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**SEALS AND THE NEED FOR MORE DEFERENCE TO VIENNA
BY WTO ADJUDICATORS**

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Christian Häberli

Executive Summary

This paper asks how World Trade Organization (WTO) panels and the Appellate Body (AB) take public international law (PIL) into account when interpreting WTO rules as a part of international economic law (IEL). Splendid isolation of the latter is not new; indeed it is intended by the negotiators of the Understanding on the Settlement of Disputes (DSU). At the same time, the Vienna Convention on the Law of Treaties (VCLT) is quite clear when it provides the general rules and the supplementary means of treaty interpretation.¹ Despite such mandatory guidance, WTO adjudicators (when given a choice and assuming they see the conflict) prefer deference to WTO law over deference to Vienna and take a dogmatic way out of interpretation quandaries.

The AB and panels make abundant reference to Vienna, though less so to substantive PIL. Often times, however, they do so simply in order to buttress their findings of violations of WTO rules. Perhaps tellingly, however, none of the reports in *EC – Seals* contains even a single mention of VCLT, despite numerous references to international standards addressing indigenous rights and animal welfare.²

In the longer term, and absent a breakthrough on the negotiation front, this pattern of carefully eschewing international treaty law and using PIL just for the sake of convenience could have serious consequences for the credibility and acceptance of the multilateral trading system. Following the

¹ Vienna Convention on the Law of Treaties, 1155 UNTS 331(1980); also in 8 *International Legal Materials* 679. The VCLT was adopted on 22 May 1969.

² The Panel Reports list VCLT but do not ever refer to the Convention (WT/DS400/R and WT/DS401/R, p.11).

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adage ‘negotiate or litigate’ recourse to WTO dispute settlement increases when governments are less ready to make treaty commitments commensurate with the challenges of globalisation.

This is true even for ‘societal choice’ cases on the margins of classic trade disputes. We will argue here that it is precisely for cases such as these that VCLT and PIL should be used more systematically by panels and the AB. Failing that, instead of building bridges for more coherent international regulation, WTO adjudicators could burn those same bridges which the DSU interpretation margin leaves open for accomplishing their job which is to find a ‘positive solution’. Worse, judicial incoherence could return to WTO dispute settlement like a boomerang and damage the credibility and thus the level of acceptance of the multilateral trading system *per se*.

I. Introduction

Policy-makers and preamble texts in WTO agreements frequently claim *mutual supportiveness* of IEL and PIL.³ Similarly, AB exhortations to adopt a *holistic approach* guided by Article 31 VCLT seem necessarily to imply PIL consideration for all ‘trade and...’ matters. This is particularly important also because the WTO has one of the few dispute settlement systems with the constitutional power to go beyond conciliation.⁴

For disputes about sanitary and phytosanitary measures the by now well-established recourse to scientific standards as laid down in IEL bodies, especially the ‘three sisters’ Codex alimentarius, Office International des Epizooties (OIE) and the International Plant Protection Convention (IPPC) have helped WTO to avoid becoming a ‘science court.’⁵ As for

³ Some such statements, even when crafted with the help of the WTO Secretariat, look more naïve than political: ‘Effective MEAs help to prevent disputes from arising in the WTO’s dispute settlement system, and thus provide an important source of mutual supportiveness for the trading system.’ UNEP, *Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization*. Synthesis Report, January 2002, p.16.

⁴ Georges Abi Saab, *The Interaction Between Diplomatic and Judicial Means in Theoretical Perspective*. in Laurence Boisson de Chazournes, Marcelo G. Kohen, and Jorge E. Viñuales (Eds), *Diplomatic and Judicial Means of Dispute Settlement*. Brill & Nijhoff (2012), p.330.

⁵ The implementation of *EC – Biotech* still pending before the DSB, and the, well, ‘pragmatic’ solution found in *EC – Hormones* seem to show a limit to purely ‘science-based’ trade disputes.

other matters it has been argued that real conflicts between trade measures implementing multiple objectives including human rights, environmental or animal welfare norms have been rare.⁶ According to this view, WTO is not and need not become a public morals court or a place for adjudicating claims of violations of human rights or environmental norms. Things may be changing though.

For example, before *EC – Seals* the only two WTO rulings on public morals claims were those in *US – Gambling* and in *China – Audiovisuals*.⁷ In all three cases public morals have been accepted as a possible exception to GATT rules. Yet the actual implementation measures taken were found to unduly discriminate against third country suppliers. This seems to increasingly contradict legal doctrine (and wishful thinking of politicians) on the available avenues to consistent rule-making and to coherence between PIL and IEL.

