

The London School of Economics and Political Science

**THE WTO DISPUTE SETTLEMENT SYSTEM AND THE
CHALLENGE OF ENVIRONMENT AND LEGITIMACY**

Kati Kulovesi

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Declaration

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Abstract

This thesis analyses the legitimacy of the WTO dispute settlement system, especially in the context of disputes involving questions concerning environmental protection. It argues that since the early 1990s, such disputes have posed important challenges to the legitimacy of the WTO. From the legal point of view, they have fuelled a lively doctrinal debate on fragmentation of international law and the role of non-WTO norms in the WTO dispute resolution mechanism.

The thesis conceives legitimacy as a notion consisting of various interlinked components, including social, substantive, formal and procedural ones, and analyses the operation of the WTO dispute settlement system in light of these criteria. It shows that the compulsory but materially restricted jurisdiction of the WTO dispute settlement limits its ability to solve disputes involving non-trade interests and legal norms. The dissertation argues, however, that some of the ensuing problems could be remedied if the WTO dispute settlement system approached international environmental law in a more constructive, consistent and transparent manner.

Turning to the formal and procedural elements of legitimacy, the thesis conceives the situation of the WTO dispute settlement system as a dilemma between the pressure to improve substantive legitimacy by considering environmental norms and interests, and the need to observe the limits of its judicial function. It explores tensions at the boundary between the WTO and its Member States, arguing that only limited potential exists to enhance the authority of the WTO dispute settlement through 'importing' substantive legitimacy.

Finally, the dissertation highlights institutional and systemic problems arising from fragmentation of international law. Using the relationship between the WTO and the international climate change regime as an example, it concludes that the WTO dispute settlement system's legitimacy challenge involves two dimensions. Certain unexploited potential exists to improve the situation through the judicial techniques at the disposal of the WTO dispute settlement system. However, the more profound and systemic problems are incapable of solution by the WTO dispute settlement system or even by WTO negotiators alone. Instead, they would require broader international efforts.

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Abbreviations

AAU	Assigned Amount Unit
AB	Appellate Body
ACP	African, Caribbean and Pacific Countries
AR4	Fourth Assessment Report by the Intergovernmental Panel on Climate Change
BISD	GATT Basic Instruments and Selected Documents
CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CER	Certified Emission Reduction
CIEL	Center for International Environmental Law
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on Conservation of Migratory Species of Wild Animals
CUP	Cambridge University Press
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
EC	European Community /European Communities
ERU	Emission Reduction Unit
EU	European Union
ETS	EU Emissions Trading Scheme
FIELD	Foundation for International Environmental Law and Development
GA	(United Nations) General Assembly
GATS	Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GM	Genetically Modified
GMO	Genetically Modified Organism
GSP	Generalised System of Preferences
GSTP	Global System of Trade Preferences
CTE	(WTO) Committee on Trade and Environment
ibid	ibidem (in the same place)
ICJ	International Court of Justice
ICTSD	International Center for Trade and Sustainable Development
IETA	International Emissions Trading Association
IISD	International Institute for Sustainable Development
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
INSEREM	Institut National de la Santé et de la Recherche Scientifique
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
JI	Joint Implementation
MEA	Multilateral Environmental Agreement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NAMA	Non-agricultural Market Access
NGO	Non-governmental Organization
NIEO	New International Economic Order
OUP	Oxford University Press
Para./paras.	Paragraph / paragraphs
PPMs	Process and Production Methods

ppm	parts per millimetre
RECIEL	Review of European Community & International Environmental Law
Rio Declaration	Rio Declaration on Environment and Development
RMU	Removal Unit
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TRIMS	Trade-related Investment Measures
TRIPS	Trade-related Aspects of Intellectual Property
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNTS	United Nations Treaty Series
U.S./US	United States
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization
WWF	World Wildlife Fund

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The WTO Dispute Settlement System and the Challenge of Environment and Legitimacy – an Introduction

The dispute settlement process is perhaps the single most controversial component of the WTO system... For some WTO critics, it is a question of legitimacy: the panels do not reflect any direct democratic representation, and they seem not to be accountable to any checks and balances. For others, it is an issue of transparency, openness and access: the panel reviews are not public, and only governments involved in the dispute are allowed to submit testimony. For yet others, the issue is ideological: the panel rulings have in some cases declared environmentally based trade provisions to be inconsistent with WTO obligations.¹

The dispute settlement system of the World Trade Organization (WTO) was not designed to resolve challenges related to trade and environment, legitimacy and globalization that form the core of this study. While debates related to these issues were already at full swing at the time of its inception in 1995, the focus of those negotiating the WTO *Dispute Settlement Understanding* (DSU) was on creating an improved forum for settling international trade disputes. And judging from that narrow perspective, they succeeded. The WTO dispute settlement system has fruitfully solved a considerable number of 'traditional' trade disputes. That it would also become entangled in controversies related to globalisation, legitimacy, democracy and environmental protection could perhaps be predicted at the time of its creation - but there were no realistic prospects for solving the ensuing problems at that point in time. Such challenges are, however, very much a part of the reality in which the WTO dispute settlement system currently operates: They might not form the core of its functions, but they are an important and extremely demanding part of it.

Regardless of the more modest ambitions of its creators, the WTO Appellate Body has been characterised as "the most powerful court in the world."² This reputation is based on certain unique features of the WTO dispute settlement system. Its jurisdiction is compulsory for all WTO Member States and it is the supreme authority on WTO law. Due to its competence to authorise trade sanctions against Member States violating WTO rules, the WTO dispute resolution mechanism can also have important economic and political implications. It therefore stands out from the growing number of other international courts and tribunals. The WTO was also born into an international reality undergoing several important changes. The end of the Cold War and globalisation both highlighted the role of international law and organizations, prompting paradigm changes concerning their legitimacy. Around the same time, international environmental consciousness was expanding rapidly, bringing to the fore tensions between trade and environmental protection. All

¹ K. Jones, *Who's Afraid of the WTO?* (OUP, 2004), 81.

² P. Sands, *Lawless World. America and the Making and Breaking of Global Rules*. (Penguin Books, 2005), 99.

these factors have inspired some fundamental questions concerning the WTO dispute settlement system. What is its role in solving conflicts between international trade and non-trade policy objectives? Given that it is a trade body with limited jurisdiction, can it reach satisfactory decisions in such disputes? To what extent can it rely on such rules of international law that are not contained in the WTO Agreements? What is, for instance, the role of international environmental law in the WTO dispute settlement system? How can the system respond to tensions resulting from fragmentation of international law into various specialised legal regimes?

The focus of this study is on the legitimacy of the WTO dispute settlement system especially in the context of disputes involving environmental and health issues. There have been several such cases in the GATT/WTO system. In the beginning of the 1990s, two *GATT* panels condemned an import prohibition by the U.S. on tuna caught by fishing techniques that resulted in incidental killings of dolphins. The *Tuna-Dolphin* decisions caused a remarkable backlash against the world trading system, which became labelled as the dolphin-eating *GATTzilla* monster. The new WTO dispute settlement system thus inherited the challenge of responding to the fierce environmentalist critique and attempting to 'balance' trade and environmental protection without jeopardizing the position that the WTO "is not an environmental protection agency and does not aspire to be one."³ Some of the most famous cases in the WTO era have involved a trade ban on shrimp by the U.S. to protect sea turtles, as well as a prohibition by France on asbestos. In the autumn of 2006, the WTO Dispute Settlement Body (DSB) ruled on the *Biotech* dispute concerning the *de facto* moratorium on genetically modified products by the European Union (EU). In 2007, dispute settlement reports were adopted concerning an import ban on retreated tyres by Brazil based on their adverse health and environmental impacts. In March 2008, yet another panel report was circulated in the prolonged trans-Atlantic dispute concerning the prohibition by the EU on meat produced with the aid of growth hormones.

Several potential new disputes are already looming around the corner. In the autumn of 2007, first steps were taken in a dispute concerning a prohibition on seal products by Belgium and the Netherlands. According to Canada, the trade ban violates WTO rules and has important implications on the livelihood of indigenous people. Numerous trade-related policies and measures are also being contemplated and implemented to mitigate climate change. The EU, for instance, has set an ambitious ten per cent target for biofuels in the transport sector by 2020. To address environmental concerns associated with biofuels, such as deforestation, loss of biodiversity and their modest impact on reducing greenhouse gas emissions, the EU is contemplating strict sustainability standards for both domestically produced and imported biofuels. Various climate

³ D. Abdel Motaal, "Trade and Environment in the World Trade Organization: Dispelling the Misconceptions," *RECIEL* 8(3) (1999), 330 at 330.

change related initiatives are also mushrooming in the U.S. Congress. Some of the most prominent include a proposal for a Low Carbon Economy Act, which would launch a federal cap and trade system for carbon dioxide emissions. Importers from countries that have not adopted comparable measures to mitigate climate change would be required to purchase emission allowances to compensate for the loss of competitiveness. It is easy to see how such measures could be challenged in the WTO dispute settlement system.

All this goes to show that the WTO dispute settlement system has become the most significant judicial forum to tackle international conflicts between economic interests and environmental protection. This has not occurred without significant political controversies and doctrinal debates. One of the main themes in this work concerns the role of international environmental law in the WTO dispute settlement system. The contours of that complex question will be discussed throughout the study. Certainly, the lack of consideration for relevant legal norms is bound to have a negative impact on the legitimacy of a judicial body. The prevailing view is, however, that as a trade body, the competence of the WTO dispute settlement system to consider international environmental norms is limited. Furthermore, any stretching of the boundaries of the trade regime by the WTO dispute settlement system risks irritating WTO Member States and jeopardising their faith in the world trading system. The importance of the WTO respecting its mandate has also been underlined through several public protests against it. In the eyes of many protestors, the WTO is an institution that has undemocratic decision-making structures, promotes hard-line neoliberal globalization and steals power from the local level to the supranational one where its use is not subject to adequate checks and balances. Although the protests have often taken extreme manifestations, underlying are valid concerns over the lack of democratic accountability and possibilities for public participation in decision-making that concerns subject matters of a great public interest.

Such are the broad themes that form the focus of this research. What is common to these topics is that they can be linked to the question of legitimacy. Legitimacy is a complex notion lacking an unequivocal definition but it is essentially about justified and acceptable authority. It is commonly associated with a combination of factors, including compliance with formal legal requirements, adherence to just procedures, the social acceptance of an institution and its ability to advance commonly shared policy objectives. Conceived in this way, legitimacy offers a useful conceptual tool for analysing the role and functioning of the WTO dispute settlement system. Its flexibility makes it possible to draw together the various questions, concerns and criticisms relating to the WTO dispute settlement and assess them against a broader theoretical umbrella. The distinction between formal and substantive legitimacy also provides a helpful way of categorising some of the

problems commonly associated with the WTO dispute resolution mechanism and understanding their interrelations.

While the approach and methods of this research are legal, its focus on the legitimacy of the WTO dispute settlement system and the environmental linkage means that its substance is intimately connected to several broader interdisciplinary debates. The question concerning the legitimacy of the WTO dispute settlement system builds on an intense debate about the need to rethink the legitimacy of international law and organizations. The focus on WTO disputes where environmental issues play a dominant role brings to the fore tensions between trade and environment, the two elements that are essential to the notion of sustainable development but that are not always easy to combine. When considering the potential to solve such 'linkage' disputes through the WTO dispute settlement system, one soon comes across the problematique related to fragmentation of international law. Indeed, many of the problems discussed in this study draw their origins from the increasingly specialised nature of international law and its dissolution into relatively isolated sub-systems, such as international trade law and international environmental law. While the uncoordinated nature of international regimes and potential conflicts and tensions in their shared territory are problematic in their own right, limits to the jurisdiction of the WTO dispute settlement system add an additional layer of complexity to the analysis. Finally, the subject matter of many of the existing and potential linkage disputes brings to the fore questions concerning the interaction between law, science and policy and the problem of striking appropriate balances between scientific uncertainty, risk, precautionary action, economic interests.

In the legal language, these problems are translated into questions such as the competence of the WTO dispute settlement system to apply such norms of international law that are not contained in the WTO Agreements, the potential of such norms to influence the interpretation of WTO law even if they cannot be directly applied and the substantive conclusions to be drawn from such norms. The focus on the legitimacy of the WTO dispute settlement system also draws attention to such formal and procedural issues as the distinction between law-application and law-making functions, standard of review and justifiability of the WTO dispute settlement procedures in terms of their transparency, access to information and possibilities for public participation. Certainly, it is also relevant to ask how international law, its practitioners and institutions responsible for making and applying international norms should respond to the challenges posed by the increased specialisation, indeed, fragmentation of international life and where is the point in which the legal techniques at the disposal of the WTO dispute settlement system have exhausted their potential.

Structurally, this study consists of two parts, with three Chapters in each. The first part lays down the theoretical and legal background necessary to analyse the legitimacy of the WTO dispute

settlement system. It reviews the ongoing debate about the legitimacy of international law and institutions, most notably the WTO. It describes how the WTO dispute settlement system operates, how its scope and competence have been drawn and how its substantive limits have resulted in challenges to the legitimacy of the WTO. It also outlines the 'linkage' debate concerning the appropriate limits of the WTO system, with a special emphasis on environmental questions. Chapter 1 begins with the story of how a new international organization, the World Trade Organization (WTO), was born into an international reality undergoing some important changes, and how it immediately became the prime target for critical voices highlighting the need to rethink the legitimacy of international law and institutions. The aim of Chapter 1 is to develop the conceptual and theoretical tools used in this study and demonstrate the increasing relevance of legitimacy in the field of international law. While Chapter 1 focuses on the unifying forces associated with globalisation, Chapter 2 points to the increasing fragmentation of international life and the dissolution of international law into highly specialised and relatively autonomous spheres. It shows how the legitimacy of the GATT/WTO system and international trade law to deal with 'linkage' disputes first came under fierce attack as a result of the *Tuna-Dolphin* and *Shrimp-Turtle* panel reports. Chapter 2 then outlines the key institutional features of the WTO dispute settlement system, with a special emphasis on its limited mandate to consider non-WTO norms of international law. Chapter 3 reviews the key policy and legal developments relevant to understanding the problems that 'linkage' disputes have caused at the WTO and it also overviews the main facts and legal arguments in the key environmental and health disputes at the WTO.

The second part focuses directly on the legitimacy of the WTO dispute settlement system with an emphasis on the relevant case law. It is structured on the basis of the key components of legitimacy, namely substantive/social and procedural/formal legitimacy, which offers a useful tool for categorising the most pressing legitimacy challenges at the WTO dispute settlement system. Chapter 4 questions whether the scope of the WTO dispute settlement system has resulted in a bias towards trade and economic interest thereby challenging its substantive/social legitimacy. It also puts forward some proposals on how the WTO dispute settlement system could improve its legitimacy while respecting the limits of its mandate. Chapter 5 highlights the formal and procedural dimensions of legitimacy. It examines the institutional limits of the WTO dispute settlement system through the fundamental doctrine concerning the separation of powers and distinction between adjudicative and legislative functions. It also discusses the relationship between the WTO dispute settlement system and national authorities of the WTO Member States, both institutionally and through the standard of review by the WTO dispute settlement system. Finally, it considers questions concerning WTO dispute settlement procedures and their legitimacy in terms of transparency, access to information and public participation. Chapter 6 focuses to the phenomenon known as fragmentation of international law. It analyses the volatile relationship between the WTO

and the international legal regime on climate change with the aim of justifying the conclusion that both the WTO dispute settlement system and WTO negotiators are incapable of responding to all the legitimacy challenges facing the WTO dispute settlement system. Chapter 7 puts forward the key conclusions from this study, stressing the need to strike appropriate balances not only between trade and environment, but also the different components of legitimacy.

As indicated earlier, this study has a legalistic focus. Parts of it also come up with proposals for improving the legitimacy of the WTO dispute settlement system through the available judicial techniques. Such techniques are as complex as they are intriguing and it is easy to get lost in the legal detail. However, what should not be forgotten when reading this work is the broader legal and institutional framework in which the WTO dispute settlement system is situated. A thread that runs through the storyline, sometimes implicitly but very explicitly towards the end, is thus the question whether something more than the WTO dispute settlement system is needed to respond to the challenges discussed here. In other words, when reading this study, it is essential to distinguish between two questions. The first one, forming the main focus of this study, is how the legitimacy of the WTO dispute settlement system has been challenged by linkage disputes and how it could be improved. The second, much broader and more profound question is whether the challenges of trade, environment, globalisation and legitimacy can be ultimately answered through the WTO dispute settlement system. Concerning the second question the conclusion of this study is, ultimately, negative. This may sound self-evident to some, but certainly not for everyone and should be kept in mind when reading this work. To put it differently: From the perspective of the WTO dispute settlement system, the answer to linkage problems could be in striking and maintaining a balance between the different components of legitimacy, developing a consistent, transparent and legally sound relationship with international environmental law and improving the transparency of the operating procedures. But for linkage problems themselves, this is not an adequate solution. By “greening the GATT” and “GATting the greens”⁴ important improvements can and have been achieved. But when the push comes to shove, the present WTO norms and the present mandate of the dispute resolution mechanism are not equipped for the task at hand.

⁴ Expression borrowed D.C. Esty, *Greening the GATT* (Institute for International Economics, 1994); and D.C. Esty, “GATting the Greens. Not Just Greening the GATT,” *Foreign Affairs*, November/December (1993), 32.

1. The WTO, Legitimacy and New Trends in International Law

This democratic deficit is inherent in all modern international law-making but is especially pronounced in the field of trade. If it is not addressed, serious consequences will ensue.⁵

This Chapter argues that international law and its institutions are undergoing a profound change and that the WTO and its dispute settlement mechanism are in the forefront of this change. While one may still assert with some credibility that legitimacy is not a concern in the international sphere, the persuasiveness of this argument is decreasing rapidly. For the most part, this work aims to look forward and begin visualizing legitimacy criteria applicable to international judicial bodies such as the WTO dispute settlement system. This Chapter, however, is best understood in light of the traditional visions on the legitimacy of international law and organizations that perhaps still dominate the scholarly imagination. To justify the need to assess the legitimacy of the WTO dispute settlement system, it emphasizes factual and intellectual shifts influenced by the end of the Cold War and globalization that are increasingly challenging the dominant views on the legitimacy of international law and organizations.

Section 1.1. describes the broader factual and political context in which the WTO dispute resolution mechanism operates and reviews the lively debate concerning the legitimacy and alleged democratic deficit of the WTO. Section 1.2 describes the image that this Chapter seeks to shatter, explaining the conventional views on the legitimacy of international law and organizations. It takes an in depth look at the notion of legitimacy and its key definitions, including the distinction between formal/procedural and substantive/social legitimacy reflected in the structure of this work. It also outlines the main understandings and debates about legitimacy in the field of international legal theory. Section 1.3. analyses in more detail the reasons why the conventional understandings of legitimacy and international law are being challenged. It outlines the key forces at work, namely globalization and the intellectual atmosphere produced by the end of the Cold War. It also describes how the recent scholarly debates on the need to reconsider the legitimacy of international law and organizations have manifested in the WTO context. In short, the aim here is to set the stage for focusing on the legitimacy of the WTO dispute settlement system in the rest of this work.

⁵ Sands, *Lawless World*, 103.

1.1 Debating the Legitimacy of the WTO

The WTO was established in 1995, shortly after the end of the Cold War and fundamental economic and political changes in the former communist countries inspired the argument that capitalism and liberal democracy had now proved their supremacy over rival ideologies. The period was also characterised by an intense focus on globalisation, ranging from academic analysis to massive street protests against international organizations, most notably the WTO, the World Bank and the International Monetary Fund (IMF). Indeed, nearly a decade later, it is difficult to discuss the WTO without mentioning the estimated tens of thousands of anti-globalisation protesters who took to the streets of Seattle at the end of 1999 with the aim of preventing the launch of a new round of international trade negotiations.⁶ Against this background, it is easy to see that the WTO was born to an international reality undergoing some significant changes and it is hardly surprising that it has been subject to a lively debate, questioning its legitimacy, democratic credentials and role in the international arena.

Arguments in the debate about the WTO have ranged from the dismissal of any serious legitimacy problems to claims that a profound legitimacy crisis is threatening to destroy the world trading system. Those advocating the traditional, state centred understanding of the legitimacy of intergovernmental organizations do not see any significant problems with the WTO system. The following quote from Henderson captures the essence of their argument:

Now as in the past international agencies derive their legitimacy from their member governments; and in the case of the WTO, the fact that it is today more subject to attack, by NGOs especially, does not establish a genuine 'legitimacy crisis.'⁷

Or as expressed more elaborately by Bacchus:

The several hundreds of us who work for 'the WTO' do not work for ourselves, or some expansive global entity that is accountable and answerable only to itself. In all we do every day, we work *exclusively* for the 147 Members of the WTO. We work *only* for what they work for. We do *only* what they *agree* we should do... The source of 'legitimacy' of the WTO is the Members of the WTO. The 'legitimacy' of the WTO is a 'legitimacy' that derives from, and is inseparable from, the *individual legitimacy* of each of the individual 'nation states' that, together, comprise the WTO.⁸ (Emphasis in original, KK)

My argument is, however, that this view has come to face some important challenges and its plausibility can no longer be taken for granted. During the past couple of decades, international cooperation has both intensified and expanded into new areas. The body of international law has

⁶ The estimates of the number of protesters vary. These are from Jones, *Who's Afraid of the WTO?*, 19.

⁷ D. Henderson, "WTO 2002: Imaginary Crisis, Real Problems," *World Trade Review* 1(3) (2002), 227 at 294.

⁸ J. Bacchus, "A Few Thoughts on Legitimacy, Democracy and the WTO," in E.-U. Petersmann & J. Harrison, eds., *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (OUP, 2005), 427 at 431.

evolved rapidly and the number of international actors, such as international organizations, non-governmental organizations (NGOs) and multinational corporations, has increased exponentially. All this means that it is difficult to defend the logic that sovereign states are the only relevant constituency for assessing the legitimacy of international organizations, and that as long as government representatives are satisfied with their conduct, international organizations must be regarded as perfectly legitimate.⁹ In contrast, my argument is that the views of the growing number of non-state actors directly affected by decisions and actions by international organizations, in other words, the opinions of the broader 'global society',¹⁰ are increasingly relevant for their legitimacy.

For the WTO, reactions by the broader global society have constituted some important challenges. As Esty indicates:

...the public acceptance of the authority and decisions that emerge from the World Trade Organization can no longer be taken for granted in many countries.¹¹

He emphasizes that in the past, the international trade regime benefited from a perception that trade policy was a narrow and technical field best left to qualified experts¹² However, as linkages between international trade policy and other political objectives have grown more evident, the economic expertise of trade bureaucrats have started to appear as a manifestly inadequate foundation for the legitimacy of the WTO.¹³ The economic objectives of the WTO and the desirability of international trade liberalisation have also been put to question at a more profound level. The question has been raised whether free trade truly results in economic development and poverty reduction in developing countries and whether something could be done to the unequal distribution of its benefits. Furthermore, a growing number of authors are drawing attention to institutional problems at the WTO, identifying a 'democratic deficit', the lack of transparency and possibilities for public participation as the most notable shortcomings.¹⁴ For the purposes of this general introduction arguments challenging the legitimacy of the WTO have been divided into two rough categories: criticism relating to international trade liberalization and criticism related to institutional aspects of the WTO. Both categories will be discussed in more detail below followed by a brief analysis of their implications.

⁹ G. C. A. Junne, "International Organizations in a New Period of Globalization: New (Problems of) Legitimacy," in J.-M. Coicaud & V. Heiskanen, eds., *The Legitimacy of International Organizations* (United Nations University Press, 2001), 189-220 at 192.

¹⁰ *Ibid.*

¹¹ D. C. Esty, "The World Trade Organization's Legitimacy Crisis," *World Trade Review* 1(1) (2002), 7-22 at 9.

¹² *Ibid.*, 10.

¹³ *Ibid.*, 13.

¹⁴ See, for example, R. Howse, "The Legitimacy of the World Trade Organization," in Coicaud & Heiskanen (2001), 355; and E.-U. Petersmann, "Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationship," *Journal of International Economic Law* 4(1) (2001), 3-39.

1.1.2 Challenging the Objectives of the GATT/WTO System

Since the negotiation of the *General Agreement on Tariffs and Trade (GATT)* in 1947, international trade has grown significantly. Thus, during the past sixty years, the effects of trade liberalisation have become more evident –including the negative ones. Furthermore, until late 1980s, the Cold War left its mark on international trade cooperation and communism presented a politically compelling rival vision to the ideology underlying the liberal economic order.¹⁵ In that sense, the pre-WTO era can hardly be characterised as one of ideological harmony. However, countries that did belong to the *GATT* club were fewer and less diverse than the current WTO membership. They also tended to see the international trade pact linking market economies as a bulwark against communism.¹⁶ The substantive scope of the GATT system was also narrower than that of the current WTO regime, and its organizational structure was considerably weaker. The manner in which the GATT regime operated has been characterised as deliberately low profile, a closed and secretive club run by a small group of international trade experts.¹⁷ This situation met with no serious criticism as international trade policy was largely conceived as a ‘technical’ field requiring bureaucratic expertise rather than the balancing of conflicting policy objectives.

Some criticism was, however, voiced against the operation of the international trade regime already during the pre-WTO era. The 1960s and 1970s saw the rise of the movement of non-aligned countries, which argued that the ideological divide between the communist East and capitalist West hid from the view “a harsher and more obvious reality,” namely a “major contradiction” between the rich countries in the North and the poor countries in the South.¹⁸ This criticism by the newly independent developing countries was harnessed into proposals for a New International Economic Order (NIEO) as an alternative way of organising international economic relations. During the 1970s and 1980s, free trade provoked some criticism also in the West/North but this criticism was mild and modest in comparison with the anti-globalisation backlash a couple of decades later. In the U.S., for instance, it focused on painting threatening images of competition from Japan rather than attacking the multilateral trading system as a whole.¹⁹ It was only after the collapse of communism in the early 1990s that a widespread political movement began to emerge in the Western countries questioning the desirability of international trade liberalisation and economic globalisation.

¹⁵ R. Sally, “Globalisation, Governance and Trade Policy: The WTO in Perspective,” Research Paper for the *Global Dimensions* Research Programme at the London School of Economics and Political Science (February 2002). Available at: <www.lse.ac.uk/collections/globalDimensions/research/globalisationGovernance>.

¹⁶ Jones, *Who's Afraid of the WTO*, 38.

¹⁷ Esty, “The World Trade Organization’s Legitimacy Crisis,” 11.

¹⁸ M. Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers, 1979), 34.

¹⁹ P. R. Krugman & M. Obstfeld, *International Economics. Theory and Policy* (6th edition, Addison-Wesley, 2003), 284.

Part of this criticism was caused by the rise in manufactured exports from low-wage developing countries as both the Americans and Europeans started getting anxious about their impacts on the domestic labour markets.²⁰ The rapidly emerging anti-globalisation movement started blaming free trade for low wages and poor working conditions in developing countries,²¹ thus highlighting the connection between free trade, human rights and labour standards. In the early 1990s, the trade and environment controversy exploded as the *Tuna-Dolphin* panels condemned the U.S. import prohibition on non-dolphin-friendly tuna (see Chapter 2). All these developments blurred the boundaries between trade and other policy fields and made their tensions more manifest than ever before.²² Arguments that economic globalisation was rapidly leading to cultural homogenisation²³ (in other words, Americanisation or Westernisation) fuelled anxiety over the loss of sovereignty and control over domestic affairs.²⁴

Thus, in contrast to the 1960s and 1970s, much of the recent criticism against free trade originates from developed countries.²⁵ Bhagwati has labelled this as “an ironic reversal” of the situation.²⁶ The participation of developing countries in the trade regime has increased in comparison with the *GATT*, especially in terms of their membership but also in terms of their trade share.²⁷ It has therefore been argued that it is precisely developing countries that stand to lose the most if the ongoing Doha Development Round of trade negotiations fails.²⁸ On the other hand, controversies concerning the impact of trade liberalisation on economic development and poverty reduction are far from settled and arguments critical of free trade continue to influence perceptions of the legitimacy of the international trade regime. Below I shall first present the most common arguments supporting free trade followed by an overview of the main critiques voiced against international trade liberalisation.

²⁰ Krugman & Obstfeld, *International Economics*, 284.

²¹ *Ibid.*

²² J. McDonald, “It’s Not Easy Being Green: Trade and Environment Linkages beyond Doha,” in R. P. Buckley, ed., *The WTO and the Doha Round. The Changing Face of the World Trade* (Kluwer Law International, 2003), 145-167 at 145.

²³ N. Klein, *No Logo* (Flamingo, 2001).

²⁴ Jones, *Who’s Afraid of the WTO*, 23.

²⁵ It has been noted that the resistance to the WTO is not generated by Northern NGOs alone, but has the support of millions of people in developing countries. B. Rajagopal, “Taking Seattle Resistance Seriously,” *The Hindu*, 11 September 1999.

²⁶ J. Bhagwati, *In Defense of Globalization* (OUP, 2004), 8.

²⁷ M. Matsushita, T. J. Schoenbaum & P. Mavroidis, *The World Trade Organization, Law, Practice and Policy* (2nd edition, OUP, 2006), 763-65. The trade share of developing countries was almost unchanged between 1980 (27.4 per cent) and 1999 (28.2 per cent), while in 2004 it had risen to 31 per cent.

²⁸ B. Rajagopal, “A Floundering WTO, Part II,” *Yale Global Online*, 23 March 2006. Available at: < <http://yaleglobal.yale.edu/display.article?id=7164>>.

1.1.2.1 Theory of Free Trade and Its Critiques

The ideas underlying the international trade liberalisation system can be traced to the *Wealth of Nations* published by Adam Smith in 1776 and the theory of comparative advantage explained by David Ricardo in *The Principles of Political Economy and Taxation*, published in 1817. The basic argument is that free trade promotes the efficient allocation of resources and leads to higher living standards for everyone.²⁹ This is based on the assumption that countries concentrate on products where they have comparative advantage, which then leads to maximum international productivity.³⁰ There are also other arguments favouring free, including that protected markets lead to fragmentation of production, while free trade involves gains from the economics of scale and benefits small economies.³¹ It is also argued that because free trade provides incentives to seek new ways to export or compete with imports, it provides more opportunities for innovation and learning.³²

Arguments in favour of international trade liberalisation often reach beyond economic theory. In addition to such economic benefits as lower cost of living, more choice for consumers, higher incomes, stimulation of economic growth and more efficiency, the WTO website lists peace, constructive dispute settlement, shielding governments from lobbying and good governance as the benefits of the international trading system.³³ Free trade thus forms a part of a more comprehensive liberal agenda, the gist of which is captured in the following quote by Petersmann:

Wherever freedom and property rights are protected, individuals start investing, producing and exchanging goods, services and income. Personal self-development and enjoyment of human rights require the use of dispersed information and economic resources that can be supplied most efficiently, and most democratically, through the division of labour among free citizens and through liberal trade promoting economic welfare, the freedom of choice and the free flow of scarce goods, services and information across frontiers in response to supply and demand by citizens.³⁴

There have always been critiques of liberalism and free trade. Smith and Ricardo developed their theories against the backdrop of the mercantilist philosophy according to which exports should be maximised and imports minimised to maximise the flow of silver and gold into the national economy. In the 19th and 20th centuries, Marx and his followers came forward with fundamental critiques of capitalism and liberalism. After the collapse of the Soviet Union and most other

²⁹ Krugman & Obstfeld, *International Economics*, 218-222.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ The World Trade Organization, "The 10 Benefits of the WTO" listed at: <http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm>

³⁴ E.-U. Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," *European Journal of International Law* 13(3) (2002), 621-650 at 629.

communist regimes, arguments opposing capitalism, markets and the liberal economic order became somewhat marginalised. Anti-capitalist and neo-Marxist movements still exist but they can be characterised as either extremist and/or rather small.³⁵ They are, however, a part of the anti-globalisation movement that has been criticising the WTO and the overall international economic architecture.³⁶

There are also several economic theoretical debates concerning the benefits of free trade.³⁷ Many of those critical of the WTO are not opposing the idea of free trade as such,³⁸ but their focus is on what they see as faults in the current regime. The critique originates from several different sources, including developed and developing countries. As we saw, during the 1960s and 1970s, an influential critique of the international economic order emerged from the Third World perspective. Accordingly, the system created by the former imperial powers 'locked in' the newly independent developing countries, rich with raw materials, to serve the world market and slowed down their economic development:

The Third World country is obliged to deliver a constantly growing quantity of the energy or raw materials it produces to obtain the same product from industrialized countries. Furthermore, that product is manufactured with its own raw materials, its own energy, and sometimes with its own emigrant manpower and 'grey matter,' that of its technicians trained in the prosperous countries and remaining there... This is the new form of slavery of modern times... the Third World pays for the rest and leisure of the inhabitants of the developed world with the additional labour it puts in.³⁹

This system, captured by the image of a 'centre' dominating and exploiting the 'periphery' was so unequal that it had to be replaced by a New International Economic Order.⁴⁰ Those advocating the NIEO thus proposed several trade, debt and financing related reforms in favour of the Third World, including stabilising and raising commodity prices. They also envisaged changes to the international institutional structure, including the creation of a trading institution devoted "to problems of development by finding solutions to them and not by perpetuating them."⁴¹ However,

The new organization could not be effective if it was in competition with the *GATT*. From the moment of its foundation, UNCTAD seemed destined to become 'anti-*GATT*.' The oligarchical and conservative character of the latter institution does not need to be demonstrated, and the co-existence between a renewed UNCTAD and a *GATT* set in its ways no longer seems conceivable.⁴²

³⁵ For a recent example of Marxist views in the field of international law, see C. Mervin, *Between Equal Rights. A Marxist Theory of International Law* (Haymarket Books, 2005).

³⁶ Bhagwati, *In Defense of Globalization*, 14.

³⁷ Krugman & Obstfeld, *International Economics*, 224. For large countries, the concept of optimum tariff shows that the marginal gain from improved terms of trade equals the marginal efficiency loss from production and consumption distortion.

³⁸ Jones, *Who's Afraid of the WTO*, 33.

³⁹ Bedjaoui, *New International Economic Order*, 36.

⁴⁰ *Ibid.*, 24.

⁴¹ *Ibid.*, 209.

⁴² *Ibid.*, 209.

The NIEO achieved some concrete results. The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 and advocated preferential tariff rates for developing countries.⁴³ The *GATT* Contracting Parties subsequently adopted the Part IV of the *GATT* entitled “Trade and Development” to demonstrate a new interest in developing country concerns.⁴⁴ The system was further developed in 1971 through a waiver from the Most Favoured Nation (MFN) principle enshrined in *GATT* Article. In 1979, the Contracting Parties adopted the Enabling Clause,⁴⁵ which forms the legal basis for the current Generalised System of Preferences (GSP) whereby several developed countries offer non-reciprocal trade preferences for developing countries. It also created the Global System of Trade Preferences (GSTP) with the possibility for developing countries to exchange trade concessions among themselves.⁴⁶

While NIEO has vanished from the current debate, a part of its legacy is still alive, sometimes in a slightly modified form. For instance, arguments critical of the power of multinational corporations and their influence on developing countries were formulated already by those supporting the NIEO:

... private companies keep a tight hand on the ‘independent sovereign’ State by methods that are as varied as they are effective, enabling them to control and recast its general policy at will.⁴⁷

Such sentiments against multinational corporations are still very much part of the criticism against the WTO, the international economic architecture and economic globalisation. Indeed, one of inspirations for the anti-globalisation movement was *No Logo* by Klein, a book that fiercely attacks the power and influence of multinational corporations in developing countries, also arguing that the corporations and their brands are rapidly invading previously non-commercial spaces in the society.⁴⁸ Many anti-globalisation critiques also emphasise the gap between the rich and the poor countries and the responsibility of the Northern countries to address this problem.

One of the arguments by the anti-globalisation movement is thus that that economic liberalisation primarily advances the interests of the already rich and powerful nations, multinational corporations and individuals in a way that “makes the rich relatively richer, and the poor relatively poorer and the gap between the two absolutely wider at an accelerating, compound rate.”⁴⁹ They have challenged the argument that what is good for the business, in other words, less regulation, more mobility and

⁴³ For a brief history, see the UNCTAD website, available at: <<http://www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1>>.

⁴⁴ M. Matsushita & al., *The World Trade Organization. Law Practice and Policy* (2nd edition, OUP, 2006), 766.

⁴⁵ *GATT* Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, *BISD* S26/203.

⁴⁶ *Ibid.*

⁴⁷ Bedjaoui, *New International Economic Order*, 35.

⁴⁸ Klein, *No Logo*, 32.

⁴⁹ D. Ransom, *No-Nonsense Guide to Fair Trade* (New Internationalist&Verso, 2002), 20.

more access, will 'trickle down' into benefits for everybody else.⁵⁰ Or, in the words of Pauwelyn, even if free trade "creates some losers, eventually, the rising tide lifts all boats and overall welfare is increased."⁵¹ According to Klein, however:

...international trade law must be understood not only as taking down selective barriers to trade but more accurately as a process that systematically puts up new barriers – around knowledge, technology and newly privatised resources.⁵²

And indeed, concerns related to the widening gap between the rich and the poor and the North and the South carry an important weight in a world characterised as:

... a planet in whose northern hemisphere there is a small archipelago of wealthy nation-states, surrounded by the majority of mankind. The latter comprises of more than 130 poor, or extremely poor, quasi-nation states, where the government does not control economic life, where the state is totally absent from entire provinces, where the urban population is exploding and the majority lives in the informal sector, where life is tumultuous and difficult, and where emigration is the only way out for the youth.⁵³

While the alarming problems in the South originate from a much more complex set of factors, the WTO, the IMF and the World Bank, together with multinational corporations, have been the favourite targets of the anti-globalisation criticism.

When it comes to the WTO, the completion of the Uruguay Round in 1994 marked in many ways a turning point in the history of the international trade regime. It established the World Trade Organization and created an unprecedented, compulsory judicial mechanism for settling international trade disputes, thus significantly strengthening the institutional structure of the system. The Uruguay Round also expanded the regime into new substantive areas, including trade in services, trade-related investment measures, product standards, intellectual property and food safety. Especially services and intellectual property were difficult topics and their incorporation into the system was far from uncontroversial. Not surprisingly, the newly established WTO became the prime target of this criticism. The following quote illustrates the strong criticism that the anti-globalisation movement has voiced against the WTO:

Whereas GATT dealt only with trade in tangible products such as bananas, cotton or steel, the WTO's remit is far broader; its powers extend over investment policy, patent law and the provision of services like healthcare and education – services that have traditionally been seen as the responsibility of national governments. Unlike the governments whose responsibilities it has assumed, however, the WTO is unelected, global in reach and run totally by and for the benefit of multinational corporations.⁵⁴

⁵⁰ N. Klein, *Fences and Windows. Dispatches from the Front Lines of the Globalisation Debate* (Flamingo, 2002), 4.

⁵¹ J. Pauwelyn, "The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO," *Journal of International Economic Law* 8(2) (2005), 329 at 330.

⁵² Klein, *Fences and Windows*, xxi.

⁵³ O. de Rivero, *The Myth of Development. The Non-viable Economies of the 21st Century* (Zed Books & al., 2001), 24.

⁵⁴ "World Sold, Special report on Global Trade," *The Ecologist Magazine*, June 2003.

While the anti-globalisation movement has been severe in its critique, many academics, politicians, international civil servants and NGO representatives are supporting a more modest and relatively mainstream critique of free trade in the form of what has been characterised as ‘globalisation and social democracy.’⁵⁵ While accepting the market economy, international economic integration and many of its advantages, this line of thinking rejects the comprehensive agenda for economic liberalisation underlying the Washington Consensus⁵⁶ and advocates a proactive intervention with markets to create a more inclusive and redistributive system.⁵⁷ This line of thinking argues that trade liberalisation is not a panacea but attention needs to be given to how and when liberalisation is conducted, and to other policies, including investment in health care, education and infrastructure. In other words, the supporters of this view would like to introduce regulation and other mechanisms to address market failures and promote ‘fair trade.’ Linking this to the legitimacy debate, the argument has been made that international institutions lack legitimacy “to the extent that they bias policy-making in a neoliberal direction and fail to promote the necessary social protection to offset the expansion of markets and the concentration of wealth.”⁵⁸ These ideas form very much the essence of the linkage debate that will be discussed in more detail in Chapter 3.

As the above discussion illustrates, the debate about free trade is lively and complex, sometimes driven by different political preferences, and sometimes motivated by more scientific differences over economic analysis concerning the timing and impacts of trade liberalisation. The main objective of this overview was to emphasise the link between the debate about trade liberalisation and the legitimacy of the WTO. As we will see below, most definitions associate legitimacy at least partly with empirically determined social acceptance and the ability of an institution to advance commonly accepted policy objectives. Thus, if the overall objectives of the regime are not widely accepted, or if the WTO does not seem to be efficient in delivering them, its claim to social legitimacy can only be a weak one. On the other hand, those who believe in the benefits of free trade and the WTO system may well be willing to overlook some of the institutional questions that will be discussed in the next paragraph.

1.1.3 Challenging Institutional Aspects of the WTO

Another stream of scholarly debate has been focusing on questions concerning legitimacy, democratic deficit and constitutionalisation of the WTO. In other words, a growing number of

⁵⁵ Sally, “Globalisation, Governance and Trade Policy,” 1-3.

⁵⁶ The term “Washington Consensus” refers to economic policies and reforms promoted in the early 1990s by the IMF, the World Bank and the U.S. Treasury Department in countries facing economic crisis. The policies focus, *inter alia*, on fiscal policy discipline, redirection of public spending, tax reform, trade liberalisation, promoting foreign direct investment, privatisation, deregulation and legal security of property rights.

⁵⁷ Sally, “Globalisation, Governance and Trade Policy,” 1-2.

⁵⁸ A. Moravcsik, “Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis,” *Government and Opposition* 39(2) (2004), 337-363 at 341. Here he refers to arguments made by Karl Polanyi and Fritz Scharpf.

scholars is identifying legitimacy problems at the WTO without contesting the underlying theory of free trade or the overall economic mission of the WTO to liberalise international trade. Instead, such academics are highlighting institutional questions, asking, for instance, whether the system is adequately transparent and representative. The following quote from Petersmann captures the key concerns:

How to deal with the 'democratic deficit' of international organisations which allocate one vote to each state regardless of its population and do not afford citizens adequate possibilities for 'democratic participation' in, and democratic control of, secretive international negotiations on collective international rule-making?⁵⁹

The critique related to 'democratic deficit' – well immersed in the debate about the European Union – has thus found its way to the global level and seems to be gaining ground in the WTO context.

Howse has analysed the claim that the WTO is suffering from a 'democratic deficit.'⁶⁰ Focusing on the model of representative democracy, he examines the question whether the WTO rules are sufficiently underpinned by democratic consent. He explains that under representative democracy, the problem of 'democratic deficit' is essentially a problem of agency costs.⁶¹ He indicates that agency costs in the WTO context are unsustainably high. This is because the agents, namely the experts involved in WTO negotiations, can be said to have interests and goals which are not necessarily shared by their principals, such as a personal commitment to free trade and international cooperation.⁶² Howse also highlights "very severe" information asymmetries relating to GATT/WTO law, resulting from the fact that there is generally "very little understanding about trade rules and how they function."⁶³ He then argues that the existing institutional mechanisms focusing on the *ex post* legislative approval of trade agreements may not be sufficient for managing such agency costs. Here he draws attention to the fact that in all jurisdictions apart from the U.S., the legislative scrutiny of the Uruguay Agreements was "largely perfunctory," and their implications and the extent to which they engaged competing or contested public values was not well understood.⁶⁴ Other authors have also identified similar concerns. Describing the follow-up to the Uruguay Round negotiations Petersmann notes that:

...between the signing of the agreements in April 1994 and their entry into force on January 1, 1995, there remained so little time for translating the 25,000 pages of treaty text that some national parliaments (e.g. Germany) had to discuss the agreements without complete translation ... and this within only a few days which

⁵⁹ Petersmann, "Human Rights, Cosmopolitan Democracy and WTO Law," 94.

⁶⁰ R. Howse, "How to Begin to Think About the "Democratic Deficit" at the WTO," 5. Available at Howse's website at <<http://faculty.law.umich.edu/rhowse/>>.

⁶¹ *Ibid.*, 5.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*, 6-8.

did not enable parliaments to really understand, evaluate, discuss or criticise such complex and important 'international legislation'.⁶⁵

It is easy to agree with the concerns voiced by Howse and Petersmann. In most national jurisdictions, the means available for parliamentarians to obtain information and influence international trade negotiations while they are still ongoing remain inadequate. Constitutional procedures for the approval of the already finalized agreements leave no real possibilities for national parliaments to influence their contents. However, the political pressure to accept and implement the outcome of international trade negotiations is strong. Hence the practical influence and choices left for national democratic institutions are negligible. Clearly, there seems to be ground for the argument that the WTO system is suffering from a degree of democratic deficit.

A related challenge to the legitimacy of the WTO concerns the closed and secretive nature of international trade negotiations. It has been said that the way that the WTO negotiations are conducted makes it difficult for national legislators, the general public and even delegates from smaller WTO member states to be adequately informed of what is going on. In their book "*Behind the Scenes at the WTO*" Jawara and Kwa criticise several practices associated with international trade negotiations, including mini-ministerial meetings that are held between the formal WTO Ministerial Conferences and the so-called informal or "green room" meetings where selected WTO Member States meet in an unofficial atmosphere to discuss issues on the negotiation agenda.⁶⁶ They characterise such practices as "totally non-transparent" as attendance is by invitation only and uninvited members often find it difficult to follow what consultations are taking place, between which members and on which issues.⁶⁷ It seems evident that such procedures make it difficult for even state representatives to stay adequately informed of the substance of the negotiations.

Also Howse has criticised the lack of transparency of the WTO in analyzing the question as to whether actors in the WTO system practice democratic political ethics and adhere to the key values of inclusiveness, transparency and value pluralism.⁶⁸ According to Howse, the multilateral trade system "fails miserably" measured by such criteria.⁶⁹ This is because the WTO endorses secrecy, is reluctant to let other intergovernmental organizations participate as observers in its processes, and "even defends secrecy in dispute settlement proceedings, whereas secret trials have long been discredited as inconsistent with liberal democratic values essentially elsewhere."⁷⁰ Also several NGOs have voiced sharp criticism against the lack of transparency in the WTO:

⁶⁵ Petersmann, "Human Rights, Cosmopolitan Democracy and WTO Law," 95.

⁶⁶ F. Jawara & A. Kwa, *Behind the Scenes at the WTO. The Real World of International Trade Negotiations* (Zed Books, 2003), 15-18.

⁶⁷ *Ibid.*, 18.

⁶⁸ Howse, "Democratic Deficit," 19.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

Half the point of the World Trade Organization is that hardly anybody understands it. Its founding documents are hundreds of pages long, its committees and subcommittees proliferate endlessly, its language is obtuse, and the end result is that anyone who doesn't work there, study it for a living or have several years of hard graft as a trade lawyer behind them has a lot of trouble working out what the hell is going on.⁷¹

These questions will be reviewed in detail in Chapter 5 of this work, which also highlights the length and complexity of the reports issued by WTO dispute settlement panels as an additional legitimacy challenge.

Esty associates some of these transparency problems with what he calls the “Club Model” through which the international trade regime functioned for a long period of time:

A clique of committed economists and diplomats and a small Secretariat in Geneva toiled quietly in pursuit of a vision of open markets and deeper economic integration... The closed and secretive nature of the regime isolated – and insulated – the trade policymaking process from day-to-day politics, keeping at bay the protectionists interest that are active in many countries.⁷²

However, according to Esty, times have changed and the secrecy that lies at the heart of the Club Model is no longer workable.⁷³ Here we return to the arguments already discussed above, namely that the scope of the WTO regime has expanded and that its decisions inescapably involve trade-offs with other policy goals and “broadly affect other realms and clearly require value judgements.”⁷⁴ Therefore, decision-making based on bureaucratic rationality seems no longer acceptable.⁷⁵

The critiques challenging the democratic legitimacy and transparency of the WTO have been defended by arguments building on the traditional doctrines of international law. Accordingly, the WTO Agreements have been negotiated, approved and ratified by all Member States.⁷⁶ In most WTO Member States, national ratification procedures involve democratically representative national parliaments that must have voted in favour of joining the WTO and accepted the agreement package resulting from the Uruguay Round.⁷⁷ Thus, while the WTO Agreements affect the sovereignty of its Member States, they can also be seen as an exercise of sovereignty whereby Member States have deemed the benefits of international trade liberalisation to outweigh its costs.⁷⁸ Furthermore, all WTO Member States have the possibility of withdrawing from the organization on

⁷¹ “Cancun: Why You Should Care, Special report on Global Trade,” *The Ecologist Magazine*, June 2003.

⁷² Esty, “The World Trade Organization’s Legitimacy Crisis,” 11.

⁷³ *Ibid.*, 12.

⁷⁴ *Ibid.*, 13-14.

⁷⁵ *Ibid.*, 13.

⁷⁶ These replies to democratic criticism are found at the WTO’s website at: <

http://www.wto.org/English/thewto_e/minist_e/min99_e/english/book_e/stak_e_6.htm#unrepresentative>.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

six months' notice.⁷⁹ Without a doubt, these arguments retain some persuasiveness. Nevertheless, they seem inadequate for coming to grips with all the challenges described above. While all WTO Member States formally participate in the negotiation of new agreements, in reality, many are sidelined in the substantive discussions. In most Member States, national parliaments are involved in the ratification process – but even in prosperous countries like Germany, the ratification of the Uruguay Round single undertaking took place without complete translation and informed debate. And while the option of withdrawing from the WTO remains on the table, offering that as a cure for the legitimacy defects at the WTO represents an unnecessarily rigid and pessimistic view on the ability of international law to rise to meet the new challenges.

Finally, the legitimacy of the WTO system has been questioned based on the inequalities amongst its Member States. It is true, of course, that the principle of sovereign equality, one of the most fundamental doctrines of international law expressed in Article 2(1) of the *Charter of the United Nations*, has always been detached from political realities. According to the convincing theoretical account by Simpson, the idea of juridical sovereignty has never been straightforward.⁸⁰ Instead of sovereign equality, the international legal order has been characterised by the legalised hegemony of Great Powers,⁸¹ antipluralist tendencies to classify certain states as the 'enemies' and the imposition of separate legal regimes on 'irresponsible and repressive' outlaw states.⁸² The idea of sovereign equality has therefore "risen and fallen" depending on the needs of statecraft, international lawyers and various institutional projects in international law and diplomacy.⁸³ However, even if sovereign equality has never accurately described the international reality, questions concerning power and politics, insiders and outsiders are very much relevant in the context of the international trade regime. The 153 Members of the WTO are remarkably unequal in terms of size, population as well economic and political weight. According to Zampetti, such inequality:

...translates into an asymmetry in the ability to participate in decision-making processes, as such democratically suspect if not illegitimate, which has the potential to perpetuate if not reinforce an uneven distribution of benefits and burdens in the world economy.⁸⁴

In addition, many smaller developing countries also lack the capacity and human resources to participate efficiently in the WTO processes. The Geneva missions of the most influential WTO Members, such as Canada, the European Community, Japan and the U.S. have well over ten

⁷⁹ *Ibid.*

⁸⁰ Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (CUP, 2004), ix-x.

⁸¹ *Ibid.*, 325.

⁸² *Ibid.*

⁸³ *Ibid.*, 12.

⁸⁴ A. B. Zampetti, "Democratic Legitimacy in the World Trade Organization: The Justice Dimension," *Journal of World Trade* 37(1) (2003), 105-126 at 109-110.

professionals dealing exclusively with WTO issues.⁸⁵ In contrast, developing country diplomats tend to represent their countries also in numerous other international agencies and not all developing country Members even have permanent missions in Geneva.⁸⁶ This makes it difficult, if not impossible for such countries to participate effectively in the functioning of the WTO or to keep their national constituencies adequately informed. This problem is naturally not one confined to the WTO. Attempts are also being made to build the capacity of developing countries to participate in the functioning of the WTO and its dispute settlement procedures. Such efforts include various training activities and technical cooperation,⁸⁷ as well as the establishment of the Advisory Centre on WTO Law, where developing countries can receive legal assistance free of charge concerning existing or potential WTO disputes. Some NGOs have also provided legal advice to developing country delegates during WTO negotiations. However, such initiatives have not been able to address comprehensively the lack of expertise and resources in many developing countries and therefore many important problems remain.

1.1.4 A Striking Image of the Legitimacy of the WTO

For those supporting the liberal international economic order, the establishment of the WTO meant that nearly half a century of unfulfilled desires could finally be satisfied. The Cold War had ended, and the threat of communism had been avoided. A new organization had been created to promote free trade. Many of those supporting it firmly believed that the regime would serve as a platform for spreading economic prosperity, political stability, individual freedoms and good governance. It is therefore somewhat ironic that a fierce attack was almost immediately launched against both the substantive objectives and institutional functions of the newly established World Trade Organization. Certainly, the image that emerges from the debate concerning the legitimacy of the WTO is striking. Many significant questionmarks remain concerning the benefits and downsides of trade liberalisation, most notably its contribution to the economic development in the developing world and the global distribution of its benefits. Even more importantly for the subject of this study, the argument that the legitimacy of an international organization derives exclusively from its member states and government representatives seems manifestly inadequate to come to grips with the contemporary situation and powers of international organizations such as the WTO. The WTO dispute settlement system is but one piece in this complex puzzle. Yet it offers several fruitful opportunities to examine and analyse in detail the problems that the new focus on the legitimacy of international law and institutions has generated. However, before discussing the legitimacy of the WTO dispute settlement system in detail, the next two sections elaborate on the theoretical basis of this study. They focus on the key definitions and understandings of legitimacy,

⁸⁵ Jawara & Kwa, *Behind the Scenes at the WTO*, 21-22.

⁸⁶ *Ibid.*

⁸⁷ For detailed description of such activities, see the WTO's website at: http://www.wto.org/English/tratop_e/devel_e/teccop_e/teccop_act_e.htm.

and try to explain the reasons for its increasing relevance in the context of international law and institutions.

1.2. What is Legitimacy?

This Chapter began by stating that the WTO and its dispute resolution mechanism are in the forefront of a conceptual shift, provoked by globalization and the end of the Cold War, that is taking place concerning the legitimacy of international law and organizations. What, then, are the traditional views on the legitimacy of international law and organizations facing the challenge? Until World War II, the substantive scope of international law was mostly confined to foreign policy and consular issues, and it was made and applied in a limited domain occupied mainly by diplomats and foreign policy experts. At the beginning of the 20th century, the situation could thus be described in the following terms:

... nowhere, whether in universities or wider intellectual circles, was there organized study of current international affairs. War was still regarded mainly as the business of soldiers: and the corollary of this was that international politics were the business of diplomats. There was no general desire to take the conduct of international affairs out of the hands of the professionals or even to pay serious and systematic attention to what they were doing.⁸⁸

While even today diplomats meet in secluded settings to discuss international security and foreign relations, far more colour and substance has been added to the portrait. The new icon could well be the WTO Ministerial Meeting in Seattle at the end of November 1999, with tens of thousands of demonstrators from all over the world gathering on the streets and coordinating their plans to influence the meeting using the latest communication technologies. It is clear that such radical changes must have implications at the doctrinal level –and vice versa.

1.2.1 Legitimacy of International Law and Organizations

While occupying a prominent space in modern political philosophy, the idea of legitimacy has been largely discarded in the international context.⁸⁹ When publishing his seminal work on legitimacy of international law in the 1980s, Franck thus lamented the lack of interest in such teleological questions and indicated that:

The internationalist ought to feel both comfortable with, and stimulated by, this notion of legitimacy as the non-coercive factor, or a bundle of factors, predisposing toward voluntary obedience.⁹⁰

⁸⁸ E. H. Carr, *The Twenty Years' Crisis 1919-1939* (2nd edition, Palgrave, 2001), 3.

⁸⁹ V. Heiskanen, "Introduction," in Coicaud & Heiskanen (2001), 1 at 2.

⁹⁰ T. M. Franck, *The Power of Legitimacy Among Nations* (OUP, 1990), 16.

One explanation for the lack of interest in international legitimacy issues relates to rigid doctrinal boundaries drawn between the domestic and international spheres, and the classification of international law as a discipline concerned with the international society narrowly defined, in other words, a society consisting solely of sovereign states and intergovernmental organizations. Therefore, the conceptual framework employed by both the Continental and Anglo-American liberal traditions has struggled, and it still does, to think of the legitimacy of international organizations as a relevant problem.⁹¹ The main reason is the close connection of the idea of legitimacy with the relationship between the ruler and the ruled. This relationship is commonly conceived as the connection between the state and the people; or the government and the individual.⁹² Individuals and international organizations, in turn, have been understood to affiliate only indirectly through the Member States of an international organization, therefore lacking such a relationship in which the question of legitimacy could meaningfully arise.⁹³

Kumm has identified also other reasons for the lack of interest in the legitimacy of international law and organizations. He explains that during the period between World War II and the end of the Cold War, international law was commonly seen as “ineffective and unreliable as a guarantor of international peace and security.”⁹⁴ Furthermore, for the citizens of Western democracies, international law was a social force affecting the lives of *other people*, namely those living in developing countries.⁹⁵ This was largely because international law had few contributions to make to the post-war domestic struggles in the West.⁹⁶ Areas where effective rules of international law existed tended to be highly specialised, covering the field of foreign affairs narrowly conceived and addressing issues such as diplomatic and consular relations or mail delivery.⁹⁷ Even if some ambitious treaties existed, the absence of compulsory dispute resolution made it possible for states to interpret international law for themselves, which provided “further guarantees that ultimately international law would not impede constitutional self-government.”⁹⁸

However, today the situation is quite different. At the political level, developments related to globalization, in other words, the intensifying and expanding international cooperation and interdependence have highlighted the role of international law and organizations. In the doctrinal sphere, the ideological climate inspired by the end of the Cold War resulted in an increased focus on democracy at both national and the international levels. While there are strong reasons for

⁹¹ Heiskanen, “Introduction,” 6.

⁹² *Ibid.*, 2-4 explaining the differences between the Continental Enlightenment and the Anglo-American Liberalism.

⁹³ *Ibid.*

⁹⁴ M. Kumm, “The Legitimacy of International Law,” *European Journal of International Law* 15(5) (2004), 907-931 at 911.

⁹⁵ *Ibid.*, 911-912.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, 912.

⁹⁸ *Ibid.*

questioning the view that we are witnessing an era where the human ideological development has found its culmination in liberal democracy, as Fukuyama has famously contended,⁹⁹ it is difficult to override the argument that democracy as a form of governance is now more widespread than ever before. In short, many of the traditional reasons for ignoring the legitimacy considerations in the context of international law and organizations have been weakened by recent developments. But before discussing these developments in more detail, I shall spend some time in considering the meaning of 'legitimacy' both in general social theory and in the field of international law.

1.2.2 Definitions and Theories of Legitimacy

Essentially, the notion of legitimacy relates to rightful, acceptable authority, thereby touching upon questions of political representation, consent and obedience. The following quotes attempt to capture the essential meaning of legitimacy. The Oxford Concise Dictionary of Politics describes legitimacy as:

The property that a regime's procedures for making and enforcing laws are acceptable to its subjects... Legitimacy involves the capacity of the [political] system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.¹⁰⁰

Franck, the author of one the leading studies on legitimacy in the field of international law, defines legitimacy as:

...a property of a rule or a rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule has come into being and operates in accordance with generally accepted principles of right process.¹⁰¹

Koskenniemi has characterised legitimacy in the following terms:

To say that a decision, rule or institution is 'legitimate' is to say that one should accept it as authoritative... More particularly, it is to say that any norm produced by such decision, rule or institution should count as good reason -even a good exclusionary reason- for deferring to it...It (legitimacy, KK) is about standards that override our own, actual preferences, about acceptable paternalism.¹⁰²

Legitimacy can thus be understood as a belief in the rightfulness of a decision or the system through which authority is exercised. There are different theories on the origins of legitimacy. Traditionally, the legitimacy of political power has been seen as deriving from divine sanction, dynastic succession, charismatic authority of a strong leader or the force of history as presented by

⁹⁹ F. Fukuyama, "The End of History," *The National Interest*, Summer (1989).

¹⁰⁰ I. McLean, *Oxford Concise Dictionary of Politics* (OUP, 1996), 281. The last sentence is a quote from S.M Lipset's study *Political Man*.

¹⁰¹ Franck, *The Power of Legitimacy*, *supra* n. 99, 24.

¹⁰² M. Koskenniemi, "Legitimacy, Rights and Ideology. Notes Toward a Critique of New Moral Internationalism" *Associations* 7(2) (2003), 349 at 353.

the ruler.¹⁰³ This is, in fact, still the case in many countries but in modern democratic societies the picture is more complex. Or, as Franck has succinctly indicated, legitimacy “is really a bracketing of many integral factors, which are related but different.”¹⁰⁴ The ingredients commonly associated with legitimacy include formal legality, fair procedures and empirically determined subjective acceptance. Many scholars also associate legitimacy with justice-related issues, the substantive quality of the outcomes and the effectiveness of an institution or a system in delivering them.¹⁰⁵ A difference is in fact often made between input legitimacy and output legitimacy. It has also been stated that legitimacy could be based on technocratic expertise, which was arguably the case with the international trade regime during the GATT era.¹⁰⁶ Overall, legitimacy is far from being an unequivocal notion but “legal theory and sociology have long grappled with the difficulty of defining and measuring the term, as has international legal literature.”¹⁰⁷ This section reviews three main groups of legitimacy theories and contains an in depth analysis of legitimacy by prominent international legal scholars.

Looking back, the most influential theories on legitimacy have been developed by Weber and Habermas. Both depart from the legal positivist association of legitimacy with formal validity¹⁰⁸ but can be placed in separate categories. For Weber, the emphasis is in the subjectivist element, in other words, he argued that legitimate power is power that is *believed* to be legitimate.¹⁰⁹ Seeking to describe why men obey, Weber identified three different types of legitimate authority: the traditional, the charismatic and the legal-rational.¹¹⁰ According to Weber, belief in legality is the characteristic form of authority in the modern society; it derives from “the readiness to conform with rules which are formally correct and have been imposed by accepted procedure.”¹¹¹ This view on legitimacy is therefore largely procedural. The second category, similar to the one endorsed in this study, conceives legitimacy as a mixture of substance and process. The most notable proponent on this view is Habermas whose theory has attempted to give equal weight to the public and private autonomy.¹¹² In Habermas’s theory, the legitimacy of modern law is based neither on the legal form alone, nor on the conformity of law with an extralegal set of natural rights or natural law. Instead of being a completely functional entity, modern law necessitates a moral justification in terms of a

¹⁰³ K. Annan, “Democracy as an International Issue” *Global Governance* 8 (2002), 135 at 137.

¹⁰⁴ Franck, *The Power of Legitimacy*, 17.

¹⁰⁵ Zampetti, “Democratic Legitimacy in the World Trade Organization,” 120.

¹⁰⁶ Esty, “The WTO’s Legitimacy Crisis,” 10 *et seq.*

¹⁰⁷ D. Z. Cass, *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy and Community in the International Trading System* (OUP, 2005), 45.

¹⁰⁸ Luhmann, for instance, has argued that law is an *autopoietic system* that functions through the binary code of lawfulness/unlawfulness and does not need a moral justification to secure its internal functionality. M. Deflem, “Law in Habermas’s Theory of Communicative Action,” in M. Deflem, ed., *Habermas, Modernity and Law* (Sage Publications, 1996), 1-20 at 10.

¹⁰⁹ M. Weber, *The Theory of Social and Economic Organisation*. A translation by T. Parsons of Volume 1, Part 1 of *Wirtschaft und Gesellschaft* (1947), 132. Extracts available at: <<http://www.mdx.ac.uk/www/study/xWeb.htm>>.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² D.M. Rasmussen, “How Is Valid Law Possible? A Review of *Between Facts and Norms* by Jurgen Habermas,” in M. Deflem, ed., 21 at 41.

practical discourse on the rightness of norms.¹¹³ Habermas's theory of legitimacy can thus been associated with a combination of legal validity, subjective acceptance and discursive validation. Also other contemporary descriptions divide legitimacy into two or more components. One of such distinctions is one between formal (legal) legitimacy and social (empirical) legitimacy. According to Weiler, formal legitimacy:

...implies that all requirements of law are observed in the creation of the institution or system. This concept is akin to the juridical concept of formal validity.¹¹⁴

Weiler also draws attention to the close proximity of legitimacy and democracy in Western political systems, indicating that in the context of Western institutions or systems, "formal legitimacy is legality understood in the sense that democratic institutions and processes created the law on which it is based."¹¹⁵ As to social legitimacy, Weiler defines it as:

...a broad, empirically determined societal acceptance of the system. Social legitimacy may have an additional *substantive component*: legitimacy occurs when the government process displays a commitment to, and actively guarantees, values that are part of the general political culture, such as justice, freedom and general welfare.¹¹⁶ [Emphasis added, KK]

In sum, legitimacy theories can be categorised into three groups.¹¹⁷ The first group includes Weber and other theories that conceive legitimacy as a process. In other words, legitimacy is "perceived as adhering to the authority issuing an order as opposed to the qualities of legitimacy that inhere in an order itself."¹¹⁸ The second group regards legitimacy as a mixture of process and substance, and includes Habermas. This understanding of legitimacy "is interested not only in how a ruler and rule were chosen, but also in whether the rules made, and commands given, were considered in light of all relevant data, both objective and attitudinal."¹¹⁹ The third group focuses on outcomes and consists primarily of neo-Marxist theories. According to Franck, these arguments hold that "a system seeking to validate itself must be defensible in terms of equality, fairness, justice and freedom."¹²⁰ The understanding of legitimacy used in this study comes close to the second category. The components of legitimacy analysed in this study include formal and procedural criteria and social acceptance, influenced by substantive issues. To explain this choice, I shall now review the key understandings of legitimacy in international legal theory.

¹¹³ Deflem, "Law in Habermas's Theory of Communicative Action," 134, 9.

¹¹⁴ J.H.H. Weiler, *The Constitution of Europe. "Do the New Clothes Have an Emperor?" And Other Essays on European Integration* (CUP, 1999), 80.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Franck, *The Power of Legitimacy*, 16 *et seq.*

¹¹⁸ *Ibid.* 16-18.

¹¹⁹ *Ibid.* 17.

¹²⁰ *Ibid.* 18.

1.2.3. Legitimacy in International Legal Theory

As explained above, legitimacy issues have hardly been in the forefront of international legal theory. Nevertheless, some interesting exchanges on the meaning and relevance of legitimacy under international law have taken place between Franck and Koskeniemi, who respectively represent the more mainstream liberal tradition of international legal theory and its critical new approach. Introducing some of the details from that debate is useful in shedding light to certain profound theoretical questions relating to the notion of legitimacy, many of which can be understood by reference to the underlying divide between positivist and naturalist legal theories identified by Koskeniemi.

1.2.3.1 Franck: Legitimacy and Justice Are Separate

One of the key works on legitimacy in the field of international law is *The Power of Legitimacy Among Nations* by Franck. Its focus is on one of the perennial questions of international legal theory seeking to explain the puzzle that in the international system, “rules usually are not enforced yet they are mostly obeyed.”¹²¹ As we saw above, Franck has defined legitimacy as the property of a rule or institution that exerts ‘a compliance pull’ towards the addressees and explains why international rules are obeyed in the absence of coercive power. He has identified four criteria for measuring legitimacy, namely determinacy, symbolic validation, coherence and adherence. Franck argues that when all these criteria are present, then the compliance pull of an international rule is strong - if not, the rule is easier to ignore.¹²² Of the four criteria, determinacy relates to the clarity, transparency, and specificity of a legal rule.¹²³ The more determinate the standard, the more difficult it is to justify non-compliance.¹²⁴ Thus, “rules which have a readily accessible meaning and which say what they expect of those who are addressed are more likely to have a real impact on conduct.”¹²⁵ Symbolic validation, in turn, consists of cues, such as ritual and pedigree, signalling that a rule should be obeyed.¹²⁶ Symbolic validation is therefore the cultural and anthropological dimension of legitimacy, encompassing symbolic ways of communicating authority.¹²⁷ Coherence means “the generality of the principles which the rules apply.”¹²⁸ In other words, “a rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system.”¹²⁹ The fourth criteria, adherence, refers to the embedding of (primary) rules in a set of rules about rules (i.e. secondary rules). The legitimacy of each primary rule depends

¹²¹ *Ibid.*, 3.

¹²² *Ibid.*, 16 *et seq.*

¹²³ *Ibid.*, 31.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 30-31.

¹²⁶ *Ibid.*, 34. Franck mentions the United Nations flag and stamp as symbols that validate the institution and notes that the diplomatic practice is full of rituals and symbols of pedigree.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, 38.

¹²⁹ *Ibid.*

in part on its relation (adherence) to secondary rules of process, which govern the creation, interpretation, and application of primary rules:

Rules are better able to pull towards compliance if they are demonstrably supported by the procedural and institutional framework within which the community organizes itself, culminating in the community's ultimate rule, or canon of rules, of recognition.¹³⁰

One of the defining but problematic features about Franck's definition of legitimacy is that he sees legitimacy as a procedural quality and makes a clear distinction between legitimacy and any substantive notions of justice. In *The Power of Legitimacy Amongst Nations* Franck elaborates at length his reasons for not including justice among the factors making for legitimacy. First, Franck makes the case against blind legal formalism:

...it is surely true that compliance with rules is not the sole or ultimate goal of any decent social structure, including the global one. If, as may happen in any society, the rules are unjust, reflecting the society's imperfect social values, there may even be a good case for non-compliance.¹³¹

Franck then distinguishes between legitimacy and naturalist theories of justice. First, Franck argues that the fact that "justice can only be said to be done to persons, not such collective entities as states" forms a barrier to assessing the *justice* of the international rule system.¹³² Second, he asserts that legitimacy and justice are "related but conceptually distinct."¹³³ Even though both legitimacy and justice tend to pull toward non-coerced compliance, and frequently interact synergistically, "neither is a dependent variable of the other."¹³⁴ To illustrate his point, Franck makes a distinction between secular and moral communities. Using the principle of *pacta sunt servanda* as an example, he argues that while justice-based claims supporting the norm derive from a belief in shared moral values (i.e. fairness of honouring obligations),¹³⁵ legitimacy-based claims derive from a community's preference for (and dependence on) order and predictability.¹³⁶ Franck emphasizes that in Western nations, citizens may have different views on a rule's legitimacy and justice¹³⁷ and states that:

... the survival of a secular community depends upon the willingness of those who think a rule unjust nevertheless to recognize provisionally the validating power of its legitimacy, even while the moral factions dispute its justice.¹³⁸

Franck thus indicates that while justice can be said to promise the same ultimate prize of compliance as legitimacy does, the secular order and the moral order are still "two separate systems:

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, 210.

¹³² *Ibid.*, 208-209.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, 234.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, 236.

