Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Reality

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1. Introduction

To the uninitiated, international law presents a number of perplexities. Not the least among them is its fragmented character. The bulk of international law stems from bilateral or multilateral treaties between states covering a vast variety of different fields. A hierarchy between these norms, that could create some consistency, is largely absent.¹ So is a centralized court system enforcing international norms: quite to the contrary each treaty can provide for its own enforcement system. Such systems commonly are endowed with jurisdiction only over the system they have been set up to enforce and at times are only allowed to apply the rules of that system.² This further compounds the differentiation of international law into separate fields.³

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ and the World Trade Organization (WTO) Agreements⁵ are instances of this fragmented

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¹ The limited instances of hierarchy in international law are Art. 103 of the Charter of the United Nations and the doctrine of ius cogens. See ILC, Fragmentation of International Law, UN Doc. A/CN.4/L.682 of 13 April 2006. Despite the evolution of international law towards a more complex, constitutional order protecting community interests the bulk of international law continues to consist of non-hierarchical rules created in a decentralized manner. See e.g. A. Paulus, Die internationale Gemeinschaft im Völkerrecht (München: Beck 2001); B. Simma, “From Bilateralism to Community Interest in International Law”, 250 RdC 221 (1994); C. Tomuschat, “Obligations Arising for States without or against their Will”, 241 RdC 199 (1993).

² For two different views on the proliferation of international tribunals see N. Matz-Lück, ”Promoting the Unity of International Law”, in D. König et al. (eds), International Law Today, 99 (Heidelberg: Springer 2008) and H. Hestermeyer, “Where Unity Is at Risk”, ibid., 123.

³ This structural observation also belies the concept of a constitutionalization of international law. See C Walter, “Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law”, 44 GYIL 170,189 (2001).

⁴ 993 UNTS 3.

⁵ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (Cambridge: CUP 1999).
system. The former, a treaty with currently 160 Member States, relies for its enforcement on a system of naming and shaming violators. The WTO, an international organization with its roots in the 1947 General Agreement on Tariffs and Trade (GATT) and with 153 members in January 2012, boasts a highly ambitious and successful dispute settlement mechanism for states, with proceedings that can ultimately allow trade retaliation for violations of the WTO Agreements. As pointed out by Hans Morten Hauge elsewhere in this volume, the WTO Agreements do not contain explicit references to human rights, nor does the ICESCR make references to international trade law. The two regimes thus seemingly live entirely separate lives. Accordingly, for much of their history the two regimes existed in blissful ignorance of each other and experts of one of the regimes rarely became involved in the other.

The fact that the norms of the two regimes do not refer to each other does not imply, however, that in any given situation only one of the two regimes applies. Reality simply cannot be compartmentalized the way that normative regimes can. States in that situation, too, must comply with all of their obligations under international law – from both regimes. The WTO covers such diverse fields as trade in goods and services, agriculture, sanitary standards, technical regulations and intellectual property, imposing e.g. non-discrimination obligations on members. Such a broad

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7 The Optional Protocol providing for communications to the Committee on Economic, Social and Cultural Rights falls, at the time of this writing, still five ratifications short of coming into force.
10 Despite the impact of the UN system on both – see article 55 of the UN Charter.
11 Martti Koskenniemi once stated that “international law comes to us in separate boxes such as ‘trade law’ and ‘environmental law’ that may have different principles and objectives that do not apply across the boundaries between such boxes”. In reality though, as Frank Garcia wrote, “[t]here is no such thing as a pure trade issue.” M. Koskenniemi, International Law: Between Fragmentation and Constitutionalism, Canberra, 27 November 2006, available at http://www.helsinki.fi/eci/Publications/Koskenniemi/ MCanberra-06c.pdf. F. J. Garcia, Trade, Inequality and Justice, 212 (Ardley: Transnational Publishers 2003).
regime on economic affairs by necessity affects many other legal regimes. The human rights regime is one of them. Examples of factual situation in which both regimes apply abound: Robert Howse and Ruti Teitel in their study on the WTO and the ICESCR cite, by way of example, impacts of WTO rules on the rights to work, health and food. Where both the ICESCR and WTO law apply to a factual situation, state parties to both systems must take measures that comply with both systems.

