Adopted by General Assembly Resolution 2625 (XXV), 1970.

As noted in Oppenheim's International Law '[T]he significance of this principle touches every aspect of international law.'[161]

Primarily good faith is found in the exceptions to the trade liberalization obligations of the WTO Agreements, namely the chapeau of Article XX GATT 1994 which 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. . .".*

Appellate Body in *US-Shrimp* following previous case-law stated that, 'the chapeau of Article XX is, in fact, but one expression of the principle of good faith'.[162] Accordingly the chapeau is often interpreted as demanding a certain degree of tolerance and good faith in the application of the measure.[163] Thus in the disputes settlement, imposed trade restrictive measures aimed at environmental protection require demonstration that they are taken acting in good faith – neither applied in a manner which would constitute (1) a means of arbitrary or (2) unjustifiable discrimination between countries where the same conditions prevail, or (3) a disguised restriction on international trade.

At the same hand as spotted by Marion Panizzon, author of an in-depth research on good-faith role in WTO, 'good faith has increasingly assisted the WTO judiciary's law-finding'.[164] At the same token he concluded that:

> "[E]xpressions of good faith, and the way the WTO judiciary uses them, may provide insights into the broader relationship between general public international legal sources, such as treaty law, customary international law . . . and the WTO agreements".[165]

Though it should be mentioned that 'for the Appellate Body, good faith has been associated with the general principle of law rather than with the customary rules of interpretation under the VCLT.'[166] Hence clearly WTO parties' fulfillment of obligations either from the WTO

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[161] Oppenheim's International Law, p. 38; See also Nuclear Test Cases, 1974 I.C.J. Reports (1974), p. 268; Border and Transborder Armed Actions Case, 1988 I.C.J. Reports, p. 105.

[162] *US – Shrimp*, AB, para. 158.

[163] See Sebastian, T. Trade and environment under WTO rules after the Appellate Body report in Brazil-retreated tyres, *Journal of International Commercial Law and Technology*, Vol. 4 Issue 1, 2009. p. 58-59.

[164] Panizzon, M. *Good Faith in the Jurisprudence of the WTO: The protection of legitimate expectations, good faith interpretation and fait dispute settlement*. Zurich: Harts Publishing, 2006, p. 200.

[165] Id. p. 369.

[166] Id. p. 200.

law or general international law requires application of principle of good faith to reconcile possible discrepancies is assessment of WTO parties' conduct, i.e. to apply good faith exactly as a principle of general international law.

5.3. Equity in the Disputes Settlement of WTO

According to the wording of the Permanent Court of International Justice decision in the *Diversion of Water from the Meuse* case (Judge Hudson) '[U]nder article 38 of the Statute, if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply'.[167] However one should be cautious about lengths to which the principle may be applied. As stretched by professor Shaw:

> "The relevant courts are not applying principles of abstract justice to the cases, but rather deriving equitable principles and solutions from applicable law.[168] Equity has been used by the courts as a way of mitigating certain inequities, not as a method of refashioning nature to the detriment of legal rules.[169]

Likewise principle of equity cannot be disregarded by WTO judiciary for it is inherent in the law panels and Appellate Body apply. A conspicuous example is the recent *Brazil – Retreated Tyres* case and emanation of equity from Article XX GATT.

The dispute has arisen because Brazil has taken actions to minimize the adverse effects of waste tyres. Such policies included preventive measures aiming at reducing the generation of additional waste tyres, as well as remedial measures aimed at managing and disposing tyres that can no longer be used or retreated, such as landfilling, stockpiling, the incineration of waste tyres and material recycling.[170] Since one of the measures taken by Brazil has been a total ban on imports of both used tyres and retreated tyres, the EC lodged a complaint contesting validity of the import ban of retreated tyres. Brazil claimed exception of Article XX (b) and (g) GATT.

In fact any exception of Article XX (b) or (g) has to pass necessity test. In the words of the Appellate Body:

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[167] P.C.I.J., Series A/B, No. 70, (1937) p. 73, 77.

[168] Shaw M. *International Law*. Cambridge: Cambridge University Press, 2003, 5th ed., p. 101.

[169] Id.

[170] *Brazil – Retreated tyres*, AB Report, para. 120.