WTO adjudicators have no easy task. They are to assist the Dispute Settlement Body (DSB) in the interpretation of WTO provisions. The automaticity of dispute settlement is essential to the ‘security and predictability to the multilateral trading system’ as it serves to ‘clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’ (Art.3.2 DSU).⁸ However, the exclusive authority to adopt interpretations of the WTO Agreements lies not with the DSB but with the Ministerial Conference and the General Council (Article IX:2 WTO Agreement). For good measure the DSU insists that neither panels nor the AB can add to or diminish any WTO rights or obligations (Art.19.2 DSU). Despite this very clear limitation some common law lawyers take a pragmatic approach and consider the AB as an international customary law-maker mandated to fill the gaps and to clarify ambiguities left open by negotiators. Guzman and Meyer even argue that ‘regardless of whether an ambiguous textual basis for a tribunal’s ruling exists, in both cases a court is crafting an obligation not explicitly defined by the text of

⁶ Gabrielle Marceau, The WTO Dispute Settlement and Human Rights. in F. M. Abbott, Ch. Breining-Kaufmann, and T. Cottier (eds.), *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: University of Michigan Press, 2006), p. 204.

⁷ Panagiotis Delimatsis, Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US-Gambling and China – Publications and Audiovisual Products. 14(2) (2011) *Journal of International Economic Law* 257–293.

⁸ Gabrielle Marceau and Jennifer A. Hamaoui, Implementation of Recommendations and Rulings in the WTO System. in Boisson de Chazournes et al. (op.cit. *supra*), p.192.

an agreement.⁹ Whatever the practical implications of such a far-reaching liberty, rule-setting is not and cannot be allowed beyond the case at hand. Moreover, panels drawing on PIL to find appropriate guidance for the interpretation of WTO law tend to exercise more restraint than the AB as the ‘Supreme Court’ established by the DSU.

In reality the task of rules’ interpretation is delegated to the panels despite these limitations: their standard terms of reference are ‘to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’ cited by the parties to the dispute (Art.7.2 DSU). The appeal process and the AB’s mandate are ‘limited to issues of law covered in the panel report and legal interpretations developed by the panel’ (Art.17.6 DSU). An adjudicator’s life can therefore amount to a wild ride between Scylla and Charybdis, because on the one side ‘[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’ (Art.3.2 DSU). On the other side ‘[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute’ (Art.3.7 DSU).

Litigation, arguably, is not an ideal place to determine policy space. When looking at divergent treaty and policy objectives, adjudicators will find reconciliation singularly constrained by their terms of reference. Does this mean that when the chips are down, mutual supportiveness will turn out to be a fiction? Can adjudicators start considering PIL only when a party refers to it? Does the notion of a member-driven rules framework oblige them to limit their ‘objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements’ (Art.11 DSU)? Or can they, at best, consider procedural IEL provisions when making their findings? With all the deference imposed by the DSU can adjudicators in any way restrain further PIL and IEL fragmentation?

Our research hypothesis is that, without falling into the fatal trap of judiciary activism, a better reading of the provisions of the VCLT (including Article 31.3(c)) by adjudicators is both necessary and possible. Doing so could produce greater convergence in an international environment characterised by different legal orders, different standard setting bodies and divergent national regulations and implementing authorities. This is by no means an easy task. *Abi Saab* has pointed out the problem of advisory

⁹ Andrew T. Guzman and Timothy L. Meyer, *International Soft Law*, 2(1) (2010) *Journal of Legal Analysis*, Spring, pp.214-215. Electronic copy available at: <http://ssrn.com/abstract=1385438424846> accessed 30 June 2014.

opinions as a potential source of ‘dissonance’ when adjudicators have a ‘muddled understanding’ of their role.¹⁰ True, the problem starts with the splendid self-isolation of a *corpus iuris specialis* such as WTO law. Yet, trade diplomats may fail to see the bigger picture and the complexity of policy-making by the governments they serve, both at the national level and in other international fora. This raises the question whether the systemic limitations of WTO dispute settlement prevent the litigators and adjudicators in trade disputes from adopting the holistic treaty interpretation exercise prescribed by the AB pursuant to the customary rules as provided for in Article 31 VCLT.¹¹ Add to this the fragmentation between PIL and IEL case law, not to mention political expediency at the national level, and you get a rather unflattering picture of international regulatory governance.

In such a context it is perhaps preposterous to expect the last and weakest link in this chain to solve the problem created by incoherence at the national level and by trade policy-makers determined to keep non-traders and politicians at bay. Indeed, judges having to apply the law and to find a ‘positive solution’ are statutorily deprived of the prerogative to add even one iota to the rules. As is well known such rules are at times adopted at five o’clock in the morning by stressed and tired negotiators. Adjudicators and their case law guardians in the WTO Secretariat may have cooler heads than negotiators. They often come from different backgrounds and disciplines, and they should have a learning capacity beyond that of the interest defenders in a negotiation about policy space. But where is their wiggle room?

The assumption here is that a truly holistic and teleological treaty interpretation would also facilitate osmosis between PIL and IEL and improve understanding and acceptance of WTO and of the merits of trade liberalisation other than in trade circles. At the same time, a clarification of what adjudicators can do to discipline unilateral protection of parochial interests could further buttress the WTO’s role as a bulwark against extra-territorial standard-setting in national legislation and regional trade deals.

The focus here is on three research questions:

1. To what extent can and do DSB rulings take Vienna other international agreements and standards into account?

¹⁰ Georges Abi Saab, op.cit. *supra* p.332.

¹¹ AB Report *EC – Chicken Cuts*, para 176. AB Report *US – Continued Zeroing*, para 268.