Scholars and practitioners discovered the relationship of the WTO and human rights in the second half of the 1990s. The initial impulse came from the human rights community, which did not always hold the WTO in high esteem. Thus, a preliminary report for the Sub-Commission on the Promotion and Protection of Human Rights declared the WTO to be a “veritable nightmare” for certain sectors of humanity, particularly the developing countries of the South and some scholars charged the WTO with putting markets ahead of human rights. By now, however, a rich and much more nuanced body of literature has developed, throwing light on

14 Until fairly recently drafters of broad economic agreements commonly did not think that such agreements could interact with human rights. The EU’s slow path towards human rights protection stands as an example of how such awareness develops. See e.g. P. Alston (ed.), The EU and Human Rights (Oxford: OUP 1999); D. Ehlers (ed.), Europäische Grundrechte und Grundfreiheiten (Berlin: De Gruyter 3rd ed. 2009).
the relationship between the WTO and human rights from such diverse perspectives as international law, economics, philosophy, political science and sociology. It attests to a complex relationship between the two regimes, in which WTO rules at times further human rights interests, at times conflict with them. In the latter case, WTO provisions such as article XX(a) of the GATT or article 2.2 of the TBT Agreement, which permits technical regulations that are not more trade-restrictive than necessary to “fulfil a legitimate objective”, can and often do provide states the possibility to protect human rights interests without running afoul of WTO obligations. WTO Members may also waive WTO obligations under article IX:3 of the WTO Agreement to allow for more flexibility as happened in the case of pharmaceutical patents, where a waiver allows countries without manufacturing capacity to benefit from compulsory licenses – even though it is arguable to what extent that waiver actually is effective in practice.

The normative relationship between WTO Agreements and ICESCR, complex though it is, constitutes only part of the story of the interplay of the two international regimes. The WTO is also an international organization, with both numerous organs and a highly effective dispute settlement system that can, unlike the enforcement system of the ICESCR, authorize trade retaliation. The strength of the WTO regime raises a haunting specter for human rights: a country choosing which obligation to follow may, irrespective of the normative relationship between the two regimes, choose to follow WTO law, because a failure to implement WTO obligations entails

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21 The scope of “legitimate objective” is broad enough to include human rights. The Appellate Body so far has not excluded any objectives. The WTO member challenging a regulation has the burden to prove that the objective is not legitimate. G. Marceau, “Trade and Labour”, in D. Bethlehem et al. (eds), International Trade Law, 554-557 (Oxford: OUP, 2009). Many questions relating to the TBT Agreement still await an answer. Three recent panel reports have raised hopes in the trade community that answers by the Appellate Body may be forthcoming soon. See H. Nottage and A. Sánchez, “Navigating Unchartered Waters: A Review of US – Tuna II”, 7 Global Trade and Customs Journal 59 (2012). US – Tuna II, WT/DS381/R; US – COOL, WT/DS384/R; US – Clove Cigarettes, WT/DS406/R.
22 Hans Morten Hauge discusses some of these exceptions in more depth in his contribution.
more severe consequences than a failure to properly implement the ICESCR. I have referred to this phenomenon elsewhere as a “factual hierarchy” of regimes.26

This phenomenon shifts the focus of our analysis from the normative question of how the ICESCR relates to the WTO Agreements under general international law to the question of what role the ICESCR plays within the WTO as an international organization. Is the WTO bound by the ICESCR? Can the Covenant be applied in WTO dispute settlement, allowing states to justify violations of WTO law with their quest to implement obligations under the Covenant? Both of these questions have been much discussed in legal scholarship, a discussion that will be summarized in the following two sections. It serves as background for the issue covered in the following section, namely the extent to which human rights arguments are actually made within the WTO’s organs. This empirical question, of obvious importance for describing the reality of the relationship between the two regimes, has been neglected so far. The WTO’s documents database, however, provides scholars with ample material to gage the real impact of the ICESCR on WTO bodies. The article concludes with an analysis of the findings.

2. Human Rights Obligations of the WTO?

Two normative questions need to be answered to understand the legal background for analyzing the empirical impact of the ICESCR within debates in the WTO. The first of these is whether the WTO as an international organization is bound by the Covenant.

At first sight the question might appear odd: 129 of the Members of the WTO – 84% of the membership – have ratified the ICESCR, five more have signed it, but not ratified.27 It would be detrimental to international law if states could escape their human rights obligations simply by setting up an international organization and conducting their business through the organization. Article 61 of the International Law Commission (ILC)’s Draft Articles on the Responsibility of International Organizations reflects this consideration.28