> "[i]n order to determine whether a measure is "necessary" within the meaning of Article XX (b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued."[171]

Yet if panel determines that there is an option for a less restrictive alternative that less restrictive alternative still has to be "reasonably available". This might not be the case where the alternative is "merely theoretical in nature, for instance, *where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties* (emphasis added)."[172] Thus the Appellate Body in *Brazil – Retreated Tyres* echoed principle of common but differentiated responsibility which has developed from the application of equity in general international law.[173]

For comparison of the wording of the Appellate Body we may take a look how this principle is embraced in various instruments of international law:

Principle 7 of the Rio Declaration states:

> "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradations, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and of the technologies and financial resources they command."

United Nations Framework Convention on Climate Change resounds the principle by wording that the parties should act to protect the climate system 'on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[174]

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[171] *Brazil - Retreated Tyres*, AB, para. 156.

[172] Id.

[173] See Sands, P. *Principles of International Environmental Law*, p. 285.

[174] Article 3(1).

As explained by Sands, principle includes two elements. The first concerns the common responsibility of states for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take account of differing circumstances, particularly in relation to each state's contribution to the creation of a particular environmental problem and its ability to prevent, reduce and control the threat.[175]

Applying this principle to the measures which were presented by the EC as constituting alternatives to the import ban of retreated tyres, the Appellate Body paying account to the capabilities and inequities of Brazil in comparison with the EC found that none of these measures constituted a 'reasonably available alternative'.[176]

Thus in fact WTO Appellate Body applied equity as a source of international law in the sense of Article 38 (1)(c) of the Statute of the ICJ, though it is not legally recognized in WTO law.

5.4. Concluding Remarks

As demonstrated, general principles of law as a source of international law have also found their pathway to the disputes settlement of WTO. The most remarkable examples are application of principle of good faith and equity which contributed to WTO judiciary's legal assessments in the disputes. Thus arguably more general principles of law may be invoked in the disputes settlement of WTO as a source of law.[177]

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[175] See Sands, P. *Principles of International Environmental Law*, p. 285.

[176] *Brazil - Retreated Tyres*, AB Report, para. 159.

[177] See also *United States – Measures Affecting Imports of Softwood Lumber from Canada* on use of principle of estoppel in a proceeding involving subsidies and countervailing measures (27-28, October 1993, GATT B.I.S.D. (40th Supp.), p. 358, paras. 308-325.

6. Other Possible Sources of International Law

6.1. Scholar Writings as a Source of Law in the Disputes Settlement of WTO

It is not a surprise that there are leading scholars in respective fields of international law. Their stance affects "minds" and policies of those who interpret and apply law. There are even academic opinions that individuals and their works may affect the formation of international customary law.[178]

Article 38(1)(d) of the Statute of ICJ vests teachings of the most highly qualified publicists of the various nations with a status of subsidiary means for the determination of rules of law. Not surprisingly, writings of the most highly qualified scholars legally have no defined status in the dispute settlement system of the WTO.

However, practice of the WTO disputes settlement once again lies round other way. Sporadic reports can be found in panel reports to the teachings and writings of highly qualified publicists even in disputes settlement under GATT 1947, but these references were rare: a conspicuous example is the *United States – Measures Affecting Alcoholic and Malt Beverages* case[179], citing works of eminent professors in trade law John. H. Jackson and Robert E. Hudec.

The WTO era has tremendously boosted use of writings of famous scholars by the WTO judiciary. For instance in panel report on *Argentine – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*[180], references were made to writings of John H. Jackson (note 176) Keith Highet (note 184), Mojtaba Kazazi (185). Appellate Body in it's report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*[181] has relied on F. Roessler and E.-U. Petersmann (note 26), Ian Brownlie (note 52). Likewise in the *EC – Hormones case*[182] writings of P. Sands, J. Cameron, J. Abouchar, P. Birnie, A. Boyle, L.

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[178] See Ochoa, C. The Individual and Customary International Law Formation. Available at: <http://www.opiniojuris.org/posts/1192667431.shtml.>

[179] 19 June 1992, GATT B.I.S.D. (39th Supp.) p. 285.

[180] *Argentine – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items,* WTO Doc., WT/DS56/R, (1997) (Panel Report).

