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Human Rights and Investments at the WTO

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1. INTRODUCTION

At first sight, both human rights and investments appear to lie outside the realm of international trade law. Indeed, neither the Marrakesh Agreement establishing the World Trade Organization (WTO)[1] nor the covered agreements contain any explicit reference to human rights. Although the Havana Charter included reference to labour rights, it never entered into force.[2] Furthermore, political attempts to insert a human rights clause into the WTO law framework have not been successful. Developing countries generally oppose the insertion of human rights into WTO agreements, deeming that human rights arguments could be used to justify trade restrictions, affect state sovereignty and disguise protectionism.[3] Additional structural arguments against the integration of human rights emphasise the different institutional roles played by the WTO and human rights bodies. These structural arguments rely on the idea that each international organisation should remain within its own sphere, relying on its given competences and fulfilling its own mandate.

To date, the idea to govern both trade and foreign investments at a multilateral level has also been unsuccessful.[4] While the Havana Charter contained provisions on the treatment of foreign investment,[5] it was never ratified and only its provisions on trade were incorporated into the General Agreement on Tariffs and Trade (GATT 1947).[6] Later attempts to govern foreign direct investment at the WTO also proved unsuccessful. For example, the 1996 Singapore Ministerial Conference decided to establish a new working group on trade and investment,[7] and

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[1] Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (Marrakesh Agreement).

[2] Havana Charter for an International Trade Organization (adopted 24 March 1948) United Nations Conference on Trade and Employment, Final Act and Related Documents, UN Doc E/CONF.2/78, art 7.

[3] See eg D C K Chow, 'Why China Opposes Human Rights in the World Trade Organization' (2013) 35 *University of Pennsylvania Journal of International Law* 61.

[4] See generally P Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?' (2006) 9 *Journal of International Economic Law* 325.

[5] See eg Havana Charter (n 2), art 12.

[6] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.

[7] Singapore WTO Ministerial Declaration (adopted 13 December 1996, entered into force 18 December 1996) WT/Min(96)/DEC, para 20.

the subject was originally included on the Doha Development Agenda (DDA). According to the mandate, the negotiations would start after the 2003 Cancún Ministerial Conference, 'on the basis of a decision to be taken, by explicit consensus, at that session'.[8] However, there was no consensus and the item was therefore dropped from the Doha agenda in 2004. The US and developing countries converged in their desire to eliminate investment from the DDA, albeit for different reasons. Developing countries opposed the insertion of investment governance on the negotiation table, fearing a race to the top of investment protection standards and the consequent dilution of their regulatory autonomy. Meanwhile, the US and other industrialised countries expected to achieve a greater degree of liberalisation for investment via bilateral and regional deals.

However, the lack of formal reference to human rights within international trade law does not mean that foreign direct investments and human rights are not touched upon and/or influenced by trade governance.[9] This chapter aims to uncover the various dimensions of the complex interplay between trade, investment, and human rights through examining the following questions: What role, if any, do human rights and investments play at the WTO? Does international trade law have any impact on investment governance and human rights?

Although the law of the World Trade Organization (WTO) does not generally govern foreign direct investment, some WTO Agreements govern aspects of FDI.[10] As a result, there can be (and have been) parallel trade and investment disputes arising from the same set of facts brought before both the WTO dispute settlement mechanism and investment treaty arbitral tribunals. Moreover, although companies and industry associations cannot have recourse to the WTO dispute settlement mechanism, they constitute 'the driving force behind the initiation of dispute settlement proceedings in most cases'.[11] Not only do companies lobby governments to bring cases to the WTO, but they also play a 'behind-the-scenes' role in planning the legal strategy and drafting the submissions.[12]

The WTO in many ways serves as a battlefield between economic concerns and human rights,[13] and as a site of confrontation between international economic governance and national regulatory autonomy.[14] Several studies have examined the

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[8] Doha WTO Ministerial Declaration (adopted on 14 November 2001, entered into force 20 November 2001) WT/MIN(01)/DEC/1, para 20.

[9] On the impact of WTO law on human rights, see eg J Harrison, *The Human Rights Impact of the World Trade Organization* (Hart Publishing 2007).

[10] Agreement on Trade-Related Investment Measures, Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186; General Agreement on Trade in Services, Agreement Establishing the World Trade Organization, Annex 1B (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183; Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement Establishing the World Trade Organization, Annex 1C (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299.

[11] P Van Den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization* (CUP 2013), 178.

[12] Ibid.

[13] Wolfgang Benedek et al. (eds), *Economic Globalisation and Human Rights* (CUP 2007).

[14] J P Trachtman, 'International Legal Control of Domestic Administrative Action' (2014) 17 *Journal of International Economic Law* 753; W Shan et al. (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008).

linkage between international trade law and human rights.[15] The WTO dispute settlement system can rule on disputes carrying human rights arguments in support of either the complainant or the defendant.[16] Indeed, a number of disputes adjudicated at the WTO have touched upon human rights, including civil and political rights, economic, social and cultural rights and 'third generation' human rights.[17] Many studies have also examined the parallel linkage between international investment law and human rights.[18]

However, the literature has rarely addressed what happens when trade, investment and human rights interact at the WTO; whether the WTO is well-equipped to cope with this interplay, and in which key areas human rights, investments and trade intersect.[19] This chapter therefore aims to uncover the various dimensions of the complex interplay between trade, investment and human rights through examining several case studies. Due to space limits, the chapter focuses in particular on a selected range of trade disputes related to cultural rights. The chapter concludes that while a number of legal tools can foster the reconciliation of opposing interests under WTO law, much remains to be done to ensure better coherence between theory and practice.

This chapter proceeds as follows. First, it addresses the linkage between trade and human rights. Second, it discusses the linkage between trade and investments. Third, it explores the theoretical connection between trade and investment on the one hand and human rights on the other. The interaction between trade, investments and human rights is then explored through several case studies. Finally, the conclusions synthesise the key findings.

2. INTERNATIONAL TRADE AND HUMAN RIGHTS

In theory, trade and human rights can be mutually supportive. Economic development is undoubtedly a factor in human well-being. Furthermore, trade is based upon human interaction, and can foster mutual respect and understanding.[20] As such, the WTO 'is more than a mere technical regime dealing with trade issues';[21]

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[15] See eg C McCrudden, 'International Economic Law and the Pursuit of Human Rights' (1999) 2 *Journal of International Economic Law* 3; E-U Petersmann, 'Human Rights and International Economic Law in the 21st Century' (2001) 4 *Journal of International Economic Law* 3.

[16] G Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 *European Journal of International Law* 753, 755.

[17] Third generation human rights have shifted focus from the individual person (first generation rights) and the communities in which they live (social, economic and cultural rights) to the natural world, such as the right to a clean and healthy environment. See P Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29 *Netherlands International Law Review* 307.

