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### India – Solar Cells and Mexico – Taxes on Soft Drinks: Multilevel Rule of Law Challenges in the Interpretation of Art. XX (d) of GATT 1994 in WTO Case Law

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# INDIA – SOLAR CELLS AND MEXICO – TAXES ON SOFT DRINKS: MULTILEVEL RULE OF LAW CHALLENGES IN THE INTERPRETATION OF ART. XX (D) OF GATT 1994 IN WTO CASE LAW

*Henrik Andersen\**

**Abstract:** *Rule of law is developed by various institutions of government and judiciaries at the national, regional, and international level. The interface of rules of law between various systems poses problems as to how to uphold law as supreme when the various systems do not have a clear connecting factor to translate a rule of law with another. The article discusses the multilevel rule of law challenges in the application of Art. XX (d) of GATT 1994, which protects those measures which otherwise are inconsistent with the WTO trade rules, if they are necessary to ensure compliance with laws and regulations. Besides an identification of some overall rule of law challenges arising from when WTO Members apply Art. XX(d) of GATT 1994 to measures which seek to ensure compliance with domestic laws and regulations, the article has a particular focus on Mexico – Taxes on Soft Drinks and India – Solar Cells, which highlight the problems that arise when WTO members apply Art. XX (d) of GATT 1994 as justification for complying with their obligations under international law. There are in particular two issues of concern from a rule of law approach: the connection between international law and national law, like incorporation and direct effect, and the potential jurisdictional and norm overlap between WTO law and other international law. Some of the multilevel rule of law challenges identified in Mexico – Taxes on Soft Drinks seem to be overcome in India – Solar Cells, but there are still areas of uncertainty in the multilevel rule of law clashes between the WTO and other regimes which need to be addressed in future cases.*

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## INTRODUCTION

In the recent *India – Solar Cells* case,<sup>1</sup> the Appellate Body (AB) of the World Trade Organization (WTO) handled an issue concerning the interface between international law and national law in Art. XX (d) of GATT 1994. Art. XX (d) is an exemption to the general free trade principles of the WTO. It applies if a national measure, which otherwise would be an obstacle to trade, is necessary to ensure compliance with *laws or regulations*. One question that arises is whether international law can fall under laws or regulations, or whether it is only reserved for domestic laws and regulations. 10 years before *India – Solar Cells*, the AB had dealt with a similar issue in *Mexico – Taxes on Soft Drinks*,<sup>2</sup> and provided some guidance on the relationship, which was further clarified in *India – Solar Cells*.

This article addresses the multilevel rule of law challenges in the interface between international and national law in the context of Art. XX (d) of GATT 1994. It is an area which is untouched in literature and which deserves closer analysis due to the increase in overlaps between various regimes on national, regional and international level. The overlaps pose challenges in respect of the function of rule of law as to provide *predictability* in law for various market participants. The article has a special focus on *Mexico – Taxes on Soft Drinks* and *India – Solar Cells*.

Rule of law is traditionally associated with national systems but has increasingly gained more space in international law.<sup>3</sup> For example, former members of the AB have addressed the role rule of law plays in, and is devel-

<sup>1</sup> “India – Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 14 October 2016.

<sup>2</sup> “Mexico – Tax – Measures on Soft Drinks and Other Beverages”, WT/DS308/AB/R, adopted by the DSB on 24 March 2006.

<sup>3</sup> See Simon Chesterman, “An International Rule of Law”, 56 AM. J. COMP. L., 331 (2008).

oped and promoted in, WTO panel and AB jurisprudence.<sup>4</sup> Rule of law in the context of Art. XX (d) of GATT 1994 must be seen as a multilevel concept due to the interface between various legal systems.

This article will claim that although in *India – Solar Cells*, the AB has attempted to overcome some of the rule of law problems which arose from its previous ruling in *Mexico – Taxes on Soft Drinks*, new problems have arisen. The article will first provide an overview of rule of law and discuss conceptual and normative challenges therein, and then place it in the context of international law to identify what the article means by *multilevel rule of law challenges*. Next, the article will discuss Art. XX (d) of GATT 1994 and provide an overview of panel and AB case law<sup>5</sup> before focusing on the multilevel rule of law issues arising from *Mexico – Taxes on Soft Drinks* and *India – Solar Cells*.

## RULE OF LAW AS A MULTILEVEL CONCEPT: AN OVERALL CONTEXT

### The concept of Rule of Law

In its most abstract form, the rule of law means that law is supreme. This implies that governments, individuals, and corporations are bound by law in all their actions.<sup>6</sup> This is in contrast to political systems where law will not apply on the ruling power, like a rule of man system.<sup>7</sup> From a market perspective, the purpose of rule of law is to provide predictability for the market agents. They can make informed decisions about their market conduct, strategic decisions, contractual arrangements etc. by knowing in advance the potential legal barriers, unfair trading rules, rights of consumers, rights

<sup>4</sup> See former Appellate Body Members James Bacchus and Jennifer Hillman; James Bacchus, “Groping Towards Grotius: The WTO and the International Rule of Law”, 44 HARV. INT’L L.J. 533 (2003); Jennifer Hillman, Appellate Body Annual Report for 2011, WT/AB/17 (13 June 2012). See also speech by former WTO Director-General Pascal Lamy at Bilkent University, Ankara, 15 March 2013, [https://www.wto.org/english/news\\_e/sppl\\_e/sppl272\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl272_e.htm).

<sup>5</sup> Note that when there is reference to GATT case law further in the article, the reference will not be to “GATT 1994,” but instead to “GATT 1947” although the provision of Art. XX (d) is the same.

<sup>6</sup> Inspiration has been taken from Hayek, although he stresses the rule of law as binding on the government, whereas I extend the scope of agents to include corporations and individuals. See Friedrich Hayek, *The Road to Serfdom*, 112 [Bruce Caldwell (ed.), 2007].

<sup>7</sup> See about rule of man systems; Leigh K. Jenco, “‘Rule by Man’ and ‘Rule by Law’ in Early Republican China: Contributions to A Theoretical Debate”, 69 J. ASIAN STUD., 181, (2010).

of other corporations, rights of public institutions and so on. By upholding law as the supreme norm of governance in a society, the constitutional and institutional structures must have certain elements that guarantee the function of the rule of law. It is highly debated in literature what the elements are.<sup>8</sup> One of the main concerns is whether the rule of law is a higher-ranking norm which can evaluate law's compliance with specific values, like human rights and democratic principles.

The *formal version* rejects the judgemental character of rule of law. For example, Raz is a proponent of a formal version of rule of law. According to him, the rule of law is value neutral and can be applied to all types of political systems irrespective of the level of democracy, human rights etc. Raz suggests a non-exhaustive list of eight precepts of rule of law which can vary in degree. They are: 1) All laws should be prospective, open, and clear; 2) laws should be relatively stable; 3) the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules; 4) the independence of the judiciary must be guaranteed; 5) the principles of natural justice must be observed; 6) the courts should have review powers over the implementation of the other principles; 7) the courts should be easily accessible; and 8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.<sup>9</sup>

The *substantive version* of rule of law includes the formal constitutional and institutional requirements, but the constitution, legislation and principles of law will only be valid if they comply with specific rule of law values. This version deems certain types of law as invalid if they do not meet certain requirements related to democratic principles, human rights, liberalism, market freedom and so on. For example, Rawls in *A Theory of Justice* pursues a rule of law with inherent liberal principles which the political system must comply with in order to achieve a socially just society;<sup>10</sup> Hayek's rule of law has an economic aim by emphasising predictability as a necessity for individuals in deciding their own ends: "*a kind of instrument of*

<sup>8</sup> See for example Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", *Public Law* 467 (1997); A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> reprint edn., 1915); Joseph Raz, "The Rule of Law and its Virtue", in Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 210 (2<sup>nd</sup> edn., 2009); R. Peerenboom, "Varieties of Rule of Law" in *Asian Discourses of Rule of Law – Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, 1 [R. Peerenboom (ed.), 2004]; Hayek, (n 6), 112-123; J. Rawls, *A Theory of Justice*, 53, 206-213 (1999); Kaarlo Tuori, *Ratio and Voluntas: The Tension between Reason and Will in Law*, 207-239 (2011); Henrik Andersen, "China and the WTO Appellate Body's Rule of Law", 5 *GLOBAL J. COMP. L.* 146,150 (2016).

<sup>9</sup> J. Raz, "The Rule of Law and Its Virtue," in J. Raz, *The Authority of Law: Essays on Law and Morality* 214 (2<sup>nd</sup> edn., OUP 2009).

<sup>10</sup> J. Rawls, *A Theory of Justice* 53, 206-213 (1999).

*production, helping people to predict the behaviour of those with whom they must collaborate, rather than as efforts toward the satisfaction of particular needs.*"<sup>11</sup> It is a rule of law of a society where government should only interfere in order to preserve the spontaneous order of individuals' demands on the market – to protect against planned economies.

In the view of the author, rule of law has certain inherent values in order to ensure its own supremacy. The rule of law provides for *predictability* in the constitutional and legal order. Individuals, corporations and public institutions must know in advance their rights and obligations in all aspects of society, and, in particular, individuals must know, their basic rights and freedoms.<sup>12</sup> Thus, there must be transparency in laws, governmental administration and execution of law, and in the political processes where law-making goes through clear procedures, and where the constitutional rights and natural justice of the individuals are protected by law-makers and the government. The rule of law protects all societal members' *access to justice*. Such protection should be ensured by independent and impartial institutions, like constitutional and regular courts. They ensure the functionality of the particular constitutional and legal system and guarantee the supremacy of law. Finally, the rule of law ensures *equality* between the members and institutions of society in the context of law, as no one can be above the law, and no one can have a higher status than others in a case before the court of law. For example, the government cannot have a special status in a case against an individual.<sup>13</sup> Thus it incorporates the elements proposed by Raz but it does not escape a normative function as it provides judgment against constitutions and laws which do not meet those essential rule of law requirements. For example, it will reject a law which creates obstacles for an individual's access to the courts against the government.<sup>14</sup>

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<sup>11</sup> Hayek, (n 6), 113.

<sup>12</sup> The European Court of Human Rights has also developed a practice where corporations to some extent have certain basic rights and freedoms which are protected by the European Convention on Human Rights. See for example case law concerning fair trial, *Dombo Beheer BV v. Netherlands*, Series A, 274, 1993 ECHR 49 : (1994) 18 EHRR 213; or right to privacy, *Société Colas Est v. France*, Case No. 37971/97 ECHR 2002-III.

<sup>13</sup> H. Andersen, "China and the WTO Appellate Body's Rule of Law", 5 GLOBAL J. COMP. L 146,150 (2016).

<sup>14</sup> For example, in the context of UK constitutional and public law, which has supremacy of Parliament as a basic constitutional principle, it is deeply concerning when Parliament attempts to reduce the access to reviews by courts of decisions by governmental institutions through ouster clauses. The courts are reluctant to apply such clauses and interpret them narrowly. See for example *Anisminic Ltd v. Foreign Compensation Commission*, (1969) 2 AC 147 : (1969) 2 WLR 163.

## Rule of law and International Law

Rule of law in national systems will often be instrumental in protecting the individual against government. There will often be a vertical power structure as the individual must comply with laws enacted by law-makers and must comply with decisions from executive bodies. In that sense, the individual might appear to be the weaker party, economically and politically. But rule of law ensures that under law, the government will not have a priority over the individual and cannot make arbitrary decisions without potentially being held accountable and liable under law. The picture is different when rule of law is applied on an international level. There is no overall international law-making or executive institutions, and apart from certain principles with character of *jus cogens*, the binding effect of international norms and acceptance of international institutions' interpretative and jurisdictional authority will often be considered as a result of the state's own conduct through treaty consent and ratification, state practice and *opinio juris*, or principles of international law originating in national systems. Thus in contrast to the national system, the subject of international law, the state, is also the law-maker and the executive. Traditional international law theories have state sovereignty as the legitimate basis of international law,<sup>15</sup> which makes the state, not the law, the supreme institution; a state can choose to enter into a treaty as well as leave it. However, the concepts and theories of state sovereignty and rule of law are more nuanced.<sup>16</sup> It is not the aim in this article to engage into discussions about various types of state sovereignty. It is a concept which does not have clear authoritative definitions in international law. The UN Charter provides in its preamble the faith in the "equal rights (...) of nations large and small", and territorial integrity and political independence of all states.<sup>17</sup> Furthermore, the UN Assembly has adopted certain principles reflecting the ideas of sovereignty.<sup>18</sup> Even though

<sup>15</sup> See L. Oppenheim, "The Science of International Law: Its Task and Method", 2 AM. J. INT'L L. 313 (1908).