2. Might recent WTO dispute settlement outcomes such as *EC – Seals* exacerbate the segmentation of PIL and IEL and prevent the effective furtherance of societal values such as human rights, health and labour standards, environmental protection, animal welfare or consumer information?

3. Seen from within IEL, do Vienna-based rulings integrating PIL elements present a risk of ‘encroachment’ into the multilateral trading system, with a chilling effect on the negotiation of new trade rules? Or do they on the contrary facilitate acceptance of a ‘trade and...’ court and of future trade disciplines?

The paper begins by visiting the present pattern of references to the VCLT in WTO litigation for purposes of rules’ interpretation. Building on this basis it analyses the three research questions. The conclusion is that (WTO) adjudicators should and could make better use of the small interpretation margins they have, both for more coherence of and more deference to PIL; at the very least, every effort must be made to preserve national policy space with ‘no or at most minimal’ trade impact.

II. Vienna and the DSU

At first sight, the abundance of references to Vienna in Panel and AB reports is striking. Of its 85 Articles, no fewer than 15 are quoted more or less extensively in a rapidly increasing number of cases.¹² For this enquiry it will be useful to start by recalling three general PIL principles and their absorption into WTO case law. We then look at the two main Articles 31 and 32 VCLT, for general rules and for supplementary means of interpretation, before concluding this section with a somewhat sombre case summary.

General PIL principles

- *Good faith* is laid down in Article 26 (*pacta sunt servanda*). However, like in all international treaties, good faith by all WTO Members is presumed by default. In many disputes ‘bad faith’ is easily claimed, but there are no such rulings. In *EC – Sardines* the AB held that a panel could determine whether a Member has or has not acted in good faith, adding this qualifier: ‘Nothing, however, in the covered agreements

¹² See WTO Analytical Index, Volume II (2013), p.1511.

supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.¹³ In another reference to the VCLT the AB also clarified *good faith* as being the *common* intentions of the parties – rather than the ‘legitimate expectations’ of *one* of the parties.¹⁴

- *Internal law* is no excuse for non-fulfilment of a substantive or procedural international obligation or concession. Article 27 lays down that ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’ WTO adjudicators have clarified that this also applies to legislative¹⁵ and judiciary organs.¹⁶
- The WTO Agreements are drafted as authentic texts in three languages, presumed to have the same meaning (Art.33.3 VCLT). *Plurilingual texts* (i.e. with several authentic versions) can and must be compared for compatibility.¹⁷ In a similar vein the AB declared that while dictionaries were a ‘useful starting point’ for the determination of the *ordinary meaning* of a treaty term, panels had to analyse each case according to its particular circumstances ‘in the light of the intention of the parties as expressed in the words used by them against the light of the surrounding circumstances.’¹⁸

In the remainder of this section we describe how WTO adjudicators take PIL into consideration by applying (a) general rules of interpretation and (b) supplementary means of interpretation i.e. under Articles 31 and 32 VCLT, before returning to public morals and to the seals case.

General Rules of Interpretation (Article 31 VCLT)

Article 3.2 DSU prescribes that ‘customary rules of interpretation of public international law’ serve to clarify the provisions of the WTO agreements. Quoting several PIL cases and renowned scholars, the AB determined in its second ruling that these rules mean the general rules of

¹³ WT/DS231/AB/R, para 200.

¹⁴ AB Report *EC – Computer Equipment*, paras 83-84 (emphasis in the original text).

¹⁵ Panel Report *Mexico – Telecoms*, para 7.244.

¹⁶ AB Report *US – Zeroing (Japan) (Article 21.5 – Japan)*, para 182.

¹⁷ AB Report *India – Bed Linen (Article 21.5 – India)*, footnote 153.

¹⁸ AB Report *EC – Chicken Cuts*, paras. 175-176.

interpretation contained in Article 31 VCLT, and confirmed that they have ‘attained the status of a rule of customary or general international law’.¹⁹

The main provision for this research is Article 31.3 VCLT (emphasis added, and subsequently commented upon):

‘*There shall be taken into account, together with the context:*

(a) any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any *relevant rules of international law* applicable in the relations between the parties.’

As for the meaning of *shall be taken into account* the Panel in *EC – Biotech* clarified that rules’ interpretation in the light of other treaties is not an option but an obligation, and that in cases with more than one permissible interpretation, the good faith principle would lead a panel to settle for the interpretation ‘more in accord with other applicable rules of international law’.²⁰

In *EC – Bananas III* the AB likened *subsequent agreement* to a multi-lateral interpretation of a WTO provision by the General Council, according to Article IX:2 of the WTO Agreement ‘or the application of its provisions pursuant to Article 31(3)(a) of the Vienna Convention’.²¹ The Panel in *US – Cloves* followed this reasoning when it wrote that the legal interpretation of the Doha Ministerial Decision could be seen as (i) an authoritative interpretation under Article IX:2 of the WTO Agreement, (ii) a subsequent agreement in the sense of Art.31.3(a) or (iii) a supplementary means of interpretation (Art.32).²²

As is well known, but often misunderstood by common law scholars, WTO jurisprudence as the evolving case law of the multilateral trading system ‘is not binding, except with respect to resolving a particular dispute between the parties.’²³ Interestingly, the AB has declined to read here a reference to *subsequent practice* in a specific case, as in Art.31.1(b) VCLT.²⁴ Similarly, Article 31.2 deals with the *context* for the purpose of

¹⁹ AB Report *US – Gasoline*, page 17).