¹³⁸ *Ibid.*, 238.

with different rules, validations, loyalty systems, and pulls to compliance.”¹³⁹ Furthermore, justice and legitimacy are never dependent on each other: legitimate rules can pull toward compliance even when they are not just.¹⁴⁰ This gives legitimacy “a claim to priority which justice does not have.”¹⁴¹ Franck thus concludes that:

...it remains rather idealistic to expect justice of the rules and institutions that operate among states. It is perfectly realistic, however, to demand of them a high degree of legitimacy.¹⁴²

In Franck’s subsequent work that focuses on the *fairness* of international law the element of distributive justice plays a defining role along with legitimacy. According to Franck, the fairness of international law is:

...judged, first by the degree to which the rules satisfy the participants’ expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as a right process.¹⁴³

Legitimacy and distributive justice are thus two aspects of the concept of fairness; one (legitimacy) has a primarily procedural and the other (justice) has a primarily moral perspective.¹⁴⁴ Echoing his views in the *Power of Legitimacy Amongst Nations*, Franck notes that the two aspects of fairness may not always pull in the same direction because the one (justice) favours change and the other (legitimacy) stability and order.¹⁴⁵ In other words:

The fairness claim advanced from the perspective of legitimacy may clash with a fairness claim based on distributive justice. The two are independent variables in the concept of fairness.¹⁴⁶

In sum, in his influential work on legitimacy and fairness in international law, Franck defines legitimacy as a compliance pull that can be measured through four factors: determinacy, symbolic validation, coherence and adherence. All these criteria are procedural rather than substantive and Franck therefore makes a clear distinction between legitimacy and any substantive notions of justice. This focus on procedures has also invited criticism that deserves to be considered in more detail. Indeed, the understanding of legitimacy put forward in this work comes closer to Franck’s definition of fairness than his reductive understanding of legitimacy as a process. In order to paint a more colourful picture of the notion of legitimacy and the underlying contradictions, I shall

¹³⁹ *Ibid.*, 240.

¹⁴⁰ *Ibid.*, 243. This happens: 1) when the moral community perceives the secular rule to be justice-neutral, and 2) when the secular community’s perceptions on justice are so fragmented so the only possible rule is one that least offends the diverse notions of justice.

¹⁴¹ *Ibid.*, 246.

¹⁴² *Ibid.*

¹⁴³ Franck, *Fairness in International Law*, 7.

¹⁴⁴ *Ibid.*, 8-9. Franck thus calls legitimacy as “process fairness” and distributive justice as “moral fairness.”

¹⁴⁵ *Ibid.*, 7.

¹⁴⁶ *Ibid.*, 23.

therefore now introduce a more critical view on the growing use of legitimacy and Franck's theory presented by Koskenniemi.

1.2.3.2 Koskenniemi: Legitimacy as a Strategic Tool

Koskenniemi sees the increased focus on legitimacy of international law as an attempt to escape a theoretical deadlock. Accordingly, legitimacy is being used as:

...an intermediate concept whose very imprecision makes it available to avoid the attacks routinely mounted against the formal (but too abstract) idea of legal validity and the substantive (but too controversial) notion of justness.¹⁴⁷

Legitimacy is thus a concept that is opposed to both legal positivism and naturalism and therefore seems to offer an escape route from the dilemma between the two theories:¹⁴⁸

Containing (unlike law) no commitment to particular institutional forms and (unlike morality) no implication of transcendental standards, as well as unburdened by the negative connotations linked to words such as 'legalism' and 'moralism', the notion of 'legitimacy' rediscovers the international world in terms of categories whose beneficiality seems self-evident: lawfulness, fundamental values and human rights.¹⁴⁹

Koskenniemi argues, however, that Franck's analysis of legitimacy escapes the vicious circle of positivism versus naturalism only by "a silent but significant" association of legitimacy with contextual justice and with pragmatic legal validity.¹⁵⁰ The consequence is a kind of 'soft law' that has very loose formal conditions of validity,¹⁵¹ in other words, legitimacy is not 'hard' enough to be real law and not constraining enough to satisfy moral demands.¹⁵² Koskenniemi acknowledges that Franck has attempted to cope with these problems by using fairness as a procedural criterion for legitimacy.¹⁵³ However, this again leads to problems as there is no agreement even about the fundamentals of the right process, including who should participate.¹⁵⁴ Furthermore, if process is all that there is, then there is "nothing against its arbitrary or manipulative uses by *elites* or technical experts."¹⁵⁵

To demonstrate how the increasingly popular legitimacy discourse renders both formal legality and morality irrelevant, Koskenniemi refers to those who argue that humanitarian intervention without the authorisation by the UN Security Council could be regarded as *legitimate* even in cases where it

¹⁴⁷ M. Koskenniemi, "Book Review: The Power of Legitimacy Among Nations by Thomas M. Franck" *American Journal of International Law* 86(1) (1992), 175-178 at 175.

¹⁴⁸ *Ibid.*

¹⁴⁹ Koskenniemi, "Legitimacy, Rights and Ideology," 350.

¹⁵⁰ Koskenniemi, "Book Review," 176.

¹⁵¹ Koskenniemi, "Legitimacy, Rights and Ideology," 362.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, 363.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, 364.

can be characterised as unlawful and its moral status may be uncertain.¹⁵⁶ According to Koskenniemi, the problem is that when legitimacy is understood in this way – as “a kind of feeling” of legitimacy - power becomes authority that is answerable neither in terms of law or morality.¹⁵⁷ Instead, authority is “a psychological fact that is indifferent to the conditions of its existence: fear, manipulation, prejudice, whatever.”¹⁵⁸ Koskenniemi thus argues that:

By saying ‘legitimacy’ as often as possible in connection with as many and as controversial political actions as possible, actions that cannot be seriously discussed in terms of their lawfulness or moral substance, receive a sense of acceptability and naturalness that is precisely the function of ideology to attain.¹⁵⁹

According to Koskenniemi, however, legitimacy adds nothing to what legal validity or moral-political appropriateness may have offered – deference to action agreed by others “is a good exclusionary reason only if it is justifiable in terms of law or morality.”¹⁶⁰ If, on the other hand, neither law nor morality is present, “then the added value results simply from power.”¹⁶¹ Koskenniemi thus sees legitimacy as a strategic tool, involving “the manipulation of normative perceptions, treated as empirical feelings.”¹⁶² In other words, legitimacy:

...is not a standard external to power, against which power might be assessed but a vocabulary produced and reproduced by power itself through its institutionalised mechanisms of self-validation.¹⁶³

In a related critique elsewhere Koskenniemi has contrasted the ‘culture of formalism’ with the ‘culture of dynamism’ or American anti-formalism that he would probably associated with Franck’s work. The culture of formalism focuses on valid law¹⁶⁴ – which is something that refers to social facts and moral ideas, but cannot be reduced to them.¹⁶⁵ According to Koskenniemi,

Even if formalism may no longer be open as jurisprudential doctrine of the black and white of legal validity... nothing has undermined formalism *as a culture of resistance to power, a social practice of accountability, openness and equality whose status cannot be reduced to the political positions of any of the parties whose claims are treated within it.* As such, it makes a claim for universality that may be able to resist the pull towards imperialism.¹⁶⁶ (Emphasis added, KK)

In other words, this is a culture that emphasises the limits to the exercise of power, the accountability of those in positions of strength, the right of the weak to be heard and protected and “a community overriding particular alliances and preferences and allowing a meaningful distinction

¹⁵⁶ *Ibid.*, 354.

¹⁵⁷ *Ibid.*, 357-58.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, 368.

¹⁶⁰ *Ibid.*, 369.

¹⁶¹ *Ibid.*, 369.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, 373.

¹⁶⁴ M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (CUP, 2002), 494-495.

¹⁶⁵ *Ibid.*, 495.

¹⁶⁶ *Ibid.*, 500.

between lawful constraint and the application of naked power.”¹⁶⁷ For this reason Koskenniemi’s image, ultimately, has more appeal than Franck’s sociologically oriented account of legitimacy. While it has been phrased in different theoretical terms, in practice, Koskenniemi’s idea of a culture that respects the legal form, is based on accountability and openness and takes into account the right of the weak to be heard and protected comes close to the ideal endorsed in this study on how the WTO dispute settlement system should operate in order to be considered legitimate.

To summarise, the exchange between Franck and Koskenniemi illustrates that the notion of legitimacy is increasingly discussed in the field of international legal theory. On the one hand, legitimacy is used as a sociological factor that explains why international norms are often obeyed in the absence of coercive power. Legitimacy is thus characterised as something that acts as a compliance pull that promotes voluntary compliance with international law. On the other hand, Franck’s view has been criticised for rendering both formal legality and morality irrelevant - by ultimately leading to the question as to whether “a kind of feeling” legitimates a certain act regardless of its legal and moral credentials. It is clear that the debate between Franck and Koskenniemi retains much of the traditional focus of international legal theory given that many of their arguments can be traced back to perennial questions such as whether international law is really law in the absence of coercive power. Their analysis is, however, extremely useful in shedding light into some profound theoretical questions underpinning the notion of legitimacy thus explaining why legitimacy is often divided into different components. In other words, the underlying divide between naturalists and positivists that Koskenniemi highlighted seems to clarify why it is difficult to conceive legitimacy exclusively either in terms of social acceptance, or by reference to purely formal and procedural criteria.

Indeed, for this study, here lies the value of legitimacy as an analytical tool to assess the WTO dispute settlement system. The argument here is that social acceptance as well as formal and procedural criteria are all relevant to the legitimacy of the WTO dispute settlement system and *none* is sufficient in itself.¹⁶⁸ For the purposes of this study, the added value of legitimacy as a conceptual tool is that it links all the necessary elements together and explains why they all depend on each other. For the WTO dispute settlement system, my argument is thus that its legitimacy is connected with formal and procedural guarantees as well as the social acceptability of the outcomes, which, in turn, depend on their substantive quality and the process through which they have been reached. For a comprehensive picture of the legitimacy of the WTO dispute settlement system, it is

¹⁶⁷ *Ibid.*, 502.

¹⁶⁸ Similarly P. Nanz, “Democratic Legitimacy and Constitutionalization of Transnational Trade Governance: A View from Political Theory,” in C. Joerges & E-U Petersmann, eds., *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, 2006), 59 at 60. She laments that while one source is often overstated, “it is important to emphasise that the legitimacy of transnational governance depends on the ‘right’ balance of the three sources.”

necessary to discuss all these elements. On the other hand, this study admits that legitimacy remains a somewhat elusive as a notion, and it would be impossible to identify the exact mix of factors that make a regime or institution legitimate. Here, legitimacy is used as an umbrella covering a host of factors that are necessary to endow the WTO dispute settlement system with an aura of justified authority. Thus, while Chapter 4 criticises the legitimacy of the WTO dispute settlement system mainly from the point of view of social acceptance and the related substantive component, Chapter 5 lays a great deal of importance on the formal and procedural dimensions of legitimacy. The arguments put forward in Chapter 5 highlight the importance of a 'culture of formalism' in contrast to arguments that the legitimacy of the WTO dispute settlement system could be improved simply by 'importing substantive legitimacy' and more openly balancing environmental and other issues to reach what would be perceived by the decision-makers as a more socially acceptable outcome in linkage disputes. Chapters 6 and 7, in turn, are concerned with the need to strike appropriate balances between the various components of legitimacy – all the while ultimately posing the question whether the fragmentation of international law and the isolated evolution of legal norms applicable to international trade and environmental protections has already lead to such legitimacy challenges that reach beyond the WTO dispute settlement system and threaten the legitimacy of international law as a whole.

1.2.3.3 Kumm: The Constitutional Model

Concerning the view endorsed here of legitimacy as a combination of several interdependent elements, Kumm has also highlighted legitimacy as a sum of several factors resembling those that will be covered and discussed in this study. He has approached legitimacy from a perspective that resembles the debate in the context of national legal and political systems or in the European Union. Identifying striking structural similarities between contemporary international law and European law "that go right to the legitimacy issue,"¹⁶⁹ Kumm proposes "a constitutionalist model" for conceiving the legitimacy of international law.¹⁷⁰ At the heart of this model are four principles: the formal principle of international legality; the jurisdictional principle of subsidiarity; the procedural principle of adequate participation and accountability; and the substantive principle of achieving outcomes that do not violate fundamental rights and are reasonable.¹⁷¹ In this sense, Kumm's analytical framework incorporates the most important components of legitimacy described above, and also covers the elements analysed in this study.

Elaborating on the four constitutional principles, Kumm indicates that the principle of international legality establishes a presumption in favour of the authority of international law: international law is

¹⁶⁹ Kumm, "The Legitimacy of International Law," 916.

¹⁷⁰ *Ibid.*, 917.

¹⁷¹ *Ibid.*

prima facie legitimate “simply by virtue of being the law of the international community.”¹⁷² There is thus a moral obligation to comply with norms even if one disagrees with the content of a specific rule.¹⁷³ However, this presumption can be rebutted based on the three other principles in instances where norms of international law “constitute sufficiently serious violations of countervailing normative principles relating to jurisdiction, procedure or outcomes.”¹⁷⁴ The second principle, the principle of jurisdictional legitimacy or subsidiarity is familiar to European lawyers. Kumm argues that the subsidiarity principle is relevant also under international law and is even “in the process of replacing the unhelpful concept of ‘sovereignty’ as the core idea that serves to demarcate the respective spheres of the national and international.”¹⁷⁵ Essentially, the principle of subsidiarity is concerned with the locus of decision-making and it requires that there are good reasons justifying any infringements of local autonomy by pre-emptive norms enacted on the higher level.¹⁷⁶ According to Kumm, only collective action problems and the protection of minimal standards of human rights count as such good reasons.¹⁷⁷ Even then, these “have to be of sufficient weight to override any disadvantages connected to the pre-emption of more decentralised rule-making.”¹⁷⁸ However, there are some areas where subsidiarity strengthens rather than weakens the comparative legitimacy of international law, in other words, there are good reasons for deciding certain issues on the international level, such as actions necessary to mitigate climate change.¹⁷⁹

The third principle in Kumm’s model is the principle of adequate participation and accountability. Kumm cites arguments challenging the legitimacy of international law on the grounds that at the national level, core decisions are made by legislative bodies constituted by directly elected representatives¹⁸⁰ and that there are no such democratic institutions at the international level.¹⁸¹ He highlights, however, that the emergence of ‘the administrative state’ has eroded the role of national parliaments as the traditional legislative forum, and involved “significant delegation of regulatory authority to administrative institutions of various kinds.”¹⁸² He also indicates that the establishment of constitutional courts has had a similar influence of diminishing the role of the national political process.¹⁸³ Kumm therefore states that:

...much of international law that is in potential conflict with outcomes of the national political process competes with national rules determined either by

¹⁷² *Ibid.*, 918.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, 917.

¹⁷⁵ *Ibid.*, 920-21.

¹⁷⁶ *Ibid.*, 921.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, 922.

¹⁸⁰ *Ibid.*, 924.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*, 925.

administrative agencies or constitutional courts, suggesting that the argument for democracy has less bite at least in such cases.¹⁸⁴

However, even if electoral accountability may not be the right test to apply at the international level, “that does not mean that there are no standards of procedural adequacy.”¹⁸⁵ Instead, the relevant questions here are whether the procedures are “sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents’ concerns.”¹⁸⁶ This argument comes close to the critique of the WTO dispute settlement system in Chapter 5 on grounds of transparency and procedures. The fourth and last principle is one that relates to outcomes. While noting that bad outcomes tend to undermine the legitimacy of the decision-maker, Kumm cautions that this principle “has only a very limited role to play in assessing the legitimacy of any law.”¹⁸⁷ This is because “it is generally not the task of addressees of norms to re-evaluate decisions already established and legally binding on them.”¹⁸⁸ In other words, “there is a strong presumption that a national community’s assessment of the substantive outcome is an inappropriate ground for questioning the legitimacy of international law.”¹⁸⁹ The principle is therefore reserved to international rules that cross “a high threshold of injustice or bear a costly inefficiency.”¹⁹⁰ Finally, Kumm makes some general observations about his model. According to him, the analytical framework “helps to ask the right questions and deal with the right problems.”¹⁹¹ Furthermore, it aims to “build a bridge between national and transnational constitutional discourse.”¹⁹² It is committed “*not* to an international constitutional law but to constitutionalism beyond the state.”¹⁹³

The merit of Kumm’s model is that it directs the focus to questions that are relevant in assessing the legitimacy of international law. While his model has not been used as a theoretical basis for this study, his four concerns and principles capture the key elements employed in this work to assess the formal, procedural and social legitimacy concerns related to the WTO dispute settlement system. However, his constitutionalist mindset seems to be either premature or in the need for profound assessment to be applicable in the international context. For instance, the principle of subsidiarity seems to translate to the international level only with difficulty: unlike in the EU, there are no such strong international institutions as the European Commission vested with powers to put forward legislative proposals, or bodies such as the European Parliament or the Council mandated to approve regulations that may have direct effect in national legal systems. States thus

¹⁸⁴ *Ibid.*, 926.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 927.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, 929.

¹⁹² *Ibid.*, 930.

¹⁹³ *Ibid.*, 931.

seem to be in a better position to control the subject matter of international law than the Member States of the EU thereby decreasing the significance of the subsidiarity principle. Furthermore, Kumm does not go into the details of what he means by sufficiently transparent and participatory procedures or accountability mechanisms. As Koskeniemi pointed out in his critique of Franck, defining exactly what transparency and participation mean in the international context seems to be one of the most important contemporary challenges. Finally, invoking “costly inefficiency” of outcomes to justify non-compliance with international law also seems rather problematic. How would such ‘costly inefficiency’ be measured? Would it mean, for example, that President Bush’s characterisation of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* as ‘fatally flawed’ due to its perceived negative impacts on the U.S. economy would qualify as “costly inefficiency” justifying non-compliance? Having ratified the Kyoto Protocol, could Canada justify its likely non-compliance with its Kyoto target invoking a similar argument? Or how would the “costly inefficiency” be measured? Cutting greenhouse gas emissions might be costly for the Canada or the U.S., but on the other hand, the economic and social costs of unmitigated climate change are particularly high for small island developing states, certain African countries and the millions of people living in the Asian megadeltas projected to suffer from flooding and sea-level rise. Given Kumm’s argument that climate change is clearly one of the areas where decision-making should be global rather than local, this is probably not what he had in mind when formulating the fourth principle. Nevertheless, identifying such areas of international law where non-compliance could be justified based on undesirable outcomes would be difficult and controversial in practice. Despite its flaws, Kumm’s model is useful for the subsequent analysis in highlighting the key elements analysed in this study, namely formal and procedural legitimacy criteria, as well as social and substantive legitimacy.

1.3 Why Is Legitimacy Relevant in the International Context?

What, then, explains the current focus on the legitimacy of international law and international organizations? Several factors have contributed to this. The international institutional and legal architecture have gone through some remarkable changes. The number of international agreements¹⁹⁴ and international organizations¹⁹⁵ has multiplied manifold since the end of World War II. The past couple of decades have also been characterised by the rapid proliferation of international courts and tribunals, including the WTO dispute settlement system, the International

¹⁹⁴ M. Zürn, "Global Governance and Legitimacy Problems," in *Government and Opposition* 39(2) (2004), 260 at 267. According to him, the number of international agreements grew from 15,000 in 1960 to 55,00 in 1997.

¹⁹⁵ Held, *Models of Democracy*, 346. According to Held, in 1909 there were 37 intergovernmental organizations and 176 international NGOs, while in 1989 the respective numbers were nearly 300 and 4,642.

Tribunal for the Law of the Sea (ITLOS), the International Criminal Court, two *ad hoc* international criminal tribunals for war crimes in the former Yugoslavia and the genocide in Rwanda, the UN Compensation Commission, the World Bank Inspection Panel, its counterparts in Asian and Inter-American Development Banks, and the North American Free Trade Agreement.¹⁹⁶ In addition to the quantitative shift, international cooperation also seems to be experiencing what has been described as a *qualitative shift*. As Kumm observes:

...the *subject matter* of international law has expanded significantly. Today there is a significant overlap between the kind of questions that traditionally have been addressed by liberal democracies as domestic concerns and the kind of questions that international law addresses.¹⁹⁷

In a similar vein, Zürn argues that international organizations have become more intrusive: while they were traditionally mostly concerned with states, today it is often other societal actors such as consumers and businesses that are the ultimate addressees of international regulation.¹⁹⁸ In other words, international law and international organizations currently seem to penetrate areas that were previously left to national governments. The enforcement of international obligations also seems more efficient, especially in the context of the WTO where the new dispute settlement system may authorise trade sanctions against non-complying states.

1.3.1 The Globalisation Argument

Arguments invoking increase in, and intensification of international cooperation are closely linked with the globalisation debate, which is premised on the idea of profound and unprecedented changes in international interconnections. Globalisation has, of course, been a highly controversial notion with several different definitions, explanations and critiques having been put forward¹⁹⁹ and the justifiability of the whole notion questioned.²⁰⁰ It has been characterised as “the process of increasing interconnectedness between societies so that events in one part of the world more and more have effects on peoples and societies far away.”²⁰¹ In other words, it is:

increasingly difficult for people to live in any place isolated from the wider world” for the reason that “developments at the local level – whether economic, social or environmental – can acquire almost instantaneous global consequences, and vice versa.”²⁰²

¹⁹⁶ B. Kingsbury, “Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?” *New York University Journal of International Law and Politics* 31(4) (1999), 679 at 680.

¹⁹⁷ Kumm, “Legitimacy of International Law,” 913. Emphasis in the original.

¹⁹⁸ Zürn, “Global Governance and Legitimacy Problems,” 269.

¹⁹⁹ For an overview, see J. Baylis & S. Smith, *The Globalisation of World Politics. An introduction to international relations* (2nd edition, OUP, 2001), 6.

²⁰⁰ M. Zürn, “Democratic Governance Beyond the Nation State: The EU and Other International Institutions,” *European Journal of International Relations* 6(2) (2000), 183 at 186-187. Here Zürn argues that the term ‘globalisation’ goes too far, and proposes the notion of “debordering” instead.

²⁰¹ Baylis & Smith, *The Globalisation of World Politics*, 7; and Held, *Models of Democracy*, 340. According to

²⁰² D. Held, “Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective” *Government and Opposition* 39(2) (2004), 364 at 364-365.

Globalisation is said to be affecting at least the political, economic, cultural and social spheres. A global economic system reaching beyond the control of any single state is often mentioned as evidence of globalisation.²⁰³ Globalisation is also seen as being fuelled by the emergence of global problems such as global warming or international terrorism and the growth in transnational networks, which all seem to be challenging the once intimate nexus between location and politics and transforming the relationship between sovereignty, territoriality and political power.²⁰⁴ It has also been associated with cultural homogenisation²⁰⁵ and revolutionary changes in communications that are challenging old ideas of geographical space and chronological time.²⁰⁶

Controversial as the notion of globalisation is, it is widely accepted that it has blurred the distinction between the national and the international, and affected the role, functions and powers of sovereign states, on one hand, and global actors, such as international organizations or transnational networks, on the other hand. In posing the question whether globalisation has only affected state autonomy²⁰⁷ or whether the modern state has actually lost some of its sovereignty,²⁰⁸ Held has examined various “disjunctures” in order to map processes altering the range and nature of choices open to democratic decision-makers.²⁰⁹ He concludes that “the evidence that international and transnational relations have altered the powers of modern sovereign state is certainly strong” as the “disjunctures” reveal:

... a set of forces which combine to restrict the freedom of action of governments and states by blurring the boundaries of domestic politics, transforming the conditions of political decision-making, changing the institutional and organizational context of national politics, altering the legal framework, and administrative practices of governments and obscuring the lines of responsibility and accountability of national states themselves.²¹⁰

In other words, these developments undermine any conception of sovereignty “as an illimitable and indivisible form of public power.”²¹¹ According to Bauman, in turn:

The deepest meaning conveyed by the idea of globalisation is the indeterminate, unruly and self-propelled character of world affairs; the absence of centre; of controlling desk...²¹²

Embedded in the globalisation debate is thus the idea that power is leaking from national governments to the international level where there are no effective checks and balances to constrain

²⁰³ Held, *Models of Democracy*, 339.

²⁰⁴ Held, “Democratic Accountability,” 367.

²⁰⁵ Baylis & Smith, *The Globalisation of World Politics*, 9.

²⁰⁶ Z. Bauman, *Globalisation. The Human Consequences* (Polity Press, 1998).

²⁰⁷ Held, *Models of Democracy*, 342.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*, 342 *et seq.* The disjunctures relate to the world economy, international political decision-making, international law and culture and the environment.

²¹⁰ *Ibid.*, 352.

²¹¹ *Ibid.*

²¹² Bauman, *Globalization*, 59.

its use. Instead, public power is exercised by small sectors of governments and experts working with international issues. It is exactly these kinds of observations that have sparked the interest in the legitimacy of international law and organizations. The expanded subject matter of international law, new procedures for its creation and the diminished role of states in interpreting and enforcing international law have lead Kumm to argue that:

... it is no longer apparent what structurally distinguishes international law from national law, except, of course, one central point: international law is not generated within the institutional framework of liberal constitutional democracy and does not allow for a central role for electoral supervision. In this sense it lacks democratic pedigree.²¹³

Also Sands indicates that:

The emergence of a new body of international law – more extensive rules, more detail, greater enforceability – has a profound impact for democratic governance and accountability.²¹⁴

Similar observations have been made regarding international organizations. As Heiskanen indicates, when international organizations are seen as playing a role in international affairs independently from states and governments, and as performing functions that states and governments alone are incapable of performing, they “have to be understood as players that not only have to be taken into account, but also have to be made accountable.”²¹⁵ Echoing such sentiments, many authors have expressed critical views regarding the legitimacy and accountability of international organizations. According to Zürn, international organizations:

...indeed are mostly accountable to their national governments one way or another, but at the same time quite remote and inaccessible for the nationally enclosed addressees of the regulation in question... At best... (they, KK) are answerable to a few governments, but not to all the societies into which they intrude, and certainly not to a transnational society.²¹⁶

Moravcsik thus argues that the question as to whether the structure of international institutions is democratically legitimate seems to be “emerging as one of the central questions – perhaps *the* central question – in contemporary world politics.”²¹⁷ This argument has several dimensions. First is the question of democracy at the inter-state level. Calls have been made, for instance, to democratise the United Nations by expanding the membership of the Security Council. However, according to Kofi Annan, the focus should be broader than that:

Many important decisions, with profound effects on the lives of billions of human beings, are made in the World Bank, International Monetary Fund, World Trade Organization, Group of 8, and the boardrooms of multinational corporations. We

²¹³ Kumm, “The Legitimacy of International Law,” 915.

²¹⁴ Sands, *Lawless World*, xvii.

²¹⁵ Heiskanen, “Introduction,” 5.

²¹⁶ Zürn, “Global Governance and Legitimacy Problems,” 275.

²¹⁷ Moravcsik, “Is there a ‘Democratic Deficit’ in World Politics?,” 336.

would live in a better, fairer world – indeed a more democratic world – if in all those places, greater weight were given to the views and interests of the poor.²¹⁸

Second, there is the question of membership in international organizations. Here the crucial question is whether non-democratic states should be accepted as members.²¹⁹ In 1948, the International Court of Justice indicated in the *Admissions Case* that in light of Article 2(7) of the *Charter of the United Nations*, a state's internal affairs should remain untouched by the United Nations apart from the Security Council acting based on its powers defined in Chapter VII of the *Charter*.²²⁰ What this meant was that Members of the United Nations could not make the admission of new Members dependent on conditions not expressly mentioned in Article 4(1) of the *Charter*. However, in the 2000s, the ideological climate had changed to allow Annan, then the Secretary General of the UN, to highlight a decision by the Organization of African Unity not to admit at its summit meetings leaders having come to power by unconstitutional means, and indicate that he looks forward “to the day when the General Assembly follows this example.”²²¹ Third, then, is the question of democratic accountability of international and regional organizations themselves. As with the WTO, the argument has also been made that the ability of international organizations to produce effective solutions and achieve good results is no longer sufficient to guarantee but “governance must also fulfil certain procedural requirements in order to be rated as good.”²²²

1.3.2 Post-Cold War Influences in International Legal Theory

Arguments put forward in the globalisation debate seem to relate and partly overlap with certain developments in international legal theory. Especially the ideological climate inspired by the end of the Cold War has produced theories that are also challenging traditional views on the legitimacy of international law and international organizations. The changes of political regime that took place in Central and Eastern Europe in 1989-90 were widely celebrated as signs of progress, and capitalism was proclaimed the only viable economic system.²²³ Fukuyama made the argument that the mankind had now reached the end of its ideological evolution, and that Western liberal democracy was the sole remaining credible political philosophy.²²⁴ Fascism and communism, the chief rival ideologies, had either failed or were failing; and Islam or nationalism were only partial or incomplete ideologies.²²⁵ Therefore, only liberal democracy combined with market economy count as developments of “truly world historical significance.”²²⁶ Fukuyama's arguments entail several problems and he has been criticised, for instance, for discarding the distinctive liberal traditions

²¹⁸ Annan, “Democracy as an International Issue,” 140.

²¹⁹ For a comprehensive discussion, see Simpson, *Great Powers and Outlaw States*, 254 *et seq.*

²²⁰ *Admission of a State to the United Nations*, Advisory Opinion, *ICJ Reports* (1948), 57.

²²¹ Annan, “Democracy as an International Issue,” 141.

²²² Zürn, “Democratic Governance Beyond the Nation-State,” 184.

²²³ Held, *Models of Democracy*, 274 *et seq.*

²²⁴ Fukuyama, “The End of History,” 3

²²⁵ F. Fukuyama, “A Reply to My Critics,” *The National Interest* No. 16, Winter (1989-90), 22.

²²⁶ *Ibid.*, 23.

associated with Locke, Bentham and Mill²²⁷ and for overlooking possible tensions or contradictions between the 'liberal' and the 'democratic,' in other words, the liberal emphasis on individual rights and the democratic focus on regulation of the individual, collective action and public accountability.²²⁸ In addition, Fukuyama has been attacked for endorsing a *laissez-faire* liberalism that is based on problematic assumptions about the self-equilibrating and clear nature of markets.²²⁹ He has also failed to consider whether and how inequalities of wealth and ownership could spark ideological conflicts both within the West and between the West and the developing world.²³⁰ Furthermore, the novelty of the entire post-Cold War shift in diplomatic and academic vocabularies, has been questioned and critically classified as "a return to the application of domestic categories to international affairs, advocated by the liberal legal cosmopolitanism that emerged in Europe in the 1870s and was institutionalised in and around the League of Nations."²³¹ While they are thus not without a controversy, these ideological developments have left their mark on international legal theory and challenged traditional understandings of the role of the individual, human rights, and democracy in international law. They have highlighted the relevance of states' *internal* governance and increased interest in democratic accountability and legitimacy of international institutions.

Regarding the relevance of states internal governance in international law, Simpson has highlighted the rise of what he calls democratic liberalism or liberal anti-pluralism. He explains that classical liberalism (or legalism) relies on domestic parallels and substitutes the individual by the state as the free and equal object and subject of international law.²³² Internal governance is irrelevant to a state's status in the international community, and states are prohibited from intervening in internal affairs of other states.²³³ However, classical liberalism has been criticised for several reasons, including that states have either pooled their sovereignty to international organizations or lost it to sub-state groups or transnational markets. Classical liberalism has also been attacked with the moral argument that states are morally indefensible as a foundation for the international society because of forms of intra-state violence and human rights abuses.²³⁴ In contrast, what Simpson calls democratic liberalism (or liberal anti-pluralism) seems to be gaining ground.²³⁵ It draws inspiration from Kant and American constitutionalism²³⁶ in that the individual assumes the place of a primary

²²⁷ Held, *Models of Democracy*, 280.

²²⁸ *Ibid.*

²²⁹ *Ibid.*, 282.

²³⁰ *Ibid.*

²³¹ Koskeniemi, "Legitimacy, Rights and Ideology," 349-350.

²³² Simpson, *Great Powers and Outlaw States*. See also G. Simpson, "Two Liberalism," *European Journal of International Law* 12(3) (2001); and G. Simpson, "Imagined Consent: Democratic Liberalism in International Legal Theory," 15 *Australian Yearbook of International Law* (1994), 103.

²³³ Simpson, *Great Powers and Outlaw States*, 80.

²³⁴ *Ibid.*

²³⁵ *Ibid.*, 76 *et seq.*

²³⁶ *Ibid.*

actor in international law.²³⁷ Consent is required at two levels of international law-making: state consent remains primary and vital, but individuals must also give consent to governments in order for them to possess formal credentials of statehood.²³⁸ According to Simpson, representatives of democratic liberalism include Teson, Franck, Rawls and Slaughter.²³⁹ In Franck's own words:

Increasingly, governments recognize that their legitimacy depends on meeting normative expectation of the community of states. Democracy is thus on the way of becoming a global entitlement, one which may be promoted and protected by collective international processes.²⁴⁰

According to Franck, there is also a connection between the legitimacy of national governments and the legitimacy of international institutions:

As global and regional institutions assume powers which were once the sole preserve of sovereign states ... it is very much to the advantage of such institutional endeavours that their initiatives be perceived as legitimate and fair. This cannot be achieved if any significant number of the participants in the decision-making process are palpably unresponsive to the views and values of their own people. *In the legitimacy of national regimes resides the legitimacy of the international regime.*²⁴¹ (Emphasis added, KK)

It is interesting to note that while arguments highlighting states' internal governance and the emerging right to democratic governance are gaining ground, at the same time it is realised that national democratic institutions have lost some of their relevance. Describing this paradox Marks indicates that "commitment to democracy has never been more widespread. On the other hand, awareness of the limitations of just particular national arrangements, but of all forms of national democracy, has rarely been more acute."²⁴² In other words, the conception of democracy as the working out of democratic principles for national polities starts to appear dramatically inadequate.²⁴³ In a similar vein, Held notes that the principle of majority rule has its limits when many of the decisions taken by the 'majority' also affect citizens in other communities, including a decision to build a nuclear power station near the border of a neighbouring country or to permit the 'harvesting' of rainforests.²⁴⁴ The previously central ideas that consent legitimates government and that the ballot box is the mechanism whereby individuals express their political preferences have thus been challenged by globalisation.²⁴⁵

This, then, leads to the second trend that has emerged in international legal theory, namely the increased interest in the accountability and legitimacy of international institutions. Here we again

²³⁷ *Ibid.*, 81 *et seq.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Franck, *Fairness in International Law and Institutions*, 84.

²⁴¹ *Ibid.*, 91.

²⁴² Marks, "Democracy and International Governance," 48.

²⁴³ *Ibid.*, 48, 51.

²⁴⁴ Held, *Models of Democracy*, 337.

²⁴⁵ *Ibid.*, 338.

run into arguments similar to those already discussed above in the context of the general globalisation debate. Thus, the new challenge is to “extend the range of democratic concern beyond national political processes” and include within its scope non-national political arenas, such as international organizations.²⁴⁶ Marks notes that according to most authors, globalisation will not result in the disappearance of the state as a structure, but the process is not without consequences either.²⁴⁷ Also Held has argued that:

...the meaning of democracy, and the model of democratic autonomy in particular, has to be rethought in relation to a series of overlapping local, regional and global structures and processes.²⁴⁸

He has then proposed a cosmopolitan model of democracy, which would coexist with the system of states but override it and “seek to entrench and develop democratic institutions at regional and global levels as a necessary complement to those at the level of the nation-state.”²⁴⁹ The model would entail the establishment of regional parliaments; recognising them as independent sources of regional and international regulation; accepting the possibility of general referenda cutting across nations and nation-states; as well as “opening international governmental organizations to public scrutiny and the democratisation of international ‘functional’ bodies.”²⁵⁰ Finally, “the formation of an authoritative assembly of all democratic states and societies – a re-formed UN or a complement to it – would be an objective.”²⁵¹

International scholars are, of course, far from unanimous on the need for new models of democracy or new institutional arrangements. Slaughter, for instance, has argued that the answer lies not in the democratisation of international organisations but in informal transgovernmental networking.²⁵² Since such networking is not based on a formal transfer of powers and only involves the enforcement of laws enacted through national processes, transgovernmental networking carries the legitimacy of national processes to the international level.²⁵³ Citizens retain the possibility of holding accountable their governments for both national decisions and those made in transgovernmental networks. One of the obvious difficulties with Slaughter's theory is the lack of ability of those affected by the decisions to hold the decision-makers accountable: while citizens may be able to hold their own governments accountable in connection with transgovernmental activities, “democratic legitimacy depends on accountability to *those affected* by such activities.”²⁵⁴

²⁴⁶ Marks, “Democracy and International Governance,” 48.

²⁴⁷ *Ibid.*, 49.

²⁴⁸ Held, *Models of Democracy*, 352.

²⁴⁹ *Ibid.*, 354.

²⁵⁰ *Ibid.*, 354-355.

²⁵¹ *Ibid.*, 355.

²⁵² A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004).

²⁵³ A.-M. Slaughter, “The Real New World Order” *Foreign Affairs* 76(5) (1997), 183.

²⁵⁴ Marks, “Democracy and International Governance,” 58.

Furthermore, it overlooks the reality that international organisations already exercise powers that affect the functioning of national institutions and does nothing to remedy the ensuing problems.

Another legal theoretical response to globalisation has been the idea of global legal pluralism, according to which globalisation is governed by:

...the totality of strategically determined, situationally specific and often episodic conjunctions of a multiplicity of institutional, normative and processual sites throughout the world.²⁵⁵

The perspective of global legal pluralism is sometimes described as sociological rather than normative.²⁵⁶ It highlights the ways in which global economic networks are governed by multiple systems of law²⁵⁷ and the ensuing need to “revise many of our basic ideas about the shape of the global legal order.”²⁵⁸ In contrast to the traditional focus on normative systems, global legal pluralism starts from ‘sites,’ from social and economic relations, and ask how they are organised and governed.²⁵⁹ It would first examine global commodity chains (i.e. networks of labour and production processes whose end result is a finished commodity), then analyse the social organisation of their constituent elements, and finally focus on identifying which institutions, norms and dispute resolution processes are relevant to the social organisation of each segment in the commodity chain.²⁶⁰ Thus, in the domain of this study, research endorsing global legal pluralism would also take into consideration other normative systems that govern the global economy, including ones that result from (private) norm generation by trade associations, professional and technical organizations, commercial arbitrators, multinational enterprises and so on.²⁶¹ For the purposes of the present study, the aim is not to go into the details of these interesting debates but to justify the focus of this work on the legitimacy of the WTO dispute settlement system. Clearly, the debate inspired by globalisation, the end of the Cold War and the changing reality in which international law and institutions currently operate, has demonstrated the relevance of such an inquiry.

1.3.3 Petersmann and the “New Theoretical Trends” in the WTO Context

It is interesting to conclude this overview by focusing on arguments concerning the legitimacy and constitutionalisation of the WTO by Petersmann who has published several works emphasising the rights-based nature of WTO law, urging a “human rights approach” to WTO rules, criticising

²⁵⁵ F.G. Snyder, “Governing Globalisation,” in M. Likosky, ed., *Transnational Legal Processes* (Butterworths Lexis Nexis, 2002), 65 at 92.

²⁵⁶ *Ibid.*, 66.

²⁵⁷ O. Perez, *Ecological Sensitivity and Global Legal Pluralism. Rethinking the Trade and Environment Conflict* (Hart Publishing, 2004), 7.

²⁵⁸ Snyder, “Governing Globalisation,” 67.

²⁵⁹ *Ibid.*, 68.

²⁶⁰ *Ibid.*, 68-69.

²⁶¹ Perez, *Ecological Sensitivity and Global Legal Pluralism*, 8-9.

public international law as too state centred, calling for democratic reforms in the WTO and highlighting the European integration process as a model for global development. However, these arguments have been highly controversial and they have inspired some strong criticism. To illustrate why it may be difficult to apply some of the new theoretical insights to the WTO, it therefore seems appropriate to conclude this section by introducing Petersmann's main arguments, as well as some of strong key critiques that they have inspired.

Echoing the views of democratic liberalism, Petersmann has criticised classical public international law for being too state-centred and power-oriented a system²⁶² According to him, far reaching reforms are needed to make the individual rather than the state the central actor in international law. The underlying philosophical justification is that:

If values can be derived only from individuals and from their human rights, and if the end of states and of international law is to serve individuals by protecting their human rights, then individuals and their human rights - rather than states, "nations" or "people" (*demos*) whose collective rights are merely derivative of human rights of their citizens - should be recognised as primary normative units also in international law and international organisations. ²⁶³

According to Petersmann, human rights should thus play a central role in international law:

The progressive development and extension of human rights law in all fields of national and international law remains a permanent legal and political challenge for satisfying basic human needs, protecting 'democratic peace' and for promoting self-government and self-development of all human beings.²⁶⁴

What this means is that the WTO, together with other international organizations, should integrate human rights into their law and practice.²⁶⁵ In other words, Petersmann proposes a *human rights approach* to WTO law.²⁶⁶ WTO law should be interpreted "in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights."²⁶⁷ According to Cass, the motivating factor for Petersmann seems to be that such an approach would enable WTO law to exploit the legitimacy of human rights, respond to the claims of the anti-WTO protest movement and insert free trade deep into domestic legal arrangements.²⁶⁸

The emphasis on human rights also leads to one of Petersmann's main theses, namely the constitutionalisation argument. According to him, the recognition of human rights requires

²⁶² Petersmann, "Human Rights, Cosmopolitan Democracy," 80.

²⁶³ *Ibid.*, 91.

²⁶⁴ Petersmann, "Human Rights and International Economic Law," 21.

²⁶⁵ Petersmann, "Time for a United Nations 'Global Compact,'" 625.

²⁶⁶ Petersmann, "Human Rights and International Economic Law," 2.

²⁶⁷ Petersmann, "Time for a United Nations 'Global Compact,'" 645.

²⁶⁸ Cass, *The Constitutionalization of the WTO*, 150-151.

constitutionalisation also at the international level.²⁶⁹ This is because national constitutional guarantees remain ineffective “without complementary international constitutional guarantees of rule of law among states and cosmopolitan human rights protecting individual freedom”²⁷⁰ Furthermore, history demonstrates that liberty, democracy, welfare-increasing market competition and social justice are not “gifts of nature” but constitutional tasks.²⁷¹ To Petersmann, the European integration process confirms these insights.²⁷² However, the European example has also illustrated that integration is not possible without comprehensive package deals.²⁷³ Given the expanding agenda of the WTO and the protests against it, Petersmann suggests that it should be examined whether the European ‘integration paradigm’ should become accepted at the worldwide level “in order to promote a new kind of global integration law based on human rights and the solidary sharing of the benefits and social adjustment costs of global integration.”²⁷⁴

The WTO plays an important role in the international constitutionalisation process. According to Petersmann, international trade law restrains government action and the agreements contain several rights that attach to individuals rather than just states.²⁷⁵ Thus, “the WTO guarantees of freedom, non-discrimination and the rule of law” reach beyond national constitutional guarantees in many countries, and subject discretionary foreign policy powers to additional legal and judicial restraints ratified by domestic parliaments.²⁷⁶ For this reason WTO law serves “constitutional functions for rendering human rights and the corresponding obligations of governments more effective in the trade policy area.”²⁷⁷ Due to its unique compulsory dispute settlement and appellate review system, and its complementary guarantees to domestic courts, WTO law also seems to protect the rule of law “more effectively than any other worldwide treaty”²⁷⁸

However, Petersmann has also criticised the present WTO system and identified the need for improvements. According to him, the rule-making that often takes place behind closed doors and without effective parliamentary control, “hardly complies with the human rights requirement of transparent, democratic rule-making maximizing human rights.”²⁷⁹ On the contrary, the “appropriate balancing of human rights” would require transparent democratic discussions and

²⁶⁹ Petersmann, “Human Rights and International Economic Law,” 11.

²⁷⁰ *Ibid.*, 10.

²⁷¹ Petersmann, “Time for a United Nations ‘Global Compact,’” 641.

²⁷² *Ibid.*, 637.

²⁷³ *Ibid.*, 624.

²⁷⁴ *Ibid.*, 623.

²⁷⁵ Cass, *The Constitutionalization of the WTO*, 146. The rights may be substantive (e.g. intellectual property rights), or procedural (private access to domestic review, government procurement).

²⁷⁶ Petersmann, “Time for a United Nations ‘Global Compact,’” 644.

²⁷⁷ *Ibid.*

²⁷⁸ Petersmann, “Human Rights and International Economic Law,” 25.

²⁷⁹ Petersmann, “Time for a United Nations ‘Global Compact,’” 641.

adequate representation of all interests involved.²⁸⁰ Thus, Petersmann calls for democratic reforms of WTO law and its 'constitutional infrastructure'.²⁸¹ In more concrete terms,

The universal recognition of human rights, and the move from 'negative integration' to 'positive integration and to worldwide rule-making in the WTO, call for further 'constitutionalisation' of the WTO by means of more transparent rule-making procedures in the WTO, stricter parliamentary review, and the legal and judicial protection of human rights in the trade policy area.²⁸²

Given the rather radical nature of some of Petersmann's arguments, his views have provoked strong criticism and his theory has been classified as "highly controversial."²⁸³ According to Cass, one of key problems is that implicit in Petersmann's rights-based approach are some radical consequences; it would ultimately seem to lead to a situation where WTO law would have a direct effect in national legal systems.²⁸⁴ This would, of course, be a fundamental consequence in most national jurisdictions, which have adopted a dualist approach to international law. Petersmann has attempted to address this problem by arguing that even if WTO law does not necessarily have direct effect, it should be used as an interpretative guideline in domestic systems.²⁸⁵ Nevertheless, his approach is "at odds with the classical international law position as well as with the majority of WTO scholars."²⁸⁶

The second key critique against Petersmann relates to his approach to human rights and Kantian philosophy. Alston, for instance, has argued that Petersmann's approach is "at best difficult to reconcile with international human rights law and at worst it would undermine it dramatically."²⁸⁷ According to Alston, the references that Petersmann makes to Kant to justify his underlying philosophy ignore the complexity of Kant's writings.²⁸⁸ Petersmann's arguments are also vague from the perspective of international human rights law: he does not offer detailed legal justifications for his claims that WTO law establishes worldwide guarantees of economic freedom.²⁸⁹ According to human rights lawyers, what Petersmann calls as "the WTO guarantees of freedom, non-discrimination and property rights" are in fact not individual rights conferred to individuals in the sense of human rights and "cannot reasonably be equated to human rights in any broad sense familiar to the traditions of international human rights law."²⁹⁰ Petersmann has also been accused of being politically naïve in arguing that the WTO could play a significant role in

²⁸⁰ *Ibid.*, 646.

²⁸¹ Petersmann, "Human Rights and International Economic Law," 3.

²⁸² Petersmann, "Time for a United Nations 'Global Compact,'" 647.

²⁸³ Cass, *The Constitutionalization of the WTO*, 145.

²⁸⁴ *Ibid.*, 152.

²⁸⁵ *Ibid.*, 153.

²⁸⁶ *Ibid.*

²⁸⁷ P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann," *European Journal of International Law* 13(4) (2002), 815 at 815.

²⁸⁸ *Ibid.*

²⁸⁹ Cass, *The Constitutionalization of the WTO*, 153.

²⁹⁰ Alston, "Resisting the Merger and Acquisition," 826.

promoting human rights. In other words, he has not been able to explain why “the very same governments acting within the framework of the WTO would take a dramatically different attitude to the proposal purporting to achieve the result which they have adamantly opposed in the human rights setting.”²⁹¹ Furthermore, the WTO, “its institutional structure, its processes and the outcomes it sanctions are far from what would be required of a body to which significant human rights authority could be entrusted.”²⁹² Questions have also been raised concerning the social aspect of human rights and contradictions deriving from the economic focus of Petersmann’s model. According to Howse, Petersmann seems to be proposing a clear hierarchy of human rights:

Social and other positive human rights can only be pursued by governments to the extent to which they can be shown as ‘necessary’ limits on market freedoms. But why not the reverse? Why not subject *free trade rules* to stricter scrutiny under a necessity test, where these rules make it more difficult for governments to engage in interventionist policies to protect *social rights*?²⁹³

In a similar vein, Alston argues that Petersmann’s vision would lead to a situation where human rights would “become detached from their foundations in human dignity and would instead be viewed primarily as instrumental means for the achievement of economic policy objectives.”²⁹⁴

Finally, Petersmann can be criticised for being too Eurocentric and idealist about the potential of the European Union to serve as a model for ‘worldwide integration law.’ According to Alston, Petersmann presents also some unjustifiable arguments regarding the role of human rights in the European integration process: there has been no grand vision on human rights and individual liberties motivating the incorporation of human rights into European law but this was rather an “afterthought” and made in response “to various efforts by Community institutions which were seen as a threat to the national legal orders.”²⁹⁵ Furthermore, individuals and citizens did not originally play a role in the European process, but the move away from the “functionalist elite-driven model” only began during the last decade.²⁹⁶ It is also true that the global community does not seem to be committed to an integration process along the lines of the European Union and that similar integration would also be incredibly difficult to achieve given the global economic, political, cultural, institutional and legal differences and bearing in mind that even within the EU, its enlargement and especially the pending membership of Turkey have been highly controversial issues. Regardless of the host of convincing criticism against Petersmann’s views, his writings have also been useful in provoking debate about the fundamentals of the WTO system and the direction

²⁹¹ *Ibid.*, 834.

²⁹² *Ibid.*, 836.

²⁹³ R. Howse, “Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann,” *European Journal of International Law* 13(3) (2002), 651 at 655.

²⁹⁴ Alston, “Resisting the Merger and Acquisition,” 843.

²⁹⁵ *Ibid.*, 822.

²⁹⁶ *Ibid.*, 831-832.

that it should be taking in the future. Certainly, the debate justifies the focus on the legitimacy of the WTO dispute settlement system in this study.

1.4 Conclusions

Having situated the study in a broader context, elaborated on its theoretical basis and developed the necessary conceptual tools, the focus can now be directed to the legitimacy of the WTO dispute settlement system. As we have seen, legitimacy reflects the idea of justified and accepted authority. It has been characterised as a compliance pull or an aura of authority convincing the relevant constituencies to accept an institution or a decision that may override their particular preferences. Given the underlying contradictions, namely the tension between naturalist and positivist theories, there is no unequivocal definition for legitimacy. Most definitions of legitimacy contain both formal and consensual elements. Formal legitimacy links with legal validity, and correct procedures. Social legitimacy can be associated with subjective preferences and the acceptance by those whose behaviour an institution or a decision seeks to govern. Furthermore, social acceptance links legitimacy with substantive issues and the ability of an institution to manifest political preferences and advance generally shared goals and preferences.

The structure of this study reflects the distinction between formal and social/substantive legitimacy. I shall first describe in Chapter 4 how 'trade and' disputes, especially those involving a conflict between trade and environmental protection, have challenged the social/substantive legitimacy of the WTO and its dispute settlement system. In Chapter 5, I shall approach questions associated with formal legitimacy, including questions of procedure, transparency, accountability and the relationship between the WTO dispute settlement system and other international and national institutions. It is true, of course, that problems I have chosen to discuss in Chapter 5 as challenges to the formal/procedural legitimacy of the WTO dispute settlement can and do have a negative impact on the social/substantive legitimacy of the system: The lack of transparency and possibilities for public participations may decrease the authority and social acceptance of an institution. An intrusive standard of review second-guessing a politically sensitive law adopted by a democratic national parliament could also have a similar effect. On the other hand, the best way to address some of the problems that have challenged the social/substantive legitimacy of the WTO dispute settlement system seems to be procedural. As it will be proposed in Chapter 4, decisions in disputes involving conflicting policy objectives might be more readily accepted if the WTO dispute settlement system took a more consistent and coherent interpretative approach to non-WTO norms and was more sensitive to other international and national institutions. For such reasons the distinction between formal and social legitimacy reflected in the structure of this work should rather be seen as a rough guide towards categorising legitimacy challenges facing the WTO dispute settlement mechanism than a definite labelling of the various issues discussed. Each of the

individual Chapters attempts to take into account such complexities and engage in a more nuanced analysis of the problems.

2. Legitimacy and the WTO Dispute Settlement System

This Chapter argues the WTO dispute settlement system is confronted with considerable legitimacy challenges. The legitimacy of dispute resolution in the context of international trade institutions was first seriously contested towards the end of the GATT era when environmentalists fiercely attacked two unadopted panel reports in the *Tuna-Dolphin* dispute arguing that they pointed towards a substantive bias and institutional discrepancy in favour of free trade. The establishment of the institutionally much stronger WTO dispute settlement system in 1995 highlighted the relevance of these challenges. In contrast to the largely diplomatic and policy-oriented dispute resolution during the GATT era, the new dispute settlement mechanism came to be characterised as a quasi-judicial forum with a compulsory and exclusive jurisdiction in the field of WTO law and a mandate to authorise trade sanctions against non-complying states. The new WTO dispute settlement system also proved highly popular and since its creation, it has been utilised with an unprecedented frequency.

These reforms lifted the profile of international trade law and strengthened its status in relation to other specialised areas of international law. They also came to act as one of the drivers for a broader doctrinal debate concerning the fragmentation of international law.²⁹⁷ Thus, while we saw in the previous Chapter that one important implication of globalisation has been an expanding and intensifying international cooperation, bringing to the fore questions such as the legitimacy of international law and organizations, this Chapter highlights the somewhat paradoxical consequence that globalisation has also lead to increasing fragmentation, functional differentiation and the emergence of specialised and relatively autonomous social spheres.²⁹⁸ The challenge is to figure out how the highly specialised functional components of the international regime could coexist in harmony and interact in a way that does justice to their valid but not necessarily fully compatible claims of authority. In the context of the WTO dispute settlement system, one of the key problems is that while it has compulsory and exclusive jurisdiction in the field of WTO law, most scholars argue that it is not competent to apply other rules of international law. However, especially in linkage disputes norms such as those developed under international environmental law would often be relevant to the facts of this dispute. This has sparked a lively, albeit somewhat technical debate concerning the role of non-WTO rules of international law in the WTO dispute settlement. On the other hand, disputes such as the *Tuna-Dolphin* and *Shrimp-Turtle* have also prompted scholars to

²⁹⁷ International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi. (A/CN.4/L.682, 13 April 2006).

²⁹⁸ *Ibid.*, 11.

consider the rationale of involving the WTO dispute settlement system in such disputes from a broader and more institutionally oriented perspective. These are the main themes discussed in this Chapter, which has been structured as follows. Section 2.1 explains how legitimacy problems have emerged during *GATT* and WTO dispute settlement procedures. Section 2.2 outlines the key institutional features of the WTO dispute settlement system. Section 2.3 focuses on the substantive competence and limits of the WTO dispute settlement system and reviews the key scholarly positions concerning its competence to consider and apply such rules of international law that are not included in the WTO Agreements. Section 2.4 outlines the scholarly debate concerning the question as to how the WTO dispute settlement system should address linkage disputes.

2.1. Legitimacy Problems in the GATT/WTO Dispute Settlement

This section focuses on the familiar story of how the *Tuna-Dolphin* and *Shrimp-Turtle* panels challenged the legitimacy of the GATT/WTO dispute settlement and how the Appellate Body turned a new page by its landmark decision in the *Shrimp-Turtle* case. While the story has been told numerous times, I believe that there are some overlooked twists to the plot. I wish to challenge two popular perceptions, first that the *Tuna-Dolphin* decision was completely unjustified from the environmental point of view, and second that the Appellate Body's *Shrimp-Turtle* decision marked a completely new era in the trade-environment jurisprudence by the GATT/WTO dispute settlement mechanisms. Instead, I shall argue that while the legal analysis by the *Tuna-Dolphin* panel exposes a trade-oriented bias, the conclusion seems justified bearing in mind the several flaws in the design of the U.S. trade embargo. More importantly, I shall also argue that the famous *Shrimp-Turtle* decision by the Appellate Body in no way marked the beginning of a consistent environmental-friendly pattern in the GATT/WTO dispute settlement. The validity of the second argument will be evident from the discussion in Chapter 4, including the recent decision concerning the by the *Biotech* panel to completely deny the relevance of international environmental law in the interpretation of WTO law in a dispute concerning genetically modified organisms. The key objective here, however, is to focus on uncovering the reasons as to why the legitimacy of the GATT/WTO system has been challenged, and identify the key constituents of the legitimacy challenge in light of the theoretical scrutiny undertaken in the previous Chapter.

In the early 1990s, a *GATT* dispute focusing on tuna fishing and the American desire to protect dolphins infuriated environmentalists²⁹⁹ and turned them against the GATT/WTO dispute

²⁹⁹ As Thaggett argues that the *Tuna-Dolphin* case was a "call to arms for environmentalists." H. L. Thaggett, "A closer look at the Tuna-Dolphin case: 'Like products' and 'extrajurisdictionality' in the trade and environment context" in J. Cameron & al., eds., *Trade & the Environment: The Search for Balance*, Volume 1 (Cameron May, 1994), 69 at 83.

settlement system. At the heart of the controversy was an import prohibition imposed by the U.S. on tuna that had been caught by fishing technologies resulting in the incidental killing of dolphins. Two *GATT* panels issued reports indicating that the trade ban violated the *GATT* and that the U.S. could not impose the dolphin friendly requirement on its tuna imports. Environmentalists tend to regard these reports as seriously flawed and many WTO scholars are keen to argue that they belong to the 'old era,' in other words, the epoch before the Appellate Body's landmark *Shrimp-Turtle* ruling opened the borders for more constructive and balanced interaction between trade and environment. There are problems, however, with both of these popular perceptions.

The *Tuna-Dolphin* controversy focused on the U.S. Marine Mammal Protection Act that prohibited imports of yellowfin tuna caught by using purse seine nets that resulted in incidental and 'excessive' killing of dolphins. The trade ban affected Mexico's tuna exports to the U.S., as well as the secondary exports of Mexican tuna to the U.S. through Europe. Mexico thus requested a *GATT* dispute settlement panel in 1991 and argued that the U.S. import prohibition violated its trading rights under the *GATT*. One of Mexico's key arguments in the *Tuna-Dolphin* dispute was that it was not possible to discriminate between domestic and imported products based on the production method³⁰⁰ and the U.S. measure therefore violated the national treatment principle enshrined in *GATT* Article III. The panels accepted this, indicating that imports of a product, namely tuna, could not be restricted solely by reference to the production technique. More specifically, the 1991 *GATT* panel stated that:

... Article III:4 calls for a comparison of the treatment of imported tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product.³⁰¹ (Emphasis in the original).

The panel also found that the ban violated Article XI:1 of the *GATT* prohibiting quantitative trade restrictions and was not justified under the exceptions clause in Article XX(b) because the Article did not permit extra-jurisdictional protection of life and health. According to the panel, accepting a broad interpretation of the environmental exceptions would lead to *GATT* Contracting Parties unilaterally determining the environmental policies "from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."³⁰² Moreover, the prohibition was not "necessary" as the U.S. had not:

...exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative agreements, which would seem

³⁰⁰ D. Murphy, "The Tuna-Dolphin Wars," *Journal of World Trade* 40(4) (2006), 597-617 at 598 and 610-611.

³⁰¹ *GATT* panel report, *US-Restrictions on Imports of Tuna*, BISD 39S/155, 3 September 1991, para. 5.15.

Unadopted.

³⁰² *Ibid.*, para. 5.22.

to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.³⁰³

While many *GATT* Contracting Parties argued in favour of adopting the panel report, the U.S. and Mexico postponed the resolution of the dispute and the panel report was never formally adopted.³⁰⁴ This was not, however, the end of the controversy. The Marine Mammal Protection Act also authorised a secondary embargo against imports of Mexican tuna from other countries, including Europe.³⁰⁵ This resulted in the establishment of a second *Tuna-Dolphin* panel in 1992 to consider a complaint by the European Community that the intermediary protection affected its member states.³⁰⁶ Also the second *Tuna-Dolphin* panel found the U.S. trade ban to be inconsistent with Article XI of the *GATT* and not allowed by the general exceptions listed under Article XX.

The findings in the *Tuna-Dolphin* reports lead to extensive academic debates concerning the status of processes and production methods (PPMs) under the *GATT*/WTO regime and the justifiability of unilateral and extraterritorial environmental measures. At the same time, they highlighted linkages between international trade and other policy fields in an unprecedented manner:

Traditionally, the *GATT* demonstrated respect for regulatory diversity and progressive government. But after *Tuna-Dolphin*, environmentalists – and others with concerns about how the trading system balances competing values – saw the *GATT* as a regime dedicated to the triumph of free trade over all other human concerns.³⁰⁷

When looking closely, the outcome of the *Tuna-Dolphin* dispute seems to have much more merit than it is usually given. In contrast to sea turtles, dolphins were not classified as endangered under international environmental law. The situation is thus markedly different from the *Shrimp-Turtle* dispute where the Appellate Body was able to rely on a number of international environmental instruments recognizing the necessity of protecting sea turtles from extinction. For dolphins, however, many felt that the desire to protect them was rooted in American popular sympathy with these intelligent marine mammals³⁰⁸ and the cruelty of the ‘encirclement’ fishing method that took advantage of the tendency of yellowfin tuna to travel beneath dolphin pods. On the other hand, the dolphin-friendly fishing method was not the ideal alternative from the ecological perspective. Experience showed that it had dramatic consequences on other marine species: one report, for instance, indicated that saving 29 dolphins would kill 2,000 sharks, between 38 and 75 billfish

³⁰³ *GATT* panel report, *US-Restrictions on Imports of Tuna*, *GATT* document DS29/R, 11 October 1994, para. 5.27. Unadopted.

³⁰⁴ P. Uimonen & J. Whalley, *Environmental Issues in the New World Trading System* (Macmillan Press Ltd, 1997), 77.

³⁰⁵ Jones, *Who's Afraid of the WTO*, 108.

³⁰⁶ Uimonen & Whalley, *Environmental Issues in the New World Trading System*, 77.

³⁰⁷ R. Howse, “The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate,” *Columbia Journal of Environmental Law* 27(2) (2002), 489 at 492.

³⁰⁸ Sands, *Lawless World*, 109.

(including swordfish) and five sea turtles.³⁰⁹ Eventually even environmental NGOs such as the Greenpeace started questioning its desirability and finally concluded that dolphin-setting was less disturbing ecologically than the alternative of log-setting.³¹⁰

As to the motivation of the trade ban, the U.S. dolphin-safe policy was heavily influenced by such large American companies as Heinz, which had voluntarily adopted a dolphin-safe tuna policy but was disappointed with the economic results of the green marketing strategy.³¹¹ To make the marketing of dolphin-friendly tuna more profitable, Heinz supported compulsory regulation and thus gained from the U.S. import ban, while small canners and fishers suffered losses.³¹² Prior to imposing its trade ban, the U.S. made no efforts to cooperate with Mexico on the protection of dolphins. However, as the *Tuna-Dolphin* dispute coincided with the negotiations for the North American Free Trade Agreement (NAFTA) where fears of a “race to the bottom” played a prominent role, Mexico chose not to press for the adoption of the panel report.³¹³ Eventually, Mexico and the U.S. signed a treaty on international dolphin protection, and the trade ban was replaced by eco-labelling requirements.³¹⁴ Interestingly, the *Tuna-Dolphin* saga also testifies to the power of the media and the civil society to influence popular opinion in the U.S – and the ability of the U.S. popular opinion to influence the rest of the world. After the GATT panel reports, American NGOs launched massive campaigns against the GATTzilla monster, poised to destroy both the American sovereignty and the global environment. Slogans like “the GATTzilla just ate Flipper” also took advantage of the Flipper dolphin made famous by a popular TV series.³¹⁵ These developments had an important role in the increase in writings by mostly American scholars and NGOs on the legitimacy of the GATT/WTO system.

Regardless of the less-than-perfect environmental and political credentials of the U.S. trade embargo, the *Tuna-Dolphin* panel reports provoked a strong and furious environmentalist reaction and lead many environmentalists to believe that the GATT/WTO regime was dedicatedly and irrevocably biased in favour of free trade. In fact, some of the key legal findings by the *Tuna-Dolphin* panel gave rise to what have been characterised as environmental “myths” that more than a decade later “keep haunting the WTO.”³¹⁶ That they had such a profound impact is all the more impressive given that the panel reports were never formally adopted, meaning that “officially, those panel

³⁰⁹ Murphy, “The *Tuna-Dolphin* Wars,” 610.

³¹⁰ *Ibid.*, 615, 617. Accordingly, the commercially viable alternatives to dolphin setting proved more ecologically disruptive by depleting younger stocks of tuna and killing billfish, sharks and sea turtles.

³¹¹ *Ibid.*, 602, 605.

³¹² *Ibid.*, 606.

³¹³ Jones, *Who's Afraid of the WTO*, 109.

³¹⁴ *Ibid.*

³¹⁵ Sands, *Lawless World*, 108-109.

³¹⁶ J. Pauwelyn, “Recent Books on Trade and Environment: *GATT* Phantoms Still Haunt the WTO,” *European Journal of International Law* 15(3) (2004), 575 at 585.

rulings are not even public documents.”³¹⁷ How to explain this? In my view, an in-depth analysis of this situation is key to understanding why the legitimacy of the GATT/WTO dispute settlement system has been put into question and what factors influence the legitimacy of an international adjudicative body. In other words, the *Tuna-Dolphin* and *Shrimp-Turtle* cases provide a stimulating opportunity to build on the theoretical insights from the previous Chapter.

Given their disappointment with the *Tuna-Dolphin* rulings, environmentalists were alarmed when a dispute pertaining to a very similar set of facts was brought to the recently established WTO dispute settlement system in 1996. This time it was a group of Asian developing countries that challenged the U.S. prohibition on shrimps caught by harvesting methods that resulted in the incidental drowning of endangered species of sea turtles. Environmental NGOs struggled to participate in the closed and confidential WTO dispute settlement proceedings and failed to secure a permission from the *Shrimp-Turtle* panel to submit *amicus curiae* briefs.³¹⁸ The international environmental community was thus far from delighted when in the spring of 1998 “the three faceless bureaucrats hidden somewhere in Geneva”³¹⁹ ruled that the U.S. measure violated *GATT* Article XI and could not be justified under Article XX on the grounds that unilateral environmental measures were incompatible with the objectives of the international trade liberalisation system. In other words, WTO members were only allowed “to derogate from *GATT* provisions so long as, in doing so, they do not undermine the WTO multilateral trading system.”³²⁰ Many interpreted this statement as a confirmation that there was no space for environmental or other non-trade values within the WTO system. Environmentalists thus reacted strongly, arguing that the decision had “no economic, scientific or legal justification,”³²¹ and that the report marked “a new low-point in WTO dispute settlement.”³²² They also stressed the need to find “an alternative way to solve trade disputes involving environmental and social objectives.”³²³

2.1.1 An Institutional Bias in Favour of Free Trade?

It is clear that the *Tuna-Dolphin* and *Shrimp-Turtle* panel reports challenged the legitimacy of the GATT/WTO dispute settlement system, and as we saw in Chapter 1, did so in a way that had important implications for the legitimacy of the international trade regime as a whole. But why did

³¹⁷ *Ibid.*, 585.

³¹⁸ Panel report, *US–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998, paras. 7.7–7.8. (*Shrimp-Turtle*)

³¹⁹ R. Howse, “Adjudicative Legitimacy and treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence” in J.H.H. Weiler, ed., *The EU, the WTO and NAFTA. Towards a Common Law of International Trade?* (OUP, 2000), 43.

³²⁰ Panel report, *Shrimp-Turtle*, para.7.44

³²¹ Center for International Environmental Law, “Statement on the WTO Shrimp-Turtle Ruling against the United States,” 6 April 1998. Available at: <<http://www.ciel.org/Tae/strule.html>>.

³²² The World Wildlife Fund for Nature, “The Final Report of the Shrimp-Turtle Panel. WWF’s Response,” *WWF Legal Briefing*, May 1998. Available at:

<http://www.panda.org/news_facts/publications/index.cfm?uNewsID=3907>.

³²³ *Ibid.*

this happen? In a diverse and pluralist world it is quite inevitable that authorities make decisions that are not acceptable for everyone. When the WTO dispute settlement system gives a ruling that violates some political convictions, environmental or otherwise, this should not, as such, seriously challenge its legitimacy. Indeed, as we saw in Chapter 1, the idea of 'acceptable paternalism' and the willingness to obey decisions that go against own, actual preferences forms the very essence of the idea of legitimacy.³²⁴ In other words, if most people believe that the institution making the decision has been created and operates in accordance with formally correct and fair procedures, and if they trust that its overall objectives are acceptable, then they should be willing to accept its authority to reach a conclusion in an individual case that is contrary to their personal views. However, it seems that this was not the case in the context of the GATT/WTO dispute settlement. In my view, a serious legitimacy crisis was caused by the fact that many saw the *Shrimp-Turtle* and *Tuna-Dolphin* decisions as symptoms of some more fundamental problems with the GATT/WTO dispute settlement. Having been made by a trade organization without any environmental or democratic credentials, they exposed a trade-oriented focus – even a bias – that seemed to systematically undermine legitimate policy objectives endorsed in other fora. They thus brought to the fore fundamental challenges questioning the institutional integrity of the WTO dispute settlement system and its ability to take a balanced approach to linkage issues.

Thus, for many environmentalists criticising the *Tuna-Dolphin* and *Shrimp-Turtle* decisions the crucial problem was the general *approach* to environmental interests and norms that the panels employed rather than the mere conclusion that a particular environmental trade restriction was contrary to the *GATT Agreement*. The GATT/WTO dispute settlement procedures seemed to operate in a way that made it nearly impossible for environmentalist to conceive them as legitimate: environmental policy objectives were consistently rejected without engaging in a sound and convincing analysis of the underlying legal arguments. As Sands has indicated,

The real problem was with the reasoning of the (*Tuna-Dolphin*, KK) decision. It went too far in promoting free trade... The panel's language seemed to exclude the possibility that there might be *any* circumstances in which one country could ban imports to protect the environment of the producing state, or of the international community as a whole.³²⁵

Environmentalists, however, were not the only ones finding defects in the decision by the *Shrimp-Turtle* panel. Also the Appellate Body used some strong wordings when overturning the panel's key findings. It criticised the panel for not following the international customary rules on treaty interpretation and resorting instead to a broad standard and a test that found "no basis" in the treaty language.³²⁶ The Appellate Body thus emphasised the importance of the customary rules of

³²⁴ Section 1.2. The quotes are from Koskeniemi, "Legitimacy, Rights and Ideology," 353.

³²⁵ Sands, *Lawless World*, 109.

³²⁶ Appellate Body report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 121. (*Shrimp-Turtle*).

treaty interpretation³²⁷ and demonstrated that it was serious when indicating in the *US-Gasoline* report that WTO law was not “in clinical isolation of public international law.”³²⁸ The AB then cited a number of treaties and other instruments of international environmental law to support its interpretation of the *GATT*. Whether its understanding and approach to international environmental norms was accurate in all respects will be questioned in Chapter 4. Yet, at the time, it was a remarkable development that the Appellate Body should refer to international environmental norms and explicitly acknowledge their relevance to the interpretation of WTO law.