[18] For a comprehensive study, see Y Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 1107.

[19] See also UN Economic and Social Council, 'Economic, Social and Cultural Rights: Human Rights, Trade and Investment – Report of the High Commissioner for Human Rights' (2 July 2003) UN Doc E/CN.4/Sub.2/2003/9.

[20] P Lamy, 'Trade and Human Rights Go Hand in Hand' (Speech at UNITAR, 26 September 2010) available at <www.wto.org/english/news_e/sppl_e/sppl172_e.htm>.

[21] A Lindroos and M Mehling, 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO' (2005) 16 *European Journal of International Law* 857, 875.

rather, it has significant political, legal and social implications. For example, the Bretton Woods conference aimed to reinforce economic cooperation as a means of preventing war. In addition, at the legal level, the WTO has established a multilateral legal system to overcome the fragmentation of power-based bilateral economic relations. The objectives of the WTO do not only include economic growth, but also 'raising standards of living' and 'ensuring full employment' and sustainable development.[22] The achievement of these objectives can contribute to the protection of human rights.

Both international trade law and human rights law protect certain economic freedoms; however, they are characterised by different aims, objectives and procedural features.[23] While international trade law aims to promote free trade and sustainable development, human rights law requires states to respect, protect and fulfil human rights. The pursuit of different objectives – economic/utilitarian interests on the one hand, and basic human rights on the other – discourages the formation of broad analogies between trade and human rights. Moreover, trade and human rights are also divided by different legal matrices.

International trade law is state-centric, based on the traditional interstate nature of international law. While WTO obligations are not owed toward all (*erga omnes*), questions remain as to whether they are owed toward all the member states (*erga omnes partes*). In theory, 'while breach of human rights necessarily violates the rights of all parties [to a treaty], breach of WTO treaty can be limited to one single party'.[24] However, in practice, all WTO Members have an interest in any breach of the covered agreements.[25] In addition, in the case of violation complaints within the WTO, there is no need for the complainant to show nullification or impairment of a benefit.[26]

In contrast, human rights law is 'revolutionary' by nature,[27] 'because it conflicts with the principle of State sovereignty', which traditionally 'protected … the domestic jurisdiction of the state on its own citizens'.[28] At its core, human rights law empowers individuals, and not states, within the international community. Human rights law includes *jus cogens*, that is, peremptory norms of a non-derogable nature, as well as *erga omnes* and *erga omnes partes* obligations. The violation of a customary norm of human rights law by a state inherently affects the legal interest of the international community as a whole (*erga omnes* obligation). Moreover, the

[22] Marrakesh Agreement (n 1), preamble.

[23] M Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in P-M Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2008).

[24] J Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 13 *European Journal of International Law* 907, 934.

[25] M Matsushita, T J Schoenbaum and P C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (OUP 2004), 26.

[26] See T Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 *European Journal of International Law* 723.

[27] A Cassese, *Diritto Internazionale* (Il Mulino 2004), 83.

[28] R Pisillo Mazzeschi, 'Human Rights and the Modernization of International Law' in F Lenzerini and A F Vrdoljak (eds), *International Law for Common Goods* (Hart Publishing 2014), 89.

violation of a treaty norm of human rights law by a state party affects the legal interest of any other state party of a multilateral treaty (*erga omnes partes* obligations).[29]

The disparity between human rights law and international trade law is particularly evident in the manner in which disputes are settled and the so-called 'enforcement imbalance'.[30] International trade law is characterised by a well-developed, institutionalised and sophisticated dispute settlement mechanism. The Dispute Settlement Mechanism (DSM) of the WTO has been defined as the 'jewel in the crown' of the organisation,[31] and 'a branch of global governance'.[32] The creation of the WTO Dispute Settlement Body constituted a major shift from the political-consensus-based dispute settlement system of the 1947 GATT to a rule-based architecture designed to strengthen the multilateral trade system.[33] The WTO DSM is compulsory, exclusive and highly effective.[34] The decisions of panels and the Appellate Body are binding on the parties, and the Dispute Settlement Understanding (DSU)[35] provides remedies for breach of WTO law. While some authors argue that the system of remedies available at the WTO can be improved,[36] the enforcement system of the WTO is characterised by a high level of compliance.[37] The system provides a significant degree of 'security and predictability, which traders and other market participants need …'.[38]

Meanwhile, international human rights law is characterised by a variety of compliance and dispute settlement mechanisms, and by the 'under-enforcement' of its obligations.[39] Very few human rights treaties formally establish human rights courts; rather, 'the vast majority of human rights treaties rely on some sort of reporting and/or monitoring system as the sole mechanism to compel compliance'.[40] Human rights scholars have often highlighted the existence of 'persistent forms of decoupling', 'given the prevalence of seemingly disingenuous acceptance of human

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[29] Ibid, 91.

[30] Lamy (n 20).

[31] A Narlikar, *The WTO: A Very Short Introduction* (OUP 2005).

[32] See T Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (Cameron May 2004).

[33] S P Crowley and J H Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *American Journal of International Law* 193.

[34] Van den Bossche and Zdouc (n 11).

[35] Dispute Settlement Understanding, Agreement Establishing the World Trade Organization, Annex 2 (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU).

[36] See eg P Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 *European Journal of International Law* 763; M Bronckers and F Baetens, 'Reconsidering Financial Remedies in WTO Dispute Settlement Mechanism' (2013) 16 *Journal of International Economic Law* 281.

[37] Y Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225, asserting that evaluating effectiveness of international courts should follow a 'goal-based' approach that matches the court's goals with its outcomes.

[38] P Sutherland et al., 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium' (World Trade Organisation, 2004), para 213 available at <www.ipu.org/splz-e/wto-symp05/future_WTO.pdf> (Sutherland Report).

[39] R Goodman and D Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19 *European Journal of International Law* 725.

[40] P Quinn Saunders, 'The Integrated Enforcement of Human Rights' (2012) 45 *International Law and Politics* 97, 109–10.

rights instruments by states with poor human rights records'.[41] While sceptics argue that there are too many violations of human rights to consider the human rights system effective, others emphasise that human rights law has a progressive nature, and the fact that it can be ineffective in some areas does not mean that it has been ineffective *tout court*.[42]

It is clear that tension has arisen between economic globalisation and human rights. While the legal regimes governing trade and human rights are institutionally distinct, their subject matters are interconnected. For example, many argue that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Agreement on Agriculture (AOA)[43] prevent WTO members from implementing their human rights obligations, including the right to health and the right to food, or that trade liberalisation commitments prevent the adoption of positive measures to protect the cultural rights of indigenous peoples. Whether the WTO law can foster, or hinder, freedom of expression and cultural diversity remains a subject of fierce debate.