²⁰ Panel Report *EC – Biotech*, paras 7.69-7.70.

²¹ AB Report *EC – Bananas III (Article 21.5 – Ecuador II)*, para 383.

²² Panel Report *US – Clove Cigarettes*, para 7.576.

²³ AB Report *US – Stainless Steel (Mexico)*, para 159, with reference to AB Report *Japan – Alcoholic Beverages II*, page 14.

²⁴ AB Report *Japan – Alcoholic Beverages II*, page 14.

treaty interpretation. Here the AB once again maintained that this does not include WTO jurisprudence:

Panel reports in previous disputes do not form part of the context of a term or provision in the sense of Article 31(2). Rather, the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the WTO *acquis* and have to be taken into account as such.²⁵

What then are the *relevant rules of international law* for WTO adjudicators? In *US – Shrimp* the AB referred to Art.31.3(c) when it sought ‘additional interpretative guidance, as appropriate, from the general principles of international law.’²⁶

The problem of course starts with the question of the applicability of rules agreed between only some of the WTO Members. One trade remedy panel said that Art.31.3(c) would not be relevant where ‘Argentina has not sought to rely on any law providing that, in respect of relations between Argentina and Brazil, the WTO agreements should be interpreted in a *particular way*’.²⁷ Similarly, in *US – Shrimp* the AB noted that the United States, although a party to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), ‘did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states.’²⁸ But in *EC – Biotech* the Panel held that ‘the *principle of precaution* is a “general principle of international law” and could thus be ‘considered a “rule of international law” within the meaning of Article 31(3)(c).’²⁹

The same panel also referred to the VCLT when it clarified that *the parties* means not ‘one or more parties’ or ‘parties to a dispute’ but the States which have consented to be bound by the treaty which is being interpreted

²⁵ AB Report *US – Anti-Dumping and Countervailing Duties (China)*, para 325.

²⁶ AB Report *US – Shrimp*, para 158 and footnote 157.

²⁷ Panel Report *Argentina – Poultry Antidumping Duties*, para 7.41 and footnote 64 (emphasis in the original text).

²⁸ AB Report *US – Shrimp*, footnote 174.

²⁹ Panel Report *EC – Biotech*, para 7.67 (emphasis added). Isabelle Van Damme noted that the *EC – Biotech* Panel recognised that treaties and general principles of law could constitute ‘rules of international law’ thereby rejecting a defence brought by the United States when it ruled that it did have the discretion to consider such rules as ‘context’ to determine the ‘ordinary meaning’ under Article 31.1 VCLT. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), p. 369.

and for which that treaty is in force (7.68).³⁰ Eventually, however, that panel stopped its analysis, estimating that it ‘need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law’ (7.89).

The biotech panel ruling was not appealed. But its reasoning was taken up by the AB in *EC – Airbus* where, again, the EU opposed the US view that ‘the parties’ mean ‘all the parties’ to the treaty being interpreted (para 843). The AB held that ‘a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members’ (para 845). After reviewing the 1992 bilateral agreement between the parties, it nonetheless concluded that this agreement ‘is not a "relevant" rule of international law applicable in the relations between the parties, within the meaning of Article 31(3)(c) of the Vienna Convention, that informs the meaning of "benefit" under Article 1.1(b) of the SCM Agreement’ (para 855).

As for the *ordinary meaning* of terms used in the definitions provided in Annex A to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the *EC – Biotech* Panel relied on standard WTO jurisprudence when it argued that a panel may consider the ordinary meaning if it considers this to be informative even if not all parties are members: ‘It 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.’ This too the panel did not find to be necessary after it had considered the necessary materials for its interpretation obtained directly from the relevant international organisations (7.92–7.96).

³⁰ In the often misread footnote 242 to that paragraph the Panel further explained why the words "all the parties" in Article 31.2(a) were absent in Article 31.3(c). In doing so it explicitly referred to the renowned PIL scholar Mustafa Yasseen (*L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités*, in *Recueil des Cours de l'Académie de Droit International* (1976), Vol. III, p. 63, para. 7). Finally, the Panel also referred to Article 31.3(b) in order to explain why it nonetheless took the view that ‘the term "the parties" in Article 31(3)(c) should be understood as referring to all the parties to a treaty’: Article 31.3(b) ‘which is part of the immediate context of Article 31(3)(c), provides that a treaty interpreter must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".’ The finding on *all the parties* was thus a logical consequence of the *subsequent practice* rule in the VCLT: ‘In our view, it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law which are not applicable in the relations between all parties to the treaty, but not by a subsequent practice which does not establish the agreement of all parties to the treaty regarding the meaning of that treaty.’ (FN 243 *in fine*)

Supplementary Means of Interpretation (Art.32 VCLT)

Supplementary means of interpretation as defined in Article 32 VCLT have also attained the status of customary or general international law.³¹ References by WTO adjudicators specifically to this article are much less frequent than those made to Article 31.