<sup>16</sup> See for example Krasner, *Sovereignty: Organised Hypocrisy*, (1999); Andrew Coleman and Jackson Nyamuya Maogoto, "'Westphalian' Meets 'Eastphalian' Sovereignty: China in a Globalized World", 3 ASIAN J. INT'L. LAW 237, 241-245 (2013).

<sup>17</sup> UN Charter, Art. 2, ¶ 4.

<sup>18</sup> UN General Assembly Resolution 2625(XXV) of 24 October 1970, "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations," A/RES/25/2625. The principles are: "a. The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, b. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, c. The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, d. The duty of States to co-operate with one another in accordance

these principles do not provide a definition of “sovereignty” as a concept of international law, they indicate some normative dimensions associated with “sovereignty” as independent territories, which are recognised by other states, where domestic governing bodies have exclusive legislative, executive, and judicial authority.

Where rule of law provides equality and protection of the individual’s access to justice against an economically and politically stronger party, like a government or multinational corporation, a traditional view of international law does not provide such division between the strong and the weak. All states are considered to be equal, no state can interfere into another state’s internal matters, and a state is only bound by international treaties if it has given consent as well as ratified them. The international community cannot impose rules on other states. Thus, the vertical power structure, as seen between state and citizen does not *ceteris paribus* exist between states from a traditional international law perspective.

Nevertheless, rule of law not only protect citizens against a state, but also provides the agents, institutions, and states with expectations of lawful behaviour by other members of a particular system. Not only does international law provide expectations between states, but it also creates legal expectations of citizens of a state-expectations that the international obligations taken by their respective states, which they directly or indirectly may benefit from, are complied with by the states.<sup>19</sup> According to the UN General Assembly:

*“We recognize that the rule of law applies to all States equally, and to international Organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.”*<sup>20</sup>

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*with the Charter, e. The principle of equal rights and self-determination of peoples, f. The principle of sovereign equality of States, g. The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.”*

<sup>19</sup> It is an expectation which has its basis in a fundamental principle of international law—*pacta sunt servanda*, which is reflected in Art. 26 of the Vienna Convention on the Law of Treaties, which implies that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” This article later discusses the “direct effect” and the link between national and international systems.

<sup>20</sup> General Assembly of the United Nations 2012, “Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels”,



Where the General Assembly distinguishes between rule of law and human rights, the UN Secretary General has provided a more substantive version of rule of law:

*“The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”*<sup>21</sup>

A difference between rule of law at national and international level is that the constitutional and institutional structures at international level are weaker than in national systems. Nevertheless, the distinction between national and international is reducing with the move into organizations and their jurisdictional discourses. Numerous international organizations and international rules and principles provide mechanisms with rule of law character, although with a lesser degree of maturity and strength in comparison to domestic level.

There are various international law instruments to handle legal uncertainty and support *predictability* in the international order. In respect of law-making, there is not a single constitution on international level providing a set of rules governing law-making at international level. However, there are various international instruments with constitutional traits providing rules and guidance in that respect. For example, the Vienna Convention on the Law of Treaties (VCLT) provides rules on treaty making, application, termination, and reference to *jus cogens*; and the UN Charter provides rules legitimatizing the supranational character of UN Council Resolutions and its mandate. There are also more constitutionally based rules in specific organizations, like the WTO, providing a forum for treaty negotiations concerning trade in goods, services and intellectual property rights, and to have bodies with authority to make final interpretations of WTO treaties, and the Dispute Settlement Body (DSB) to make *de facto* binding decisions in

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Resolution adopted by the General Assembly on 24 September 2012, A/RES/67/1, ¶ 2.

<sup>21</sup> Secretary General of the United Nations, 2004, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, Report of the Secretary-General, United Nations Security Council, 23 August 2004, S/2004/616.

case of disputes. However, international organizations do only to a limited extent have a direct authority to impose sanctions on individuals, but where they do, there must be the basic guarantees of natural justice to protect the individual. For example, international criminal law applies not only to governments but also individuals. Principles of natural justice are written into the treaties, like Part V and VI of the Rome Statute of the International Criminal Court (ICC).

Furthermore, international law can require states to comply with principles of natural justice. For example, WTO law allows states to target specific companies for dumping the prices but at the same time provides rules to ensure natural justice is followed in the states' handling of antidumping investigations.<sup>22</sup> WTO law influences business transactions on global scale directly and therefore companies should have clarity in respect of, for example, antidumping law. There are also principles of natural justice applied in inter-state disputes. For example, the AB has made a reference to due process and good faith in the panel and AB proceedings.<sup>23</sup> The obvious problem from a multilevel approach is that one set of law may conflict with another set of law and thus raises the question about which law will prevail.

The rule of law protects the *access to justice* delivered by an impartial and independent institution. There are a number of international courts and tribunals offering such access and they are required under treaties to be independent. For example, the International Court of Justice (ICJ) must have independent judges,<sup>24</sup> the same applies to the International Tribunal for the Law of the Sea (ITLOS),<sup>25</sup> the ICC,<sup>26</sup> and to the WTO; panels and AB.<sup>27</sup> However, one challenge is that international law generally has states as subjects and does not provide access to citizens. There are some exceptions to this, such as regional human rights courts which provide standing

<sup>22</sup> See for example, Art. 6 of the WTO Antidumping Agreement and WTO case law; H. Andersen, "WTO Antidumping Jurisprudence and Rule of Law Challenges", in *Festschrift til Christina Moëll* 11-33 [Pernilla Rendahl, Mats Tjernberg, and Henrik Wenander (eds.), 2017].

<sup>23</sup> See for example "United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services", WT/DS285/AB/R, adopted by the DSB on 20 April 2005, ¶ 268-276.

<sup>24</sup> Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 993, Art. 2.

<sup>25</sup> Statute of the International Tribunal for the Law of the Sea, 1833 U.N.T.S. 3; 21 I.L.M. 1261 (1982) Art. 2.

<sup>26</sup> Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, preamble and Art. 40 [hereinafter Rome Statute].

<sup>27</sup> DSU, Dispute Settlement Rules, "Understanding on Rules and Procedures Governing the Settlement of Disputes", Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), Art. 8 ¶ 2 and Art. 17 [hereinafter Dispute Settlement Understanding]; Working Procedures for Appellate Review, Rule 2.

for individuals. Also the International Centre for Settlement of Investment Disputes (ICSID) provides access to individuals to make claims against states. Otherwise, it is a question of national courts letting international law penetrate into the domestic order which is dealt with below.

Another challenge concerning access to justice is when some parties do not recognize the jurisdiction of a court, and hinder another state's access to justice.<sup>28</sup> In WTO disputes, the WTO Dispute Settlement System is compulsory for all WTO Members through the WTO Treaties.<sup>29</sup>

The third challenge is the limited reviewing power of international courts over national governments' implementation of the procedural principles of natural justice. Nevertheless, regional human rights courts have a high degree of reviewing power over national law's conformity with human rights law. Further, the AB has a *de facto* reviewing power of national law and constitutions and their conformity with WTO law.<sup>30</sup> Even if national law may potentially violate WTO law, it can be subject to review by panels and the AB.<sup>31</sup> They cannot invalidate national law but it is a requirement that the WTO Members bring national measures into conformity with WTO law promptly.<sup>32</sup>

Finally, the requirement that all are equal under the law also applies on international level although in a weaker version. As mentioned above, a basic element of traditional theories of international law is that states are equal. However, the access to justice in inter-state disputes can have some reservations similar to the *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* mentioned previously. For example, the ICJ can only handle disputes where the states have recognized its jurisdiction which can be inter alia by special agreement or by declaration by respective states recognizing the ICJ's judgments as compulsory.<sup>33</sup> The ICC has no jurisdiction in cases of crimes committed by nationals from

<sup>28</sup> *Republic of Philippines v. People's Republic of China*, PCA Case No. 2013-19, Final Award (12 July 2016).

<sup>29</sup> Dispute Settlement Understanding, Art. 3.

<sup>30</sup> See for example AB's critique of the panel in "United States — Countervailing and Anti-dumping Measures on Certain Products from China", WT/DS449/AB/R, adopted by the DSB on 22 July 2014, where the AB could not complete the analysis as the panel had erroneously only focused on practices of national administrative authorities without taking into account the courts' interpretation of the constitutionality of US countervailing duty law, ¶ 4.182-4.183.

<sup>31</sup> See for example the "as such" practice; "United States — Anti-Dumping Act of 1916", WT/DS136/AB/R and WT/DS162/AB/R, adopted by the DSB on 26 September 2000.

<sup>32</sup> Dispute Settlement Understanding, Art. 21.

<sup>33</sup> Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 993, Art. 36.

US, China, India, and Russia etc.<sup>34</sup> Thus, the equality which exists on the international level must be understood in the context of the respective international organizations, courts and the like, and of the states which have ratified the specific treaties recognizing the jurisdiction of the respective courts or tribunals. In respect of WTO, there are 164 Members. They are all bound to use the WTO DSB in case of a dispute and if the recommendations from panels and the AB are adopted by the DSB, the member states must comply with those recommendations, albeit a recommendation can be rejected by the DSB if there is full consensus among all the WTO Members.

As mentioned in the introduction, former members of the AB have addressed the rule of law developments and promotion in WTO AB jurisprudence. There are rule of law elements being developed on international level, and it is reasonable to refer to rule of law in the context of international law. However, there are several challenges with *rules* of law in various regimes, and levels when there is overlap between specific legal or constitutional regimes.

### Rule of Law as a Multilevel Concept and Its Challenges

The UN General Assembly promotes a multilevel rule of law - one that applies to individuals, private and public actors, states and international organizations. Where a rule of law might work at national level, and to a lesser degree function at international level, the multilevel rule of law poses challenges in the interface and connection between different levels and systems of constitutional and legal orders with their respective sets of values, different constitutional and legal cultures,<sup>35</sup> and different types of political systems, all of which inevitably affect the type of rule of law associated with the respective order. Thus the various *rules* of law cannot easily be drawn into one narrowly defined *rule* with sharp contours. The overall rule of law elements discussed above are subject to variation depending on the respective constitutional, political and legal systems and differ in degree and maturity.

In order to overcome rule of law gaps and to provide predictability when constitutional and legal norms from various regimes overlap and interconnect, there are specific constitutional, institutional and/or legal mechanisms to facilitate the interconnection. *Mexico – Taxes on Soft Drinks* and *India*

<sup>34</sup> See Rome Statute, Art. 12.

<sup>35</sup> See more about legal cultures; Colin Picker, "Comparative Legal Cultural Analyses of International Economic Law: Insights, Lessons and Approaches", 6 IND. J. OF INTL. ECON. L. 54 (2014). See for discussion of constitutional cultures and rule of law; Kaarlo Tuori, *Ratio and Voluntas: The Tension between Reason and Will in Law* (2011).

– *Solar Cells* concern two of such challenges in the context of Art. XX (d) of GATT 1994. They are:

- The connection of international law and national law.
- The overlaps and scope of laws and regulations from different providers of international law.

The first challenge about the connection of international law and national law addresses the scope of legal effect of international norms on national systems. Traditionally, the monist/dualist theory assumes that international law and national law are two distinct systems.<sup>36</sup> A monist approach considers the international norms as part of the national system, whereas the dualist approach will only confer rights to individuals inside the national system if it has been incorporated into national law. There is a debate in literature about the appropriateness of the dualist/monist theory and the doctrine in light of globalization and the supranational character of some international and regional norms.<sup>37</sup> Where each state has its own mechanisms regarding the access for citizens to apply international law, like incorporation through legislative measures or direct effect through the courts, it also gives expectations to citizens from other states. For example, in antidumping situations there can be a producer from India, who is targeted with an antidumping duty by the EU, and who wants to make claims based on WTO law against the EU institutions before the EU judiciaries.<sup>38</sup> The main problem is that for market agents it can be difficult to anticipate whether international rights and obligations can be relied upon in a national system, and thus the market agent may be in a situation where there is different sets of laws available at the national and international level, but no certainty as to which of the laws will apply.