Structural arguments of institutional separation have given way to growing awareness of the interconnectedness of legal regimes. As a matter of policy, the so-called 'linkage issue', that is, the interplay between trade and non-economic values, can promote institutional development and progress. It can offer international trade law an opportunity for self-reflection on whether it needs to evolve and adapt to new needs and circumstances. Moreover, human rights law can have a significant impact on the system of international trade law, with the potential to facilitate its evolution.

3. TRADE AND INVESTMENT

This section explores the linkage and divergences between international trade law and international investment law. Although foreign investments and international trade often converge in a globalised economy and are frequently depicted as 'two sides of the same coin',[44] they remain governed by separate regimes.[45] While international trade is now governed at the multilateral level by the WTO-covered agreements, foreign direct investment is regulated by more than 3,000 bilateral investment treaties. Therefore, a comprehensive examination of their convergences and divergences remains critical for assessing the nexus between trade, investment, and human rights.

International trade and international investment law converge on a number of grounds.[46] From a substantive perspective, international investment law and

[41] Goodman and Jinks (n 39).

[42] D Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 121, 122.

[43] Agreement on Agriculture, Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 410.

[44] S Puig, 'The Merging of International Trade and Investment Law' (2015) 33 *Berkeley Journal of International Law* 1.

[45] S Charnovitz, 'What is International Economic Law?' (2011) 14 *Journal of International Economic Law* 1, 3–9.

[46] R P Alford, 'The Convergence of International Trade and Investment Arbitration' (2014) 12 *Santa Clara Journal of International Law* 35.

international trade law share many commonalities. Both legal fields share the general objectives of providing security and predictability to economic actors, increasing world prosperity by reducing barriers to the international flow of goods and investments and promoting (sustainable) development.[47] Moreover, there are intersections in their respective legal frameworks, as some aspects of foreign direct investment are governed by relevant WTO agreements. For example, the TRIMS Agreement prohibits trade-related investment measures, such as local content requirements, that are inconsistent with GATT Article III.[48] The TRIPS Agreement also governs trade-related aspects of intellectual property; thus, its coverage overlaps with investment treaties which include intellectual property as a type of investment.[49] In addition, Mode 3 and Mode 4 of the General Agreement on Trade in Services (GATS) address the establishment of service providers abroad. Furthermore, certain trade elements also surface in relevant investment arbitrations.[50] For example, in *Continental Casualty v Argentina*, the case arose from measures taken by the state in the wake of its economic crisis in 2001–2002. The arbitrators interpreted the US-Argentina BIT's non-precluded measures clause by drawing from WTO jurisprudence.[51] Both regimes include similar substantive provisions, including the most-favoured nation treatment.[52]

From a sociological perspective, the background and expertise of the relevant epistemic communities constitutes an informal communal element, which contributes to mutual influence and convergence between international trade law and international investment law. Investment law and arbitration have long been dominated by lawyers.[53] Meanwhile, although the GATT system used to be run by diplomats and economists, an increasing juridification has taken place.[54] Since the inception of the WTO, more and more arbitrators, WTO panellists and members of

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[47] While the preamble of the WTO Agreement expressly refers to sustainable development, preambles of investment treaties vary. Some refer to sustainable development, others to economic development. The NAFTA preamble expressly lists sustainable development among the objectives of the respective treaties. North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

[48] Agreement on Trade Related Measures Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186 (TRIMS Agreement), art 2(1).

[49] B Mercurio, 'Awakening the Sleeping Giant: Intellectual property Rights in International Investment Agreements' (2012) 15 *Journal of International Economic Law* 871.

[50] On the issue of investors *qua* traders see eg A Gourgourinis, 'Reviewing the Administration of Domestic Regulation in WTO and Investment Law: the International Minimum Standard as "One Standard to Rule them all?"' in F Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013), ch 13.

[51] *Continental Casualty Company v Argentine Republic* (ICSID Case No ARB/03/9) Award (5 September 2008).

[52] See eg N Di Mascio and J Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 *American Journal of International Law* 48, 88.

[53] On the judicialisation of investment arbitration see eg A Stone Sweet and F Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance' in W Mattli and T Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (OUP 2014) 22, 23.

[54] J H H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' Harvard Jean Monnet Working Paper 9/00, 2 available at <www.researchgate.net/publication/5015406_The_Rule_of_Lawyers_and_the_Ethos_of_Diplomats_Reflections_on_the_Internal_and_External_Legitimacy_of_WTO_Dispute_Settlement>.

the Appellate Body (AB) have some legal background.[55] Moreover, several AB members and—to a lesser extent —panellists have served as arbitrators for the International Center for the Settlement of Investment Disputes (ICSID).[56] Such informal commonality can contribute to possible convergence between international trade law and international investment law.

From a functional perspective, investment treaty arbitration and the WTO dispute settlement mechanism certainly share the same function: settling international disputes in accordance with a specific set of international economic rules, and ensuring the proper administration of justice in this area. Both foreign investment and international trade are domains in which conflict is latent between market freedom and the free flow of capital, and the state's regulatory autonomy to address public policy concerns. As is the case within WTO panels and the Appellate Body, arbitral tribunals may be asked to strike a balance between economic and non-economic concerns. These similarities explain why dozens of awards have referred to the WTO jurisprudence.[57] However, the substantive impact of the WTO law on the findings of investment treaty tribunals remains unclear, as the circumstances under which reference is made to the WTO cases are varied and relate to a range of different issues, such as the concepts of necessity and likeness, among others.

The question also remains whether a breach of WTO obligations constitutes a breach of investment treaties. There are 'measures which are plainly capable of challenge in the trade regime and which also affect the economic interests of investors and their investments'.[58] Indeed, government measures which are challenged before the WTO are increasingly also challenged before arbitral tribunals.[59] However, as Davies argued, 'this does not mean that WTO obligations are granted direct effect before investment tribunals since the compatibility of the challenged measures with trade law obligations cannot be decisive in investment law disputes'.[60] However, if a given measure has been found to be a violation of international trade law, this can help the investor's case within investment tribunals.[61] While some contend that measures that are capable of review in both regimes tend to be either compliant or non-compliant with both regimes,[62] inconsistent outcomes are nonetheless possible. Moreover, investors can use a breach of WTO law to

[55] J A Fontoura Costa, 'Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields' (2011) Oñati Socio-Legal Series Working Paper 1/4, 16 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832382>.

[56] ibid, 20.

[57] See G Marceau, V Lanovoy and A Izaguerri Vila, 'A Lighthouse in the Storm of Fragmentation' (2013) 47 *Journal of World Trade* 481, noting that more than 75 investment awards have referred to the WTO jurisprudence.

[58] A Davies, 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?' (2012) 15 *Journal of International Economic Law* 793.