[181] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/R**,** (1998) (Panel Report).

[182] *EC-Hormones*, AB, note 92.

Gundling, A. deMestral, D. Bodansky (note 92) were taken into account. Author deems unnecessary to continue quantitative analysis, because the presented cases sufficiently evidence intensive application of this subsidiary source of international law in the disputes settlement of WTO. Given the fact that even the ICJ has only rarely once referred to scholarly writings[183] such practice evidences very liberal approach in the disputes settlement of WTO towards this source of law.

Though evidently at the end, teachings of most qualified scholars can be only subsidiary source of international law among the law applied by the WTO judiciary. Yet in the words of authoritative Oppenheim's treatise: "[i]nasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinize critically the practice of states by reference to legal principles."[184]

6.2. Question of Status of Soft Law in the Disputes Settlement of WTO

Some fields of international law that might be relevant in the disputes of WTO are heavily comprised of or affected by so called soft law, hence consideration of possible soft law role in the disputes settlement of WTO cannot be ignored.

Soft law are resolutions, draft articles and framework conventions, declarations issued at ministerial conferences, codes of conduct, joint declarations or statements, etc.[185]. The force or legal effect of soft law in international law is highly debatable. Pretension of soft law as a source of international law is somewhat blurred. As pointed out by professor Shaw this terminology is meant to indicate that the instrument or provision in question is not of itself 'law', but its importance within the general framework of international legal development is such that particular attention requires to be paid to it. [186] Thus although in the words of professor Shaw '[S]oft law is not law . . . but a document'[187], yet the use of such documents is significant in

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[183] See *Case concerning the land, island and maritime frontier dispute and maritime delimitation* (El Salvador /Honduras), 1992 I.C.J. Reports.

[184] Oppenheim's International Law, p. 43.

[185] See Klabbers, I. The Redundancy of Soft Law in Koskenniemi M., *Sources of International Law*. Ashgate Publishing Company, 2000, p. 168.

[186] See Shaw, M. *International Law*, p. 117.

[187] See Shaw, M. *International Law*, p. 117.

signaling the evolution and establishment of guidelines, which may ultimately be converted into legally binding rules.'[188] Arguably such application of soft law may be attractive for international tribunals, not excluding WTO judiciary.

In fact reliance on soft law by authoritative international tribunals is not a new issue. Thus, the International Court of Justice have on some occasions relied on General Assembly resolutions[189] and Helsinki Final Act as confirmation of opinion juris,[190] the European Court of Justice in the 1980s applied a Council of Ministers resolution on fisheries without hesitation.[191]

In WTO practice for instance the GATT panel dealing with the banana regime of the EC relied on the ECOSOC resolution by virtue of its having been incorporated in the GATT framework. Similarly Appellate Body referred to the provision of Rio Declaration to interpret sustainable development.[192]

Professor Klabbers argues that 'to the extent that soft law instruments are applied by international tribunals, they are somehow recast into the more accepted sources of international law: treaties and custom.'[193] If soft law is pervasive and authoritative the question arises what to do in case of soft law instrument is in collision with the WTO law, i.e. GATT core obligations? Klabbers contend that '[T]he most popular and obvious strategy, then, is to simply deny the existence of any conflict, and interpret the older treaty in the light of the newer soft law instrument.'[194] Thus soft law may never loose significance, for there will always be newer resolutions, draft articles, framework conventions, declarations, statements dealing with the rights and obligations regulated and affected by WTO law.

In this sense soft-law may be called a source of international law in the disputes settlements of WTO.

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[188] Shaw, M. *International Law*, p. 118; See also Klabbers, I. The Redundancy of Soft Law, p. 177.

[189] See *Military and Paramilitary Activities in and against Nicaragua* (merits), 1986 I.C.J. Reports [hereinafter – Nicaragua case], p. 100-101, esp. para. 188 and 191; *Advisory Opinion on Western Sahara* 1975 I.C.J. Reports, para. 162.

[190] Nicaragua case, para. 189.

[191] See Commission v. Ireland [1978], 61/77 ECR 417; 141/78 France v. United Kingdom, [1979] ECR 2923; 32/79, Commission v. United Kingdom, [1980] ECR 2403; 804/79, Commission v. United Kingdom, [1981], ECR 1045.