The second challenge concerns cross-sectorial overlap: when two or more international systems claim jurisdictional and/or interpretative authority

<sup>36</sup> See for example a reflection of Hans Kelsen's monistic theory in *François Rigaux*, Hans Kelsen on International Law, 9 EUR. J. INT'L. LAW 325 (1998).

<sup>37</sup> See for example Armin von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law", 6 INTL. J. OF CONST. L., 397, 399-401 (2008); Xiuyan Fei, "Direct Effect of WTO Rulings: The Case for Conditional Recognition", 13 US-CHINA L. REV. 491, 492 (2016).

<sup>38</sup> There are several examples of exporters from outside the EU making claims based on WTO law before the EU judiciaries. See for example; Case T-35/01, *Shanghai Teraoka Electronic Co. Ltd v. Council of the European Union*, Judgment of the Court of First Instance of 28 October 2004, EU:T:2004:317; Case T-143/06, *MTZ Polyfilms Ltd. v. Council of the European Union*, Judgment of the Court of First Instance (Third Chamber) of 17 November 2009, EU:T:2009:441; and Case T-512/09 *RENV, Rusal Armenal ZAO v. Council of the European Union*, Judgment of the General Court of 25 January 2017, EU:T:2017:26.

to regulate and/or decide an issue which has multiple anchors in different regimes. For example, the WTO does not provide any explicit rules concerning protection of labour which to a large extent is regulated through the International Labour Organization (ILO). The question is to what extent the AB can reject a state access to impose discriminatory measures against another state, which does not comply with its ILO commitments, and which by violating the ILO obligations is getting a competitive advantage in the market.<sup>39</sup> Thus there can potentially be overlaps between WTO and ILO law and a risk that a rejection of the discriminatory measures can lead other states to also violate ILO law in order to safeguard their industries. That will undermine the rule of law, as law from one system will appear to have lesser weight and the access to justice from that particular system might be eliminated.

Rule of law is a doctrine which is being developed on international level at different paces and with different levels of maturity and with variations in the respective regimes. It needs to be refined to encompass the multilevel challenges. There are some theoretical and normative tools in theories of constitutional pluralism where meta-principles are developed which to some extent guide the norm overlaps.<sup>40</sup> That could for example be the reference to human rights in the UN Charter,<sup>41</sup> and in the VCLT,<sup>42</sup> the recognition of principles of *jus cogens*,<sup>43</sup> due process principles applied and developed at

<sup>39</sup> See for example Henrik Andersen, "Core Workers' Rights as Constitutional Principles in the WTO?" in *Festskrift – Liber Amicarum et Amicorum in Honour of Ruth Nielsen*, 31 [Christina Tvarnø, Ulla Neergaard, Jens Fejø, and Grith Ølykke (eds.) DJØF Forlag 2013].

<sup>40</sup> See about constitutionalization at international level and constitutional pluralism; Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes", 16 IND. J. GLOBAL LEGAL STUD. 621 (2009); Ernst-Ulrich Petersmann, "International Economic Law, 'Public Reason', and Multilevel Governance of Interdependent Public Goods", 14 J. INT'L ECON. L. 23 (2011); Henrik Andersen, "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions", 18 J. INT'L ECON. L. 383 (2015).

<sup>41</sup> See the preamble of the UN Charter which provides that "*We the Peoples of the United Nations determined (...) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.*"

<sup>42</sup> See preamble of the Vienna Convention on the Law of Treaties "*The States Parties to the present Convention (...) Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all.*"

<sup>43</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 53; jurisprudence from the ICJ, inter alia, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986, 14, and *Jurisdictional*

international level,<sup>44</sup> and the rule of law development at international level. But the idea of developing constitutional meta-principles is challenged by other theories like legal pluralism.<sup>45</sup> Referring to meta-principles as clarifying multilevel rule of law challenges requires support from various actors at national, regional and international level. The normative force of constitutional meta-principles might be stronger reflected over time through practices by various institutions and through their cross-referencing to each other's respective practices where institutions like panels and AB can be influential. But it is a process which is slowly being developed. The remainder of the article will address Art. XX (d) of GATT 1994 and relevant panel and AB jurisprudence and discuss multilevel rule of law challenges.

## ART. XX (D) OF GATT 1994

### Introduction

The WTO is based on market economy principles aiming at an efficient allocation of resources.<sup>46</sup> The means used for this are opening up the global market through elimination of trade restrictions and reduction of tariffs. The core principles to achieve the aims are non-discrimination principles, transparency in laws, regulations and practices, market access, and counter measures against unfair trading practices. The market based values of the WTO must be seen in context of non-trade values, like public morals, protection of human, animal and plant life and health, protection of exhaustible resources, etc. Non-trade values are protected through exceptions to the general rules of WTO law and enshrined in Art. XX of GATT 1994,<sup>47</sup> concerning goods, and in Art. XIV of the General Agreement on Trade in Services (GATS). The main focus of this article is on Art. XX of GATT

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*Immunities of the State (Germany v. Italy: Greece Intervening)*, ICJ Reports 2012; Report of the International Law Commission, Sixty-sixth session (5 May-6 June and 7 July-8 August 2014), Supplement No. 10 (A/69/10), Annex.

<sup>44</sup> See above with reference to natural justice in the WTO and ICC systems.

<sup>45</sup> See for example Nico Krisch, "The Case for Pluralism book chapter in Postnational Law" in *The Worlds of European Constitutionalism* 203 [G. de Búrca & J.H.H. Weiler, (eds.), Cambridge University Press 2012]; and Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? – Postmodern Anxieties", 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002).

<sup>46</sup> See the preamble of the WTO Agreement.

<sup>47</sup> Non-trade values may also be protected by other means. See Henrik Andersen, "Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions", 18 J. INT'L ECON. L. 383 (2015).

1994, but it will also draw on practice concerning Art. XIV of GATS which is textually similar to Art. XX (d) of GATT 1994.<sup>48</sup>

Art. XX (d) of GATT 1994 protects *measures which are necessary in order to ensure compliance with laws and regulations*. There are three conditions for applying Art. XX (d):

- 1) that the “laws or regulations” with which compliance is being secured are themselves “not inconsistent” with WTO law;
- 2) that the measures are “necessary to secure compliance” with those laws or regulations;
- 3) that the measures are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.<sup>49</sup>

There is a considerable number of cases from the GATT and WTO judiciaries concerning the application and interpretation of Art. XX (d) GATT 1994.<sup>50</sup> The impression is that if a responding state fails to meet the criteria, then the application of Art. XX (d) is generally rejected by panels and the AB with only a few exceptions. For example, in *US – Spring Assemblies*,<sup>51</sup> the US International Trade Commission (ITC) had issued an order to exclude the import of automotive spring assemblies which were violating specific patents. The legal basis for the ITC order was Section 337 of the United States Tariff Act of 1930, which provides that it is unlawful to have “*unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy*

<sup>48</sup> The AB has made cross-interpretations between Art. XX of GATT 1994 and Art. XIV of GATS. See for example, “United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services”, WT/DS285/AB/R, adopted by the DSB on 20 April 2005, ¶ 291-292.

<sup>49</sup> Art. XX (d) of GATT 1994 provides: “*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...) (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.*” See from case law; GATT Panel Report, “United States – Section 337 of the Tariff Act of 1930”, L/6439, adopted 7 November 1989, BISD 36S/345, ¶ 5.22.

<sup>50</sup> GATT 1947 from the GATT era.

<sup>51</sup> GATT Panel Report, “United States — Imports of Certain Automotive Spring Assemblies”, L/5333, adopted 26 May 1983, BISD 30S/107.



or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States". Canada claimed that the US order violated Art. III and Art. XI para. 1 of GATT 1947. The US, on the other side, contended that the enforcement through Section 337 was necessary to ensure compliance with its domestic law for the protection of patents.<sup>52</sup> This was the view which was shared by the panel.<sup>53</sup>

The following sub-parts will briefly provide an overview of cases where the criteria were not met.

### i. Laws and Regulations Not Consistent with GATT 1994

As mentioned above, *US – Spring Assemblies* seems more to be an exception as panels and the AB often reject a claim with basis in Art. XX (d) of GATT 1994. In *Japan – Agricultural Products*,<sup>54</sup> the panel found that even though the Japanese measures were necessary to secure compliance with the Japanese regulations, which should ensure that all trade of agricultural products would go through a monopoly, the regulations themselves were inconsistent with GATT 1947 and thus Art. XX (d) could not apply.<sup>55</sup> In *Brazil – Retreaded Tyres*, the panel rejected Brazil's claim that its fines imposed on importers of retreaded tyres could be justified under Art. XX (d) of GATT 1994 to uphold an import ban on such tyres. The panel had found that the import ban was inconsistent with GATT 1994.<sup>56</sup> In *Thailand – Cigarettes (Philippines)*, the panel rejected the application of Art. XX (d) of GATT 1994 as the Thai VAT laws, which Thailand wanted to secure compliance with, were inconsistent with WTO law. The panel had found that the VAT laws violated Art. III para. 4 of GATT 1994 as they imposed additional administrative requirements on imported cigarettes and therefore treated imported cigarettes less favourable than domestically produced cigarettes.<sup>57</sup> The criterion was met in *Columbia – Textiles*, where Panama claimed that Columbia

<sup>52</sup> *Supra* note 51, ¶41.

<sup>53</sup> *Supra* note 51, ¶61.

<sup>54</sup> GATT Panel Report, "Japan — Restrictions on Imports of Certain Agricultural Products", L/6253, adopted 2 March 1988, BISD 35S/163.

<sup>55</sup> *Supra* note 55, ¶5.2.2.3.

<sup>56</sup> "Brazil — Measures Affecting Imports of Retreaded Tyres", WT/DS332/R, adopted by the DSB on 17 December 2007, ¶7.381-7.389. This part was not appealed.

<sup>57</sup> "Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines", WT/DS371/R, adopted by the DSB on 15 July 2011, ¶. 7.758. This part was not appealed to the AB, where the AB held that Thailand had not made a *prima facie* defence under Art. XX (d) of GATT 1994, cf. "Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines", WT/DS371/R, adopted by the DSB on 15 July 2011, ¶174-181.

had not attempted to demonstrate that their money laundering laws were not inconsistent with GATT 1994; Columbia was seeking to comply with the laws through the contested measures. The panel rejected the argument by Panama, as it follows from case law that “a responding Member’s law should be treated as WTO-consistent until proven otherwise”.<sup>58</sup> However, the application of Art. XX (d) was still rejected as Columbia failed the “necessity test”.<sup>59</sup>

## ii. Not Demonstrated that Measures are “necessary to secure compliance” with the national laws or regulations

This criterion has two aspects: a test of whether measures can “secure compliance”, and a necessity test.<sup>60</sup> In *Argentina – Financial Services*,<sup>61</sup> the AB stated that even though they are conceptually distinct, the necessity test and the interpretation of “secure compliance” may overlap, and that there cannot be constructed a rigid method of analysing this criterion. It depends on the specific measures and laws in the case, and on the arguments by the parties.<sup>62</sup>

As mentioned above with reference to *Columbia – Textiles*, Columbia failed to demonstrate that its measures to combat money laundering were necessary. But there are several cases both from GATT and WTO case law where the responding state has failed the necessity test. In *Canada – FIRA*,<sup>63</sup> the panel was not persuaded by the use of the exception in Art. XX (d). Canada had introduced the Foreign Investment Review Act which required

<sup>58</sup> “Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear”, WT/DS461/R, adopted by the DSB on 22 June 2016, ¶ 7.509-7.511. The panel referred to the principle from AB case law; “United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany”, WT/DS213/AB/R, adopted by the DSB on 19 December 2002, ¶ 157. That part was not appealed to the AB. See also the panel in “Colombia — Indicative Prices and Restrictions on Ports of Entry”, WT/DS366/R, adopted by the DSB on 20 May 2009, ¶ 7.526-7.532; and panel in “China — Measures Affecting Imports of Automobile Parts”, WT/DS339, WT/DS340, and WT/DS342/R, adopted by the DSB on 12 January 2009, ¶ 7.288-7.296.