What the Appellate Body concluded was that the U.S. import prohibition was in fact provisionally justified under the subparagraph (g) of Article XX (which allows measures “relating to the conservation of exhaustible natural resources”) and only failed because *its application* amounted to arbitrary and unjustifiable discrimination prohibited by the chapeau of Article XX. The implications of the Appellate Body’s legal analysis were partly lost, however, in the fact that the outcome of the appeal was still that the U.S. import prohibition violated the *GATT*. The significance of these findings became apparent only in 2001, when a panel and the Appellate Body ruled on the implementation of the *Shrimp-Turtle* decision by the U.S. under *DSU* Article 21.5. After attempting to reach a multilaterally negotiated solution to the problem and remedying other defects relating to the implementation of its measure, the U.S. was now able to legally prohibit imports of shrimps from countries that did not take adequate precautions to prevent endangered species of sea turtles from drowning in shrimp nets.

It seems justified to argue that the Appellate Body succeeded in responding to some of the challenges to the legitimacy of the WTO dispute settlement. It did so by employing legal techniques that addressed some of the most immediate systemic problems. Its legal arguments and analytical approach to Article XX of the *GATT* seemed far better justified than the panel’s interpretation building on the general economic objectives of the multilateral trade regime. It displayed a commitment to more transparent and systematic treaty interpretation based on customary rules that also takes into consideration other relevant norms of public international law. Taking advantage of Franck’s definition of legitimacy discussed in the previous Chapter, in the *Shrimp-Turtle* case the Appellate Body improved *coherence* by sending a message that it will interpret all WTO norms alike no matter what the underlying political interests: its interpretation will start from the treaty language and the context and proceed in accordance with accepted interpretative standards. Furthermore, the Appellate Body also improved *adherence* by showing that its interpretation of the primary norms (i.e. the *GATT*) was supported by secondary norms (i.e. the customary rules of interpretation codified in the *Vienna Convention on the Law of Treaties*). The key message here was that

³²⁷ *Ibid*, para.114.

³²⁸ Appellate Body report, *US-Gasoline*, 17.

the Appellate Body's approach was embedded in a broader procedural and institutional framework and not driven by a blind commitment to international trade liberalisation.

Having illustrated through concrete examples how the legitimacy of the WTO dispute settlement mechanism was originally put into question and how some of the problems have been addressed through legal techniques I shall now focus on explaining how the system functions as an institution and how it relates to non-WTO norms of international law. As it will be seen, it is in particular the limited mandate of the WTO dispute settlement system that continues to challenge its legitimacy.

2.2 Institutional Parameters of the WTO Dispute Settlement System

As a result of the Uruguay Round, the system for settling international trade disputes went through an important transformation. During the GATT era, the methods for settling trade disputes evolved from the first ruling given by the chairman in 1948, through the consideration of disputes by working parties to three- or five-member panels giving expert opinions.³²⁹ As the GATT system operated on a basis of a consensus rule, the losing party could block the adoption of an adverse report.³³⁰ While in most cases it eventually accepted the result, 'blocking' remained a problem and "seemed to be occurring with increasing frequency in the 1980s."³³¹ In a marked contrast, under the new WTO dispute settlement system, the adoption of panel and Appellate Body reports can only be *prevented* by a consensus. The move to the negative consensus rule was one of the most significant changes making the WTO dispute settlement system the exceptionally powerful international judicial body that it is today, in other words, "in all probability, the most effective area of adjudicative dispute settlement in the entire field of public international law."³³²

The WTO dispute settlement system is regulated by the *Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU)*. According to Article III:2 of the *WTO Agreement* the DSU is "an integral part of this Agreement, binding on all Members." What this means is that the jurisdiction of the WTO dispute settlement system is compulsory for all WTO Members. This is naturally remarkable under international law where states have traditionally been reluctant to agree to a compulsory judicial-type dispute settlement. The jurisdiction of the WTO dispute settlement

³²⁹ D. Palmeter and P.C. Mavroidis, *Dispute Settlement in the World Trade Organization. Practice and Procedure* (2nd edition, CUP, 2004), 7.

³³⁰ *Ibid.*, 9.

³³¹ *Ibid.*

³³² *Ibid.*, 234.

system is also exclusive in the sense that WTO-related disputes can only be litigated before WTO adjudicating bodies, and only WTO adjudicating bodies can decide if WTO violations exist.³³³

Institutionally, the WTO dispute settlement system is made up of *ad hoc* panels, a permanent Appellate Body and the Dispute Settlement Body (DSB). New and distinct panels are established for each individual case and they are composed of three experts selected from a roster.³³⁴ In principle, it is the parties to a dispute that designate the panellists. However, in practice the WTO Secretariat selects the panellists in consultation with the parties.³³⁵ If this process does not lead to an agreement, the WTO Director General appoints the panel.³³⁶ The Appellate Body, in turn, is a permanent body with seven members appointed for a term of four years. Their term can be renewed once. The new rules guaranteeing the quasi-automatic adoption of panel reports was one of the key reasons for the introduction of the appellate procedure. It has been argued that the negotiators were not fully aware of the groundbreaking implications of the new procedure that they had created:

When they agreed to the establishment of a standing Appellate Body to which parties could appeal panel reports, the ambitions of most, if not all, participants in the negotiations were, however, quite modest. They certainly did not intend to create a strong, international court at the apex of the new dispute settlement system. On the contrary, they only wanted to ensure that their biggest innovation, namely the quasi-automatic adoption of panel reports by the DSB, would not have undesirable side effects...The choice of the unappealing, technical, non-descriptive term... as the name of this new institution is telling of the aspirations of the negotiators. It is no coincidence that the new institution was not called the World (or International) Trade (Appeals) Court...³³⁷

The Dispute Settlement Body consists of representatives of all WTO Member States. It normally meets every month to establish dispute settlement panels, adopt panel and Appellate Body reports, monitor their implementation and to authorise the suspension of concessions and other obligations.³³⁸ In theory, WTO Members thus retain political oversight over the dispute settlement system. However, as indicated above, the DSB makes decisions on the basis of a negative consensus rule. In practice this means that it always adopts the reports by the panels and the Appellate Body - and the power of the DSB not to establish a panel or adopt a report is "more illusory than real."³³⁹ The main function of the DSB is thus that it serves as a forum where matters of dispute are discussed.³⁴⁰

³³³ G. Marceau, "Consultations and the Panel Process in the WTO Dispute Settlement System," in R. Yerxa and B. Wilson, eds., *Key Issues in WTO Dispute Settlement. The First Ten Years* (CUP, 2005), 29 at 30.

³³⁴ B. Wilson, "The WTO Dispute Settlement System and Its Operation" in Yerxa & Wilson (2005), 15 at 18.

³³⁵ Palmetier & Mavroidis, *Dispute Settlement in the WTO*, 106.

³³⁶ *Ibid.*

³³⁷ P. Van Den Bossche, "The Making of the 'World Economic Court': the Origins and Development of the Appellate Body of the World Trade Organization," in R. Yerxa and B. Wilson (2005), 63 at 64-65.

³³⁸ Palmetier & Mavroidis, *Dispute Settlement in the WTO*, 15.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

In terms of procedures and timelines, the WTO dispute settlement proceedings consist of four stages: mandatory consultation stage; a panel stage; an appellate stage; and an implementation/compliance stage.³⁴¹ During the consultation stage, the parties attempt to solve their differences through political negotiation. If attempts to find a negotiated solution prove unsuccessful, either party may request the establishment of a dispute settlement panel. The DSB will grant this request unless there is negative consensus to reject it. After it has been established, the panel first receives written submissions from the disputing parties.³⁴² It then convenes the first meeting during which both the complaining and defending parties orally present their arguments.³⁴³ Also third parties – in other words, WTO Members with “substantial interest” in the dispute – are usually invited to the first meeting and given the opportunity to present their views orally.³⁴⁴ Parties then file their written rebuttals, followed by their second meeting with the panel.³⁴⁵ Third parties are not usually invited to this meeting, where the defending party often takes the floor first, followed by the complaining party.³⁴⁶ Usually four weeks after the second meeting, the panel will issue the draft descriptive part of the report, to which parties are invited to make comments within two weeks.³⁴⁷ The panel will then modify the descriptive part and issue an interim panel report with interim findings and conclusions.³⁴⁸ Again, parties are invited to comment on the report.³⁴⁹ They can also request to have a third meeting with the panel, but in practice they usually forego this right in exchange for the opportunity to submit a second set of written comments on the interim report in order to respond to the written comments by the other party.³⁵⁰ After this, the final panel report will be issued, translated and circulated.³⁵¹ Once the panel report has been issued, either party may appeal the report or any part of it to the AB. If the panel report is not appealed, it is formally adopted by the DSB within 60 days of its circulation unless there is a consensus to the contrary.

In case the panel report is appealed, the AB will consider the case. The AB has seven permanent members, but according to Article 17.1 of the *DSU*, only three of them will hear and make decisions concerning an individual case. According to the *Working Procedures for Appellate Review*, the members of the AB constituting the division are selected on the basis of a non-disclosed rotation “intended to ensure random selection, unpredictability and opportunity for all members to serve regardless of their national origin.”³⁵² The proceedings before the AB are initiated by a written

³⁴¹ Wilson, “The WTO Dispute Settlement System and Its Operation,” 16.

³⁴² Marceau, “Consultations and the panel process,” 39-40.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, 42-43.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² Palmetier & Mavroidis, *Dispute Settlement in the WTO*, 213.

notice of appeal, followed by the appellant's written submission.³⁵³ The appellee then has the right to respond in writing to the arguments raised in the appellant's written submission.³⁵⁴ In each case, also an oral hearing will be held. The written and oral proceedings before the Appellate Body are confidential,³⁵⁵ but any third parties before the panel can participate also during the appellate phase. According to *DSU* Article 17.5, the appeal proceedings "shall in no case exceed 90 days." Importantly, the competence of the AB is limited to questions of law – it cannot reassess questions of fact.³⁵⁶ Also reports by the AB must be formally adopted by the DSB, on the basis of the negative consensus rule.

The fourth possible stage of the WTO dispute settlement proceedings relates to the implementation of the findings by the panels and the AB. In their conclusions, the panels and the AB recommend the party to bring its measures into conformity with its WTO obligations.³⁵⁷ The party is given 'a reasonable period of time' to do this. The length of this period can be agreed by the parties or determined through arbitration under *DSU* Article 21.3. These proceedings are confined to defining *when* implementation must take place, but they are not intended to consider *what* constitutes implementation.³⁵⁸ The complaining party can also challenge the measures taken by the defending party to comply with the panel or AB recommendations, and request a panel consisting of the original panel members to determine under *DSU* Article 21.5 whether the steps taken to comply with the decision are compatible with WTO obligations.³⁵⁹ The case remains under the surveillance of the DSB until compliance has been achieved.³⁶⁰ If the respondent fails to comply with the ruling, the complaining party is entitled to remedies, namely 'compensation' or 'suspension of concessions or other obligations.' Typically, compensation takes the form of a reduction in tariffs or other bound trade barriers, and 'suspension of concessions' means the imposition of tariffs or other trade barriers.³⁶¹ If parties disagree, the appropriate level of retaliation can be determined through arbitration by the original panel members.³⁶² In real life, the sanctions applied by the WTO dispute settlement system can sometimes be quite significant. In the dispute concerning tax exemptions for *US-Foreign Sales Corporations*, for instance, the EU was authorised to retaliate on exports worth of US dollars 4.043 billion from the United States.

The WTO dispute settlement proceedings are often characterized as 'quasi-judicial.' This is because especially during the panel stage, many features distinguish the WTO proceedings from the

³⁵³ *Ibid.*, 215, 217.

³⁵⁴ *Ibid.*, 218.

³⁵⁵ *DSU* Article 17.10.

³⁵⁶ *DSU* Article 17.6.

³⁵⁷ Wilson, "The WTO Dispute Settlement System and Its Operation," 17.

³⁵⁸ Palmetier & Mavroidis, *Dispute Settlement in the WTO*, 237-238.

³⁵⁹ Wilson, "The WTO Dispute Settlement System and Its Operation," 18.

³⁶⁰ *Ibid.*

³⁶¹ Palmetier & Mavroidis, *Dispute Settlement in the WTO*, 265

³⁶² Wilson, "The WTO Dispute Settlement System and Its Operation," 18.

functioning of an ordinary court, and are more reminiscent of arbitration.³⁶³ The parties agree on the panels' 'terms of reference,' which are crucial in determining the matters over which the panel has a jurisdiction.³⁶⁴ Furthermore, the disputing parties are given the opportunity to comment on the initial panel report, which is clearly not the case in ordinary court proceedings.³⁶⁵ Also the fact that the Member States play an important role in selecting the *ad hoc* panellists is relevant: in courts the disputing parties do not have the same degree of control over the appointment of judges.³⁶⁶ The appellate stage is, however, remarkably different.³⁶⁷ First, the Appellate Body is a standing body with permanent membership. Second, the AB can only examine the points of law, while points of fact are not appealable.³⁶⁸ It has been argued that:

...the Appellate Body has a kind of supreme court jurisdiction to control the interpretation and application of law. Here we are in the presence of not only of a judicial system, but very developed judicial system of judicial control of legality. The procedure is that of a judicial body.³⁶⁹

In practical terms, the Appellate Body has the final say in a dispute settlement process:

Even if the Appellate Body makes a mistake, there is no mechanism to correct it. In a domestic jurisdiction, if the Supreme Court makes a mistake, the legislature can enact a law to correct it. However, in the WTO process the political branch (the General Council and the Ministerial Conference) does not commonly exercise this power. This means that there are no effective 'checks and balances' operating within the WTO.³⁷⁰

These are the key institutional features that have made the WTO dispute settlement system an exceptionally strong institution measured by international standards. It is also one that has been used frequently. During its first decade from 1995 to 2005, some 324 cases were addressed through the WTO dispute settlement system, amounting to an average of 30 new cases a year.³⁷¹ About half of the complaints (159) resulted in the establishment of 129 panels by the DSB.³⁷² The DSB adopted 83 panel reports, 56 Appellate Body reports, 12 implementation review panel reports, 8 implementation review Appellate Body reports, and circulated 16 arbitration reports regarding retaliation.³⁷³ What this means in comparison with other international courts and tribunals is that the WTO dispute settlement is exceptionally popular. The case list of the International Court of Justice, for example, has contained 136 cases between May 1947 and October 2007. Furthermore, many of those cases never reached the merits phase due to the failure by the complainant to

³⁶³ G. Abi-Saab, "The WTO Dispute Settlement and General International Law," in Yerxa & Wilson (2005), 7 at 9.

³⁶⁴ Marceau, "Consultations and the Panel Process in the WTO dispute settlement system," 32.

³⁶⁵ Decision of the European Ombudsman of 11 July 2006 on complaint 582/2005/PB against the European Commission.

³⁶⁶ *Ibid.*

³⁶⁷ Abi-Saab, "The WTO Dispute Settlement and General International Law," 9-10.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ Matsushita & al., *The World Trade Organization* (2nd.ed), 43.

³⁷¹ Wilson, "The WTO Dispute Settlement System and Its Operation," 20.

³⁷² *Ibid.*

³⁷³ R. Yerxa, "The Power of the WTO Dispute Settlement System" in Yerxa & Wilson (2005), 3 at 5.

establish the jurisdiction of the Court. While they were undoubtedly beneficial for the evolution of the international trade regime, the institutional strength of the WTO dispute settlement system and its compulsory jurisdiction have also brought to the fore many significant challenges. One of the most pressing ones relates to the substantive scope of the system and its competence to consider and apply such rules of international law that have not included in the WTO Agreements. As it was already seen above, these questions are particular relevant to the politically sensitive linkage disputes and they thus have important implications on the legitimacy of the WTO dispute settlement system.

2.3 Substantive Limits of the WTO Dispute Settlement System

WTO law is one of the most prominent examples of new and special systems of international law that aim to respond to special technical and functional requirements and act as drivers for the fragmentation of international law.³⁷⁴ What once appeared to be the domain of 'general international law' has now dissolved into highly specialised systems such as 'trade law,' 'human rights law,' 'environmental law,' 'law of the sea,' and even 'international refugee law,' and 'investment law.'³⁷⁵ These developments have posed some serious challenges for the unity of international law, and the relationship and interaction between its specialised fragments. As the International Law Commission has indicated,

Each rule-complex or 'regime' comes with its own principles, its own form of expertise and its own 'ethos,' not necessarily identical to the ethos of neighbouring specialization. 'Trade law' and 'environmental law,' for example, have highly specific objectives and rely on principles that may often point in different directions.³⁷⁶

International trade law and the WTO dispute settlement system have both become deeply entangled in this problematique. During the GATT era it was often argued that the *GATT* was a completely separate legal regime, "in some way insulated from the general body of international law."³⁷⁷ Currently the picture is quite different. In the *Gasoline* case the Appellate Body famously emphasised that the *GATT* "is not to be read in clinical isolation from public international law."³⁷⁸ In the *Shrimp-Turtle* dispute, the AB gave this statement a more concrete expression and generously referred to a number of international environmental instruments. As a result, the argument that the WTO system forms a closed system is no longer plausible but WTO law is now commonly considered as a *lex specialis* system, in other words, a specific subsystem of international law.³⁷⁹ This

³⁷⁴ ILC, *Fragmentation of International Law*, 14.

³⁷⁵ *Ibid.*, 11.

³⁷⁶ *Ibid.*, 14.

³⁷⁷ J. H. Jackson, "Dispute Settlement and the WTO. Emerging Problems," *Journal of International Economic Law* (1998), 329 at 341.

³⁷⁸ Appellate Body report, *US-Gasoline*, 18.

³⁷⁹ G. Marceau, "WTO Dispute Settlement and Human Rights," *European Journal of International Law* 14(4) (2002), 753 at 755.

system has been characterised as largely, but not entirely, self-contained.³⁸⁰ Thus, WTO law is “an important part of the larger system of public international law”³⁸¹ that must “evolve and be interpreted consistently with international law.”³⁸²

When examining relationship between WTO law and other rules of international law, it must be borne in mind that there are in fact two separate issues at stake. First is the relationship between WTO law and general international law in the abstract, in other words, independent of the jurisdiction of any international court or tribunal. Second is the question of the substantive scope and competence of the WTO dispute settlement system. It is the second question that is the central theme in this Chapter. How does one define the substantive scope and competence of the WTO dispute settlement system? The answer can be searched by examining a set of related questions: What is the jurisdiction *ratione materiae* of the WTO dispute settlement system? What is the applicable law in the WTO dispute settlement proceedings? When answering these questions, the relevant provisions of the *DSU* are naturally an important starting point.

According to Article 1(1) of *DSU*, its provisions apply to disputes “brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding,” in other words, disputes concerning the “covered agreements.” The reference to “covered agreements” is repeated in Articles 7(2) and 11 of the *DSU*. According to Article 7(2), panels “shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. Article 11 of the *DSU* indicates that the panels:

...should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and to make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.³⁸³

Also Article 3.2 of the *DSU* is important in defining the scope of the WTO dispute settlement system:

Recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements.

³⁸⁰ Matsushita & al., *The World Trade Organization* (2nd ed), 76.

³⁸¹ *Ibid*. They argue that this is reflected by the use of interpretative principles of public international law, and also by increasing recourse to the other traditional sources of public international law.

³⁸² Marceau, “WTO Dispute Settlement and Human Rights,” 755.

³⁸³ The last sentence of *ADSU article 11* of *DSU* has, however, also been interpreted as an “implied powers” provision “so that the panels and Appellate Body can decide all aspects of a dispute.” T. J. Schoenbaum, “WTO Dispute Settlement: Praise and Suggestions for Reform,” *International and Comparative Law Quarterly* 47(2000), 647 at 653.

In light of the *DSU* it seems clear that the jurisdiction *ratione materiae* of the WTO dispute settlement system is limited to the covered agreements.³⁸⁴ What this means is that WTO adjudicative bodies do not have jurisdiction to consider claims relating to rules of international law other than those contained in the covered agreements. Even though the *DSU* does not contain an explicit provision concerning the latter, most scholars are of the view that it also limits the law applicable by the WTO dispute settlement system:

The provisions on the limited jurisdiction of panels mirror those on the applicable law between WTO Members.³⁸⁵

The consequence of this is that there can be a gap between the rights and obligations of a WTO Member State that are within the competence of the WTO dispute settlement system, and the rights and obligations of that state existing outside the scope of the WTO system. Scholars have been eager to point that this does not “reduce the obligations of WTO Members to comply at all times with their other international law obligations.”³⁸⁶ Other scholars, such as Pauwelyn, argue that WTO panels and the Appellate Body can apply non-WTO norms of international law. In other words,

The WTO treaty must be construed and applied in the context of all other international law. This other law may fill gaps or provide interpretative material. But it may also overrule WTO norms. WTO law must thus be united with other public international law... There is no need to expand the mandate of the WTO as an international organization for the WTO to take into account of other non-trade concerns (including those going beyond the exceptions provided for in, for example, *GATT* Art. XX). The fact that the WTO is part of international law should suffice.³⁸⁷

Scholarly opinion is thus divided over this important question. What it is clear that WTO law is not “in clinical isolation.” General international law does play a role in the WTO dispute settlement proceedings. Indeed, as the International Law Commission has pointed out,

Even if it is clear that the competence of WTO bodies is limited to consideration of claims under the covered agreements (and not, for example, under environmental or human rights treaties), when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties).³⁸⁸

I will now introduce the main views put forward in the doctrinal debate.

³⁸⁴ J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law* (CUP, 2003), 441.

³⁸⁵ Marceau, “WTO Dispute Settlement and Human Rights,” 766-767. She defines applicable law as “the law that can be given (direct) effect between WTO Members... and which can be enforced by WTO adjudicating bodies.”

³⁸⁶ *Ibid.*, 773.

³⁸⁷ Pauwelyn, *Conflict of Norms*, 492.

³⁸⁸ ILC, *Fragmentation of International Law*, 90-91.

2.3.1 International Law in the WTO Dispute Settlement System

International law is commonly divided into two categories based on its role in the WTO dispute settlement system. The first and clearest category has been labelled as ‘the incorporated international law.’ The second, more contentious one, encompasses general principles of law, customary international law as well as international treaties not explicitly referred to in the WTO Agreement. For the purposes of this study, this category will be referred to as “non-WTO norms” or “non-WTO law.” The first category consists of rules of international law that have been incorporated into the WTO system by explicit reference. The *Agreement on Trade Related Aspects of Intellectual Property* (TRIPS) assimilating provisions of the international intellectual property conventions, namely the *Berne Convention* of 1971, the *Paris Convention* of 1967 and the *Rome Conventions* is an obvious and important example.³⁸⁹ Also the customary rules of treaty interpretation have been incorporated into the body of WTO law through Article 3.2 of the *DSU*. These rules have been codified in the *Vienna Convention on Law of Treaties* (VCLT), which has also been frequently referred to in the WTO jurisprudence. It is undisputed that WTO panels and the Appellate Body are competent to apply any incorporated international rules if a dispute requires them to do so. Such norms have effectively become a part of “the corpus of WTO law and thus serve as a direct source of law in WTO dispute settlement proceedings.”³⁹⁰ What is less clear is whether the incorporated rules are only those in force at the time of the entry into force of the WTO Agreement, or whether the WTO incorporated rules also change as the actual agreements change.³⁹¹

The relationship between the second category of international law and the competence of the WTO dispute settlement system is far more complicated. In theory, non-WTO norms of international law could play a role in the WTO dispute settlement system in three different ways: through direct application, as a source of interpretative material, or as factual evidence. The following two paragraphs will address each of these three possibilities. By the way of a short summary of the main arguments, WTO scholars have given markedly different answers the question as to whether the WTO dispute settlement system may directly apply non-WTO norms.³⁹² Influential scholars such as Marceau and Trachtman interpret the substantive competence of the WTO dispute settlement system in a restrictive manner. In their view, the applicable law in the WTO dispute settlement is restricted to the covered agreements and incorporated international law. Non-WTO norms of

³⁸⁹ *TRIPS Agreement* Articles 3, 9, 15, 21 and 35.

³⁹⁰ M. Oesch, *Standards of Review in WTO Dispute Resolution* (OUP, 2003), 210.

³⁹¹ Matsushita & al., *The World Trade Organization* (2nd ed.), 68. They argue that at least in the case of the *TRIPS Agreement*, any changes to the incorporated intellectual property conventions would not be sources of WTO law.

³⁹² For an overview, see also A. Lindroos & M. Mehling, “Dispelling the Chimera of ‘Self-Contained’ Regimes,” *European Journal of International Law* 16(5) (2006), 857.

international law cannot be directly applied. Others, such as Pauwelyn, are advocating a more interactive and flexible approach to the boundaries between the WTO system and other norms of international law. The relevant WTO dispute settlement practice has been invoked to support both of the different views and the situation thus seems far from clear.³⁹³ The aim here is to give an overview of the relevant scholarly debate. Given that many of the legitimacy problems forming the core of this study can be traced to the substantive scope and boundaries of the WTO dispute settlement system, the role of international environmental law in the WTO dispute resolution will be discussed in detail in Chapters 4 and 6. As it will be seen, this rather technical debate has some important implications for the legitimacy of the WTO dispute settlement system. Essentially, it highlights the dilemma in which the WTO dispute settlement system is caught in between the different components of legitimacy: directly applying non-WTO norms of international law would sometimes be necessary to reach a satisfactory substantive outcome, especially in linkage disputes. Yet, the formal competence of the WTO dispute settlement system to engage in such an exercise is far from clear – and venturing too far into the grey area would almost certainly irritate WTO Member States and surface critique based on the formal aspects of legitimacy.

2.3.2 Direct Application of Non-WTO Rules?

A group of influential scholars interprets the references to “covered agreements” in Articles 1.1, 7.2 and 11 of the *DSU* as well as the wording “cannot add or diminish the rights and obligations provided in the covered agreements” in *DSU* Article 3.2 as clear limits to the law applicable by the WTO dispute settlement system. According to Marceau,

... the application (or direct effect) of non-WTO law provisions into the WTO legal system will always lead to an addition to or diminution of the covered agreements.³⁹⁴

She thus argues that WTO adjudicating bodies are not competent either to reach any formal conclusions on the violation of non-WTO norms or to require any positive action pursuant to them.³⁹⁵ In a similar vein, Trachtman argues that “the mandate to the WTO dispute resolution panels, to the Appellate Body, and to the Dispute Settlement Body is clear: apply (directly) only WTO law.”³⁹⁶ In his view, the language used in the *DSU* “would be absurd if rights and obligations arising from other international law could be applied by the DSB.”³⁹⁷ What may perhaps be seen as the prevailing view on the relationship between the WTO system and other norms of international law can thus be summarised as follows:

³⁹³ Compare J. P. Trachtman, “The Domain of the WTO Dispute Resolution,” *Harvard International Law Journal*, Spring (1999), 333 at 343; and Marceau, “WTO Dispute Settlement and Human Rights,” with Pauwelyn, “The Role of Public International Law in the WTO,” *American Journal of International Law* 95(3) (2005), 568 *et seq.*

³⁹⁴ Marceau, “WTO Dispute Settlement and Human Rights,” 777.

³⁹⁵ *Ibid.*, 756.

³⁹⁶ Trachtman, “The Domain of WTO Dispute Resolution,” 342.

³⁹⁷ *Ibid.*

WTO adjudicating bodies cannot formally interpret other treaties and customs and thus cannot apply or enforce other treaties or customs or determine the legal consequences of rights and obligations that WTO Members may have under other treaties or by custom; these may be examined only when necessary for the interpretation of WTO law and/or as a factual determination.³⁹⁸

There are, however, other interpretations. One of the leading WTO law textbooks explains that Article 11 of the *DSU* stating that panels should make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements grants them the authority:

...to consider all aspects of a dispute, including those involving legal issues not strictly arising under a covered agreement.³⁹⁹

Furthermore, the textbook argues that the covered agreements do not exhaust the sources of relevant law but all sources mentioned in Article 38(1) of the *Statute of the International Court of Justice* “are potential sources of law in WTO dispute settlement.”⁴⁰⁰ This is because the terms of this provision “are effectively brought into the WTO dispute settlement by Articles 3.2 and 7 of the *DSU*.”⁴⁰¹ In case of a conflict that cannot be solved through interpretation, the situation should be resolved using “recognized public international law interpretative tools to break the conflict.”⁴⁰²

In a similar vein, Pauwelyn argues that unless an international treaty by an explicit wording contracts out of general international law, general international law automatically applies to the regime created and fills gaps left by the treaty.⁴⁰³ He indicates that since the WTO Agreement contains no such “contracting out” provision, it is unnecessary for the *DSU* to explicitly refer to general international law as a source of law: the WTO system is automatically part of general international law.⁴⁰⁴ Furthermore, the last paragraph of *DSU* Article 3.2 does *not* limit the competence of the WTO dispute settlement system in terms of applicable law.⁴⁰⁵ Instead, it constrains the interpretative powers of the WTO dispute settlement system by setting out the limits of the judicial function.⁴⁰⁶ What follows is that the WTO dispute settlement system *can apply but not enforce* non-WTO rules.⁴⁰⁷ Pauwelyn makes three important points in this regard: Firstly, the interplay with WTO rules and other rules of international law will not ultimately be solved through

³⁹⁸ Marceau, “WTO Dispute Settlement and Human Rights, 753.

³⁹⁹ M. Matsushita & al., *The World Trade Organization. Law Practice and Policy* (1st edition, OUP, 2003), 24.

⁴⁰⁰ *Ibid.*, 54.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*, 74-75.

⁴⁰³ J. Pauwelyn, “How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law: Questions of Jurisdiction and Merits,” *Journal of World Trade* 37(6) (2003), 997 at 1001-1002.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Pauwelyn, “The Role of Public International Law in the WTO,” 561. For a contrary interpretation, see Marceau, “WTO Dispute Settlement and Human Rights,” 771.

⁴⁰⁶ Pauwelyn, “How to Win a WTO Dispute Based on Non-WTO Law,” 1003.

⁴⁰⁷ Pauwelyn, “The Role of Public International Law in the WTO,” 566.

interpretation, but through having recourse to conflict norms such as *lex posterior* and *lex specialis*.⁴⁰⁸ These apply where a WTO rule interpreted in light of general international law cannot be reconciled with the non-WTO rule.⁴⁰⁹ Second, to apply a WTO rule in a situation where non-WTO rule actually prevails in accordance with conflict rules would effectively be “adding or diminishing obligations” prohibited by Article 3.2 of the *DSU*.⁴¹⁰ In affirming the non-WTO rule the panel is not creating law but it is giving effect to law applicable between the WTO Members created elsewhere. Third, WTO rules may apply differently to different WTO members depending on whether they have accepted other non-WTO rules. This may complicate things but it is an “unavoidable consequence of not having a centralised legislator in international law.”⁴¹¹

There is thus a clear difference of opinion between what can perhaps be seen as the majority of scholars such as Marceau and Trachtman on the one hand and Pauwelyn on the other. Trachtman and Marceau argue that the competence of the WTO dispute resolution system is limited to the covered agreements.⁴¹² Consequently, non-WTO rules of international law can only be considered by the WTO adjudicative bodies as interpretative material when applying WTO law, or as factual evidence. They emphasise that states are free to limit the WTO system this way in the material sense. Any ensuing problems must be dealt with through political and not judicial means. Pauwelyn, in turn, accepts that the jurisdiction of the WTO dispute settlement system is limited *ratione materiae* as is its competence to enforce non-WTO rules. He also accepts that states could, in theory, contract out of general international law, but they have not done so in the case of the WTO. Thus, the WTO was automatically born into the system of international law. Both the covered agreements and the WTO dispute settlement system are integral parts of public international law, not closed, self-contained regimes.⁴¹³ The WTO dispute settlement system is therefore competent to apply non-WTO rules where these prevail over WTO rules in accordance with conflict norms.

What, then, are the differences between the approach by Trachtman/Marceau and Pauwelyn in concrete terms? They all seem to agree that a genuine conflict only arises where a WTO rule, interpreted in light of other rules of international law, cannot be reconciled with a non-WTO rule. Following Pauwelyn’s approach would mean having recourse to conflict norms. “The worst case scenario” in such situations would be a finding by the WTO dispute settlement system that a non-

⁴⁰⁸ Pauwelyn, *Conflict of Norms*, 327 *et seq.*, identifying several conflict norms: 1) *Lex Posterior* 2) *Lex Specialis* 3) Particular international law prevails over general international law 4) Later custom prevails earlier treaty unless it can be shown that the treaty is *lex specialis* 5) Treaties and custom prevail over general principles of law 6) Special custom prevails over general custom. 7) In some very specific circumstances it is possible that no conflict norm solves the situation. In such cases the adjudicator may have to pronounce a *non liquet*.

⁴⁰⁹ Pauwelyn, “The Role of Public International Law in the WTO,” 577.

⁴¹⁰ *Ibid.*, 566.

⁴¹¹ *Ibid.*, 567.

⁴¹² Answering to Pauwelyn’s argument Marceau indicates that: “The covered agreements are explicitly listed, and it cannot be presumed that members wanted to provide the WTO remedial system to enforce obligations and rights other than those listed in the WTO treaty.” Marceau, “WTO Dispute Settlement and Human Rights,” 777-778.

⁴¹³ Pauwelyn, “The Role of Public International Law in the WTO,” 566.

WTO rule prevails but that it cannot enforce such norm.⁴¹⁴ Marceau in turn argues that where interpretation cannot resolve the conflict, WTO adjudicative bodies are not competent to make a formal finding concerning a non-WTO norm.⁴¹⁵ According to Marceau, one of the problems with Pauwelyn's approach is exactly that it would require WTO adjudicating bodies to interpret the non-WTO norm to decide on its compliance or violation.⁴¹⁶ As a court of limited jurisdiction "they cannot interpret and apply all treaties involving WTO Members as states."⁴¹⁷ As will be explained in Chapters 4 and 6, I am more inclined to lean towards Pauwelyn as his approach would mean placing international environmental law on a more equal footing with WTO norms, thereby acknowledging the competing claims to legitimacy by these two specialised fragments of international law. Yet, also Pauwelyn's approach is somewhat challenged by the systemic discrepancies between WTO law and international environmental law. As it will also be seen in Chapter 4, the existence and contents of potentially conflicting environmental norms may not always be easy to define. Furthermore – as Pauwelyn rightly emphasises – even where the existence of valid non-WTO norms is clear, their relevance in a particular WTO dispute is questionable as they may apply differently to different WTO Members depending on whether they have ratified a particular international agreement. To highlight the ensuing challenges to the legitimacy of the WTO dispute settlement system, Chapter 6 focuses on the fragmentation of international law and makes a contribution to this debate through analysing various conflict scenarios between WTO law and the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.

Finally, it is useful to note that the situation regarding the use of non-WTO norms is different when it comes to procedural rules and standards from general international law. It is widely accepted that in light of the *DSU* and especially its Article 11, the WTO dispute settlement system is competent to "adopt practices and follow judicial principles to ensure that the application of the covered agreements and the administration of the dispute settlement process are done objectively."⁴¹⁸ It has also done so regarding, *inter alia*, the use of private lawyers in the WTO proceedings (*Bananas III*),⁴¹⁹ in introducing the concept of burden of proof (*US-Shirts and Blouses*)⁴²⁰ and referring to "due process" (*Brazil-Desiccated Coconut*).⁴²¹ Furthermore, the WTO dispute settlement system has occasionally referred to scholarly writings – a source of international law mentioned in Article 38 of

⁴¹⁴ *Ibid.*, 565.

⁴¹⁵ Marceau, "WTO Dispute Settlement and Human Rights," 795.

⁴¹⁶ *Ibid.*, 777.

⁴¹⁷ *Ibid.*

⁴¹⁸ Marceau, "WTO Dispute Settlement and Human Rights," 765. Pauwelyn specifies that international courts have "certain implied jurisdictional power," to decide all matters linked to the exercise of their substantive jurisdiction. Pauwelyn, *Conflicts of Norms*, 447-448.

⁴¹⁹ Appellate Body report, *EC-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, para. 10. (*EC-Bananas III*).

⁴²⁰ Appellate Body report, *US-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, para. 14.

⁴²¹ Appellate Body report, *Brazil-Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, 20 March 1997, para. 21. Analysis from Marceau, "WTO Dispute Settlement and Human Rights," 765.

the *Statute of the ICJ* but not in the *DSU*.⁴²² To my mind, this reinforces the argument that the WTO cannot “live outside its legal environment.”⁴²³

2.3.3 Non-WTO Rules in WTO Jurisprudence

As stated above, the WTO dispute settlement practice concerning substantive non-WTO norms has been cited both as supporting the narrow view on its substantive limits as well as the opposite conclusion. According to Oesch, “panels and the Appellate Body have not yet developed a consistent practice in this respect.”⁴²⁴ This paragraph reviews the existing case law. It briefly refers to the linkage cases where relevant and discusses some of the “non-linkage” cases in more detail. The subsequent Chapters contain a detailed analysis of the way in which WTO dispute settlement system has approached customary law, general principles of law as well as international agreements, when solving linkage disputes, most notably the *Shrimp-Turtle*, *Hormones* and *Biotech* cases.

In the *Argentina – Footwear* dispute the question was whether a three percent statistical tax that had been found to violate the *GATT* could be justified by reference to a Memorandum of Understanding (MoU) between Argentina and the IMF. The MoU stated that Argentina should adopt fiscal measures such as increases in import duties, including a temporary three per cent surcharge on imports. The Appellate Body found that it was not possible to determine the “precise legal nature of this Memorandum” and also that “Argentina did not show an irreconcilable conflict between the provisions of its Memorandum of Understanding with the IMF and the provisions of Article VIII of the *GATT* 1994.”⁴²⁵ Therefore, the purported agreement between Argentina and the IMF did not modify Argentina's WTO obligations.⁴²⁶

For Pauwelyn, the Appellate Body applied here a conflict rule, namely that on the basis of the *Declaration on the Relationship of the WTO with the IMF*, their relationship is governed by the *GATT*. For this reason, only exceptions provided in the *GATT* 1947 could be used to justify violations, and not independent IMF rules such as the Argentinean MoU. Pauwelyn thus stresses that:

If the Appellate Body had thought the IMF memorandum could not possibly cure the violation of *GATT* Article VIII simply because the memorandum is not part of WTO covered agreements, it could have said so. But it did not. Rather, it assessed whether the IMF memorandum conflicts with *GATT* rules and considered which of the two rules should prevail in case a conflict arises.”⁴²⁷

⁴²² On this, see e.g. Matsushita & al., *The World Trade Organization. Law Practice and Policy*, (1st ed.), 66.

⁴²³ Abi-Saab, “The WTO Dispute Settlement and General International Law,” 10.

⁴²⁴ Oesch, *Standards of Review*, 218.

⁴²⁵ Appellate Body report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, 27 March 1998, para. 69.

⁴²⁶ *Ibid.*, para. 72.

⁴²⁷ Pauwelyn, “The Role of Public International Law in the WTO,” 568-69. Emphasis added. For comparison, see Trachtman, “The Domain of the WTO Dispute Resolution,” 343.

Another example of a WTO dispute where a non-WTO treaty has been relevant is the *EC – Poultry*. The *Oilseed Agreement* had been concluded between the European Communities and Brazil in the context of renegotiations under Article XXVIII of the *GATT*.⁴²⁸ Brazil, as the claimant, invoked this bilateral treaty arguing that it applied to the dispute. When discussing the legal relevance of the *Oilseed Agreement*, the AB examined its status in relation to the covered agreements, concluding that it was not one of them.⁴²⁹ It then stated that:

... the Oilseeds Agreement may serve as *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention* as it is part of the historical background of the concessions of the European Communities for frozen poultry meat."⁴³⁰

The AB then added that:

... it is not necessary to have recourse to Article 59.1 or Article 30.3 of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the legal transition from the *GATT* 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case"⁴³¹

It is thus clear that the Appellate Body did not apply the *Oilseeds Agreement* itself as law, a point that has been stressed by Trachtman as evidencing the limited scope of the WTO dispute settlement system.⁴³² However, Pauwelyn argues that the outcome may have been different had the Oilseed Agreement been invoked as a defence, rather than as a claim, and had the relationship between the Agreement and the relevant *GATT* rules not been addressed in the WTO Agreement itself.⁴³³

In the *EC-Bananas III* case the question arose concerning the scope of the Lomé Waiver that permitted the EU to derogate from the most-favoured nation principle by granting preferential treatment to goods originating from the African, Caribbean and Pacific (ACP) countries. The substantive question concerned the meaning of the *Lomé Convention*, in other words, whether the EU's preferential treatment of bananas originating from ACP countries was required by the *Lomé Convention*. The panel indicated, and the Appellate Body affirmed, that since reference to the Lomé Convention was incorporated into the Lomé waiver,

...the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver."⁴³⁴

⁴²⁸ Appellate Body report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998, para. 83. Emphasis in the original.

⁴²⁹ *Ibid.*, para. 79.

⁴³⁰ *Ibid.*, para. 83. Emphasis in the original.

⁴³¹ *Ibid.*, para. 81.

⁴³² Trachtman, "The Domain of the WTO Dispute Resolution," 342-343.

⁴³³ Pauwelyn, "The Role of Public International Law in the WTO," 568.

⁴³⁴ Appellate Body report, *EC-Bananas III*, para. 167

The expression “we have no alternative” seems to imply a restrained attitude towards the application of instruments of international law other than the covered agreements. However, as it will be discussed in much more detail in Chapters 3 and 4, in its *Shrimp-Turtle* decision the AB referred to several international environmental instruments but their exact legal relevance remains somewhat unclear. The *Biotech* panel then elaborated on these questions and the most plausible conclusion is that environmental norms have not been directly applied in the WTO dispute settlement. Yet, as it will be seen in the next paragraph, the question remains whether they were relevant as legal norms or as factual evidence.

The previous cases have dealt with non-WTO treaty norms. In addition, there is some practice relating to other sources of public international law, focusing mainly on customary law and general principles of law. As it was seen above, these sources have not been mentioned in the *DSU*. However, the WTO jurisprudence indicates that such sources have some relevance in the WTO system. The WTO panels as well as the Appellate Body have sometimes referred to, and applied, general principles of international law.⁴³⁵ The Appellate Body has also referred to also such articles of the *VCLT* that have not been explicitly referred to in the covered agreements.⁴³⁶ Presumably, their application has thus been based on their status as either general principles of law or customary law.⁴³⁷ Also the statement by the panel in the *Korea-Government Procurement* dispute seemed to indicate that customary international law is relevance in the WTO system:

We take note that Article 3.2 of the *DSU* requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.⁴³⁸

In fact, the *Biotech* panel explicitly confirmed the relevance of customary law and general principles of law in the WTO dispute settlement. These questions will be discussed in more detail in Chapter 4. To fully grasp the problematique, we will now consider the two other possibilities for non-WTO rules to be considered during WTO proceedings.

⁴³⁵ Oesch, *Standards of Review*, 216. According to Oesch, these include the principle of *lex specialis*, presumption against conflicts, the rule of non-retroactive application of a provisions and the principle of good faith.

⁴³⁶ *Ibid.*, 218-219.

⁴³⁷ *Ibid.*

⁴³⁸ Panel report on *Korea – Measures Affecting Government Procurement*, WT/DS/163/R, 1 May 2000, para. 7.96.

2.3.4 Non-WTO Rules in Interpretation and as Factual Evidence

What is readily accepted by the WTO scholarship is that non-WTO rules of international law play a role in the WTO dispute settlement system through interpretation. This is in conformity with the customary rules of treaty interpretation and more specifically Article 31.3(c) of the *VCLT* providing that:

There shall be taken into account, together with the context... any relevant rules of international law applicable in the relations between the parties.⁴³⁹

For Marceau, this provisions servers to attain a degree of coherence in international law and helps to remedy some of the problems arising out of the limited substantive applicability of non-WTO law in the dispute settlement system:

The WTO Agreement, as with any other treaty, should be interpreted taking into account other relevant and applicable rules of international law, including human rights law. In this context, it should be generally be possible to interpret WTO provisions in a way that allows and encourages WTO Members to respect all their international law obligations.⁴⁴⁰

Some scholars have also advocated interpretations of WTO law that take into account international law norms pertaining, for instance, human rights and the environment. While attractive, there are some important problems concerning this approach. The key stumbling block with this otherwise promising approach is that while there seems to be consensus that relevant rules of international law must be taken into account in the interpretation of WTO law, it is far less clear what constitutes such “relevant rule of international law applicable in the relations between the parties.”⁴⁴¹ Are they only such rules that are binding on all WTO Member States? Or are they rules that are binding on the parties to a particular dispute? The first interpretation would mean that the practical relevance of this option is very limited:

...the more WTO members we have, the less relevant rules we can refer to. Because there are more WTO members, there will be less ‘other rules’ that are binding on all WTO members.⁴⁴²

A third possibility for non-WTO rules to play a role in the WTO dispute settlement system is for them to be used as facts or evidence in the WTO proceedings. This option also enjoys considerable scholarly support, but there is no clear answer to the question as to when non-WTO rules of international law count as ‘relevant rules’ of international law, and when they should be considered as factual evidence. Legally speaking there is an important difference between the two approaches.

⁴³⁹ According to Marceau, Article 31 of the *VCLT* thus sometimes requires the panels and the AB to take into account outside legal materials. G. Marceau, “A Call for Coherence in International Law: Praises for the Prohibition Against ‘Clinical Isolation’ in WTO Dispute Settlement System,” *Journal of World Trade* 33(5) (1999), 87 at 108.

⁴⁴⁰ Marceau, “WTO Dispute Settlement and Human Rights,” 785-86.

⁴⁴¹ For discussion see, *ibid.*, 780-783; and Matsushita & al., *The World Trade Organization. Law Practice and Policy* (1st ed.), 71 *et seq.*

⁴⁴² J. Pauwelyn, “Speech Delivered at the Fourth Annual WTO Conference,” in M. Andeas & F. Ortino, eds., *WTO Law and Process* (BIICL, 2005), 494.at 496.

When a non-WTO norm is being invoked as factual evidence and not as a legal right or an obligation, it means that the evidence can also be overturned by more convincing materials presented by the other party.⁴⁴³ Oesch has attempted to create a basic distinction that:

...systematically irrelevant bilateral treaties should be dealt with as questions of fact whereas systematically significant multilateral treaties, as well as general international law, should be treated as questions of law.⁴⁴⁴

According to Pauwelyn, a classic example would be a situation where all parties to a WTO dispute were not parties to the same multilateral environmental agreement, but the provisions of the environmental agreement could be considered as factual evidence.⁴⁴⁵ A practical example from the WTO jurisprudence is from the *Shrimp-Turtle* case, where the Appellate Body noted the reference by the Article 21.5 panel to the *Inter-American Convention for the Protection and Conservation of Sea Turtles* as follows:

The panel rightly used the *Inter-American Convention* as a factual reference in this exercise of comparison⁴⁴⁶

However, the WTO dispute settlement practice again leaves some questionmarks, many of which will be addressed in detail in Chapters 4 and 6. There is no question that panels and the AB have referred to several non-WTO norms and instruments in various cases such as *The EC-Poultry*, *Argentina-Footwear* and *Bananas III*. However, it is not clear whether they directly applied such norms, used them as 'relevant rules' to guide the interpretation of WTO law or merely referred them as factual evidence. Also in the *EC-Certain Computer Equipment* the Appellate Body criticised the panel for not having considered the *Harmonized Commodity and Coding System* to properly interpret the relevant Schedule, even though the parties had not invoked the *Harmonized System*.⁴⁴⁷ In *Korean Beef* the panel examined various bilateral agreements between Korea and the disputing parties.⁴⁴⁸ It did so not in order to enforce the content of these bilateral agreements, but to interpret an ambiguous WTO provision, i.e. an entry into Korea's Schedule.⁴⁴⁹ In *US-Cotton Safeguard* rules on state responsibility - binding upon WTO members to the extent that they are customary law - were referred to as a relevant benchmark for the interpretation of WTO law.⁴⁵⁰ The AB indicated that:

Our view is supported further by the rules of general international law on state responsibility, which require the countermeasure in response to breaches by states of their international obligations be commensurate with the injury suffered.⁴⁵¹

⁴⁴³ Pauwelyn, *Conflict of Norms*, 463-464.

⁴⁴⁴ Oesch, *Standards of Review*, 225 *et seq.*

⁴⁴⁵ Pauwelyn, *Conflict of Norms*, 463.

⁴⁴⁶ Appellate Body report, *US-Import Prohibition of Certain Shrimp and Shrimp Products*, *Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, 22 October 2001, para. 122.

⁴⁴⁷ Appellate Body report, *European Communities -Custom Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, paras. 74-99.

⁴⁴⁸ Panel report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS61/R, WT/DS69/R, 10 January 2001, paras. 539 *et seq.*

⁴⁴⁹ Marceau, "WTO Dispute Settlement and Human Rights," 776.

⁴⁵⁰ *Ibid.*, 774-775

⁴⁵¹ Appellate Body report, *United States Transnational Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB7R, 5 November 2001, para. 120.

Not surprisingly, the question of interpreting WTO law in light of other relevant rules of international law has also come up in the key linkage disputes. In the *Shrimp-Turtle* case, one of the most notable features of the Appellate Body's decision was the way in which it referred to both international environmental agreements as well as general principles of international law when interpreting *GATT* Article XX. But, as it will be seen in Chapter 4, some of these references are confusing and bring to the fore important questionmarks. For instance, the Appellate Body referred to the *Convention on Biological Diversity* to which the U.S. is not a party. Similarly, in the *GSP* case the AB referred to drug conventions without checking whether they were binding on the parties to the dispute.⁴⁵² Pauwelyn admits that this practice of circumventing the consensus risks "upsetting the sovereignty of states"⁴⁵³ but:

...advantage of what the Appellate Body is doing is that it avoids the strictures of the consent rule. This may be positive in certain way, e.g. it permits a 'living', adaptable WTO treaty, it permits panels to interpret WTO rules with reference to other agreements more like some kind of a public law entity where you refer to societal values you interpret.⁴⁵⁴

Given the prevailing scholarly opinion that non-WTO rules cannot be directly applied in the WTO dispute settlement system, and the hopes that interpretation could provide consistency, we will revisit this question several times in Chapter 4. Related problems will also be addressed in Chapter 6 when reflecting the findings of this study in light of prospective conflicts between the WTO regime and the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. The analysis carried out so far has demonstrated the key substantive limits to the WTO dispute settlement system. First, according to the mainstream scholarly view, it cannot directly apply non-WTO norms of international law. Second, while it is clear that it should take such norms into account when interpreting WTO law if they are relevant, it is not clear *when* non-WTO rules of international law are to be considered relevant.

2.4 Linkage Disputes and Limits of the WTO Dispute Settlement System

In the scholarly debate, a range of opinions has been put forward concerning the role of WTO dispute settlement system in solving linkage disputes. At one extreme, Dunoff has suggested that the WTO adjudicating bodies should refuse decide any such disputes. In his view, such disputes are too political and therefore incapable of judicial resolution at the WTO. The more moderate stance taken by scholars such as Jackson and Marceau highlights the limits of the WTO dispute settlement system, arguing that while it cannot achieve ambitious results in fields not covered by WTO law, it

⁴⁵² Pauwelyn, "Fourth Annual WTO Conference," 497.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*, 498.

must consider such disputes and evolve and apply WTO law in conformity with other norms of international law. Finally, scholars such as Petersmann have raised ideas that would seem to have the practical effect of expanding the scope of the WTO dispute settlement to fields such as human rights law.

2.4.1 Main Views in the Scholarly Debate

One of the most provocative arguments limiting the role and scope of the WTO dispute settlement system in linkage disputes has been put forward by Dunoff. Relying strongly on the distinction between legal and political questions as well as the corresponding divide between legislative and adjudicative functions, Dunoff argues that the WTO dispute settlement system should refuse to decide linkage dispute. He argues that linkage disputes are political in a fundamental sense. This is because they challenge the traditional rationale of the world trade liberalization system.⁴⁵⁵ Linkage problems, such as the relationship between trade and environmental protection are contested in a very profound way, effectively moving them from the legal domain and placing them “squarely in the political domain.”⁴⁵⁶ The WTO dispute settlement system is ill-equipped as an institution to deal with linkage problems and therefore, it is not appropriate for the WTO dispute settlement organs to weigh and balance the relevant interests involved.⁴⁵⁷ Doing so would seriously undermine the legitimacy of the WTO dispute resolution system.⁴⁵⁸ The case for judicial caution is even more compelling in the WTO than in the domestic courts because of the acute lack of democratic legitimacy in the WTO dispute settlement system.⁴⁵⁹ Also, due to the depth of the controversy applying any nuanced tests in a consistent manner would not be possible.⁴⁶⁰ Dunoff argues that linkage problems are such that:

...they cannot be solved by more artful treaty language, or better reasoned panel reports – indeed these sorts of 'trade and' conflicts persist even where there is specific treaty language apparently resolving the issue.⁴⁶¹

In his view, “it would be politically naïve to urge WTO panels to 'struggle openly' with the value conflicts raised by 'trade and' issues.”⁴⁶² The WTO dispute settlement system “should not be expected to ignore the political costs that accompany the unsatisfactory resolution of 'trade and' disputes.”⁴⁶³ For these reasons, the WTO dispute settlement system should, according to Dunoff,

⁴⁵⁵ J. L. Dunoff, “The Death of the Trade Regime,” *European Journal of International Law* (10)4 (1999), 733 at 733-734.

⁴⁵⁶ *Ibid.*, 754-755.

⁴⁵⁷ *Ibid.*, 754.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*, 758.

⁴⁶⁰ *Ibid.*, 755.

⁴⁶¹ *Ibid.*, 756.

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*, 761.

adopt a highly constrained role and resort to the “passive virtues of judicial function” deferring linkage questions to be decided by other means.⁴⁶⁴

At the other end, there are proposals that would seem to have the practical effect of expanding the role and scope of the WTO dispute settlement system. As we have seen in Chapter 1, Petersmann has put forward ideas concerning the role of the WTO in creating “worldwide integration law” that takes after the European Union; sets up a constitutional regime along the lines of Kantian ideals; and promotes human rights as well as solidarity sharing of the benefits and social adjustment costs of global integration.⁴⁶⁵ According to Petersmann, the UN human rights law and WTO rules offer “mutually beneficial synergies for rendering human rights law and the social functions and democratic legitimacy of the emerging global integration law more effective.”⁴⁶⁶ He points to the fact that all 189 UN member states have committed themselves to inalienable human rights as part of general international law.⁴⁶⁷ Even though the *DSU* does not explicitly refer to human rights, they form part of the “context” for the interpretation of the law of worldwide organizations and may thus be important in interpreting the general exceptions under Article XX of *GATT* as well as other provisions relating to guarantees of freedom, non-discrimination, property rights, individual access to courts and ‘necessity’ requirements for safeguarding measures to protect ‘public interests’ and human rights.⁴⁶⁸ In other words,

The universal recognition of human rights requires us to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights. The non-discrimination and ‘necessity’ requirements in the ‘general exceptions’ of WTO law (e.g. in Article XX of *GATT* and Article XIV of *GATS*) reflect these human rights principles. WTO law gives clear priority to the sovereign right to restrict trade if this is necessary for the protection of human rights.⁴⁶⁹

Petersmann has also mentioned the WTO Ministerial Declaration according to which the *TRIPS Agreement* should be interpreted in a manner that supports the WTO members’ right to protect public health.⁴⁷⁰ Moreover, to Petersmann, the *Shrimp-Turtle* decision “confirmed that import restrictions may be justifiable under WTO law for protecting human rights not only inside the importing country but also in other countries on the high seas.”⁴⁷¹

⁴⁶⁴ *Ibid.*, 757. Dunoff has also suggested that trade-environment issues should be moved to a forum expressly designed to address them. Arguing that trade-environment issues are on the whole ill-suited for adjudication, Dunoff has also been in favour of a facilitative approach, mediation and negotiations. See J. L. Dunoff, “Institutional Misfits: the *GATT*, the ICJ and Trade-Environment Disputes,” *Michigan Journal of International Law* 15 (1994), 1043 at 1107 *et seq.*

⁴⁶⁵ Petersmann, “Time for United Nations ‘Global Compact,’” 623.

⁴⁶⁶ *Ibid.*, 632.

⁴⁶⁷ *Ibid.*, 633.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*, 645.

⁴⁷⁰ *Ibid.* See also WTO Ministerial Declaration, 4 November 2001, WT/MIN(01)/DEC/2, para. 4.

⁴⁷¹ Petersmann, “Time for United Nations ‘Global Compact,’” 645.

However, Petersmann's recent writings seem to be taking a more moderate stance. Referring to reports by the UN High Commissioner for Human Rights calling for a human approach to free trade and emphasising the relevance human rights in the interpretation of international economic agreements, Petersmann notes that:

Due to their limited trade policy mandate, WTO bodies have, hitherto, not responded to UN proposals for a 'human rights approach to trade.' As national human rights, democratic and constitutional traditions differ legitimately among states, and as long as UN human rights conventions refrain from protecting welfare-creation through freedom of profession and trade it appears unrealistic to expect WTO members to reach agreement on the complex inter-relationship between human rights and WTO rules.⁴⁷²

Also many other scholars have taken a position that can be seen as more moderate than the two extremes described above. Legal arguments by scholars such as Marceau and Trachtman were discussed in detail in Section 2.3. Reflecting a similar ethos, Jackson points to the:

...delicate interplay between the Dispute Settlement process on the one hand, and the possibilities or difficulties of negotiating new treaty texts or making decisions by the organization that are authorized by the Uruguay Round text on the other hand.⁴⁷³

He indicates that there are a number of checks and balances built into the WTO system during the Uruguay Round, such as Article IX of the *WTO Agreement* on decision-making and Article X on amendment as well as provisions concerning decisions, waivers, and formal interpretations.⁴⁷⁴ Given the constraints on the use of these instruments, Jackson sees a temptation to try to use the dispute settlement system to clarify ambiguous treaty provisions and fill gaps.⁴⁷⁵ In his view, however,

...there are indications that the Dispute Settlement system cannot and should not carry much of the weight of formulating either by way of filling gaps in the existing agreements, or by setting forth norms which carry the organization into totally new territory such as competition policy or labour standards.⁴⁷⁶

One solution envisaged by Jackson regarding linkage issues such as investment, competition policy or environmental protection, could be the use of optional plurilateral agreements (WTO Annex 4) - although even these could be blocked by the consensus rule required for their adoption.⁴⁷⁷ However, it would be better to look for ways out of the consensus problem rather than attempt to

⁴⁷² E.-U. Petersmann, "Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism," in Joerges & Petersmann (2006), 5 at 22.

⁴⁷³ Jackson, "Dispute Settlement and the WTO: Emerging Problems," 345.

⁴⁷⁴ *Ibid.*, 345-346.

⁴⁷⁵ *Ibid.*, 346.

⁴⁷⁶ *Ibid.*, 347.

⁴⁷⁷ *Ibid.*, 348.

solve linkage problems through the WTO dispute settlement system.⁴⁷⁸ Jackson hopes that some of his detailed practical suggestions would achieve the goal of:

... allowing measures to go forward short of unanimity or total consensus, but at the same time protecting some sort of ultimate and 'vital sense' the right and power of every member of the WTO to object in (hopefully) only those very few cases where it felt it was so strongly important to its vital national interests that it would refrain from blocking the consensus.⁴⁷⁹

In other words, the temptation to use adjudication should be avoided in favour of deference to national governments while at the same time developing practical means for overcoming the problems of the WTO legislative process.

The picture that emerges from the scholarly debate is that a wide range of views exists on the potential to solve linkage dispute through the WTO dispute settlement mechanism. In this regard, a connection probably exists between the ambitiousness of the proposed mandate for the WTO dispute settlement system and the scholars' views on free trade and the WTO in general. For Dunoff, who is arguably more oriented towards environmental issues than free trade, the WTO dispute settlement system is not the appropriate forum for deciding linkage disputes. Those very much 'inside' the trade circles, such as Marceau and Jackson, seem to have faith in the ability of the WTO dispute settlement system to deal with politically sensitive issues as such, but want to avoid a situation where such questions hamper the overall functioning of the trade regime. Petersmann, in turn, is known for his rather ambitious proposals concerning the 'human right to free trade' and the connection that he sees between Kantian philosophy, individual freedom and the international trade regime. For him, the question is therefore how the WTO dispute settlement system could be used to advance such ideals.

The argument here is that the debate about the limits of the WTO dispute settlement system points to a dilemma caused by the political pressure to consider non-trade values and interests on one hand, and to respect the substantive and formal boundaries of the WTO dispute settlement system on the other. The discussion in Sections 2.3 and 2.4 shows that what most scholars conceive as limits of the WTO dispute settlement system derive from two key sources. First, its jurisdiction *ratione materiae* is limited and it cannot entertain claims made based on non-WTO norms. For many scholars, also its competence to apply non-WTO norms is restricted: the WTO dispute settlement system can only take non-WTO norms into account through the customary rules of treaty interpretation, in other words, by interpreting WTO law in light of 'other relevant rules' or by referring to them as factual evidence. Second, *DSU* Article 3.2 contains a provision that points to

⁴⁷⁸ *Ibid.*, 349. Here Jackson suggests that it might be feasible to develop certain practices about consensus that would lead WTO members to restrain themselves from blocking a consensus in certain circumstances.

⁴⁷⁹ *Ibid.*, 351.

the limits of the judicial function to apply the law as opposed to making the law. It indicates that the WTO dispute settlement bodies cannot add to or diminish the rights and obligations contained in the covered agreements. However, as it will be seen in Chapter 3 and 4, the growing awareness of the link between international trade liberalisation and other policy fields has increased pressures on the WTO dispute settlement bodies to “import substantive legitimacy,”⁴⁸⁰ in other words, to increasingly consider non-trade values and such rules of international law that give expression to such values. The ensuing dilemma is closely related to the limits to the scope of the WTO dispute settlement system and the questions of social/substantive and formal/procedural legitimacy that are central to this study. From that perspective, it is important to note that the visions neither Dunoff or Petersmann are cost-free: the legitimacy of the WTO dispute settlement system will be challenged whether it refuses to decide linkage disputes, as proposed by Dunoff, or chooses to advocate a human rights approach to free trade or an ambitious global integration agenda. In fact, it appears that the legitimacy dilemma facing the WTO dispute settlement system looks like a two-headed dragon: any attempts to tame the substantive legitimacy challenges immediately alerts the second head, which guards the formal dimension of legitimacy. These questions will be discussed in depth in the second part of the study.

⁴⁸⁰ This expression was used by professor F. Snyder when commenting on my work at the LSE Law Department’s Ph.D. seminar.

3. The WTO, Environment and the Problem of 'Linkages'

This Chapter argues that the increasing specialisation of international law underlies many of the WTO dispute settlement system's legitimacy challenges. Since World War II, international law has evolved significantly. The number of international agreements has multiplied and many of them focus on a specific topic, such as trade, environment, human rights, law of the sea or humanitarian law. All this has resulted in the functional fragmentation of international law and the birth of specialised legal regimes.⁴⁸¹ Without a doubt, the international trade regime is amongst the strongest and most advanced international legal regimes. This Chapter describes briefly how the regime has evolved since the 1940s and shifted especially after the Uruguay Round from its original focus on trade barriers towards the idea of harmonisation. This has blurred the boundaries between international trade and other policy fields, highlighting that there are no "natural" or "inherent" limits to the WTO system. The previous Chapter described how the *Tuna-Dolphin* and *Shrimp-Turtle* disputes challenged the legitimacy of the WTO dispute settlement system. This Chapter expands this image, showing how they also prompted a policy debate concerning the scope and function of the WTO regime, and its "linkages" with non-trade objectives. The question is essentially whether the WTO should focus on fair trade and harmonisation in areas such as environmental protection and labour standards, or embrace regulatory diversity as an essential element of free trade. These questions were debated especially before launching the Doha Development Round of negotiations, which excludes, however, most linkage issues, apart from a limited mandate on environmental issues.

Especially since the 1970s, international environmental law has evolved rapidly in parallel with international trade law. Even if the prominent notion of sustainable development links their subject matters together, the two spheres of international law have existed largely in isolation of each other. There are also important differences. Especially in terms of institutions and enforcement mechanisms, the trade regime is more developed than the environmental one. Most notably for the topic of this study, there are no corresponding dispute settlement mechanisms like the WTO dispute settlement system in the field of international environmental. The argument here is that such institutional features are partly responsible for the legitimacy challenges that form the focus of this study. The WTO dispute settlement system is often the only judicial forum available for settling disputes involving linkages between trade and environmental protections. Its role in solving

⁴⁸¹ ILC, *Fragmentation of International Law*, 10 *et seq.*

sensitive conflicts is further highlighted by the slow progress in the political track and the narrow mandate by WTO negotiators to solve these issues during the Doha Round.

3.1. From Free Trade to Fair Trade?

The origins of the international trade regime lie in the Bretton Woods Conference, held in July 1944 in New Hampshire where the allied powers met to create a new institutional framework for international economic relations and reconstruction after the World War II. They agreed to establish the IMF to administer international financial flows, and the World Bank (in other words, the International Bank for Reconstruction and Development) to provide funding for post-war reconstruction and developing countries. The Bretton Woods conference also contemplated the creation of a third institution, namely the International Trade Organization (ITO). The proposed agenda of the ITO was ambitious and covered issues such as employment and economic policy, economic development and post-war reconstruction, as well as trade in commodities. However, the ITO failed to materialise due to opposition from the U.S. As Barfield describes, President Truman first held back the ITO Charter and then withdrew it from congressional consideration in 1950.⁴⁸² An international system was nevertheless created for liberalising trade in goods through the *General Agreement on Tariffs and Trade*. The *GATT* was negotiated in 1947 as an interim arrangement and provisionally applied pending the adoption of the ITO Charter.⁴⁸³ This period of 'provisional application' came to last for nearly half a century, until the WTO was finally created in the beginning of 1995.

Initially, the international trading system focused on the removal of tariff barriers. The *GATT 1947* consisted of a number of general clauses drawn mainly from the draft *ITO Charter*, including key principles such as the Most Favoured Nation principle (Article I) and national treatment requirement for imported products (Article III). It also contained schedules with thousands of reciprocal tariff commitments.⁴⁸⁴ The regime evolved through eight rounds of trade negotiations. The first round in 1947 involved only 23 countries, while the second in 1949 had 49 participants. By the time the Uruguay Round was launched in 1986, the number of *GATT* Contracting Parties had increased to 103, and in 1994, the *WTO Agreement* was ratified by 128 countries. As of the summer of 2008, the number of WTO Members had increased to 153. Prior to the Uruguay Round, the most important talks included the Kennedy Round (1963-67) and the Tokyo Round (1973-79). The Kennedy Round was significant in that it employed a linear, across-the-board approach to tariff reductions instead of the previous line-by-line approach.⁴⁸⁵ It also addressed non-tariff

⁴⁸² C. E. Barfield, *Free Trade, Sovereignty, Democracy* (AEI Press, 2001), 21.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Jones, *Who's Afraid of the WTO*, 69.

barriers through the anti-dumping code, and introduced trade preferences for developing countries.⁴⁸⁶ The Tokyo Round continued to apply the across-the-board tariff approach, and broadened the agenda both in terms of non-tariff issues and developing country preferences.⁴⁸⁷ However, given the growing membership and expanding agenda, the Tokyo Round resulted in fragmentation and numerous codes on subsidies, product standards, government procurement, custom valuation and so on.⁴⁸⁸ Countries could then adhere formally to the core *GATT* and participate in the codes *à la carte*.⁴⁸⁹

The Uruguay Round marked an important turning point. It resulted in a 'single undertaking,' established the WTO and strengthened the dispute resolution mechanism. It also expanded the substantive reach of the system. Increasing attention was now given to non-tariff barriers and matters of domestic regulation, such as trade remedies, agricultural subsidies and intellectual property.⁴⁹⁰ The outcome thus included agreements on trade in services (*General Agreement on Trade in Services, GATS*), trade-related investment measures (*Trade-Related Investment Measures, TRIMs*) and intellectual property (*Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS*). Their inclusion into the *GATT*/WTO regime was not without controversy.⁴⁹¹ This is particularly true for intellectual property rights, which has been criticized as a subject matter that should not have been dealt with under the umbrella of the WTO but which ended there due to intensive lobbying by the American pharmaceutical and entertainment industries.⁴⁹² The Uruguay Round outcome also included the *TBT* and *SPS Agreements*, which also focus on non-discriminatory trade barriers. Thus, the argument has been made that as a result of these developments, the regulatory philosophy underlying the international trade regime experienced a fundamental shift from the elimination of discrimination towards the far more ambitious idea of harmonization.⁴⁹³

In the aftermath of the *Tuna-Dolphin* dispute, environmental groups took an interest in the final moments of the Uruguay Round negotiations and had some influence on outcome. The preamble of the *Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)* recognized the relevance of environmental protection and provided that WTO Members would pursue their various economic objectives:

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*, 71.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ T. Cottier, "From Progressive Liberalization to Progressive Regulation in WTO Law," *Journal of International Economic Law*, 9(4) (2006), 779 at 783.

⁴⁹¹ J. Bhagwati, "Afterword: The Question of Linkage," *American Journal of International Law* 96(126) (2002), 126 at 127.

⁴⁹² *Ibid.*, 128. On the influence of industrial lobbies, see J. H. Jackson, *The World Trading System. Law and Policy of International Economic Relations* (MIT Press, 1999), 310-311.

⁴⁹³ V. Heiskanen, "The Regulatory Philosophy of International Trade Law," *Journal of World Trade* 38(1) (2004), 1, at 1-4. See also Leeborn, "Lying Down with Procrustes," 41.

...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.

In addition, the *Uruguay Round Decision* of 14 April 1994 refers to environmental protection indicating that,

...there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.

To make the Uruguay Round results operational, the WTO Committee on Trade and Environment (CTE) was established in January 1995.⁴⁹⁴ The CTE has addressed a host of topics relevant to the trade and environment dilemma. These have included eco-taxes, product standards, processes and production standards, eco-labelling schemes, packaging regulations, handling requirements, economic policy instruments, safeguard measures as well as multilateral environmental agreements.⁴⁹⁵ It has been argued that the CTE:

...has provided a valuable forum for discussions on reconciling environmental and WTO treaty obligations and other crossover issues. However, it has not produced concrete proposals for trade policy reform to enforce or promote environmental goals because it has no institutional mandate to do so.⁴⁹⁶

In sum, the incorporation of new subject matters, such as intellectual property, and the recognition of the relevance of certain non-trade policies, such as environmental protection, had very important implications on the WTO. It blurred the boundaries between trade and other policy areas, and made the tension between trade and some other policy goals is more explicit than ever before.⁴⁹⁷ Thus, while the new WTO regime seemed relatively well-equipped to handle questions concerning international trade - how about its relationship with questions such as environment, human health, labour rights and so on?