[192] *US – Shrimp*, AB, paras. 129-134.

[193] Klabbers, I. The Redundancy of Soft Law, p. 174.

[194] Id., p. 177.

CONCLUSIONS

1. Although WTO and its disputes settlement system is contended to be self-contained or closed regime, the reality shows, that especially in areas related with environmental protection, it has to deal with issues also regulated by non-WTO international law. "Jurisdiction – applicable law" rationale provided by professor Pauwelyn and ILC Report on Fragmentation of International Law accurately identify deficiencies of the "red-light approach".

2. Though Article 3.2 DSU restricts applicable law to the covered agreements of WTO in accordance with the customary rules of interpretation of public international law, generally disputes settlement of WTO is open for application of all type of sources of international law enshrined in Article 38 (1) of the Statute of International Court of Justice.

3. With respect to the customary law, partial application of international customary law is legitimized by the WTO law itself. WTO judiciary at great lengths relies on customary rules of interpretation, primarily those enshrined in Article 31 VCLT. Interpretation of these rules is generally consistent with interpretation provided by ICJ and ILC. This has also opened disputes settlement system for application of the wider body of general international law in interpreting and applying WTO law. At the same token the use of Article 32 VCLT in disputes settlement of WTO is minimal, giving priority to the rule of Article 31 (3) VCLT.

4. With respect to non-legitimized customary law in WTO, attempts by the EC in *EC-Hormones case* to invoke precautionary principle, demonstrate unexplored potential for application of customary law. Yet since Article 3.2 DSU obliges WTO DSB not to add or diminish the rights and obligations provided in the covered agreements, WTO panels whose reports have to pass approval by DSB may be reluctant to declare set of rules customary law on the responsibility of their own.

5. With respect to the international treaty law - MEAs, there has been no direct application in practice of disputes settlement of WTO, though high number of WTO inconsistent MEAs poses question if it could be applied as source of law, should a dispute arise. Common solution in practice is prevention of dispute in WTO by simply abstaining to challenge WTO inconsistent measure among MEA parties or searching for solution under MEA clauses. In this sense MEA cannot even play role of law in the disputes settlement, but this detail sufficiently explains why dispute settlement system of WTO has so far avoided direct MEAs application. Possible other options, though never invoked yet, could be *lex specialis* and *lex posteriori* unless such application does not violate rule *pacta tertiis nec nocent nec prosunt*. In that case disputes

settlement system of WTO could consider MEAs in the light of exception clause of Article XX GATT, as was to some extent evident in *US-Shrimp* case, or take MEAs into account via Article 31(3) VCLT

6. With respect to the judicial decisions, be it GATT 1947/WTO judiciary reports or decisions of other tribunals, such as ICJ their status within WTO disputes settlement clearly conform qualification of subsidiary source of international law as enshrined in Article 38(1)(c) of the Statute of International Justice. It is the GATT/WTO panels themselves who legalized use of this source of international law. In the words of Judge Shahabuddeen '[O]nce standing judicial bodies have come into existence, they provide an additional mechanism for the further development of the law'.[195]

7. With regard to the general principles of law, WTO panels have already employed principle of good faith as principle common in international law, and in an environmental fashion principle of equity (common but differentiated responsibilities).

8. Likewise teachings of most qualified scholars also are comprehensively applied implying their status as subsidiary means for the determination of rules of law, be it WTO or general international law.

9. With respect to the soft law, given its importance in such areas as international environmental law, it also pretends to play some role in related fields disputes of WTO.

10. At the same token some fear that WTO panels are becoming more rule makers rather than rules interpreter[196] Yet in the words of one writer '[I]f the WTO is to become a vehicle for global governance one thing has to be clear: this vehicle ought not to travel without a road map, and should be mindful of other traffic'.[197] In the disputes settlement of WTO, especially related with environment protection, clearly that other traffic is nothing but rules enshrined in non-international WTO law.

11. It seems sensible to contribute to clarifying the application and effectiveness of sources of non-WTO international law in the disputes settlement of WTO by carrying out further research on larger set of aspects, such as human rights law and other international organizations law. Under any circumstances hypothesis is confirmed.