[59] ibid, 794.

[60] ibid, 795.

[61] ibid.

[62] N F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 *International and Comparative Law Quarterly* 831, 844–45.

establish a breach of fair and equitable treatment which requires treatment in accordance with international law.[63]

International investment law and international trade law also present a number of notable differences. Although the current investment treaty network is multilateral in nature, due to the similarities among different treaties and dispute settlement mechanisms,[64] it is still structurally based on a myriad of international investment treaties. There is no world investment organisation charged with governing foreign investments, nor is there a 'World Investment Court'.[65] Even the proposal to establish a permanent investment court, as advanced by the European Union, was made in the context of the specific negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States. By contrast, since its inception in 1995, the World Trade Organization has emerged as the world forum for multilateral trade negotiations, and the Appellate Body has been frequently analogised to a World Trade Court.[66] The fact that the WTO 'as an organization possesses a separate legal personality under international law from WTO Member States… gives the organization the capacity to develop its own …"systemic interest" – that is independent from that of WTO Members'.[67]

At the procedural level, while *ad hoc* tribunals settle investment disputes without an appellate review by a permanent body, WTO panel reports can be appealed before the Appellate Body, which reviews the relevant legal issues and thereby ensures consistency and predictability. Moreover, foreign investors can pursue investor-state arbitration directly without any intervention of the home state, and can nominate one of the arbitrators. By contrast, access to the dispute settlement mechanism of the WTO is limited to members of the WTO. As noted by Alvarez, 'Investor-state dispute settlement was designed to avoid politicized espousal and the gunboat diplomacy by powerful states that often accompanied it, much as the WTO was intended to displace bilateral trade leverage …'.[68] While the trade regime focuses on the macro-issues of liberalising trade flows, the investment regime deals with the 'micro issues of attracting and protecting investments made by individual investors'.[69]

This is not to say that non-state actors do not play any substantive role at the WTO. On the one hand, specific industrial sectors have influenced the negotiation of covered agreements. For example, the pharmaceutical industry significantly

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[63] G Verhoosel, 'The Use of Investor–State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6(2) *Journal of International Economic Law* 493, 496.

[64] See generally S W Schill, *The Multilateralization of International Investment Law* (CUP 2009); E Chalamish, 'The Future of BITs: A De Facto Multilateral Agreement?' (2009) 34 *Brooklyn Journal of International Law* 303 (introducing the concept of multilateral bilateralism).

[65] On the idea of a standing 'World Investment Court' see M Goldhaber, 'Wanted: A World Investment Court' (2004) 3 *Transnational Dispute Management* 1.

[66] C D Ehlermann, 'Six Years on the Bench of the World Trade Court – Some Personal Experiences as Member of the Appellate Body of the WTO' (2002) 36 *Journal of World Trade* 605.

[67] D Sarooshi, 'Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?' (2014) 49(3) *Texas International Law Journal* 445, 447.

[68] J E Alvarez, 'Beware: Boundary Crossings' (2016) 17 *Journal of World Investment and Trade* 171, 217.

[69] Di Mascio and Pauwelyn (52), 53-56.

influenced the negotiations of the TRIPS Agreement.[70] On the other hand, many cases have been brought by states to protect the interests of given industrial sectors. However, at a procedural level, companies cannot enforce their rights against a foreign state at the WTO; rather, they 'depend on their home state of nationality to take up a WTO case on their behalf'.[71] The various factors which influence the choice of a WTO member to bring a case against another member state include the magnitude of the impact of the measure in question, political considerations and the lobbying efforts of the relevant industry sectors.[72]

The trade and investment regimes also offer different remedies to the aggrieved actors. In order to encourage trade liberalisation and prevent protectionism, the WTO dispute settlement mechanism enables the authorisation of trade retaliation by the injured state.[73] However, this is possible only after a state fails to withdraw or modify an offending measure within a 'reasonable period of time'.[74] The investment regime, on the other hand, provides a monetary remedy to foreign investors whose investments have been affected because of government action. Therefore, while remedies at the WTO have only a prospective and state-centric character, arbitral tribunals can award damages to foreign investors.[75]

In conclusion, despite their structural separation and various differences, the borders between international trade law and international investment law are porous. There are several reasons for juxtaposing the two systems. Firstly, international investment law and international trade law belong to the same branch of international law, namely international economic law, and as such, both fields are concerned with economic integration. Secondly, the nature of the problems that both systems encounter is similar – that is, arbitral tribunals and WTO adjudicative bodies are often required to review domestic regulation pursuing certain non-economic values against a set of obligations of a purely economic character (unlike, for example, other international courts and tribunals). Thirdly, several WTO agreements touch upon various aspects of international investment law. As such, portions of WTO law can be regarded as a component of the international investment regime. Finally, WTO jurisprudence on a number of issues is well developed when compared to other sections of international law, providing rich practical, albeit not necessarily transposable, material for comparison.

4. TRADE, INVESTMENT AND HUMAN RIGHTS IN THEORY

The following section examines the theoretical framework of the interaction between the disciplines of international trade law, international investment law, and human rights. The section opens with the premise that legal systems reflect the cultures within which they are located and thus have distinct identities.[76] It

[70] See eg S K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP 2003).

[71] Sarooshi (n 67), 462.

[72] J Kurtz, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and Its Discontents' (2009) 20 *European Journal of International Law* 749, 757.

[73] DSU (n 35), art 22.

[74] Ibid, arts 19–21.

[75] Kurtz (n 72), 759.

[76] On the institutional culture of the WTO see D Steger, 'The Culture of the WTO: Why it Needs to Change' in W J Davey and J Jackson (eds), *The Future of International Economic Law* (OUP 2008), 45–59;

nonetheless highlights that, in theory, a variety of mechanisms exist at the WTO to reconcile conflicting interests and values.

First, the preamble of the agreement establishing the WTO refers to the goal of raising standards of living and promoting sustainable development.[77] In parallel, the preamble of the TRIPS Agreement recognises 'the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives'.[78] Although preambles are not binding, they must be taken into account by adjudicators as they form part of the agreement, as restated under Article 31.2 of the Vienna Convention on the Law of Treaties (VCLT).[79] The preamble can thus contribute to clarifying the aim and objectives of a treaty, playing an important role in the teleological interpretation of the treaty.

Second, general exceptions to WTO law allow states to strike a balance between the pursuit of a given policy objective and the promotion of free trade.[80] For example, GATT Article XX provides an exception to the core GATT provisions, recognising that states can pursue valuable objectives, including the protection of public health, public morals and environmental protection.[81] However, very rarely have exceptions been successfully invoked by defendants in the adjudication of international trade disputes.[82]

Third, while the Ministerial Conference has 'no general law-making competence', it has the power to adopt authoritative interpretations,[83] amendments[84] and waivers.[85] These three different, albeit related, competences can 'open the WTO for political debates on the coordination and reconciliation of competing norms and interests'.[86] To date, the WTO has not made any *explicit* use of authoritative interpretations.[87] The only amendment to the WTO Agreements was adopted by the

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on the culture of investment governance see A K Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) *Penn State Law Review* 113, 1269–300.