In some cases the AB disagreed with the panel and saw an ‘appropriate, indeed necessary’ recourse to *supplementary means* as provided for in Article 32. Such recourse becomes necessary, for instance, where the Schedule language is not clear³² or if by applying Article 31 the meaning ‘leads to a result manifestly absurd or unreasonable’.³³

Little more is found in the WTO Analytical Index where VCLT recourse was made to PIL sources as a supplementary means of IEL interpretation. A case in point where such an opportunity was perhaps missed is *EC – Seals*.

Seals as a Missed Opportunity

As mentioned above, not a single reference to VCLT is made in the seals case by either the Panel or the AB, despite frequent references to various international conventions throughout the proceedings. The main reference was to the United Nations *Declaration on the Rights of Indigenous Peoples* which affirms indigenous peoples' right to self-determination (Articles 3 and 4) and their control over resources.³⁴ Another treaty with almost identical relevant wording is the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries.³⁵ Art.2.2(b) mandates governments to take into account and to protect the interests of indigenous peoples by ‘promoting the full realisation of the social, economic and cultural rights of these peoples with respect to their social and cultural identity.’ The *Guiding Principles for Animal Welfare* established

³¹ AB Report *Japan – Alcoholic Beverages II*, p.10. Footnote 17 contains ample reference to academic PIL views as well as to a number of ICJ rulings in this matter.

³² AB Reports *Canada – Dairy*, para 138, and *US – Gambling*, para 197

³³ AB Report *EC – Computer Equipment*, para 86.

³⁴ Resolution of the UN General Assembly A/RES/61/295 of 13 September 2007

³⁵ The ILO Convention 169 *Indigenous and Tribal Peoples* (1989) has a special website with numerous materials and resources, including information about ILO technical assistance related to Convention No. 169: www.ilo.org/indigenous accessed 4 July 2014. It has been ratified by 22 mainly Latin American countries. In Europe, only Denmark, The Netherlands, Norway and Spain have ratified this Convention. Canada and the United States have not ratified it.

by the OIE was the third IEL standard repeatedly referred to in this case, and with basically the same arguments by the parties. In the panel and AB deliberations all three went through the same process, without a reference in the findings.³⁶

Canada rejected outright the relevance of these texts in the case at hand, because they ‘do not require the EU to introduce a measure that provides trade preferences for Inuit.’³⁷

Norway also argued that the PIL requirements did not conflict with those of the WTO covered agreements, because they did not prescribe discriminatory trade preferences. Further, the EU could ‘protect the relevant interests of indigenous communities whilst also avoiding WTO-inconsistent discrimination.’ In Norway’s view the EU could find a better way to improve the welfare of seals than with an exception for seals’ harvesting by its indigenous communities. Besides, a ‘panel may *not* look for objectives beyond the four corners of the WTO legal system.’³⁸

In respect of indigenous communities the Panel acknowledged that ‘States are called on to "provide effective mechanisms for prevention of, and redress for ... [a]ny action which has the aim or effect of dispossessing them of their ... resources" (Article 8(2)(b)).’³⁹ The Panel also quoted directly from the ILO Convention affirming ‘the "rights of [indigenous peoples] to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources" (Article 2(2)(b)).’⁴⁰ The Panel then waded deep into moralities of different kinds, and it recognised the difference between commercial and traditional (Inuit) hunts. It thus rejected the complainants’ argument that the ban was ‘more trade-restrictive than necessary’ under TBT-Article 2.2. While recognising the public morals exception in principle, it also rejected the EU’s attempt

³⁶ Office International des Epizooties (OIE), *Guiding Principles for Animal Welfare* (2004). The Panel also quotes from Chapter 7.1 of the OIE’s *Terrestrial Animal Code* whose 22nd edition incorporates the modifications to the Terrestrial Code agreed during the 81st General Session in May 2013. For a history of OIE’s codification of animal welfare standards see <http://www.oie.int/animal-welfare/animal-welfare-key-themes/> accessed 1 July 2014. Moreover it refers to an *amicus curiae* brief by Howse et al. which enunciates ‘the philosophy of "animal welfarism" and its connection to "a long established tradition of moral thought".’ Panel Reports *EC – Seals*, Footnotes 668 and 672.

³⁷ Canada’s 2nd written submission, p.168.

³⁸ Norway’s answers to Panel Question 39.

³⁹ Panel Reports *EC – Seals*, Footnote 468.

⁴⁰ *Ibidem*, Footnote 469.

to link the reason for the differences in the treatment of seals to a general standard of the EU public's morality (7.301). This meant that the 'lack of even-handedness' could not 'cure' the violations of national treatment and most-favoured nation (MFN) obligations. The Panel also found that its analysis of *legitimate regulatory distinction* under Art.2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) was 'relevant and applicable' to its assessment of the requirements of the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT). This finding was reversed by the AB. But there is no further argument on or reference to the existence of a mandatory international 'moral standard' possibly showing the detrimental impact of the EU regime to stem exclusively from the *legitimate regulatory distinctions* which have emerged as a standard test in the TBT triad (COOL, Cloves and Tuna).