<sup>59</sup> “Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear”, WT/DS461/AB/R, adopted by the DSB on 22 June 2016, ¶ 5.142-5.150.

<sup>60</sup> The necessity test is found in other paragraphs of Art. XX and there is rich case law from GATT and WTO practice concerning its application. See also Mads Andenas and Stefan Zleptnig, “Proportionality: WTO Law: In A Comparative Perspective”, 42 TEX. INT’L L.J. 371 (2007).

<sup>61</sup> “Argentina — Measures Relating to Trade in Goods and Services”, WT/DS453/AB/R, adopted by the DSB on 9 May 2016.

<sup>62</sup> “Argentina — Measures Relating to Trade in Goods and Services”, WT/DS453/AB/R, adopted by the DSB on 9 May 2016, ¶ 6.2015.

<sup>63</sup> GATT Panel Report, “Canada — Administration of the Foreign Investment Review Act”, L/5504, adopted 7 February 1984, BISD 30S/140.

that foreign acquisition of control of Canadian businesses should be subject to review by the Canadian authorities, and should only be allowed if it would benefit Canada. Foreign investors could submit undertakings to the Canadian authorities and they would mostly be a result of negotiations between the foreign investor and the Canadian authorities. The undertakings could take the form of purchase undertakings where the foreign investor would accept to use Canadian products and supplies. The US claimed that the undertakings violated Art. III of GATT 1947, whereas Canada claimed that if they violated the national treatment principle they would be exempted under Art. XX (d) of GATT 1947. The panel rejected the Canadian argument. According to the panel, Canada had not demonstrated why it was necessary – in order to secure compliance with the Foreign Investment Review Act – for foreign investors to bind themselves to purchase Canadian products or use Canadian supplies.<sup>64</sup>

*Korea – Various Measures on Beef* went through both the panel and the AB stages. Korea had introduced a dual retail system for the sales of meat where imported beef would only be sold at specialised stores. Korea claimed it was necessary to enforce its Unfair Competition Act against fraudulent misrepresentation of the origin of beef in the beef sector. The panel rejected the claim by Korea. The AB agreed with the conclusions of the panel and consequently rejected Korea's claim. According to both the panel and the AB, Korea had not demonstrated that there were not less trade restrictive alternatives to detect fraud in the beef sector, as Korea otherwise had done in the past, and thus failed the necessity test of Art. XX (d) of GATT 1994.<sup>65</sup> In *Dominican Republic – Import and Sale of Cigarettes*, the panel found that the Dominican Republic's requirement that tax stamp be affixed to cigarette packets violated the national treatment principle as it added extra processes and costs on the importers. The Dominican Republic did not appeal the panel's finding concerning the violation of the national treatment principle. Instead, the Dominican Republic appealed the panel's rejection of the claim that the measures were necessary to comply with laws on tax evasion and the smuggling of cigarettes. The panel found that the measures were not necessary as there were less trade restrictive measures reasonably available for the Dominican Republic. The AB agreed with the panel, as the Dominican Republic could have made tax stamps for exporters which they could affix during the course of production of the cigarette packets.<sup>66</sup>

<sup>64</sup> *Supra* note 63, ¶5.20.

<sup>65</sup> "Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef", WT/DS161/AB/R, adopted by the DSB on 10 January 2001, ¶ 152-185.

<sup>66</sup> "Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes", WT/DS302/AB/R, adopted by the DSB on 19 May 2005, ¶ 57-73. *See also* from AB case law rejection of appeal concerning "necessity"; joined cases "United States

In respect of securing compliance with laws and regulations, the panel held in *US – Gasoline*, that US' discriminatory baseline methods, which were methods to determine the quality of gasoline, were not an enforcement system and could therefore not "secure compliance" and be exempted under Art. XX (d).<sup>67</sup> In *Canada – Periodicals*, the panel found that Canada's Tariff Code 9958 could not be seen as an enforcement measure for Canada's Income Tax Act. Tariff Code 9958 prohibited the import of periodicals with advertisements directed at the Canadian market unless similar advertisements were found in the country of origin of the periodical. Canada claimed that it was necessary to have this prohibition as the Income Tax Act allowed tax deduction for expenses for advertisements placed in Canadian periodicals only, and not for expenses for advertisements in foreign periodicals. The panel found that the aim of the Income Tax Act was to motivate advertisements in Canadian periodicals, and therefore the Tariff Code 9958 did not "secure compliance" with the Income Tax Act.<sup>68</sup>

**iii. Means of arbitrary or unjustifiable discrimination  
between countries where the same conditions prevail, or a  
disguised restriction on international trade**

This criterion relates to the chapeau of Art. XX of GATT 1994 and the textually similar Art. XIV of GATS. In the context of Art. XX (d) of GATT 1994, the panel found in *Argentina – Hides and Leather* that even though Argentina's measures to combat tax evasion were necessary to secure compliance with its tax laws, they could not be justified under the chapeau of Art. XX. The higher interest rates imposed on imported goods compared to domestic goods were not in themselves unjustifiable, but the fact that the additional loss of interests suffered by the importers considered as an

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— Measures Relating to Shrimp from Thailand" and "United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties", WT/DS343/AB/R and WT/DS345/AB/R, adopted by the DSB on 1 August 2008, ¶ 304-319; "Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear", WT/DS461/AB/R, adopted by the DSB on 22 June 2016, ¶ 5.142-5.150; and from panel case law, "Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain", WT/DS276/R, adopted by the DSB on 27 September 2004, ¶ 6.215-6.251; "European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs", WT/DS290/R, adopted by the DSB on 20 April 2005, paras 7.328-7.341; "Colombia — Indicative Prices and Restrictions on Ports of Entry", WT/DS366/R, adopted by the DSB on 20 May 2009, ¶ 7.545-7.620.

<sup>67</sup> "United States — Standards for Reformulated and Conventional Gasoline", WT/DS2/R, adopted by the DSB on 20 May 1996, ¶ 6.32-6.33.

<sup>68</sup> "Canada — Certain Measures Concerning Periodicals", WT/DS31/R, adopted by the DSB on 30 July 1997, ¶ 5.6-5.11. See also from panel case law, "China — Measures Affecting Imports of Automobile Parts", WT/DS339, WT/DS340, and WT/DS342/R, adopted by the DSB on 12 January 2009, ¶ 7.298-7.346.

additional tax burden could not be justified under the chapeau of Art. XX of GATT 1994.<sup>69</sup> Regarding Art. XIV (c) of GATS, the panel found in *Argentina – Financial Services*<sup>70</sup> that Argentina could not apply Art. XIV (c) of GATS. Argentina had various financial measures and tax measures which distinguished between countries which cooperated for tax transparency purposes and countries which did not cooperate. The countries which did not have a cooperation agreement with Argentina would get less a favourable treatment. Argentina held that the measures were necessary to secure compliance with their tax laws on evading tax, money laundering, and fraudulent transactions. Even though the measures could be considered necessary to secure compliance with Argentine tax laws, they constituted arbitrary discrimination as Argentina designated cooperative status to some countries which it did not have a tax transparency agreement with. Thus, there was no clear criteria for designating countries with cooperative status.

#### iv. Balancing between Free Trade and Protectionism

Panels and the AB do not take a narrow approach to the interpretation of exceptions. As the AB stated in *EC – Hormones*,<sup>71</sup> it is not stipulated that a different methodology should be applied to exceptions as to the general rules. The aim of Art. XX (d) is to secure that national systems can ensure that compliance with its laws and regulations is not put in jeopardy by the general principles of WTO law as long as the national laws and regulations are in conformity with WTO law. The rule protects national law and lets the protection of national law be a legitimate basis for overriding the WTO free trade principles. If it had no qualifications, the WTO Members could use Art. XX (d) as a political instrument to protect national production against foreign competition, favouring some states over others, and also as a bargaining tool against the other WTO partners. That would undermine the whole purpose of WTO law and would eliminate the idea of *rule of law* at WTO level. The qualifications stipulated in Art. XX (d) serve to balance the WTO principles with a legitimate protection of national law while avoiding national protectionism.<sup>72</sup>

<sup>69</sup> “Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather”, WT/DS155/R, adopted by the DSB on 16 February 2001, paras 11.285–11.331.

<sup>70</sup> The panel’s finding was later upheld by the AB. “Argentina — Measures Relating to Trade in Goods and Services”, WT/DS453/R and WT/DS453/AB/R, adopted by the DSB on 9 May 2016.

<sup>71</sup> “European Communities — Measures Concerning Meat and Meat Products (Hormones)”, WT/DS26 and WT/DS48/AB/R, adopted by the DSB on 13 February 1998, ¶104.

<sup>72</sup> See for example statements concerning the chapeau of Art. XX, AB in “United States — Standards for Reformulated and Conventional Gasoline”, WT/DS2/AB/R, adopted by the DSB on 20 May 1996, at pp. 22 and 25, and panel in “Argentina — Measures Affecting

From a case law perspective, the “necessity” test is the biggest hurdle for the national governments, and the approach by the AB has attracted critique in literature.<sup>73</sup> It is not the aim to engage in that discussion here, but only emphasise that consistency in the methodological approach is a rule of law requirement imposed on judiciaries and governmental institutions.<sup>74</sup> The AB has not deviated from its approach wherein the responding state must demonstrate that there are not less trade restrictive measures available. However, the AB has developed a practice where the objects, which are sought to be protected by national measures, are categorised in order of importance which may reflect the necessity analysis with lesser requirements for measures protecting vital objectives, like human health. It is not clear what basis the AB has used for such categorization and for developing variation in the necessity tests.<sup>75</sup> Apart from such general challenges in respect of Art. XX, the cases concerning Art. XX (d) demonstrate multilevel challenges:

- 1) the delicate balance of protecting national law with measures and institutions guaranteeing law to be upheld by ensuring that foreign products meet the same national standards as national products. Different standards between states can be a problem in the importing state which cannot easily monitor production methods and product standards of the exporting state. It is a multilevel rule of law problem if the importing state, in order to comply with WTO law, cannot have specific measures targeted at foreign products to ensure that they meet the requirements under national law as it would otherwise create inequality between the national and the foreign producers; and

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the Export of Bovine Hides and the Import of Finished Leather”, WT/DS155/R, adopted by the DSB on 16 February 2001, ¶11.312.

<sup>73</sup> See for example, Gisele Kapterian, “A Critique of the WTO Jurisprudence on ‘Necessity’”, 59 INT’L & COMP. L.Q. 89 (2010).

<sup>74</sup> It should also be noted that both panels and the AB, and third parties rely on jurisprudence from panels and the AB. It indicates that panels and the AB interpretations if consistently applied will add positively to the openness and predictability of law and its methodologies, and thus be part of shaping a rule of law in the WTO. It should be noted that in “United States — Final Anti-Dumping Measures on Stainless Steel from Mexico”, WT/DS344/AB/R, adopted on 20 May 2008, para 160, the AB made it clear to the panel that its decisions have a high legal value – and in other words stated their *stare decisis*-like characteristics where it is expected that if the AB has provided an interpretation of a WTO provision and a similar legal question arises in a subsequent case, the case will be resolved in the same way. See also Alec Stone Sweet and Brunell characterizing the AB as a Trustee court; A. Stone Sweet & T.L. Brunell, “Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization”, 1 JOURNAL OF LAW AND COURTS 61 (2013).

<sup>75</sup> See Henrik Andersen, “Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions”, 18 J. INT’L ECON. L. 383, 397 (2015).

- 2) upholding WTO law by ensuring that there is no discrimination exercised by national governments against foreign products, or if such discrimination is allegedly serving to uphold national laws and regulations, that such measures are not applied as protectionist tools to reduce or eliminate foreign competition.