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[195] Shahabuddeen, M. *Precedent in the World Court*, p. 45.

[196] See Neumayer, E. The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak. *Global Environmental Politics*, volume 4, no. 3, 2004, p. 8.

[197] Bronckers, M. More Power to the WTO? *Journal of International Environmental Law*, vol. 4, 2001, p. 56.

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SUMMARY

Valūnas R. Sources of International Law in the Disputes Settlement of WTO/ Joint program international law master thesis. Assoc. professor doc. dr. J. Žilinskas. – Vilnius: Mykolas Romeris University, Faculty of law, 2009. –

Although WTO and its disputes settlement system is contended to be self-contained regime closed from the application of non-WTO international law in reality disputes especially in areas related with environmental protection have to deal with issues also regulated by non-WTO international law.

Present thesis attempt to demonstrate that all sources of international law enshrined in Article 38(1) of the Statute of International Court of Justice are applicable and to lesser of higher extent applied in the disputes settlement of WTO. In order to understand obstacles to and potential of application of non-WTO international law, it first presents arguments for non-use of non-WTO international law by exploring GATT 1947 panels' reports and providing hypothetical dispute in the WTO. Having not found credibility of non-WTO law application approach, author concurs with the writings of professor Pauwelyn and the findings of International Law Commission advocating international law application in the WTO.

Consequently, every category of sources of international law is examined to demonstrate openness of the disputes settlement system of WTO to non-WTO international law: customary law, international treaty law – multilateral environmental agreements, general principles of law, judicial decisions, teaching of the most qualified scholars and even the role of soft law.

Thesis conclude that the disputes settlement in WTO is generally open for application of all sources of international enshrined in Article 38(1) of the Statute of International Court of Justice.

Valūnas R. Tarptautinės teisės šaltiniai Pasaulinės prekybos organizacijos ginčuose / Jungtinės programos tarptautinės teisės magistro baigiamasis darbas. Vadovas doc. dr. J. Žilinskas. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2009. -

SANTRAUKA

Nors Pasaulinės prekybos organizacija ir jos ginčų sprendimo sistema daugelio laikoma savarankišku režimu, uždaru nuo kitos nei Pasaulinės prekybos organizacijos teisės taikymo, dauguma kylančių ginčų, ypač aplinkosaugos srityje apima klausimus, reguliuojamus ir tarptautinės teisės, esančios už Pasaulinės prekybos organizacijos ribų.

Šiuo darbu siekiama įrodyti, jog visi tarptautinės teisės šaltiniai, įtvirtinti Tarptautinio Teisingumo Teismo 38 straipsnio 1 dalyje yra taikytini sprendžiant Pasaulinės prekybos organizacijos tarp narių kylančius ginčus. Tam, kad būtų galima suvokti galimas kliūtis ir paskatas ne Pasaulinės prekybos organizacijos tarptautinės teisės taikymui, analizuojama GATT 1947 ginčų sprendimų praktika bei pateikiamas hipotetinis ginčas pagal Pasaulinės prekybos organizacijos teisę. Autorius nesutikdamas su požiūriu, pasisakančiu prieš tarptautinės teisės, kuri nėra sukurta Pasaulinės prekybos organizacijos taikymą ginčų sprendime, remiasi profesoriaus Pauwelyn darbais bei Tarptautinės Teisės Komisijos išvadomis.

Darbe analizuojami visų galimų tarptautinės teisės šaltinių panaudojimo Pasaulinės prekybos organizacijos ginčų sprendime praktiniai ir teoriniai aspektai – tarptautinė paprotinė teisė, aplinkosaugos daugiašalės sutartys kaip tarptautinė sutarčių teisė, bendrieji teisės principai, teismų sprendimai, doktrina, taip pat taip aptariamas vadinamosios „minkštosios teisės“ vaidmuo.

Darbe daroma išvada, jog sprendžiant Pasaulinės prekybos organizacijos tarp narių kylančius ginčus iš esmės yra naudojami ir naudotini visi tarptautinės teisės šaltiniai įtvirtinti Tarptautinio Teisingumo Teismo 38 straipsnio 1 dalyje.

ANNEXES

ANNEX 1