3.1.1 The Linkage Debate

Already during the post-World War II era it was contemplated that some compatibility problems could arise between international trade liberalisation and other policy objectives. Article XX of the *GATT*, entitled "General Exceptions," thus justifies derogations *inter alia*, where "necessary to protect human, animal or plant life or health"⁴⁹⁸ or to implement measures relating to the

⁴⁹⁴ For an overview of the CTE, see S. Shaw & R. Schwartz, "Trade and Environment in the WTO: State of Play," *Journal of World Trade* 36(1) (2002), 129 at 130 *et seq.*

⁴⁹⁵ E.-U. Petersmann, "Trade and the Protection of the Environment after the Uruguay Round," in R. Wolfrum, ed., *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer, 1996), 164.

⁴⁹⁶ Jones, *Who's Afraid of the WTO*, 107.

⁴⁹⁷ McDonald, "It's Not Easy Being Green," 145.

⁴⁹⁸ *GATT* Article XX(b).

conservation of exhaustible natural resources.”⁴⁹⁹ However, in the 1940s it was certainly not foreseen that the link between trade liberalisation and other policy fields would once play such a prominent role as it currently does.

The dilemma known as the “linkage problem” or the “trade and” question embraces policy fields such as environmental protection, human rights, labour standards, competition policy and investment rules.⁵⁰⁰ The academic foundations of the linkage debate are contained in the two volumes of *Fair Trade and Harmonization. Prerequisites for Free Trade?* edited by Bhagwati and Hudec in the mid-1990s. Their focus is on:

...areas in which differences in national domestic policies seem to be causing the most significant problems in international trade relations – environmental policy, labor policy, and competition (or antitrust) policy. In each of these areas, some governments have adopted rigorous regulation of private behaviour, while others impose only weak or nonexistent regulation. The policy differences that exist in these three areas have become a major point of friction in the trade relations between developed and developing countries, although they also create certain problems between developed countries as well.⁵⁰¹

These books thus examine various arguments calling for the international harmonisation of standards in the name of fair trade. Several factors can be identified as having motivated such demands. In the case of labour standards, both moral concerns over the well-being of employees in poor developing countries and fears for lower salaries and unemployment in industrialised countries motivate such initiatives. Also environmentalists have been anxious about a “race to the bottom,” namely the lowering of environmental standards in industrialised countries as a result of competition, as well as about global and local environmental problems caused by low or non-existent standards in developing countries. However, many of the papers contained in the Bhagwati and Hudec books are critical of the idea of harmonization and support the argument that the diversity of standards is legitimate as it reflects differences in fundamentals across countries.⁵⁰² Others, however, argue that the inclusion of environmental and social issues, such as labour standards, is the inevitable next step in the journey that began with tariffs and continued to services and intellectual property.⁵⁰³ Thus:

Once it is agreed that the harmonization of technical regulations and sanitary measures and more effective global protection of intellectual property are necessary to create an orderly market, there is no objective reason not to extend the harmonization effort, in the long term at least, to other market-related areas such as

⁴⁹⁹ GATT Article XX(g).

⁵⁰⁰ For an overview of the relationship between the WTO, human rights and labour standards, see R. Howse & M. Mutua, *Protecting Human Rights in a Global Economy. Challenge for the World Trade Organization* (Rights and Democracy, 2000).

⁵⁰¹ R.E. Hudec “Introduction to Legal Studies,” in J. Bhagwati & R. E. Hudec, eds., *Fair Trade and Harmonization*, Volume II (The MIT Press, Cambridge, 1996), 1 at 1.

⁵⁰² J. Bhagwati, “Introduction,” in Bhagwati & Hudec (1996), 3.

⁵⁰³ J.L. Dunoff, “The Post-Doha Agenda: Questions about Constitutions, Competence and Coherence,” in R. Buckley, ed., *The WTO and the Doha Round. The Changing Face of World Trade* (Kluwer Law International, 2003), 59.

competition policy, public procurement, foreign investment, labour standards, environmental protection and consumer protection.⁵⁰⁴

Some insist that the WTO should focus on core issues of international trade liberalization. Yet others question any implicit or explicit assumptions about the “true nature” of the WTO or its “inherent limits,” arguing that there are no “natural borders” for the WTO but it is necessary to consider political realities and which linkages would work in practice.⁵⁰⁵ There is thus no evident consensus on the subject matters that should be dealt with by the WTO and on ones that should remain outside its realm. In the aftermath of the Seattle demonstrations where linkage issues played an important role, the American Society of International Law organised a symposium on the boundaries of the WTO inviting contributions from leading WTO scholars. To illustrate the key elements of the linkage debate the following summarises the key positions.

According to Jackson, the linkage problem is one of the key challenges to the WTO. One of the reasons is that there are no inherent or logical limits to GATT/WTO system.⁵⁰⁶ Even if the *GATT* originally focused on tariffs, by the 1970s, it was already turning to “non-tariff barriers,” that were addressed, for instance, during the Tokyo Round through the Subsidies Code and the Technical Barriers Code.⁵⁰⁷ For Jackson, the ultimate question is therefore about sovereignty and subsidiarity, in other words, “the tough question of allocation of power.”⁵⁰⁸ Where should the decisions be made? In the WTO, at the national level or in some other inter-governmental organization? Through negotiations or by a judicial body?⁵⁰⁹ Using competition policy as an example, Jackson offers a list of further questions to assist in finding the answer: Does something need to be done? Can it be done by national governments? If not, is there already an international institution in existence? What are the dangers and costs of handling the issues, for instance, in terms of fairness and democracy?⁵¹⁰ He suggests that issues such as competition policy could also be addressed by setting up a forum independent of the WTO and more open to the civil society.⁵¹¹ Overall, Jackson suggests that analysis should start from a specific problem and identifying the need for action, moving down to institutional questions.⁵¹²

Bhagwati, in turn, is critical of Northern lobbies that try to impose their own agendas on the WTO by adding the words “trade-related” in front of the subject matter.⁵¹³ In his view, the *TRIPS* was

⁵⁰⁴ Heiskanen, “Regulatory Philosophy,” 14.

⁵⁰⁵ J. H. Jackson, “Afterword: The Linkage Problem – Comments on Five Texts,” *American Journal of International Law* 96(126) (2002), 118.

⁵⁰⁶ *Ibid.*, 120-121.

⁵⁰⁷ *Ibid.*, 121.

⁵⁰⁸ *Ibid.*, 122.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*, 124.

⁵¹² *Ibid.*, 125.

⁵¹³ Bhagwati, “Afterword: The Question of Linkage,” 127.

already a step too far, essentially legitimising the use of the WTO “to extract royalty payments.”⁵¹⁴ It also demonstrated to the Northern labour, environmental and other lobbies that they could try to do the same, leaving developing countries to protest the best they can.⁵¹⁵ Bhagwati analysis focuses on labour standards, arguing against their inclusion in the WTO system.⁵¹⁶ He refers to empirical evidence showing that the adverse effects of trade on salaries in rich countries is small, and there is no convincing evidence of “race to the bottom” in terms of labour standards.⁵¹⁷ Furthermore, he argues that the WTO does not even begin to qualify as an institution capable of managing complex issues such as the right to unionise and the absence of gender discrimination.⁵¹⁸ Finally, Bhagwati defends the *Tuna-Dolphin* panel’s approach of rejecting value-related production and process methods.⁵¹⁹ He states that the *Shrimp-Turtle* case should not have changed this approaches, criticises the AB for referring to the obscure notion of sustainable development and identifies the need for political negotiations on Article XX.⁵²⁰ Bhagwati concludes that the linkage question involves an important North-South dimension that should be taken seriously.⁵²¹

For Alvarez, the WTO has become a “linkage machine” mainly because of its institutional features.⁵²² In other words, he argues that centralized, quasi-autonomous institutions can be effective in promoting international cooperation,⁵²³ and notes that “boundaries” of international organizations have always been fluid.⁵²⁴ However, even if international organizations can be effective for dealing with a variety of issues, there is no guarantee that a particular linkage will be successful.⁵²⁵ For deciding which linkages have the potential to succeed under the WTO, Alvarez proposes comparative analysis, and cooperation between organizations.⁵²⁶ Like Jackson, he regards the linkage question as an inquiry into “what works” in international law.⁵²⁷ In his view it would be necessary to study comparative organization, feasibility and wisdom of cooperative ventures between organizations.⁵²⁸ Alvarez concludes that the linkage debate reveals a wide consensus among trade experts that the problem of linkages is not a new one, the mandate of the GATT/WTO system has evolved significantly during its relatively short history and the boundaries

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*, 128.

⁵¹⁶ *Ibid.*, 130.

⁵¹⁷ *Ibid.*, 130-131.

⁵¹⁸ *Ibid.*, 132.

⁵¹⁹ *Ibid.*, 133.

⁵²⁰ *Ibid.*, 133-134.

⁵²¹ *Ibid.*, 134.

⁵²² J.E. Alvarez, “The WTO as Linkage Machine,” *American Journal of International Law* 96(126) (2002), 146 at 146.

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*, 149.

⁵²⁵ *Ibid.*, 149-150.

⁵²⁶ *Ibid.*, 153.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

of the regime are not fixed.⁵²⁹ He stresses, however, the need to extending the conversation beyond trade experts.⁵³⁰

3.1.2 Linkage Issues in the WTO and Doha Round

Linkage issues have also influenced political developments at the WTO. They played an important role in attracting thousands of demonstrators to the streets of Seattle, and failing the attempts to launch a new round of trade negotiations in 1999. Given the criticism in the U.S. against sweatshop labour, child labour and poor working conditions in developing countries, the Clinton Administration had promised to raise labour standards as a trade issue at the WTO.⁵³¹ During the Seattle Ministerial Meeting, he thus expressed sympathy for the demonstrators and indicated that the WTO should establish:

...a working group on labor... and then that working group should develop those core labor standards and they ought to be part of every trade agreement.⁵³²

This demand was highly controversial for developing countries and played an important role in the failure of the Seattle meeting.⁵³³ Developing countries tend to regard strict labour standards as a protectionist tool, and some also feared private lawsuits against foreign companies in countries like the U.S.⁵³⁴ Japan and the EU also proposed that the new round of trade negotiations should consider the so-called “Singapore issues” of investment, competition policy, transparency in government procurement and trade facilitation. For developing countries, in turn, trade in agricultural products and textiles were a high priority. As we have seen, delegates ultimately failed to reach an agreement and launch a new negotiation round in Seattle.

After the Seattle failure, the WTO Secretariat and various WTO Members pooled their efforts and carefully prepared for the Doha Ministerial Conference in 2001.⁵³⁵ Despite persisting differences in areas such as agriculture, environment, investment and competition, the WTO Members agreed to launch a new “Development Round” of trade negotiations. As a part of the compromise, negotiations on the controversial Singapore issues were deferred until after the Fifth WTO Ministerial Conference in 2003 and subsequently all but trade facilitation have been dropped from the Doha Agenda. The relationship between trade and environment did find its way to the Doha

⁵²⁹ *Ibid.*, 157.

⁵³⁰ *Ibid.*

⁵³¹ Jones, *Who's Afraid of the WTO*, 20.

⁵³² *Ibid.* 19.

⁵³³ *Ibid.*, 20.

⁵³⁴ Krugman & Obstfeld, *International Economics*, 287.

⁵³⁵ M. Moore, *A World Without Walls. Freedom, Development, Free Trade and Global Governance* (CUP, 2003), 112-116.

Round. However, the mandate is limited and the issue has not been given a high priority in the negotiations.⁵³⁶

The Doha Round negotiations were officially launched in January 2002 with a work programme listing 21 subjects. The two key groups are the Non-agricultural Market Access (NAMA) negotiating group and the Agricultural negotiating group. The negotiations have experienced several difficulties. The original deadline for completing the Doha Round was in January 2005. This deadline was missed. The new deadline at the end of 2006, agreed at the Sixth Ministerial Conference in Hong Kong, was also missed. The negotiations broke down in the summer of 2006 but resumed in the beginning of 2007. By the spring of 2008, some progress has been reported on agriculture and NAMA, and delegates are now aiming to conclude the round by the end of 2008. However, the U.S. President's Fast-Track Trade Negotiation Authority for Trade Agreements expired in the summer of 2007, meaning that the Doha outcome must be approved by the U.S. Congress. Given that in 2008, the U.S. is facing both presidential elections and an economic recession, the conclusion of the Doha Round in 2008 looks rather unlikely.

One of the most difficult subjects in the Doha Round concerns trade in agricultural products. Notwithstanding that agriculture has been covered by international trade rules since the original *GATT 1947*, international trade in agricultural products suffers from severe distortions caused by trade barriers and heavy subsidies by the EU, U.S. and others. The Uruguay Round resulted in the *Agreement on Agriculture* to improve market access and limit domestic support and export subsidies. Still, the situation is far from ideal. One of the most controversial issues stalling the Doha agricultural negotiations has concerned cotton, which is heavily subsidised especially by the U.S..⁵³⁷ West African cotton producing countries have therefore proposed to eliminate all domestic support and export subsidies for cotton.⁵³⁸ Developing countries have flagged cotton subsidies as a question that is crucially important for their poor populations and crystallises problems caused by trade-distorting agricultural subsidies by rich industrialised countries.⁵³⁹ The U.S. cotton subsidies were also subject to a legal challenge by Brazil, with both the panel and the Appellate Body concluding that they violated WTO rules.⁵⁴⁰ In a similar vein, the EU's regime for sugar export subsidies was challenged in the dispute settlement system and found to violate the *Agreement on Agriculture*.⁵⁴¹ It is clear that decisions by the WTO dispute settlement system finding that the EU and the U.S., two

⁵³⁶ A. Palmer & R. Tarasofsky, *The Doha Round and Beyond: Towards a Lasting Relationship Between the WTO and International Environmental Regime* (Chatham House & FIELD, 2007), 48

⁵³⁷ C.E. Hanrahan, "The African Cotton Initiative and the WTO Agriculture Negotiations," *Congressional Research Service Report for the U.S. Congress*, 16 January 2004, 3.

⁵³⁸ *Ibid.*, 1.

⁵³⁹ D.A. Sumner, "Reducing Cotton Subsidies: the DDA Initiative," W.Martin & K.Anderson, eds., *Agricultural Trade Reform and the Doha Development Agenda*, 1 at 2.

⁵⁴⁰ Appellate Body report, *US - Subsidies on Upland Cotton*, WT/DS267/AB/R, 21 March 2005.

⁵⁴¹ Appellate Body report, *EC-Export Subsidies on Sugar*, WT/DS266/AB/R, 28 April 2005.

key players in the Doha agricultural negotiations, are violating existing WTO rules do affect the negotiations.⁵⁴² As Sumner argues, “any reasonable negotiating strategy has to take into account the results achieved under the cotton dispute brought by Brazil against the U.S. highland cotton programs.”⁵⁴³ At the same time, such strategic use of the dispute settlement system is hardly conducive for its legitimacy.

The ongoing negotiations on environmental issues are based on paragraph 31(i) of the Doha Ministerial Declaration, which lists specific topics to be covered, namely: links between the WTO rules and multilateral environmental agreements (MEAs); exchange of information between the WTO and MEA secretariats; and the reduction of trade barriers from environmental goods and services.⁵⁴⁴ The Doha Declaration further instructs the CTE to “give particular attention” to the effect of trade measures on market access, the relevant provisions of the *TIRPS Agreement* as well as environmental labelling requirements.⁵⁴⁵ According to McDonald,

These topics are conservative, in that they are restricted to issues where substantive entitlements are unlikely to be altered or where there is an opportunity for environmental gains from trade. The Doha Declaration is nonetheless the first time that environmental issues have been included in the formal negotiating agenda and form part of the single undertaking to be concluded by 2005.⁵⁴⁶

The lack of meaningful progress during the Doha Round also applies to the environmental negotiations, which have been characterised as “divisive and aimless.”⁵⁴⁷ For this study, the most relevant topic is clearly the relationship between WTO rules and MEAs. As discussed in Chapter 2, the relationship between WTO law and other rules of international law has emerged as one of the key challenges to the legitimacy of the WTO dispute settlement system. However, the prospects for finding a lasting solution to the problem through the Doha negotiations are dim: the Doha mandate only covers questions involving MEA Parties and excludes the far more difficult question of non-Parties (see Chapters 4 and 6).⁵⁴⁸ It also precludes an outcome that would change WTO rules.⁵⁴⁹ Thus,

There is no opportunity under this mandate to discuss the full range of issues relevant to the WTO-MEA relationship in a meaningful way that involves all relevant actors.⁵⁵⁰

⁵⁴² For analysis, see E-U. Petersmann, “Strategic Use of the WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture,” in E-U. Petersmann & J. Harrison, eds., *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (OUP, 2005), 127 at 139 *et seq.*

⁵⁴³ Sumner, “Reducing Cotton Subsidies,” 19.

⁵⁴⁴ Doha Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1, para. 31.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ McDonald, “It’s Not Easy Being Green,” 159.

⁵⁴⁷ *Ibid.*, 15.

⁵⁴⁸ Palmer & Tarasofsky, *The Doha Round and Beyond*, vi.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.*, v.

In sum, the question of linkages is politically sensitive and negotiated outcomes are difficult to reach. The Doha mandate on linkage issues is limited and the new round will not solve any of the principled debates analysed in this Chapter. At the same time, long-standing divergences over questions such as trade in agricultural products are responsible for long delays in completing the Doha Round. The argument here is that all this highlights the role of the WTO dispute settlement system in deciding politically sensitive disputes.

3.2 Trade and the Emergent Environmental Regime

As we saw in Chapter 1, for several decades, international trade was conceived as a technical field and left largely to trade specialists. Moreover, environmental issues were not a major concern when the *GATT 1947* was negotiated and the agreement makes no explicit reference to “the environment.”⁵⁵¹ A widespread environmental movement only began to emerge in the 1960s and 1970s, and the first large international conference dedicated to environmental issues was held in Stockholm in 1972. In the 1980s, the international community stressed need to reconcile economic development and environmental protection, and launched the idea of “sustainable development.”⁵⁵² Still, the body of rules and instruments currently known as “international environmental law” remained insulated from the *GATT* legal regime. In the early 1990s, however, the *Tuna-Dolphin* disputes threw the trade and environment linkage to the centre of public attention. Since then, the relationship between the two international legal regimes has continued to preoccupy international trade and environmental experts alike. The aim of this section is to highlight my argument that the years of insulation and fragmented development of international law are responsible for many of the current legitimacy challenges at the WTO dispute settlement system.

The roots of modern environmentalism reach beyond the political movement that began to emerge in the 1960s and 1970s.⁵⁵³ It has been argued that European attitudes to nature were first modified by experiences in the colonies: the myth of the garden of Eden was revived through travellers’ tales of ‘wild’ and ‘unaffected’ landscapes in India, Africa and America.⁵⁵⁴ On the other, hand, the damaging effects of commercial exploitation of the nature were also becoming apparent.⁵⁵⁵ It was not, however, until the early 1990s that the world saw a significant rise in global interest in environmental issues.⁵⁵⁶ Several factors have been identified as drivers for this trend, including: rising wealth and a sense in the North that people can afford higher environmental standards;

⁵⁵¹ Esty, *Greening the GATT*, 9.

⁵⁵² T. Kuokkanen, *International Law and the Environment. Variations of a Theme*, (Kluwer Law International, 2000),

xxx.

⁵⁵³ See generally, D. Pepper, *Modern Environmentalism. An Introduction*, (Routledge, 1996).

⁵⁵⁴ *Ibid.*, 168.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Esty, *Greening the GATT*, 9 *et seq.*

better scientific understanding of environmental problems; and visible impacts of ecological problems such as air pollution, fisheries depletion, deforestation and land degradation.⁵⁵⁷

For the development of international environmental law, the United Nations Environmental Conference, held in Stockholm in June 1972, was an important threshold. One of its concrete achievements included establishment of the UN Environment Programme (UNEP) to coordinate international cooperation in the field. Subsequent milestones included the finalisation of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) in 1973, the *Convention on the Conservation of Migratory Species of Wild Animals* (CMS) in 1979, and the *Vienna Convention for the Protection of the Ozone Layer* in 1985. From the start, international environmental cooperation involved an important North-South dimension. The newly independent developing countries insisted that asking them to forgo development options or divert their limited resources to environmental protection was unjustified, especially since many of the problems drew their origins from colonialisation and industrialisation in the North.⁵⁵⁸ At the same time, however, scientific evidence on global environmental problems such as global warming, desertification and the loss of biodiversity highlighted the need to address tensions between economic development and environmental protection.

In 1983, the UN General Assembly convened the World Commission on Environment and Development (commonly known as the Brundtland Commission).⁵⁵⁹ The famous outcome of the Commission's work was the formulation of the notion of 'sustainable development.' Accordingly,

Environment and development are not separate challenges; they are inexorably linked. Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction. These problems cannot be treated separately by fragmented institutions and policies. They are linked in a complex system of cause and effect.⁵⁶⁰

The Brundtland Commission thus identified the need for 'sustainable development,' in other words, "development that seeks to meet the needs and aspirations of the present without compromising the ability of those of the future."⁵⁶¹ While the idea of "sustainable development" links trade and environmental protection together, international cooperation on these issues continued on two largely separate tracks.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Esty, *Greening the GATT*, 25.

⁵⁵⁹ UN General Assembly Resolution, A/RES/38/161, 19 December 1983.

⁵⁶⁰ Report of the World Commission on Environment and Development, UNGA A/42/427, para. 40.

⁵⁶¹ *Ibid.*, para. 49.

The end of the Cold War and dreams of “a new world order” gave an important boost to the evolution of international environmental law.⁵⁶² Around the same time as trade negotiators were attempting to conclude the Uruguay Round, also international environmental law made significant advances. As an illustration of fragmented international law-making, there was hardly any coordination between the processes. The UN Conference on Environment and Development, held in Rio de Janeiro, Brazil, in 1992, witnessed the launch of three groundbreaking multilateral environmental agreements. These so-called ‘Rio Conventions’ were the *UN Framework Convention on Climate Change (UNFCCC)*, the *Convention on Biological Diversity (CBD)* and the *UN Convention to Combat Desertification*. All of them embraced a proceduralist idea whereby their Parties would convene annually to consider implementation, and craft protocols and other instruments in response to new scientific information. The UNFCCC was complemented in 1997 by the *Kyoto Protocol* that lays down binding greenhouse gas emission reduction targets for industrialised countries. In 2000, Parties to the *CBD* adopted the *Cartagena Protocol on Biosafety* to regulate transboundary movements of genetically modified organisms. In the field of customary international law, the International Court of Justice confirmed the customary law status of Principle 21 of the Stockholm Declaration in its advisory opinion on the legality of nuclear weapons in 1996.⁵⁶³ Also the precautionary principle was invoked in several disputes before the ICJ, the WTO dispute settlement system and the International Tribunal for the Law of the Sea.⁵⁶⁴ On the whole, the discipline that is now commonly referred to as “international environmental law” emerged rapidly, and it is now commonly accepted that like international trade law, international environmental law forms part of general international law but possesses several distinctive features.⁵⁶⁵ As it will be shown in this study, the emergence of specialised regimes of international law is responsible for many of the challenges to the legitimacy of the WTO dispute settlement system.

The evolution of international environmental law has also been heavily influenced by non-governmental actors, who argued for reforming the state-centred international regime and called for transparent and participatory international processes and institutions. The “Earth Summit” in Rio brought together thousands of environmental groups who began forming global networks and disseminating information on international environmental issues through the rapidly developing communication technologies.⁵⁶⁶ Non-governmental actors also got involved in the actual negotiations by providing advice to smaller delegations and even representing some small

⁵⁶² Esty, *Greening the GATT*, 24-25.

⁵⁶³ ICJ: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* (1996), 226.

⁵⁶⁴ K. Kulovesi, “Cautious about Precaution: Recent Judicial Practice concerning the Status of the precautionary principle under International Law,” *Ympäristöjuridiikka* 2 (2002), 8.

⁵⁶⁵ P. Daillier & A. Pellet, *Droit international public* (Librairie Générale de Droit et de Jurisprudence, 2002), 1271.

⁵⁶⁶ One of the most prominent examples is the *Earth Negotiations Bulletin*, which originates from the Rio Conference and regularly reports from all major international environmental negotiations. A brief history of the Bulletin available at < <http://www.iisd.ca/about/about.htm#history>>.

developing countries.⁵⁶⁷ While also the WTO system has increasingly opened doors for NGOs and other non-state actors, the participatory culture in the environmental field initially stood in stark contrast to the GATT “club model.” Writing at the height of the *Tuna-Dolphin* controversy, Esty indicated that:

At least some of the GATT’s problems stem from the fact that its structure reflects the nation-state focus of the post-World War II international order. This translates into rules and procedures that do not easily accommodate nongovernment actors and that become a source of tension in the handling of environmental matters...⁵⁶⁸

Most of the other tensions between the international trade and environmental regimes were also known in the early 1990s. Esty argued that:

In contrast to the international trade regime... the management of international environmental affairs has little structure and is marked by policy gaps, confusion, duplication and incoherence. A dozen different UN agencies, the secretariats to a number of environmental treaties and conventions, the World Bank, regional political groups, and the world’s 190 countries acting individually try to cope with the planet’s environmental problems.⁵⁶⁹

These problems also extended to the legal realm. The strict stance on environmentally motivated trade measures by the *Tuna-Dolphin* panels:

...leaves in GATT limbo such important international environmental agreements as the Montreal Protocol phasing out CFCs (chlorofluorocarbons, KK) and other chemicals that destroy the ozone layer, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Basel Convention on the export of hazardous waste.⁵⁷⁰

In sum, this overview demonstrates the lack of coordination between the two spheres of international law and some of the ensuing problems. It also shows that the two regimes have traditionally adopted very different approaches to transparency and participation by non-governmental actors. Importantly for the topic of this study, it explains why the question of “linkages” acquired such a prominent role in the WTO in the late 1990s, both politically and in the context of the WTO dispute settlement system.

3.3 Environmental Disputes in the GATT/WTO System

The WTO dispute settlement system has dealt with environmental disputes more frequently than any other international court or tribunal. One of the explanations is that the close connection between trade and environmental protection makes it impossible to prevent linkage disputes such

⁵⁶⁷ Sands, *Lawless World*, 76 *et seq.* Sands describes the establishment of FIELD and its assistance to small island developing states in the negotiations for the *UNFCCC*.

⁵⁶⁸ Esty, *Greening the GATT*, 27.

⁵⁶⁹ *Ibid.*, 78.

⁵⁷⁰ *Ibid.*, 29.

as *Shrimp-Turtle*, *Hormones* or *Biotech* from being brought up in the WTO dispute settlement system. The second reason relates to institutional discrepancies between the trade and environmental spheres. In contrast to the compulsory jurisdiction by the WTO dispute settlement system, the most prominent MEAs do not contain any provisions for legally binding dispute resolution. Instead, agreements such as the *Montreal Protocol on Substances that Deplete the Ozone Layer*, the *CITES*, the *Kyoto Protocol* and the *Cartagena Protocol* have created non-compliance systems, which typically focus on gathering information, monitoring and inspection, and the legally binding nature of their decisions is questionable. Under most MEAs, implementation has thus been characterised as:

...a technical or financial problem, to be dealt with through advice and assistance, instead of normative problem, raising disputes about blameworthiness and sanction.⁵⁷¹

For this reason, the WTO dispute settlement system is usually the only judicial forum available for considering disputes that bring to the fore linkages between the trade and environment regimes.⁵⁷² To provide the necessary background information for analysing their legitimacy implications for the WTO dispute settlement system, this section introduces the key linkages cases under the *GATT*, the *TBT Agreement* and the *SPS Agreement*.

3.3.1 Linkage disputes under the *GATT*

In the 1980s and early 1990s, several cases relating to the relationship between trade and environmental protection were brought before *GATT* panels.⁵⁷³ They centered on Article XX, which allows States to derogate from their obligations, for instance, by implementing measures that are “necessary to protect human, animal or plant life or health”⁵⁷⁴ or relate to “the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁵⁷⁵ Some of the first disputes emerged between the U.S. and Canada on an import prohibition by the U.S. on Canadian tuna,⁵⁷⁶ and on Canada’s export restrictions on herring and salmon.⁵⁷⁷ Both panels found that the measures failed to fulfil the

⁵⁷¹ M. Koskenniemi, “New Institutions and Procedures for Implementation Control and Reaction” in J. Werksman, *Greening International Institutions* (Field/Earthscan Publications Ltd., 1996), 236 at 247.

⁵⁷² Note, however the dispute on access to Chilean ports by European fishing vessels that was brought to the WTO in 2000 by the EU, and taken to the ITLOS by Chile. Both proceedings were halted after a bilateral solution was reached. Request for consultations by the EC on *Chile - Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1, 26 April 2001; and ITLOS: *Case on Conservation of Swordfish-Stocks between the European Community and Chile in the South-Eastern Pacific Ocean*.

⁵⁷³ Disputes not mentioned in the text included the “*Superfund*” case on tax treatment in the U.S. on domestic petroleum and petroleum-based products. *GATT* panel report, *US - Taxes on Petroleum and Certain Imported Substances*, L/6175, 17 June 1987, BISD 34S/136. For discussion on three other cases, see Esty, *Greening the GATT*, 269-270.

⁵⁷⁴ *GATT* Article XX(b).

⁵⁷⁵ *GATT* Article XX(g).

⁵⁷⁶ *GATT* panel report, *US-Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198, 22 February 1983, BISD 29S/91.

⁵⁷⁷ *GATT* panel report, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, 22 March 1988, BISD, 35S/98.

requirements of Article XX(g), *inter alia*, because they were not “primarily aimed at” environmental protection.⁵⁷⁸ In the *Thailand Cigarettes*, the U.S. challenged Thailand’s trade restrictions on imported cigarettes, and the justification that the measures were designed to protect the health of Thai citizens.⁵⁷⁹ The panel found that the measures were not “necessary” to protect health under Article XX(b) of the *GATT* since there were less *GATT*-inconsistent measures available to achieve the same policy objective.⁵⁸⁰ This ruling was followed by the two *Tuna-Dolphin* cases that have been discussed in detail in Section 2.1 In general, *GATT* panels tended to interpret the scope of legitimate exceptions narrowly and never accepted a defence based on Article XX. The WTO dispute settlement system thus inherited the challenge of responding to the fierce criticism caused in particular by the *Tuna-Dolphin* disputes.

From early on, the WTO dispute settlement system had several opportunities to address the trade and environment linkage. One of the first WTO disputes was the *Gasoline* case brought against the U.S. by Brazil and Venezuela, arguing that the programme for reformulated gasoline and baseline establishment rules under the U.S. Clean Air Act favoured domestic refineries. Both the panel and the Appellate Body found that the U.S. measure violated the national treatment requirement under Article III of the *GATT* by discriminating imported gasoline. Both also ruled that the measure was not justified under Article XX. The AB accepted that the measure was one “related to the conservation of exhaustible natural resources” consistent with Article XX(g), but found that it violated the requirement that such measures may not constitute “unjustifiable discrimination” or “disguised restriction on international trade” under the chapeau of Article XX.⁵⁸¹ In doing so, it stressed that WTO law did not exist “in clinical isolation” from public international law.⁵⁸² The AB also noted that while the ‘primarily aimed at’ test applied by *GATT* panels and the *Gasoline* panel had not been disputed, it was not based on treaty language and “was not designed as simple litmus test for inclusion or exclusion from Article XX(g).”⁵⁸³ All of these were important developments, and ones that were further elaborated in the subsequent *Shrimp-Turtle* dispute.

3.3.1.2 The *Shrimp-Turtle* Case

The *Shrimp-Turtle* case is the most significant linkage dispute in the WTO dispute settlement system. It originated from an import prohibition by the U.S. on shrimp and shrimp products caught by fishing technologies that may adversely affect sea turtles. As we saw in Chapter 2, the *Tuna-Dolphin* panels rejected the argument that goods could be differentiated based on processes and production

⁵⁷⁸ Esty, *Greening the GATT*, 266-267.

⁵⁷⁹ GATT panel report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, 7 November 1990, BISD 37S/200.

⁵⁸⁰ Esty, *Greening the GATT*, 268.

⁵⁸¹ Appellate Body report, *US-Gasoline*, 22, 29.

⁵⁸² *Ibid.*, 17.

⁵⁸³ *Ibid.*, 18-19.

methods. This approach has a long tradition in the GATT/WTO system⁵⁸⁴ and the *Shrimp-Turtle* decision, implying that such differentiation is sometimes possible, was therefore a remarkable milestone. This section introduces the main facts and legal arguments in the dispute. Chapter 4 will argue that while welcome, the recognition by the AB of the relevance of international environmental law also introduced several important questionmarks. These relate, in particular, to references to MEAs such as the *CBD* (to which the U.S. is not a Party) and reliance on soft-law concepts such as Principle 12 of the *Rio Declaration*. Overall, Chapter 4 argues that contrary to what some influential scholars contend, the *Shrimp-Turtle* decision did not mark the beginning of a clear and consistent trend towards the more careful consideration of environmental issues by the WTO dispute settlement system.

3.3.2.1.1 *Decisions by the Panel and Appellate Body*

Shrimp trawling has been identified as one of the leading causes of sea turtle deaths and a serious threat to the survival of sea turtles.⁵⁸⁵ The U.S. National Marine Fisheries Service developed a technology called Turtle Excluder Device (TED), essentially a trapdoor enabling sea turtles to escape from trawling nets. TEDs have been estimated to reduce turtle casualties by 97 per cent.⁵⁸⁶ After its voluntary programmes failed to produce the desired result, the U.S. first required all domestic shrimp trawlers to use TEDs in areas where incidental catches of sea turtles were likely. In 1989, also imports of shrimps were limited and no shrimp could be imported to the U.S. unless it was certified that the harvesting nation either had a regulatory programme to protect sea turtles and an incidental take rate comparable to that of the U.S., or did not pose a threat to sea turtles.⁵⁸⁷ India, Pakistan, Malaysia and Thailand jointly challenged this in 1996.

The U.S. did not contest the argument that its shrimp embargo violated the prohibition on quantitative import restrictions under *GATT* Article XI.⁵⁸⁸ The *Shrimp-Turtle* panel thus focused on whether the violation could be justified by under Article XX. The panel proceeded immediately to apply the chapeau of Article XX, contending that WTO Members were only permitted to derogate from their trading obligations “so long as, in doing so, they do not undermine the WTO multilateral trading system.”⁵⁸⁹ The panel elaborated that:

...when considering a measure under Article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but

⁵⁸⁴ Bhagwati, “Afterword: the Question of Linkage,” 133.

⁵⁸⁵ D.E. Kaczka, “A Primer on the Shrimp-Sea Turtle Controversy,” *RECIEL* 6(2) (1997), 171 at 173.

⁵⁸⁶ B. Plus, “The Murky Waters of International Environmental Jurisprudence: A Critique of Recent WTO Holdings in the Shrimp/Turtle Controversy,” *Minnesota Journal of Global Trade*, Summer (1999), 343 at 346.

⁵⁸⁷ Appellate Body report, *Shrimp-Turtle*, para. 161.

⁵⁸⁸ Howse, “A New Legal Baseline,” 495.

⁵⁸⁹ Appellate Body report, *Shrimp-Turtle*, para. 7.44

also whether such type of measure, if it were to be adopted by other Members would threaten the security and predictability of the multilateral trading system.⁵⁹⁰

This test seems to leave very little room for justifying exceptions under Article XX. It also places a lot of emphasis on the integrity of the multilateral trading system in comparison to the other legitimate policy objectives listed under Article XX. This bias made the report an easy and popular target for critiques. Also the AB criticized the panel for not following the customary rules of treaty interpretation and examining the ordinary meaning of the words of Article XX.⁵⁹¹ Instead, the panel:

...formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States.⁵⁹²

The AB stressed that application of Article XX consisted of a two-tiered analysis and concluded that the U.S. import prohibition was provisionally justified under Article XX(g) that allows measures “relating to the conservation of exhaustible national resources.” The AB highlighted that the *GATT* had to be interpreted “in the light of contemporary environmental concerns” and that its language was “by definition, evolutionary.”⁵⁹³ Thus, also living natural resources such as sea turtles fell under the definition of “exhaustible natural resources.”⁵⁹⁴ As will be shown in Chapter 4, in a significant move, the AB referred to several MEAs and other environmental instruments to support its interpretation of Article XX(g). Furthermore, instead of the “primarily aimed at” test applied by the *Tuna-Dolphin* panel, the AB simply determined that the U.S. measure was *designed* to conserve sea turtles.⁵⁹⁵ Importantly to the debate concerning the acceptability of extraterritorial trade measures, the AB stated that unilaterally conditioning market access may “to some degree be a common aspect” of measures under Article XX and:

It is not necessary to assume that requiring from exporting countries compliance with or adoption of, certain policies... prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX.⁵⁹⁶

Turning to the chapeau test, the AB also made several environmentally conscious statements. It discussed the language used in the preamble of the WTO Agreement, which demonstrated “a recognition by the WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development” – a fact that must “add colour, texture

⁵⁹⁰ *Ibid*, para.7.44

⁵⁹¹ *Ibid*, paras. 114-115.

⁵⁹² *Ibid*, para.121.

⁵⁹³ *Ibid*, paras.129-130

⁵⁹⁴ *Ibid*, para.131.

⁵⁹⁵ T.J. Schoenbaum, “The Decision in the *Shrimp-Turtle* Case,” *Yearbook of International Environmental Law* (1998), 36 at 38.

⁵⁹⁶ Appellate Body report, *Shrimp-Turtle*, para. 133.

and shading” to the interpretation of Article XX.⁵⁹⁷ The AB also emphasised the establishment of the CTE as an example of other developments “which help to elucidate the objectives of WTO members with respect to the relationship between trade and environment.”⁵⁹⁸

However, when examining the three specific criteria contained in the chapeau, namely the requirement that the measure must not constitute “unjustifiable discrimination,” “arbitrary discrimination” or “disguised restriction to trade” the AB found several defects in the U.S. measure. It indicated that the measure had been implemented in a way whereby other possible measures to conserve sea turtle were not taken into account, and this amounted to “unjustifiable discrimination.”⁵⁹⁹ As only shrimp originating from certified waters could be imported meant that shrimp caught with methods identical to those used by the U.S had been excluded from the market.⁶⁰⁰ Furthermore, the failure of the U.S to engage in serious and good faith negotiations to conclude bilateral or multilateral agreements with the relevant countries to protect sea turtles was an aspect that bore “heavily in any appraisal of unjustifiable discrimination.”⁶⁰¹ As it will be discussed in detail in Chapter 4, the AB invoked several instruments of international environmental law to show that a multilateral approach was preferable to unilateralism, including Principle 12 of the *Rio Declaration*. The AB also noted that the U.S. had negotiated one regional agreement on the protection of sea turtles, namely the *Inter-American Convention for the Protection and Conservation of Sea Turtles*,⁶⁰² showing that a reasonable alternative would have been available.⁶⁰³ Negotiating with some but not with other WTO members also had an unjustifiable and discriminatory effect.⁶⁰⁴ The AB also found that the application of the Section 609 constituted “arbitrary discrimination” due to the inflexible manner it had been applied.⁶⁰⁵ For these reasons, also the AB concluded that the import prohibition on shrimp was not justified under *GATT* Article XX.

3.3.2.1.2 Implementation Proceedings under DSU Article 21.5

The *Shrimp-Turtle* proceedings continued in October 2000. After the AB’s ruling, the U.S. only changed the way in which the measure was implemented, while Malaysia argued that the U.S. was not entitled to impose any prohibition on the imports of shrimps in the absence of an international environmental agreement.⁶⁰⁶ The outcome of the implementation phase was remarkable in that

⁵⁹⁷ *Ibid.*, para.152.

⁵⁹⁸ *Ibid.*, para.153.

⁵⁹⁹ *Ibid.*, para. 163.

⁶⁰⁰ *Ibid.*, para 165. Emphasis omitted.

⁶⁰¹ *Ibid.*, para. 165.

⁶⁰² *Ibid.*, para. 169.

⁶⁰³ *Ibid.*, para. 171.

⁶⁰⁴ *Ibid.*, para. 172.

⁶⁰⁵ *Ibid.*, paras. 177-180.

⁶⁰⁶ Panel report, *US-Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, 15 June 2001, para. 5.24.

both the panel and the AB found that Revised Guidelines on the implementation of the shrimp embargo fulfilled the requirements of Article XX and was compatible with the *GATT*.

One of the reasons why the U.S. measure no longer regarded as arbitrary or unjustifiable discrimination was that all shrimp harvesting nations were no longer required to use the same protection measure, that is, TEDs.⁶⁰⁷ Instead, a nation could be certified to export shrimps to the U.S. if it was enforcing a comparably effective regulatory program to protect sea turtles without the use of TEDs.⁶⁰⁸ This gave “sufficient latitude” to exporting countries and also allowed the U.S. authorities to consider the specific conditions in both shrimp production and sea turtle protection in each individual country.⁶⁰⁹ The second improvement were good faith efforts by the U.S. to negotiate a regional agreement concerning the conservation of sea turtles with the relevant states of the Indian Ocean. According to the 21.5 panel, what was needed were negotiations, not necessarily the conclusion of an agreement.⁶¹⁰ The AB confirmed this. In its view the U.S. “would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other.”⁶¹¹ However, requiring the U.S. to *conclude* an agreement would give any country participating in the negotiations effectively a veto as to whether the U.S. could comply with its WTO obligations.⁶¹² As the U.S. had taken several steps to negotiate an agreement on sea turtle conservation with the complaining states, it could not be held to have engaged in “arbitrary or unjustifiable discrimination” only “because one international negotiation resulted in an agreement while another did not.”⁶¹³ The outcome was thus that the U.S. measure was justified as long as these conditions and “in particular the ongoing serious good faith efforts to reach a multilateral agreement” remained satisfied.⁶¹⁴ This was an important milestone in the GATT/WTO linkage jurisprudence, but as it will be shown in Chapter 4, it did not signify the beginning of a new, consistently environmentally conscious era -and after closer examination, the *Shrimp-Turtle* decisions also created several important questionmarks.

3.3.1.3 The French Ban on *Asbestos*

The *Asbestos* arose concerning a prohibition by France on asbestos and asbestos-containing products. Canada challenged the French legislation to the extent it concerned chrysotile asbestos arguing that scientific evidence concerning health risks of chrysotile asbestos was insufficient to

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Article 21.5 Appellate Body report, *Shrimp-Turtle*, paras. 144 -148.

⁶¹⁰ Article 21.5 panel report, *Shrimp-Turtle*, para 5.64.

⁶¹¹ Article 21.5 Appellate Body report, *Shrimp-Turtle*, para. 122.

⁶¹² *Ibid.*, para. 123.

⁶¹³ *Ibid.*

⁶¹⁴ Article 21.5 panel report, *Shrimp-Turtle*, para 6.10.

warrant its comprehensive prohibition.⁶¹⁵ Both the panel and the AB disagreed. The panel was convinced by the necessity of banning asbestos to protect public health under Article XX(b). The AB went even further, concluding that the ban was consistent with *GATT* Article III:4. An individual opinion by an AB member stressed the relevance of health risks in analysing the “likeness” of asbestos and asbestos-containing products under *GATT* Article III:4, illustrating how linkage disputes challenge the economic focus of the WTO regime. Chapter 5 will also use the facts of the French asbestos prohibition to show how the competence of the WTO dispute settlement system affects the domain of national democratic processes. It also discusses the impact of the *Asbestos* case on the debate about *amicus curiae* briefs in the WTO.

3.3.1.3.1 *The Asbestos Panel Report*

The panel agreed with Canada that the French prohibition on asbestos violated the national treatment requirement under *GATT* Article III:4. The panel analysed the “likeness” of chrysotile asbestos imported from Canada in relation to PVC, cellulose and glass fibres produced by France. It relied on the four criteria developed by the Working Party on Border Tax Adjustments, namely: products’ physical properties; their end-uses; consumers’ tastes and habits; and tariff classifications. The panel emphasised that the assessment of the physical properties was an *economic analysis* rather than a scientific one.⁶¹⁶ The fact that asbestos fibres and the substituting fibres had some overlapping end-uses indicated that from the economic perspective, they were physically “like.”⁶¹⁷ In this analysis, it was not possible to consider the health risks relating to chrysotile asbestos.⁶¹⁸ Stressing “the economy of the *GATT*,” the panel argued that considering health risks of asbestos under Article III would nullify the effect of Article XX(b).⁶¹⁹ It also ruled that consumer preferences were too difficult a criteria to be examined in this context.⁶²⁰

Panel accepted, however, that the French asbestos ban was justified under Article XX(b). It stated that it had been presented with sufficient scientific evidence on the health risks of chrysotile asbestos.⁶²¹ It also explained that determining whether a measure was “necessary” under Article XX(b) involved assessing the desired level of protection, and whether alternative, less trade restrictive measures would be available.⁶²² It stressed that WTO Members had the right to set the desired level of protection.⁶²³ As the objective of France had been to obtain a high level of

⁶¹⁵ Panel report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, 18 September 2000, para. 3.12. (*Asbestos*)

⁶¹⁶ *Ibid.*, para. 8.122. Emphasis added.

⁶¹⁷ *Ibid.* Emphasis added.

⁶¹⁸ *Ibid.*, para. 8.129 *et seq.*

⁶¹⁹ *Ibid.*, 8.129-139.

⁶²⁰ *Ibid.*, paras. 8.139 – 140.

⁶²¹ *Ibid.*, paras. 8.188-8.195.

⁶²² *Ibid.*, para. 8.175.

⁶²³ *Ibid.*, para. 8.171.

protection, this could only be achieved with a comprehensive ban.⁶²⁴ Therefore, no less trade restrictive alternative was available and the requirements of Article XX(b) were satisfied.⁶²⁵ As Canada had not even argued that the ban violated the chapeau of Article XX, the panel concluded that the French measure was consistent with the *GATT*.

3.3.1.3.2 *The Appellate Body's Asbestos Report*

The Appellate Body modified the panel's interpretation of likeness of products under Article III:4 in an important way. It emphasized that:

...in examining the 'likeness' of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the *GATT*.⁶²⁶

The AB explained that health risks were not a separate criterion but could be considered "under the existing criteria of physical properties, and of consumers' tastes and habits."⁶²⁷ This would not nullify the effect of Article XX(b) given that Articles III and XX were distinct and independent provisions to be interpreted on their own.⁶²⁸ The AB also criticized the panel for declining to examine consumers' tastes and habits.⁶²⁹

In its own likeness analysis, the AB emphasized that chrysotile asbestos fibres have been internationally recognized as a carcinogen since 1977.⁶³⁰ Carcinogenity, or toxicity, was "a defining aspect of the physical properties of chrysotile asbestos fibres,"⁶³¹ meaning that "physically, chrysotile asbestos and PCG fibres are very different."⁶³² This placed a high burden for the complainant to demonstrate the 'likeness' of asbestos and substituting fibres.⁶³³ The AB also found that although asbestos and PCG fibres had some overlapping end-uses, it was not known what proportion of all end-uses overlapped.⁶³⁴ It was therefore not possible to determine the significance of the overlapping end-uses.⁶³⁵ As there was no evidence of the consumers' taste and habits, there was no basis, bearing in mind their physical properties, for concluding that the products were 'like.'⁶³⁶ The evidence taken together thus lead the AB to reverse the panel's finding that chrysotile

⁶²⁴ *Ibid.*, para. 8.204 *et seq.*

⁶²⁵ *Ibid.*, para. 8.222.

⁶²⁶ Appellate Body report, *EC- Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, 12 March 2001, para. 113.

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.*, para. 115.

⁶²⁹ *Ibid.*, para. 120.

⁶³⁰ *Ibid.*, para. 135.

⁶³¹ *Ibid.*, para. 114.

⁶³² *Ibid.*, para. 136.

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*, para. 138.

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*, para. 139.

asbestos fibres were 'like' PCG fibres under Article III:4 of *GATT*. It reached the same conclusion regarding such products respectively emphasizing that:

In terms of composition, the physical properties of the different cement-based products appear to be relatively similar. Yet, there is one principal and significant difference between these products: one set of cement-based products contains a known carcinogenic fibre, while the other does not.⁶³⁷

The implication of the AB' finding was that the French asbestos was consistent with *GATT* Article III:4. For this reason, there was no need for recourse to Article XX.

The AB upheld, however, the panel's findings concerning Article XX. In discussing the necessity test and the availability of less trade restrictive alternative measures to the French asbestos decree under subparagraph(b) of Article XX, the AB referred to its report on *Korean Beef*. It indicated that one element in "the weighing and balancing process" to determine whether a WTO-consistent alternative measure was reasonably available was the extent to which such alternative measures contributed to the realization of the end pursued.⁶³⁸ In the *Asbestos* case the AB found that the objective pursued, the preservation of human life and health, was "both vital and important in the highest degree."⁶³⁹ Alternative measures, such as controlled use of asbestos as suggested by Canada, "would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks"⁶⁴⁰ The AB thus upheld the panel's finding that the French legislation was necessary to protect human life or health under Article XX(b). The legitimacy implications of the AB's "necessity" test that seeks to balance the relative importance of the values protected will be criticised in section 5.1.

The analysis of "likeness" in the *Asbestos* illustrates the difficulty of sustaining an economic perspective when applying the *GATT*. The panel's approach of not considering carcinogenic properties of asbestos in its "likeness" analysis received well-deserved criticism: it would have placed "on any regulator wishing to distinguish between hazardous and non-hazardous... products, the burden of meeting the *GATT*'s narrowly drawn exceptions."⁶⁴¹ The AB's decision was therefore a welcome development. It was accompanied with a concurring statement by a member of the AB, stressing "overwhelming" scientific evidence on the carcinogenicity of chrysotile asbestos⁶⁴² and expressing preparedness to go further than the Appellate Body and conclude that chrysotile asbestos fibres were not "like" PCG fibres even in the absence of evidence on end-uses

⁶³⁷ *Ibid*, para. 142.

⁶³⁸ *Ibid.*, para. 172.

⁶³⁹ *Ibid*.

⁶⁴⁰ *Ibid*, para. 174.

⁶⁴¹ A. Palmer & J. Werksman, "Case Note: World Trade Organization, European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Panel Report," *RECIEL* 10(1) (2001), 125 at 126-127.

⁶⁴² Appellate Body report, *Asbestos*, para. 151.

and consumers' tastes and habits.⁶⁴³ The statement indicated that it was difficult to imagine what kind of evidence could “outweigh and set naught the undisputed deadly nature of chrysotile asbestos fibres.”⁶⁴⁴ Furthermore,

... the necessity or appropriateness of adopting a “fundamentally” economic interpretation of the “likeness” of products under Article III:4 of the *GATT* does not appear to me to be free from substantial doubt. Moreover, in future contexts, the line between a 'fundamentally' and 'exclusively' economic view of 'like products' under Article III:4 may well prove very difficult, as a practical matter, to identify.⁶⁴⁵

This clearly illustrates the potential of linkage issues to challenge the limits of the WTO regime, as well as the application of fairly established and seemingly economic concepts such as “like” products. Overall, the AB’s *Asbestos* decision was welcomed by many as providing “clearer and perhaps more ample assurances to regulators that non-protectionist domestic regulations for important policy purposes will not be significantly constrained by WTO law.”⁶⁴⁶

3.3.1.4 EC-Preferences, US-Gambling and Brazilian Tyres

The WTO dispute settlement system has considered also some other linkage disputes under the *GATT*. In the *EC-Preferences*, India challenged EU’s scheme for generalised tariff preferences (GSP) for developing countries to the extent it concerned benefits granted to countries controlling drug production and trafficking.⁶⁴⁷ The panel concluded that the EU’s Special Arrangements to Combat Drug Production and Trafficking, available to only 12 countries, violated the Most Favoured Nation principle as well as the Enabling Clause, which requires benefits to be provided on a non-discriminatory basis.⁶⁴⁸ According to the panel, the term “non-discriminatory” required *identical* tariff preferences for *all* developing countries.⁶⁴⁹ The panel also rejected the argument that the European GSP system could be justified under Article XX(b) as it was not necessary to protect human life or health in the EU and also violated the chapeau of Article XX.⁶⁵⁰ The Article XX aspect of the decision was not appealed. Concerning the Enabling Clause, however, the AB ruled that granting “non-discriminatory” preferences meant that all *similarly situated* beneficiaries had to be granted identical tariff preferences.⁶⁵¹ This did not mean identical treatment of all developing

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*, para.154.

⁶⁴⁶ R. Howse & E. Tuerk, “The WTO Impact on Internal Regulations, A Case Study of the Canada-EC Asbestos Dispute,” in G. de Burca & J. Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2001), 283 at 327.

⁶⁴⁷ For an overview, see M. Irish, “GSP Tariffs and Conditionality: A Comment on *EC-Preferences*,” *Journal of World Trade* 41(4) (2007), 683.

⁶⁴⁸ Panel report, *EC-Conditions for Granting Tariff Preferences to Developing Countries*, WT/DS246/R, 1 December 2003, paras. 7.134-7.147. (*EC-Preferences*).

⁶⁴⁹ *Ibid.*, para. 7.161.

⁶⁵⁰ *Ibid.*, para. 7.210.

⁶⁵¹ Appellate Body report, *EC-Conditions for Granting Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 20 April 2004, para. 154.

countries but additional preferences could be granted for countries with particular needs.⁶⁵² The AB found, however, that the EU's GSP scheme violated these requirements as the EU had not demonstrated that its Drug Arrangement was available to all countries similarly affected by the problem of drug trade.⁶⁵³ While the outcome thus remained the same, the AB's decision was important in accepting a degree of conditionality and differentiation.

The *U.S. Gambling* dispute concerned the question whether the U.S. could prevent the cross-border supply of online gambling and betting services under the general exceptions of the *GATS*. Antigua and Barbuda challenged the U.S. prohibition, while the U.S. argued that online gambling brought to the fore concerns related to organized crime, money laundering, fraud, underage gambling and public health. The panel ruled that the U.S. measure violated *GATS* Articles VI:1 and VI:3, and were not justified under the general exceptions listed in Articles XIV(a) and XIV(c).⁶⁵⁴ The AB, however, accepted that the measures qualified as ones "necessary to protect public morals or to maintain public order" but failed to satisfy the conditions of the chapeau of Article XIV.⁶⁵⁵

In analysing *GATS* Article XIV, the panel had found that the U.S. had failed to look for reasonable available alternatives to its restrictions. Essentially, the panel's findings seemed to mean that for a measure to be "necessary," WTO Members must demonstrate that they have explored and exhausted all reasonably available WTO-consistent alternatives. The AB did not agree. It stated that:

An alternative measure may be found not to be "reasonably available", however, where it 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. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection...⁶⁵⁶

Furthermore, the respondent is *not* required to demonstrate that there are no other reasonable alternatives to its measure.⁶⁵⁷ As in the *Korean Beef*, the panel and AB also used a weighing and balancing test in determining the necessity of a measure. This question will be discussed in detail in section 5.2. Here, the AB's more lenient test concerning reasonably available alternatives seems well-justified as one that leaves WTO Members leeway in choosing the most appropriate measures.

⁶⁵² *Ibid.*, para. 169.

⁶⁵³ *Ibid.*, paras. 180-189.

⁶⁵⁴ Panel report, *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS258/R, 10 November 2004. (*US-Gambling*).

⁶⁵⁵ Appellate Body report, *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS258/AB/R, 7 April 2005, para. 373.

⁶⁵⁶ *Ibid.*, para. 308.

⁶⁵⁷ *Ibid.*, paras. 309-310.

In the *Gambling* dispute the AB did, however, uphold the panel's conclusion that the measures violated the chapeau of *GATS* Article XIV, although on a narrower ground.⁶⁵⁸

In the recent *Brazilian Tyres* dispute, questions concerning necessity and reasonable alternatives surfaced again. The dispute is interesting as it is a case where an emerging economy, namely Brazil, is invoking health protection as a justification for a measure challenged by the EU.⁶⁵⁹ In its decision, the *Brazilian Tyres* panel agreed with the EU that the import ban on retreaded tyres was inconsistent with *GATT* Articles XI and III:4. Concerning Brazil's defence under Article XX, the panel accepted that accumulation of waste tyres was associated with serious health risks, including transmission of dengue, yellow fever and malaria, and exposure by human beings to toxic emissions from tyre fires.⁶⁶⁰ The seriousness of these risks and the importance of the policy objective lead the panel to accept that the measure was "necessary"⁶⁶¹ and provisionally justified under Article XX(b).⁶⁶² It concluded, however, that the ban failed to comply with the chapeau requirements given, *inter alia*, that large quantities of rethreaded tyres were imported to Brazil through court injunctions. The import ban was thus applied in a way that constituted unjustifiable discrimination and disguised restriction to trade.⁶⁶³

In its decision, the AB analysed the panel's approach to determining "necessity" under Article XX(b). It explained that the methodology to assess a measure's contribution to the objective of health protection is a function of the nature of the risk, the objective pursued, and the level of protection sought.⁶⁶⁴ Referring to the *Asbestos* case, the AB stressed that risk to human health could be demonstrated either in quantitative or qualitative terms⁶⁶⁵ and the same applies to assessing the measure's contribution to the policy objective.⁶⁶⁶ The panel's *qualitative* analysis of health risks associated with the accumulation of retreaded tyres was therefore justified.⁶⁶⁷ The AB also stressed that certain complex public health or environmental problems "may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures," and sometimes the impacts of such measures can only be measured with the benefit of time.⁶⁶⁸ As an example, the AB mentioned measures to combat climate change.⁶⁶⁹

⁶⁵⁸ *Ibid.*, paras. 369-372.

⁶⁵⁹ Panel report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007. (*Brazilian Tyres*).

⁶⁶⁰ *Ibid.*, para. 7.742.

⁶⁶¹ *Ibid.*, para. 7.746.

⁶⁶² *Ibid.*, paras. 7.842-850.

⁶⁶³ *Ibid.*, para. 7.989.

⁶⁶⁴ Appellate Body report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, DS332/AB/R, 3 December 2007, para 145.

⁶⁶⁵ Appellate Body report, *Asbestos*, para. 167.

⁶⁶⁶ Appellate Body report, *Brazilian Tyres*, para. 146.

⁶⁶⁷ *Ibid.*, paras. 147-149, 153.

⁶⁶⁸ *Ibid.*, para. 151.

⁶⁶⁹ *Ibid.*

The AB appreciated that Brazil was implementing a comprehensive strategy to deal with waste tyres and that over time, the import ban on waste tyres was likely to make a material contribution to its objectives.⁶⁷⁰ The AB also upheld the panel's finding that no less trade restrictive alternatives were reasonably available for Brazil. It stressed the *Gambling* decision and noted that the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure.⁶⁷¹ Concerning the chapeau, however, the AB found that exempting MERCOSUR countries from the import ban amounted to arbitrary and unjustifiable discrimination as well as disguised restriction to international trade, even if the exemption was based on a ruling by a MERCOSUR arbitral tribunal.⁶⁷² Furthermore, the imports of used tyres through court injunctions went "against the objective pursued" and therefore also amounted to arbitrary or unjustifiable discrimination.⁶⁷³ Therefore, also the AB ultimately found that the Brazilian ban was not justifiable under Article XX.⁶⁷⁴

3.3.2 Disputes under the *TBT Agreement*

The *TBT Agreement* was negotiated during the Uruguay Round to ensure that technical regulations and standards do not create unnecessary obstacles to international trade.⁶⁷⁵ It was first considered in the *Asbestos* dispute. Contrary to the panel, the AB found that the French asbestos ban fell under the *TBT Agreement*.⁶⁷⁶ The *TBT Agreement* applies to technical regulations, defined as "documents, which lay down product characteristics."⁶⁷⁷ While the panel concluded that a measure banning a product is not a measure specifying product characteristics, the AB ruled that an integral and essential aspect of the French asbestos decree was the regulation of products containing asbestos fibres - namely that all products must *not* contain asbestos.⁶⁷⁸ Even if the measure was a technical regulation covered by the *TBT Agreement*, the AB decided that the legal and factual aspects of the panel report did not give it an adequate basis to rule on the *TBT Agreement*.⁶⁷⁹ Nevertheless, the AB's report offered some clarity concerning the relationship between the *GATT* and *TBT*

⁶⁷⁰ *Ibid.*, paras. 154-155.

⁶⁷¹ Appellate Body report, *Brazilian Tyres*, para. 171.

⁶⁷² *Ibid.* paras. 228, 233 and 238.

⁶⁷³ *Ibid.* para. 246.

⁶⁷⁴ *Ibid.* para 252.

⁶⁷⁵ *TBT Agreement*, preamble.

⁶⁷⁶ Appellate Body report, *Asbestos*, paras. 75-76..

⁶⁷⁷ *TBT Agreement*, Annex 1.1.

⁶⁷⁸ Appellate Body report, *Asbestos*, para. 72.

⁶⁷⁹ *Ibid.*, paras. 81-83. The AB has been criticised for violating the principle *jura novit curia* and even for effectively rendering a *non liquet*. J. Pauwelyn, "Cross-Agreement Complaints before the Appellate Body: A Case Study of the *EC-Asbestos* Dispute," *World Trade Review* 1(1) (2002), 63.

Agreements by seemingly endorsing the view that the rights and obligations in these two agreements operate concurrently and both may apply to a single dispute.⁶⁸⁰

The *TBT Agreement* has subsequently been applied in the *EC-Sardines* dispute whereby Peru challenged the EU's regulation according to which only the species *Sardina pilchardus* *Albaum* could be marketed in the EU as 'sardines'.⁶⁸¹ The said species is largely fished by European vessels, while similar species caught in the Pacific Ocean could not be sold as sardines in Europe.⁶⁸² However, according to an international standard by the Codex Alimentarius Commission, the species found in the Pacific could be sold as sardines in most other markets.⁶⁸³ The AB's decision emphasised the role of Codex standards and rejected the EU's argument that only standards adopted by consensus could be "relevant" international standards under Article 2.4 of the *TBT Agreement*.⁶⁸⁴ The AB also agreed with the panel that the EU's regulation was not based on the Codex standard.⁶⁸⁵ It reversed, however, the burden of proof from the EU to Peru to show that the Codex Standard is an effective and appropriate means to fulfil the "legitimate objectives" of market transparency, consumer protection, and fair competition pursued by the EU.⁶⁸⁶ The AB's conclusion was that Peru had furnished adequate evidence of this. The EU's trade description of sardines thus violated the obligation in Article 2.4 of the *TBT Agreement* to base technical regulations on international standards except where such standards would be ineffective and inappropriate for the fulfilment of legitimate objectives pursued.⁶⁸⁷ The *Sardines* dispute is remarkable in that it is the first and only dispute thus far where the *TBT Agreement* has been applied, and that it emphasises the relevance of the Codex Alimentarius Commission and international standardisation bodies under the *TBT* and *SPS Agreements*. The case has also been highlighted as one where a developing country took advantage of the Advisory Centre on WTO Law and won a WTO case concerning complex international standards against the "much more formidable legal services" of the EU.⁶⁸⁸

3.3.3 Disputes under the *SPS Agreement*

Like the *TBT Agreement*, the *SPS Agreement* was negotiated during the Uruguay Round. It covers sanitary and phytosanitary measures, laying down the requirement that WTO Members must base

⁶⁸⁰ Howse & Tuerk, "The WTO Impact on Internal Regulations, A Case Study of the Canada-EC Asbestos Dispute," 308. See Trachtman & Marceau, "A Map of WTO Law of Domestic Regulation of Goods," 873 for the argument that AB considered the *TBT Agreement* as *lex specialis*.

⁶⁸¹ Panel report, *EC-Trade Description of Sardines* WT/DS231/R, 29 May 2002.

⁶⁸² G. Shaffer & V. Mosoti, "The EC-Sardines Case: How North-South NGO-Governmental Links Benefited Peru," *Bridges Monthly* 6(7), 15 October 2002.

⁶⁸³ *Ibid.*

⁶⁸⁴ Appellate Body report, *EC-Trade Description of Sardines* WT/DS231/AB/R, 26 September 2002, para. 227.

⁶⁸⁵ *Ibid.*, para. 258.

⁶⁸⁶ *Ibid.* para. 283.

⁶⁸⁷ *Ibid.* paras. 315-16.

⁶⁸⁸ Shaffer & Mosoti, "The EC-Sardines Case."

such measures on international standards or scientific risk assessment.⁶⁸⁹ Especially many NGOs felt that the built-in view of SPS measures as protectionist instruments and trade barriers undermined governments' ability to control various health and environmental risks, and advance social objectives.⁶⁹⁰ And indeed, the *Hormones* and *Biotech* disputes have been some of the most controversial linkage disputes in the WTO dispute settlement system.

In the five disputes under the *SPS Agreement*, questions concerning international standards, scientific risk assessment and precaution have played an important role. In the *Hormones* case, the AB stressed that WTO Members can implement measures resulting in a higher level of protection than that obtained by following international standards. However, such stricter measures must comply with the requirements of scientific justification and risk assessment under Articles 3 and 5 of the *SPS agreement*. The AB also indicated that during the risk assessment process, risk can be defined in either quantitative or qualitative terms and governments could act also on the basis of minority scientific opinion.⁶⁹¹ In a dispute concerning Australia's import restrictions on salmon, the AB specified three steps for the risk assessment procedure, namely identifying the diseases that a WTO Member wishes to prevent, evaluating the likelihood of the risk, and evaluating the likelihood of risk on the basis of the contemplated SPS Measure.⁶⁹² It also stated that in determining their desired level of protection, WTO Members could choose a "zero risk."⁶⁹³ Concerning the relationship between the SPS measure and risk assessment, the AB has ruled that there must be a "rational relationship."⁶⁹⁴ In the *Japan-Varietals*, the AB ruled on Article 5.7 of the *SPS Agreement*, which reflects a precautionary approach by allowing the provisional application of SPS measures while a WTO Member seeks to obtain additional information for completing a risk assessment. Agreeing with the panel, the AB concluded that the Japanese measure was not compatible with Article 5.7 as it had not been reviewed within a reasonable period of time.⁶⁹⁵

The *Japan-Apples* focused scientific justification on measures applied on imported apples from the U.S. to prevent risks associated with the fire blight disease. Both the panel and AB found that the Japanese measure did not satisfy the definition of risk assessment as Japan had not evaluated the likelihood of the disease or conducted an evaluation of the risk in light of the SPS measures to be

⁶⁸⁹ *SPS Agreement*, Articles 2.1 and 5.1.

⁶⁹⁰ Perez, *Ecological Sensitivity and Global Legal Pluralism*, 116.

⁶⁹¹ Appellate Body report, *EC-Measures Concerning Meat and Meat Products*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, paras. 187, 195. (*Hormones*)

⁶⁹² Appellate Body report, *Australia-Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, 20 October 1998, para. 123. (*Australian Salmon*).

⁶⁹³ *Ibid.*, para 125.

⁶⁹⁴ Appellate Body report, *Hormones*, para. 186.

⁶⁹⁵ Appellate Body report, *Japan-Measures Affecting Agricultural Products*, WT/DS76/AB/R, 22 February 1999. (*Japan-Varietals*).

applied.⁶⁹⁶ While Japan subsequently modified its measures, a panel established under *DSU* Article 21.5 ruled that all aspects of the new measures violated the *SPS Agreement*.⁶⁹⁷ This ruling has been criticised for shifting the locus of the scientific justification test from Article 5.1 to Article 2.2 of the *SPS Agreement*, which would seem to envisage “detailed inquiry by a WTO panel into the underlying scientific basis and justification of an SPS measure.”⁶⁹⁸ According to the same analysis, this highlights questions concerning the standard of review and the role of panels in balancing political, legal and scientific complexities.⁶⁹⁹ All this is naturally relevant for the legitimacy of the WTO dispute settlement system and related issues will be examined in detail in Chapter 5. Here, the focus will be on the *Hormones* and *Biotech* cases, which have been instrumental in shaping the relationship between WTO law and other fields of international law, including the precautionary principle as well as MEAs.

3.3.2.1 The *Hormones* Case

The *Hormones* dispute originates from the 1980s when the European Community banned imports of beef produced with the aid of growth hormones due to concerns that such hormones had caused deformities in babies.⁷⁰⁰ After years of trans-Atlantic negotiations, the U.S. and Canada brought the dispute to the WTO. They argued that the EU was violating the *SPS Agreement* as its import ban on hormone beef was not based on scientific justification. Both the panel and the AB ruled in favour of the Canada and the U.S. This did nothing to convince the EU of the need to remove its ban on hormone meat. After enacting a new directive in 2003, the EU launched dispute settlement proceedings against Canada and the U.S. to argue that as a consequence of its new, WTO-compliant measure, suspension of concessions was no longer justified. After reviewing complex scientific evidence, the panel ruled, in March 2008, that also EU’s new hormone ban violated the *SPS Agreement*.

The original *Hormones* panel found several violations the *SPS Agreement*: The EU had failed to base its SPS measure on international standards. It had also failed to conduct a scientific risk assessment and adopted arbitrary or unjustifiable distinctions in the level of protection, for instance, by permitting the use of growth hormones in the swine industry. The Appellate Body, in turn, overturned the panel’s strict interpretation of Article 3.3 requiring that SPS measures must conform to international standards, guidelines and recommendations where these exist. According to the AB, Article 3.3 conferred the WTO Members the right to adopt a higher level of protection

⁶⁹⁶ Panel report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/R, 15 July 2003, para. 8.920, and Appellate Body report in the same dispute, WT/DS245/AB/R, 26 November 2003, para. 216.

⁶⁹⁷ Article 21.5 panel report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/RW, 23 June 2005.

⁶⁹⁸ G. Goh, “Tipping the Apple Cart: The Limits of Science and Law in the SPS Agreement after *Japan-Apples*,” *Journal of World Trade* 40(4) (2006), 655 at 663, 668.

⁶⁹⁹ *Ibid.*, 665 *et seq.*, 671.

⁷⁰⁰ Esty, *Greening the GATT*, 270-271.

than that obtained by observing international standards as long as such measures were based on a scientific evaluation. The AB also modified the panel's interpretations concerning the concept of risk assessment under Articles 5.1 and 5.2 of the *SPS Agreement*. It broadened the scope of factors that could be taken into account and noted that also matters “not susceptible of quantitative analysis by the empirical or scientific laboratory methods commonly associated with the physical sciences” could be considered.⁷⁰¹ Furthermore, the AB revised the panel's finding under Article 5.2 on the existence of a procedural obligation to demonstrate a relationship between the risk assessment and the SPS measure adopted. According to the Appellate Body, what was required was a substantive rather than a procedural obligation, namely a reasonable or rational relationship between the risk assessment and the measure.⁷⁰² It concluded, however, that the EU had failed to conduct a scientific risk assessment and the hormone ban therefore violated the *SPS Agreement*. Chapter 4 will address in detail the arguments concerning the precautionary principle in the *Hormones* case as these are particularly interesting for the substantive limits of the WTO dispute settlement system.

On appeal, the EU also argued that the panel had applied an incorrect standard of review, in other words, the panel should have deferred to the EU's judgement on whether the ban on hormone beef was justified on scientific grounds.⁷⁰³ In response, the AB explained that the required standard was neither *de novo* nor deferential review, but “objective assessment.”⁷⁰⁴ As the standard of review determines the extent to which the WTO dispute settlement system second guesses decisions by national authorities, it affects the delineation of competences between the national and international levels and is therefore relevant for the legitimacy of the WTO dispute settlement system (see section 5.2).