[77] Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 33 ILM 1144 (WTO Agreement), preamble.

[78] Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement Establishing the World Trade Organization, Annex 1C (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement), preamble.

[79] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[80] General Agreement on Tariffs and Trade, Agreement Establishing the World Trade Organization, Annex 1A (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 (GATT), art XX.

[81] G Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 *Journal of World Trade* 87.

[82] J F Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 *Vanderbilt Journal of Transnational Law* 383.

[83] WTO Agreement (n 77), art IX(2).

[84] Ibid, art X(1).

[85] Ibid, art IX(3).

[86] I Feichtner, 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests' (2009) 20 *European Journal of International Law* 615.

[87] Some authors, however, have interpreted the Doha Declaration on the TRIPS Agreement and Public Health as one. See H Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (OUP 2007), 281.

General Council in December 2005 in order to facilitate access to medicines, which constitutes an aspect of the right to health. Pursuant to the decision, under given conditions members can export medicines produced under compulsory licences to certain eligible countries. Rather than issue amendments, the WTO more frequently grants waivers. For example, when more than 40 governments and all members of the European Union adopted the Kimberley Process Certification Scheme (KPCS) to prevent trade in the so-called blood diamonds, a WTO waiver was issued.[88] The Kimberley Process (KP) is a multi-stakeholder initiative in which states, businesses and NGOs participate, and which has been endorsed in General Assembly and Security Council resolutions.[89] The KPCS aims at barring trade in conflict diamonds – that is, diamonds used by rebel movements to finance armed conflict aimed at overthrowing legitimate governments. Under the scheme, trade between Kimberley participants is restricted to certified non-conflict diamonds only. In addition, trade between participants and non-participants is banned altogether. By preventing rebels from financing their weapons through the diamond trade, the scheme contributes to maintaining peace and security and preventing human rights violations. The waiver immunises the measures adopted under the KPCS from claims of illegality under WTO law.

Fourth, at the adjudicative level, the rules of interpretation as restated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties can also promote a holistic approach to the interpretation of conflicting provisions. The Appellate Body has clarified that 'the General Agreement is not to be read in clinical isolation from public international law'.[90]

Fifth, conflict rules under public international law can also play a role with respect to the interplay between WTO law and subsequent human rights law. For example, Pauwelyn argued that according to the *lex posterior* rule,[91] human rights law as embodied in the KPCS should prevail over WTO law.[92] Under the *lex specialis* rule, the Framework Convention on Tobacco Control would similarly prevail over the WTO agreements,[93] albeit only between countries that are parties to both treaties.[94]

Finally, institutional cooperation and coordination can moderate the effects of conflicts of norms. Human-rights-related issues are increasingly discussed at the WTO annual public forum.[95] Some have proposed including non-trade experts – for

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[88] WTO General Council, 'Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Decision of 15 May 2003' (27 May 2003) WTO Doc WT/L/518. The waiver was extended in 2006 by WTO General Council, 'Kimberly Process Certification Scheme for Rough Diamonds: Decision of 15 December 2006' (19 December 2006) WTO Doc WT/L/676.

[89] See eg UNSC Res 1459 (28 January 2003) UN Doc S/RES/1459 and UNGA Res 57/302 (30 April 2002) UN Doc A/RES/57/302.

[90] WTO Appellate Body, 'United States – Standards for Reformulated and Conventional Gasoline' (29 April 1996) WTO Doc WT/DS2/AB/R, 17.

[91] VCLT (n 79), art 30.

[92] J Pauwelyn, 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for "Conflict Diamonds"' (2003) 24 *Michigan Journal of International Law* 1177, 1193.

[93] WHO Framework Convention on Tobacco Control, WHA Res 56.1, World Health Assembly, Annex WHO Doc A56.VR/4 (adopted 21 May 2003, entered into force 27 February 2005) (2003) 42 ILM 518 (FCTC).

[94] Pauwelyn (n 92), 1202.

[95] Lamy (n 20).

example, cultural experts – in panels which adjudicate on cases in which cultural interests are at stake,[96] as panels have previously consulted, for example, with officials of the World Health Organization (WHO) on certain cases relating to public health.[97] Institutional cooperation can certainly be improved through building more explicit legal bridges between specialised international organisations, including the International Labour Organization, the United Nations Environmental Programme, the Food and Agriculture Organization, the WHO, the World Intellectual Property Organization and the World Bank. For example, human rights institutions could be granted observer status at the WTO.[98]

The key question is whether it is possible to 'embrace the human rights agenda from within the citadel of WTO law'.[99] Some scholars contend that trade obligations can be conceived as human rights entitlements of traders, stressing that international trade law emphasises economic freedom from governmental intervention.[100] As such, for these scholars, there is the possibility of balancing different interests and values at the WTO.[101] Dissenting scholars, however, warn against a merger and acquisition of human rights by trade law.[102] They stress that there is a risk that WTO panels and the AB will misunderstand human rights law, eventually leading to incoherence and inconsistency between different fields of international law. Far from being of a purely theoretical nature, this battle of ideas can have very practical implications in the adjudication of human-rights-related disputes before WTO panels and the AB. The following section explores how WTO panels and the WTO have addressed these issues in practice.

5. TRADE, INVESTMENT AND HUMAN RIGHTS IN PRACTICE

International trade 'courts' have attracted a number of disputes related to trade, investment and human rights. At the procedural level, when trade-related disputes emerge, Article 23.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) obliges members to subject the dispute exclusively to WTO bodies.[103] For example, in *US – Section 302 Trade Act*, the panel held that members 'have to have recourse to the DSU DSM to the exclusion of any other

[96] See C Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO' (2006) 9 *Journal of International Economic Law* 553, 571.

[97] Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (7 November 1990) BISD 37S/200, para 5.

[98] Lamy (n 20) also suggesting that the WTO could be granted observer status at human rights institutions.

[99] P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815.

[100] E-U Petersmann, 'Human Rights in European and Global Integration Law: Principles for Constitutionalizing the World Economy' in A von Bogdandy, P Mavroidis and Y Meny (eds), *European Integration and International Coordination: Festschrift für CD Ehlermann* (Kluwer Publishers 2002) 383, 387.

[101] E-U Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?' (2000) 37 *Common Law Market Review* 1363.

[102] Alston (n 99).