Before the AB the EU complained that 'the Panel failed to recognise that the fundamental tenet of "animal welfarism" is precisely that it is morally acceptable to inflict suffering upon animals where sufficiently justified by human needs.' Like it had done before the panel the EU motivated its 'moral assessment' by reference to the above-mentioned UN, ILO and OIE texts but did not take this link to PIL any further under Article 31 VCLT.⁴¹ In its view, international instruments are 'evidence' and not 'instruments setting out legal obligations that would conflict with the WTO agreements.'⁴²

The Appellants again rejected this argument, saying 'international agreements cited by the European Union before the Panel do not require the European Union to protect the interests of Inuit or other indigenous communities by discriminating against the products of non-indigenous peoples.'⁴³

The AB did not accept the Panel's use of Article 2.1 TBT for an analysis under GATT Article XX (5.310–5.314). In completing 'to the extent possible' the analysis under the chapeau of GATT Article XX it found the EU's criteria for differentiating commercial hunts from those by indigenous communities 'ambiguous'. The EU Seals Regime could thus 'be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'

⁴¹ Opening Oral Statement by the European Union, 17 March 2014, Geneva, pp.6&7. Cf. Other Appellant Submission by the European Union, 29 January 2014, Footnote 59 with another, PIL-unrelated reference to VCLT.

⁴² EU Appellee Submission, para. 90.

⁴³ AB Report *EC – Seals*, para 2.4.

(5.328). In plain English, the AB found that commercially hunted EU seals could still end up on the EU market. This led the AB to reject the public morals exception under the chapeau of GATT Article XX. The AB made no more references to possibly competing PIL and IEL.

For seals it looks as if international agreements do not even serve to ‘inform the analyses’ of WTO adjudicators, as happened in the three TBT cases.⁴⁴ The matter is thus left to WTO historians – and as an easy target for criticism by animal welfare and human rights NGOs. Unless the AB gets a chance to review its own position, ‘evolutionary interpretation’ as posited by Marceau seems to have reached a limit.⁴⁵

Case Summary

These then are the most frequent references to the Vienna Convention and to PIL. The general pattern is a confirmation of the adjudicators’ findings and reasoning which however remain almost exclusively based on WTO law. Additional examples could be quoted where the VCLT bypass also serves to fill gaps or clarify terms such as ‘circumstances’, ‘preparatory work’, ‘including’, ‘confirm’ and others, as well as to ‘determine’ certain meanings by reference to the records of the negotiation.⁴⁶

In our analysis we proceed to examine the reasons for what looks like a conspicuous absence of recourse to substantive PIL in WTO dispute settlement.

III. Analysis

Perhaps the very advent of the WTO changed the parameters and the rules for policy-making even in fields that are only remotely trade-related such as the size and design of fishing nets. After a decade-long search for a more level playing field for international trade, negotiators thought they had plugged the last loopholes for discrimination. In particular, the SPS

⁴⁴ AB Reports *US – COOL*, para. 271 (quoting AB Reports *US – Cloves*, para. 182 and *US – Tuna II (Mexico)*, paras. 215-216.).

⁴⁵ Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*. 13/4 (2002) EJIL 753-814.

⁴⁶ Panel Report *China – Intellectual Property Rights*, para 7.260 and footnote 252 (supplementary means of interpretation in accordance with Article 32 VCLT). The panel in *China – Audiovisuals* made no less than 38 references to Articles 31 and 32 VCLT in order to determine the meaning of ‘sound recording distribution services’ in China’s Schedule of concessions.

and TBT Agreements looked like foolproof prohibitions of all non-trade barriers (NTB) where any (unnecessary) trade restriction cannot even be rescued under one of the general exception clauses in GATT Article XX. This attempt was so successful that, except for a few sea turtles, even dolphins and menthol cigarettes were caught in the net cast by WTO to defend free trade. Very few slippages occurred. Growth hormones had to be bailed out with a murky beef quota reserved for the complainants, and the EU's GMO moratorium remains before the DSB. But mandatory labels for informing consumers face a tough examination under discrimination complaints. Classic trade remedy cases such as aircraft and car subsidies come under policy space scrutiny unheard of in pre-WTO times. The next challenge to the system might well be a ruling of a violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of a law protecting publicity-enslaved cigarette smokers.

This is the apparent success story of the WTO. 'Apparent' because, as we argue here, the fight against protectionism has only been successful at the price of splendid isolation. Moreover, it comes at the expense of policy space restrictions for otherwise legitimate non-trade objectives and for the protection of public goods. Seen from outside, the DSU increasingly appears like a system-inherent self-restraint. Even internationally agreed non-trade concerns appear as so many Trojan horses being ridden to defeat the multilateral trading system.⁴⁷ Indeed, disputes where respondents invoke such concerns increasingly come to WTO adjudicators. The surprising feature is that all too often the complainants, and still less the adjudicators, do not seem to want to recognise their PIL obligations as a basis for the multiplicity of policy objectives guiding the measures at issue.