3.3.2.1.1 *Dispute over the Continued Suspension of Concessions*

After the original panel and AB reports, the *Hormones* dispute continued with arbitration under DSU Article 21.3 to determine the reasonable period for EU to implement the rulings,⁷⁰⁵ and proceedings under DSU Article 22.2 to authorise Canada and the U.S. to retaliate by suspending concessions against the EU.⁷⁰⁶ In 2003, the EU argued that the suspension of concessions was no longer justified since the new Directive 2003/74/EC, complying with the *Hormones* reports, had

⁷⁰¹ Appellate Body report, *Hormones*, para 187.

⁷⁰² *Ibid.*

⁷⁰³ *Ibid.*, para. 111.

⁷⁰⁴ *Ibid.*, para. 117.

⁷⁰⁵ Decision by the Arbitrators, *EC-Hormones. Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, 29 May 1998.

⁷⁰⁶ Decision by the Arbitrators, *EC-Hormones. Recourse to Arbitration by the European Communities*, WT/DS26/ARB, 12 July 1999.

been notified to the DSB.⁷⁰⁷ The new Directive placed a definitive import prohibition on meat from animals treated with oestradiol-17 β and a provisional ban on meat and meat products from animals treated with the five other hormones.⁷⁰⁸ At the request of the EU, a panel was established in 2005 to examine the continued suspension of concessions by Canada and the U.S., and its report was circulated at the end of March 2008. What is remarkable about the process is that for the first time, the panel's meetings with the disputing parties were opened to the public (see section 5.3).

The panel first found in favour of the EU that the U.S. had breached *DSU* Articles 23.1 and 23.2(a) by determining that the new hormone meat ban violated covered agreements without having recourse to the WTO dispute settlement proceedings.⁷⁰⁹ It then addressed EU's claims under *DSU* Article 22.8 providing that the suspension of concessions must be temporary and applied only until the inconsistent measure has been removed. The panel concluded that while the substantive provisions of the *SPS Agreement* were not covered by its terms of reference, analysing them was the "immediate consequence" of including *DSU* Article 22.8 in the EU's request to establish a panel.⁷¹⁰ The panel thus proceeded to analyse whether the EU's new directive complied with the *SPS Agreement*.⁷¹¹ It noted that in doing so, it "performed functions similar to that of an Article 21.5 panel" but stressed that this was done "only in order to determine whether Article 22.8 had been breached" since it did not have jurisdiction to determine the compatibility of the EU's new measure with the covered agreements.⁷¹²

The EU contended that its ban on oestradiol-17 β complied with the *SPS Agreement* by virtue of a comprehensive risk assessment, and the ban on five other growth hormones was justified Article 5.7 of the *SPS Agreement* permitting provisional measures due to insufficient scientific information.⁷¹³ The U.S. argued that the EU's ban on hormone meat violated Article 3.3 of the *SPS Agreement* as it was not based on the international standards developed by the Codex Alimentarius Commission.⁷¹⁴ Stricter measures were not justified as the EU had still not complied with the requirements for risk assessment and justification of provisional measures under Article 5.7 of the *SPS Agreement*.⁷¹⁵

The panel began by examining whether the EU's ban on oestradiol-17 β complied with the risk assessment requirement under Article 5.1. Conscious of the delicacy of questions concerning the

⁷⁰⁷ Panel report, *US-Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/R, 31 March 2008, para. 7.151.

⁷⁰⁸ *Ibid.*, para. 7.157.

⁷⁰⁹ *Ibid.*, paras. 7.232, 7.856.

⁷¹⁰ *Ibid.*, para. 769.

⁷¹¹ *Ibid.*, para. 7.580.

⁷¹² *Ibid.*, para. 8.3.

⁷¹³ *Ibid.*, para. 7.841.

⁷¹⁴ *Ibid.*, paras. 7.838-840.

⁷¹⁵ *Ibid.*

standard of review, it stressed that it did not intend to conduct its own assessment or impose its scientific opinions on the EU.⁷¹⁶ After reviewing complex scientific information, it found two defects: the EU had not complied with the requirements for risk assessment set out in Annex 4(a) of the *SPS Agreement* because its scientific assessment had not evaluated the possibility that the adverse health effects of excess hormones result from the consumption of hormone meat.⁷¹⁷ Furthermore, scientific evidence on hormone meat did not support the conclusion that the EU had drawn from the risk assessment.⁷¹⁸ Therefore, the EU's new measure was not consistent with Article 5.1. of the *SPS Agreement*.⁷¹⁹

Concerning the five other hormones, the panel analysed whether scientific evidence was insufficient to justify a provisional ban in accordance with Article 5.7. The panel recalled the AB's decision in *Japan-Apples* that scientific evidence is not sufficient if it does not, in quantitative or qualitative terms, allow a risk assessment under Article 5.1.⁷²⁰ It noted large amount of evidence from parties and ruled that since the EU had the burden of proof to demonstrate the lack of sufficient scientific evidence, its analysis focused on insufficiencies identified by the EU.⁷²¹ Going through evidence on each of the five hormones, the panel concluded that the EU had not established that scientific evidence was insufficient concerning any of them.⁷²² The EU should have identified "critical mass" of new evidence to support its argument that since 1997, new evidence had identified important gaps in scientific knowledge concerning the five hormones.⁷²³

The conclusion was therefore that the EU's ban violated Articles 5.1 and 5.7 of the *SPS Agreement*. On this basis, the panel refrained from making conclusions under Article 3.3.⁷²⁴ Returning to the EU's complaint under the *DSU*, the panel concluded that since it had not been established that the EU had removed the measure inconsistent with the covered agreements, there was no basis for finding that the U.S. had violated *DSU* Article 22.8 by continuing the suspension of concession.⁷²⁵ Instead, to implement its findings, the panel recommended the U.S. to "have recourse to the rules and procedures of the *DSU* without a delay."⁷²⁶ Thus, the WTO dispute settlement found yet again that the EU's ban on hormone meat lacked scientific foundation due to the lack of evidence on specific risk - namely that adverse health effects associated with growth hormones are linked with the consumption of hormone meat. Furthermore, the panel contended that scientific evidence on

⁷¹⁶ *Ibid.*, para 7.443.

⁷¹⁷ *Ibid.*, para. 7.537, 7.578.

⁷¹⁸ *Ibid.*, para. 7.573, 7.587.

⁷¹⁹ *Ibid.*, para. 7.579.

⁷²⁰ *Ibid.*, para. 7.24, and Appellate Body report, *Japan-Apples*, para. 179.

⁷²¹ Panel report, *US-Continued Suspension of Concessions*, paras. 7.651-53.

⁷²² *Ibid.*, para. 7.834.

⁷²³ *Ibid.*, para. 7.831-35.

⁷²⁴ *Ibid.*, paras. 7.845-846.

⁷²⁵ *Ibid.*, paras. 7.847-850.

⁷²⁶ *Ibid.*, para 8.3

the five other hormones was sufficient for the EU to conduct a proper risk assessment. For environmental NGOs, the outcome of the proceedings was a disappointment and they accused the WTO for continuing to push ahead a narrow-minded market-access agenda that completely overshadows non-trade concerns.⁷²⁷ Be as it may, the latest decision in the hormones controversy illustrates yet again trans-Atlantic differences over trade in products of modern science, including hormone meat and genetically modified products. Together with the *Biotech* dispute, it also demonstrates that SPS disputes often require WTO panels to assess extremely complex scientific evidence, bringing to the fore questions concerning expertise and distribution of competence between the WTO and its Member States (see section 5.2).

3.3.2.2 *Biotech* - the WTO and Modern Biotechnology

Another recent high profile linkage dispute in the WTO dispute settlement system is the *Biotech* dispute concerning the approval of genetically modified (GM) products by the EU.⁷²⁸ Given advances in the field of biotechnology, it is possible to produce genetically engineered organisms in laboratories. These include transgenic crops, which contain a gene or genes transferred from different species by using recombinant DNA methods. Since the mid-1990s, GM crops have been introduced for cultivation in agricultural lands. Typically, their genome has been manipulated to increase yields, make them tolerant against herbicides or resistant against insects, or non-biological stresses such as droughts. However, several ecological concerns have been associated with biotech crops, including spread of transgenes to related organisms, horizontal gene flow and effects on non-target organisms.⁷²⁹ These risks are both complex and uncertain.⁷³⁰ This is why many argue that more time and scientific analysis is necessary before releasing biotech crops into the environment at a larger scale.

The first GM crop, the FlavrSavr Tomato, was approved for sale in the U.S. in 1994. Since then, especially the cultivation of genetically modified soy, maize and cotton has increased and become commercially viable. The cultivation of GM crops is still largely confined to a few countries, most notably the U.S., Argentina, Canada, Brazil, China and South Africa. In the early 1990s, the EU authorised the commercial release of a number of GM products to be used for cultivation or as food or feed. Soon afterwards, several Member States started voicing concerns over the adequacy

⁷²⁷ Friends of the Earth & al., "WTO Ruling Force-Feeds Hormones to Europe," Press Release of 31 March 2008. Available at: <http://www.foeeurope.org/press/2008/Mar31_WTO_ruling_force_feeds_hormones_to_Europe.html>

⁷²⁸ The terms biotech products, GMOs, GM products, GM plants and GM crops were used interchangeably in the *Biotech* panel report and they will also be used interchangeably in this work.

⁷²⁹ R. Hill & al., "Risk Assessment and Precaution in the Biosafety Protocol," *RECIEL* 13(3) (2004), 263 at 263-265. Accordingly, "horizontal gene-flow" means non-sexual gene flow to related or unrelated species. Concerns have been expressed, in particular, relating to the transfer of antibiotic-resistant genes to bacteria, including human bacteria.

⁷³⁰ Friends of the Earth & Greenpeace, "Hidden Uncertainties: What the European Commission Does Not Want Us To Know About the Risks of GMOs," April 2006. Available at: <http://www.foeeurope.org/biteback/download/hidden_uncertainties.pdf>.

of the European regulatory framework concerning risk assessment, labelling and traceability of GM products. This was largely motivated by highly critical attitudes by European consumers towards GM products, probably influenced by European food scares such as the “mad cow disease” (i.e. the bovine spongiform encephalopathy, BSE) or outbreaks of the food and mouth disease. Pending the formulation of its new regulations on the approval and labelling of bioengineered products, the EU effectively suspended the approval of new GM products from October 1998 to May 2004. Certain individual Member States also prohibited products already approved for the European market. The leading producers of biotech products, including the U.S., grew concerned about their access to the European market and the potential of the European actions to influence attitudes towards GM crops around the world.

From the beginning, the international community was conscious of challenges posed by modern biotechnology to environmental protection. Between 1996 and 2000 negotiations thus took place under the *CBD* for a specialised regime to protect biological diversity and control international movements of GM products. Participation in the process was extensive and the five main negotiating groups also included the Miami Group in which Argentina, Australia, Canada, Chile, the U.S. and Uruguay participated.⁷³¹ The resulting *Cartagena Protocol* applies to transboundary movements of living modified organisms designed for voluntary introduction into the environment (such as seeds and fish) as well as those destined for use as food, feed or in food processing (despite the U.S opposition in the negotiations). The latter definition would cover most of the internationally traded biotech products, including soybeans, maize and cotton. The *Protocol* creates a detailed regime for international movements of such products. It establishes an Advance Informed Agreement procedure to ensure that countries have all the necessary information before approving imports of living modified organisms into their territory. The Protocol also contains detailed provisions on risk assessment related to living modified organisms. Its Article 26 highlights the role of socio-economic considerations in the decision-making process and provides that parties:

... may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.

Article 18 of the Protocol and related decisions by the Conference of the Parties serving as the Meeting of the Parties establish detailed requirements for the handling, transport, packaging and identification of living modified organisms. The *Protocol* also created the Biosafety Clearing House to facilitate the exchange of information on living modified organisms.

⁷³¹ IISD, *The Earth Negotiations Bulletin*, 9(379), 26 February 2007.

Those negotiating the *Cartagena Protocol* were aware of its close proximity with WTO rules, including the *SPS Agreement* and attempted addressing their potential conflicts.⁷³² The preamble of the *Cartagena Protocol* thus emphasizes that the Protocol does not imply a change in the Parties' rights and obligations under existing international agreements - but it also refers to the understanding that this "is not intended to subordinate" the Protocol to other international agreements. Through this ambiguous formulation the negotiators effectively deferred questions concerning the relationship between the Protocol and WTO rules for future resolution by those applying the rules. The *Cartagena Protocol* entered in force in September 2003, only a few months after Argentina, Canada and the U.S. launched the *Biotech* proceedings against the EU at the WTO. The Protocol has over 130 parties, including the European Community and its Member States. In addition, 60 countries have signed the Protocol – including Canada and Argentina. The U.S., in turn, is not party to either the *Convention on Biological Diversity* or the *Cartagena Protocol*.

As Argentina, Canada and the U.S. commenced WTO dispute settlement proceedings against the EU, many observers worried about the legitimacy implications of a WTO ruling on such a sensitive topic.⁷³³ They anticipated that a strong condemnation of the EU's GM regime by the WTO would lead to protests against the decision in Europe, thereby further challenging the legitimacy of the WTO. International lawyers also worried about the potential for an open conflict between the *SPS Agreement* and the *Cartagena Protocol*. Not surprisingly, the European Union regretted the decision by the complainants to launch dispute settlement proceedings at the WTO:

There is a serious question as to whether the WTO is the appropriate international forum for resolving all the GMO issues that the Complainants have raised in these cases. The European Community can only regret that the Complainants have chosen to start a dispute settlement procedure based on flawed premises...⁷³⁴

The complainants chose to limit their legal challenge in a way that did not contest the existence or the substance of the EU's regulatory framework but focused on its *de facto* application. Their first complaint thus concerned the EU's practice for the approval of biotech products, in other words, the *de facto* suspension of their approval and product-specific delays.⁷³⁵ The complainants emphasized that while over 30 applications were pending in the pipeline, some of which had received a favourable risk assessment from the EU's own scientific bodies, the EU had failed to approve any new biotech products since October 1998.⁷³⁶ The EU denied the existence of a *de facto* moratorium and highlighted the scientific complexity of assessing the impacts of GMOs, limited

⁷³² For criticism of the *Cartagena Protocol*, see A. L. Hobbs & al., "The Biosafety Protocol: Multilateral Agreement on Protecting the Environment or Protectionist Club," *Journal of World Trade*, 39(2) (2005), 281.

⁷³³ Isaac & Kerr, "A Harvest for Trouble," 1083-1095.

⁷³⁴ First written submission by the EU in *EC –Measures Affecting the Approval and Marketing of Biotech Products*, 17 May 2004, para. 10.

⁷³⁵ Panel report, *EC-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, para. 7.98. (*Biotech*).

⁷³⁶ *Ibid.*, paras. 4.10-11, 4.418.

experience on GMOs and the irreversibility of introducing them into the environment given that they are able to reproduce autonomously.

The panel concluded that the EU had applied a *de facto* moratorium on the approval of GMO products from June 1999 until August 2003 when the panel was established.⁷³⁷ Its legal analysis focused on the *SPS Agreement*, while the complainants had also invoked the *GATT* and the *TBT Agreement*. The panel found that the general moratorium and the product-specific delays were not themselves SPS measures but they were measures affecting the operation of SPS measures.⁷³⁸ As a consequence, the EU's entire regulatory scheme on the environmental release of GM crops as well as substantial parts of its regulations on novel food authorisations were covered by the *SPS Agreement*. Several authors have criticised the panel for its broad interpretation of the coverage of the *SPS Agreement*, bringing a range of health and environmental risks fall within its scope.⁷³⁹ The panel ruled that by failing to undertake and complete the approval procedures without "undue delay" the EU had violated Article 8 and Annex C of the *SPS Agreement*.⁷⁴⁰ The delays could not be justified by reference to evolving science or precaution as the EU could have adopted temporary measures or placed conditions on the final approval.⁷⁴¹ The panel thus concluded that the EU must lift its general moratorium on GMO products, if still in place, and complete the delayed approval processes.⁷⁴²

The second category of challenged measures concerned actions by Austria, Belgium, France, Germany, Italy and Luxembourg prohibiting or restricting the marketing of biotech products. The panel found these to be SPS measures that were not based on a risk assessment in violation of Articles 2.2 and 5.1 of the *SPS Agreement*.⁷⁴³ It explained that none of the individual Member States had evaluated risks associated with the GM products that they banned.⁷⁴⁴ Furthermore, it was not possible for these countries to invoke risk assessments carried out at the Community level as the EU's scientific bodies had assessed the risks favourably and the products had been approved in the EU as a whole.⁷⁴⁵ The panel also found that the bans imposed by the individual Member States could not be justified under Article 5.7 of the *SPS Agreement* as sufficient scientific evidence was available for conducting a proper risk assessment.

⁷³⁷ *Ibid.*, para. 7.1285. For a good summary of the decision, see A. Palmer, "The WTO GMO Dispute: Implications for Developing Countries and the Need for an Appeal," November 2006.

⁷³⁸ *Ibid.*, para. 7.1318-1319.

⁷³⁹ J. Peel, "A GMO by Any Other Name... Might Be an SPS Risk! Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement," *European Journal of International Law* 17(5) (2007), 1009 at 1012-1013. See also Palmer, "The WTO GMO Dispute," 6-7, 10.

⁷⁴⁰ Panel report, *Biotech*, para. 8.6-7.

⁷⁴¹ *Ibid.*, para. 7.1529.

⁷⁴² *Ibid.*, para. 8.16.

⁷⁴³ *Ibid.*, paras. 8.9-10.

⁷⁴⁴ *Ibid.*, para. 8.10.

⁷⁴⁵ *Ibid.*, para. 8.9.

It is clear that the *Biotech* dispute brings to the fore several questions relevant to the topic of this study. The broad interpretation of the coverage of the *SPS Agreement* seems problematic given that SPS measures are subject to the more stringent requirement of scientific justification than the test of discriminatory trade effects under the *GATT* and *TBT Agreement*.⁷⁴⁶ The aspect of the dispute that will be criticised the most in Chapter 4 relates to the way in which the panel rejected the relevance of non-WTO rules of international law in the dispute. In response to arguments by the EU invoking international environmental law, the panel found that neither the precautionary principle nor any other rules of international environmental law, including the *Cartagena Protocol*, were relevant to the dispute.⁷⁴⁷ As it will be seen in Section 4.3, both its legal reasoning and political wisdom were questionable in this regard. However, the panel report was not appealed. Instead, its flawed legal analysis on the relationship between WTO law and international environmental law thus stands to demonstrating that linkage issues continue to pose serious challenges to the legitimacy of the WTO dispute settlement system.

3.4 A Dilemma between Substance and Form

This Chapter has described how the question of linkages between trade and non-trade policy objectives acquired a prominent role in the late 1990s, both politically and in the context of the WTO dispute settlement system. By reviewing the parallel but isolated evolution of the international trade and environmental regimes, it illustrated the lack of coordination between the two spheres of international law and discrepancies in their level of institutional development, especially concerning dispute settlement. It argued that due to the political prominence of the idea of sustainable development and the intimate practical linkages between trade and environmental policies, as well as the compulsory jurisdiction of the WTO dispute settlement system, linkage disputes have become a regular feature at the WTO.

As we have also seen, some of the linkage disputes have posed enormous challenges to the legitimacy of the WTO dispute settlement system. Chapter 2 highlighted the limited material jurisdiction of the WTO dispute settlement system and showed how its competence to apply non-WTO norms is subject to debate. Chapter 3 drew attention to the political tensions to broaden the substantive scope of the international trade regime and incorporate, *inter alia*, environmental issues into its realm. From the point of view of the WTO dispute settlement system, the situation appears as a difficult dilemma. As summarised by Barfield,

... the new 'judicative' WTO dispute settlement system *is substantively and politically unsustainable*. It is *not sustainable substantively* because there is no real consensus among many WTO members on many of the complex regulatory issues that the panels and the Appellate Body will be asked to rule upon. In many instances, moreover, the

⁷⁴⁶ Peel, "A GMO by Any Other Name," 1011-12.

⁷⁴⁷ *Ibid.*, paras. 7.74-75.

underlying treaty text contains gaps, ambiguities and contradictory language. The system is *not sustainable politically* because the imbalance between ineffective rule-making procedures and highly efficient judicial mechanisms will increasingly pressure panels and the AB to 'create' law, raising intractable questions of democratic legitimacy.⁷⁴⁸ (Emphasis added, KK)

This statement alludes to the tensions that form the focus of the second part of this study. The first three Chapters of this work have laid the basis for analysing the legitimacy of the WTO dispute settlement system in light of the social, substantive, formal and procedural elements of legitimacy. They have demonstrated the growing relevance of legitimacy in the field of international law, and defined it as a notion consisting of several interlinked components. They have also explained how the WTO dispute settlement system functions and how its competence has been understood. The next two Chapters, then, focus on the questions raised by Barfield and many others, namely whether the WTO dispute settlement system is sustainable substantively' and whether it is 'sustainable politically.'

⁷⁴⁸ Barfield, *Free Trade, Sovereignty, Democracy*, 7.

4. Social/Substantive Legitimacy and the WTO Dispute Settlement System

Is the WTO dispute settlement system biased towards trade and economic interests? Are non-trade values and environmental norms marginalised in the course of WTO dispute settlement proceedings? These questions have surfaced as the most prominent challenges to the social and substantive legitimacy of the WTO dispute settlement system. As we have seen, environmentalist critique of the WTO dispute settlement system has often proceeded from the argument that the WTO system is biased towards economic interests and does not adequately take into account non-trade values and policy objectives. Many of these problems result from the limited substantive mandate of the WTO dispute settlement system and its inability to consider claims based on international environmental law. According to Esty,

GATT procedures reflect a systemic bias toward trade concerns and fail to provide an appropriate (open, democratic, technically competent and fair) forum for setting the rules of international economic interaction or for adjudicating disputes that affect environmental policies.⁷⁴⁹

Many argue, however, that there have been important changes since Esty made his argument in 1994 and the most significant hurdles have now been overcome.⁷⁵⁰ Pauwelyn, for instance, contends that many of the old environmentalist myths about the GATT/WTO regime are no longer relevant and invites everyone to:

... embrace and carefully examine the Appellate Body's more nuanced approach in cases such as *US-Shrimp Turtle* and *EC-Asbestos*, as well as the WTO's increasing openness to other regimes of international law, including MEAs.⁷⁵¹

With a similar ethos Avafia argues that:

An examination of Panel and Appellate Body Reports reveals a trend generally favourable to the pursuit of sustainable development goals. There are indications that the appreciation of sustainable development objectives by WTO organs is widening to its broader socio-economic goals.⁷⁵²

However, this Chapter takes the opposite view and argues that there is no constant evolution in the jurisprudence of the WTO concerning environmental issues. While there have been important

⁷⁴⁹ Esty, *Greening the GATT*, 52-53.

⁷⁵⁰ D.A. Wirth, "Some Reflection on Turtles, Tuna, Dolphin and Shrimp," *Yearbook of International Environmental Law* (1998), 40.

⁷⁵¹ Pauwelyn, "GATT Phantoms Still Haunt the WTO," 591.

⁷⁵² T. Avafia, "Does the WTO's Dispute Settlement Understanding Promote Sustainable Development," in M. W. Ghering & M.-C. Cordonier Segger, eds., *Sustainable Development in World Trade Law* (Kluwer Law International, 2005), 257 at 271.

developments, it is impossible to detect a consistent practice towards a more careful and open approach to environmental norms in the WTO dispute settlement system.

To demonstrate this, the Chapter contains two levels of analysis concerning the relationship between WTO law and international environmental law. The first approaches the key linkage disputes from a perspective that is broader and different from one employed by many WTO scholars. Instead of assessing the *Shrimp-Turtle* and *Hormones* cases ‘top down’ from the perspective of WTO norms, I will also examine them from the viewpoint of international environmental law, asking whether their outcome could have been different if the facts were assessed in light of all relevant norms. Essentially, this analysis highlights some systemic differences between international trade law and international environmental law that, for their part, are challenging the social/substantive legitimacy of the WTO dispute settlement system. The conclusion is, however, that many of these problems are such that they cannot be remedied by the WTO dispute settlement system but their solution requires a more policy-oriented approach. The second analysis focuses on the WTO dispute settlement system and identifies ways in which its social/substantive legitimacy could be improved while at the same time respecting its limited substantive mandate. It illustrates that the WTO dispute settlement system has been somewhat inconsistent and untransparent in its approach to international environmental norms. It has therefore missed important opportunities within the scope of its mandate for enhancing its substantive legitimacy through constructive interaction with international environmental law. Finally, Section 4.3 contains a critical assessment of the recent *Biotech* decision and contends that the narrow approach to international environmental law seems to have taken the WTO dispute settlement system further from the proposed solution.

4.1 International Environmental Law in the WTO Dispute Settlement System

The argument has often been made that the limits to the substantive competence of WTO dispute settlement system prevent it from deciding linkage disputes in a way that is not biased towards international trade norms and economic interests. As we saw in Chapters 2 and 3, in its first *Shrimp-Turtle* decision, the AB was able to alleviate some of the most pressing concerns. It confirmed that the interpretation of the *GATT* was evolutionary, taking into account the rise in environmental awareness and the importance attached to sustainable development. The meaning of the expression “exhaustible natural resources” in Article XX(g) was therefore informed by various instruments of international environmental law. All this seemed to give a more concrete meaning to the famous statement by the AB that WTO law does not exist “in clinical isolation” from other rules of

international law.⁷⁵³ By involving “some kind of an engagement with the relevant MEAs,”⁷⁵⁴ the *Shrimp-Turtle* seemed to open the borders of the WTO system to international environmental law. My argument is, however, that even if the Appellate Body’s report contains some groundbreaking features, important problems remain. Some of them are legal technical in nature: On what legal grounds did the AB choose to refer to the various environmental instruments in the *Shrimp-Turtle* case? How did it conceive their legal status and relevance? Some of the remaining problems have a broader systemic dimension. By analysing the facts of the dispute from a broader perspective than that of the WTO dispute settlement system, this section aims to highlight how a dispute might be solved differently under WTO law and international environmental law. Could it have been convincingly argued that the U.S. trade ban was justified under international environmental law? And more importantly to the social/substantive legitimacy of the WTO dispute settlement system, did the limited mandate of the WTO dispute settlement system distort the legal analysis and result in a substantive bias towards trade and economic interests?

4.1.1 The *Shrimp-Turtle* Dispute and MEAs

As the AB acknowledged, it is obvious that sea turtles are endangered species and several international instruments aimed at conserving biological diversity recognise their protection as a legitimate objective. All seven species of sea turtles are listed as “critically endangered,” “endangered,” or “threatened” on the World Conservation Union (IUCN) Red List. These lists have been compiled since 1966 by the Species Survival Commission, which monitors and documents man-made risks to the survival of wild fauna and flora.⁷⁵⁵ Sea turtles are protected under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) to which all the disputing states are parties and which strictly prohibits international trade in sea turtles and turtle parts. All species of sea turtles, except the Australian flatback, are also listed in Appendices I and II of the *Bonn Convention on Migratory Species of Wild Animals* (CMS) that prohibits, *inter alia*, the “taking” of the protected migratory species.⁷⁵⁶ This can be interpreted to mean both direct and incidental takings.⁷⁵⁷ The *United Nations Convention on the Law of the Sea* (UNCLOS) also addresses the protection of living marine resources. Its Article 194(5) obligates states to take measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species. Article 60(4) requires states to consider the effects of fishing on species associated with the harvested species with a view to avoiding situations where “their reproduction may become seriously threatened.” Furthermore, the *Agreement on Implementation of the Provisions of UNCLOS*

⁷⁵³ Appellate Body report, *US-Gasoline*, 17.

⁷⁵⁴ Fiona Macmillan, *WTO and the Environment* (Sweet&Maxwell, 2001), 42.

⁷⁵⁵ P. H. Sand, “Commodity or Taboo? International Regulation of Trade in Endangered Species,” *Green Globe Yearbook* (1997), 19 at 19.

⁷⁵⁶ Article 1.1 of the CMS defines “taking” as: “taking, hunting, fishing, capturing, harassing, deliberate killing or attempting to engage in any such conduct.”

⁷⁵⁷ Kaczka, “Shrimp-Sea Turtle Controversy,” 173.

relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the *Straddling Stocks Agreement*) obliges states to minimise bycatches of non-target species.

During the *Shrimp-Turtle* proceedings, the U.S. argued that the use of Turtle Excluding Devices had:

...become a recognized multilateral environmental standard, fulfilling twin commitments on the part of the international community to conserve endangered species such as sea turtles, and to minimize their unintentional mortality in fishing operations.⁷⁵⁸

To support its arguments, the U.S. invoked the *CITES* as well as the *UNCLOS*, the *Agenda 21* and the *Straddling Stocks Agreement*.⁷⁵⁹ An *amicus curiae* brief by the Center of International Environmental Law further developed the arguments based on international environmental law. The brief stressed that the protection of sea turtles was required by numerous instruments of international environmental law and by customary principles reflected in these instruments.⁷⁶⁰ It indicated that customary rules codified in the *UNCLOS* obligate fishing states to protect the marine environment by taking into account effects on other than target species.⁷⁶¹ These general rules had been given a more specific content in the *FAO Code of Conduct for Responsible Fisheries*, which emphasises the need to ensure the conservation of species belonging to the same ecosystem as the target species.⁷⁶² The same argument was made based on the *Straddling Stocks Agreement*, requiring states to minimise catches of non-target species, especially endangered ones.⁷⁶³ The brief also invoked the *Convention on Biological Diversity*, indicating that as the complainant states had ratified it, they were required to identify threatened species and alter their commercial activities so as to minimise impacts on such species and promote their recovery.⁷⁶⁴ It further highlighted that the *CMS*, to which India and Pakistan were parties, prohibits the “taking” of protected species, including sea turtles apart from for limited purposes.⁷⁶⁵ The *amicus* brief went as far as to argue that while the U.S. conservation measures were based on international environmental obligations, the complainant nations were violating international environmental law. In other words,

...by refusing to implement TED programs the Complainants have failed to meet their commitments and obligations under these agreements and principles, and failed to abide by broad international consensus regarding the goals and means of protecting endangered sea turtles.⁷⁶⁶

The *amicus* brief then outlined some more general international environmental standards, such as the requirement to control unsustainable consumption patterns under the *Rio Declaration* and *Agenda*

⁷⁵⁸ Panel report, *Shrimp-Turtle*, 54.

⁷⁵⁹ *Ibid.*, 54-55.

⁷⁶⁰ CIEL & al., “*Amicus Curiae* Brief to the WTO Appellate Body on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*.” Available at: <<http://www.ciel.org/Publications/shrimpturtlebrief.pdf>>.

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*, 22.

⁷⁶³ *Ibid.*, 23.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*, 24.

⁷⁶⁶ *Ibid.*, 24.

21, the duty to prevent harm to the environment of other states and global commons, and the precautionary principle.⁷⁶⁷ It also argued that by providing financial and technical support for the protection of sea turtles, the U.S. was acting in accordance with principle of common but differentiated responsibilities.⁷⁶⁸ Finally, the *amicus* brief stated that while international environmental law prefers multilateral solutions, it does not prohibit unilateral trade measures.⁷⁶⁹ In contrast, the complainant nations strictly opposed any attempts to regard the U.S. import prohibition on shrimp as something justified or required by international environmental law.

Basing itself “on the current status of the WTO rules and of international law” the panel emphasised that its reasoning was consistent with general international law:

Our findings with respect to international norms confirm our reasoning regarding the WTO Agreement and the *GATT*. General international law and international environmental law clearly favour the use of negotiated instruments rather than unilateral measures...⁷⁷⁰

According to the panel, the fact that both the complainants and third parties had objected to the use of TEDs “made it difficult to conclude that the mandatory use of TEDs has been customarily accepted as a multilateral standard applicable to the complainants.”⁷⁷¹ As will be explained in detail in section 4.2, the AB listed various environmental instruments to justify its conclusion that sea turtles were an “exhaustible natural resource” and that international environmental law preferred multilateralism to unilateral trade measures. But was this enough to show that the limited mandate WTO system does not lead to any alarming bias in its legal analysis in favour of free trade? Or could a judicial body with a broader mandate have done more?

Of the various international environmental instruments relevant to the *Shrimp-Turtle* dispute, the *CITES* seems to be most specific in addressing the protection of sea turtles. The *CITES* is designed to protect endangered species by preventing commercial international trade in wild species from driving them towards extinction. It classifies species into three categories based on the degree of protection needed and imposes controls on their transboundary movement. Species listed in Appendix II can be traded subject to strict controls whereas species listed in Appendix I cannot be traded at all. Sea turtles are included in the first Appendix of the *CITES*, in other words, the highest risk category. Consequently, trade in both sea turtles and turtle parts is prohibited under the *CITES* and the international movement of sea turtles is subject to strict controls. As indicated in Article II(1) of the *CITES*, trade in sea turtles must be subject to “particularly strict regulation in order not to endanger their survival and must be authorized only in exceptional circumstances.” All the

⁷⁶⁷ *Ibid*, 26-27.

⁷⁶⁸ *Ibid*, 29.

⁷⁶⁹ *Ibid*, 29-30.

⁷⁷⁰ Panel report, *Shrimp-Turtle*, para. 7.50.

⁷⁷¹ *Ibid*, para. 7.49.

parties to the *Shrimp-Turtle* case are also Parties to the *CITES* and its applicability to the facts underlying the *Shrimp-Turtle* dispute is therefore clear.

Being an instrument that focuses on a single threat facing the wildlife, the *CITES* fails to specify protection measures other than export controls. As the *Shrimp-Turtle* panel noted,

...CITES, even though its object is to contribute to the protection of certain species, does not impose on its members specific methods of conservations such as TEDs.⁷⁷²

Furthermore, even if the *CITES* aims to protect certain species by limiting their trade, it is silent concerning measures to be taken in situations where trade in *other species* threatens the survival of these endangered species. As sea turtles are not threatened by trade in turtles themselves, but by trade in shrimps, the controls imposed by the *CITES* were not directly applicable. Trying to infer otherwise from the provisions of the *CITES* would have clearly amounted to an expansive interpretation of the Convention.

Similar problems also arise when attempting to justify the U.S. trade prohibition under the other instruments of international environmental law relevant to the *Shrimp-Turtle* case. International environmental law indisputably recognises that sea turtles are a highly migratory, endangered species and that protective measures should be taken at the global level to prevent them from becoming extinct. In the words of the *amicus* brief to the Appellate Body,

...the sea turtle conservation measures flow from the fundamental principles of sustainable development embodied in international environmental agreements and customary law principles. They are based on an international consensus that sea turtles are endangered, that endangered species should be protected, that by-catch should be eliminated, that selective fishing gear should be used, and that unsustainable consumption patterns should be eliminated.⁷⁷³

However, international environmental instruments fail to address explicitly the leading cause of sea turtle mortality, namely drowning in shrimp nets, or prescribe specific policies and measures to protect sea turtles from the threat. Thus, even if it is evident that the U.S. legislation contributes to a legitimate objective recognised under international environmental law, there seems to be no clear legal basis for the U.S. import prohibition in the instruments of international environmental law currently in force. The analysis thus highlights that international environmental law is far less developed than the WTO regime.⁷⁷⁴ By its very nature, international environmental law is fragmented: It encompasses a multitude of legal instruments addressing specific environmental threats that are often deeply intertwined with other, much broader ecological problems. While sea turtles are protected under several instruments, the achievement of the underlying conservation

⁷⁷² *Ibid.*, para.7.58.

⁷⁷³ CIEL, “*Amicus Curiae* Brief to the AB,” 30.

⁷⁷⁴ See generally, Macmillan, *WTO and the Environment*, 266 *et seq.*

objectives is held back by the fact that there is no overarching structure to ensure coordinated and comprehensive protection. International environmental law also relies more on principles and standards than on clearly written, specific rules.⁷⁷⁵ For these reasons, the contents of international environmental law are at times hard to determine and the legality of a measure that seeks to advance a widely recognized, legitimate environmental objective can be difficult to define. Given the ambiguous nature of the underlying norms, it seems that even an international environmental court would have struggled to do more than the WTO dispute settlement system in the *Shrimp-Turtle* dispute

However, it is not inconceivable that a body with a comprehensive jurisdiction would have accepted the argument put forward by environmental NGOs in their *amicus* brief – that the protection of sea turtles was required by international environmental law and therefore the U.S. condition concerning the use of TEDs was justifiable. Arguably, this would have been possible through a teleological interpretation highlighting the protection of sea turtles as the fundamental objective of the *CITES* and the various other instruments of international environmental law. The decision could have emphasized that the endangered status of sea turtles is clearly recognised under international environmental law and emphasised that states are required to take steps to protect them. As TEDs are one of the most efficient means to address the leading cause of sea turtle mortality, the decision could have concluded that the U.S. measure was fully compatible with the *objectives* of international environmental law. It could even have drawn interpretative support from *GATT* Article XX(g) to stress that the multilateral trade agreement does not prevent states from taking measures to protect exhaustible natural resources. Indeed, it can be asked whether such a decision emphasising the legitimate objectives of international environmental law would have been radically different from the statement by the first *Shrimp-Turtle* panel that all measures undermining the objectives of the multilateral trade system were inconsistent with the *GATT*. While this controversial analysis was overturned by the AB, the *Shrimp-Turtle* panel decision was by no means the only example of a teleological interpretation in the history of the *GATT*/WTO dispute settlement but the regime has in other instances been successfully developed with the overarching goal of trade liberation in mind.⁷⁷⁶ For under the *CITES*, a teleological interpretation seeking to advance its general objective of environmental conservation could be legitimate whereas under the

⁷⁷⁵ As Sands describes, international environmental norms are set forth “in literally thousands of acts adopted at the national, bilateral, sub-regional, regional and global levels... The lack of central legislative authority, or of a coherent set of international legislative arrangements, has resulted in a law-making process and a body of rules which are *ad hoc*, piecemeal and fragmented.” P. Sands, *Principles of International Environmental Law, Volume 1, Frameworks, Standards and Implementation* (MUP, 1995), 136-137.

⁷⁷⁶ Howse, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law,” 54-55. According to Howse, especially many *GATT* panels have tended “to assume they understood the general purpose of a provision, and to give sense to it in light of that purpose, without regard to the individual words and phrases,” which “almost always resulted in rulings tilted towards on particular value among the competing values at stake, namely that of liberal trade.”

GATT, environmental protection constitutes an exception and similar conservationist emphasis would not seem justified.

Conscious of problems related to fragmentation of international law (see Chapter 6), it is not my intention to argue that the *Shrimp-Turtle* dispute should have been decided by an international environmental court and that such a court, if it existed, should go for ambitious teleological interpretations. Clearly, such a decision would thus carry all the weaknesses usually associated with an expansive, interpretation of the relevant legal norms (see Section 5.1). The objective of the present analysis was different. Its intention was to examine the argument that the WTO dispute settlement system is biased towards trade interests and study whether and to what extent the limited mandate of the WTO dispute settlement system distorts the legal analysis in linkage disputes. In that regard, two conclusions can be drawn. First, is conceivable that the *Shrimp-Turtle* case could have been decided differently by a judicial body laying more emphasis on the environmental norms that indisputably recognise the necessity of protecting sea turtles from extinction. Hence, even in the environmentally conscious *Shrimp-Turtle* decisions, there seems to be a certain bias towards trade in the WTO dispute settlement system. The above analysis thus confirms that the limited substantive mandate of the WTO dispute settlement system continues to pose challenges to its legitimacy. The second - preliminary - conclusion is that the judicial techniques at the disposal of the WTO dispute settlement system are not adequate to remedy the important institutional and systemic problems. As the International Law Commission indicates, priorities between international law's different rules or rule-systems:

... cannot be justifiably attained by what is merely an elucidation of the process of legal reasoning. They should reflect the (political) preferences of international actors, above all States. Normative conflicts do not arise as technical "mistakes" that could be "avoided" by a more sophisticated way of legal reasoning... They require a legislative, not a legal-technical response.⁷⁷⁷

In other words, while the fragmented and decentralised nature of international law continues to challenge the legitimacy of the WTO dispute settlement system, the system itself seems incapable of addressing these problems given the limits of its judicial function. Instead, what would be required are legislative efforts within the WTO legal framework – and even beyond. The reasons for this will be elaborated in Chapters 5 and 6.

Finally, I wish to highlight that the limited mandate of the WTO dispute settlement system would seem to exclude from its ambit even considerations of a more economic nature.⁷⁷⁸ There is an obvious and important development dimension in a dispute between the world's economic

⁷⁷⁷ *Ibid.*

⁷⁷⁸ For a proposal to interpret WTO Agreements in light of the development objective, see A. F. Qureshi, *Interpreting the WTO Agreements* (CUP, 2006), 114 *et seq.*

superpower and a group of developing countries concerning technologically advanced fishing methods and discrepancy in resources. Even though TEDs are often characterized as a “simple and inexpensive innovation” striking the best balance between the competing economic and environmental objectives, at the time of the dispute their price ranged between 75-500 U.S. dollars. For developing country fishermen, this is a lot of money. As India and Pakistan indicated during the *Shrimp-Turtle* proceedings, the average annual income of fishermen in India and Pakistan was around 300 U.S. dollars and 60-700 U.S. dollars respectively. Furthermore, Thailand argued that the consequential cost of TEDs, including installation and training, amounted to 3.200 U.S. dollars per vessel. Thus, cheap as they may seem by the U.S. standards, TEDs were still too expensive to be considered by the developing country fishermen affected by the U.S. shrimp embargo. Bhagwati has criticized the *Shrimp-Turtle* case from this perspective asking whether the U.S. should have bought and distributed TEDs:

...to the several thousand, but still few, fishermen in the plaintiff countries, as a procedure that would be a fair-minded since the rich countries and their NGOs that feel strongly about this issue should provide enabling assistance to developing countries that do not.⁷⁷⁹

Considered in this light, the *Shrimp-Turtle* dispute clearly appears as something more than an environmental dispute. The fact that it is predominantly conceived as one thus illustrates the problems considered in Chapters 1 and 5, namely that not all relevant interest groups, such as developing country fisherman, have either the expertise or the means to effectively participate in the functioning of the WTO.

4.1.2 The *Hormones* Case and the Precautionary Principle

Another encounter between WTO rules and international environmental law occurred in the *Hormones* case. Here, the question concerned the relationship between the *SPS Agreement* and the precautionary principle, which the EU invoked as a justification for its ban on meat produced with the aid of growth hormones. As we saw in Chapter 3, the *SPS Agreement* requires that measures taken to protect human, animal or plant life or health are necessary and based on scientific justification. The precautionary principle, in turn, is a concept that has been developing in international environmental law to justify precautionary action in the face of scientific uncertainty.⁷⁸⁰ Hence the potential tension between the *SPS Agreement* and the precautionary principle.

⁷⁷⁹ Bhagwati, “Afterword: The Question of Linkage,” 134.

⁷⁸⁰ It has been argued that the weakest version of the precautionary principle requires States to act with care and when taking decisions which may have an adverse impact on the environment. A stronger formulation urges them to regulate activities which may be harmful to the environment *even* if conclusive scientific evidence of their harmfulness is not yet available,” J. Cameron & H. Ward, “The Multilateral Trade Organisation: A Revised Perspective” in J. Cameron & al., eds., *Trade & the Environment: The Search for Balance*, Volume 1 (Cameron May, 1994), 96 at 106.

As we have already seen, international environmental law remains a relatively undeveloped field of international law, and the legal status of several environmental principles still waits for confirmation. As of today, this is very much true regarding to the precautionary principle. In the *Hormones* case, the panel and the AB did not take a stand on the controversial question as to whether the precautionary principle had evolved into a norm of customary international law. They both concluded that neither the principle nor its legal status were of relevance since the *SPS Agreement* itself reflected precaution and laid down detailed requirements concerning scientific justification of trade-restrictive SPS measures. Despite the fact that the relationship between the *SPS Agreement* and the precautionary principle have been subject to a lively discussion subsequent to the *Hormones* decision, the *Biotech* panel chose to apply the same logic and concluded that neither the precautionary principle nor its specific formulation in the *Cartagena Protocol* were relevant to the interpretation of the *SPS Agreement* in a dispute concerning genetically modified products.

4.1.2.2 Legal Status and Relevance of the Precautionary Principle

The precautionary principle is a tool to mitigate risks to health and environment caused by the lack of scientific certainty and to justify regulatory action in such situations. Its key elements have been elaborated in the Principle 15 of *Rio Declaration*:

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.

Since the mid-1980s the precautionary principle has appeared in several international environmental treaties and instruments, including such key MEAs as the *United Nations Framework Convention on Climate Change* and the *CBD*. The customary law status of the precautionary principle has been debated in literature and before various international courts and tribunals. The International Court of Justice has come across the principle twice, in the attempted reactivation of the *Nuclear Tests* case in 1995⁷⁸¹ and the *Gabcikovo-Nagymaros* dam dispute between Hungary and Slovakia in 1998.⁷⁸² In 1999, Australia and New Zealand requested interim measures of protection from the International Law of the Sea Tribunal in the *Southern Bluefin Tuna* dispute, arguing that the precautionary principle was customary international law.⁷⁸³ All these decisions took a cautious approach to the legal status of the precautionary principle, in some cases hinting at the possibility that the precautionary principle is emerging as a rule of customary law.⁷⁸⁴ However, they also illustrated that a difference of opinion existed as to whether precaution was a legal principle or an “approach,” in other words,

⁷⁸¹ ICJ: *Request for an examination of the situation in accordance with paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) (Provisional Measures), ICJ Reports (1995), 288.

⁷⁸² ICJ: *Case concerning Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) ICJ Reports (1997), 7.

⁷⁸³ ITLOS: *Southern Bluefin Tuna Cases* (Australia & New Zealand v. Japan) (Provisional Measures) Order of 27 August 1999.

⁷⁸⁴ For a thorough analysis, see Kulovesi, “Cautious about Precaution,” 8-27.

something more flexible and obscure.⁷⁸⁵ The fact that the precautionary principle has been invoked before so many international courts and tribunals within such a short period of time is significant in its own right and serves to illustrate the growing relevance of the principle.

The precautionary principle enjoys a strong status in the EU where it has been incorporated into Article 174(2) of the *Treaty Establishing the European Community*. In the *Hormones* dispute, the EU argued that the precautionary principle would override the requirement in the *SPS Agreement* that a SPS measure must have a sound scientific basis.⁷⁸⁶ According to the EU, there was scientific uncertainty concerning the health effects of hormone-treated meat. It argued that Article 3.3 of the *SPS Agreement* allowed each WTO Member State to determine its desirable level of sanitary and phytosanitary protection. Furthermore, Articles 5.1 and 5.2 requiring trade restrictions to be based on a scientific risk assessment did not prevent a state from being cautious when setting health standards in the face of conflicting scientific information and uncertainty. In support, the EU indicated that the precautionary principle was:

...already a general customary rule of international law or at least a general principle of law, the essence of which is that it applies not only in the management of a risk, but also in the assessment thereof.⁷⁸⁷

The implication of the precautionary principle in the *Hormones* dispute was that the risk assessment requirement in Articles 5.1 and 5.2 of the *SPS Agreement* was flexible in the face of scientific uncertainty. WTO Members were thus allowed to restrict trade even where there was no conclusive scientific evidence of the risk. It is worth noting the EU refrained from invoking Article 5.7 of the *SPS Agreement*, which reflects a precautionary approach but only as a justification for temporary trade restrictions pending a scientific risk assessment. The EU was looking for a more permanent justification for its ban on hormone beef and based its argument rather on customary international law.⁷⁸⁸ According to the U.S. and Canada, however, precautionary principle was not a norm of customary international law.⁷⁸⁹ Rather, it was an “approach” the content of which could vary from context to context.⁷⁹⁰ According to Canada, the precautionary approach or concept was an *emerging* principle of international law that could, in the future, crystallize into general principle of law.⁷⁹¹ Presumably, the U.S. opposition relates to fears that as a definite legal concept, the precautionary principle would provide “the litigious American society with another tool to

⁷⁸⁵ *Ibid.*, 26-27.

⁷⁸⁶ H. Mann & S. Porter, *The State of Trade and Environment Law 2003, Implications for Doha and Beyond*. (IISD & CIEL, 2003), 36.

⁷⁸⁷ Appellate Body report, *Hormones*, para. 16.

⁷⁸⁸ Panel report, *EC-Measures Concerning Meat and Meat Products*, WT/DS26/R, WT/DS48/R, 18 August 1997, para. 8.157.

⁷⁸⁹ Appellate Body report, *Hormones*, paras. 43 and 60.

⁷⁹⁰ *Ibid.*

⁷⁹¹ *Ibid.*, para. 60.

challenge governmental decisions.”⁷⁹² The U.S. and Canada also stressed that Article 5.7 of the *SPS Agreement* permitted the adoption of provisional sanitary measures where scientific evidence was uncertain and there was thus no need to invoke the precautionary principle.⁷⁹³

Both the panel and the AB were hesitant to define the legal status of the precautionary principle. According to the panel, to the extent that the precautionary principle:

...could be considered as part of customary international law *and* be used to interpret Articles 5.1 and 5.2 on the assessment of risks as a customary rule of interpretation of public international law ... (it, KK) would not override the explicit wording of Articles 5.1 and 5.2... in particular since the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement.⁷⁹⁴

The AB was more explicit:

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.⁷⁹⁵

The AB did not go into the details of the uncertainty or attempt to solve it indicating that it was “unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question.”⁷⁹⁶ It ruled that even if the principle was reflected in Article 5.7 as well as in other parts of the *SPS Agreement*, it had not been written into the *SPS Agreement* as a ground for justifying measures otherwise inconsistent the Agreement.⁷⁹⁷ In other words, the precautionary principle did not override Articles 5.1 and 5.2 of the *SPS Agreement* requiring a WTO Member to base its SPS measures on scientific risk assessment.⁷⁹⁸ According to this logic, the customary law status of the precautionary principle was not relevant in determining of the legality of the European ban on hormone beef. Many commentaries have endorsed the AB’s approach on the grounds that “there was no need to define the legal value of precaution because the *SPS Agreement* incorporated many of the necessary elements in its treaty language.”⁷⁹⁹

⁷⁹² S. Shaw & R. Schwartz, “Trading Precaution: The Precautionary Principle and the WTO” *United Nations University – Institute of Advance Studies Report* (United Nations University, 2005), 5.

⁷⁹³ Appellate Body report, *Hormones*, para. 43.

⁷⁹⁴ Panel report, *Hormones*, paras. 8.160-61.

⁷⁹⁵ Appellate Body report, *Hormones*, para. 123.

⁷⁹⁶ *Ibid.*

⁷⁹⁷ *Ibid.*, para. 124.

⁷⁹⁸ *Ibid.*, para. 125.

⁷⁹⁹ M.-C. Cordonier Segger & M.W. Gehring, “The WTO and Precautions: Sustainable Development Implications of the WTO Asbestos Dispute,” *Journal of Environmental Law* 15(3) (2003), 289 at 306.

In my view, however, this legal analysis is not correct. Contrary to what the AB argued, the legal status of the precautionary principle really is not irrelevant and abstract question. As Marceau and Trachtman note:

...WTO Members are bound to respect all their obligations simultaneously ("the" or "a" the precautionary principle would be of equal hierarchical value to the treaty provisions of the WTO). Under international law, WTO Members would be under an obligation to comply with both their WTO obligations and any general principle of law regarding the precautionary principle, although such a general principle could not be given direct effect as such by WTO adjudication bodies who would recognize its existence and appreciate its impact on WTO law.⁸⁰⁰

Also Pauwelyn indicates that although he agrees with the AB's conclusion, the legal reasoning was not justified but the AB "was obliged to make a ruling on whether this principle is, indeed part of customary law binding on the disputing parties."⁸⁰¹ I agree with these comments. In my view, the AB erred in finding that the legal status of the precautionary principle was irrelevant to the *Hormones* decision. Instead, it should have appreciated the precautionary principle's potential impact on WTO law - or, at least explained why the precautionary principle, even as a customary norm, would be irrelevant to the interpretation of the *SPS Agreement*.⁸⁰² Was this because states can adopt treaties that override other customary norms than those having an *erga omnes* nature?⁸⁰³ Does it mean that, according to the AB's view, customary rules cannot override specific treaty obligations and do not have any impact on their interpretation?

It must not be forgotten, however, that determining the legal status and meaning of the precautionary principle would have been challenging tasks for an international trade body. Indeed, it can be asked whether the WTO dispute settlement system should play a role in developing international environmental law, and whether it could have done what both the International Court of Justice and the International Tribunal for the Law of the Sea failed to do. As we saw, both of these courts would have had the opportunity to confirm the customary law status of the precautionary principle and elaborate on its meaning around the same time that the Appellate Body rendered its *Hormones* decision. However, neither confirmed the legal status of the precautionary principle in unequivocal terms. The reluctance of the AB to engage in such an exercise is therefore perfectly understandable – but it does not remedy the consequent legal defects in the *Hormones* decision.

⁸⁰⁰ G. Marceau & J.P. Trachtman, "The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A Map of World Trade Organization Law of Domestic Regulation of Goods," *Journal of World Trade* 36(5) (2002), 811 at 849.

⁸⁰¹ Pauwelyn, *Conflict of Norms*, 482.

⁸⁰² On relationship between treaties and customary law, P. Sands, "Treaty, Custom and the Cross-fertilization of International Law" *Yale Human Rights and Development Law Journal* 1 (1998), 85 at 95.

⁸⁰³ Mann & Porter, *The State of Trade and Environment Law* 2003, 29.

What, then, could be the impact of the precautionary principle on WTO law? One of the counter-arguments to the environmentalist critique is that the WTO jurisprudence and the precautionary principle are already fully compatible. This argument highlights the unclear meaning of the precautionary principle in the field of international environmental law and the fact that various MEAs use different definitions of its meaning.⁸⁰⁴ According to Mootal, differences in the definition of the precautionary principle relate to four main issues: (1) the level of scientific uncertainty (2) the nature of the threat or risk (3) burden of proof and (4) factors that may be considered when designing the precautionary measure.⁸⁰⁵ She argues that the *SPS Agreement* contains extensive space for precautionary action and would seem to accommodate at least one interpretation of the precautionary principle.⁸⁰⁶ In other words, the definition of risk can be interpreted in a flexible manner and the evaluation of likelihood can be either quantitative or qualitative.⁸⁰⁷ Furthermore, the very nature of risk assessment process is flexible:

The use of inference options (which, in the end, are policy decisions, and not necessarily scientific ones) creates tremendous flexibility in the conduct of a risk assessment... Therefore, in requiring countries to base their measures on a risk assessment, the WTO provides them with tremendous flexibility for the use of the precautionary principle.⁸⁰⁸

Regarding the threshold for triggering precaution, Mootal argues that WTO Members have a “right to react to events which have a very low probability of occurrence.”⁸⁰⁹ She also indicates that like the *Cartagena Protocol*, also the *SPS Agreement* allows countries to reverse the burden of proof if they so desire – although here she admits that it is the importing country that has the burden of proof *vis-à-vis* the WTO.⁸¹⁰ Furthermore, Mootal argues that the *SPS Agreement* does not differ to any great extent from the different definitions of the precautionary principle embodied in MEAs: it mentions cost-effectiveness and lays down the requirement that SPS measures must be transparent and not arbitrarily or unjustifiably discriminatory.⁸¹¹ In conclusion, Mootal thus argues that:

... WTO rules provide countries with extensive scope for exercising the precautionary principle, despite the fact that there is not a universal definition or interpretation of that principle...⁸¹²

While it is true, as Mootal explained, that the current WTO practice would seem to be largely compatible at least with some understandings of the precautionary principle, this does not remedy all the flaws in the AB’s legal analysis. This is because in theory, several possibilities exist for interpreting the terms of the *SPS Agreement* - such as the meaning of risk assessment, factors that are relevant

⁸⁰⁴ D. Abdel Mootal, “Is the World Trade Organization Anti-Precaution?,” *Journal of World Trade* 39(3) (2005), 483 at 484.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *Ibid.*, 492.

⁸⁰⁷ *Ibid.*, 493-94.

⁸⁰⁸ *Ibid.*, 495.

⁸⁰⁹ *Ibid.*, 497.

⁸¹⁰ *Ibid.*, 498.

⁸¹¹ *Ibid.*, 498.

⁸¹² *Ibid.*, 501.

during the process and the threshold risk that can justify SPS measures. Therefore, also *different interpretations* of the *SPS Agreement* are possible. For instance, risk assessment could also be understood as a highly formalised process that is to the greatest extent possible based on quantitative data.⁸¹³ If, however, the precautionary principle has acquired the status of customary international law or general principle of law, the AB would, in my view, be legally bound to such interpretations of the *SPS Agreement* that reflect the precautionary principle. This could mean interpreting - as the AB has done - the *SPS Agreement* in such a way that allows risk to be assessed in either quantitative or qualitative terms,⁸¹⁴ or that allows a very low threshold risk to trigger precautionary action.⁸¹⁵ Thus, the key problem here is not that the current WTO practice is at odds with the precautionary principle but that it remains unclear whether the AB has chosen to adopt such interpretations at its own discretion. Given the refusal of the WTO dispute settlement system (and other judicial bodies) to define the legal status and meaning of the precautionary principle, this question is now awaiting authoritative answer.

4.1.3 Conclusions

The task here was to consider WTO norms and international environmental norms on an equal footing to examine whether and how the mandate of the WTO dispute settlement system affects the outcome of linkage disputes. Looking at the facts of both the *Shrimp-Turtle* and *Hormones* cases, it is clear that international environmental law could have given more relevance. On the other hand, the fact remains that even for a judicial body with a comprehensive jurisdiction to consider WTO law and international environmental law, it would have been difficult to reach unequivocal conclusions based on the relevant environmental norms. International environmental law is far less developed than WTO law – and the prospects for its further development are limited given the absence of suitable judicial fora. As it will be emphasised in Chapter 6, these broader institutional problems are such that they cannot be remedied through WTO dispute settlement but should be considered by those making international law. From the perspective of the WTO dispute settlement system, the fact remains that it cannot fully consider claims made based on international environmental law. An ambitious approach to international environmental law by the WTO dispute would immediately bring to the fore the formal/procedural dimension of legitimacy and questions that will be considered in Chapter 5. However, the argument here is that the legal toolkit at the disposal of the WTO dispute settlement system still holds some unexploited potential. The following section therefore revisits the two cases and makes some concrete proposals for ways in which the WTO dispute settlement system could improve its legitimacy.

⁸¹³ Hill & al, “Risk Assessment and Precaution,” 268.

⁸¹⁴ Appellate Body report, *Asbestos*, para. 167.

⁸¹⁵ According to the AB, the appropriate level of protection could also be ‘zero risk.’ Appellate Body report, *Australian Salmon*, para. 126.

4.2. References to International Environmental Law and Legitimacy

While the previous section addressed challenges to the social/substantive legitimacy of the WTO dispute settlement system from a broader perspective, the focus in this section is on areas where the WTO dispute settlement system itself could – and *should* – alleviate some of the remaining problems. One of the most compelling critiques against the WTO dispute settlement system is that it has been inconsistent and selective towards international environmental law. According to Dunoff,

The critical question is whether a move towards more permeable doctrinal borders [in the *Shrimp-Turtle* decision, KK] represents the wholesale incorporation of international environmental law into international trade law or the “*selective incorporation*.” More pointedly, will doctrinal borders be relatively permeable where international environmental law does not interfere with the trade regime’s goal of market liberalisation, but *relatively impermeable where international environmental law impedes this objective?*⁸¹⁶ [Emphasis added, KK]

Indeed, the following analysis demonstrates that the WTO dispute settlement system has not been transparent and consistent in its approach to international environmental norms. For instance, it has not adequately justified why certain environmental norms have been considered relevant to the interpretation of WTO law while others have not. This is unfortunate from the point of view of its legitimacy: Consistency and transparency of legal reasoning contribute to the legitimacy of a judicial body and these qualities are particularly important in politically sensitive disputes such as trade-environment ones.⁸¹⁷ As Howse has indicated:

Integrity and coherence in legal interpretation contribute to the legitimacy of a tribunal adjudicating competing values through providing assurance that the tribunal’s decisions are not simply a product of its own personal choice of the values that should prevail in a given dispute.⁸¹⁸

The argument here is that some of the challenges to the substantive legitimacy of the WTO dispute settlement system could be remedied by a more transparent and careful approach to international environmental norms when applying the WTO Agreements. These conclusions apply even if one interprets the mandate of the WTO dispute settlement system and argues – as Marceau and Trachtman have done – that it is never competent to directly apply non-WTO norms. It would of course be even more relevant if one agrees with Pauwelyn that the WTO dispute settlement system is competent to directly apply non-WTO norms in conflict situations. In any case, the WTO dispute settlement system should ensure that the references it makes to environmental norms are

⁸¹⁶ J.L. Dunoff, “Border Patrol at the World Trade Organization,” *Yearbook of International Environmental Law* 9 (1998), 20 at 24-25.

⁸¹⁷ The following analysis has been published in slightly edited form in K. Kulovesi, “A Link Between Interpretation, International Environmental Law and Legitimacy in the WTO Dispute Settlement,” *International Trade Law and Regulation* 11(6) (2005), 188.

⁸¹⁸ Howse, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law,” 51.

consistent and justified not only in terms of WTO law but also from the point of view of international environmental law.

4.2.1 The Problem of Inconsistency

The AB's first *Shrimp-Turtle* decision makes several significant statements concerning the interpretation of the *GATT*. In applying Article XX(g), the AB highlighted that the text had to be read "in the light of contemporary environmental concerns," and that its language was not "static" but rather "by definition, evolutionary."⁸¹⁹ Thus, the definition 'exhaustible natural resources' also encompassed living natural resources such as sea turtles.⁸²⁰ To support this evolutionary interpretation, the AB referred to several multilateral environmental agreements including the *UNCLOS*, *CBD* and *CMS*.⁸²¹ It also acknowledged that sea turtles were listed in the Appendix I of *CITES* which, according to the AB, meant that their exhaustibility "would in fact have been very difficult to controvert."⁸²² Again when applying the chapeau of Article XX, the AB referred to the preamble of the WTO Agreement, which demonstrated "a recognition by the WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development" – a fact that must "add colour, texture and shading" to the interpretation of Article XX."⁸²³ The AB also emphasised the establishment of the Committee on Trade and Environment as an example of other developments "which help to elucidate the objectives of WTO members with respect to the relationship between trade and environment."⁸²⁴

While significant, these references also bring to the fore some important questionmarks. Why were certain environmental instruments relevant and exactly how did the AB conceive their legal status? This is particularly true for the *Convention on Biological Diversity*, which, as Scott indicates:

Not only is this not an instrument cited by the WTO Decision on Trade and Environment (it thus not being possible to infer indirect consent on the part of all WTO Members), but the US is not a party and it predates the WTO.⁸²⁵

As we saw in Chapter 2, the majority of WTO scholars argue that at least all parties to the dispute need to be parties to a MEA in order for it to be considered a relevant rule that must be taken into account in accordance with Article 31.3(c) of the *VCLT*. In section 4.3 we will see that the *Biotech* panel has subsequently referred to an even stricter interpretation, namely that it is possible that all WTO Members must be Parties to a treaty before its provisions become relevant rules of

⁸¹⁹ Appellate Body report, *Shrimp-Turtle*, paras.129-130.

⁸²⁰ *Ibid.*, para. 131.

⁸²¹ *Ibid.*, para. 130.

⁸²² *Ibid.*, para. 132.

⁸²³ *Ibid.*, para. 152.

⁸²⁴ *Ibid.*, para. 153.

⁸²⁵ J. Scott, "International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO," *European Journal of International Law* 15(2) (2004), 307 at 339.

international law under the *VCLT* and the customary rules of treaty interpretation. The *Biotech* panel explained, however, that non-WTO norms of international law can also be taken into account not as legal rules but “for their informative character.”⁸²⁶ In other words, they can assist in defining the ‘ordinary meaning’ of the treaty text in the same way as a dictionary.⁸²⁷ Interestingly enough, while the AB deemed the *CBD* as relevant to the *Shrimp-Turtle* case, the *Biotech* panel went to rule that neither the *CBD* nor the *Biosafety Protocol* were relevant in a dispute dealing with the very subject matter of the *Biosafety Protocol*. This can be seen as a first indication that WTO jurisprudence has not been consistent in its approach to international environmental law.

Taking the consistency analysis further, the way that the AB emphasised the role of multilateralism in solving international environmental problems offers a particularly fruitful object. The intensity of the U.S. efforts to negotiate a multilateral solution to the protection of sea turtles played an important role in determining whether its import prohibition constituted ‘unjustifiable’ and ‘arbitrary’ discrimination inconsistent with the chapeau of Article XX. This aspect of the case, touching upon the controversial issue of unilateral trade measures, was also politically highly sensitive: on the one hand, categorically rejecting such measures is capable of generating environmentalist criticism leading to such legitimacy challenges as illustrated by the *Tuna-Dolphin* disputes. On the other hand, the decision also had to account for powerful fears that if treated too lightly, unilateral trade measures and “green protectionism” could flourish inflicting serious harm on the multilateral trading system.

During the first phase of the *Shrimp-Turtle* case, the AB found that the U.S measure fulfilled the requirements of Article XX(g), but ruled that the it was being applied in a manner that constituted ‘unjustifiable discrimination’ in violation of the chapeau. In explaining this conclusion the AB stated that:

Another aspect...that bears heavily in any appraisal... is the failure of the United States to engage the appellees... in serious, *across*-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles.⁸²⁸

The AB identified three defects in the U.S conduct in this regard. First, it noted that the U.S Congress had emphasized the importance of reaching an international agreement on sea turtles.⁸²⁹ Second, the U.S. had only negotiated with some but not all relevant states, even though its success in concluding the *Inter-American Convention for the Protection and Conservation of Sea Turtles* demonstrated

⁸²⁶ Panel report, *Biotech*, para. 7.92.

⁸²⁷ *Ibid.*, para. 7.92.

⁸²⁸ AB report on *Shrimp-Turtle*, para. 166.

⁸²⁹ *Ibid.*, para 171.

that an alternative to its unilateral import prohibition was reasonably available.⁸³⁰ From the point of view of the present analysis, the most interesting was the third one. According to the AB:

...the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migration. *The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations.*⁸³¹ [Emphasis added, KK]

In support, the AB first referred to the *Marrakech Ministerial Decision on Trade and Environment*, noting reference to both the *Rio Declaration on Environment and Development*, and *Agenda 21* thereof.⁸³² It then listed relevant instruments of international environmental law, namely Principle 12 of the *Rio Declaration*; Paragraph 2.22(i) of *Agenda 21*; Article 5 of the *CMS*; and the Report of the Committee on Trade and Environment to the WTO Singapore Ministerial Conference.⁸³³ According to the AB, the Principle 12 of the *Rio Declaration* was “of particular relevance” because it demonstrated the need for “concerted and cooperative efforts” to address the protection of sea turtles. The AB thus cited the relevant part of the Principle, which reads as follows:

Unilateral actions to deal with environmental challenges outside the *jurisdiction* of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus. [Emphasis in the original AB report, KK.]

Welcoming the approach Howse argues that:

... unlike the *Tuna-Dolphin* panels, [the AB, KK] did not simply invent its own limitation on unilateralism as a means of protecting the environmental commons; *instead*, it referred to a baseline in actual international environmental law, that contained in *Rio Declaration*.⁸³⁴

According to Howse, the AB used such a baseline from international environmental law, not in order to incorporate into the chapeau a duty to negotiate, but “to determine whether, in the circumstances, the discriminatory behaviour of the U.S. was *also* unjustifiable.”⁸³⁵ While convincing, this understanding of the AB’s decision brings to the fore some pressing issues. Given that the current state of international environmental law can best be characterised as ‘rapidly evolving’ and much of the discussion thus tends to focus on the legal status of some of the key concepts,⁸³⁶ it is interesting to assess how the AB conceived the legal relevance of Principle 12 of the *Rio*

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*, para. 168.

⁸³² Adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh on 14 April 1994.

⁸³³ AB report, *Shrimp-Turtle*, para. 168.

⁸³⁴ Howse, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law,” 55.

⁸³⁵ Howse, “A New Legal Baseline,” 506.

⁸³⁶ P. Birnie & A. Boyle, *International Law & the Environment* (2nd edition, OUP, 2002), 80.

Declaration.⁸³⁷ Why did the AB regard the Principle as ‘particularly relevant’ to the interpretation of *GATT*? Was it because the AB saw it as a baseline established in international environmental law, as Howse has understood its decision, or was there some other reason, such as the fact that the *WTO Ministerial Decision* makes reference to the Principle? More importantly, how does this reference relate to the statement by the AB in the *Hormones* case on the precautionary principle?

As we saw above, one of the crucial issues in the *Hormones* dispute related to scientific uncertainty, thereby bringing into focus the legal status and relevance of the precautionary principle. This question had been extensively debated both in literature as well as before various international courts and tribunals, which all took a cautious approach to the legal status of the precautionary principle, in some cases hinting at the possibility that it would at least be emerging under customary international law.⁸³⁸ However, the decisions and the individual opinions also illustrated that a difference of opinion existed as to whether precaution was a legal principle or an ‘approach,’ in other words, something more flexible and obscure.⁸³⁹ The stance that the AB took on the precautionary principle was that the status of the precautionary principle in international law was “subject to debate.”⁸⁴⁰ In other words, it was not clear whether the precautionary principle had crystallised into a general principle of customary international *environmental* law, and it was even less clear whether it has become accepted as a principle of *general* or *customary international law*.⁸⁴¹ However, according to the AB – and this is crucial for the present analysis – it was “*unnecessary, and probably imprudent*” for it “to take a position on this important, but *abstract, question*.”⁸⁴²

When comparing how the AB has approached and used different notions of international environmental law in its *Shrimp-Turtle* and *Hormones* decisions, the crucial issue is not so much that the AB did not feel it was appropriate for it to take a position on the legal status of the precautionary principle, but that it did refer to similar sources of international environmental law, in particular Principle 12 of the *Rio Declaration*, in the *Shrimp-Turtle* decision. Why did the AB in *Shrimp-Turtle* note the ‘particular relevance’ of Principle 12 of the *Rio Declaration* in assessing unilateral trade restrictions under the *GATT* while indicating in the *Hormones* case that the legal status of the precautionary principle was irrelevant when considering scientific risk assessment and uncertainty under the *SPS Agreement*? Is there a solid legal justification for its approach, or can these differences be taken as evidence of the validity of environmentalist critique that the AB is selective with respect to environmental norms, only allowing international environmental law to penetrate the borders of

⁸³⁷ See I. Cheyne, “Trade and the Environment: Future of Extraterritorial Unilateral Measures after the *Shrimp* Appellate Body,” 5 Web JCIL (2000); and P. Sands, “Unilateralism, Values and International Law,” *European Journal of International Law* 12(2) (2000) 291.

⁸³⁸ Kulovesi, “Cautious About Precaution,” 8-27.

⁸³⁹ *Ibid.*, 26-27.

⁸⁴⁰ Appellate Body report, *Hormones*, para. 123.