[103] DSU (n 35), art 23.1.

system'.[104] In *Mexico – Soft Drinks,* the Appellate Body clarified that the provision even implies that 'that Member is entitled to a ruling by a WTO panel'.[105] Given the magnetism of WTO panels and the AB, the key substantive issue is whether, and how, they have dealt with human rights issues.

An exploration of all relevant conflicts between trade and investment on the one hand and human rights on the other is beyond the reasonable scope of this paper. Rather, this section focuses on a selected range of trade disputes related to cultural rights. The specific clash between cultural rights and free trade epitomises the broader clash between trade and investment, and human rights. Moreover, due to their traditional neglect, but significant importance, cultural rights well deserve additional scrutiny.

Notwithstanding early case law and the formal entry of cultural rights into the human rights pantheon after the Second World War,[106] cultural rights have long been neglected, and have therefore been significantly less developed than civil, political, economic and social rights.[107] From a legal perspective, cultural rights remain difficult to define, as the concept of culture has a fluid and elusive nature and adopts different forms across time and space.[108] From a political perspective, governments have feared that cultural entitlements could determine claims of self-determination and ultimately jeopardise national unity. Furthermore, the distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other was traditionally based on the perceived characterisation of civil and political rights as entailing negative obligations on the part of the state, and economic, social and cultural rights as requiring positive duties. In recent decades, however, cultural rights have undergone a renaissance. UN treaty bodies have highlighted the indivisibility and interrelatedness of all human rights, recognising that 'without affording full guarantees for … cultural rights … the protection offered … by other rights can become practically meaningless'.[109] Moreover, some elements of cultural rights can achieve *jus cogens* status and 'preference over *pacta sunt servanda* in the hierarchy of international public policy'.[110]

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[104] WTO Panel Report, 'United States – Section 301–310 of the Trade Act of 1974' (27 January 2000) WTO Doc WT/DS152/R, DSR 2000: II, para 7.43.

[105] WTO Appellate Body, 'Mexico – Tax Measures on Soft Drinks and Other Beverages' (24 March 2006) WTO Doc WT/DS308/AB/R, para 52.

[106] See, for instance, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 22.

[107] See J Symonides, 'Cultural Rights: A Neglected Category of Human Rights' (1998) 158 *International Social Science Journal* 559.

[108] For instance, the preamble to the Universal Declaration on Cultural Diversity defines culture as 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, … [encompassing], in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'. Universal Declaration on Cultural Diversity (adopted 2 November 2001) 41 ILM 57, preamble.

[109] UN Economic and Social Council, 'Commission on Human Rights: Final Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (D Türk), the Realization of Economic, Social and Cultural Rights' (3 July 1992) UN Doc E/CN.4/Sub.2/1992/16.

[110] B M Cremades and D J Cairns, 'The Brave New World of Global Arbitration' (2002) 3 *Journal of World Investment* 173, 206.

This section therefore examines what role, if any, cultural rights play at the WTO. Cultural sovereignty is a traditional component of state sovereignty.[111] Thus, if a state adopts measures, for example, to protect the cultural entitlements of its polity, it is important to understand what could happen if they restrict trade. Several WTO cases have presented cultural aspects. This section examines two types of disputes: (1) cultural disputes in a strict sense; and (2) cultural disputes in a broad sense.

5.1 Cultural Disputes in a Strict Sense

The first category of disputes – cultural disputes in a strict sense – concerns goods and services which have both economic and cultural value, such as books and audio-visual products. For example, in 1998, the EC requested consultations with Canada about specific 'measures affecting film distribution services',[112] as certain Canadian guidelines governing foreign investment restricted foreign investors in film distribution. The EC requested consultations when Polygram, a European company, was affected by the given measures. However, no panel was established, because Polygram was eventually sold to a Canadian company, Seagram.[113]

In the *Canada – Periodicals* case, Canada restricted the publication of split-run magazines marketed in Canada. A split-run magazine has substantially the same content as a foreign publication, but contains advertisements aimed at the Canadian market. The Canadian government argued that larger US publications which commercialised split-run Canadian editions threatened to supplant Canadian culture unless Canada adopted import restrictions. Canada therefore prohibited the import of split-run periodicals that contained advertisements directed at the Canadian market which did not appear in the home country edition of that periodical. In 1993, a US corporation found a way around the import ban, publishing a Canadian edition of *Sports Illustrated* by electronically transmitting the editorial content from its US edition to a press in Canada. In response, the parliament imposed a tax on split-run periodicals equal to 80% of the value of all the advertising revenue earned by the edition. The tax made it unprofitable to publish a split-run edition in Canada. The US subsequently challenged the Canadian measure before a WTO panel, arguing that the Canadian ban violated the prohibition on import bans under GATT Article XI and that the tax violated the national treatment provision under GATT Article III.

Canada responded *first* that the dispute concerned access to advertising services and should be subject to the General Agreement on Trade in Services (GATS). Under GATS, Canada did not make any commitment to grant national treatment to advertising services. *Secondly*, Canada argued that even if the GATT did apply, split-run magazines are not like Canadian magazines, as their intellectual content makes them different. As one commentator articulated, 'at its heart, this disagreement mirrored an underlying value difference between the United States and Canada; in the view of the United States, there was no essential difference between

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[111] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States*) (Judgment) [1986] ICJ Rep 14, paras 202–209 (holding that 'each state is permitted, by the principle of state sovereignty, to decide freely for example the choice of political, economic, social and cultural system, and formulation of foreign policy').

[112] Canada – Measures Affecting Film Distribution Services: Request for Consultations by the European Communities (22 January 1998) BISD S/L/53.

[113] T Voon, *Cultural Products and the World Trade Organization* (CUP 2007) 27.

cultural commodities like magazines or books and other commodities like automotive parts'.[114] Meanwhile, in the view of Canada, cultural products had a specificity that distinguished them from ordinary items of trade.