Very few substantive PIL (or non-WTO IEL) references squeeze through this WTO net of non-discrimination. Of course, there are the 'three sisters' in SPS cases which are recognised under Article 3.4 SPS as the competent organisations for setting 'default standards' in all trade matters relating to human, animal and plant life and health. These are the only standard-setters recognised in a WTO agreement, apart from preambular language and indicative lists. Dispute settlers are on safe ground

⁴⁷ We borrow the term 'non-trade concerns' from Article 20 of the WTO Agreement on Agriculture: never defined in either the Uruguay or the Doha Rounds, or in any trade dispute, but often invoked like a mantra by trade diplomats trying to slow down agricultural trade liberalisation. 'Rural development', 'food security' and 'financial needs' might be viewed as terms with similar impacts for those who claim them for their own policy space while calling for more market access.

here, and this direct reference allows WTO not to become a ‘science court’.

Furthermore, as shown in some of the above cases, there are abundant examples of PIL/IEL texts referred to in the submissions of litigating parties, both complainants and respondents: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Biodiversity Convention (including the Cartagena Protocol), the WHO Framework Convention on Tobacco Control, the Western and Central Pacific Fisheries Convention, and many others. How do panels and the AB deal with such arguments? Cautiously, because typically the other party or parties would argue non-applicability in the case at hand or in general, invoking DSU ‘seclusion’. Nonetheless, as we have seen above, for instance the AB in *US – Shrimp* and the panel in *EC – Biotech* carefully defined new approaches with a prudent and limited opening up to VCLT-based treaty interpretation.

There are no references to VCLT and PIL for interpreting public morals in the so far three WTO cases. Adjudicators did use the VCLT for interpreting other terms in those cases, but for ‘public morals’ they showed total deference to the parties. The lead case is *US – Gambling* where dictionary definitions were used to define public morals as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation.’⁴⁸ That panel also referred to earlier AB findings when it agreed that ‘the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values’ and that ‘Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate’ (para 6.461).

We would argue that not even attempting to find internationally agreed language in respect of public morals is somewhat surprising, considering that trade rules are hardly sufficient to tackle situations where different cultural values lead to trade disputes. In *China – Audiovisuals* the respondent made a reference to the United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration on Cultural Diversity but not as a defence for its breaches of trading rights commitments under the

⁴⁸ Panel report *US – Gambling*, para 6.465. Upheld in AB Report, para 299.

Accession Protocol.⁴⁹ For its analysis of GATT Article XX(a) the Panel then adopted the deferential definition used in *US – Gambling*.⁵⁰

The seals case is another step backwards for a consideration of public morals by a VCLT-based reference to international treaties. The recognition of the right to invoke Art.XX(a) is seemingly a victory for the EU. But, regardless whether the EU can now solve the ‘ambiguity’ problem which led its public morals defense to fail, the rulings of the panel and of the AB are not based on the international standards for the rights of indigenous people or for animal welfare invoked by the EU. Purists will argue that there was no need, or that the respondent saw that such a direct recourse would not help. The parties themselves seem to harbour doubts, or mixed feelings, as to the use of such standards in a trade dispute. Possible negative fallout in another case of interest to them, or the general reluctance to introduce non-trade concerns into WTO dispute settlement might act as deterrents to more forceful arguments, with the VCLT as a bridge. In all such cases, adjudicators will clearly find it very difficult or impossible to go beyond the arguments put forward by the parties. Nevertheless, in our view a direct, VCLT-based recourse by the respondent and the adjudicators to international human rights or rights of indigenous people, or to animal welfare standards, might have led to a different outcome precisely because the seal ban put the EU in a quandary between two at least partly conflicting policy objectives.

Excessive prudence can exacerbate what Petersmann recently called the *systemic problem of multilevel governance of international public goods*. He argued that both PIL and IEL obligations can be ‘justified as necessary instruments for reforming international law for the benefit of citizens; the “consistent interpretation” – and “judicial comity” – requirements of national and international legal systems call for interpreting such agreements in conformity with the UN and WTO legal obligations of contracting parties as integral parts of multilevel governance of “aggregate PGs” demanded by citizens. Petersmann also reminds us that ‘WTO dispute settlement bodies continue neglecting that the customary rules of treaty interpretation and adjudication require interpreting treaties and settling related disputes not only on the basis of the text, context, objective and purpose of the applicable rules; as explicitly recalled in the Preamble and Article 31 VCLT, treaty interpretation and adjudication must also remain “in conformity with the principles of justice and international law”, including “human rights and fundamental freedoms for all” (cf. Preamble and

⁴⁹ Panel Report *China – Audiovisuals*, footnote 538.

⁵⁰ *Ibid.* para 7.759.