Panels and AB must strike a balance between these considerations and between national law and WTO law. In that exercise, they are reviewing national laws' compliance with WTO law and thus upholding rule of law at WTO level. At the same time, they are challenging the rule of law at national level for those market agents who have their legal expectations anchored in the national rules. Apart from the obvious violations of WTO law, it can hardly be easy for market agents to see through WTO law and national law, and confirm whether national law is in conformity with WTO law. That might decrease as the panel and the AB develop their case law and maintain consistency. With such examples, it is more likely that the WTO Members can construct their national laws in conformity with their own expectations about WTO law derived from the interpretations by panels and the AB.

Where these cases concerned measures to uphold national laws and regulations, the following parts of this article will take an international dimension and discuss the multilevel challenges in the application of Art. XX (d) of GATT 1994 in the context of international law.

## MEXICO – TAXES ON SOFT DRINKS

*Mexico – Taxes on Soft Drinks* has in particular three issues of interest in light of multilevel rule of law challenges: the jurisdiction of WTO panels and the AB concerning disputes from other regimes; the application of international law in the WTO regime; and the connection between international law and domestic law.

### Jurisdictional Issues and the Application of International Law

Mexico had imposed certain tax measures on soft drinks which contained sweeteners other than cane sugar. The US claimed that Mexico violated the national treatment principle as cane sugar was predominantly a Mexican product and accounted for more than 95% of the sweetener production in Mexico. The rules would effectively exclude Mexican soft drinks from the tax. Mexico claimed that its taxes on soft drinks fell outside the jurisdiction

of the WTO panel as this dispute was already being adjudicated under the North American Free Trade Agreement (NAFTA). According to Mexico, the US and Mexico had negotiated a balanced sweetener trade regime under the NAFTA, which was now in dispute. The US refused to take the dispute to the NAFTA dispute settlement system. By imposing the tax on sweeteners other than cane sugar, Mexico sought to rebalance the trade loss resulting from the US violation of the sweetener trade regime under the NAFTA. Mexico argued that on that account, the issue should be a matter for the NAFTA Arbitral Panel, and not the WTO panel. However, the WTO Panel rejected Mexico's claim, holding that it had no discretion to reject jurisdiction of a case properly before it.

Mexico later appealed the part of the panel report pertaining to determination of jurisdiction, and made the same claim before the AB. They asserted that by complaining against Mexico in the WTO DSB, and at the same time refusing Mexico access to justice in the NAFTA system, the US had prejudiced its right to apply WTO law. The AB noted that there had not been no resolution of the dispute between Mexico and the US on the NAFTA level. It further rejected Mexico's reference to the principle of *nemo ex propria turpitudine commodum capere potest* (no one should profit from his own wrong)<sup>76</sup> and the reference to the decision by the Permanent Court of International Justice in *Factory at Chorzów (Germany v. Poland)* where it stated that "(...) one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him."<sup>77</sup> According to the AB, even if the principle of *nemo ex propria turpitudine commodum capere potest* was to be applicable in the case, it would imply that the AB would have to make a decision concerning the alleged NAFTA infringement in order to establish wrongdoing as an element of the principle. The AB referred to Art. 3.2 of the Dispute Settlement Understanding (DSU) which stipulates that the WTO DSB "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements". Thus, there is no mandate for WTO panels or the AB to decide disputes outside of the WTO regime.

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<sup>76</sup> See more about the development of this principle in public international law; Robert Kolb, *La maxime "nemo ex propria turpitudine commodum capere potest" (nul ne peut profiter de son propre tort) en droit international public (The Maxim "nemo ex propria turpitudine commodum capere potest" (no one should profit from his own wrong) in public international law)*, 1 REV. B. DR. INT'L 84 (2000).

<sup>77</sup> *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927 PCIJ Series A, No. 9, 31.



In this context, the rule of law issues pertain to the traditional assumption that the state is the sovereign law-maker of international law. States confer mandates on various international bodies to exclusively administrate and interpret the respective treaties of their regimes, but provide only a few tools to handle cross-sectorial overlaps. That creates uncertainty for the market agents. It seems clear from *Mexico – Taxes on Soft Drinks* that the panel and the AB recognize their jurisdictional limit. They did not interfere into a potential dispute in the NAFTA system where the US allegedly violated NAFTA law. However, that is not the full extent of the potential overlap between WTO law and law of other regimes. It will later be discussed whether the AB crossed into the law of El Mercado Común del Sur (MERCOSUR)<sup>78</sup> in *Brazil – Retreaded Tyres*.

Another element of uncertainty is that the AB seems vague about the applicability of the principle of *nemo ex propria turpitudine commodum capere potest*. The WTO agreement and its treaties do not provide a catalogue of sources. Art. 3.2 of the DSU emphasises that the panel and AB cannot add to or diminish the rights and obligations of the WTO Members under the WTO treaties. In *Korea – Procurement*, the panel stated that “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 the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.”<sup>79</sup> Apart from this case, there is little guidance from WTO case law about the application of sources other than the WTO treaties as a basis for independent claims before the WTO judiciaries.<sup>80</sup>

However, what is clearer from case law is the application of principles of international law as an interpretative context for the WTO treaties.<sup>81</sup> Art. 3.2. of the DSU provides that WTO treaties must be interpreted in accordance with customary rules of interpretation of public international law, where the VCLT reflects the customary rules of law. Art. 31.3 (c) of

<sup>78</sup> The MERCOSUR is the *Southern Common Market* is an example of the same.

<sup>79</sup> “Korea — Measures Affecting Government Procurement”, WT/DS163/R, adopted by the DSB on 19 June 2000, ¶7.96.

<sup>80</sup> As mentioned above, principles of *jus cogens* will override WTO law in case of conflict, and the UN Charter also has priority. Panels and the AB are expected to comply with these rules and principles of law.

<sup>81</sup> See AB in “United States — Import Prohibition of Certain Shrimp and Shrimp Products”, WT/DS58/AB/R, report of the AB circulated on 12 October 1998, adopted by the DSB on 6 November 1998, ¶ 158. See also panel in “European Communities — Measures Affecting the Approval and Marketing of Biotech Products”, WT/DS291/R, WT/DS292/R, and WT/DS293/R, adopted by the DSB on 21 November 2006, in respect of the interpretative context of relevant rules of international law as stipulated in Art. 31.3 (c) of the VCLT, ¶7.67.

the VCLT provides that any relevant rule of international law applicable between the disputing parties shall be taken into account, and the AB has occasionally applied international law as relevant context for the interpretation of WTO law. WTO literature suggests that panels and the AB may take a harmonious approach in case of overlaps between WTO law and other international law.<sup>82</sup> This view finds support in the AB's statement in *EC and Certain Member States – Large Civil Aircraft*, that Art. 31.3 (c) of the VCLT reflects a “systemic integration” and that any relevant rule of international law between the disputing parties must be taken into account. The AB stated further that it must strike a balance between other rules of international law and WTO law.<sup>83</sup> Extending this to the issue about Art. XX (d) of GATT 1994, it would imply that panels and the AB should, as far as possible, interpret Art. XX (d) in a manner which would conform with a state's other international obligations.

However, as the AB demonstrated in *EC - Hormones*, principles of international law must have reached a certain level of generality, and not be sector-specific, before they will qualify as general principles of international law. In that case, the AB dismissed the claim that the precautionary principle was a general principle of international law. According to the AB, the principle had crystalized into a *principle of international environmental law*, but still awaited authoritative formulation under international law. Nevertheless, aspects of the precautionary principle were found in the Agreement on the Application of Sanitary and Phytosanitary Measures and could be applied to the extent to which they fell within the confinement of the SPS Agreement.<sup>84</sup> In *EC – Approval and Marketing of Biotech Products*, the panel followed the same line of reasoning as the AB and stated that the legal status of the precautionary principle as a general principle of international law was still unsettled.<sup>85</sup> The overarching problem is that, on one hand panels and the AB seem to be reluctant to apply other sources of international law as it might be construed as a violation of their mandate under Art. 3.2 of the DSU; but on the other hand, the catalogue of sources, which for example apply to the ICJ,<sup>86</sup> are generally binding on the WTO Members. Disregarding these

<sup>82</sup> Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 357 (Oxford University Press 2009).

<sup>83</sup> “European Communities — Measures Affecting Trade in Large Civil Aircraft”, WT/DS316/AB/R, adopted by the DSB on 1 June 2011, ¶ 845.

<sup>84</sup> “European Communities — Measures Concerning Meat and Meat Products (Hormones)”, WT/DS26/AB/R and WT/DS48/AB/R, adopted by the DSB on 13 February 1998, ¶ 123-124.

<sup>85</sup> “European Communities — Measures Affecting the Approval and Marketing of Biotech Products”, WT/DS291/R, WT/DS292/R and WT/DS293/R, report of the panel circulated on 29 September 2006, ¶ 7.76-7.89.

<sup>86</sup> Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 993, Art. 38.

sources could jeopardise a WTO Member's other obligations under public international law and create legal uncertainty as to which international obligations a state should comply with.

### International Law Forming Part of Domestic Law

The next aspect of *Mexico – Taxes on Soft Drinks* concerns the link between international law and domestic law. Mexico claimed that international law fell under “laws or regulations” of Art. XX (d) of GATT 1994. As mentioned above, Mexico argued that even if there was a violation of the national treatment principle, it would be justified under Art. XX (d) of GATT 1994 as the measures were necessary to ensure that the US complied with its obligations under NAFTA law.<sup>87</sup> According to Mexico, “laws or regulations” included US’ obligations under NAFTA.

The panel rejected the use of Art. XX (d) of GATT 1994. The AB upheld the finding of the panel although with a different argumentation. *Firstly*, the AB noted that “laws or regulations” does not refer to another WTO Member’s obligations under international law. Thus Mexico cannot seek recourse to Art. XX (d) in order to ensure that the US complies with its international obligations. *Secondly*, the examples of laws and regulations illustrated in Art. XX (d) all refer to domestic systems. *Lastly*, from the context of Art. XX, there are express references to *international* obligations and agreements in some of the other paragraphs. For example, paragraph (h) refers to measures “*undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved*” (emphasis provided), whereas paragraph (d) omits such references indicating that “international law” is not intended to be covered by “laws or regulations” of Art. XX (d) of GATT 1994.<sup>88</sup>

However, even though “laws or regulations” refers to domestic legislative or regulatory measures, it does not exclude the relevance of international law. According to the AB:

*“Domestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the*

<sup>87</sup> “Mexico — Tax Measures on Soft Drinks and Other Beverages”, WT/DS308/R, panel report circulated on 7 October 2005, ¶ 4.118.

<sup>88</sup> “Mexico — Tax Measures on Soft Drinks and Other Beverages”, WT/DS308/AB/R, adopted by the DSB on 24 March 2006, ¶ 69-72.

*origin of the rule is international, but the implementing instrument is a domestic law or regulation*"<sup>89</sup>

Without further elaboration on the implementing instruments, the AB concluded:

*"[W]e conclude that the terms "laws or regulations" cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system."*<sup>90</sup> (emphasis provided)

Therefore, according to the AB violations of WTO law by a member cannot be justified if the measures serve to seek compliance with international law. It is only compliance with domestic laws and regulations which is covered by Art. XX (d) of GATT 1994. Only in situations where international law either has been "incorporated" into domestic law or has "direct effect" will it be considered as forming part of domestic law.

"Direct effect" generally means that national courts give effect to rules or principles of international law without relying on an "incorporation" mechanism through legislative measures. The concept itself can vary in degree and function. Direct effect can be used in the construction of national law where international law serves as a basis for supporting or guiding national law's protection of certain rights, or it can be used to give effect directly to international law without resorting to national law.<sup>91</sup> The AB itself does not elaborate on the meaning of "direct effect". Notably, it has been applied within the EU legal order, concerning the EU citizens right to invoke and rely on EU law before the national courts if the EU provisions are sufficiently clear, precise and unconditional.<sup>92</sup> Direct effect has also been applied to give effect to international law in the EU legal order by the European Court of Justice (ECJ).<sup>93</sup> However, the effect of international treaties in the EU order

<sup>89</sup> "Mexico — Tax Measures on Soft Drinks and Other Beverages", WT/DS308/AB/R, adopted by the DSB on 24 March 2006, ¶ 69.