The panel ultimately found that both GATT and GATS were applicable and accepted the US view that split-run periodicals were like Canadian magazines, deeming that the Canadian measures were inconsistent with GATT. The panel incidentally dismissed the cultural arguments put forward by Canada, holding that 'the ability of a Member to take measures to protect its cultural identity was not an issue in the present case'.[115] Cultural arguments were not discussed autonomously, but were 'encoded in the determination of what is a like, directly competitive or substitutable product' and 'translated … into a more technocratic argument about the common characteristics of different products'.[116] The panel highlighted the following:

{quotation}despite the Canadian claim that the purpose of the legislation is to promote publications of original Canadian content, this definition essentially relies on factors external to the Canadian market – whether the same editorial content is included in a foreign edition and whether the periodical carries different advertisements in foreign editions.[117]{/quotation}

The Appellate Body, however, voided the panel's finding that split-run periodicals and domestic periodicals were like products; rather it deemed them to be directly competitive or substitutable products. Nonetheless, the AB concurred with the panel that the tax afforded protection to domestic products in violation of GATT Article III.[118]

In *China – Publications and Audiovisual Entertainment Products*, the US alleged that various Chinese restrictions on the importation and distribution of US films, sound recordings and publications violated provisions of GATT, GATS and the Accession Protocol. The challenged measures included prohibiting foreign-owned enterprises from importing the relevant products, requiring publication import entities to be fully owned and subject to an approval system pursuant to a state plan and granting trading rights in a discretionary manner. China attempted to justify diverse measures in the media domain invoking, *inter alia*, the UNESCO Convention on Cultural Diversity (CCD)[119] and the related UNESCO Declaration on Cultural Diversity. However, the attempt to use the CCD as a shield was ultimately unsuccessful. The panel held that restrictions on the distribution of publications violated Articles XVI and XVII of GATS and the national treatment requirement

[114] J R Paul, 'Cultural Resistance to Global Governance' (2000–2001) 22 *Michigan Journal of International Law* 1, 48.

[115] WTO Panel Report, 'Canada – Certain Measures Concerning Periodicals' (15 March1997) WTO Doc WT/DS31/R, para 5.45.

[116] Paul (n 114), 51.

[117] WTO Panel Report, Canada – Periodicals (n 115), para 5.24.

[118] WTO Appellate Body Report, 'Canada – Certain Measures Concerning Periodicals' (30 June 1997) UN Doc WT/DS31/AB/R.

[119] Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) in UNESCO, Records of the General Conference, 33rd session, Paris (3–21 October 2005) vol I, 83.

under GATT, and found a number of Chinese measures inconsistent with the Accession Protocol. The panel's report was then upheld by the Appellate Body.[120]

China also invoked Article XX(a) GATT, which embodies the public morals exception, arguing that '… reading materials and finished audiovisual products are so-called cultural goods, i.e. goods with cultural content … with a potentially serious negative impact on public morals'.[121] China explained that 'as vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours'.[122] In this sense, China made express reference to Article 8 of the Universal Declaration on Cultural Diversity, which states that cultural goods 'must not be treated as mere commodities or consumer goods'.[123] Thus, China argued that it was legitimate to adopt a content review mechanism in order to prevent the dissemination of cultural goods that may negatively affect public morals,[124] or 'Chinese culture and traditional value'.[125]

The panel noted China's reference to the Declaration on Cultural Diversity and stated that as China had not invoked the Declaration as a defence to its breaches of trading rights commitments, but had referred to it 'as support for the general proposition that the importation of products of the type at issue in this case could, depending on their content have a negative impact on public morals in China', 'it had no difficulty in accepting this general proposition'.[126] The panel thus admitted the applicability of Article XX(a). However, the panel also found that because there was at least one other reasonably available alternative, China had not demonstrated that the relevant provisions were 'necessary'.[127] This holding was confirmed by the AB.

5.2 Cultural Disputes in a Broad Sense

The second category of disputes – cultural disputes in a broad sense – displays a cultural character because of the way a given product is produced or consumed, or the way it affects local identity and traditional lifestyle. For example, in an early case, *Japan – Measures on Imports of Leather*,[128] Japan had established an import licensing scheme to limit the imports of certain leather goods in order to protect a cultural minority, the Dowa. Japan explained that a segment of Japanese society had suffered discrimination for centuries due to social exclusion that originated during the

[120] WTO Appellate Body, 'China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products' (21 December 2009) WTO Doc WT/DS363/AB/R, para 25.

[121] WTO Panel, 'China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products' (12 August 2009) WTO Doc WT/DS363/R, para 7.751.

[122] Ibid.

[123] Ibid, para 7.751.

[124] Ibid, para 7.752.

[125] Ibid, para 7.753.

[126] Ibid, fn 538.

[127] Ibid, para 7.913.

[128] Japan – Measures on Imports of Leather (15 May 1984) BISD 31S, 94.

Japanese feudal period.[129] Although the people of Dowa districts had already been emancipated from institutional discrimination in the nineteenth century, 'this emancipation was only formal as in actual social life, these people continued to lead a destitute life under miserable conditions not too different from those in the feudal or pre-modern days'.[130] Moreover, as these people were mainly employed in the leather industry,[131] Japan added that the measures at stake 'constituted more than a minority problem as the phenomenon was unique and relating to subsistence and survival'.[132]

The GATT panel noted that Japan had not invoked any provision of GATT to justify the maintenance of the quota, and therefore concluded that the import licensing scheme constituted an import quota, which was in violation of GATT Article XI. It also held that:

{quotation}the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter 'in the light of the relevant GATT provisions' and these provisions did not provide such a justification for import restrictions.[133]{/quotation}

More recently, the *EC – Seal Products* case dealt with indigenous hunting practices which are deemed essential to indigenous peoples' cultural and subsistence rights under human rights law. European citizens perceive seal hunting as cruel because of the means through which the seals are hunted. The EU therefore adopted a comprehensive regime governing seal products.[134] The EU seal regime prohibits the importation and sale in the EU of any seal product except: (a) those derived from hunting conducted in a traditional fashion by Inuit and other indigenous communities and which contribute to their subsistence;[135] and (b) those that are by-products of a hunt regulated by national law and with the sole purpose of the sustainable management of marine resources.[136] In addition, seal products for personal use may be imported but may not be placed on the market.[137] The EU allowed the exception for indigenous hunting because of the international law commitments of its member states and of the United Nations Declaration on the Rights of Indigenous Peoples.[138]

In response to the EU seal regime, Canada and Norway both brought claims against the EU before the WTO Dispute Settlement Body, arguing, *inter alia*, that the indigenous communities condition (IC condition) violated the non-discrimination

[129] Ibid, para 21(i).

[130] Ibid, para 21(iv).

[131] Ibid, para 21(vi).

[132] Ibid, para 22.

[133] Ibid, para 44.

[134] Council Regulation (EC) 1007/2009 of 16 September 2009 on Trade in Seal Products [2009] OJ (L286) 36.

[135] Ibid, art 3(1).

[136] Ibid, art 3(2)(b).

[137] Ibid, art 3(2)(a).