⁸⁴¹ *Ibid.*

⁸⁴² *Ibid.*

the WTO regime when it “does not interfere with the trade regime’s goal of market liberalization”?⁸⁴³

The first argument that lends support to the environmentalist critique that the WTO is selective when allowing environmental norms to cross the borders of the trade regime concerns the political interests underlying the precautionary principle and Principle 12. It would seem that it is environmentalist in particular who support and advocate the precautionary principle, while Principle 12 reflects some of the key concerns of free trade advocates. But more interesting in this regard is to assess the legal status of these two notions under international environmental law. It is not clear whether either of them can be considered anything more than ‘soft law’ but if one of them can, then the precautionary principle would be a stronger candidate to have emerged into a customary norm or general principle. Both Principle 12 and the precautionary principle are included in the *Rio Declaration* (which is not, as such, a binding legal instrument).⁸⁴⁴ However, it is obvious that Principle 12 has received far less attention from environmental scholars than some of the other principles also contained in the *Rio Declaration*. When searching through the leading textbooks of international environmental law, one finds Principle 12 mentioned in passing when lamenting the ‘aspirational’ language used in certain parts of the *Rio Declaration*,⁸⁴⁵ or noting that the Principle “reflects the concerns of free trade advocates.”⁸⁴⁶ When comparing the language used in the *Rio Declaration*, it is also evident that the precautionary principle has been worded in language that is stronger and more binding than that used in Principle 12. According to Principle 15 of the *Rio Declaration*, precaution “shall be widely applied.” In contrast, unilateral trade measures under Principle 12 “should be avoided,” and measures addressing transboundary environmental problems “should as far as possible” be based on cooperation. Indeed, according to one of the leading environmental law textbooks, Principle 12 is:

...expressed in aspirational rather than obligatory terms, suggesting a rather weaker commitment on these economic issues than developed countries would have liked to see.⁸⁴⁷

The circumstances under which the *Rio Declaration* were negotiated further testify to the controversial status of Principle 12. The talks were notably influenced by the disagreement surrounding unilateral trade restrictions. As Sands describes, the controversy arising from the *Tuna-Dolphin* dispute influenced the atmosphere in Rio:

... the issue became one of the most contentious topics at the Earth Summit in Rio in June 1992. It very nearly prevented agreement from being reached on Agenda 21

⁸⁴³ Dunoff, “Border Patrol at the WTO,” 24-25.

⁸⁴⁴ P. Sands, *Principles of International Environmental Law* (2nd edition, CUP 2003), 52.

⁸⁴⁵ Birnie & Boyle, *International Law & the Environment*, 84.

⁸⁴⁶ A. Boyle & D. Freestone, “Introduction,” in A. Boyle & D. Freestone, eds., *International Law and Sustainable Development. Past Achievements and Future Challenges* (OUP, 2001), 10.

⁸⁴⁷ Birnie & Boyle, *International Law & the Environment*, 84.

and the Rio Declaration, the instruments which global leaders had gathered to sign.⁸⁴⁸

The solution was a compromise between Mexico and the U.S. to formulate Principle 12 in a language that would not totally close the door open from unilateral trade restrictions.⁸⁴⁹ Principle 12 was thus adopted in Rio subject to a statement from the U.S. that trade measures might sometimes be effective to protect the environment.⁸⁵⁰ For this reason, neither the legal status of the *Rio Declaration* itself, nor the language used in Principle 12 or even its *travaux préparatoires* support the Appellate Body's understanding of the relevance of Principle 12 under international environmental law. As we saw above, the *Rio Declaration* is not the only instrument where the precautionary principle and Principle 12 can be found but both notions are included in multilateral environmental agreements, including the *CBD*. However, the list of MEAs containing some formulation of the precautionary principle is longer than that supporting Principle 12. During the past ten years states have also invoked the precautionary principle before various judicial bodies with a frequency that is quite rare in international law, a fact that also illustrates its emerging legal status.

From the perspective of international environmental law, it would be easier to justify the argument that the precautionary principle rather than the Principle 12 of the *Rio Declaration* has obtained an independent legal status. In this light, one of the most regrettable aspect of the *Shrimp-Turtle* and *Hormones* decisions is the lack of detailed justifications concerning the relevance or otherwise of international environmental law.⁸⁵¹ Trying to look for explanations, it might have been possible for the AB come up with an argument along the lines that Principle 12 of the *Rio Declaration* was "particularly relevant" to the interpretation of environmental exceptions under Article XX of the *GATT* as the *WTO Ministerial Declaration on Trade and Environment* makes specific reference to the principle. Its statement in the *Hormones* decision that the legal status of the precautionary principle was an "abstract" question irrelevant to its decision seems harder to justify. But the AB should have at least tried, indicating, for instance, that even as a norm of customary law, the precautionary principle or approach would not contradict the provisions of the *SPS Agreement*, and that these provisions also reflecting a precautionary approach gave the general concept a more specific content. The argument has also been made that international environmental law is more relevant when interpreting the older and more ambiguous terms of the *GATT* than the more recent and more specific *SPS Agreement*.⁸⁵² Even though I would not have been persuaded by such arguments, in light of such transparent reasoning, the validity of the AB's approach could then have been analysed and debated by legal scholars and other interested parties.

⁸⁴⁸ Sands, *Lawless World*, 108.

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *The Earth Negotiations Bulletin* 2(13), 3-14 June 1992. Available at: <<http://www.iisd.ca/vol02/0213032e.html>>.

⁸⁵¹ Similarly, Cheyne, "Trade and the Environment."

⁸⁵² Cordonier-Segger & Gehring, "The WTO and Precaution," 306-307.

However, as they now stand, the *Shrimp-Turtle* and *Hormones* decisions seem to lend some support the argument that the AB is biased in deciding which concepts of international environmental law were relevant to the interpretation of WTO law. When reading, for instance, the *amicus curiae* brief submitted by a coalition of environmental NGO in the *Shrimp-Turtle* case, it would seem that arguments supporting the view that the use of TEDs is required by international environmental law are at least as robust and backed by more convincing legal sources than the argument accepted by the AB that unilateral measures are not allowed under international environmental law. It is also true that from the perspective of international environmental law, the precautionary principle would seem like a stronger candidate to have emerged into a norm of customary law, or general principle of law. However, while the precautionary principle still “awaits authoritative formulation” as indicated by the Appellate Body,⁸⁵³ Principle 12 of the *Rio Declaration* has now, by virtue of the *Shrimp-Turtle* decision, been conceived as “actual baseline from international environmental law.”⁸⁵⁴ In the future, to avoid claims that it is biased, or that it lacks adequate expertise in international environmental law, the AB should pay attention also to such aspects of its decisions. It is clear that a consistent, transparent, and more detailed reasoning in approaching environmental instruments could further improve the substantive/social legitimacy of the WTO dispute settlement system when it has to deal with politically sensitive disputes.

4.3 *Biotech* – a Missed Opportunity for Constructive Interaction

The *Biotech* panel report provides an interesting opportunity to evaluate the current state-of-the-play regarding the relationship between WTO law and international environmental law. To me, it demonstrates the validity of the argument that there is no continuous evolution towards more careful consideration of environmental issues in the WTO. While *GATT* disputes such as the *Asbestos* and *Shrimp-Turtle* have somewhat expanded the borders of the WTO regime, at least the interpretation of the *SPS Agreement* dedicatedly avoids interaction with international environmental law. The *Biotech* decision indicates that panels are reluctant to engage in constructive interaction with other fields of international law and demonstrates that concerns related to substantive legitimacy are far from overcome.

⁸⁵³ AB report on *Hormones*, para. 28.

⁸⁵⁴ Howse, “A New Legal Baseline,” 324.

4.3.1 GM Products, the WTO and International Environmental Law

From the outset, the *Biotech* dispute was regarded as difficult, especially regarding the role of international environmental law. According to some observers, the *Cartagena Protocol* was in fact the implicit target of the WTO proceedings because:

...it multilateralizes the EU regulatory approach, meaning that other countries might use the Protocol to justify adopting EU-style market access rules. The United States and Canada would like the WTO to implicitly determine whether or not the Cartagena Protocol is trade compliant, hence, sending a signal to all other countries that might attempt to use the protocol to ban GMOs.⁸⁵⁵

Yet others were worried about the legitimacy implications of the dispute:

It is apparent that any legal finding on trade restrictions on GMOs that simply ignores the existence and operation of the protocol [Biosafety, KK} will result in amplified criticism of what is often felt to be excessively intrusive WTO law and a predominance of the trade paradigm, and this will erode further the legitimacy of the trading system in the view of public opinion.⁸⁵⁶

In defending its GMO regime, the EU stressed the need to interpret WTO Agreements in light of other instruments of international law.⁸⁵⁷ Accordingly, the national safeguard measures applied by its individual Member States had to be addressed in light of Article 5.7 of the *SPS Agreement*, which was one expression of the precautionary principle.⁸⁵⁸ The EU stressed that the precautionary principle had “by now become a fully-fledged and general principle of international law.”⁸⁵⁹ For this reason, Article 5.7 of the *SPS Agreement* constituted an autonomous right, one that was also recognised in the *Cartagena Protocol*.⁸⁶⁰ According to the EU, the *Protocol* “has confirmed the key function of the precautionary principle” in the decision to restrict or prohibit imports of GMOs in the face of scientific uncertainty.⁸⁶¹ The EU also stressed that the *Cartagena Protocol* was legally binding on the EU Member States, and, as signatories, Argentina and Canada had to refrain from acts that would defy the object and purpose of the treaty.⁸⁶² The EU also noted that the U.S. participates in the Clearing House Mechanism established by the *Protocol* and should therefore have no objection to the approach taken by the *Protocol*.⁸⁶³ It stressed the close connection between the *Biosafety Protocol* and the *SPS Agreement*, and the need to interpret and apply these instruments consistently.⁸⁶⁴ The EU further explained that those negotiating the *Cartagena Protocol* were acutely

⁸⁵⁵ Isaac & Kerr, “A Harvest for Trouble,” 1083-1084.

⁸⁵⁶ T. Cottier, “Implications for Trade Law and Policy: Towards Convergence and Integration,” in C. Bail & al. eds., *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development* (RIIA, 2002), 473. See also M.L. Busch & R. Howse, “A (Genetically Modified) Food Fight. Canada’s WTO Challenge to Europe’s Ban on GM Products,” *C.D.Howe Institute Commentary* 186 (2003).

⁸⁵⁷ Panel report, *Biotech*, para. 4.518.

⁸⁵⁸ *Ibid.*, paras. 4.522-523.

⁸⁵⁹ *Ibid.*, para. 4.523.

⁸⁶⁰ *Ibid.*

⁸⁶¹ *Ibid.*, para. 4.524.

⁸⁶² *Ibid.*, para. 7.53.

⁸⁶³ *Ibid.*

⁸⁶⁴ *Ibid.*, para. 7.55.

aware of the *Protocol's* relationship with WTO Agreements and cannot have meant to create an inconsistent approach.⁸⁶⁵ According to the EU, the *Cartagena Protocol* and the WTO Agreements were fully compatible with each other and the *Protocol's* provisions on precaution and risk assessment should inform the interpretation of the relevant provisions in the WTO Agreements.⁸⁶⁶

The U.S. and others contested the relevance of these MEAs and the precautionary principle to the dispute.⁸⁶⁷ According to the U.S., the *Cartagena Protocol* could not be applied between the EU and itself as the U.S. was not a Party to the MEA.⁸⁶⁸ Canada specified that only such treaties were relevant to the interpretation of the covered agreements that applied between all WTO Members.⁸⁶⁹ The U.S. also stressed text in the *Protocol* indicating that it does not change the rights and obligations under any existing international agreement - nor does it "require or condone the adoption of moratoria or undue delays in decision-making concerning GM products."⁸⁷⁰ Canada argued that the *Protocol* was consistent with the WTO Agreements as it was premised on transparent and scientifically-sound risk assessment but the EU's measures were stark refutations of this premise.⁸⁷¹ Concerning the precautionary principle, the U.S. contended that it was neither a principle nor a customary rule of international law.⁸⁷² Even if the precautionary principle was a relevant rule of international law, it would not affect the interpretation of the *SPS Agreement*. This was because the precautionary principle:

...would be useful only for interpreting particular treaty terms, and could not override any part of the *SPS Agreement*. So, for example, the notion of precaution could not excuse the European Communities from complying with the requirement under Article 5.1 that SPS measures be based on risk assessments. In addition, Article 5.7 of the *SPS Agreement* already allows for the European Communities to adopt a precautionary approach to regulating biotech products.⁸⁷³

The *Biotech* panel responded to these arguments by first offering some general views on the role of international law in the interpretation of WTO provision. Quoting Article 31 of the *VCLT*, it stated that there was no doubt that international treaties and custom were such relevant rules of international law that a panel is mandated to take into account under Article 31.3(c).⁸⁷⁴ Furthermore, the AB had confirmed in its *Shrimp-Turtle* decisions that also general principles of international law were to be taken into account when interpreting the WTO Agreements.⁸⁷⁵ The panel stressed that according to the *VCLT*, only such rules had to be considered that were

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.*, para. 7.56 *et seq.*

⁸⁶⁸ *Ibid.* para. 7.59.

⁸⁶⁹ *Ibid.* 7.60.

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Ibid.* para. 7.61.

⁸⁷² *Ibid.* para. 4.542.

⁸⁷³ *Ibid.* para. 4.540.

⁸⁷⁴ *Ibid.* para. 7.67 and 7.69.

⁸⁷⁵ *Ibid.*

“applicable in relations between the parties.”⁸⁷⁶ In its view, this meant rules *applicable in the relations between the WTO Members*.⁸⁷⁷ As a consequence, the panel was *not* required to take into account rules that are not applicable to one of the parties to the dispute.⁸⁷⁸ Given that the case was *not* one where relevant rules of international law were applicable between *all Parties* to the dispute but not between *all WTO Members*, it did not need to decide whether, in such a situation, it would be entitled to take the relevant rules of international law into account.⁸⁷⁹

Proceeding from this basis, the panel concluded that neither the *CBD* nor the *Cartagena Protocol* were relevant to the interpretation of the WTO Agreements in the present case.⁸⁸⁰ The same was true for the precautionary principle: the legal debate about the status of the precautionary principle was still ongoing.⁸⁸¹ Notably, there had been no decision by an international court or tribunal recognising the precautionary principle as either a customary rule or general principle of law.⁸⁸² The panel noted, however, that the principle had been incorporated in several international instruments and several authors had argued that it has become a general principle of law.⁸⁸³ In conclusion, the panel stated that:

Since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue particularly if it is not necessary to do so. Our analysis below makes clear that for the purposes of disposing of the legal claims before us, *we do not need to take a position on whether the or not the precautionary principle is a recognised principle of general or customary international law*. Therefore, we refrain from expressing a view on this issue.⁸⁸⁴ (Emphasis added, KK).

Finally, the panel responded to the interesting arguments raised by the EU that the Appellate Body had in the *Shrimp-Turtle* decision referred to such MEAs as the *CBD* to which the U.S. was not a party.⁸⁸⁵ It explained that under Article 31.1 of the *VCLT*, a treaty must be interpreted with “ordinary meaning” given its terms of the treaty in their context and in the light of its object and purpose.⁸⁸⁶ According to the panel,

...in addition to dictionaries, *other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character. It*

⁸⁷⁶ *Ibid.*, para. 7.68.

⁸⁷⁷ *Ibid.* Emphasis added.

⁸⁷⁸ *Ibid.*, para. 7.71.

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*, para. 7.74-7.75.

⁸⁸¹ *Ibid.*, para. 7.88.

⁸⁸² *Ibid.*

⁸⁸³ *Ibid.*, para. 7.88.

⁸⁸⁴ *Ibid.*, para. 7.89.

⁸⁸⁵ *Ibid.*, para. 7.91.

⁸⁸⁶ *Ibid.*, para. 7.92.

follows that *when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it.*⁸⁸⁷ (Emphasis added, KK).

While the Appellate Body had considered the *CBD* and the other environmental instruments as informative for the interpretation of Article XX(g) in the *Shrimp-Turtle* case, the *Biotech* panel came to the contrary conclusion. Noting that it had “carefully considered the provisions” of the *Biosafety Protocol* and the *CBD* but without explaining this analytical process any further, the panel ruled that it “did not find it necessary or appropriate to rely on these particular provisions in interpreting the WTO Agreements at issue in this dispute.”⁸⁸⁸

4.3.2 The *Biotech* Panel: Cautious and Conservative

The *Biotech* panel report is interesting in that it brings to the fore many of the questions concerning the relationship between WTO law and other rules of international law discussed in this study. As the panel quoted the AB’s *Hormones* ruling concerning legal status and relevance of the precautionary principle, it is easy to voice the same criticism against its report as above. Interestingly, the panel itself stressed that Article 31 of the *VCLT* covers both customary norms and general principles of law - and that their consideration is mandatory.⁸⁸⁹ Given this obligation it was exceedingly deferential, even flawed, for the panel to rule that “prudence suggests we not attempt to resolve” the legal status of the precautionary principle.⁸⁹⁰ My argument is that even if the provisions of the *SPS Agreement* leave room for precautionary measures, it is not irrelevant whether the precautionary principle is a customary norm or a general principle of law. As a customary norm or general principle of law, the principle can and *should* guide the interpretation of the relevant provisions of the *SPS Agreement*. In practice, this means that it should guide the choice between several possible interpretations of the *SPS Agreement* towards a reading that is consistent with the precautionary principle - whatever that may be. From a legal point of view, it is not adequate to highlight that the WTO dispute settlement practice has *de facto* adopted interpretations that leave ample room for national discretion and precautionary action, such as accepting that the likelihood of risk can be expressed in either quantitative or qualitative terms, and indicating that governments can adopt a high level of protection. If the precautionary principle is a norm of customary law, then the WTO dispute settlement bodies are legally mandated to apply the WTO Agreements in a way that takes into account the precautionary principle and they cannot, for instance, decide to change its practice in a way that would not be consistent with the precautionary principle.

The panel also took an extremely narrow view of Article 31.3(c) of the *VCLT* and the role of other rules of international law in the WTO dispute settlement system. Its finding has been interpreted to

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*, para. 7.95.

⁸⁸⁹ *Ibid.*, paras. 7.67 and 7.69

⁸⁹⁰ *Ibid.*, para. 7.89.

mean that only such relevant rules can be taken into account that are applicable to all WTO Members.⁸⁹¹ As a consequence, it is unlikely that conventional international law could have *any* use in interpreting the WTO covered agreements.⁸⁹² According to the ILC, a better solution would have been to permit references to another treaty in cases where the parties to the dispute are also parties to the other treaty - otherwise, the coherence of the WTO regime comes at the expense of the coherence of the multilateral treaty system as a whole.⁸⁹³ I agree with the ILC and those who argue that the *Biotech* panel erred in failing to consider the potential relevance of the *CBD* in the dispute.⁸⁹⁴ Given that *Biotech* dispute essentially entails three separate complaints, the panel should have examined the relevance of the *CBD* in the dispute between the EC and Argentina, and the EC and Canada. The fact that the U.S. is not a Party to the *CBD* does not affect the applicability of the treaty between the EU, Canada and Argentina.

Finally, the *Biotech* panel can be criticised for completely discarding the relevance of the *Cartagena Protocol*. In my view, the *Protocol* - designed to address international trade in biotech products - could and should have been used as supporting material in defining the ordinary meaning of the *SPS Agreement*.⁸⁹⁵ This argument surfaces the tricky question of how the consideration of the *Cartagena Protocol* would have affected the rights and obligations of non-Parties.⁸⁹⁶ First, I wish to emphasise that the panel was right in finding that in light of Article 31.3(c) of the *VCLT*, the *Protocol* was not a relevant rule that had to be taken into account in interpreting the covered agreements. Thus, there was no legal obligation to consider it, and the question of its direct application does not even arise here. All this illustrates the limits of the *VCLT* and conflict norms in solving collisions between multilateral treaty regimes such as the WTO and MEAs. As the ILC has indicated,

The relationship between treaties that belong to different regimes is a general problem. Its most acute manifestations has concerned relations between instruments forming part of trade and environment regimes.⁸⁹⁷

The arguments supporting the consideration of the *Cartagena Protocol* in the *Biotech* dispute include the need to avoid fragmentation of international law and to ensure that the WTO system does not become isolated from other treaty regimes, and is consistent and constructive in the way it refers to international environmental instruments. As we have seen, the AB's *Shrimp-Turtle* decision referred to a host of environmental instruments, including the *CBD* to which the U.S. was not a Party. As the *Biotech* panel explained, this was because the AB used the *CBD* as interpretative material to

⁸⁹¹ ILC, *The Fragmentation of International Law*, 237 and 227-228.

⁸⁹² *Ibid.*

⁸⁹³ *Ibid.*, 238.

⁸⁹⁴ A. Palmer, *The WTO GMO Dispute. Implications for Developing Countries and the Need for an Appeal*, GeneWatch UK, Forum for Biotechnology and Food Security & GM Freeze, November 2006.

⁸⁹⁵ Panel report, *Biotech*, para. 7.92.

⁸⁹⁶ For analysis, see J. Scott, "International Trade and Environmental Governance," 340 *et seq.* According to Scott, the dilemma "poses formalist nightmare against realist dystopia; the system disabled against the system abused," *ibid.*, 343.

⁸⁹⁷ ILC, *Fragmentation of International Law*, 138

define the “ordinary meaning” of the WTO agreements in the same way as it might use a dictionary. This demonstrated that MEAs could play a role in disputes involving non-Parties to ensure that WTO law does not become isolated from other rules of international law.

While, this is still “a rather contrived way” of preventing the isolation of WTO law,⁸⁹⁸ it respects state sovereignty and the fundamental doctrine that treaties cannot create obligations on non-Parties. Certainly, given these notions, it would not be possible for the WTO dispute settlement system to rule that a MEA places any obligations on non-Parties. However, what the *Biotech* panel could have examined is whether any such definitions or practices had been developed by the Parties to the *Cartagena Protocol* concerning trade in biotech products that could be useful in the dispute. The *Protocol* contains detailed provisions on issues such as risk assessment, the precautionary principle and prior informed consent.⁸⁹⁹ Regarding risk assessment, for instance, Annex III of the *Cartagena Protocol* gives comprehensive guidance, including some general principles and methodologies. Palmer argues that the *Protocol* could have provided evidence of the shared values of the international community regarding the careful consideration of risks associated with GMOs, thus supporting the legitimacy of the delay in the approval of GM products.⁹⁰⁰ All this is not to say that the panel should have deferred to the practices and definitions adopted but the *Protocol's* Parties - but given the panel's lack of expertise on the novel and complex topic of GMOs, as well as concerns about the overall consistency of international law, openly examining them and spelling out the justifications would have been an appropriate move. Interestingly, *de facto* the *Biotech* panel seems to have agreed with these arguments: it requested several international organizations, such as Codex, the UN Food and Agriculture Organization, the World Health Organization, the UNEP and the CBD Secretariat to identify relevant materials, such as “reference works, glossaries, official documents of the relevant international organizations, including conventions, standards and guidelines etc.”⁹⁰¹ Without any more elaborate justifications, the panel then concluded that the materials obtained “have been taken into account by us, as appropriate.”⁹⁰² As Currie indicates, it would have been interesting to know what these materials were and how they were taken into account.⁹⁰³ From the point of view of the legitimacy of the WTO dispute settlement system, it would certainly have been better to openly admit the relevance of the *CBD* and the *Protocol*, and explain how they were taken into account instead of the obscure reference of information obtained from the CBD Secretariat.

⁸⁹⁸ *Ibid.*, 228.

⁸⁹⁹ On the relevant parts of the Protocol, see Hill & al., “Risk Assessment and Precaution,” 266. On comparison between the WTO approach and the Protocol, see Boisson de Chazournes & Mbengue, “GMOs and Trade,” 301-303.

⁹⁰⁰ Palmer, “The WTO GMO Dispute,” 5-6, 8.

⁹⁰¹ Panel report, *Biotech*, para. 7.96.

⁹⁰² *Ibid.*

⁹⁰³ D. Currie, *Genetic Engineering and the WTO: An Analysis of the Report in the EC-Biotech Case*, Greenpeace International (2006), 12.

Overall, the *Protocol* seems far more relevant for the *Biotech* dispute than the *CBD* in the *Shrimp-Turtle* case: as we saw in Chapter 3, the negotiating history of the *Cartagena Protocol* shows that the international community was acutely aware of the potential overlap between the *Cartagena Protocol* and the *SPS Agreement*, and were ultimately unable to agree on a provision clarifying their relationship. Given that the *Protocol* was negotiated after the entry into force of the *SPS Agreement*, in a dispute between WTO Members Parties to the *Protocol*, either would be able to invoke the *lex posterior* rule to argue that the *Cartagena Protocol* should prevail. Also arguments based on *lex specialis* would seem plausible. In light of all this, the panel's hazy dismissal of the *Protocol's* potential relevance seems absurd. It is effectively sending a message that a recent multilateral agreement with 147 Parties, negotiated to regulate the unprecedented challenges arising from transboundary movements of biotech products is totally irrelevant in a dispute that concerns transboundary movements of biotech products. Furthermore, while the non-Party question is formally and doctrinally compelling and my intention is not to challenge it, it is also useful note that at present, the distinction between MEA Parties and non-Parties is perhaps not as stern as those drafting the *VCLT* had in mind. Even as non-Parties to the *CBD*, the U.S. and other GM producers played an influential role in the negotiations for the *Cartagena Protocol* and they still participate in the work done under the *Protocol*, including the Biosafety Clearing House and negotiations for the liability and redress regime under Article 27 of the *Cartagena Protocol*.

Overall, the *Biotech* dispute would have entailed ample opportunities for constructive interaction between WTO law and international environmental law. Regrettably, the *Biotech* panel report shows that the WTO dispute settlement system is reluctant to engage progressively with international environmental instruments and explain its reasons for doing so. All this highlights concerns relating to the fragmentation of international law and the potential of inconsistencies between institutionally separate but materially overlapping legal regimes. Chapter 6 will return to this problematique. The conclusion from this analysis is that tensions persist in the borderline between WTO law and international environmental law in a way that continues to challenge the legitimacy of the WTO dispute settlement system.

5. Formal/Procedural Legitimacy and the WTO Dispute Settlement System

For an environmentalist criticising the WTO, it would seem only logical to argue that the WTO dispute settlement system should take a more active role in balancing trade and environmental issues. For an international legal scholar concerned about the fragmentation of international law and the separation of its contents into different 'boxes' labelled 'trade', 'environment' and so on, it would seem just as natural to contend that the WTO dispute settlement system should start unwrapping the boxes and mixing their contents.⁹⁰⁴ Indeed, it is not difficult to find proposals for improving the legitimacy of the WTO dispute settlement system in a way that would effectively expand its substantive borders. As we saw in Chapter 3, a member of the Appellate Body questioned in the *Asbestos* decision the appropriateness of the economic focus of the WTO dispute settlement. Scholars have interpreted his statement as a possible step towards:

...a more 'rule-based' or even 'principle-based' international trading regime, allowing more comprehensive judgements which encompass richer consideration of the plurality of the issues.⁹⁰⁵

Also Perez has proposed that the WTO dispute settlement system should follow a more pluralistic deliberative process, especially in risk disputes, and recognise different types of knowledge claims.⁹⁰⁶ This would mean, for instance, that the WTO dispute settlement bodies would listen not only to scientific experts but also consider other bodies of knowledge, such as sociology and anthropology.⁹⁰⁷

Having concluded in the previous Chapter that the limited substantive competence of the WTO dispute settlement system challenges its legitimacy, and that the system has been both inconsistent in its approach to international environmental law, and reluctant to imagine a more constructive and interactive relationship between the two spheres of international law, it should be easy to agree with those proposing to expand the substantive scope of the WTO dispute settlement system. But instead, in this Chapter I shall emphasise that this route has only limited potential to improve the legitimacy of the WTO dispute settlement system. In fact, it appears that the legitimacy dilemma facing the WTO dispute settlement system looks like a two-headed dragon: any attempts to tame the substantive legitimacy challenges immediately alerts the second head, which guards the formal

⁹⁰⁴ The image of international law as separate boxes is borrowed from M. Koskenniemi, "International Law: Between Fragmentation and Constitutionalism," presentation in Canberra, Australia, 27 November 2006. Available at: <<http://www.helsinki.fi/eci/Publications/MCanberra-06c.pdf>>.

⁹⁰⁵ Cordonier Segger & Gehring, "The WTO and Precaution," 320.

⁹⁰⁶ Perez, *Ecological Sensitivity and Global Legal Pluralism*, 152.

⁹⁰⁷ *Ibid.*

dimension of legitimacy. For this reason, I do not believe that the many of the problems identified in the previous Chapters could be solved with the WTO dispute settlement system simply ‘importing’ substantive legitimacy and injecting a dose of international environmental law or ecological sensitivity into the domain of trade rules where appropriate. My argument is that when tackling its substantive legitimacy challenges, the WTO dispute settlement system must pay careful attention to the web of institutional and procedural factors underpinning the notion of formal legitimacy. Without balancing the different components of legitimacy, it is clear that any attempts to remedy one set of problems will only give rise to new, equally compelling criticism.

What, then, are the considerations relating to the formal and procedural aspects of legitimacy that the WTO dispute settlement system should be aware of? As explained in Chapter 1, formal legitimacy is akin to the concept of formal legal validity, which, in turn, highlights the need to observe all requirements of law in the creation and operation of an institution or system.⁹⁰⁸ Furthermore, especially in Western political systems formal legitimacy is strongly associated with democracy, and fair and participatory procedures.⁹⁰⁹ This Chapter can be seen as an attempt to visualize how these ideas translate in the context of the WTO dispute settlement, focusing on three particular questions. Section 5.1 examines the institutional limits of the WTO dispute settlement system through the lenses of the fundamental doctrine concerning the separation of powers and the ensuing distinction between judicial and legislative functions. Section 5.2 concentrates on questions concerning the distribution of competencies in the vertical relationship between the WTO dispute settlement system and the national authorities of the WTO Member States both institutionally and through the notion of standard of review. This dimension is particularly interesting bearing in mind the context in which the WTO dispute settlement system functions, characterised by globalisation and shifting perceptions concerning the role of international institutions on the one hand, and state sovereignty on the other. In theory, any powers not explicitly transferred to the international level are retained by the state. However, many decisions by the WTO dispute settlement system are *de facto* having the impact of modifying the boundaries between the international and national spheres, in other words, they have been said to be realigning constitutional relationships between the WTO and its Member States.⁹¹⁰ Finally, in section 5.3, the focus will be on the WTO dispute settlement procedures and questions of transparency, access to information and participation.

⁹⁰⁸ Weiler, *The Constitution of Europe*, 80.

⁹⁰⁹ *Ibid.*

⁹¹⁰ Cass, *The Constitutionalization of the WTO*, 187-191.

5.1 Limits of the Judicial Function

The function and institutional limits of the WTO dispute settlement system have been enshrined in Article 3.2 of the *DSU* according to which:

Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

This provision can be associated with one of the fundamental doctrines of modern political and legal theory concerning the separation of powers and the distinction between the legislative, adjudicative and executive branches of government.⁹¹¹ Accordingly, a distinction is made between the legislative and judicial institutions, and between legislation and adjudication as methods of decision-making.⁹¹² These are closely related to a number of other distinctions such as that between law and politics, objective and subjective questions, rights and powers, as well as professionally and electorally accountable officials.⁹¹³ These distinctions reflect the conception that making the law necessitates value judgements, which are subjective and therefore political.⁹¹⁴ Adjudication, in turn, is a process whereby the abstract laws are applied to the facts of a concrete dispute. The idea is that the political and subjective elements have been resolved by the democratically accountable legislator during the rule-making process, and what is left for the adjudicator is to apply these rules and principles in an impartial and objective fashion. As explained by Lauterpacht,

...courts have to *apply* the law and that they have to apply the *law in force*. They have to apply – and no more than that – the law. It is not within their province to speculate on the law or to explore the possibilities of its development.⁹¹⁵

While the distinction between law-making and law-application is a fundamental component of modern political theory and analytically compelling, the challenge is that the line between these two forms of decision-making is difficult to draw. Certainly, legal theory has long struggled with the question. The distinction between adjudication and legislation has thus been characterised as,

... one of the 'great dichotomies' of political theory. It leads to profound theoretical debates about the nature of judicial decision-making, whether it is ideological or personal.⁹¹⁶

Without going to the details of this theoretical debate, the problems relate to the nature of judicial decision-making, determinacy/indeterminacy of legal materials and the amount of creativity in their interpretation.⁹¹⁷ The starting point of every contemporary legal doctrine is that legal decision-

⁹¹¹ Pauwelyn, "How to Win a WTO Dispute Based on Non-WTO Law?," 1003.

⁹¹² D. Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997), 26.

⁹¹³ *Ibid.*, 7.

⁹¹⁴ *Ibid.*, 27.

⁹¹⁵ H. Lauterpacht, *The Development of International Law by the International Court* (Frederick A. Praeger Publisher, 1958), 75.

⁹¹⁶ Kennedy, *A Critique of Adjudication*, 23-25.

⁹¹⁷ K. Kulovesi, "Legality or Otherwise: Nuclear Weapons and the Strategy of *Non Liquet*," *Finnish Yearbook of International Law* X (1999), 55 at 73.

making always involves interpretation.⁹¹⁸ The meaning of the existing law must be determined and the abstract rule adjusted to the requirements of the concrete situation.⁹¹⁹ According to one understanding,

As long as the process of reformulation is understood to be 'semantic' or 'deductive,' in the sense of looking for the 'meaning' of the words that compose the rule to be applied, it is not, in this understanding, rule making, even if the case is a hard one.⁹²⁰

However, as Kennedy indicates, judges constantly do something that can be better described as making rather than applying the law.⁹²¹ At minimum, they must resolve gaps, conflicts or ambiguities in the legal system and by doing so, they make new rules rather than merely apply the existing ones.⁹²² The question then arises concerning the limits of such judicial creativity.

In the field of international legal theory, one important and classical part of this debate is focused on the question whether the international legal system is materially complete or whether it is possible that international courts might have to reach a decision of *non liquet*.⁹²³ Like the formal and substantive components of legitimacy, these theoretical views can ultimately be traced to the divide between the naturalist and positivist theories. A naturalist would highlight the role of general principles in remedying the inevitable substantive deficiencies of the legal system, whereas a positivist would lay emphasis on formal rules and the need to avoid judicial legislation. In other words, constructivist theories, such as those of Lauterpacht⁹²⁴ conceive the international legal system as materially complete: in case legal *rules* are inadequate for solving a case, recourse must be had to the general *principles* of law.⁹²⁵ This way, a judge is always able to decide a case while remaining within the limits of her judicial function. On the other hand, political realists, such as Stone, have accepted the idea of the international legal system being materially incomplete, and highlighted the possibility of a decision of *non liquet*. In his view, a decision based on general principles is already involves a law-creating choice: general principles of law are so ambiguous and indeterminate that selecting the relevant principle or interpretation of the principle is essentially 'a law-creating choice, however much it be concealed by the form of logical deduction from the principle finally chosen.'⁹²⁶ The Advisory Opinion by the International Court of Justice in the

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.*

⁹²⁰ Kennedy, *A Critique of Adjudication*, 26-27.

⁹²¹ *Ibid.*, 28.

⁹²² *Ibid.*, 28

⁹²³ Kulovesi, "Nuclear Weapons and the Strategy of *Non Liquet*," 74.

⁹²⁴ Lauterpacht constructed his theory against a doctrine delimiting the scope of international law with the distinction between legal and political questions and justifiable and non-justifiable disputes. See H. Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon, 1966). 70-76. For a review of Lauterpacht's thesis, see M. Koskenniemi, "Lauterpacht: the Victorian Tradition in International Law," *European Journal of International Law* 8(2) (1997), 215 at 223 *et seq.*

⁹²⁵ Kulovesi, "Nuclear Weapons and the Strategy of *Non Liquet*," 74.

⁹²⁶ J. Stone, "Non *Liquet* and the Function of Law in the International Community," *British Yearbook of International Law* XXV (1959), 133.

Nuclear Weapons case where the Court ultimately refused to define the legality of the threat or use of nuclear weapons under such circumstances where the very existence of a state is at stake has often been characterised as a decision of *non liquet*.⁹²⁷ While there are also contrary interpretations of the *Nuclear Weapons* decision and the applicability of the same legal logic under the ICJ's contentious jurisdiction is unclear, the example shows how highly political dispute bring to the fore the limits of the international judicial function.

How do these insights apply to the WTO dispute settlement system? In light of the *DSU*, it is clear that the negotiators intended the WTO dispute settlement system to be a judicial (or quasi-judicial) institution the role of which would be confined to applying the law. The Appellate Body has described this function in the following terms:

Pursuant to Article 3.2 of the *DSU*, the task of panels and the Appellate Body in the dispute settlement system of the WTO is 'to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rule of interpretation of international law. Determining what the rules of the *DSU* ought to be is not our responsibility nor the responsibility of panels, it is clearly the responsibility solely of the Members of the WTO.⁹²⁸ (emphasis in the original)

However, in the international sphere, the problem of drawing the boundary between law-making and law-application has been characterised as being even more difficult than in the national legal systems. According to Lauterpacht,

...the problem is complicated, on the one hand, by the requirement of caution and restraint called for by the sovereignty of the States and by the voluntary, and therefore precarious nature of the jurisdiction of international tribunals. It is intensified, on the other hand, by the strong inducements to supplement and remedy the deficiencies and inconsistencies of an imperfect system of law.⁹²⁹

Even though several decades have passed since Lauterpacht wrote these words and even if the remark about the 'voluntary and therefore precarious nature of the jurisdiction of international tribunals' does not apply to the WTO, similar challenges can nevertheless be identified concerning the functioning of the WTO dispute settlement system. Clearly, the development of WTO rules by the legislative branch is slower and more difficult than at the national level. Therefore, the pressure on the WTO dispute settlement system to play a constructive and active role is greater than in the domestic context. However, many fear that the involvement of the WTO dispute settlement system in politically controversial issues will erode not only the legitimacy of the dispute settlement mechanism itself, but that of the entire organization.⁹³⁰ Recently, such fears seem to have escalated as the lack of progress with the Doha Round of trade negotiations has lead several observers to

⁹²⁷ Kulovesi, "Nuclear Weapons and the Strategy of *Non Liquet*," 60-61.

⁹²⁸ Appellate Body report on *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, 10 January 2001, para. 92.

⁹²⁹ Lauterpacht, *The Development of International Law*, 155.

⁹³⁰ Ricubero "The Paradoxes and Contradictions of World Trade," 3

note that countries may seek to exploit the dispute settlement system in order to achieve through litigation what they are unable to achieve through negotiation.⁹³¹ This is somewhat paradoxical, of course, given that such attitudes can also be interpreted as signs of fate on the dispute settlement mechanism as “the only viable, functioning part of the WTO.”⁹³²

As was seen in Chapter 1, the WTO dispute settlement system operates in an international reality where many important doctrines and ideas concerning legitimacy and democracy are in a flux. The distance between the WTO dispute settlement system and any democratically accountable body is larger than usually is the case in the national context. These seem like compelling reasons for the WTO dispute settlement system to be mindful the limits of its judicial function. Not surprisingly, linkage disputes, involving a variety of important values and interests as well as several different groups of stakeholders, have been particularly challenging in this regard. The following section discusses practical examples of instances where the WTO dispute settlement system has come close to the frontiers of its judicial function and draws attention to the ensuing legitimacy concerns.

5.1.1 Political Balancing vs. Legal Interpretation

Several factors highlight the role of the WTO dispute settlement system in solving politically sensitive disputes. As we saw in Chapter 3, due to its compulsory jurisdiction, it is often the only judicial forum available for solving linkage disputes. Furthermore, many provisions in the covered agreements are vague, even out-of-date, leaving the law-applier abundant room for construing their meaning. From the point of view of linkage disputes, these difficulties culminate in Article XX of the *GATT*, which was drafted more than sixty years ago by negotiators preoccupied by the problems of the post-World War era, and largely unaware of global environmental problems such as climate change or depletion of the ozone layer. Conscious of this, the Appellate Body indicated in its first *Shrimp-Turtle* report that the *GATT* “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.”⁹³³ Reaching agreement on new rules through international negotiations is slow and the Doha mandate concerning environmental issues is limited (see Chapter 3). The combination of these factors easily leads to situations where the WTO dispute settlement system must balance conflicting values and interests in such a way that flirts with the boundary between the law-making and law-applying functions. From the point of view of the legitimacy of the WTO dispute settlement system this is a dilemma: applying broad balancing tests in linkage disputes allows it to take into account non-trade interests - but such tests also brings to the fore questions concerning

⁹³¹ B. McGivern, “WTO Dispute Settlement After Doha: A Risk of ‘Imbalance?’,” *Bridges Monthly Review*, 10(5), August 2006, 10.

⁹³² *Ibid.*

⁹³³ Appellate Body report, *Shrimp-Turtle*, para. 129.

the formal limits of its judicial function. As Marceau and Trachtman have explained, this is problematic in particular because it involves an *international* court intervening in the domain of national regulatory autonomy.⁹³⁴ In the following, these pressures will be illustrated by analysing the in *Shrimp-Turtle*, the *Korean Beef* the *Brazilian Tyres* decisions. The conclusion of this analysis is that a degree of political balancing in linkage disputes is inevitable, there are broader and narrower options - and the WTO dispute settlement system, given its institutional role and international situation, should opt for the narrower ones.

The *Shrimp-Turtle* dispute is a classic example of a linkage dispute in that it involves a range of divergent interests related to trade, environmental protection, livelihoods of developing country fishermen, technology transfer and unilateralism. The Appellate Body's report explicitly acknowledges that applying *GATT* Article XX to these facts requires political balancing. Essentially, it explains that applying the chapeau of Article XX requires balancing between the right of a WTO Member State to invoke an exception under Article XX, and its obligation to respect the rights of other WTO Member States under the multilateral trading system. In other words,

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions... The location of the line of equilibrium ... is not fixed and unchanging; the line moves as the kind and the shape of measures at stake vary and as facts making up specific cases differ.⁹³⁵

When comparing the AB's report, for instance, to the *Shrimp-Turtle* panel, it is clear that the AB chose to give environmental interests a relatively high priority: the decision has therefore "become emblematic of change in the global trade rules. It pointed to the WTO adopting a more holistic approach, placing trade interests in a broader social context."⁹³⁶ While many environmentally-minded scholars, myself included, regarded this as a welcome development, some others - quite unsurprisingly - disagreed. While appreciating that the AB tries to be fair-minded in its decisions, Bhagwati indicated that,

...it would be more prudent if it did not to let earlier findings be replaced so drastically as in the shift from the *Tuna-Dolphin* to the *Shrimp-Turtle* decisions, which was doubtless influenced to some degree by the environmental lobbies of the North.⁹³⁷

⁹³⁴ Marceau & Trachtman, "A Map of the World Trade Organization Law of Domestic Regulation of Goods," 851.

⁹³⁵ Appellate Body report, *Shrimp-Turtle*, para.159.

⁹³⁶ Sands, *Lawless World*, 113.

⁹³⁷ Bhagwati, "Afterword: The Question of Linkage," 133-134.

Oxley, in turn, accused the AB of “judicial hyper-activism” in permitting unilateral environmental trade restrictions, which many WTO Members do not support.⁹³⁸ Therefore, this,

...dramatic change in WTO jurisprudence ... creates the conditions for a new era of global governance, in which the economically powerful nations, principally the US, the EU, but soon probably China, will be able to impose their political will upon countries which are economically dependant on uninterrupted access to these metropolitan markets.”⁹³⁹

Nevertheless, the majority of observers conceive the *Shrimp-Turtle* decision as a balanced and justifiable approach to the difficult issue.⁹⁴⁰ According to Cheyne, the virtue of the balancing test is that the underlying arguments and conflicting values inherent in the trade-environment conflict must be presented in a public and reasoned manner,

However, a case-by-case approach, drawing from sometimes conflicting and partial evidence of Members' intentions, and the inherently mobile nature of the line itself, all place the Appellate Body in a central role which blurs the division between law and politics, adjudication and policy-making.⁹⁴¹ (Emphasis added, KK)

Appreciating the AB's dilemma and the tensions between law-application and law-making, Howse emphasises that:

... the Appellate Body was *required* to decide the appeal, and however the appeal was decided, *it is hard to imagine that the AB would not find itself on one side of the controversy or the other*, merely by virtue of having to make a legal ruling... the Appellate Body was not institutionally situated such as to be neutral or completely deferential to a political determination of the problem posed by the *Shrimp-Turtle* dispute.⁹⁴² (Emphasis added, KK)

What these reactions demonstrate is how the political balancing required to decide multifaceted linkage disputes challenges the legitimacy of the WTO dispute settlement system and how they bring to the fore the limits of its judicial function. In the subsequent dispute settlement practice, however, the WTO dispute settlement system seems to have even further expanded the scope of the balancing involved in applying Article XX of the *GATT*.

In the *Korean Beef* case, the U.S and Australia challenged measures by the Republic of Korea affecting the imports of beef. They included government support for the domestic beef industry, and separate retail distribution channels for domestic and imported beef. During the proceedings, the dual retail system was found to violate the national treatment requirement under *GATT* Article III:4.⁹⁴³ In defence, the Republic of Korea invoked Article XX(d) to justify that the measures were

⁹³⁸ A. Oxley, *Implications of the Decisions in the WTO Shrimp Turtle Dispute*, International Trade Strategies, February 2002.

⁹³⁹ *Ibid.*, 8.

⁹⁴⁰ J. Atik, “Two Hopeful Readings of the *Shrimp-Turtle*,” *Yearbook of International Environmental Law* (1998), 6 at 6. Similarly, Schoenbaum, “The Decision in the *Shrimp-Turtle* Case,” 39.

⁹⁴¹ Cheyne, “The Future of Unilateral Extraterritorial Measures After the *Shrimp* Appellate Body.”

⁹⁴² Howse, “A New Legal Baseline for the Trade and Environment Debate,” 517.

⁹⁴³ Panel report, *Korean Beef*, para. 639.

“necessary to secure compliance with laws or regulations” which are not inconsistent with the *GATT*. In its decision, the Appellate Body introduced a very open form of balancing into the interpretation of the word “necessary” in Article XX. It stated that:

... a treaty interpreter assessing a measure claimed to be necessary... may, in appropriate cases, take into account the *relative importance of the common interests or values* that the law or regulation to be enforced is intended to protect. *The more vital or important the common values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument.*⁹⁴⁴ [Emphasis added, KK.]

The AB then elaborated that the determination of whether a measure is ‘necessary’:

...involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interest or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.⁹⁴⁵

The necessity test in the *Korean Beef* was different from the previous practice. During the *GATT* era, to justify a measure as “necessary,” countries were required to demonstrate that no *GATT*-consistent and less trade restrictive alternative was reasonably available.⁹⁴⁶ Essentially, this necessity test would consider the costs of the alternative regulation but it would not evaluate the degree to which the alternative regulation contributed to the domestic policy objective.⁹⁴⁷ In other words, it “would truncate cost-benefit analysis by not examining the benefits of the regulatory measure, or compare those benefits with the trade restriction.”⁹⁴⁸ In contrast, according to Trachtman and Marceau, the balancing test in the *Korean Beef* constitutes a “significant shift” toward a greater role of the WTO dispute settlement system in weighing regulatory values against trade values as it is,

... less deferential to national regulatory goals than a test that would simply seek to confirm whether those goals are met, rather than assessing the degree to which they are met. It actually purports to examine the importance of those national goals. These are to be balanced against the impact on trade.⁹⁴⁹

This test seems broader than in the *Shrimp-Turtle* decision, where AB balanced the right of one WTO Member State to rely on the substantive obligations of the *GATT* and the right of another Member State to advance legitimate non-trade policy objectives listed in reliance of the exceptions listed under Article XX. While this test also requires balancing between competing policy objectives, it seems to build on the structure of the *GATT* based on rules and exceptions. In the *Korean Beef*, however, the AB openly weighs and balances the relative value of domestic regulatory

⁹⁴⁴ Appellate Body report, *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, para. 162.

⁹⁴⁵ *Ibid.*, para. 164.

⁹⁴⁶ *GATT* panel report, *US-Section 337 of the Tariff Act of 1930*, 7 November 1982, BISD 36S/345.

⁹⁴⁷ Marceau & Trachtman, “A Map of the World Trade Organization Law of Domestic Regulation of Goods,” 826.

⁹⁴⁸ *Ibid.*

⁹⁴⁹ *Ibid.*, 852-53.

goals and decides which of them are as important as to be considered necessary to deviate from trading obligations.

The subsequent WTO dispute settlement practice has built on the *Korean Beef* approach. In the *US-Gambling* dispute the question was whether the U.S. prohibition on online gambling was “necessary” to protect public morals or to maintain public order under Article XIV of the *GATS*. The AB explained the analytical process that it had developed to assess necessity. Accordingly, one must first assess the ‘relative importance’ of the interests and values furthered by the challenged measure.”⁹⁵⁰ After the importance of the particular interests has been ascertained, panels should weigh and balance other factors.⁹⁵¹ In most cases, there will be at least two relevant factors, namely the contribution of the measure to the realisation of the ends pursued by it; and its restrictive impact on international commerce.⁹⁵² What then follows is the comparison between the challenged measure and possible alternatives, with the results “considered in light of the importance of the interests at issue.”⁹⁵³ Thus,

It is on the basis of this ‘weighing and balancing’ and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available.’⁹⁵⁴

The AB also indicated that necessity was an objective standard in the sense that panels are not bound by the characterisation of the measure’s objectives and effectiveness by the WTO Member State.⁹⁵⁵

On the other hand, the AB has emphasised the WTO Members’ right to determine their desired level of protection. In the recent *Brazilian Tyres*, the AB pointed to tensions “that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns,” and highlighted that,

... the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed

⁹⁵⁰ Appellate Body report, *US-Gambling*, para. 306.

⁹⁵¹ *Ibid.*

⁹⁵² *Ibid.* According to the AB, the list may not be exhaustive.

⁹⁵³ *Ibid.*, para. 307.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ *Ibid.*, para. 304.

*against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it.*⁹⁵⁶ (Emphasis added, KK)

Thus, to determine whether a measure is “necessary,” the WTO dispute settlement system assess whether the measure protects important values, whether it is sufficiently effective in promoting them and whether this seems to justify limitations to international trade. Based on the WTO dispute settlement practice, it seems that this broad test is well-established. The *Brazilian Tyres* panel was thus able to note that:

...both parties agreed that the elements identified by the Appellate Body were relevant to the case (including the assessment of the three factors, i.e. the trade impact of the measure, importance of the interests protected and contribution of the measure to the realization of the end pursued).⁹⁵⁷

To me, however, this approach holds the potential of rather radical intrusions into the domain of national legal and political systems, and highlights why linkage questions constitute a challenge to the legitimacy of the WTO dispute settlement system. Clearly, the Appellate Body is not an institution equipped to weigh and balance “the importance of the common interests or values” and decide whether objectives defined through national legislative processes are important and sufficiently met through the disputed legislation. As we have seen, the WTO dispute settlement operates in an environment where it is more powerful than most other international institutions, and where fundamental questions have been raised concerning the need to rethink the legitimacy of international law and organizations. To me, factors such as remoteness from democratically accountable institutions and closed procedures constitute powerful reasons for the WTO dispute settlement system to exercise caution when adjudicating competing values and interests.

In *Asbestos* and *Brazilian Tyres*, the AB also stressed that certain complex public health or environmental problems “may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures,” and sometimes the impacts of such measures can only be measured with the benefit of time.⁹⁵⁸ As an example, the AB mentioned measures to combat climate change.⁹⁵⁹ The point about the complexity of measures necessary to address complex environmental problems, such as climate change, is certainly valid. However, my argument is that following the AB’s necessity test in relation to such complex environmental problems would be highly likely to challenge the limits of WTO dispute settlement system’s judicial function. As it will be seen in Chapter 6, there are several possible ways in which the WTO regime could conflict with the *Kyoto Protocol to the UN Framework Convention on Climate Change*. In anticipation of such conflicts, Green has analysed the prospects to justify measures taken to mitigate climate change under *GATT*

⁹⁵⁶ Appellate Body report, *Brazilian Tyres*, para. 210.

⁹⁵⁷ Panel report, *Brazilian Tyres*, para. 7.738.

⁹⁵⁸ Appellate Body report, *Brazilian Tyres*, para. 151.

⁹⁵⁹ *Ibid.*

Article XX(b). He has proposed that in deciding whether such measures are necessary, the WTO dispute settlement bodies would weigh and balance the scientific evidence on climate change, the need for and timing of climate change mitigation and the potential impact of climate change on the environment and human health.⁹⁶⁰ Green concludes that during such balancing, the risks posed by climate change:

... may not be viewed as sufficiently strong to warrant a strong presumption in favour the regulating country... A panel or the Appellate Body may view climate change as an important issue but be influenced by the lack of consensus around the timing of required action or the potential impact of climate change on the environment or human health. To the extent there is some uncertainty, the panel or the Appellate Body may be less willing to find a particular measure to be 'necessary'.⁹⁶¹

In my view, however, weighing and balancing these extremely difficult and complex questions could easily become an exercise that breaks the boundaries of the WTO dispute settlement system's judicial role. Health risks associated with climate change depend on the level at which atmospheric concentrations of greenhouse gases are stabilised. On what is at stake in making a decision on the appropriate mitigation level, the Intergovernmental Panel on Climate Change, indicates that it:

...involves iterative risk management process that includes mitigation and adaptation, taking into account actual and avoided climate damages, co-benefits, sustainability, equity, and attitudes to risk. Choices about the scale and timing of GHG mitigation involve balancing the economic costs of more rapid emission reductions now against the corresponding medium-term and long-term climate risks of delay.⁹⁶²

Furthermore, determining the level of protection in the context of climate change would assume interesting global dimensions. The impacts of climate change are estimated to vary considerably depending on the region, and are certainly not limited to the territory of the country whose measures would be challenged. Could the EU, which is considered relatively safe in comparison to Africa or small island states,⁹⁶³ justify strict controls and trade measures to achieve a high level of *global* protection? The relationship between the WTO and climate change mitigation will be analysed in more detail in Chapter 6. My conclusions from this analysis is that the WTO dispute settlement system would be wise to exercise caution when evaluating the necessity of exceptions under Article XX. In particular, it should omit or considerably restrict the inquiry into the importance of national policy objectives in relation to international trade. While the necessity test

⁹⁶⁰ A. Green, "Climate Change, Regulatory Policy and the WTO," *Journal of International Economic Law* 8(1) (2005), 134 at 184.

⁹⁶¹ *Ibid.*

⁹⁶² IPCC, *Climate Change 2007. Mitigation of Climate Change. Working Group III Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers and Technical Summary* (IPCC, 2007), 18.

⁹⁶³ IPCC, *Climate Change 2007. Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers and Technical Summary* (IPCC, 2007), 12-14.

should not be made redundant, the WTO dispute settlement system should show a high degree of deference to national value judgements in this regard.

The climate change example also sheds light to the differences between approach proposed in Section 4.2 and the criticism voiced here. In other words, what I proposed in the previous Chapter, and continue to stress here, is the need for a transparent, consistent and constructive interaction between the WTO law and international environmental law: the WTO dispute settlement system should take into account international environmental norms in accordance with an appropriate legal standard under Article 31 of the *VCLT*. As discussed in Chapters 2, 4 and 6, this involves several complex legal questions concerning, for example, whether international environmental norms can sometimes be applied directly, when they should be taken into account in the interpretation of WTO law as relevant rules of international law under the *VCLT*, when they could play a role as factual evidence in defining the ordinary meaning of WTO Agreements and how all this affects interests of states that are not Parties to the MEA in question. What is important here, however, is that such interaction would take place using formal legal devices and be guided by the attitude of ‘judicial caution.’ In contrast, what this section has criticised is the kind of balancing contained in the *Korean Beef* decision and frequently applied in the subsequent practice that purports to decide the relative importance of national regulatory objectives and their relationship to international trade objectives. Such an analysis easily brings to the fore important questions concerning the institutional role of the WTO dispute settlement system and the formal dimension of legitimacy. The distinction between law-making and law-application may be notoriously difficult to draw, but it exists, and should be borne in mind when the WTO dispute settlement system is required to decide politically sensitive disputes by reference to rather dated and obscure norms.

5.2 On the Border between the National and International Spheres

Questions concerning competence and separation of powers also arise in the vertical relationship between the WTO dispute settlement system and national authorities of the WTO Member States. This section examines the frontier between the WTO dispute settlement system and national authorities from two perspectives. Paragraph 5.2 describes the relationship between the WTO dispute settlement system and national institutions, using the French *Asbestos* dispute as an example. The second section takes a detailed look at how the WTO jurisprudence has approached the question concerning delimitation of powers by defining the applicable standard of review, which is a judicial tool impacting the delimitation of competencies between the national and international levels.

5.2.1 The WTO Dispute Settlement System and National Political Processes

The *Asbestos* case is a good example of tensions at the border between WTO dispute settlement system and national political institutions. It is a dispute where the challenged trade measures pertains to a question of immense public interest and is based on the balancing of competing interests by democratically accountable national institutions. As explained in Chapter 3, the *Asbestos* dispute between Canada and the EU concerned a comprehensive prohibition on asbestos and products containing asbestos by France. Here, the facts of the dispute will be recounted to illustrate how the WTO dispute settlement system affects the functioning of the national political system. The analysis demonstrates how the WTO dispute settlement system is often tasked with assessing a political compromise reached in accordance with national constitutional processes even if it first reconceptualises the problem and translates it in the language of international trade law. It also illustrates how the jurisdiction of the WTO dispute settlement system *de facto* affects the possibilities for public participation and the transparency and accountability of decision-making as questions of public interest are transferred to an alien international institution and rephrased in a jargon that is extremely difficult for non-trade lawyers to understand. These issues are closely linked to the debate about globalisation and the need to rethink the legitimacy of international law and institutions discussed in Chapter 1.

The subject matter of the *Asbestos* case relates to a problem of great public interest and one that had already been subject to a lively national debate in France before adopting the contested prohibition on asbestos. When looking from the perspective of the WTO dispute settlement system, the French asbestos regulation appears as a trade measure that must be assessed against the national treatment principle set out in the Article III of the *GATT*. From the point of view of French national politics, however, the asbestos regulation can be characterised in manifestly different terms. It can be regarded as an act by a democratically accountable government responding to elevated public concerns and national political debate concerning the use of asbestos and asbestos containing products. The French decision to prohibit all types of asbestos was influenced by widespread public anxiety in the mid-1990s caused by several reports in the media showing the increase of diseases caused by occupational exposure to asbestos.⁹⁶⁴ In October 1994, a scandal broke out concerning asbestos exposure at the University of Jussieu in Paris. As of September 1995, fifteen cases of asbestos-related disease had been discovered at the University of Jussieu.⁹⁶⁵ In addition, reports of several teachers dying of lung cancer after working in other buildings containing asbestos were made public.⁹⁶⁶ Families of some of these teachers pressed charges

⁹⁶⁴ Panel report, *Asbestos*, para. 3.26.

⁹⁶⁵ "France: A Call to Arms," *British Asbestos Newsletter* 22, Winter (1996). Available at: <<http://www.lkaz.demon.co.uk/ban22.htm>>.

⁹⁶⁶ "Chronology of Events Leading to the Ban of Asbestos in France," the Canadian Asbestos Institute, 22 July 1996. Available at: <http://www.asbestos-institute.ca/media/france/annex_1.html>.

against the French Government, manufacturers of asbestos-containing products as well as building managers.⁹⁶⁷ To respond to the growing public concerns, the French Government commissioned a report on the health risks posed by asbestos from the Institut National de la Santé et de la Recherche Scientifique (INSERM) and adopted a plan of action for dealing with asbestos-related hazards.⁹⁶⁸ The summary of the INSERM report was made public in the summer of 1996. Within days of its publication the French Government announced that it was planning to introduce a regulation completely banning all types of asbestos and asbestos-containing products.⁹⁶⁹

At the time of the adoption of the asbestos legislation, a lively public debate thus took place in France concerning the risks of asbestos. The views expressed were far from unanimous. French industries using asbestos opposed the ban, trying to convince the public as well as the decision-makers that a comprehensive ban was not necessary. They campaigned for the controlled use of asbestos and emphasised the costs of banning asbestos.⁹⁷⁰ A French institution called Comité Permanent Amiante argued that the controlled use of asbestos would be relatively safe and that a ban on asbestos was thus unnecessary.⁹⁷¹ Also the French Minister for Education, Research and Technology argued that “some kind of mass psychosis had transformed a minor problem into a major hazard.”⁹⁷² He tried to convince the public that asbestos is not a poison, but a mineral that normally only posed minimal risks.⁹⁷³ Their arguments were attacked from various sources. Several NGOs were actively campaigning against the use of asbestos with the objective of a comprehensive ban.⁹⁷⁴ Also the media published reports on the deadly dangers of asbestos.⁹⁷⁵ All this was sufficient to eventually turn the political scale on the side of a total prohibition on asbestos.

Looking from the perspective of national politics, the origins of the French asbestos legislation do not look alarming. As a body accountable to the electorate, the French government responded to public concerns over health risks caused by asbestos exposure. It commissioned a scientific study on its health effects and when the study indicated that there indeed was a reason for concern, the government acted by prohibiting the substance that was likely to cause serious health hazards and be expensive for the national health care system. However, during the WTO proceedings, Canada invoked the political background of the asbestos legislation as an argument *against* France. It questioned whether it was possible for the French Government to sufficiently study and analyse the INSERM report in such a short period of time, arguing that “the ban was politically motivated

⁹⁶⁷ *Ibid.*

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid.*

⁹⁷⁰ “France: A Call to Arms,” *British Asbestos Newsletter* 22, Winter (1996).

⁹⁷¹ “The Asbestos Conspiracy,” *Le Monde Diplomatique*, July 2000. Available at: <http://mondediplo.com/2000/07/15asbestos>.

⁹⁷² *Ibid.*

⁹⁷³ “Amiante: Où Est le Scandale?” *Le Point*, 19 October 1996.

⁹⁷⁴ “France: A Call to Arms,” *British Asbestos Newsletter* 22, Winter (1996).

⁹⁷⁵ “Chronology of Events Leading to the Ban of Asbestos in France,” the Canadian Asbestos Institute, 22 July 1996.

and that the INSEREM report merely provided the *ex post facto* scientific rationale.”⁹⁷⁶ According to Canada, the French political leaders were under tremendous pressure to take action and to be seen to be remedying a situation blown out of all proportion by the media, a fact that the French parliamentarians had themselves acknowledged.⁹⁷⁷ What Canada was trying to demonstrate was that the French asbestos ban was not based on sound scientific justification but responded to an irrational public hysteria and that French politicians were also motivated by the desire to avoid legal proceedings questioning their liability. As explained in Chapter 3, the *Asbestos* panel accepted that the French measure rested on a sound scientific foundation and was justifiable under *GATT* Article XX(b), and the AB went even further, indicating that the measure did *not* violate *GATT* Article III:4, and that the toxicity of asbestos had to be taken into account when assessing its likeness with other substances used for similar purposes and therefore.

Certainly, it can be argued that in the *Asbestos* dispute, the WTO dispute settlement system found a reasonable way out of a sensitive situation. However, all this goes to show the tensions at the border between the WTO bodies and its Member States. From the point of view of a national political system, the decision to ban asbestos by the French government is a classic example of action taken by a democratically accountable institution in the face of pressure from the electorate. From a strictly formal perspective, the WTO dispute settlement system fits into the picture to the extent that the WTO Agreements have been enforced in the WTO Member States in accordance with their national constitutional requirements. However, discarding the overtly formalist stance, the competence of the WTO dispute settlement system to assess the compatibility of such national regulations with international trade rules adds a new dimension to the classic image of a national democratic system in a way that draws attention to its legitimacy implications:

If the DSB's decision does not call into question the French decision to ban asbestos, the very proceedings are bringing human health and workplace safety within the remit of the WTO although they had hitherto been matters for national sovereignty.⁹⁷⁸ [Emphasis added, KK.]

In other words, due to the jurisdiction the WTO dispute settlement system, the democratically accountable government no longer has the exclusive competence to implement protective measures that it deems necessary – either for political or scientific reasons. The *Asbestos* case thus illustrates the challenges that the WTO dispute settlement proceedings pose to the functioning of democratic processes at the national level. In my view, these tensions are a good reason for the WTO dispute settlement system to exercise caution and be mindful of the tensions inherent in its relationship with domestic institutions.

⁹⁷⁶ Panel report, *Asbestos*, para. 3.27.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ “The Asbestos Conspiracy,” *Le Monde Diplomatique*, July 2000.

5.2.2 Standard of Review and Deference to National Authorities

From legal perspective, the standard of judicial review plays an important role in drawing the line between the domain of the WTO dispute settlement system and the national authorities of the WTO Member States. As Oesch has indicated, the standard of review:

... is nothing other than the embodiment of a carefully drawn balance between the jurisdictional and institutional competencies of the actors. In substance, standards of review express a deliberate allocation of power to decide upon factual and legal issues.⁹⁷⁹

The standard of review determines the extent to which a judicial body 'second guesses' decisions taken by other institutions, in other words, it defines the intensity of the judicial review. The two extremes of a standard of review are *de novo* review and total deference. The former means that the judicial body undertakes an independent review and may completely replace the findings of another authority. When applying a deferential standard, the judicial body takes substantive findings as given and confines itself to "the formal examination of whether the relevant procedural requirements for the adoption of the measure in question were complied with."⁹⁸⁰

Due to its impact on the power-relations between the WTO dispute settlement system and the Member States, standard of review became one of the issues risking to fail the entire Uruguay Round negotiations.⁹⁸¹ As a result, the *DSU* contains no general provision on the standard of review. The most relevant provisions is Article 11 of the *DSU*,⁹⁸² according to which:

... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and the conformity with the relevant covered agreements...

The only provision in the WTO Agreements specifically addressing the standard of review is Article 17.6(i) of the *Antidumping Agreement*. Accordingly, a panel must not overturn the evaluation by the national antidumping authority if the establishment of the facts was proper and their evolution "unbiased and objective." Taking into account the mood prevailing during the Uruguay Round negotiations and the treaty texts, it would seem that Article 17 of the *Antidumping Agreement* is a special provision requiring a more deferential standard in anti-dumping disputes than the general rule in Article 11 of the *DSU*. However, the WTO dispute settlement practice seems to have

⁹⁷⁹ Oesch, *Standards of Review*, 23. Footnote omitted. Similarly, J. H. Jackson, *The Jurisprudence of GATT and the WTO. Insights on Treaty Law and Economic Relations* (CUP, 2000), 159.

⁹⁸⁰ Oesch, *Standards of Review*, 15.

⁹⁸¹ Jackson, *The Jurisprudence of GATT and the WTO*, 135.

⁹⁸² S. P. Croely & J. H. Jackson, "WTO Dispute Settlement Panel Deference to National Government Decisions: the Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine" in E.-U. Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Law International, 1997), 187 at 195. See also Oesch, *Standards of Review*, 83, 87.

adopted a different approach whereby Article 17.6(i) is supplementary to Article 11 of the *DSU*.⁹⁸³ According to Ehlermann, the standard of review depends on the Agreement, the type of issue, the type of measure and obligations:

The standard of review in trade remedy cases... leaves a certain margin of discretion to the competent national authorities. But it appears to be rather strict in spite of the fact that the panels and the Appellate Body pay deference to the investigatory process... With respect to non-trade remedy cases, particularly *GATT*, *GATS* and *TBS* cases, panels and the Appellate Body are not restrained in the same way through a prior national investigatory process. Therefore the standard of review is less restrained and could be stricter.⁹⁸⁴

In the WTO practice, the standard of review was first addressed in by the panel in the *US-Underwear*, where it indicated that “total deference to findings of the national authorities would not ensure an ‘objective assessment’” under *DSU* Article 11.⁹⁸⁵ In the *Hormones* case, the AB elaborated on the standard of review. It first noted the absence of a specific provision concerning the standard of review, emphasising, however, that *DSU* Article 11 articulates “with sufficient clarity” the appropriate standard of review for panels.⁹⁸⁶ It ruled that the applicable standard was neither *de novo* review nor total deference but “the objective assessment of facts.”⁹⁸⁷ In other words, the applicable standard stands in the middle of a full review and a reasonableness or procedural review.⁹⁸⁸ The AB stressed that the standard of review:

... must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves⁹⁸⁹

According to Cass, this shows that the AB was “acutely aware of the sensitivities raised by the decision.”⁹⁹⁰ Had the AB decided on full *de novo* review, this would have meant “a much deeper level of integration.”⁹⁹¹ Nevertheless, the decision “is constitutionalizing because it suggests that, even in the exercise of mere treaty interpretation by a central tribunal, the legal system under interpretation can be construed in a particular way.”⁹⁹² The decision affects the extent of Member State power within the WTO legal system, and the relationship between the two levels of control -

⁹⁸³ Oesch, *Standards of Review*, 97 *et seq.*

⁹⁸⁴ C.-D.Ehlermann, “Speech delivered at the Fourth Annual WTO Conference,” in Andenas & Ortino (2006), 394 at 397.

⁹⁸⁵ Panel report, *US - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, 8 November 1996, paras. 7.9-7.13. There are currently several disputes addressing the standard of review including: Panel report, *US - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, 6 January 1997, para. 7.16; panel report, *Canada - Certain Measures Concerning Periodicals*, WT/DS31/R, 14 March 1997, paras. 5.25-5.26; and the Appellate Body report on the same case, WT/DS31/AB/R, 30 June 1997, part V.A, p. 22.

⁹⁸⁶ Appellate Body report, *Hormones*, para. 114 *et seq.*

⁹⁸⁷ *Ibid.*, para. 117.

⁹⁸⁸ For analysis, see Cass, “The ‘Constitutionalization’ of International Trade Law,” 57 *et seq.*

⁹⁸⁹ *Ibid.*, para. 115.