<sup>90</sup> "Mexico — Tax Measures on Soft Drinks and Other Beverages", WT/DS308/AB/R, adopted by the DSB on 24 March 2006, ¶ 79.

<sup>91</sup> André Nollkaemper, "The Duality of Direct Effect of International Law", 25 (1) EJIL, 105, 110 (2014).

<sup>92</sup> Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Admn.*, judgment of the Court of 5 February 1963, EU:C:1963:1.

<sup>93</sup> Case 181/73, *R. & V. Haegeman v. Belgian State*, judgment of the EC Court on 30 April 1974, EU:C:1974:41; Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. KG a.A.*, judgment of the EC Court on 26 October 1982, EU:C:1982:362, ¶ 18-27.

depends on the character of the treaty.<sup>94</sup> For example, the ECJ has developed a substantial practice concerning the effect of WTO law in the EU. Only if the EU institutions have intended to implement a WTO treaty, or if there is explicit reference to WTO provisions in EU legal instruments, will the ECJ review the legality of EU measures in light of WTO law.<sup>95</sup>

Direct effect may be able to close a gap in the multilevel rule of law by connecting international law with the domestic system, however it opens some others. Armin von Bogdandy suggests that direct effect implies increased pressure to harmonize national law with international law. Otherwise the state risks reverse discrimination as it allows the transnational market agent to rely on international rules which may not be applicable in sole intra-state issues, whereas the intra-state agents would have to rely on domestic law. Furthermore, there is risk of legal uncertainty for national agents as they would be unclear as to whether national law or international law would apply to foreign competitors, and finally legal equality would be endangered if there are no institutional structures on the international level to guarantee the same treatment of all individuals across all the national systems; a risk of non-uniform application of the international rules in the respective national systems.<sup>96</sup>

Moreover, if “direct effect” and “incorporation” are understood narrowly, it will create some challenges in respect of legal expectations. The

<sup>94</sup> Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, judgment of the Court of 5 October 1994, EU:C:1994:367, ¶ 110.

<sup>95</sup> Case C-149/96, *Portuguese Republic v. Council of the European Union*, judgment of the Court of 23 November 1999, EU:C:1999:574, ¶ 47; Case C-93/02 P, *Biret International SA v. Council of the European Union*, Judgment of the Court (Full Court) of 30 September 2003, EU:C:2003:517, ¶ 52; Case C-377/02, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*, Judgment of the Court (Grand Chamber) of 1 March 2005, EU:C:2005:121, ¶ 39; and joined cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA v. Council of the European Union*, judgment of the Court (Grand Chamber) of 9 September 2008, EU:C:2008:476, ¶ 111. The ECJ based its argument on the reciprocal nature of the WTO, and the fact that some other WTO Members do not allow a direct effect of WTO law in their national system, see *Portuguese Republic v. Council of the European Union*, judgment of the Court of 23 November 1999, EU:C:1999:574, ¶ 42-44. Furthermore, the ECJ has also rejected direct effect of AB decisions even if the decision is directed towards the EU. The reasons for the rejections are based on same arguments as above concerning the effect of WTO treaties, and the fact that panel and AB decisions cannot add to or diminish the rights and obligations of WTO members and thus cannot impose any rights for individuals before the ECJ, see C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA v. Council of the European Union*, judgment of the Court (Grand Chamber) of 9 September 2008, EU:C:2008:476, ¶ 131.

<sup>96</sup> Armin von Bogdandy, “Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law”, 6 INTL. J. CONST. L., 397, 404-407 (2008).

two approaches might not exhaustively cover all the ways in which a state incorporates international law into its domestic sphere. International law might enter the domestic sphere by other means which depends on both the legal culture and the political system. For instance, there can be administrative practices where international law is applied without being incorporated through a law-making exercise or without a court giving direct effect to international law. An example of this is how the European Convention on Human Rights (ECHR) was incorporated into Danish law by the Danish Parliament in 1992.<sup>97</sup> Before the incorporation, the High Court of Eastern Denmark had found that the ECHR had “direct effect” before the courts because principles of the ECHR had been effectively applied in the public system.<sup>98</sup> The Danish Ombudsman, who is authorised to make critique of the public administration and to provide recommendations to the public institutions about reopening cases against citizens, had an established practice of applying the ECHR as a legal basis of his critique of the administrative practices of public institutions, a long time before the High Court of Eastern Denmark established its “direct effect”.<sup>99</sup> The Danish Ombudsman does not make binding decisions but it is a constitutional convention that public authorities comply with its recommendations. Notwithstanding the non-binding nature of the recommendations and the fact that the Danish Ombudsman does not have the mandate to incorporate international law, nor to give international obligations a direct effect as a binding legal instrument, the recommendations are considered with high legal value in Danish public law.<sup>100</sup>

Where administrative decisions or practices create legal expectations among citizens of a society, it can be debated whether the connection between international law and an administrative practice, in particular non-binding measures, can be considered as “incorporated” or “direct effect” if these concepts are defined narrowly. The result is that a rule of law at the national level will not match a rule of law at the WTO level.

<sup>97</sup> See more at Institut for Menneskerettigheder (*the Danish Institute for Human Rights*); <https://menneskeret.dk/om-os/menneskerettigheder/menneskerettigheder-eu/europaeiske-menneskerettighedskonvention>, retrieved on 14 October 2017.

<sup>98</sup> See Pia Justesen, *Menneskerettighedernes status i dansk ret (The status of Human Rights in Danish Law)*, in *Grundloven og menneskerettigheder – i et dansk og europæisk perspektiv* (The Constitution and Human Rights – A Danish and European Perspective), 105, 113 [Morten Kjærum, Klaus Slavensky, and Jens Vedsted-Hansen (eds.), Jurist- og Økonomforbundets Forlag 1997].

<sup>99</sup> See for example two cases from 1983 and 1988 where the Danish Ombudsman referred to Art. 8 of the European Convention on Human Rights about the right to family life as partly basis for his recommendations; FOB nr. 83.205; and FOB nr. 88.93.

<sup>100</sup> See for example Jon Andersen, *Forvaltningsret, Administrative Law*, 26, 169-202 [5<sup>th</sup> edn., Forlaget Thomson/GadJura (eds.), 2003].

## INDIA – SOLAR CELLS: NUANCES AND CONTINUED UNCERTAINTY

Where *Mexico – Taxes on Soft Drinks* revealed some uncertainty in respect of connecting international and national law as well as the application of customary rules and principles of public international law within the WTO regime, *India – Solar Cells* seems to vaguely clarify and nuance the scope of the connection mechanisms, but does not overcome the uncertainty about the relationship between WTO law and international law.

### Overview

India had domestic content requirements (DCR) for producers of electricity which restricted the use of foreign solar cells. According to India, the DCRs were necessary in order to establish a locally based production which could ensure a sustained supply in case of disruption of imported components. India argued that if not for the DCR, it would not be able to comply with its obligations under domestic law and international law to ensure ecologically sustainable growth, and with its obligations related to climate change.<sup>101</sup> The US argued that the DCRs were inconsistent with Art. III of GATT 1994 and the Agreement on Trade-Related Investment Measures (TRIMs). India defended the use of the DCRs with reference to Art. XX (d) of GATT 1994; the DCRs had been designed to ensure compliance with both domestic and international law concerning obligations of ecologically sustainable growth and climate change, and there were no reasonable alternatives available. To support its arguments, India referred to national measures like the Electricity Act read with the National Electricity Policy, and the National Climate Change Action Plan and to its international obligations under international law<sup>102</sup> like the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and the Rio+20 Document: ‘The Future We Want’, adopted by the United Nations General Assembly in 2012. The US, on the other hand, argued that Art. XX (d) was not applicable as several of the international instruments India referred to had more characters of policy documents than law, that India had failed to demonstrate that the DCRs were necessary to comply with their national obligations, and that the

<sup>101</sup> See India’s arguments in “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/R/Add.1, Annex B-3, ¶ 53.

<sup>102</sup> See India’s Arguments, “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/R/Add.1, Annex B-4, ¶ 31-44.

international instruments, which India referred to, had not been sufficiently incorporated into domestic law.<sup>103</sup>

The panel examined the international and national instruments in order to establish whether they were “laws or regulations” within the meaning of Art. XX (d) of GATT 1994, and referred to the AB’s finding in *Mexico – Taxes on Soft Drinks* to determine whether the international rules had been incorporated or had direct effect. In analysing “laws or regulations” the panel took a narrow approach. “Laws or regulations” was limited to “legally enforceable rules of conduct under the domestic legal system.”<sup>104</sup> However, the AB disagreed with the narrow approach adopted by the panel and concluded:

*“a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others:*

- i. the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member;*
- ii. the degree of specificity of the relevant rule;*
- iii. whether the rule is legally enforceable, including, e.g. before a court of law;*
- iv. whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member;*
- v. the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and*
- vi. the penalties or sanctions that may accompany the relevant rule.”<sup>105</sup>*

However, the AB also noted that some cases might not be straightforward and that the assessment must be made on a case-by-case basis, “*in light of*

<sup>103</sup> See US Arguments, “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/R/Add.1, Annex B-1, ¶ 58-61.

<sup>104</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/R, panel report circulated on 24 February 2016, ¶ 7.311.

<sup>105</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.113.



*the specific characteristics and features of the instruments at issue, the rule alleged to exist, and the domestic legal system of the Member concerned.*”<sup>106</sup>

India argued that both binding and non-binding national instruments qualify as “laws or regulations” as, “*“legal framework in India” comprises both “binding” laws, and policies and plans, that provide the “framework for executive action”*”.<sup>107</sup> The panel had analysed the Indian domestic instruments but found that India had not lifted the burden of demonstrating that the domestic instruments were altogether a rule to ensure ecologically sustainable growth. The AB, in spite of its critique of the panel’s narrow approach to “laws or regulations”, upheld the conclusion of the panel. The relevant domestic instruments were held to be “hortatory, aspirational, declaratory, and at times solely descriptive.”<sup>108</sup>

The factors to determine whether a rule can fall under “laws or regulations” also apply to a rule of international law if it meets the connection requirements. However, the AB nuanced its view from *Mexico – Taxes on Soft Drinks*. It first repeated the “incorporation” or “direct effect” requirement and then stated:

*“Subject to the domestic legal system of a Member, there may well be other ways in which international instruments or rules can become part of that domestic legal system. An assessment of whether a given international instrument or rule forms part of the domestic legal system of a Member must be carried out on a case-by-case basis, in light of the nature of the instrument or rule and the subject matter of the law at issue, and taking into account the functioning of the domestic legal system of the Member in question.”*<sup>109</sup>

However, India’s argument in this respect was rejected by both panel and AB. India’s reference to a Supreme Court ruling did not demonstrate that there existed direct effect of international rules in the Indian legal system. According to the AB, the Indian Supreme Court had emphasized the relevance of the international instruments but it could not be inferred from that statement that the international instruments formed part of Indian law.

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<sup>106</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.114.

<sup>107</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.117.

<sup>108</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.133.

<sup>109</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.140.

Rather, the direct effect of the rule was established only if the executive branch takes actions in pursuance of international law.<sup>110</sup>

### Overcoming some Rule of Law Challenges; Incorporation, Direct Effect, and the Nature of an International Instrument

There must be an individual assessment of whether the international instrument forms part of domestic law. In *India – Solar Cells*, the AB took a broader approach compared to *Mexico – Taxes on Soft Drinks* as it recognized that the WTO Members may have other means to form international law as part of its domestic system than “incorporation” and “direct effect”. In that respect it seems to overcome some of the rule of law problems which were identified above, as arising in *Mexico – Taxes on Soft Drinks*. It must be assumed that administrative practices in national systems can provide the connection mechanism. In *India – Solar Cells*, the AB also stated that “*the very fact that the executive branch can take action to “execute” the international instruments or rules at issue, (...) because they are not in conflict with domestic legislation shows that these international instruments may already form part of its domestic legal system.*”<sup>111</sup> However, it is not enough if the international instrument only serves as a context for the interpretation of national law, or if they are used merely as a guidance for exercising decisions by governmental bodies.<sup>112</sup> It seems that the test of whether an international instrument forms part of domestic law is based on three elements;

- 1) the nature of the international instrument,
- 2) the subject matter of the law at issue, and
- 3) the functioning of the domestic legal system.