Article 31 VCLT), as confirmed in numerous UN legal instruments.’ Referring to Dworkin and Rawls, Petersmann concludes that ‘most WTO dispute settlement reports fail to balance private and public interests in terms of “principles of justice” and “human rights and fundamental freedoms for all”, contrary to the customary methods of treaty interpretation.’ In his view the blame does not lie with the adjudicators but with the negotiators: ‘Diplomatic monopolization of intergovernmental rulemaking (eg in secretive GATT/WTO negotiations) without effective parliamentary and democratic control risks undermining general consumer welfare and human rights, which diplomats deliberately refrained from mentioning anywhere explicitly in GATT/WTO law.’⁵¹

Is this the last word on PIL from the WTO? Perhaps not. There is no reason for adjudicators not to consider international customary law to find a valid basis on which to assess regulations with a public morals objective, especially where different morals may modify competitive conditions. The necessary ‘weighing and balancing’ of the restrictiveness of the measures on international trade would seem even more forcefully to warrant recourse to PIL: the Panel in *China – Audiovisuals* had recognised (although without recourse to the VCLT) that ‘the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy’.⁵²

IV. Conclusions

WTO law must be read in conjunction with, and ‘not in clinical isolation’, from other IEL and from PIL. At the same time we must bear in mind the admonition in the same Article 3.2 of the DSU that ‘[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’. A review of the present recourse to the VCLT in the DSB is thus useful to describe the leeway for interpretation available to WTO adjudicators. We do this even though in *EC – Seals* neither the panel nor the Appellate Body refer to the VCLT. What matters in this enquiry are not so much the rules or the number of references to the VCLT – often at the instigation of respondents

⁵¹ Ernst-Ulrich Petersmann, The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System. European University Institute, Department of Law, EUI Working Paper LAW 2013/10, p.10-13. Electronic copy available at <http://ssrn.com/abstract=2346661> accessed 1 July 2014.

⁵² Panel Report *China – Audiovisuals*, para. 7.817

or even complainants – but the extent to which adjudicators have considered non-WTO law and international standards in their deliberations and rulings.

Many cases now come before the WTO that concern measures taken at least partly in response to non-trade concerns. A case in point is the TBT triad but there are others.

Automaticity – the brilliant solution found in the Uruguay Round to prevent non-compliance – seems to have turned into a problem for cases which should not find a WTO judge as long as they are not protectionist (which they often are). As a result of the automatic litigation process in the WTO, all cases brought to the DSB end with a legally binding ruling, never mind the intents and purposes of the incriminated measures. Security and predictability are definitely the winners. However, perhaps as an at least partial consequence of its inherent ‘export bias’, a successful WTO may increasingly come under attack. Non-trade rules have been neglected or rejected as defences. Public morals, for example, are strongly upheld – as long as they do not result in any sort of discrimination against foreign suppliers.

Negotiations leading to policy space limitations by way of further trade liberalisation can easily hit the wall. The sorry state of the Doha Round is but one example. The same however goes for the acceptance by society at large of WTO rulings with a potential to reach beyond trade aspects. It will take a brave trading community to agree on new disciplines for freer trade. Moreover, the necessary support of ‘non-traders’ in the ensuing ratification process might also depend on truly holistic adjudicators.

This answers, at least politically, the third question raised in this paper, namely whether WTO adjudicators as the gate-keepers of rules’ security should make full use of their margin of appreciation. Up to now, orthodoxy has often prevailed over contextual wisdom and a vision beyond trade distortions. This may be partly due to a DSU provision formally prohibiting any rules development. But it could also be that panellists deliberately choose to stay on the safe side and adhere to the letter if not the spirit of WTO law. They perhaps also do so knowing that a more sovereign AB having the last word, absent a negotiated outcome, can take a broader view, albeit with an analysis limited to issues of law.

For the time being this trend towards deference and self-restraint despite the VCLT obligations continues. This raises the question whether the EU actually wants to accept PIL as a mandatory standard guiding its indigenous rights and animal welfare policies. Also, neither Inuit nor seals have a

standing in WTO dispute settlement. Another matter for further consideration?

To sum up, while WTO dispute settlement as a whole can be said to be sailing on smoothly without any major blips or too many unsolved cases, this is not the same for a perhaps increasing number of individual cases. Ultimately, one could liken the EU's problem in the seals case to a Russian doll, with trade restrictions (doll #1) justified by conflicting public morals of animal protection (doll #2) except for killings by a community (doll #3) whose survival requires trade distortions (doll #4).

Under the DSU rules adjudicators are prevented from 'making the case' for the parties and thus cannot really look at PIL unless the litigating parties consider those international treaties as binding. Even so, the perceptible differences between the different rulings examined here confirm, first, that there is room for manoeuvre in a critical path analysis and, second, that the WTO would do well to carefully brief and train panellists, and AB members, with a view to defining their margin of appreciation in due deference to national policy space. An alternative – adjudicators as part of the Secretariat – is definitely the worst option in this course of action towards more coherence in international treaty interpretation.

The WTO must continue to distinguish protectionism from protection. In most cases it is clearly inappropriate to protect public morals and societal choices with 'WTO-incompatible' measures. All too often a hidden agenda drives measures found to be violating trade law. At the same time, adjudicators disregarding context and ruling out 'not more than minimally' trade-distorting measures might be overstepping their mandate where the underlying policy objective and the public good is of high societal value and cannot be attained otherwise than with a minimal trade distortion. To continue doing so because of the splendid isolation syndrome may well come back to paralyse trade rules development by those negotiators who successfully isolated WTO from non-trade concerns.