⁹⁹⁰ Cass, *Constitutionalization of the World Trade Organization*, 189-190

⁹⁹¹ *Ibid.*

⁹⁹² *Ibid.*

national authorities can no longer make decisions without them being subject to international judicial oversight at the WTO.⁹⁹³

As in many other legal traditions, also in the WTO context the standard of review is divided into issues of fact and issues of law. This distinction is explicit in Article 17.6(i) of the *Antidumping Agreement* and also reflected in Article 17.6 of the *DSU* that limits the appeal procedure to “issues of law”.⁹⁹⁴ A comprehensive analysis by Oesch shows that the standard of review in the WTO dispute settlement system has been fairly intrusive both in relation to facts and even more so in relation to law.⁹⁹⁵ When it comes to the interpretation of WTO law, a *de novo* standard seems perfectly justifiable in light of the role of the WTO as the principle judicial organ interpreting and applying the WTO Agreement. When it comes to the evaluation of facts, however, the situation is more sensitive and the legitimacy of the WTO dispute settlement system to exercise a similar intrusive standard is questionable. As Ehlermann has indicated:

That is probably the most critical, the most delicate business a panel and the Appellate Body have to perform.⁹⁹⁶

Regardless of this delicacy, the comprehensive analysis by Oesch shows that the standard of review applied to the evaluation of facts has also been fairly intrusive. He concludes that in assessing the ‘raw’ evidence,

...panels usually did not discernibly defer to factual records as presented by the defendants. Panels examined the scope and appropriateness of the relevant facts searching and thoroughly.⁹⁹⁷

Nevertheless, in assessing the *conclusions* drawn by the national authorities from the ‘raw’ evidence, panels have tended to avoid a *de novo* examination. In other words,

As long as a member state’s conclusion is ‘justifiable’ in the light of all facts, and in the case of scientific assessments based on a ‘qualified and respected opinion’, it may not be reversed by a panel although another conclusion would be perfectly possible to arrive at as well.⁹⁹⁸

Scott, in turn, has pointed to a trade-off between substance and process in terms of the standard of review, meaning:

... a higher level of scrutiny of procedural requirements in the course of adoption of decisions, contested decisions, and lower level of scrutiny of the substantive compatibility of those decisions with the agreements.⁹⁹⁹

⁹⁹³ *Ibid.*, 188.

⁹⁹⁴ *Ibid.*, 17 *et seq.*

⁹⁹⁵ Oesch, *Standards of Review*, 239.

⁹⁹⁶ C.-D.Ehlermann, “Speech delivered at the Fourth Annual WTO Conference,” in Andenas & Ortino (2006), 394 at 397.

⁹⁹⁷ Oesch, *Standards of Review*, 236.

⁹⁹⁸ *Ibid.*

⁹⁹⁹ J. Scott, “Speech delivered at the Fourth Annual WTO Conference,” in Andenas & Ortino (2006), 410 at 410.

She refers, *inter alia*, to the *EC-Preferences* case where a procedural discipline was “used as a means of allowing greater deference in terms of substance,” in other words, “transparency and adaptability type criteria are being deployed by the Appellate Body” in evaluating the legitimacy of the EU’s GSP scheme.¹⁰⁰⁰ She then raises the question as to what extent such trade-offs between process and substance are appropriate especially in areas where the WTO Agreements do not lay down binding procedural requirements.¹⁰⁰¹

In the *US-Cotton Yarn*, the AB specified, in the context of the *Agreement on Safeguards*, that:

...panels must examine whether the competent authority has evaluated all relevant factors;... whether the competent authority has examined all pertinent factors and assessed whether an adequate explanation has been provided as to how those factors support the determination; and they must also consider whether the... explanation addresses fully the nature and complexities of the data and response to other plausible interpretations of the data. However, panels must not conduct a *de novo* review ... nor substitute their judgement for that of the competent authority.¹⁰⁰²

According to Becroft, this “casts a high onus on panels to thoroughly review member measures” and suggests that “the approach required of panels is close to a *de novo* standard of review in relation to the assessment of facts.”¹⁰⁰³ In an illustration of the “fine line” that the panel must tread between *de novo* review and objective assessment,¹⁰⁰⁴ the AB overturned some of the panel’s findings on in the *DRAMS* dispute under the *Agreement on Subsidies and Countervailing Measures* the basis that it had failed to apply the proper standard of review. Accordingly,

...the Panel went beyond its role as the reviewer of the investigating authority’s decision, and instead, it conducted its own assessment, relying on its own judgement, of much of the evidence.¹⁰⁰⁵

Questions concerning standard of review have also emerged in several disputes under the *SPS Agreement*. In the *Hormones* case the AB made several statements that seemed to highlight the Member States’ discretion to implement SPS Measures. It stressed that risk does not necessarily need to be expressed in quantitative terms,¹⁰⁰⁶ SPS measures do not need to be based on majority scientific opinion,¹⁰⁰⁷ and the requirement that SPS measures must be “based on” risk assessment means there must be a rational relationship between the measure and the risk assessment.¹⁰⁰⁸ Goh stresses that the “line between a panel conducting an objective assessment of the scientific evidence

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ *Ibid.*

¹⁰⁰² Appellate Body report, *US- Cotton Yarn*, para. 74.

¹⁰⁰³ R. Becroft, “The Standard of Review Strikes Back: The *US-Korea Drums Appeal*,” *Journal of International Economic Law* 9(1) (2006), 207 at 211.

¹⁰⁰⁴ *Ibid.*, 214.

¹⁰⁰⁵ Appellate Body report, *US-Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, 20 July 2005, para. 190.

¹⁰⁰⁶ Appellate Body report, *Hormones*, para. 187.

¹⁰⁰⁷ *Ibid.*, para. 194.

¹⁰⁰⁸ *Ibid.*, para. 193.

and a *de novo* risk assessment is however a fine one.”¹⁰⁰⁹ He criticises the subsequent *Japan-Apples* decision, which, in his view, shifted the emphasis from Article 5.1 of the *SPS Agreement* to Article 2.2, and notes that the latter Article “envisages detailed inquiry by a WTO panel into the underlying scientific basis and justification of an SPS measure.”¹⁰¹⁰ He indicates that disputes such as *Hormones*, *Biotech* and *Japan-Apples* relate more to “different national cultural approaches to certain perceived risk” than scientific uncertainty.¹⁰¹¹ Science is but one factor “in a complex political matrix confronted by national authorities” as bans on hormone meat or GM products “constitute a political response to legitimate consumer concerns about life and health.”¹⁰¹² It is therefore more difficult for domestic audiences to accept a WTO ruling that strikes down the national measure.¹⁰¹³ These questions will be discussed in more detail in the section below.

From this brief overview it is clear that the standard of review is relevant for the legitimacy of the WTO dispute settlement system especially because it modifies the relationship between the WTO and the Member States. On the face of it, the “objective assessment” standard under the *DSU* grants a certain degree of deference to the Member State. However, in practice, “objective assessment” of complex science by WTO panels can lead to rigorous review of the factual decision by national authorities. From the perspective of the legitimacy of the WTO dispute settlement system, there are valid reasons against applying a standard of review that is too intrusive. This is especially true for politically sensitive linkage disputes involving value judgements, and where the WTO dispute settlement system is entering the sensitive territory of matters previously under exclusive national jurisdiction.

5.2.3 Opening the Borders and ‘Importing’ Substantive Legitimacy?

Having examined the broader context in which the WTO dispute settlement system operates and relates to the national authorities of the WTO Member States, we can now return to the argument that the WTO dispute settlement system should ‘import substantive legitimacy’ and broaden its horizons to better accommodate the values and interests at stake in linkage disputes. To that effect, I shall use the debate about the role of science and other knowledge claims in risk disputes as an example.

The way in which the WTO dispute settlement system has relied on science in risk disputes adjudicated under the *SPS Agreement*, such as the *Hormones*, has been challenged by several scholars. The main critique is that the WTO is placing too much faith on the ability of science to both

¹⁰⁰⁹ Goh, “Tipping the Apple Cart,” 666.

¹⁰¹⁰ *Ibid.*, 668.

¹⁰¹¹ *Ibid.*, 676.

¹⁰¹² *Ibid.*

¹⁰¹³ *Ibid.*

predict and manage potential risks and leaves too little room for the inevitable political balancing involved in such disputes. According to Scott,

Context, as well as culture, is silenced in this uni-dimensional world of scientific rationality. This is a world in which law is the servant of science in the name of free trade; a world in which law as an instrument of other values – social order, public confidence, trust, community, rights, democracy or deliberation – has no role.¹⁰¹⁴

According to Perez, the WTO is harbouring “a naïve conception of science.”¹⁰¹⁵ Elaborating on the philosophical idea of “incompletable universe,”¹⁰¹⁶ Perez argues that none of the scientific techniques used by the WTO dispute settlement bodies to confront problems of indeterminacy in risk disputes are able to provide a guarantee against surprises.¹⁰¹⁷ Against this background, the privileged role bestowed to science in resolving the dilemma of distinguishing between legitimate and protectionist trade measures does not seem to be warranted.¹⁰¹⁸ Perez describes how the AB rejected in its *Hormones* decision the several general studies and opinions submitted by the EU demonstrating the risk of cancer associated with growth hormones, requiring instead a *specific* study addressing the *particular* risk, namely “the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth purposes.”¹⁰¹⁹ The AB thus assumed that more specific studies could have removed the indeterminacy characterised by the general studies invoked by the EU.¹⁰²⁰ However, in Perez’s view, the AB overestimates the capacity of regulatory sciences such as toxicology and epidemiology to cope with uncertainty around SPS measures – “a new study could not have been ‘clean’ of extrapolatory (and inherently uncertain) inferences.”¹⁰²¹ On the contrary, given that both the general and more specific on hormones studies apply the same intrinsic logic of extrapolation, the essential question is in ‘reasonableness’ of the extrapolation.¹⁰²² It is clear that answer to the question what is ‘reasonable’ cannot be found from the field of toxicology itself, but “one can argue that the law has more experience in making judgements about ‘reasonableness’ than science.”¹⁰²³

¹⁰¹⁴ J. Scott, “On Kith and Khine (and Crustaceans): Trade and Environment in the EU and WTO,” *Jean Monnet Working Paper* No. 3/1999. Available at: <<http://www.jeanmonnetprogram.org/papers/99/990301.html>>

¹⁰¹⁵ Perez, *Ecological Sensitivity and Global Legal Pluralism*, 127.

¹⁰¹⁶ *Ibid.*, 127-128. According to Perez, the idea of ‘incompletable universe’, derives from two aspects of indeterminacy: ontological indeterminacy (i.e. uncertainty about our description of reality) and time indeterminacy (uncertainty about the future). It “requires us to consider our understanding of the world as inherently transient – there is always the risk that discovering new data will force us to revise our theories of the world.”

¹⁰¹⁷ *Ibid.*, 128-129

¹⁰¹⁸ *Ibid.*, 129

¹⁰¹⁹ *Ibid.*, 136-137. See also Appellate Body report, *Hormones*, para 200.

¹⁰²⁰ *Ibid.*, 137.

¹⁰²¹ *Ibid.*, 137

¹⁰²² *Ibid.*, 137.

¹⁰²³ *Ibid.*, 137. Against this background, he also criticises the AB’s approach to the precautionary principle and Article 5.7 of the SPS Agreement: if uncertainty is the norm rather than the exception, then the distinction is not really one between ‘full knowledge’ and ‘insufficient knowledge’ but between different levels of insufficiency. Under these conditions, the precautionary principle would be an instrument that allows more risky inferences (i.e. ones that are more likely to prove wrong) – however, these questions cannot be answered through science.

As non-scientific factors thus form an inherent part of the risk assessment process, Perez is proposing a more pluralistic deliberative process based on the recognition that the process of risk assessment is an inherently incomplete process that can be informed by different types of knowledge claims.¹⁰²⁴ In more concrete terms, this would mean that in SPS disputes expert testimonies should not be confined to epidemiology and toxicology but they should also cover sociological and anthropological studies of communities closely related to the risks in question.¹⁰²⁵ According to Perez,

This pluralistic vision should be seen as a positive step by the democratic critiques of the WTO and could thus contribute to its overall legitimacy. It should also extend the ability of the WTO to cope with the complex challenges generated by SPS/TBT domains.¹⁰²⁶

While it is easy to concur with the insight that science is ultimately incapable of providing all the answers in risk disputes, what would be the consequences of the proposed pluralistic approach and how would it really have such positive implications on the legitimacy of the WTO as Perez suggests? To my mind, the answer is influenced by two considerations. Accepting that considerations other than scientific rationality play a role in the risk assessment process,¹⁰²⁷ openly acknowledging the relevance of non-scientific arguments and openly discussing the relevance such factors would seem a justified step. Increasing the transparency of the decision-making process could, as such, improve the legitimacy of the WTO dispute settlement system.

The second consideration, however, relates to my arguments concerning the dangers of weighing and balancing values and interests, and the need to pay due regard to the limits of the judicial function as well as to the tensions at the frontier between the WTO dispute settlement system and the national domain. Is it the role of the WTO dispute settlement system to develop a pluralistic vision of the risk assessment process and balance the various and possibly competing knowledge claims? Or would it, again, be better to defer these questions to negotiations and national authorities? Clearly, to answer this question one would need to strike a balance not only between the different values and interests at stake, but also between the different components of legitimacy that be pointing towards somewhat opposing directions. My argument is that in many cases, concerns over the formal dimension of legitimacy pose important constraints on the ability of the WTO dispute settlement system to broaden its substantive horizons.

¹⁰²⁴ *Ibid.*, 152-155.

¹⁰²⁵ *Ibid.*, 153.

¹⁰²⁶ *Ibid.*

¹⁰²⁷ While Perez's arguments seem logical and well-founded, it must be noted, however, that the role of value judgements in the risk assessment process is subject to debate. Hill & al., "Risk Assessment and Precaution," 268.

5.3 The WTO Dispute Settlement Proceedings and Legitimacy

When discussing the legitimacy of the WTO dispute settlement system from the procedural point of view, one frequently runs into explanations referring to the closed and secretive ‘Club’ of trade experts that is said to have dominated the *GATT* era. Accordingly, people working with the international trade regime grew accustomed to a culture of secrecy and inter-state diplomacy and are therefore finding it difficult to adjust to the new situation and respond to the pressures to make the WTO more transparent. Also some of the problems concerning the WTO dispute settlement procedures are traced to the ‘ethos’ of the *GATT* era trade diplomats, which, according to Weiler, “tenaciously persists despite the much transformed juridified WTO.”¹⁰²⁸ In terms of trade disputes,

Within this ethos, there was an institutional goal to prevent trade disputes from spilling over or, indeed, spilling out into the wider circles of international relations: a trade dispute was an “internal” affair which had, as far as possible, to be resolved (“settled”) as quickly and smoothly as possible within the organization.¹⁰²⁹

However, as we have seen in Chapter 1 and elsewhere, this ‘trade ethos’ created problems when those outside the trade circles first came to realise that the *GATT* rules could have important implications on substantive issues close to their hearts, and then learned of the unprecedented powers of the new WTO dispute settlement system. The aim of this section is to present an overview of questions concerning the legitimacy of the WTO dispute settlement procedures, in particular concerning transparency, access to information and participation, including the question concerning the admissibility of *amicus curiae* briefs. These themes are crucial to the legitimacy of the WTO dispute settlement system – not least because of the challenges brought to the fore by globalisation discussed in Chapter 1. It can be argued that procedural guarantees are even more important when decision-making takes place in a forum that is distant from those affected by its decisions and direct democratic control.¹⁰³⁰ Furthermore, these themes have also been highly relevant in linkage disputes. Many of the controversies concerning legitimacy of the WTO dispute settlement procedures have culminated in such high-profile linkage disputes as the *Asbestos*, *Shrimp-Turtle* or *Biotech* cases where the public has had a keen interest in the proceedings but several constituencies have felt that their opportunities to participate, influence or be informed of the proceedings have been modest.

5.3.1 Transparency and Access to Information

One of the most common critiques against the *GATT* and WTO dispute settlement panels is one referring to the ‘three faceless bureaucrats’ or ‘gnomes’ in Geneva deciding important issues of the

¹⁰²⁸ J. H. H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement,” *Journal of World Trade* 35(2) (2001), 191 at 193.

¹⁰²⁹ *Ibid.*, 195.

¹⁰³⁰ Howse, “Adjudicative Legitimacy and Treaty Interpretation,” 42.

world and domestic socio-political and economic policy.¹⁰³¹ This accusation has been voiced so frequently that it has provoked some less understanding reactions from inside the WTO:

The dispute settlement system has given rise to charges that WTO decisions are made by 'faceless bureaucrats,' but when I hear this I often wonder what these critics would rather have: a system where decisions are made by well-known politicians? A coin toss? A system where might makes right? No dispute settlement system at all? The system may not operate perfectly but no one has yet been able to prescribe something better with respect to its basic fundamentals.¹⁰³²

While it is probably easy for the 'insiders' to grow tired of the accusations made towards the WTO and dispute settlement system, it is not difficult to see how the legitimacy of the WTO dispute settlement procedures could be improved.

In general terms, access to the WTO dispute settlement system is restricted to WTO Member States. While provisions on third party participation by WTO Member States appear to be functioning relatively well, some concerns have been raised also in that regard, for example over short time-limits and resources of developing countries to participate.¹⁰³³ From that perspective, a significant decision was made by the AB made in the *Bananas* dispute to allow parties to be presented by private lawyers:¹⁰³⁴

Many times a smaller Member might not have the resources alone to pursue WTO disputes effectively, particularly against large WTO Members like the United States or the EC. Private sector involvement...can help even out the asymmetry.¹⁰³⁵

According to Howse, the use of private lawyers may improve procedural legitimacy also because private lawyers are more used to such procedural rights than are government officials.¹⁰³⁶ From the perspective of developing countries, the problem with private law firms is that they tend to be expensive to hire for legally and technically complex WTO disputes. The creation of the Advisory Centre on WTO Law has therefore been hailed as an important advance for developing countries.¹⁰³⁷ Its rates vary based on the developing country's membership status, and in the *EC-Sardines* case, for example, it provided legal advice to Peru for only 100 U.S. dollars per hour.¹⁰³⁸

From the point of view of the general public, the WTO dispute settlement proceedings take place in secret. At least, there is no legal basis for members of the public to access the written or oral proceedings. During the written phase, submissions by the disputing parties are not made public -

¹⁰³¹ Weiler, "The Rule of Lawyers and the Ethos of Diplomats," 202.

¹⁰³² Yerxa, "The Power of the WTO Dispute Settlement System," 5.

¹⁰³³ J.P. Durling, "Rights of Access to WTO Dispute Settlement," in P. Rutledge & al, eds., *Due Process in the WTO Dispute Settlement* (Cameron May, 2000), 141 at 146-147.

¹⁰³⁴ Appellate Body report, *EC-Bananas III*, paras. 4-12.

¹⁰³⁵ Durling, "Rights of Access to WTO Dispute Settlement," 155.

¹⁰³⁶ Howse, "Adjudicative Legitimacy and Treaty Interpretation," 47.

¹⁰³⁷ Shaffer & Mosoti, "The EC-Sardines Case," 3.

¹⁰³⁸ *Ibid.*

unless the participants decide to do so. According to the panels' Working Procedures contained in Appendix 3 of the *DSU*, WTO Members "must treat as confidential information submitted by another Member to the panel which that Member has designated as confidential."¹⁰³⁹ However, at the request of its counterpart in a dispute, a WTO Member must provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.¹⁰⁴⁰ Some WTO Members, such as the EU, the U.S. and Australia, have developed a practice of publishing their own written submissions on their websites.¹⁰⁴¹

In principle, oral proceedings before the panels and the Appellate Body are conducted in secret behind closed doors. There has been some discussion as to whether it would be possible to open panel hearings through agreement of the parties.¹⁰⁴² And indeed, during the proceedings concerning the *Continued Suspension of Obligations in the EC-Hormones Dispute*, the disputing parties jointly requested that the panel's meetings be opened for public observation.¹⁰⁴³ The panel decided to accept the parties' joint request on the basis that *DSU* Article 12 allows panels to deviate from the working procedures in Appendix III of the *DSU*.¹⁰⁴⁴ It also interpreted *DSU* Article 14.1 providing that "panel deliberations shall be confidential" in such a way that "deliberations" only covered the panel's internal discussions in reaching its conclusions.¹⁰⁴⁵ Several third parties, including Brazil, China, India, Taiwan and Mexico, disagreed and the panel decided that its session with third parties remained closed.¹⁰⁴⁶ Countries opposing open panel hearings highlighted that questions of transparency are being discussed in the ongoing negotiations concerning the review of the *DSU* and an agreement has yet to be reached.¹⁰⁴⁷ This is true and highlights tensions between the dispute settlement system and the slow political arm of the WTO. On the other hand, a solid legal basis for open panel proceedings exist under the *DSU*, and the argument here is that the panel was thus right in complying with the joint request by all the disputing parties. From the point of view of further improving the procedural legitimacy of the WTO dispute settlement system, it is useful to highlight that most national and international courts and tribunal are open to public and there are thus strong arguments to apply the same principle at the WTO.¹⁰⁴⁸

¹⁰³⁹ *DSU*, Appendix 3, para.3.

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ See, for instance, the European Commission's website at: <http://ec.europa.eu/trade/issues/respectrules/dispute/index_en.htm>.

¹⁰⁴² I. Gracia-Bercero, "Speech Delivered at the Fourth Annual WTO Conference" in Andenas & Ortino (2006), 433 at 436.

¹⁰⁴³ Panel report, *US-Continued Suspension of Obligations in the EC-Hormones Dispute*, para. 7.1

¹⁰⁴⁴ *Ibid.*, paras. 7.45-47.

¹⁰⁴⁵ *Ibid.*, para. 7.49.

¹⁰⁴⁶ *Ibid.*, para. 7.53.

¹⁰⁴⁷ *Ibid.*, paras. 7.21-7.39.

¹⁰⁴⁸ W. Davey, "Proposals for Improving the Working Procedures of the WTO Dispute Settlement Panels," in F. Ortino & E-U Petersmann, eds., *The WTO Dispute Settlement System 1995-2005* (Kluwer Law International, 2004), 19 at 21.

Concerning access to the actual panel and Appellate Body reports the current situation is already fairly satisfactory. All dispute settlement reports are made publicly available after their adoption by the DSB, and can be downloaded from the WTO's website.¹⁰⁴⁹ The website also provides plenty of other high-quality information relevant to the WTO dispute settlement system, including short summaries by the WTO Legal Service on most disputes. However, this applies only to adopted panel reports. In contrast, the interim panel reports are distributed solely to the disputing WTO Member States for comments and not made available for even other WTO Members. This practice seems justifiable given that in most judicial bodies, even the disputing parties are not given the opportunity to comment on the outcome before the decision is finalised. In the *Biotech* case, an interesting incident occurred concerning the interim panel report. Unsurprisingly, the civil society had been both following the case as closely as possible and complaining about the lack of transparency of the proceedings. The amount of scientific information reviewed by the panel was enormous and its deadline for finalising the report was postponed several times. In February 2006, the interim panel report was finally given to the parties. It did not take long until first the findings and conclusions were published, and then also the descriptive part of the report was made available online through the website of the Friends of the Earth.¹⁰⁵⁰ What is interesting is the sharp tone that the final *Biotech* panel report uses to criticise the NGOs involved in this incident:

... it is surprising and disturbing that the same NGOs which claimed to act as *amici*, or friends, of the Panel when seeking to convince the Panel to accept their unsolicited briefs subsequently found it appropriate to disclose, on their own websites, interim findings and conclusions of the Panel, which were clearly designated as confidential.¹⁰⁵¹

Why was it necessary for the *Biotech* panel to criticise the NGOs - in all likelihood, it was one of the disputing parties that leaked the report? It is also a commonly known fact that most interim panel reports are leaked.¹⁰⁵² As the former WTO Director-General Ruggiero stated, "almost all interim reports have been leaked, sometimes within hours, usually within a matter of a few days."¹⁰⁵³ While concerns voiced by the *Biotech* panel and Ruggiero over confidential information contained in the interim reports are valid, it is hardly surprising that the report was leaked in such a high-profile linkage dispute as the *Biotech*. While bringing the matter to the disputing parties' attention seems appropriate, it certainly seems unnecessary for the panel to criticise the relevant NGOs in such harsh terms.

¹⁰⁴⁹ The WTO Dispute Settlement Gateway. Found at: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes.

¹⁰⁵⁰ Panel report, *Biotech*, paras. 6.183-6.185.

¹⁰⁵¹ *Ibid*, para. 6.196.

¹⁰⁵² Currie, *Genetic Engineering and the WTO*, 8-9.

¹⁰⁵³ Statement by the Director-General to the General Council, 24 April 1998. Found at: http://trade.wto.org/english/news_e/sprr_e/stat17_e.htm.

There is little doubt that having access to the final panel and Appellate Body reports is fundamentally important for the legitimacy of the WTO dispute settlement system. While they are readily available online in several languages the situation is unfortunately still not ideal. The sheer size and length of some panel reports is bound to deter many who would have been interested in knowing more about the dispute and the outcome but are not obliged to do so for professional reasons. In the *Biotech* case, for instance, the panel's report without the annexes is almost 1.100 pages long and the entire report is contained in 12 separate Microsoft Word documents. After having overcome technical hurdle of downloading and reading the multiple documents, the fact remains that the panel and Appellate Body reports are "increasingly difficult to understand."¹⁰⁵⁴ While the daunting flood of information, its enormous complexity and difficult jargon is by no means confined to the WTO, the problem still merits attention. This is because the WTO and especially its dispute settlement system are notorious for producing lengthy and complicated documents. All this very much affects the ability of those interested in the issues before the WTO dispute settlement system to follow and understand what is going on. While laymen will never be able to understand WTO dispute settlement documents perfectly (and few will read them), certain measures would still improve the legitimacy of the WTO dispute settlement proceedings. This is because both, lack of information and a flood of information that is too daunting to understand are prone to inspiring misconceptions and negative rumours. The conclusion here is that the legitimacy of the WTO dispute settlement system could be improved by allowing the public to access written submissions and observe hearings, as well as by producing short, easily accessible summaries of all disputes.

5.3.2 Public Participation and *Amicus* Briefs

The question concerning public participation in the WTO dispute settlement proceedings has been even more difficult and controversial than that of access to information and transparency. Since the *DSU* contains no provisions on rights of access by any other actors apart from the WTO Member States, possibilities for private actors and NGOs to participate in the WTO dispute settlement proceedings depend on the national regulation and practices of each individual WTO Member State. In reality, the situation has been described in the following terms:

When private parties have interests that align completely with one of the Members, private parties can play a very active role in the conduct of the case. However, this access is completely subject to the limits set by that Member.¹⁰⁵⁵

In practice, private actors have played an important role in high-profile disputes such as the *Hormones*, *Bananas* and *Photographic Film*¹⁰⁵⁶ (revealingly known as the Fuji-Kodak case). For this

¹⁰⁵⁴ T. Cottier, "Speech Delivered at the Fourth Annual WTO Conference," in Andenas & Ortino (2006), 451.

¹⁰⁵⁵ Durling, "Rights of Access to WTO Dispute Settlement," 147.

¹⁰⁵⁶ *Ibid.*, 153.

reason, the problems can be characterised as “subtler than the lack of any access”¹⁰⁵⁷ – and perhaps even more difficult. In other words, while the involvement of private actors can in many case be suspected, their exact role is often not publicly known.¹⁰⁵⁸ For this reason, it is often difficult “to single out those private sector interests that deserve to be exposed and evaluated.”¹⁰⁵⁹ It has been argued – convincingly – that transparency “is going to be politically more important rather than less.”¹⁰⁶⁰ It has also been estimated that the question will be “difficult to resolve because it brings forward very different political perspectives.”¹⁰⁶¹ However, a strong and convincing argument can be made for improving the legitimacy of the WTO dispute settlement proceedings in this regard:

When a process is open, when all stakeholders feel they have some chance to influence the process, the entire process has more credibility and legitimacy... The current, frequently non-transparent, forms of access do not as much to build and reinforce legitimacy as might be the case.¹⁰⁶²

The following discussion focuses on a particular form of participation, namely *amicus curiae* briefs, that have been particularly controversial at the WTO dispute settlement system.

Amicus curiae, ‘friends of the court’, is a legal institution dating back to Roman law when oral history was the principal means for transmitting jurisprudence and wisdom.¹⁰⁶³ The role of the *amici* was to draw a court’s attention to precedents and crucial facts that had been overlooked.¹⁰⁶⁴ Currently, the concept is used in several legal systems but predominantly in common law ones in the form of *amicus curiae* briefs submitted by groups or individuals seeking to influence the outcome of the judicial process and stressing facts and legal arguments favourable to their interests.¹⁰⁶⁵ At the WTO, the question of *amicus* briefs has been highly controversial. Their admissibility is not regulated by the *DSU* but their status has evolved through the WTO dispute settlement practice. The current situation is that *amicus* briefs have been accepted at all stages of the dispute settlement process, in other words, during panel, appeal and Article 21.5 implementation proceedings. However, the practice has been widely criticised both by those opposing the admissibility of *amicus* briefs at the WTO and by those accusing the WTO dispute settlement system for not properly considering the *amicus* briefs that it has accepted.

The first important decision concerning the admissibility of *amicus* briefs at the WTO was made in the *Shrimp-Turtle* dispute. Highlighting their interest in the dispute, two NGOs, namely the World

¹⁰⁵⁷ *Ibid.*, 154.

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ Gracia-Bercero, “The Fourth Annual WTO Conference,” 435.

¹⁰⁶¹ *Ibid.*, 436.

¹⁰⁶² Durling, “Rights of Access to WTO Dispute Settlement,” 155.

¹⁰⁶³ G. C. Umbricht, “An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO,” *Journal of International Economic Law* (2001), 773 at 778.

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ *Ibid.*

Wildlife Fund and the Center for International Environmental Law (CIEL), submitted *amicus* briefs to the *Shrimp-Turtle* panel. According to the WWF, its aim was to:

...ensure that the WTO Dispute Settlement System has before it both the scientific and other technical facts relevant to the conservation of se turtles; and the relevant international, regional and national law and policy governing the conservation of sea turtles.¹⁰⁶⁶

The *Shrimp-Turtle* panel, however, rejected the *amicus* briefs. It explained that:

We note that, pursuant to Article 13 of the *DSU*, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the *DSU* as currently applied.¹⁰⁶⁷

The panel went on to indicate that the parties had the option of attaching *amicus* briefs as a part of their own submissions and noted that the U.S. had done so with regard to the brief submitted by the CIEL.¹⁰⁶⁸ The AB, however, adopted a different approach to the admissibility of *amicus* briefs. It underscored the “comprehensive nature” of the panel’s right to ‘seek information’ under Article 13 of the *DSU*.¹⁰⁶⁹ It also emphasized that Article 12.1 of the *DSU* made it possible for panels to depart from the Working Procedures annexed to the *DSU* and develop their own Working Procedures after consulting with the disputing parties.¹⁰⁷⁰ Thus, Articles 12 and 13 of the *DSU* taken together gave panels “ample and extensive authority” to undertake and control the fact-finding process.¹⁰⁷¹ The AB stated that the panel’s reading of the word ‘seek’ was “unnecessarily formal and technical” and indicated that:

A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.¹⁰⁷²

Subsequently, panels have both accepted and rejected *amicus* briefs. In the *Australia-Salmon* dispute a panel established under Article 21.5 of the *DSU* accepted an *amicus* brief¹⁰⁷³ whereas in the *Carbon Steel* dispute the panel, referring to Articles 12 and 13 of the *DSU* and the *Shrimp-Turtle* decision, used its discretion and decided to reject an *amicus* brief.¹⁰⁷⁴ The *Asbestos* panel accepted two *amicus* briefs attached by the EC to its submission, rejected two briefs as not relevant and one because it

¹⁰⁶⁶ “Amicus Brief to WTO: Shrimp-Turtle Dispute,” (WWF, September 1997.). Available at: <<http://www.field.org.uk/files/shrimpbrief.pdf>>.

¹⁰⁶⁷ Panel report, *Shrimp-Turtle*, para. 7.8

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ Appellate Body report, *Shrimp-Turtle*, para. 104.

¹⁰⁷⁰ *Ibid.*, para. 105.

¹⁰⁷¹ *Ibid.*, para. 106.

¹⁰⁷² *Ibid.*, paras. 107-108.

¹⁰⁷³ Panel report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, , WT/DS18/RW, 18 February 2000, paras. 7.8-7.9.

¹⁰⁷⁴ Panel report, *US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, 23 December 1999, para. 6.3.

had arrived too late. During the Article 21.5 proceedings in the *Shrimp-Turtle* case, the panel also considered one brief attached to the U.S. submission and rejected another one.

The admissibility of *amicus* briefs during the appeal phase has been legally more controversial than at the panel phase. In its first *Shrimp-Turtle* decision in 1998, the AB accepted *amicus curiae* briefs “attached to the appellant’s submission as a part of the appellant’s submission.”¹⁰⁷⁵ In addition, it issued a preliminary ruling accepting an *amicus* brief submitted directly to it by the CIEL and promised to give reasoning for this in the final report. However, it was not until the *Carbon Steel* dispute that the AB elaborated on the legal basis for its authority to accept *amicus* briefs. In its justification, the AB referred to Article 17.9 of the *DSU* providing the AB the competence to draw up its own working procedures in consultation with the Chairman of the DSB and the Director General of the WTO.¹⁰⁷⁶ In a footnote, it also referred to Rule 16(1) of its Working Procedures authorising the AB to create an appropriate procedure when a question arises not covered by the Working Procedures.¹⁰⁷⁷ According to the AB, Article 17.9 of the *DSU* provides it with “broad authority to adopt procedural rules” which do not conflict with the *DSU*.¹⁰⁷⁸ On this basis, the AB took the position that:

...as long as we act consistently with the provisions of the *DSU* and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that is pertinent and useful in an appeal.¹⁰⁷⁹

The AB’s legal reasoning has been subject to criticism. The scope of the appellate review is limited to questions of law, and the *DSU* contains no explicit provision providing the AB with a similar right to seek information and technical advice as the panels have under Article 13. According to Appleton, the AB:

...chose not to draw the obvious conclusion, that the Members did not grant the Appellate Body the right to seek information and technical advice with respect to questions of law falling within its purview.¹⁰⁸⁰

In his view, the AB’s conviction that by accepting *amicus* briefs, it is not adding or diminishing the rights and obligations of WTO Members is “somewhat hard to reconcile” with Article 13 of the *DSU*.¹⁰⁸¹ He also laments that while the AB has normally “placed great emphasis” on textual interpretation of WTO instruments, in the *Carbon Steel* dispute it “may have strayed from a text of its own creation,” namely the provisions of the Working Procedure.¹⁰⁸²

¹⁰⁷⁵ Appellate Body report, *Shrimp-Turtle*, para. 91.

¹⁰⁷⁶ Appellate Body report, *US-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, 7 June 2000, para 39.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ *Ibid.*

¹⁰⁸⁰ A.E.Appleton, “*Amicus Curiae* Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body’s Hat?”, *Journal of International Economic Law* 3(4) (2000), 691 at 696.

¹⁰⁸¹ *Ibid.*, 698.

¹⁰⁸² *Ibid.*, 699.

In the *Asbestos* dispute the AB attempted to respond to some of this criticism – but ironically it did so in a way that infuriated virtually all stakeholders in the *amicus* controversy, thereby marking in many ways the culmination of the situation. During the appeal phase of this dispute relating to a subject matter of enormous public interest, the AB created a special procedure under Article 16(1) of its Working Procedures for dealing with *amicus curiae* briefs for the purposes of this single appeal. Accordingly, those interested in filing an *amicus* brief were first required to apply for ‘leave to file’ and comply with certain procedural requirements.¹⁰⁸³ Some WTO Members, however, did not appreciate the Appellate Body’s initiative and called for an extraordinary meeting of the General Council. Several delegates accused the AB for exceeding its mandate and competence.¹⁰⁸⁴ Meanwhile, the AB received 17 applications for ‘leave to file’ but decided to reject every single one of them either because they had been filed too late or did not comply with other procedural requirements.¹⁰⁸⁵ It is commonly understood, however, that it was because of the negative reaction by the WTO Member States to the adoption of the special procedure rather than serious procedural flaws in all 17 applications that the AB decided to categorically reject all the applications. This series of decisions caused what has been characterised as “the most virulent backlash yet seen against the WTO.”¹⁰⁸⁶ In addition to upsetting several developing country WTO Members, those who had submitted an application were appalled by the ‘comedy of errors.’:

This was very clumsily handled – for me at least, it was an insult to be told that I could not follow a set of simple instructions.¹⁰⁸⁷

Thus, as Mavroidis observes:

...the Appellate Body managed to alienate all of the WTO constituency: the WTO Members, the NGOs and some of us who continue to write on WTO issues.¹⁰⁸⁸

Since the *Asbestos* episode, the situation has calmed down somewhat and the current legal situation can be summarised as follows: parties are free to attach *amicus* briefs to their written submission. Otherwise, panels have the authority to accept unsolicited *amicus* briefs on the basis of Article 13 of the *DSU*. The Appellate Body has also accepted *amicus* briefs, but the exact legal basis for its authority to accept unsolicited *amicus* briefs remains unclear.¹⁰⁸⁹ On the other hand, the AB has an authority to request *amicus* briefs under Article 16(1) of its Working Procedures as an *ad hoc* solution. One possible interpretation suggested by Mavroidis is thus to interpret Article 16(1) in the same way as Article 13 of the *DSU*, namely that since the AB has the authority to request *amicus*

¹⁰⁸³ Appellate Body report, *Asbestos*, paras. 51-52.

¹⁰⁸⁴ WTO Minutes of General Council Meeting (22 November 2000), WT/GC/M/60, 23 January 2001.

¹⁰⁸⁵ Appellate Body report, *Asbestos*, paras. 55-56.

¹⁰⁸⁶ R. Howse, “Membership and its Privileges: the WTO, Civil Society and the *Amicus* Brief Controversy” *European Law Journal* 9(4) (2003), 496 at 505.

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ P. C. Mavroidis, “*Amicus Curiae* Briefs Before the WTO: Much Ado About Nothing,” *Jean Monnet Working Paper* 2/2001.

¹⁰⁸⁹ *Ibid.*, 5.

briefs, it also has the authority to accept unsolicited briefs. In any case, the fact that the *DSU* is silent concerning the admissibility of *amicus* briefs should not automatically mean that they are inadmissible. The *DSU* does not explicitly address numerous other procedural matters either, but this does not prevent the WTO dispute settlement system from drawing the obvious conclusions. As Mavroidis also observes, the *DSU* contains no provision concerning the AB similar to Article 11 of the *DSU* obligating panels to make ‘an objective assessment’ of matters before it. Furthermore, the *DSU* makes no mention of due process – yet few would disagree that due process has to be complied with and “WTO Members, in their submissions, whenever they raise a procedural concern, almost always refer to due process.”¹⁰⁹⁰ It is useful to note that some WTO Members have proposed clarifying the status of *amicus* briefs during the negotiations to review the *Dispute Settlement Understanding* and adopt appropriate procedures.¹⁰⁹¹ However, these proposals did not receive sufficient support to be included in the Chair’s texts used as a basis for the negotiations.¹⁰⁹²

What, then, are the main stakes in the *amicus* debate? The admissibility of *amicus* briefs has been contested based on the view that the WTO is an intergovernmental organization and therefore, its procedures should be open for WTO Members only. Other stakeholders should approach their respective WTO Member States and make their contribution through national processes. Chapter 1 already took a strong position against this type of argumentation. International law is undergoing a profound change and the old view is no longer plausible. This does not mean, however, that *amicus* briefs should necessarily be accepted, but if not, then this is not the right argument. Furthermore, as already indicated above, those with powerful economic interest already have means of securing their interests in the WTO dispute settlement proceedings:

They have access to politicians, and therefore to the servants of politicians, delegates and ambassadors; they also have access, or the resources that buy access to lawyers, consultants, and lobbyists who can make their views effectively known in the Geneva community... All the howls of the trade ‘Club’ about *amicus* practice when NGOs are involved should be interpreted in the light of their utter silence about the due process issues raised by the long-standing practice of lawyers, lobbyists etc. speaking to delegates or even legal officials of the Secretariat.¹⁰⁹³

Even more interestingly – and probably accurately – Howse also indicates that while he is not arguing that the lobbying extends to the Appellate Body itself,

... there are routine third-party (government) interveners in disputes who will sometimes make systemic arguments that have been suggested by the trade community and have little to do in any case with the specific interests of that country at stake in the dispute, if indeed there *are* any.¹⁰⁹⁴

¹⁰⁹⁰ *Ibid.*, 8.

¹⁰⁹¹ Davey, “Proposals for Improving the Working Procedures of the WTO Dispute Settlement Panels,” 22-23.

¹⁰⁹² E-U. Petersmann, “The Doha Development Round Negotiations on Improvements and Clarifications of the WTO Dispute Settlement Understanding 2001-2003: An Overview,” in Ortino & Petersmann, eds., (2004), 3 at 3.

¹⁰⁹³ Howse, “*Amicus* Brief Controversy,” 509.

¹⁰⁹⁴ *Ibid.*

In light of such realities where powerful economic interests find their way to the WTO in any case, allowing *amicus* briefs from NGOs would be a way of ensuring that the WTO dispute settlement system is aware of all the relevant interests and viewpoints. If industry groups were interested in submitting *amicus* briefs, this would only make the situation more transparent. In my view, it is important for informed and responsible decision-makers to be aware of all the relevant facts, views, interests and interpretations. And while it is true that those authoring *amicus* briefs tend to have a substantive bias and be interested ‘in selling a message,’

...this is not an argument against accepting *amicus curiae* briefs. This is an argument in favour of selecting properly the members of a court.¹⁰⁹⁵

The key and most challenging argument against the admissibility of *amicus* briefs relates to developing countries and discrepancy of resources. The concern here is that since developing countries are already at an disadvantage given their limited resources to participate in the WTO and its dispute settlement, allowing *amicus* briefs from NGOs would make the situation worse. The reality is that most NGOs are situated in the North and their resources to prepare for a WTO case are sometimes better than those of the poorest WTO Members. The argument has thus been made that *amicus* briefs are systematically biased in favour of developed countries. However, Howse and others argue – convincingly in my view – that this view is increasingly difficult to sustain.¹⁰⁹⁶ This is because also developing country NGOs are taking advantage of the practice.¹⁰⁹⁷ For example, in the *Shrimp-Turtle* case NGOs from developing countries had collaborated with Northern ones to submit an *amicus* brief to the panel.¹⁰⁹⁸ Howse also indicates that developed and developing country NGOs are cooperating on questions concerning access to medicines.¹⁰⁹⁹ Interestingly, the only WTO Member that has ever filed an *amicus* brief – successfully – was also a developing country, namely Morocco in the *Sardines* dispute.¹¹⁰⁰ Howse states that this example illustrates that:

...*amicus* participation can be cost-effective way for a country with limited resources to participate in WTO proceedings in which it has some interest, but where formal third-party participation may be more cost-intensive.¹¹⁰¹

As I have indicated before, the discrepancy of resources to participate in the functioning of the WTO is a real and serious problem. And indeed, drafting and submitting an *amicus* brief to the WTO requires familiarity with the institution and the subject matter of the dispute. But in my view, it is not an adequate reason for denying the admissibility of *amicus* briefs. Other – more proactive – ways should be sought to address concerns related to the lack of capacity and resources in developing countries. It is not plausible to argue that the world’s most powerful court should not

¹⁰⁹⁵ Mavroidis, “Much Ado About Nothing,” 7.

¹⁰⁹⁶ Howse, “*Amicus* Brief Controversy,” 509.

¹⁰⁹⁷ *Ibid.*

¹⁰⁹⁸ *Ibid.*

¹⁰⁹⁹ *Ibid.*

¹¹⁰⁰ Appellate Body report, *EC-Sardines*, paras. 164-169.

¹¹⁰¹ Howse, “*Amicus* Brief Controversy,” 509.

have the opportunity to hear all arguments because of the lack of intellectual and financial resources. And in any case, the information contained in the *amicus* briefs is out there anyway:

What if NGOs, instead of submitting their briefs to the Appellate Body, publish it in the Financial Times, the Economist or make it available in the Internet? And what if Appellate Body judges (as hopefully is the case) read the Financial Times, the Economist and keep in track with what is going on?¹¹⁰²

This comes to back to the point raised above concerning the hidden influence of the private sector and powerful economic interests. At the end of the day, is it not a lesser evil for the developing countries participating in the WTO proceedings to be aware of arguments that presumably go against them, and whether and how the WTO dispute settlement system has considered them when making their decision? Being aware of various arguments – legal or factual – does not mean that the WTO dispute settlement system would immediately jump across the barriers limiting its competence that have been carefully analysed in this and the previous Chapters. On the contrary, the analysis in the previous Chapters would rather seem to point towards a completely different direction.

There are also other, weaker, arguments against the admissibility of *amicus* briefs. Another argument against *amicus* briefs relates to the clash of legal cultures: *amicus curiae* are mostly used in common law systems and some lawyers with a civil law background thus tend to view them suspiciously. In the field of international law, the practice of the growing number of international courts and tribunals remains divergent. *Amicus* briefs have been accepted in some courts and tribunals but not all of them. From a more pragmatic procedural perspective, it is being argued that *amicus* briefs would overwhelm the WTO dispute settlement system and that the disputing parties may not have enough time to respond to them.¹¹⁰³ It has also been questioned whether *amicus* briefs can be useful – but there is an easy reply to this argument:

The panel remains free to use or ignore the *amicus* submission as it sees fit. Those making such submissions have a compelling incentive to make them as useful as possible, thereby maximising the likelihood that the panel will consider the submission.¹¹⁰⁴

The usefulness argument also has another side to it. While panels and the Appellate Body have accepted *amicus* briefs, they have not been taken necessarily too much into account.¹¹⁰⁵ A recent example of this trend is the *Biotech* panel, which accepted three unsolicited *amicus curiae* briefs but then ruled that it did not find it necessary to take them into account.¹¹⁰⁶ This would not be a problem as long as it is done *bona fide* – in other legal system where *amicus* briefs are admissible the

¹¹⁰² Mavroidis, “Much Ado About Nothing,” 9.

¹¹⁰³ Durling, “Rights of Access to WTO Dispute Settlement,” 152. Durling later rejects both these arguments.

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ Gracia-Bercero, “The Fourth Annual WTO Conference,” 435.

¹¹⁰⁶ Panel report, *Biotech*, para. 7.11.

conclusion has been drawn that it is seldom that they actually affect the decision-making in any radical way.¹¹⁰⁷ However, all this would not be acceptable if it was done to give NGOs and those outside the immediate WTO community a false sense of transparency and openness while ultimately (but not explicitly) deferring back to WTO Members and the lack of clear mandate to consider *amicus* briefs to balance the dilemma caused by a situation where the judicial branch must compensate for the difficulties of the legislative branch.

¹¹⁰⁷ Mavroidis, "Much Ado About Nothing," 1044, 7. Mavroidis refers to a study on an influence of *amicus* briefs in the U.S. Supreme Court by Kearney and Merrill (2000).

6. Legitimacy of the WTO Dispute Settlement System and Fragmentation of International Law

This is the background to the concern about fragmentation of international law: the rise of specialized rules and rule-systems that have no clear relationship to each other. Answers to legal questions become dependent on whom you ask, what rules you focus on.¹¹⁰⁸

The previous Chapters have approached the legitimacy of the WTO dispute settlement system mostly from the perspective of one specialised rule-system of international law - WTO law - and were mainly guided by its internal logic and normative structures. This Chapter seeks to highlight the evolution of international law, indeed its fragmentation, during the past couple of decades. Using climate change law as an example, it argues that while focusing on international trade law and the WTO dispute settlement system may seem perfectly logical, it may also lead to a bias that undermines other specialised areas of international law in such a way that challenges the legitimacy of the WTO dispute settlement system. At first, this Chapter may seem like out of context in this study - why start a new substantive discussion and address the relationship between the WTO and the international climate change regime only in the penultimate Chapter? Why not include this analysis and climate change examples in the earlier Chapters? The justification is methodological. If the placement of this Chapter seems like fragmentation – then this is intentional and serves to illustrate the current fragmented state of international law and its possible implications for the legitimacy of the WTO dispute settlement system. As the WTO Director-General Lamy has indicated,

The effectiveness and legitimacy of the WTO depend on how it relates to norms of other legal system and on the nature and quality of its relationship with other international organizations.¹¹⁰⁹

The previous Chapters have explained how the international trade regime has evolved from the 1940s to 1995 and beyond, and how the WTO dispute settlement system has been faced with a number of substantive and procedural legitimacy challenges arising from disputes where non-trade interests play an important role. Certainly, these Chapters have tried to broaden the readers' horizons and highlight pressures and opportunities at the border between WTO law and international environmental law by asking, *inter alia*, how some of the classic WTO disputes should be assessed from the point of view of international environmental law. The aim here, however, is to draw attention to the this tension at a more profound level. In the overall structure of this study, the following climate change narrative aims to demonstrate why all the problems challenging the

¹¹⁰⁸ ILC, *Fragmentation of International Law*, 245.

¹¹⁰⁹ P. Lamy, "The Place of the WTO and Its Law in the International Legal Order," *European Journal of International Law* 17(5) (2007), 969 at 977.

legitimacy of the WTO dispute settlement system are not capable of being solved by focusing on its institutional constraints – or even by the WTO negotiators alone.

To do this, it is necessary to first demonstrate what the fragmentation of international law means in practice. Before returning to the WTO dispute settlement system, this Chapter jumps from one international legal regime to another. By discussing in detail the evolution of the UN climate change regime, it seeks to illustrate how other specialised systems of international law have developed simultaneously with, but very much in isolation of the WTO system. It emphasises how they, like the WTO system, are motivated by a compelling internal logic and sense of a urgent mission to protect and promote the interests of the international community. Even more importantly, specialised regimes such as the UN climate change regime are also composed of binding norms of international law and impose sanctions on those in non-compliance. In sum, the objective here is to paint a clear picture of the somewhat competing claim to legitimacy by WTO law on the one hand, and the UN climate change regime on the other, and, with that image in mind, broaden the conclusions that have been drawn from the analysis focusing on the WTO dispute settlement system in the previous Chapters.

To stress the importance of a perspective not determined by WTO law, this Chapter will first provide basic information on climate change and the international legal and policy response to what is increasingly characterised as one of the most important global security challenges. Section 6.1 reviews the current understanding of anthropogenic climate change and its impacts. Section 6.2 explains the evolution and current status of the international legal framework to address climate change. Section 6.3 discusses some of the most common policy options for mitigating greenhouse gas emission and, at the same time, identifies four potential conflict scenarios between WTO law and the UN Climate Change regime. Section 6.4 analyses imaginary but not unrealistic scenarios whereby the WTO dispute settlement system would be requested to decide a dispute involving measures aimed at mitigating climate change.

6.1 Another Nobel Cause: Fighting Anthropogenic Climate Change

Recently, climate change has become the centrepiece of public attention. The Intergovernmental Panel on Climate Change (IPCC) finalised its Fourth Assessment Report in November 2007. Throughout the year, findings by each of the IPCC's three Working Groups were widely reported in the world media. The enormous publicity culminated in the award of the Nobel Peace Prize to the IPCC and the former U.S. Vice President Al Gore for their work to raise awareness of the dangers of anthropogenic climate change. As a result, public pressure mounted on climate negotiators to provide a political response to the threats identified by the IPCC and expectations

from the Bali Climate Change Conference in December 2007 were high. In an unprecedented move, the UN Secretary General Ban-ki Moon flew to Bali twice to urge an agreement. Also the Nobel Prize winners Al Gore and IPCC Chair Rajendra Pachauri attended the meeting. For several days, the BBC and CNN treated climate change negotiations as their main story, broadcasting drastic images of the U.S. delegation being booed at and harshly criticised before joining the consensus to launch a two-year negotiation process to improve international climate change cooperation.¹¹¹⁰

For those focusing exclusively on the WTO and international trade issues, the recent emphasis on climate change and the emotional media spectacles such as the Bali negotiations may be somewhat confusing. For many years, loud voices questioned scientific evidence on anthropogenic climate change and rendered the prospects for any meaningful global action extremely unlikely. High-profile critiques such as the U.S. President George W. Bush and the Danish ‘sceptical environmentalist’ Björn Lomborg stressed that mitigating climate change was extremely costly and its benefits so few and uncertain that international climate change policies were simply not feasible.¹¹¹¹ Economists, international trade lawyers and the global business community could feel quite safe in either ignoring climate change or downplaying the need for, and the effectiveness of international climate change mitigation efforts. For the mainstream international economic community, trade was one thing and environmental problems were another. While the political emphasis on ‘sustainable development’ meant there had to be some shared territory, this was rather small and unimportant. Hence, during the 1990s and early 2000s, the two international legal regimes dealing with trade and climate change respectively could evolve and exist in a relatively comfortable isolation from each other.

But recently the battle against anthropogenic climate change seems to have received wind beneath its wings and is rapidly beginning to invade the global economic reality. Despite the U.S. opposition, the *Kyoto Protocol* with its legally binding emissions reduction obligations entered into force in 2005 and currently has 180 Parties. The same year, the European Union launched an emissions trading scheme putting a price on the carbon dioxide emissions of more than 10,000 companies. For many, the rapidly expanding carbon markets, with an estimated value of 16 billion euros in 2006, hold the key to climate change mitigation. In 2006, the high-profile *Stern Review on the Economics of Climate Change* argued that also from the economic perspective it makes sense to start urgently and seriously mitigating global greenhouse gas emissions.¹¹¹² In other words, it estimated

¹¹¹⁰ For a detailed description, see B. Mueller, “Bali 2007: On the Road Again. Impressions from the UN Climate Change Conference,” online paper from the Oxford Climate Policy. Available at: <<http://www.oxfordclimatepolicy.org/publications/mueller.html>>.

¹¹¹¹ B. Lomborg, *Cool It. The Skeptical Environmentalist's Guide to Global Warming* (Alfred A. Knop, 2007). See section 6.2 for references to statements by President Bush.

¹¹¹² N. S. Stern & al., *Stern Review: The Economics of Climate Change*, (HM Treasury, 2006).

that the economic cost of inaction would be higher than that of climate change mitigation. Also the influential *The Economist* magazine began stressing the dangers of anthropogenic climate change and calling for appropriate action.¹¹¹³ Even the Bush Administration launched the Major Economies' Initiative aimed at reducing emissions by the world's largest economies. With the nascent consensus that a price needs to be set for carbon dioxide emissions, the consideration of climate change related border tax adjustments and other trade measures received a boost on both sides of the Atlantic Ocean to offset the negative impacts on domestic economies. At the same time, countries such as Brazil, Argentina and Thailand are rapidly developing their biofuels industries, calling for the removal of related trade barriers in the hope of supplying the growing markets in the U.S. and the EU. The EU, in turn, is contemplating strict rules and sustainability standards for biofuels to ensure that they do not result in the loss of biodiversity and reduce greenhouse gas emissions by at least 35 per cent.¹¹¹⁴ All in all, the relationship between climate change, economic interests and international trade is becoming too intimate to ignore – putting the legal segregation of the two international legal regimes under increasing strain.

Before examining in detail the legal relationship between the WTO and UN climate change regime and their possible implications on the legitimacy of the WTO dispute settlement system, it is useful to shift for a few moments the perspective from the WTO to the UN climate change regime and assess the situation through lenses that do not immediately categorise things with the intrinsic logic and terminology of WTO law. The natural starting point for such an exercise is the latest climate science, which is responsible for much of the recent publicity and calls for urgent action against climate change. The aim of the following overview of the key findings in the Fourth Assessment Report by the IPCC and their policy implications is to highlight that the debate about anthropogenic climate change seems to be over and the calls for international action rest on a solid and convincing basis. All this serves to build the argument that questions concerning climate change mitigation are here to stay, and the legitimacy of the WTO dispute settlement could be seriously challenged if it had to decide a related dispute.

Even for those sceptical of climate change, the comprehensive and authoritative evaluation of the latest research in the Fourth Assessment Report (AR4) conveys a striking image. The report was drafted by several hundreds of government-appointed scientists and experts, and hundreds of more scientists and experts participated in the peer-review process.¹¹¹⁵ The findings paint a clear and threatening image of anthropogenic climate change and its impacts. The IPCC indicates that

¹¹¹³ See, for instance, "The Heat is On," *the Economist*, 7 September 2006.

¹¹¹⁴ European Commission, *Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources*, COM(2008) yyy, 23 January 2008.

¹¹¹⁵ *The Earth Negotiation Bulletin* 12(341), 12 November 2007.

“warming of the climate system is unequivocal”¹¹¹⁶ and “very likely” to be caused by human activities.¹¹¹⁷ The “very likely” statement corresponds with a 90 per cent or more likelihood and is thus considerably higher than the 66 per cent probability used in the previous IPCC assessment in 2001. Evidence is also mounting that global warming is already well underway. The IPCC indicates the global mean surface temperatures have increased with a linear trend over the last 100 years¹¹¹⁸ and the curve showing the mean temperature increase is steepening exponentially. Eleven of the past twelve years to 2006 rank among the warmest twelve on record.¹¹¹⁹ Because of this, the linear trend of 0.74°C, illustrating temperature increase from 1850 to 2005, is already higher than the corresponding trend of 0.6°C given in 2001. Further warming and other changes in the global climate system are predicted for the 21st century.¹¹²⁰ The best estimates for temperature increases for the next century range from 1.8 to 4.0°C depending on the level of greenhouse gas concentrations in the atmosphere.¹¹²¹ The lower the level at which greenhouse gas concentrations in the atmosphere are stabilised, the lower the temperature increase.

Another crucial finding in the AR4 is that the impacts of warming are already being felt across the globe. In contrast to the previous IPCC reports, which focused on future *projections*, the AR4 contains plenty of data on *observed* impacts of climate change from all around the world. Accordingly, mountain glaciers and snow cover are declining in both hemispheres.¹¹²² The global average sea level has risen at a growing rate.¹¹²³ Other observed changes include changes in arctic temperatures and ice, precipitation amounts, ocean salinity, wind patterns and extreme weather events including droughts, heavy precipitation, heat waves and intensity of tropical cyclones.¹¹²⁴ Some of the projected impacts of climate change are alarming. Up to 30 per cent of known animal and plant species are likely to be at risk of extinction if the global average warming exceeds 1.5-2.5°C¹¹²⁵ – in other words, this could happen within the next century. Climate change is also predicted to have serious social impacts. The Arctic, sub-Saharan Africa, small islands and the African and Asian mega-deltas have been identified as particular vulnerable regions.¹¹²⁶ Hundreds of millions people, especially in developing countries, are estimated to suffer increasing droughts,

¹¹¹⁶ IPCC, *Climate Change 2007. Synthesis Report. A Report of the Intergovernmental Panel on Climate Change* (Intergovernmental Panel on Climate Change, 2007) 1.

¹¹¹⁷ *Ibid.*, 5.

¹¹¹⁸ IPCC, *Climate Change 2007. The Physical Science Basis. Working Group I Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers and Technical Summary* (Intergovernmental Panel on Climate Change, 2007), 5.

¹¹¹⁹ *Ibid.*

¹¹²⁰ *Ibid.*

¹¹²¹ *Ibid.*, 13.

¹¹²² *Ibid.*, 5.

¹¹²³ *Ibid.*

¹¹²⁴ *Ibid.*, 5-9.

¹¹²⁵ IPCC, *Climate Change 2007. Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers and Technical Summary* (IPCC, 2007), 11.

¹¹²⁶ *Ibid.*, 12.

water shortages, annual flooding, and storm surges.¹¹²⁷ While not necessarily caused by climate change, recent events such as the Hurricane Katrina, European heat wave of 2003 and flooding in the United Kingdom in the summer of 2007 have demonstrated how even the wealthy North is vulnerable to extreme weather events. In the South, however, adaptive capacity is significantly lower¹¹²⁸ but extreme weather events are estimated to be far more severe and frequent than in the North. The IPCC thus indicates that:

New studies confirm that Africa is one of the most vulnerable continents to climate variability and change because of multiple stresses and low adaptive capacity.¹¹²⁹

Climate change is also projected to impact the health of millions of people due to malnutrition, increased risk of malaria, deaths and disease associated with heat waves, floods, storms and droughts, as well as cardio-respiratory diseases due to higher concentrations of ground level ozone related to climate change.¹¹³⁰

From the IPCC assessment it is evident that climate change is not only a serious environmental problem but also an economic and social one. Mitigating climate change, adapting to its consequences while at the same time achieving the economic and development objectives promoted by the WTO regime appears as an enormous challenge. In light of the IPCC projections, it looks like the benefits of international trade liberalization, even after a successful conclusion of the Doha Development Round, could easily be outweighed by climate change. In fact, the widely discussed *Stern Review on the Economics of Climate Change* classifies climate change as “the greatest and widest-ranging market failure ever seen.”¹¹³¹ According to Stern,

The evidence shows that ignoring climate change will eventually damage economic growth. Our actions over the coming few decades could create risks for *major disruption to economic and social activity, later in this century and in the next, on a scale similar to those associated with the great wars and the economic depression of the first half of the 20th century*. And it will be *difficult or impossible to reverse these changes*.¹¹³² (Emphasis added, KK)

Stern also highlights the need for urgent action against climate change:

Unfortunately, this opportunity to stabilise the atmospheric concentrations of GHGs (greenhouse gases, KK) will not wait for us. Because the stock of GHGs continues to grow, the cost of attaining a given stabilisation level increases with time.¹¹³³

¹¹²⁷ *Ibid.*, 13-15.

¹¹²⁸ *Ibid.*, 12.

¹¹²⁹ *Ibid.*, 13.

¹¹³⁰ *Ibid.*, 12.

¹¹³¹ Stern & al., *The Economics of Climate Change*, i.

¹¹³² *Ibid.*

¹¹³³ S. Dietz & al., “Reflections of the Stern Review: A Robust Case for Strong Action to Reduce the Risk of Climate Change,” *World Economics* 8(1) (2007), 121 at 126.

One of the most remarkable – and controversial – aspects of the *Stern Review* has been its finding that the economic costs of inaction would clearly outweigh the costs of action against climate change. Without measures to mitigate climate change, Stern estimates the ‘social cost of carbon’ would amount to around 85 U.S. dollars per tonne of carbon dioxide.¹¹³⁴ However, if measures are taken to reduce atmospheric greenhouse gas concentrations at a level that would avoid the most extreme negative impacts of climate change, Stern indicates that the ‘social cost of carbon’ would be only around a third of it - 25 to 30 U.S. dollars per tonne.¹¹³⁵

While the scientific and economic case for taking action against climate change seems to rest on an increasingly solid foundation, it does not solve the key question of *how* and *how much* to mitigate climate change. Essentially, climate change mitigation would involve stabilising greenhouse gas concentrations in the atmosphere. Their current level is estimated at 379 parts per millimetre (ppm), up from 280 ppm in the pre-industrial times.¹¹³⁶ The lowest scenario analysed by the IPCC would stabilise atmospheric greenhouse gas concentrations at 450 ppm, a scenario estimated to result in a global average of 2°Celsius warming from pre-industrial times. However, choosing the stabilisation level and the degree of acceptable warming is an extremely complicated and politically sensitive task. For many years, international climate change negotiators did not even seriously attempted to define their objective in numerical terms - and their recent decision in Bali to try to find a “shared vision” of global emissions is considered an important breakthrough.¹¹³⁷ The EU has chosen the two-degree target as its benchmark, arguing that this target would be compatible with the ultimate objective of the *UNFCCC* to “prevent dangerous anthropogenic interference with the climate system.”¹¹³⁸ Some, including Stern, argue, that the 450 ppm stabilisation scenario is already unachievable:

It is still possible to follow a path to stabilise at 550 ppm CO_{2e}... Ten or twenty years ago, a similarly smooth and affordable path might have been available for a corridor consistent with stabilising below 450 ppm. But it is now too late – the kind of retrenchment required to stabilise below 450 ppm CO_{2e} is likely to be extremely costly.¹¹³⁹

For countries like small island developing states in turn, already the 450 ppm and two-degree scenario are projected have dramatic and irreversible ecological and social consequences whereas the 550 ppm scenario is projected to have serious consequences also in many other places. Overall, the fact remains that the impacts of climate change will not be equally distributed across the globe, but some regions are manifestly more vulnerable while others are estimated to even benefit from

¹¹³⁴ Stern & al., *The Economics of Climate Change*, xvi-xvii.

¹¹³⁵ *Ibid.*

¹¹³⁶ IPCC, *Climate Change 2007. The Physical Science Basis*, 25,115.

¹¹³⁷ Bali Action Plan, Decision 1/CP.13 (FCCC/CP/2007/6.Add.1, 14 March 2008).

¹¹³⁸ *UNFCCC*, Article 2.

¹¹³⁹ Dietz & al, “Reflections on the Stern Review,” 126-127.

moderate temperature increases. Given the complexity of the underlying problem - how has the international climate regime evolved so far and what are the prospects for its further development?

6.2 The Specialised Legal Regime for Climate Change

Given their formal insulation from each other, it is interesting that the body of international legal rules applicable to climate change has evolved largely in parallel with the creation of the WTO and strengthening of the international trade regime. While the history of the UN climate regime has been told several times elsewhere, it seems useful to recount some of the details here in order to distance, for a while, the focus from the WTO regime. Indeed, one of the key legitimacy challenges that this Chapter seeks to highlight is that at the WTO dispute settlement system, the dominant perspective is that of international trade law. The relevance of international environmental norms is often reduced to examining whether they are helpful in defining the ordinary meaning of the terms of the WTO Agreements. As we have seen in the *Biotech* case, the threshold for their 'usefulness' seems exceedingly high. For those involved in the construction of the international climate regime, similar treatment of the *Kyoto Protocol* would be outrageous and they would be highly unlikely to accept the authority of the WTO dispute settlement system to reach such a decision. To better understand this challenge, it is therefore useful to paint a somewhat detailed picture of another specialised international legal regime and, more importantly, convey a sense of its internal logic and sense of mission.

The process leading to the adoption of the *UN Framework Convention on Climate Change* (UNFCCC) was initiated in 1990 after the IPCC published its First Assessment Report. Even though there was no consensus or certainty on anthropogenic climate change, negotiations were launched on a global climate change treaty. From the beginning, the process has been incredibly complex. The question of monitoring, accounting and controlling greenhouse gas emissions involves all major economic sectors from industry, energy production, transport and construction to agriculture and forestry. Describing the negotiation process leading to the adoption of the *UNFCCC*, Sands indicates that:

...it seemed that no human activity was left untouched. American gas-guzzlers, Vietnamese rice-fields, Amazonian forest fires – everything came under the same spotlight of global warming. Apart from these daunting economic and lifestyle issues, there were also complex political, legal and cultural factors...¹¹⁴⁰

Having been signed at the Rio Conference in 1992, the *UNFCCC* came into force in 1994 and currently has 189 Parties. According to Article 2 of the *Convention*, its ultimate objective is to achieve:

¹¹⁴⁰ Sands, *Lawless World*, 83.

..stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.¹¹⁴¹

However, the *UNFCCC* does not prescribe any legally binding emission reduction objectives. During the first Conference of the Parties (COP) organized in Berlin in early 1995, governments agreed that this would not be sufficient to prevent dangerous anthropogenic climate change and decided to launch negotiations for additional commitments for industrialised countries.¹¹⁴² In 1996, the IPCC finalised its Second Assessment Report reinforcing its earlier warning on anthropogenic impact on the climate system. This speed up the ongoing negotiations and delegates adopted the *Kyoto Protocol* in December 1997. The most notable feature of the *Protocol* were individual, legally binding targets for industrialized countries to reduce their greenhouse gas emissions by an average of 5.2 per cent from 1990 levels during the first commitment period between 2008 and 2012.¹¹⁴³

However, at the time the *Kyoto Protocol* was adopted, it was already known that the modest emissions cuts it prescribed would be manifestly inadequate to effectively mitigate climate change. Recognising that centuries of fossil-fuel based economic growth cannot be turned overnight, the supporters of the *Kyoto Protocol* and the UN climate regime had put their hope on the process eventually leading to deeper emissions cuts, technological change and a gradual transition towards a low-carbon economy:

International law is process-driven and incremental in meeting its aims and objectives. No one claims that the Kyoto Protocol can, as it stands, prevent global warming or be fully effective in that sense. It is a wake-up call, a preliminary step, complex but important.¹¹⁴⁴

The process-oriented view suffered a serious blow when, in March 2001, the U.S. effectively abandoned its participation in international cooperation to cut greenhouse gas emissions.¹¹⁴⁵ While the Clinton Administration had signed the *Kyoto Protocol* committing the U.S to reducing its greenhouse gas emissions by seven per cent from the 1990 levels, President George W. Bush stated that U.S. would not be ratifying the agreement. His stance captured the sentiments of the majority of the U.S. Senate that would have been unlikely to ratify the Protocol even during the Clinton era. President Bush explained that he did not support the *Kyoto Protocol* “because it exempts 80 per cent of the world, including major population centres such as China and India, from compliance, and

¹¹⁴¹ *UNFCCC*, Article 2.

¹¹⁴² Decision 1/CP.1, The Berlin Mandate: Review of the Adequacy of Article 4, Paragraph 2(a) and (b), of the Convention, Including Proposals Related to a Protocol and Decisions on Follow-Up, FCCC/CP/1995/7/Add.1, June 6, 1995.

¹¹⁴³ *Kyoto Protocol*, Article 3 and Annex B.

¹¹⁴⁴ Sands, *Lawless World*, 91.

¹¹⁴⁵ *Ibid.*, 70.

would cause serious harm to the U.S. economy.”¹¹⁴⁶ He was correct in indicating that developing countries are not subject to any emission controls under the *Kyoto Protocol* and their greenhouse gas emissions are growing rapidly. However, his explanation overlooks the scientific, legal, political and ethical factors that have had a profound impact on the evolution of international climate policy and the Kyoto architecture. These include the principle of ‘common but differentiated responsibilities,’ strongly reflected in the structure of the UN climate regime¹¹⁴⁷ as well as the controversial but morally challenging argument that emissions rights should be distributed on *per capita* basis.

For this reason, the U.S. decision not to ratify the Kyoto Protocol sent a shockwave amongst those involved in the development of the global climate regime. It was:

... seen as an arrogant step aimed at refashioning the global order, putting American lifestyles above foreign lives, American economic well-being above all other interests, and manifesting a refusal to be constrained by new international rules.¹¹⁴⁸

The widespread opposition to the U.S. climate policy explains proposals to tax imports from the U.S. based on their carbon content that will be discussed in section 6.4 from the point of view of WTO law. Many also feared that the U.S. decision would signal the death of the *Kyoto Protocol* as its entry into force had been made conditional of ratification by industrialised countries representing at least 55 per cent of the total greenhouse gas emissions of those countries in the year 1990.¹¹⁴⁹ Given that the U.S. accounts for 34 per cent of such emissions, the 55 per cent threshold would not have been crossed without the Russian Federation. The Russian ratification at the end of 2004 was preceded by heavy lobbying by the EU, and a rumour has it that the deal was reached in exchange of the EU accepting certain conditions of the Russian WTO Membership.¹¹⁵⁰ Having secured the necessary number of ratifications, the *Kyoto Protocol* entered into force on 16 February 2005. Its 180 current Parties include all major emitters and economies apart from the U.S.

The combined effect of the *UNFCCC* and the *Kyoto Protocol* is to set up a complex and comprehensive regime for international cooperation on climate change, covering both mitigation and adaptation to the adverse effects of climate change. Since the entry into force of the *UNFCCC*, the Conference of the Parties has met 13 times and adopted hundreds of decisions laying down the details of the regime. These decisions have included politically significant ones, such as the adoption of the *Kyoto Protocol* and the detailed rule-book for its implementation known as the *Marrakech Accords*. But most COP decisions can be characterised as technical ones, concerning, for instance, guidelines for the preparation of national greenhouse gas inventories and

¹¹⁴⁶ Sands, *Lawless World*, 70.

¹¹⁴⁷ *UNFCCC*, Article 3.1.