By including *the nature* of the international instrument in the connection test, the AB seems to accept that international legal instruments can have different legal weight. They can range from overall policy frameworks, which nevertheless might have a *de facto* binding force, to hard law instruments and various other instruments of different legal nature in between. The question is whether some international instruments have such special character and strength in the international order that it would be difficult to reject a state’s reference to it as forming part of its domestic system. For

<sup>110</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.148.

<sup>111</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.145

<sup>112</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.148.

example, a state might not have incorporated the UN Charter, nor have a basis for direct effect if it has not been subject to practice by the courts, but may nevertheless resort to “laws or regulations” as a basis for applying measures to secure the state’s compliance with the UN Charter. It is similar with *erga omnes* obligations which a state must comply with regardless of its incorporation or direct effect. But that argument does not seem to be persuasive. Just because a rule of international law might pass the connection criteria, does not mean that it will pass the “laws or regulations” test, nor does it mean that international rules and principles of law with a higher ranking status will automatically qualify as “laws or regulations”. This is discussed in the next section.

### The “Laws or Regulation” Test and New Challenges

In *India – Solar Cells*, the panel and AB took different approaches to “laws or regulations”. Where the panel relied on the enforceability of a rule as qualifying criterion for “laws or regulation”, the AB took a broader approach with its non-exhaustive list of factors which should be included in the analysis. The list of factors, which should be taken into consideration; i.e. degree of normativity, degree of specificity, enforceability, recognized by competent authority, form and title, and sanctions, has the advantage of including specific norms or practices from a society, which in that society may have character of law, even if it does not have a clear formal basis or only has limited enforceability. Thus, it allows for various cultural dimensions to “law”. It is interesting to note that a panel in *US – Section 301 Trade Act* took a broader approach to “domestic law” than the panel in *India – Solar Cells*. Even though the case cannot be directly comparable to *India – Solar Cells* as it does not concern Art. XX (d) of GATT 1994, it still demonstrates different methodological bases between panels. In *US – Section 301 Trade Act*, the panel had to establish US law as a fact to determine whether the law violated various provisions of GATT 1994. In establishing domestic law, the panel stated:

*“[A]ccount must be taken of the wide-ranging diversity in the legal systems of the Members. Conformity [with WTO law] can be ensured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved. Only by understanding and respecting the specificities of each Member’s legal system, can a correct evaluation of conformity be established”.<sup>113</sup> (...)*

<sup>113</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 7.24.

*In evaluating the conformity of Sections 301-310 with the relevant WTO provisions we must, thus, be cognizant of this multi-layered character of the national law under consideration which includes statutory language as well as other institutional and administrative elements.”<sup>114</sup>*

Thus, in contrast to the panel’s approach in *India – Solar Cells*, it is not only a matter of enforceability, but more of a holistic exercise taking into account various elements of the legal and administrative system. It is an approach with wider scope for differences in the respective WTO Members’ constitutional, legal and administrative systems. As mentioned before, with the example of the Danish Ombudsman, his recommendations would probably not qualify as “laws or regulations” based on an approach on enforceability, as the recommendations are not binding. However, Danish public authorities are still expected to comply with the recommendations. By taking a broad approach to “laws or regulations” under Art. XX (d) of GATT 1994, the AB seems to acknowledge the differences there can be between various types of “laws or regulations” in the WTO Members’ constitutional, political, and legal systems and cultures.

The broader approach opens up for debate the question whether international norms, which have character of *soft law*, can pass the “laws or regulations” test which will be discussed below.<sup>115</sup> The international instruments, which form part of the domestic system, must go through the same “laws or regulations” test as domestic instruments. As the AB stated in *India – Solar Cells*:

*“We emphasize that, even if a particular international instrument can be said to form part of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule, obligation, or requirement within the domestic legal system of the Member that falls within the scope of a “law or regulation” under Article XX(d).”<sup>116</sup>*

According to the criteria from *India – Solar Cells*, it is a matter of their normative force, degree of specificity etc. whether the international instrument will qualify under “laws or regulations”. In a footnote, the AB added:

<sup>114</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 7.26.

<sup>115</sup> International law can be made of “hard law” or “soft law” where the distinguishing factor is the binding character of the norm.

<sup>116</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, ¶ 5.141.

*“In the context of India’s argument that the “DCR measures ... have been designed to secure compliance with India’s obligations under international law” (India’s appellant’s submission, para. 169), we note that the degree of normativity of an international instrument or rule under the domestic legal system of a Member may be different from the degree of normativity of such an instrument or rule under public international law. Thus, for example, while the principle of pacta sunt servanda under public international law, as codified in Article 26 of the Vienna Convention on the Law of Treaties (done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331), requires that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”, this does not mean that, in and of itself, there is a rule, requirement, or obligation within the domestic legal system of a Member that falls within the scope of “laws or regulations”.<sup>117</sup>*

It might imply that a hard law instrument will not pass the test if in the national system it does not carry a sufficient degree of normative force. For example, the *UN Convention against Transnational Organized Crime and the Protocols Thereto* provides a number of obligations on states to combat transnational crimes – in respect of their constitutional traditions – and to introduce specific institutional and legal instruments for the purpose. Even if a state has implemented it into its domestic system, but the operation of it in the specific domestic system is weak, it might not qualify under “laws or regulations” regardless of its hard law character in international law. However, international soft law instruments might qualify as “laws or regulations” if they are provided with sufficient normative force in the domestic systems. For example, international financial law and regulations have numerous soft law instruments in areas which are regulated by the financial sector to a large extent. If a state attempts to introduce measures, which are facilitating export and limiting import of goods and services, in order to attract foreign investment and capital to national production and to improve the liquidity of financial institutions, it could be a violation of the trade rules. Capital requirements and supervision of financial institutions is regulated internationally in the Basel Accords. They aim at strengthening the regulation, supervision, and risk management of the banking sector, for example by imposing specific levels of capital requirements on banks, but they are not binding on states. They are issued by the Basel Committee of Banking Supervision (BCBS) whose mandate is *“the primary global standard setter for the prudential regulation of banks and provides a forum for cooperation*

<sup>117</sup> “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/AB/R, adopted by the DSB on 16 September 2016, footnote 386.

on banking supervisory matters. Its mandate is to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability.”<sup>118</sup> However it “does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members’ commitments, (...), to achieve its mandate.”<sup>119</sup> The Members, which are mostly central banks with authority to supervise and regulate the national banking and financial sector, are expected to implement the standards of the BCBS. The implementation of the Basel Accords is monitored and will be published by the BCBS, and the Members are accountable to the BCBS and must publish follow-up actions. In the latest progress report there seem to be a high level of compliance with the implementation of the Basel III standards, although there are still areas which are in the process of implementation.<sup>120</sup> Therefore, it can here be argued that even though the Basel Accords do not have a binding character, they do get binding effect through implementation by national regulators, and thus the tools for connecting international law to the domestic systems seem to change the character of the Basel Accord, at least in the national regulatory systems. It then becomes a question of how much normative strength they will have in the national system. For example, the EU in its prudential requirements and supervision regulations and directives has implemented Basel III.<sup>121</sup> EU regulations and

<sup>118</sup> Basel Committee on Banking Supervision (BCBS) Charter, 2013, S. 1.

<sup>119</sup> Basel Committee on Banking Supervision (BCBS) Charter, 2013, S. 3; Basel Committee on Banking Supervision (BCBS) Charter, 2013, S. 5 concerns the responsibilities of the Members; “BCBS members are committed to: (a) work together to achieve the mandate of the BCBS; (b) promote financial stability; (c) continuously enhance their quality of banking regulation and supervision; (d) actively contribute to the development of BCBS standards, guidelines and sound practices; (e) implement and apply BCBS standards in their domestic jurisdictions within the pre-defined time frame established by the Committee; (f) undergo and participate in BCBS reviews to assess the consistency and effectiveness of domestic rules and supervisory practices in relation to BCBS standards; and (g) promote the interests of global financial stability and not solely national interests, while participating in BCBS work and decision-making.”

<sup>120</sup> See Basel Committee on Banking Supervision, *Twelfth Progress Report on Adoption of the Basel Regulatory Framework*, April 2017. See also general overview of Members’ performance, [https://www.bis.org/bcbs/implementation/rcap\\_jurisdictional.htm](https://www.bis.org/bcbs/implementation/rcap_jurisdictional.htm), retrieved on 14 October 2017.

<sup>121</sup> See Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 Text with EEA relevance, generally in the preamble; and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, Recitals 79-80.

The European Commission, the European Banking Authority (EBA) and the European Central Bank are observers, not members, of the BCBS.

directives are binding EU law and they have strong normative force in the EU Member States.<sup>122</sup>

Here, the AB steps into a more realist approach where it is necessary to determine whether the international instrument, which seeks to pass the connection test, in reality has a normative value in the domestic system. A state should not be able to invoke the exception in Art. XX (d) of GATT 1994 based on compliance with international law which has merely been incorporated into the national system, without the said international rule having a sufficient degree of normativity in the domestic system. The AB takes a role of assessing some of the rule of law elements at domestic levels, concerning the actual access to justice with its basis in a rule of international law. The irony is that an international soft law instrument might qualify under “laws or regulations,” if it has achieved normative force through its implementation into the domestic order, while an international hard law instrument might not.

### Jurisdictional Issues and Cross-Sectorial Overlaps

Where the AB seems to overcome some operational rule of law challenges between international and national level, it still leaves open some questions about the scope of international law in the WTO system and the potential overlap between WTO law and other rules of international law. It is clear from *Mexico – Taxes on Soft Drinks*, and confirmed in *India – Solar Cells*, that sources of international law can be applied as “laws or regulations” if they meet the connection criteria and they qualify under “laws or regulation”. But if an international rule complied with by the state overlaps with WTO law, it might also be in conflict with WTO law. In the situation in *India – Solar Cells* if the international environmental treaties had been better connected into the Indian domestic legal system, they could potentially be at odds with WTO law. The aim of this paper is not to engage in a discussion about the relationship between WTO law and international environmental law, and the extent of overlaps between them, but only to illustrate the multilevel rule of law challenge in respect of the application of Art. XX (d) of GATT 1994.<sup>123</sup>

<sup>122</sup> Consolidated Version of the Treaty on the Functioning of the European Union Art. 288, 2008 O.J. C 115/47.

<sup>123</sup> It should be noted that protection of the environment is one of the aims of the WTO as provided in the preamble of the WTO Agreement, it is a legitimate exemption in various provisions, like Arts. XX (b) and (g) of GATT 1994, and it has been a legitimate reason for subsidizing industries which otherwise would harm the environment in argument based on negative externalities by the AB in its interpretation of “market” in the Subsidies and Countervailing Measures Agreement in “Canada — Certain Measures

India stated in its submission to the panel:

*“India’s DCR Measure has been designed to secure compliance with the afore-mentioned laws and regulations [including the WTO Agreement, the United Nations Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and the Rio+20 Document: ‘The Future We Want’, adopted by the United Nations General Assembly in 2012] which are themselves not GATT inconsistent.”*<sup>124</sup>

The conformity between WTO law and the international instruments, which India referred to, was not questioned by the US or the third parties, and thus India’s statement of “not GATT inconsistent” international instruments was not tested by the panel and the AB. However, the question remains: can a panel or AB decide whether an international obligation can be inconsistent with WTO law?