[138] Ibid, pt 14.

obligation under Article I:1 and III:4 of GATT 1994.[139] According to Canada and Norway, such a condition accords seal products from Canada and Norway less favourable treatment than that accorded to like seal products of domestic origin, primarily from Sweden and Finland, as well as those of other foreign origin, in particular from Greenland.[140] In fact, the majority of seals hunted in Canada and Norway would not qualify under the exceptions, 'while most if not all of Greenlandic seal products are expected to conform to the requirements under the IC exception …'.[141] Therefore, according to the complainants, the regime would *de facto* discriminate against Canadian and Norwegian imports of seal products,[142] as it would restrict virtually all trade in seal products from Canada and Norway within the EU.[143] Moreover, the complainants argued that while the EU measures did not prevent products derived from seals killed inhumanely from being sold on the EU market,[144] they could prevent products derived from seals killed humanely by commercial hunters from being placed on the market.[145]

In this case, the panel found that the seal products produced by indigenous peoples and those not hunted by indigenous peoples were like products.[146] The panel acknowledged the existence of a number of international law instruments, including the United Nations Declaration on the Rights of Indigenous Peoples,[147] and also referred to a number of WTO countries adopting analogous Inuit exceptions.[148] Despite the reference to these instruments as 'factual evidence',[149] however, the panel concluded that the design and application of the IC measure was not even-handed, because the IC exception was available *de facto* to Greenland.[150] Therefore, the Panel held, *inter alia*, that the exception provided for indigenous communities under the EU seal regime accorded more favourable treatment to seal products produced by indigenous communities than that accorded to like domestic and foreign products.[151] The panel concluded that the same exception, *inter alia*, violated Articles I:1 and III:4 of GATT 1994 because an advantage granted by the EU to seal products derived from hunts traditionally conducted by the Inuit was not accorded immediately and unconditionally to like products originating in Canada.[152]

Finally, the panel examined the question as to whether the seal products' regulation was justified under any of the exceptions contained in Article XX of

[139] GATT.

[140] WTO Panel, 'European Communities – Measures Prohibiting the Importation and Marketing of Seal Products' (25 November 2013) UN Doc WT/DS400/R and WT/DS401/R, para 7.2.

[141] Ibid, paras 7.161 and 7.164.

[142] Ibid, para 7.141.

[143] Ibid, para 7.46.

[144] Ibid, para 7.4.

[145] Ibid, para 7.226.

[146] Ibid, para 7.136.

[147] Ibid, para 7.292.

[148] Ibid, para 7.294.

[149] Ibid, fn 475.

[150] Ibid, para 7.317

[151] Ibid, para 8(2).

[152] Ibid, para 8(3)(a).

GATT 1994, and in particular in Article XX(a) on public morals. The panel noted that 'animal welfare is an issue of ethical or moral nature in the European Union'[153] and therefore found that the EU seal regime was necessary to protect public morals. Nonetheless, it determined that the regime had a discriminatory impact that could not be justified under the *chapeau* of Article XX(a) of GATT 1994.[154]

Immediately after the release of the reports, Canada, Norway and the EU each appealed certain legal interpretations developed in the panel reports. The Appellate Body *inter alia* confirmed that the EU seal regime *de facto* discriminated like products under Articles I:1 (Most Favoured Nation) and III:4 (National Treatment) of GATT 1994. The AB also confirmed that the ban on seal products can be justified on moral grounds under GATT Article XX(a). However, it held that the regime did not meet the requirements of the *chapeau* of Article XX of GATT 1994, criticising the manner in which the exception for Inuit hunts had been designed and implemented.[155] *Inter alia*, the AB noted that the IC exception contained no anti-circumvention clause,[156] and that 'seal products derived from … commercial hunts could potentially enter the EU market under the IC exception'.[157] The AB ultimately concluded that the EU seal regime was not justified under Article XX(a) of GATT 1994.[158] In short, the panel and the AB found flaws in the specific implementation of the ban's exception for indigenous peoples. Therefore, the EU will have to refine the seal regime to demonstrate good faith, insert anti-circumvention rules and thus comply with the *chapeau* requirements.

In conclusion, GATT/WTO panels and the Appellate Body have confronted the issue of culture versus trade at several points, and 'have consistently confirmed that culture does not have any special status in the GATT/WTO regime'.[159] Both panels and the AB tend 'not to radically alter the "delicate and carefully negotiated balance" of the WTO Agreements', but rather 'follow the conventional analysis' and 'concentrate on the core trade-related questions that fall within the DSB's authority'.[160]

6. CONCLUDING REMARKS

International trade, foreign direct investment and human rights increasingly intersect and interact. In theory, a number of mechanisms are available within the WTO to promote mutual supportiveness between different fields of international law. In

[153] Ibid, para 7.409.

[154] Ibid, para 7.651.

[155] WTO Appellate Body, 'European Communities – Measures Prohibiting the Importation and Marketing of Seal Products' (22 May 2014) WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, para 5.339.

[156] Ibid, para 5.327.

[157] Ibid, para 5.328.

[158] Ibid, para 6.1(d)(iii).

[159] S-Y Peng, 'International Trade in "Cultural Products" – UNESCO's Commitment to Promoting Cultural Diversity and its Relations with the WTO' (2008) 11 *International Trade and Business Law Review* 218, 221.

[160] M Burri Nenova, 'Trade Versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition' (2008) 12 *Journal of International Economic Law* 17, 28.

practice, however, much still needs to be done to ensure better coherence between the different fields of law.

In several disputes previously brought before the WTO, the arguments in support of free trade and foreign direct investment have addressed cultural claims. These cases demonstrate that there may be both synergy and tension between economic interests and the protection of cultural rights. For example, the seal products dispute reveals that free trade can enhance indigenous peoples' cultural practices, and that trade can be a mechanism of economic subsistence and cultural empowerment. However, there is friction between the non-discrimination principle, as applied in international trade law, and positive measures, that is, those exceptions or measures adopted by states to protect specific sectors of society.

Like other specialised international courts and tribunals, WTO fora may have a built-in bias (*Missionsbewusstsein*).[161] It is evident that 'an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favour free trade'.[162] WTO panels and the AB are tribunals of limited jurisdiction and cannot adjudicate on eventual infringements of cultural entitlements. As such, WTO panels and the AB do not decide whether cultural rights are protected by a given state measure; rather, their prime task is 'to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law …'.[163]

The existence of highly sophisticated dispute settlement mechanisms in international economic law risks eclipsing the values of other regimes, such as human rights law. The cases outlined in this chapter epitomise the notion that economic globalisation can affect human rights, and that the WTO fora may not be the most appropriate courts for disputes presenting cultural issues.

The relationship between international trade law and other branches of international law, including human rights law, should be addressed in terms of coordination between interrelated systems of public international law. WTO law is a public international law sub-system, endowed with relative autonomy, but still open to the influence of international law. It is not a question of direct application of non-WTO law;[164] rather international trade 'courts' are called on to incidentally evaluate the regulatory measures adopted by states to determine whether such measures can be justified even if *prima facie* they appear to be inconsistent with provisions of international economic law.

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[161] Y Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *European Journal of International Law* 73, 81.

[162] See J P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333.

[163] DSU (n 35), art 3(2).

[164] See P Picone and A Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio* (CEDAM 2002), 633.