¹¹⁴⁸ Sands, *Lawless World*, 70.

¹¹⁴⁹ *Kyoto Protocol*, Article 25.1.

¹¹⁵⁰ K. Kulovesi, “How to Prevent Babies from Being Thrown Away with the Bathwater: Perspectives on the International Climate Change Regime from Buenos Aires to the Future,” in *The Future of Environmental Law: International and European Perspective*. EUI Working Papers, Law, 2006/01 (EUI, 2006).

communications, or political ones on technology transfer and capacity building.¹¹⁵¹ Especially decisions concerning the implementation of the market-based Kyoto Mechanisms have important implications on the states Parties as well as the private sector, which plays an important role in the implementation of the *Protocol*.¹¹⁵² Most of the rules and details have taken years to negotiate - and are quite daunting in their detail. While their complexity may well be criticised given the modest impact that the regime has had so far on climate change mitigation, the rationale lies in the belief that complexity and bureaucracy are necessary to build trust in the process and create the regulatory framework for more ambitious future commitments.

In the year 2008, international climate change cooperation is at an interesting place where questions concerning its long-term development occupy a large space. The *Kyoto Protocol* has been in force since 2005 and its legally binding emission targets took full effect in January 2008. As a consequence, the international carbon market is growing steadily, creating a new service industry of carbon brokers and various technical experts in its wake. The fact remains, however, that the world's largest emitters are not participating in mitigation efforts under the *Protocol*. Furthermore, the current commitments expire at the end of 2012 - hence the need to agree on a legal framework beyond that period. In addition, the IPCC AR4 and the *Stern Review* have increased political pressures for enhanced climate change cooperation. Negotiations on the long-term perspective are thus steadily gathering pace.¹¹⁵³ A crucial milestone was the decisions by the Bali Climate Change Conference to launch a two-year negotiations process with a view to finalising the new regime by the end of 2009. The so-called "Bali Roadmap" contains seeds for extremely complicated negotiations - while also holding the potential for important breakthroughs leading to mitigation action by the world's largest greenhouse gas emitters.¹¹⁵⁴ After years in the sidelines, also the U.S. has shown signs of re-engagement. This is partly due to popular pressure generated by high-profile awareness raising campaigns such as Al Gore's book and movie 'the Inconvenient Truth.' Another important factor is that in the absence of meaningful federal regulation, various individual states have launched their own climate initiatives leading to fragmentation and complexity. With the U.S. comes increased pressure on emerging economies such as China, Brazil and India to participate in the efforts to mitigate climate change - a political compromise that will certainly not be difficult to achieve.

¹¹⁵¹ The Climate Change Secretariat, *United Nations Framework Convention on Climate Change Handbook* (UNFCCC, 2006).

¹¹⁵² K. Kulovesi, "The Private Sector and the Implementation of the Kyoto Protocol: Experiences, Challenges and Prospects," *RECIEL* 16(2) (2007), 145 at 146-147.

¹¹⁵³ K. Kulovesi, M. Gutierrez, M. Munoz & P. Doran, "UN 2006 Climate Change Conference: A Confidence Building Step," *Journal of Climate Policy* 7(3) (2007), 255 at 257 *et seq.*

¹¹⁵⁴ C. Spence, K. Kulovesi, M. Munoz & M. Gutierrez, "Great Expectations: Understanding Bali and the Climate Change Negotiations Process," forthcoming in *RECIEL* 17(2) (2008).

This is the picture as it appears from the perspective of those involved in the development of international climate-policy. In that world of experts, there is little doubt that urgent action must be taken to prevent a social and ecological disaster. But when one looks at the same image through the lenses of the WTO regime, it suddenly looks very different. Some of the most common instruments of climate policy have been identified as potentially problematic from the perspective of WTO law and many WTO scholars have tended to see the whole climate change debate from a rather sceptical perspective.¹¹⁵⁵ Attitudes seem to be changing rapidly, however. After the *Stern Review*, the Economist magazine, for instance, has changed its approach to climate change and instead of its earlier focus on questioning climate science, it now often supports the mitigation of greenhouse gas emissions.¹¹⁵⁶ Nevertheless, many still conceive the linkage between trade and environment as a *controversy* and argue along the lines that:

The debate over climate change hinges on values – how we value the environment, how we value the relationship of humans and nature, how important we feel are the advantages of free trade. The institutional framework will determine whose values prevail.¹¹⁵⁷

The argument here is, however, that climate change is no longer about different values and preferences. Economic, social and ecological interests are merging into a complex web and becoming virtually impossible to separate. Furthermore, the current institutional framework, including the WTO dispute settlement system, do not seem well equipped to deal with the challenge. Letting the narrow mandate of the WTO dispute settlement, for instance, to determine “whose values will prevail” would hardly be a sustainable solution – for neither the substantive nor the formal legitimacy of the WTO dispute settlement system. But what are the potential links between the WTO and climate regimes, and how could they be dealt with by the WTO dispute settlement system?

6.3 Interaction between Two Fragments: Climate Change and the WTO

According to the AR4, global greenhouse gas emissions grew by 70 per cent between 1970 and 2004.¹¹⁵⁸ Without new mitigation efforts, they are projected to grow by a further 25 to 90 per cent between 2000 and 2030.¹¹⁵⁹ If one takes the latest climate science seriously, the need for mitigating climate change and reducing greenhouse gas emissions appears as urgent. The window of

¹¹⁵⁵ See, for instance, J. Bhagwati, *In Defence of Globalisation*.

¹¹⁵⁶ See, for instance, “The Heat is On,” *The Economist*, 7 September 2006.

¹¹⁵⁷ Green, “Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?,” 189.

¹¹⁵⁸ IPCC, *Climate Change 2007. Mitigation of Climate Change. Working Group III Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Summary for Policymakers and Technical Summary* (IPCC, 2007), 3.

¹¹⁵⁹ *Ibid.*, 4.

opportunity to stabilise atmospheric greenhouse gas concentrations at the ‘relatively safe’ level of 450 ppm is closing rapidly, or is closed. As Stern explains,

...demand for energy and transportation is growing rapidly in many developing countries, and many developed countries are also due to renew a significant proportion of capital stock. The investments made in the next 10-20 years could lock in very high emissions for the next half-century, or present an opportunity to move the world onto a more sustainable path.¹¹⁶⁰

However, in light of the AR4, reversing the growth of emissions would still seem possible. The IPCC has identified “substantive economic potential” for mitigating global greenhouse gas emissions over the coming decades that could offset the growth projections and reduce emissions below current levels.¹¹⁶¹ The IPCC’s has analysed various mitigation options both in the short and medium term (up to 2030) and longer term (beyond 2030). It concludes that:

A wide variety of national policies and instruments are available to governments to create the incentives for mitigation action. Their applicability depends on national circumstances and on understanding their interactions, but experience from implementation in various countries and sectors shows there are advantages and disadvantages for any given instrument.¹¹⁶²

The options analysed by the IPCC include regulations and standards (which provide “some certainty about emission levels” and “may be preferable to other instruments”),¹¹⁶³ taxes and charges (which set a price for carbon “but cannot guarantee a particular level of emissions”),¹¹⁶⁴ tradable permits (which “will establish a price for carbon”),¹¹⁶⁵ financial incentives such as subsidies and tax credits (which “are often critical to overcome barriers”),¹¹⁶⁶ voluntary agreements between the government and industry (the majority of which “has not achieved significant emissions reductions beyond business as usual”),¹¹⁶⁷ information instruments (“the impact of which on actual emissions remains unclear”)¹¹⁶⁸ and research, development and deployment (to “stimulate technological advances”).¹¹⁶⁹

In discussing these options, the IPCC makes no mention of the WTO or potential conflicts between climate change mitigation measures and international trade law. For some WTO scholars, however, the problematic territory between the WTO and greenhouse gas mitigation appears as surprisingly large. Green, for instance, has analysed how WTO rules constrain countries’ ability to adopt:

¹¹⁶⁰ Stern, *The Stern Review*, xxii.

¹¹⁶¹ IPCC, *Climate Change 2007. Mitigation of Climate Change*, 9.

¹¹⁶² *Ibid.*, 19.

¹¹⁶³ *Ibid.*

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ *Ibid.*

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ *Ibid.*

... emission and energy efficiency standards, eco-labeling, voluntary measures (including voluntary measures between governments and industry) and domestic emissions trading programmes.¹¹⁷⁰

It is difficult to see what (effective) climate policy options remain in addition to those listed and identified by Green as potentially problematic from the point of view of WTO law. There are, however, also far more optimistic assessments. According to Doelle,

The bottom line in the relationship between the WTO and the climate change regime would appear to be that, as long as the WTO dispute settlement bodies continue to make decisions based on legal principles and precedents, there will be opportunities to develop climate change measures in a way to protect domestic industries from the impact of having to meet more stringent GHG (greenhouse gas, KK) emission-reduction requirements, motivate other States to take action; and protect those that do against competition from those that do not.¹¹⁷¹

In sum, a wide range of potential climate change mitigation policies and measures is available - all of which can be “designed well or poorly, be stringent or lax” as the IPCC points out.¹¹⁷² Depending on the perspective, they can be seen as a problem from the point of view of WTO law – or WTO law can be seen as a problem from the point of view of the climate policies. Given the range of policy options and the broad scale of conceivable interpretations of the relevant but rather abstract legal rules in the *GATT* and *TBT Agreements*, a heavy responsibility falls on the shoulders of the institution charged with a task deciding a possible conflict. As the WTO dispute settlement system looks like the most probable forum for settling such a dispute, what are the prospects of a successful outcome? And what would be the likely implications for the legitimacy of the WTO dispute settlement system?

6.3.1 Four Conflict Scenarios between the WTO and the UN Climate Regime

The current relationship between the WTO and the UN climate regime testifies more to the trend of specialization and isolation than cooperation and coordination between the two prominent international regimes. While their insulation is partly intentional and preferred by many of those working with either regime, it seems to bring to the fore most of the challenges associated with the fragmentation of international law discussed by the International Law Commission:

The problem... is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices, and, possibly, the loss of an overall perspective on the law.¹¹⁷³

¹¹⁷⁰ Green, “Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?,” 146.

¹¹⁷¹ Doelle, “Climate Change and the WTO: Opportunities to Motivate State Action on Climate change through the World Trade Organization,” 103.

¹¹⁷² IPCC, *Climate Change 2007. Mitigation of Climate Change*, 19.

¹¹⁷³ ILC, *Fragmentation of International Law*, 11.

The only provision that explicitly addresses the relationship between climate change mitigation and international trade is Article 3.5 of the *UNFCCC*, which provides that:

Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade.

On the other hand, the *Kyoto Protocol* does not contemplate the use of trade sanctions and its trade-related provisions are not specific enough to be considered under the Doha mandate on multilateral environmental agreements. The argument has thus been made that the provisions of the *Kyoto Protocol* “do not conflict directly with the WTO regime.”¹¹⁷⁴ This is, however, only a part of the story. While the *Protocol* does not explicitly restrict international trade, the implementation of its quantitative emission reduction targets could easily have some important trade implications.

The question thus arises what would happen in case of a legal dispute surfaced involving the *UNFCCC* and WTO regimes. Institutionally, the WTO system appears stronger than the combined force of the *UNFCCC* and the *Kyoto Protocol*, neither of which contains provisions on legally binding dispute settlement. The Compliance Committee established under the *Kyoto Protocol* is mandated to facilitate implementation and address questions concerning enforcement. However, the legally binding nature of its decisions has been highly controversial and is still open to negotiation.¹¹⁷⁵ Furthermore, the mandate of the Compliance Committee appears to be even narrower than that of the WTO dispute settlement system.¹¹⁷⁶ It would be thus extremely difficult, or outright impossible to argue that it is competent to assess the compatibility of measures taken to implement the Kyoto targets with international trade rules. Against this background, in case a legal dispute arises involving the *Kyoto Protocol* and WTO rules, the WTO dispute settlement system, with its compulsory and exclusive jurisdiction on matters related to WTO law, would be the likely to forum to settle the controversy.

In my view, however, bringing the trade and climate communities at loggerheads through a dispute involving the *Kyoto Protocol* could be explosive in terms of the legitimacy of the WTO dispute settlement system. Clearly, such a dispute would be far more challenging than the *Tuna-Dolphin* or *Shrimp-Turtle* cases. The political sensitivities involved in balancing the protection of dolphins and sea turtles with the economic implications of trade bans on shrimp or tuna seem much easier than the task of judging the compatibility of WTO rules with an international regime that has (also) taken years of painful negotiations to produce and is designed to address a global problem with

¹¹⁷⁴ M. Wemaere & C. Streck, “Legal Ownership and Nature of Kyoto Units and EU Allowances,” in D. Freestone & C. Streck, eds., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms. Making Kyoto Work* (OUP, 2005) 35 at 46.

¹¹⁷⁵ *Kyoto Protocol*, Article 18.

¹¹⁷⁶ *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, Decision 24/CP.7. (FCCC/CP/2001/13/Add.3, 21 January 2002).

unprecedented ecological, economic and social dimensions. The climate community is also larger, much more diverse and business-oriented than the average environmental movement. There are many more of those dealing with climate change issues than there are those, for instance, working with GMOs. It is exactly for these reasons that the interface between the WTO and the UN climate change regime offers such an interesting framework for reflecting the findings of this study. How could the WTO dispute settlement system respond to such enormous challenges?

In principle, three different types of conflict scenarios between the WTO regime and the *Kyoto Protocol* can be imagined. The first is such where specific provisions of the *Kyoto Protocol*, such as those concerning its market-based flexible mechanisms, are challenged under the WTO. The second scenario is one where measures not explicitly prescribed by the *Kyoto Protocol* but related to the implementation of its legally binding emission targets are contested. The third situation is one where a country attempts to offset the negative effects of measures taken to implement its Kyoto emission target on its competitiveness, for instance, through taxing imports from countries that have not ratified the *Protocol* and are not implementing similar climate change mitigation policies. I shall address this scenario together with a fourth, increasingly likely, scenario that a dispute would arise concerning national or regional climate policies that are not directly related to the implementation of the *Kyoto Protocol* or any other multilateral environmental agreement.

There are plenty of initiatives that could be relevant in this regard. Several countries have adopted unilateral and voluntary targets to reduce their greenhouse gas emissions. The EU, for instance, has pledged to cut its greenhouse gas emissions unilaterally by 20 per cent from 1990 levels by the year 2020 (compared with its legally binding Kyoto reduction target of eight per cent from 1990 levels between 2008 and 2012)¹¹⁷⁷ and Norway has decided to become completely carbon neutral by the year 2050. The Russian Federation has been advocating a system for voluntary emissions targets for developing countries under the *UNFCCC* and the *Kyoto Protocol*. In the U.S., Senators Bingaman and Specter recently proposed a new “Low Carbon Economy Act” that would create a U.S. federal cap and trade system for greenhouse gas emissions. This proposal made in July 2007 was followed by another one in December 2007 by Senators Lieberman and Warner. As it will be seen below, especially the Bingman-Specter proposal could have fundamental implications for the WTO regime. The analysis is structured as follows. The three sub-sections identify the four potential conflict scenarios and outline the key legal and political challenges that they would entail. Section 6.4 discusses each of the scenarios and the challenges that they would pose to the WTO dispute settlement system.

¹¹⁷⁷ According to the Conclusions adopted by the European Environment Council in March 2007, the EU would be willing to cut its emissions by a further 10 per cent by the year 2020 (i.e. 30 per cent) in the context of global mitigation efforts.

6.3.1.1 The WTO and the Kyoto Mechanisms

The first potential conflict between the WTO and Kyoto regimes is one where measures based on specific provisions of the *Kyoto Protocol* were challenged from the point of view of WTO law. Some of the most potential candidates for such a conflict are the *Kyoto Protocol's* market-based flexible mechanisms. The combined effect of Kyoto mechanisms and the EU's Emissions Trading Scheme has been a significant boost to the global carbon market, the estimated value of which was 16 billion euros in 2006.¹¹⁷⁸ It is only logical to suspect that there is a connection between the international trade regime and international carbon trading – hence the question concerning the relationship between WTO law and the Kyoto mechanisms.

The *Kyoto Protocol* creates a system for trading emissions allowances among industrialised countries bound by the emission reduction targets. It also established what are known as project-based mechanisms, the Clean Development Mechanism (CDM) and Joint Implementation (JI).¹¹⁷⁹ They are based on the idea that industrialised countries can meet a part of their Kyoto commitments by purchasing carbon credits from a project that reduces emissions in a foreign country. Their key difference is that JI projects are implemented in industrialised countries bound by the *Protocol's* quantitative emissions reduction targets, while CDM projects take place in developing countries that do not have any emissions commitments. The dual objective of the CDM was to ensure low-cost mitigation opportunities for industrialised countries, and promote sustainable development in developing countries, most notably, by facilitating the transfer of cleaner energy technologies.¹¹⁸⁰ It appears that the CDM has largely failed to deliver on the latter two objectives.¹¹⁸¹ Nevertheless, it continues to be hailed as one of the most successful features of the *Kyoto Protocol* – and without a doubt, it has helped to mobilise various actors to participate in climate change mitigation efforts.

When it comes to the compatibility of the Kyoto mechanisms and WTO rules, it can be convincingly argued that emissions trading between two governments does not interact with WTO rules: it should rather be seen as an exchange of commitments between two sovereign states and their agreement to reallocate the overall 'emissions cap' (assigned amount) established by the *Kyoto Protocol*.¹¹⁸² However, the situation is more complicated when it comes to the CDM and JI, the implementation of which relies largely on the private sector and involves trade in privately generated emission credits.¹¹⁸³ One of the key uncertainties is that the *Kyoto Protocol* itself does not contain a definition of the legal nature of the carbon credits. In terms of the *Protocol*, what is being

¹¹⁷⁸ K. Roine & E.M. Tvinneeim, "The Global Carbon Market in 2007," in *Greenhouse Gas Market 2007. Building upon a Solid Foundation: the Emergence of a Global Emissions Trading System* (IETA, 2007), 42 at 42.

¹¹⁷⁹ Kulovesi, "The Private Sector and the implementation of the Kyoto Protocol," 148.

¹¹⁸⁰ *Ibid.*, 153-154.

¹¹⁸¹ *Ibid.*

¹¹⁸² Wemaere & Streck, "Legal Ownership and Nature of Kyoto Units," 46.

¹¹⁸³ *Ibid.*, 43.

transferred are *registry units* corresponding to one ton of carbon dioxide equivalent. In the Kyoto jargon, these units are known Assigned Amount Units (AAUs) and Removal Units (RMUs) for emission trading, Emission Reduction Units (ERUs) for Joint Implementation and Certified Emission Reductions (CERs) for the CDM.¹¹⁸⁴ Those negotiating the rules for carbon trading under the *Protocol* shun away from any more sophisticated definitions as they would have surfaced the politically and philosophically difficult questions concerning emissions rights and the rationale for distributing such rights between countries.¹¹⁸⁵ To highlight that they had not attempted to solve such principled issues, the rules for implementing the Kyoto Mechanisms thus stress that “the Kyoto Protocol has not created or bestowed any right, title or entitlement to emissions of any kind on Parties included in Annex I.”¹¹⁸⁶

Given the uncertainty concerning the legal nature of the Kyoto units, “it is not evident which part of the international trade law would be applicable for the trade in emission rights.”¹¹⁸⁷ As trading under the *Kyoto Protocol* is limited to *Protocol* Parties, it has been argued that this could violate the Most Favoured Nation principle.¹¹⁸⁸ Most scholars agree, however, that as they are not material things with intrinsic value, emission allowances cannot be defined as ‘goods’ or ‘products’ covered by the *GATT*.¹¹⁸⁹ As to the *GATS*, while the Agreement itself does not define ‘services,’ the leading legal authorities in the field of carbon trading have argued that Kyoto units are not covered by the *GATS* “mainly because they do not represent activities with an economic value.”¹¹⁹⁰ Furthermore, Kyoto units or emission allowances are not listed as services in the WTO’s Services Sectoral Classification List or the United Nations Provisional Central Product Classification System.¹¹⁹¹ Thus, while trade in Kyoto units will “eventually involve services, such as exchange services by brokers or trustee services by banks and financial managers”¹¹⁹² the most pressing WTO concerns do not relate to the Kyoto mechanisms as such, but “to the domestic implementation of measures related to the Kyoto Protocol and secondary markets on derivatives (financial services).”¹¹⁹³ However, there are also other views. According to Green:

... a conflict may arise under the General Agreement on Trade in Services (GATS) if emission reduction units are viewed as ‘securities’ and trading rules only permit

¹¹⁸⁴ Modalities for Accounting of Assigned Amounts under Article 7, Paragraph 4 of the Kyoto Protocol. Decision 13/CMP.1 (FCCC/KP/CMP/2005/8/Add.2, 30 March 2006).

¹¹⁸⁵ Wemaere & Streck, “Legal Ownership and Nature of Kyoto Units,” 44-45.

¹¹⁸⁶ Principles, Nature and Scope of the Mechanisms Pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, Decision 2/CMP.1 (FCCC/CMP/2005/8/Add.1, 30 March 2006), preamble.

¹¹⁸⁷ Wemaere & Streck, “Legal Ownership and Nature of Kyoto Units,” 46.

¹¹⁸⁸ A. Cosby, *The Kyoto Protocol and the WTO. A Seminar Note*, International Institute for Sustainable Development. Available at: <<http://www.iisd.org/pdf/kyoto.pdf>>.

¹¹⁸⁹ Wemaere & Streck, “Legal Ownership and Nature of Kyoto Units,” 46. See also, J. Werksman, “Greenhouse Gas Emissions Trading and the WTO,” *RECIEL* 8(3) (1999), 1 at 3.

¹¹⁹⁰ Wemaere & Streck, “Legal Ownership and Nature of Kyoto Units,” 47.

¹¹⁹¹ *Ibid.*

¹¹⁹² *Ibid.*, 46.

¹¹⁹³ *Ibid.*, 47.

service producers from countries listed in Annex I of the Kyoto Protocol (industrialised countries) to participate in the trading regime.¹¹⁹⁴

In this context, it is interesting to note that uncertainties concerning the legal nature of the emissions allowances is not limited to the WTO-Kyoto context:

As the development and implementation of different emissions trading schemes progresses, questions are increasingly raised on the legal nature and appropriate legal treatment of the various types of units traded under these regimes. These questions include the treatment of these units under property law, contract law, taxation law, accounting rules, competition law, public procurement and state aid rules, and financial services and securities laws, at the domestic and EU levels, and under international trade rules.¹¹⁹⁵

These legal questions have been particularly pertinent for private legal entities participating in the EU Emissions Trading Scheme, struggling with incoherent and often unclear definitions of emissions allowances in national legal systems. Also for European governments purchasing carbon credits, some problems have been generated concerning the classification of the Kyoto units under the European regulations on government procurement and state aid.¹¹⁹⁶ In a similar vein, the question has been raised whether WTO's procurement rules would apply to a situation where an industrialised country invests in a CDM project and obtains CERs in return,¹¹⁹⁷ or whether funding for CDM and JI projects could constitute actionable subsidies under the *Agreement on Subsidies and Countervailing Measures*.¹¹⁹⁸ All this goes to show that defining the legal nature of something like the Kyoto units for the purposes of WTO law is not a straightforward exercise. Some uncertainty concerning the relationship between the WTO and Kyoto mechanisms thus persists - even if the rapidly evolving carbon market seems to operate on the assumption that WTO rules do not pose any constraints on the Kyoto mechanisms, and no threats have been made by non-Kyoto countries to challenge the system at the WTO.

To highlight the potential challenges to the legitimacy of the WTO dispute settlement system that a clash between the trade and climate communities could entail, it is interesting to consider the political implications of a dispute concerning the compatibility of the Kyoto mechanisms and WTO rules. In other words, the aim of this analysis is not to solve the legal puzzle as to how the Kyoto mechanisms should be classified and what would be the most feasible option of challenging the Kyoto Mechanisms under WTO law, but to highlight that requesting the WTO dispute settlement system to do so would be likely to surface severe legitimacy challenges. As we have seen, the international carbon market has been growing rapidly. A large share of this can be attributed to the

¹¹⁹⁴ Green, "Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?," 145

¹¹⁹⁵ Foundation for International Environmental Law and Development (FIELD), *Workshop Report: Legal Nature of GHG Emission Reductions*. An International Workshop May 24-25 2004, London (FIELD, 2004).

¹¹⁹⁶ *Ibid.*, 8.

¹¹⁹⁷ *Ibid.*, 11.

¹¹⁹⁸ T. L. Brewer, "The WTO and Kyoto Protocol: Interaction Issues," *Journal of Climate Policy* 4 (2004), 3 at 9.

EU Emissions Trading Scheme (ETS) involving some 11,500 installations and representing almost 50 per cent of the total carbon dioxide emissions of the EU.¹¹⁹⁹ Through the so-called Linking Directive these installations can also use, with relatively minor restrictions, credits from CDM and JI projects to comply with their emission allocations.¹²⁰⁰ In fact, private companies have taken over the markets for CDM and JI credits with a 80-90 per cent share of all transactions between 2005 and 2006.¹²⁰¹ The carbon market has also given birth to a new service industry of carbon brokers, carbon funds, experts and consultants involved in the implementation of CDM and JI projects. All this goes to show that anything that affects the carbon market and the CDM and JI will immediately affect the economic interests of thousands of private actors all over the world. An (unlikely) decision by the WTO dispute settlement system that the Kyoto mechanisms are not compatible with WTO rules could therefore have some fundamental implications. The ensuring lack of legal certainty could even undermine the legitimacy of international law itself due to the lack of coordination between its different fragments.

There are also important differences between the professional cultures in which the WTO dispute settlement system and the Kyoto mechanisms operate. The private sector and environmental NGOs have actively participated in the creation and implementation of the Kyoto mechanisms. For many private actors in both the developed and developing world, the way that the CDM and JI are governed has direct economic consequences. For NGOs, their interests range from ensuring the environmental integrity of the *Kyoto Protocol* to monitoring the social and ecological impacts of CDM and JI projects in their host countries. Given the considerable public and private interest in the CDM and JI, elaborate procedures have been created to ensure their transparent operation and provide possibilities for public participation and input. For instance, the rules for the CDM make it possible for anyone (individual or organization) to review the design of each individual CDM project and make comments before the project is registered under the *Kyoto Protocol*.¹²⁰² After the project has been implemented, anyone can also raise concerns over the quality of emission reductions that seek certification under the *Kyoto Protocol*. These and other practical details concerning the implementation of the CDM are resolved by an international body known as the CDM Executive Board (the equivalent body created for the JI is called JI Supervisory Committee.) The CDM Executive Board and the JI Supervisory Committee consist of representatives appointed by the Parties to *Kyoto Protocol* and report to the COP/MOP. The private sector as well as

¹¹⁹⁹ Directive 2003/87/EC of the European Parliament and Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, *Official Journal of the European Union* 275, 25.10.2003, 32.

¹²⁰⁰ Directive 2004/101/EC amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, *Official Journal of the European Union* L 338, 13.11.2004, 18.

¹²⁰¹ K. Capoor & P. Ambrosi, *State and Trends of the Carbon Market 2006* (IETA/WB, 2006), 23.

¹²⁰² Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol, Decision 3/CMP.1 (FCCC/KP/CMP/2005/Add.1, 30 March 2006).

environmental NGOs and academics meticulously follow their meetings that are open to observers and webcast, and communicate with their members during regular question and answer sessions. They are also present at international climate change negotiations, making interventions at plenary sessions and observing deliberations in contact groups. During a dispute involving the CDM or JI, important questions concerning the transparency of the WTO dispute settlement procedures and participation would be bound to arise. Determining the compatibility of WTO law and the *Kyoto Protocol* mechanisms during closed WTO dispute settlement proceedings would deviate dramatically from this fairly transparent and participatory culture in which the Kyoto mechanisms currently operate and could hardly be deemed as a legitimate outcome.

6.3.1.2 The WTO and Climate Change Mitigation Policies and Measures

One of the most difficult dilemmas involving the *Kyoto Protocol* and the WTO rules concerns the question of specificity – or rather the lack of it under the *Kyoto Protocol*. What is clear is that the *Protocol* contains legally binding targets for industrialised countries to reduce their emissions by a given percentage between the years 2008 and 2012. However, it leaves it entirely up to each individual country to decide how to comply with this target, including how much of the emission reductions are achieved through domestic means and how much of them will be achieved through the flexibility mechanisms. The only requirement imposed by the COP/MOP is that domestic measures must constitute a ‘significant’ element of a Party’s efforts to meet its commitments. The expression ‘significant’ has not been defined in quantitative terms, and the Netherlands, for instance, has decided to implement half of its Kyoto target through the flexible mechanisms. According to Cosby, the conflict scenario arising from policies and measures designed to implement the *Kyoto Protocol*:

...is troubling because it is likely, and because it might precipitate a damaging clash between trade and environment objectives, were the rules and institutions no more evolved than those we have today. It is almost certain that some parties will eventually implement policies and measures in a protectionist manner... the defendant would probably claim it was acting within its mandated obligations under the Kyoto Protocol (though they would not be specifically mandated), and the stage would be set for a titanic clash of trade and environment rules, with fallout that would be damaging for both communities regardless of the outcome.¹²⁰³

Some WTO scholars have argued that measures designed to mitigate greenhouse gas emissions would be easier to justify under WTO rules if they were specifically prescribed by the *Kyoto Protocol*.¹²⁰⁴ The argument has even been made that measures to implement the *Kyoto Protocol* should be placed in the same category as any unilateral trade measures:

¹²⁰³ Cosby, *The Kyoto Protocol and the WTO*, 5-6.

¹²⁰⁴ Green, “Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?,” 187.

The regulatory measures under the Kyoto Protocol are unilateral measures since the Kyoto Protocol does not specify any required content for the domestic measures or even which measures to use.¹²⁰⁵

However, while the argument that the *Kyoto Protocol* should be more specific concerning the means for its implementation sounds may reasonable from the perspective of WTO law, it sounds rather unrealistic to those familiar with the political realities and evolution of the international climate regime. From the point of view of the UN climate regime, the vagueness of the *UNFCCC* and the *Kyoto Protocol* in terms of policies and measures for their implementation is - again - anything but an accident. As the IPCC AR4 indicates, the suitability of the various greenhouse gas mitigation options depends largely on national circumstances (see 6.3 above). No two countries are identical in terms of their emissions profiles and mitigation potential. Options that are readily available in some countries could be completely excluded in others. At the very least, specific options would be far less efficient in some countries and politically controversial in others. Conscious of these problems, international climate negotiators chose to defer to national decisions on how to reduce greenhouse gas emission and which economic sectors to involve to the national level.

The wide variety of possible ways of implementing the *Kyoto Protocol* explains the vast landscape of potential conflicts between the implementation of the *Kyoto Protocol* and WTO law. Evidently, much would also depend on the detailed design of the measure. Potential conflicts have thus been envisaged between the *Kyoto Protocol* and the *GATT*, *GATS*, *TBT Agreement* as well as the *Agreement on Subsidies and Countervailing Measures*. Highlighting the complexity of the situation, such controversies have surfaced even between the EU and Japan, both prominent supporters of the *Kyoto Protocol*. For example, Japan indicated that it considered introducing fuel efficiency standards for motor vehicles to reduce carbon dioxide emissions and meet its Kyoto target.¹²⁰⁶ Accordingly, vehicles with smaller and more fuel efficient engines would be subject to lower tax rates.¹²⁰⁷ The EU, however, raised a possibility of a WTO challenge stressing that such measures would discriminate against European car imports as Japanese car models tended to be generally smaller than the European ones.¹²⁰⁸ The EU, in turn, has adopted an ambitious ten per cent target for biofuels by 2020 as a part of its efforts to reduce greenhouse gas emissions. A critical part of the plan is to introduce strict sustainability criteria for both domestically produced and imported biofuels to ensure that they do not result in the loss of biodiversity and reduce greenhouse gas emissions by at least 35 per cent.¹²⁰⁹

¹²⁰⁵ *Ibid.*, 146.

¹²⁰⁶ Brewer, "The WTO and Kyoto Protocol: Interaction Issues," 14.

¹²⁰⁷ *Ibid.*

¹²⁰⁸ *Ibid.*

¹²⁰⁹ European Commission, *Proposal for a Directive on the Promotion of the Use of Energy from Renewable Sources*, January 2008.

From the point of view of WTO law, possible conflicts with the *Kyoto Protocol* bring to the fore, among other things, the classic questions concerning ‘likeness’ of products: can, for example, products be subjected to a differential treatment based on their energy efficiency or greenhouse gas emissions produced during the manufacturing process? The latter question highlights lively and long-standing debates concerning measured targeting processes and production methods, as well as the question whether the regulatory objective would be acceptable grounds for justifying ‘less favourable treatment’ of like products. Questions could also arise concerning the justifiability climate change mitigation measures under either subparagraph (b) or (g) of *GATT* Article XX. This would raise questions similar to those discussed in Chapter 4 including whether climate protection qualifies as “exhaustible natural resource”¹²¹⁰ under Article XX(g) and how the measure would qualify in terms of the ‘necessity’ test under Article XX(b) that was discussed in Chapter 5.¹²¹¹ Complex and technical as these legal questions are from the point of view of WTO law, they easily distract attention from the broader legal universe in which the conflict would be situated – which is the key focus of the present analysis. Seen from the perspective of the UN climate change regime, the fact that the *Kyoto Protocol* does not specify the policies and measures required for its implementation, does not mean that it is neither silent nor irrelevant in this regard.

Under the *Kyoto Protocol*, the relevant provision dealing with policies and measures is its Article 2. Accordingly, “in achieving its quantified emission limitation and reduction commitment” each Annex I country “shall implement and/or further elaborate policies and measures in accordance with its national circumstances.” Article 2.1 of the *Kyoto Protocol* contains a non-exhaustive and non-binding list of policies and measures that its implementation could entail, including: enhancement of energy efficiency; protection and enhancement of carbon sinks; promotion of sustainable forms of agriculture; taking measures related to renewable energy and carbon dioxide sequestration; addressing market imperfections (such as tax and duty exemptions and subsidies in greenhouse gas emitting sectors); encouraging appropriate reforms to promote policies and measures that limit or reduce emissions in relevant sectors; addressing emissions in the transport sector; and addressing methane emissions. This is as close to specification as international climate negotiators have been able to come.

The text of the *Kyoto Protocol* also gives some guidance on the relationship between climate change mitigation and other policy objectives. According to Article 2.3, Annex I parties “shall strive to implement” their policies and measures “in such a way as to minimize adverse effects, including adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties,” especially developing countries. From the legal perspective,

¹²¹⁰ Green, “Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules?,” 176.

¹²¹¹ *Ibid.*, 177-178.

the language used in the *Kyoto Protocol*, especially the expression that industrialised countries should “strive to implement” their policies and measures “in such a ways as to minimize” their adverse effects could easily be interpreted so that the negotiators were willing to accept certain ‘adverse effects’ on international trade – listed in Article 2.3 as one of the several any social spheres potentially affected by the implementation of the *Kyoto Protocol*. Looking at the text of the *Kyoto Protocol*, the same sentence mentions ‘adverse impacts of climate change’ as one of the relevant considerations that needs to be balanced with international trade and other adverse social, environmental and economic impacts of climate change mitigation. The argument could also be made that in a dispute between two Parties, the *Kyoto Protocol*, adopted after the entry into force of the WTO Agreements, should be considered as *lex posterior* and prevail in case it conflicts with WTO rules. Legally justified as such arguments are from the perspective of the *Kyoto Protocol*, would they be compatible with WTO law and what would be their prospects in the WTO dispute settlement system?

6.3.1.3 Border Tax Adjustments and Other Trade Measures

The third and final conflict scenario discussed here involving the *Kyoto Protocol* and the WTO regime relates to border tax adjustments and other measures applied on imports from countries where the price of carbon is not reflected in the production costs.¹²¹² This possibility received a fair amount of scholarly attention and at the height of the EU-U.S. climate change controversy and it also solicited some political support in Europe. After the U.S. announced that it would not ratify the *Kyoto Protocol*, the argument surfaced that the EU should impose a carbon tax on imports from the U.S. to put their economies on an equal footing – especially as many saw that the *Shrimp-Turtle* decision had opened a doorway for designing such trade measures in a way that is compatible with WTO law. Essentially, the rationale of border tax adjustments is to offset the negative environmental and competitiveness effects caused by national climate policies. In other words,

Price differentials caused by different taxation schemes between the Kyoto coalition and the anti-Kyoto coalition could also thwart the environmental purpose for which the Kyoto countries have introduced the tax in the first place.¹²¹³

According to the EU’s Trade Commissioner Mandelson, however, taxing imports from countries that have not ratified the *Kyoto Protocol* is,

... highly problematic under current WTO rules and almost impossible to implement in practice... Not participating in the Kyoto process is not illegal. Nor is it a subsidy under WTO rules. How would we choose what goods to target? China has ratified the Kyoto but has no Kyoto targets because of its developing country

¹²¹² M. Lodefalk & M. Storey, “Climate Measures and WTO Rules on Subsidies,” *Journal of World Trade* 39(1) (2005), 23-44 at 27.

¹²¹³ F. Biermann & R. Brohm, “Implementing the Kyoto Protocol without the United States: The Strategic Role of Energy Tax Adjustments at the Border,” *Global Governance Working Paper* No 5. (2003). Available at: <www.glogov.org>.

status. The US has not, but states like California have ambitious climate change policies.¹²¹⁴

Nevertheless, the idea of border tax adjustments by the EU has not disappeared. On the contrary, the proposed new Directive to improve and extend the EU ETS during 2013-2020 contemplates “an effective carbon equalisation system” to put European and foreign installations on a comparable footing in case there is no international climate change agreement on the post-2012 period.¹²¹⁵ Accordingly,

Such a system could apply requirements to importers that could be no less favourable than those applicable to installations within the EU, for example, by requiring the surrender of allowances.¹²¹⁶

Interestingly enough, also the U.S. itself is currently contemplating trade measures on imports based on their carbon content. In July 2007, Senators Bingman and Specter introduced a ‘Low Carbon Economy Act’ that would create a federal cap and trade system for greenhouse gas emissions in the U.S. An important element of that system would be a requirement for importers of greenhouse gas intensive goods to purchase carbon credits (‘international reserve allowances’) reflecting the U.S. price for carbon if their countries were not taking ‘comparable action’ to the U.S. to limit greenhouse gas emissions.¹²¹⁷ This possibility would apply from the year 2020 onwards if other countries, including developing ones, were deemed by the President to be making inadequate efforts to reduce their greenhouse gas emissions.¹²¹⁸ Having the U.S. President determine what constitutes ‘adequate efforts’ to mitigate climate change in developing countries and elsewhere would naturally bring to the fore fundamentally controversies. While the fate of the Low Carbon Economy Act is still unclear, it is evident is that the proposed legal act would have huge implications not only for the WTO regime, but also for international climate change cooperation. In the worst case, the U.S. system could circumvent some of the key principles that have been guiding international climate change cooperation for almost two decades, including the principle of common but differentiated responsibilities and the leadership role of industrialised countries. This is exactly the reason why the European Commission’s proposal for a carbon equalisation system stresses that:

Any action would need to be in conformity with the principles of the UNFCCC, in particular the principle of common but differentiated responsibilities and respective capabilities, taking into account the particular situation of Least Developed

¹²¹⁴ “How Trade Can Be Part of the Climate Change Solution,” Comment by EU Trade Commissioner Peter Mandelson, Brussels, 18 December 2006.

Available at: <http://ec.europa.eu/commission_barroso/mandelson/speeches_2006_en.htm>.

¹²¹⁵ European Commission, *Proposal for a new directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community*, COM(2008)16. 23 January 2008, 8.

¹²¹⁶ *Ibid.*

¹²¹⁷ *The Bingaman-Specter Low Carbon Economy Act of 2007*, Section 502. S 1766 IS. Introduced to the 110th Congress on 11 July 2007. Found at: <<http://www.govtrack.us/congress/bill.xpd?bill=s110-1766>>.

¹²¹⁸ *Ibid.*

Countries. It would also need to be in conformity of the international obligations of the Community including the WTO agreement.¹²¹⁹

Given their close proximity with the WTO regime and the still somewhat unclear legal situation concerning processes and production methods, the U.S. Low Carbon Economy Act (and other similar proposals) as well as the European carbon equalisation system would seem like likely candidates for high-profile and sensitive WTO dispute. Clearly, such disputes could pose important challenges to the legitimacy of the WTO dispute settlement system.

6.4. The Conflict Scenarios and the WTO Dispute Settlement System

Attempting to anticipate the outcome of the three conflict scenarios brings us back to the realm of WTO law. Here, the relevance of the detailed rules of the UN climate change regime is no longer self-evident. In stark contrast, one of the most pressing legal questions in the WTO dispute settlement system would concern the role of the *Kyoto Protocol* in the WTO dispute settlement proceedings: Could it sometimes be directly applied as Pauwelyn has suggested? Would it count as a relevant rule of international law that should inform the interpretation of WTO law in accordance with the customary rules of treaty interpretation? Under what conditions would this be the case given that not all WTO Member States have ratified the *Kyoto Protocol*? If it did not qualify as ‘relevant rule,’ should it be referred to as factual evidence? Or would it be –as happened to the *Cartagena Protocol* in the *Biotech* dispute – ignored completely? The uncertainties surrounding these questions are the rather absurd consequence of fragmentation of international law and the lack of institutional coordination. True, the International Law Commission has indicated that “even as international law’s diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context.”¹²²⁰ Furthermore,

... no homogenous, hierarchical meta-system is realistically available to do away with such problems. International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions.¹²²¹

However, all this highlights the role of institutions tasked with solving problems generated by the incoherence of the international legal system. The International Law Commission did not examine such questions in its report¹²²² - but the question of institutions and the impacts of the fragmentation of international law on their legitimacy are highly relevant for the WTO dispute

¹²¹⁹ European Commission, Proposal to amend the EU ETS, 8.

¹²²⁰ ILC, *Fragmentation of International Law*, 248.

¹²²¹ *Ibid.*, 249.

¹²²² According to the ILC, certain institutional and substantive problems “have to do with the competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The Commission decided to leave this question aside.” *Ibid.*, 13.

settlement and this study. How could the WTO dispute settlement system deal with a dispute involving the *Kyoto Protocol* and the WTO regime? And how would this affect its legitimacy?

Literature has identified discrimination of non-Kyoto parties as one of the likely reasons for challenging the Kyoto mechanisms under WTO law. The first of the four conflicts could therefore arise between two countries one of which is not a Party to the Kyoto Protocol and one that is. In event that the compatibility of the Kyoto trading system with the Most Favoured Nation principle was challenged on the grounds that trading excludes others than industrialised countries parties to the *Protocol*, there would be a clear legal basis in a multilateral environmental agreement for limiting market access to countries that have ratified the *Kyoto Protocol*. Under the detailed rules for the CDM and JI, being a party to the *Kyoto Protocol* is an unequivocal and explicit condition for participating in the two flexible mechanisms. The compelling rationale of this restriction is that allowing carbon credits from non-parties would inflate the carbon markets, thereby introducing an important loophole into the system and jeopardising the environmental integrity of the *Kyoto Protocol*.

In such a dispute, what would be the legal relevance of the *Kyoto Protocol*? While ignoring the *Protocol* in a dispute that relates to its specific provisions could hardly be seen as a legitimate outcome, the possibility remains that the WTO dispute settlement system would end up using the same narrow logic as the *Biotech* panel. In other words, the *Kyoto Protocol* would not be considered as a relevant rule of international law that should guide the interpretation of WTO law because both disputing countries would not have not ratified it. In the *Biotech* case, the panel also hinted at the possibility that only agreements that have been ratified by all WTO Member States might qualify as relevant rules of international law within the meaning of the *VCLT*. The WTO dispute settlement system could also choose to refer to the *Kyoto Protocol* as factual evidence –although the *Biotech* panel refused to do even this with regard to the *Cartagena Protocol* in a dispute that related to its very subject matter of transboundary movement of living modified organisms. Even if the WTO dispute settlement system would accept to consider the *Kyoto Protocol* as factual evidence, this would be problematic. As the International Law Commission has indicated:

...taking “other treaties” into account as evidence of the “ordinary meaning” appears a rather contrived way of preventing the “clinical isolation” as emphasized by the Appellate Body.¹²²³

Overall, the situation seems far from satisfactory in the sense that the legal relevance of the *Kyoto Protocol* in the WTO dispute settlement proceedings remains unclear with the options ranging from its direct application to complete ignorance.

¹²²³ ILC, *Fragmentation of International Law*, 228.

While this example serves extremely well to illustrate the potential legitimacy challenges arising from a conflict between the *Kyoto Protocol* and WTO law, I wish to emphasise the legal analysis above showing that trade in Kyoto registry units is unlikely to lead to serious challenges under the other WTO Agreements *per se*. A more likely target for a WTO challenge would be the rapidly evolving service industry of carbon brokers and experts or WTO rules on subsidies and investment. In this context, it is also useful to keep in mind that it would not be possible for a country that has not ratified the *Kyoto Protocol* to use the WTO dispute settlement system to claim that it must be allowed to participate in the Kyoto Protocol mechanisms *per se*. It is not possible for a country to make claims based on a treaty that it has not ratified, and the WTO dispute settlement system would definitely not be a forum competent to make a decision concerning the eligibility to participate in the Kyoto mechanisms as such. In my view, the only thing that the WTO dispute settlement system could decide is that all WTO Members, independent of their status under the *Kyoto Protocol*, should be allowed to import products 'like' the Kyoto units or produce services similar to those related the CDM and JI. And it is true that also the 'voluntary carbon market' is growing both in the form of companies purchasing Kyoto units voluntarily as a marketing strategy or corporate social responsibility campaign and in terms of 'unofficial' carbon credits generated outside the strict rules and controls of the *Kyoto Protocol*.¹²²⁴ However, in the event of hitherto unreported trade restrictions on the sale of voluntary carbon credits or on purchases of Kyoto units by companies from non-Parties, the economic value of such transactions is unlikely to exceed the threshold for bringing a dispute to the WTO. At the end of the day, what is being traded under the *Kyoto Protocol* is 'thin air' and the air is mainly valuable to participating governments and private companies affected by government measures such as the EU ETS designed to implement the Kyoto emissions reduction targets.

Thus, while a conflict between the Kyoto mechanisms and the WTO system does not seem likely to candidate to actualise in real life, imagining a clash between the businessmen involved in carbon trading and businessmen involved in the WTO provides a delicious opportunity to highlight the somewhat competing claims to legitimacy of these two international regimes, and their very different cultures of transparency and participation. Clearly, the WTO dispute settlement system would struggle in deciding this unlikely dispute, not only because of the pressures to improve the legitimacy of its operating procedures but also because it would come under immense pressure to clearly define the legal relevance of the *Kyoto Protocol* and other multilateral environmental agreements at the WTO.

Concerning the second scenario, a lot would depend on the exact design of the disputed measure and whether all countries involved in the proceeding were Parties to the *Kyoto Protocol* or not. Given

¹²²⁴ M. Wider & L. Day, "Voluntary Carbon Market – A Legal Perspective," in IETA (2007), 121 at 121.

the wide range of conceivable climate policies, it is possible that a WTO dispute could also be initiated by a country that is not a Party to the Kyoto Protocol but also by one that has ratified the Protocol. Even in the ‘easier’ situation where all disputing WTO Members were also Parties to the Kyoto Protocol and invoked it during the proceedings, the WTO dispute settlement system would come to face some challenging questions. Could it make a finding based on the *Kyoto Protocol*? If it decided to follow Pauwelyn’s argument and travel that difficult road (as it probably should) – then what would happen? How should the WTO dispute settlement system deal with the fact that the *Kyoto Protocol* does not prescribe any specific measures, yet it obliges countries to implement a ‘significant’ part of their legally binding emission targets through domestic mitigation measures?

Clearly, the door would not be open for the WTO dispute settlement system to argue that any policies that have not been specifically prescribed by the *Kyoto Protocol* are incompatible with WTO rules. As we saw above, Article 2 of the *Kyoto Protocol* lays down an obligation that industrialised countries *must* implement national policies and measures to reduce their greenhouse gas emissions. To a certain degree, its Article 2.3 also seemed to accept the possibility that such policies and measures have adverse effects on other social spheres, including international trade. Could this provision be interpreted in a way that is compatible with WTO rules, or would it result in a norm conflict necessitating the use of conflict norms such as *lex posterior* or *lex specialis*? What then? The WTO dispute settlement system might also have to engage in some rather politically sensitive analysis, for instance, under Article XX(b) of the *GATT* when determining the ‘necessity’ of a certain climate policy. This could happen even leaving aside such explosive lines of inquiry as the overall ‘necessity’ of taking action against climate change¹²²⁵ or balancing the importance of climate change mitigation in relation to international trade. Even defining the ‘necessity’ of particular domestic policy in terms of the availability of other, less trade restrictive options could have important economic implications and highlight tensions in the borderline between the WTO dispute settlement system and national authorities. If a measure genuinely intended to contribute to the achievement of a country’s Kyoto target was found to be incompatible with WTO rules, the country would be obliged to identify alternative policies and measures to reduce its emissions to the required level. Such a decision would have important implications the balance struck when formulating the national Kyoto compliance strategy and allocating the burden between economic sectors and actors, including the decision whether and how much to spend tax payers’ money to purchase credits through the Kyoto mechanisms. All this highlights the fact that the WTO dispute settlement system affects the relations between the WTO and its Member States.

Challenging as the first two scenarios would be for the legitimacy of the WTO dispute settlement system, it is really the third scenario that could generate the most serious problems. From a broader

¹²²⁵ As proposed by Green, see Chapter 5.

policy perspective, a measure like the proposed U.S. 'Low Carbon Economy Act' could easily undermine multilateral cooperation under both the WTO and UN climate regimes. A carbon levy on most imports to the U.S. or the EU would have huge economic implications and immediately surface all the familiar criticism about imposing one country's environmental values and policies on others. And indeed, unless the regulation was carefully designed, it would circumvent the fundamentals that have been guiding the development of the UN climate change regime, most notably, the idea of the historical responsibility of industrialised countries and the common but differentiated responsibilities of developing countries to participate in climate change mitigation efforts.

Could the WTO dispute settlement system be reasonably expected to determine whether something with such enormous political implications is possible? The WTO dispute settlement system would also be confronted with interesting legal challenges. Those drafting 'the Low Carbon Economy Act' have clearly read the *Shrimp-Turtle* decision and worded some of its most crucial provisions in language that is similar to that used by the Appellate Body in the 1998 *Shrimp-Turtle* decision. Clearly, the legitimacy of the WTO dispute settlement could suffer a serious blow if a country (like the U.S.) designed a national regulatory scheme that takes into account earlier WTO dispute settlement practice - and then the scheme was found to be incompatible with WTO rules. At the very least, the WTO dispute settlement system would struggle to make an analytical distinction between the *Shrimp-Turtle* dispute and the one involving the Low Carbon Economy Act. According to one observer,

Under Article XX of the *GATT* and judicial precedent, the US may likely defend this duty on the grounds of environmental protection, as long as the response does not discriminate against other countries.¹²²⁶

Difficult as the question of unilateral trade measures is, an interpretation that fluctuates every few years is hardly a solution that could improve the legitimacy of the WTO dispute settlement system. From the perspective of environmental policy, however, the merits of the International Reserve Allocation requirement are questionable and – interestingly enough - it could thus become a dispute where the international environmental community finds itself taking a stance against the U.S. environmental trade measure.

In real life, such a situation may or may not arise. In the end, the U.S regulation may not even be adopted – there are several other climate bills currently in the Congress. A new treaty on post-2012 climate change cooperation is set to be concluded by the end of 2009 also involving the U.S in multilateral efforts to mitigate climate change. Even if it is unlikely that the new treaty will be much

¹²²⁶ P. Breselin, "Guest Commentary: Caveat Emptor: Trade Policy's Role under Cap-and-Trade," *Point Carbon's Carbon Market North America*, 12 September 2007.

more specific than the *Kyoto Protocol* in terms of the measures for its implementation, it could provide a legal basis for finding regulations such as the Low Carbon Economy Act incompatible with WTO rules interpreted in light of the new climate treaty. However, what the new post-2012 climate treaty is likely to do is to define more ambitious emission targets than the *Kyoto Protocol* did – and possibly for an even larger number of countries. Given that almost everyone agrees that the flexible mechanisms and the carbon markets are the most successful features of the *Kyoto Protocol*, the new treaty is likely to also incorporate and even expand the use of market-based mechanisms, thereby enhancing link between the trade and climate regimes. What seems clear is that the four conflict scenarios bring to the fore difficult legal and political problems and their solution could have fundamental implications for the legitimacy of the WTO dispute settlement system. Considering everything that is at stake, the institutional skills and capabilities of the WTO dispute settlement could be stretched to the breaking point. To phrase it differently, the ‘rule of lawyers’ brought about by the judicialisation of the WTO dispute settlement procedures¹²²⁷ may be reaching its limits in such a situation.

¹²²⁷ The phrase is borrowed from Weiler, “The Rule of Lawyers.”

7. Conclusion: Striking the Right Balances?

When beginning this study in the summer of 2003, the legitimacy of the WTO dispute settlement system was a highly relevant topic. The panel and Appellate Body decisions during the implementation phase of the *Shrimp-Turtle* case had recently crystallised what only few had understood when reading its first decision in the case back in 1998: that environmentally motivated trade measures can be designed so as to make them compatible with WTO law. However, from the environmentalist perspective, the boost to the legitimacy of the WTO dispute settlement system seemed short-lived. Argentina, Canada and the U.S. had just formally commenced dispute settlement proceedings against the EU's treatment of imports of genetically modified products in the *Biotech* case. Given the highly critical attitudes of European consumers towards GMOs, the complexity of the EU's regime and its proximity with the *Cartagena Protocol*, many predicted that the dispute would pose another great challenge to the WTO dispute settlement system. While the *Biotech* report, focusing on the *de facto* suspension of approval procedures rather than the EU's legal regime for GMOs, was narrower than many had feared, the past four years have demonstrated that concerns related to the legitimacy of the WTO dispute settlement system are far from settled. For instance, the WTO dispute settlement system has yet to develop a consistent, coherent and predictable approach to international environmental norms and engage in a constructive interaction with the field.

The reality is, however, that environmental disputes find their way to the WTO at almost regular intervals. In October 2007, Canada requested consultations with the EU concerning a ban imposed by Belgium and the Netherlands on seal products.¹²²⁸ Animal rights groups are currently putting pressure on other EU countries and the European Commission to adopt similar regulations. Canada, in turn, argues that the Belgian and Dutch bans violate the *TBT Agreement* as well as the *GATT*¹²²⁹ and stresses that seal hunting represents an important source of livelihood for Canadians, including indigenous communities. If consultations between the EU and Canada are unsuccessful, the dispute concerning *Certain Measures Prohibiting the Importation and Marketing of Seal Products* might eventually lead to the establishment of a panel – and bring to the WTO yet another linkage dispute, also involving the question of indigenous rights. It is thus clear that many of the legal and political challenges that originally inspired this study are still highly relevant. Furthermore, Chapter 6 identified several potential candidates for new environmental disputes at the WTO in the context of climate change mitigation.

¹²²⁸ Request for consultations by Canada on *European Communities-Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS/369/1, 1 October 2007.

¹²²⁹ *Ibid.*

In the scholarly field, the past four years have seen several significant developments in areas relevant to the topic of this study. Many of the debates born around the WTO and its dispute settlement system have matured and moved forward. Highly accomplished works have been published concerning the legitimacy, democratic deficit, constitutionalisation of the WTO;¹²³⁰ fragmentation of international law;¹²³¹ the relationship between WTO law and other rules of international law;¹²³² the standard of review applicable in the WTO dispute settlement;¹²³³ the SPS Agreement;¹²³⁴ and the involvement of WTO dispute settlement system in environmental disputes.¹²³⁵ Needless to say, this research has greatly benefited from such developments. The rapidly moving discussion has also posed some challenges in terms of keeping up to date on the latest developments. While academic understanding concerning questions relevant to the topic of this study has evolved, many important question marks and divergences remain.

This study began by arguing in Chapter 1 that the relevance of legitimacy in the context of international law and international institutions has increased significantly as a result of intellectual developments related to globalisation and the end of the Cold War. Chapter 1 thus discussed the key definitions and understandings of legitimacy. It introduced the distinction between the substantive/social and procedural/formal components of legitimacy as a basis for structuring this study and categorising legitimacy challenges at the WTO dispute settlement system. Reviewing the *Tuna-Dolphin* and *Shrimp-Turtle* disputes, Chapter 2 explained how legitimacy challenges have surfaced in the WTO dispute settlement system, especially concerning disputes where environmental interests play an important role. It argued that one of the key reasons is the substantive scope and mandate of the WTO dispute settlement system. The fact that the WTO dispute settlement cannot consider claims based on non-WTO norms and, according to the mainstream scholarly view, is not competent to directly apply non-WTO norms of international law, has been an important motivation for arguments that the WTO dispute settlement system is systemically biased towards trade and economic interests. Chapter 2 also argued that in its first *Shrimp-Turtle* decision in 1998, the Appellate Body was able to alleviate some of the most immediate problems by demonstrating that WTO law does not exist ‘in clinical isolation’ from other rules of international law and opening the borders of the WTO regime to international environmental norms.

Chapter 2 then reviewed in detail the debate and WTO dispute settlement practice concerning the role of non-WTO norms in the WTO dispute settlement system. Essentially, it identified two main

¹²³⁰ See for instance, Howse, “Democratic Deficit” and “Legitimacy of the WTO”; Cass, *The Constitutionalization of the WTO*; and Petersmann, “Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism.”

¹²³¹ See most notably, ILC, *Fragmentation of International Law*.

¹²³² See, for instance, Pauwelyn, *Conflict of Norms*.

¹²³³ See, for instance, Oesch, *Standards of Review*.

¹²³⁴ J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary* (OUP, 2007).

¹²³⁵ See, for instance, Macmillan, *WTO and the Environment*.

scholarly positions. According to Pauwelyn, the WTO regime was not born in a vacuum: unless a treaty explicitly contracts out of general international law, it continues to apply to a regime and fills gaps left by the treaty.¹²³⁶ Furthermore, the *DSU* does not limit the competence of the WTO dispute settlement system in terms of applicable law.¹²³⁷ However, in cases where it is not possible to apply a WTO rule and other relevant rule of international law by interpreting the norms in such a way so as to make them compatible, recourse must be had to conflict norms to determine which norm should prevail. If a non-WTO norm is found to be the prevailing one, the WTO dispute settlement system is competent to apply it but it cannot enforce it.¹²³⁸ The second position, supported by scholars such as Trachtman and Marceau, was that the WTO dispute settlement system is never competent to apply non-WTO norms of international law directly. Again, the primary method for dealing with norm conflicts is interpretation: according to the customary norms of treaty interpretation, codified in the *Vienna Convention on the Law of Treaties*, the WTO dispute settlement system must take into account any relevant rules of international law when it interprets the WTO Agreements. However, in case the conflict cannot be solved through interpretation, the WTO dispute settlement system cannot make a finding based on a non-WTO norm. Finally, a third and less formal approach to non-WTO norms was identified in Chapters 2 and 4 that could also broaden the substantive horizons of the WTO dispute settlement system. Accordingly, non-WTO norms could play a role in WTO dispute settlement proceedings as factual evidence. In other words, they could be used not as legal norms but as interpretative material to assist in defining the meaning of words used in the WTO Agreements in the same way that the WTO dispute settlement organs might use a dictionary to guide their textual interpretation. This possibility was discussed by the *Biotech* panel, and according to its interpretation, the Appellate Body used this method in the *Shrimp-Turtle* case when referring to environmental instruments such as the *Convention on Biological Diversity* to support its interpretation of the *GATT*.

Based on the WTO dispute settlement practice, it remains somewhat unclear as to what extent the WTO dispute settlement system has directly applied non-WTO norms, to what extent it has referred to them as relevant rules of international law that guide the interpretation of WTO law and to what extent it has used non-WTO norms as factual evidence rather than as legal norms. As it was seen in Chapters 3 and 4, in its first *Shrimp-Turtle* decision, the Appellate Body generously listed various binding and non-binding sources of international environmental law but ultimately left their legal status and relevance undefined. In contrast, in the *Hormones* decision the AB did not see any potential role for the precautionary principle to influence the interpretation of WTO law, and the *Biotech* panel explicitly refused to consider the *Cartagena Protocol* either as a relevant rule of international law or as factual evidence. The *Biotech* report also highlighted an important grey area

¹²³⁶ Pauwelyn, "The Role of Public International Law in the WTO," 577.

¹²³⁷ *Ibid.*

¹²³⁸ *Ibid.*, 566.

that would seem to diminish the potential of using non-WTO norms to increase coherence in international law by interpreting WTO law in light of other rules of international law. While the fact that the Appellate Body referred to the *Convention on Biological Diversity* in the *Shrimp-Turtle* case lead some to believe that there might be some more flexibility in the *Biotech* panel argued that the *Cartagena Protocol* was not a relevant rule of international law because not all WTO Members are Parties to it. It then refused to answer the question as to whether it would be relevant in case all disputing parties had ratified it – as in the *Biotech* case, the EU was the only one having done so.

Going deeper into the legitimacy dilemma, Chapter 4 identified two sets of challenges to the substantive/social legitimacy of the WTO dispute settlement system originating from the mandate of the WTO dispute settlement system that restricts its ability to consider international environmental norms. To illustrate the relevant but limited potential of conflict norms and norm conflicts, it questioned whether an international judicial body mandated to consider all relevant international norms on an equal footing might have reached a different conclusion in the *Shrimp-Turtle* and *Hormones* cases. This inquiry demonstrated that in addition to the limited mandate of the WTO dispute settlement system, differences in regulatory techniques and levels of development influence the interaction between WTO law and international environmental law in a way that is often unfavourable to legitimate interests protected by international environmental law. In other words, Chapter 4 explained that international environmental norms are scattered in various different instruments and the legal status of several key concepts remains unclear. Furthermore, the progressive development of international environmental law is not possible due to the absence of an appropriate judicial forum. For all these reasons, the existence of relevant and conflicting norms is often difficult to determine. While these systemic problems continue to challenge the substantive/social legitimacy of the WTO dispute settlement system, for reasons highlighted in Chapter 5, they cannot all be resolved by the WTO dispute settlement system itself. Rather, they should be addressed by those in a position to improve the interaction between the fragmented and increasingly specialised sub-system of international law and relevant institutions.

Turning to the second level of analysis, namely that confined to the WTO dispute settlement system, Chapter 4 then argued that the WTO dispute settlement system has not exploited the full potential of the legal methods at its disposal to improve its legitimacy. It highlighted the link between legitimacy, consistency and transparent, well-reasoned justifications and argued that the legitimacy of an international judicial body can easily be challenged if there are faults in its legal reasoning. Chapter 4 emphasised that the existing WTO jurisprudence leaves some important and troubling questionmarks. Why, for example, was it that the Appellate Body found Principle 12 of the non-binding *Rio Declaration* to be particularly relevant to the interpretation of the *GATT* in the *Shrimp-Turtle* case, but argued in the *Hormones* case that the legal status of the seemingly more

established the precautionary principle was an abstract and academic question, completely irrelevant to the interpretation of the *SPS Agreement*? And how can it be justified that the AB in the *Shrimp-Turtle* case referred to the *Convention on Biological Diversity*, to which the U.S. is not a party, and the substance of which is relevant but rather remote from the subject matter of the dispute? But in *Biotech* dispute, the panel found that the *Cartagena Protocol* – intimately related to the question of GMOs – was not at all relevant to the dispute either as a relevant rule of international law within the meaning of the *VCLT* or as factual evidence? In light of this analysis, Chapter 4 stressed that the WTO dispute settlement system could improve its legitimacy by being consistent in its approach to international environmental norms, and giving adequate justifications for its decisions concerning such norms. The last part of Chapter 4 lamented that the recent *Biotech* panel decisions seems to have taken the WTO further from this proposed approach. In fact, the decision is so modest and conservative that it seems to ignore the intellectual effort that has been put to clarifying the relationship between WTO law and other norms of international environmental law, and to identifying problems arising from the fragmentation of international law. From that perspective, it is unfortunate that the *Biotech* decision was not appealed as it would have been interesting to see how the AB – whose legal analysis is usually more rigorous than that of the panels – would have approached these issues ten years after the *Shrimp-Turtle* case.

Chapter 5 turned to the formal and procedural dimension of legitimacy and argued that the legitimacy of an international judicial body will also suffer if it gets involved in policy-making and exceeds the boundaries of its judicial function. Drawing on legal theory, Chapter 5 admitted that while fundamental, the distinctions between law-making and law-application, law and politics, court and legislature are notoriously difficult to draw. It argued, however, that these distinctions do exist and that they must be drawn in such a way that takes into account the institutional framework in which the WTO dispute settlement system operates. Given that many ideas concerning legitimacy, democracy and accountability in the international sphere are in a flux, the WTO dispute settlement system should be mindful of factors influencing its formal legitimacy. For this reason, Chapter 5 challenged arguments calling for more open balancing of trade objectives and environmental interests in the WTO dispute settlement system to the extent that such arguments were not based on international environmental law but seemed to be more politically and ideologically motivated. To distinguish, what Chapter 4 suggested was legally justified and transparent application of international environmental norms when relevant to WTO disputes and what Chapter 5 opposed was extensively balancing the conflicting values and interests at stake inherent in the *Korean Beef* approach of balancing the relative importance of the national regulatory objective and international trade interests. In other words, Chapter 5 sought to emphasise the limits of the judicial function and the need to respect other institutional boundaries, including appropriate deference to national authorities and other international institutions. Finally, Chapter 5 also stressed the importance of

transparency, access to information and inclusiveness in terms of procedures as factors that also have important implications to the legitimacy of the WTO dispute settlement system.

Having analysed the WTO dispute settlement system and the different elements of legitimacy, it seems that much of the legitimacy of the WTO dispute settlement system depends on finding the right balances – not only between the various norms and interests, but also between the different components of legitimacy. At the beginning, I conceived my research question as a dilemma between the formal and substantive dimensions of legitimacy. From the environmental perspective, I found aspects of the WTO jurisprudence highly disappointing and saw a clear need for improving the situation. However, it initially seemed that any significant substantive improvements would not be possible without exceeding the mandate of the WTO dispute settlement system. But the rapidly evolving debate concerning conflict norms and interaction between international treaty regimes showed that some tools were available for improving the substance while respecting the formal mandate of the WTO dispute settlement system. Indeed, it lead me to realise that the substance can be improved *by following the legal form* – although the size of this window depends on whether one agrees with the more progressive arguments concerning the interaction between WTO norms and non-WTO norms made by Pauwelyn, or the more reserved arguments by Marceau and Trachtman. While both arguments are convincing, I have felt more inclined to lean towards Pauwelyn as his approach would mean placing international environmental law on a more equal footing with WTO norms, thereby acknowledging the competing claims to legitimacy by these specialised fragments of international law. Still, given formal constraints, the substance cannot ultimately be perfection through the legal tools available for the WTO dispute settlement system but it must ultimately be deferred elsewhere. To justify this conclusion, Chapter 6 focused on fragmentation of international law and possible conflicts between the WTO regime and climate change mitigation measures. In particular, it demonstrated how legal analysis based on the internal logic and assumptions of the WTO regime can easily lead to a bias that is unacceptable to those following the internal logic of the international climate change regime.

It seems that the debate about the treatment of environmental issues in the GATT/WTO dispute settlement began as something very political – partly because the relevant actors had not yet internalised each other's vocabulary and logic and could not formulate their frustration in such sophisticated terms as they do nowadays. Later on, however, the debate took a highly legalistic turn highlighting the potential of customary rules of treaty interpretation, conflict norms and other legal devices in solving the problems that linkage disputes created in the WTO dispute settlement system. Certainly, the legal technical solutions offered by WTO scholars examined and elaborated in this study have offered some relief. It has also been shown that there is still unused potential for constructive interaction between WTO law and international environmental law, even if adopting a

narrow view on the mandate of the WTO dispute settlement system. To start with, the role of international environmental law in the WTO dispute settlement system should be clarified: when can it be referred to as a relevant rule of international law under *VCLT*, when should it be considered as factual evidence? In case of a norm conflict that cannot be solved through interpretation, can non-WTO norms be directly applied, as Pauwelyn argues, or not? In any case, when the WTO dispute settlement system does refer to international environmental law in any form or shape, its reasoning should be transparent and adequately justified. But ultimately, even the most sophisticated legal techniques do not seem to offer an escape that would guarantee the legitimacy of the WTO dispute settlement system. The only way of doing so would stretch the mandate in such a way that would bring to the fore the formal components of legitimacy discussed in Chapter 5.

From the institutional perspective, settling highly political disputes through the WTO dispute settlement system would not be an ideal solution. Again, I agree with the International Law Commission:

...when conflicts emerge between treaty provisions that have their home in different regimes, care should be taken so as to guarantee that any settlement is not dictated by organs exclusively linked with one of the other of the conflicting regimes.¹²³⁹

Certainly, a lot of the criticism against the WTO dispute settlement system as an institution where ‘faceless bureaucrats’ determine the fate of the world while hiding in Geneva is based on lack of information and unfounded fears – and could be improved through increased transparency and awareness raising. However, what either better information or rule-oriented and judicialised dispute settlement system cannot really address is the clash of two professional cultures such as those created by the WTO and the *Kyoto Protocol*, each of which is able to stake a valid and persuasive claim to legitimacy. Both involve highly competent and responsible international experts who genuinely believe that they are advancing the world’s best interest and common good. Both regimes are so complex that the respective experts are somewhat blinded by their internal logic, which is, however, compelling only to those who have internalised the basic assumptions of the regime in question. Solving such conflicts through the WTO dispute settlement system would be far from the ideal institutional framework for the fruitful cooperation and interaction of such regimes.

At the end of the day, the WTO dispute settlement system is therefore not equipped to deal with all the problems relating to the increasing specialisation within international law - indeed its fragmentation - and the need to clarify and define political priorities. While in the international institutional reality the WTO dispute settlement system is uniquely powerful, the logical conclusion

¹²³⁹ ILC, *Fragmentation of International Law*, 252.

should *not* be that international trade law should become uniquely powerful in comparison with other areas of international law. Throughout the study I have thus attempted to draw attention to the linkages between WTO law and international environmental law in a way that highlights the somewhat competing claims to legitimacy by these two increasingly specialised sub-systems of international law and professional cultures. The previous Chapter sought to demonstrate through concrete examples that the WTO dispute settlement system alone is ultimately unequipped to handle the kind of controversies that could arise from a conflict between two powerful spheres of international law, such as the WTO regime and the Kyoto Protocol. It remains to be seen whether the validity of these arguments will eventually need to be demonstrated through a concrete dispute that makes the problems so explicit that it leaves no doubt that the situation needs to be addressed, whether states manage to avoid surfacing such an open legal conflict, or whether they gradually negotiate a more suitable institutional arrangement. But as the latent tension between the WTO and the Kyoto Protocol illustrates, it is an illusion to think that all the major challenges to the legitimacy of the WTO dispute settlement system have been overcome.

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