Art. XX (d) of GATT 1994 requires that the measures must be “*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*”. (emphasis provided). As mentioned above with reference to *Japan – Agricultural Products*,<sup>125</sup> and *Thailand – Cigarettes (Philippines)*,<sup>126</sup> if domestic laws or regulations are inconsistent with WTO law, Art. XX (d) will not apply. Here, it can be argued that if the “international rule” is not consistent with WTO law, it cannot meet the conditions of Art. XX (d). However, such position cannot be justified easily; a state must comply with *all* its international obligations.<sup>127</sup> Generally there no hierarchy within international law instruments, and further there is no hierarchy between WTO law and other international treaties, where the former is placed above the latter. However, there are a few exceptions like principles of *jus cogens* having priority over WTO law,<sup>128</sup> and in cases

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Affecting the Renewable Energy Generation Sector”, WT/DS412/AB/R and “Canada — Measures Relating to the Feed-in Tariff Program”, WT/DS426/AB/R, adopted by the DSB on 24 May 2013, ¶ 5.179-5.189; and Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT’L ECON. L. 383, 397 (2015).

<sup>124</sup> India’s Arguments “India — Certain Measures Relating to Solar Cells and Solar Modules”, WT/DS456/R/Add.1, Annex B-4, ¶ 37.

<sup>125</sup> GATT Panel Report, “Japan — Restrictions on Imports of Certain Agricultural Products”, L/6253, adopted on 2 March 1988, BISD 35S/163.

<sup>126</sup> “Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines”, WT/DS371/R, adopted by the DSB on 15 July 2011.

<sup>127</sup> Cf. for example the principle of *pacta sunt servanda*.

<sup>128</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 53; See also representative of Switzerland, Summary Report on the Thirteenth Meeting of the Committee on Trade and Environment in Special Session, 15-16 September 2005, TN/TE/R/13, 11 October 2005, ¶ 6;



of conflict between the UN Charter and the WTO treaties, the UN Charter will prevail.<sup>129</sup>

There is not a lot of guidance in AB jurisprudence concerning the relationship between WTO law and international law in general. As mentioned above, the AB has generally been reluctant to include sources of international law other than WTO law, but has been more open to applying international law as context for the interpretation of WTO treaties, and in general seems to take a harmonious approach to interpretation in order to avoid conflict with other international law. In addition, as mentioned above in *Mexico – Taxes on Soft Drinks*, the AB made a clear jurisdictional delimitation concerning disputes falling within the realm of other international organizations.

Even though there is not a lot of guidance in WTO jurisprudence concerning the interface between WTO law and law of other organizations, *Brazil – Retreaded Tyres* took the panel and the AB into an area with a potential institutional and legal conflict between WTO law and MERCOSUR law. Brazil had imposed a ban on the import of retreaded tyres. Brazil, as a member of the MERCOSUR, was challenged by another MERCOSUR Member, Uruguay, before the MERCOSUR Arbitral Tribunal for violating MERCOSUR law. According to Uruguay, Brazil violated MERCOSUR decision 22/2000 which provides that MERCOSUR Members must not introduce trade restrictions amongst themselves. The MERCOSUR Arbitral Tribunal ruled in favour of Uruguay, and Brazil complied with the ruling and amended its law accordingly. Brazil then allowed import of retreaded tyres from other MERCOSUR Members but kept the ban on all other countries. After Brazil's amendments of its laws, the EU filed a complaint in the WTO dispute settlement system against Brazil. The EU claimed that Brazil imposed quantitative restrictions on retreaded tyres and discriminated between MERCOSUR Members and non-MERCOSUR Members in violation of WTO law. As mentioned above, the panel rejected that Art. XX (d) of GATT 1994 was applicable as the import ban was inconsistent with GATT 1994. Besides referring to Art. XX (d) of GATT 1994, Brazil defended its measures by claiming that they were necessary in order to protect human health under Art. XX (b) of GATT 1994. The import of retreaded tyres increased the risk of malaria caused by mosquitoes which used tyres as breeding grounds. The panel supported the Brazilian view that the measures were necessary to protect human health under Art. XX (b) of GATT 1994, which was upheld by the AB in its report. The panel further found that the measures did not constitute arbitrary or unjustifiable discrimination under the chapeau of Art. XX of GATT 1994, as the ruling

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<sup>129</sup> UN Charter, Art. 103, together with Art. XVI.6 of the WTO Agreement.

by the MERCOSUR Arbitral Tribunal provided legitimate basis for such discrimination. However, on this issue, the AB disagreed with the panel.<sup>130</sup> According to the AB, the ruling by the MERCOSUR Arbitral Tribunal was not a justifiable explanation under the chapeau of Art. XX of GATT 1994 for discrimination between MERCOSUR Members and WTO Members as the ruling by the MERCOSUR Arbitral Tribunal had no connection with the policy objective of human health of Art. XX (b) of GATT 1994.<sup>131</sup>

The question is whether the AB with its decision takes priority over other international trade courts and whether it ranks WTO law higher than MERCOSUR law.<sup>132</sup> The AB stated that it did not see a conflict between WTO law and MERCOSUR law, nor a conflict between its own decision and the ruling by the MERCOSUR Arbitral Tribunal, as Brazil had not used the human health argument before the MERCOSUR Arbitral Tribunal. According to the AB, Brazil could have resorted to Art. 50 (d) of the Treaty of Montevideo which provides similar exceptions as Art. XX (b) of GATT 1994, but decided not to.<sup>133</sup> Thus, the case before the MERCOSUR Arbitral Tribunal cannot be directly compared to the one before the AB. However, the question remains that if Brazil had applied the exemption of Art. 50 (d) of the Treaty of Montevideo and the MERCOSUR Arbitral Tribunal had rejected it, would the AB then have accepted the ruling regardless of its outcome? The wording of the AB report seems to indicate that it is not a rejection of *acceptance of rulings* by other international courts and tribunals but merely a rejection of *application of the ruling* in the specific case because it bears no relationship with Art. XX (b) of GATT 1994, i.e. the ruling by the MERCOSUR Arbitral Tribunal does not concern human health which Art. XX (b) of GATT 1994 protects. The statement from the AB about the

<sup>130</sup> “Brazil — Measures Affecting Imports of Retreaded Tyres”, WT/DS332/AB/R, adopted by the DSB on 17 December 2007, ¶ 253-256. The AB did not make an analysis of the exemption in Art. XX (d) of GATT 1994 as it had found that the import ban was inconsistent with the chapeau of Art. XX and thus could not be exempted under Art. XX (d).

<sup>131</sup> “Brazil — Measures Affecting Imports of Retreaded Tyres”, WT/DS332/AB/R, adopted by the DSB on 17 December 2007, ¶ 229.

<sup>132</sup> The case caused some debate in literature; see N. Lavranos, *Jurisdictional Competition: Selected Cases in International and European Law*, 46 (Europa Law Publishing, 2010); and Ernst-Ulrich Petersmann, “Administration of Justice in the World Trade Organization: Did the AB Commit ‘Grave Injustice’?”, 8 (3) *Law & Prac Int’l Courts & Trib.* 329 (2009).

<sup>133</sup> Under the Treaty of Asunción – and later the Protocol of Ouro Preto, the MERCOSUR Members must comply with their obligations under the Latin American Integration Association, cf. Art. 8 of the Treaty of Asunción, which has its basis in the Treaty of Montevideo (1980). It provides in Art. 50 (d): “*Ninguna disposición del presente Tratado será interpretada como impedimento para la adopción y el cumplimiento de medidas destinadas a la: (...) (d) Protección de la vida y salud de las personas, los animales y los vegetales.*” (No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding: (...) (d) Protection of human, animal and plant life and health).

non-conflict between its decision and MERCOSUR law should be considered as an *obiter dictum* which the AB found necessary to include in order to eliminate the thought that it posits its own rulings over those of other international courts.

How the panel and AB will approach an overlap between WTO law and other international law, and case law from other international courts, in cases concerning Art. XX (d) of GATT 1994, still needs to be clarified. At this stage, there are only hints taken from cases concerning other provisions, where the impression is that the AB explicitly avoids conflict between WTO law and other international law, and that so far it has not put WTO law and its own mandate higher than other international law and international courts. It must be expected that panels and the AB in situations where a WTO Member resorts to Art. XX (d) of GATT 1994 to comply with its international obligations, which are connected to the domestic system with a sufficient degree of normative force etc., will as far as possible interpret such international obligations in harmony with WTO law. Furthermore, it must be expected that the panels and AB will take into account decisions by international courts and tribunals, which have the mandate to interpret the specific international treaties from which the relevant international obligations are derived, in order to avert a situation where a state cannot comply with decisions from other international courts as it would violate WTO law. This would ensure harmony between international courts and would ensure that the rule of law can be upheld in the respective international orders. It would also help developing some overall principles of law at the international level which can serve as guidance in potential norm or jurisdictional overlaps in the future.

## CONCLUSION

The article has addressed multilevel rule of law challenges when Art. XX (d) of GATT 1994 is applied. Finding a balance between WTO law and measures protecting national law is a task for panels and the AB where the WTO Members often fail in demonstrating that they meet the criteria of Art. XX (d). The problem is that market agents might find it difficult to see through national measures compliance with WTO law but a consistent approach by panels and the AB in the interpretation of Art. XX (d) might give predictability into the multilevel challenge and support a rule of law.

The special focus of this article has been on the role of other international law in WTO law. Multilevel rule of law must have some additional

dimensions, as compared to a traditional, nationally anchored, rule of law. It includes the connection between international law and national law, and it includes norm and jurisdictional overlaps between WTO law and international law. Through *Mexico – Taxes on Soft Drinks* and *India – Solar Cells*, the AB has clarified the position about connecting international law with national law. The connecting tools used should not be limited to incorporation or direct effect. It should further depend on the domestic systems, including the constitutional, legal and administrative systems. It should be decided on a case-by-case basis with focus on the nature of the international instrument, the subject matter of the law issue, and the functioning of the domestic system. Here it can here be argued that had the AB taken a narrow approach, like the panel in *India – Solar Cells*, it would have been clearer which criteria could be applied. However, the problem with the narrow approach – and the multilevel issue – is that it would rule out the specific legal traditions in a domestic system, which use means other than incorporation and direct effect to connect international law into the domestic system. That would violate the specific rule of law expectations within that state as their traditional connecting mechanism would be overruled by WTO law. The broader approach seems to accommodate such differences between the WTO Members and thus allow them to protect the expectations which international law has for citizens, companies etc. if it has become part of domestic law through their specific connecting mechanism.

It is also clear that panels and the AB cannot step beyond the jurisdictional scope of WTO law and interfere into the jurisdiction of other international courts. However, there can be situations with overlaps, where a state introduces measures to comply with its international obligations – assuming that they form part of national law – which must be exempted through Art. XX (d) of GATT 1994, but where the international obligations overlap, and potentially conflict, with WTO law. That leads to two questions, 1) about the jurisdictional scope of WTO panels and the AB; and 2) about norm overlaps between WTO law and other international law. This is still unsettled in practice. However, in *Brazil – Retreaded Tyres*, the AB made it clear that it did not see a conflict between its own decision and that of the MERCOSUR Arbitral Tribunal, nor between MERCOSUR law and WTO law, when it rejected the application of a decision from the MERCOSUR Arbitral Tribunal as a legitimate basis for applying Art. XX (b) of GATT 1994 concerning protection of human health. This indicates that the AB will justify its own decision when it potentially overlaps with other jurisdictions and establish a legal argument which suggests that there are no jurisdictional conflicts. In respect of norm overlaps, both panels and the AB accepts that international environmental law can be justified by a state

as “laws or regulations” under Art. XX (d) of GATT 1994 if all criteria are met. Nevertheless, it is not clear how they will handle the situation if the other international treaties are potentially in conflict with WTO law. It is generally assumed under public international law that states must comply with *all* their international obligations. WTO case law indicates that a harmonious approach is taken in order to avoid such conflict. Such a position will eliminate one rule of law challenge, as states and their citizens can rely on all their international rights and obligations, but it will create another, WTO law must be open for some variations in the interpretations of the WTO law in relation to states’ other obligations under international law. Thus, WTO law cannot be interpreted too rigidly in such situations. The primary objective is that panels and the AB should take a consistent approach in their methodology and allow for such balance between the WTO law and other international law as a conflict between WTO law and other international law could create much bigger rule of law challenges. However, these multilevel rule of law challenges need further clarification in case law before a clearer picture of the jurisdictional and norm overlaps between the WTO and other international law can be established. Some overall constitutional meta-principles are available to settle certain norm conflicts but it still needs further expression in practice.