A. Obligations of States in the WTO

27 Conversely, 81% of the state parties to the ICESCR are WTO Members, 16% have observer status. Note that some WTO Members, such as Hong Kong, cannot ratify the ICESCR as they are not states.
28 Yearbook of the ILC, 2011, vol. II, Part Two. Art. 61(1) of the ILC Articles reads: “A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.”
Hence it comes as no surprise that under international law states remain bound by their obligations when founding an international organization, delegating powers to that organization or acting within it. To what extent they are also responsible for measures undertaken to implement obligations imposed by the organization has been the subject of much discussion. Legal rules and practice allow for diverging arguments. The measures could be attributed to the organization to the exclusion of the state, an approach taken (erroneously as to the standards of attribution) in the Behrami case of the European Court of Human Rights (ECHR) involving acts of states undertaken under KFOR and UNMIK missions. Even in that case member states of the organization can still be responsible for the measures under articles 58-62 of the ILC’s Draft Articles on the Responsibility of International Organizations. Responsibility would, e.g., arise under article 61(1) if the state circumvented its obligations by causing the organization to take the measures in question, taking advantage of the fact that the organization has competence in relation to the subject-matter.

In many cases, however, the measures will also be attributable to the state, which is bound by and has to comply with both the obligations imposed by the international organization it founded and its other obligations under international

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31 Articles 6-9 of the ILC’s Draft Articles on the Responsibility of International Organizations govern attribution to an international organization. However, they do not answer the question whether this attribution is exclusive. According to the ILC’s commentary on the Draft Articles, the question of the attribution to states remains subject to the ILC’s Articles on the Responsibility of States. Draft Articles on the Responsibility of International Organizations, with Commentaries, Yearbook of the ILC, 2011, vol. II, Part Two, Part Five, para. 2.

32 The standards of attribution are contained in articles 4-11 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the ILC, 2001 vol. II, Part Two.
law. As full scrutiny of state action under its international obligations even where that state action is taken to comply with obligations imposed by an international organization can complicate international cooperation, the ECHR allows states to justify acts taken in compliance with obligations stemming from the international organization if that organization offers an equivalent substantive and procedural protection of human rights to the one granted in the European Convention. In the *Bosphorus* case the ECHR held:

“The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organization in order to pursue cooperation in certain fields of activity. ... On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. ... In reconciling both these positions and thereby establishing the extent to which a State’s action can be justified by its compliance with obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty, the Court has recognized that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention ... In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.”

Following these principles and transposing them to the ICESCR, action of state parties of the ICESCR to implement WTO obligations does not benefit from the presumption established by the ECHR in *Bosphorus*. Any attempt to justify a breach of the ICESCR with obligations under the WTO Agreements would have to fail, because the WTO does not possess any mechanism to protect rights flowing from the ICESCR.

**B. Obligations of the WTO itself**

The fact that state parties to the ICESCR remain bound by the Covenant when acting within the WTO does not imply, however, that the WTO *itself* is bound by the Covenant.

It has been argued that when states bound by a treaty set up an international organization, the treaty also binds the organization. Logically this result is supposed to flow either from the principle *nemo plus iuris transferre potest quam ipse habet*,

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33 The ECHR had to deal with this issue in several cases. See L. Bartels, *WTO Member Responsibility for Acts Implementing Obligations of Organizations Established by Regional Trade Agreements*, BIICL presentation 20 May 2010 (on file with the author).

i.e. states have limited their legal competences by ratifying a treaty and when they transfer competences they can only do so within those limits,\(^{35}\) or from an analogy to state succession.\(^{36}\) The argument can claim some support in the case-law of the European Union (EU), which applies the so-called “doctrine of functional succession” to treaties concluded by all Member States prior to the establishment of the European Communities / EU\(^{37}\) - most prominently the GATT and the UN Charter.\(^{38}\)

However, this position fails to take into account that international organizations themselves are subjects of international law with their own rights and obligations and their own capacity to enter into treaties,\(^{39}\) at least for the area of law in which they possess competences according to their founding documents.\(^{40}\) States have a duty to set up international organizations so that these do not violate States’ obligations.\(^{41}\) However, the organizations are not automatically bound by all obligations incumbent on the states that set them up, but by their own obligations, namely – according to the ICJ – “any obligations incumbent upon them under general rules of international law, under their constitutions or under international


\(^{36}\) H. G. Schermers and N. M. Blokker, \textit{International Institutional Law}, 996 (Leiden: Martinus Nijhoff 5\textsuperscript{th} ed. 2011) (also arguing with the weakness of legal systems of international organizations, the reluctance to accept international organizations as parties to treaties, the fact that international organizations have no reason to claim a right to abstain from treaties).


\(^{39}\) See also Art. 6 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not in force); in-depth: ILC, \textit{First report on the question of treaties concluded between States and international organizations or between two or more international organizations by Mr. Paul Reuter}, Special Rapporteur, Yearbook ILC 1972, vol. II, 171, 178-182.


\(^{41}\) The EU case-law can be read as an approach to fulfill this obligation. Treaties can also explicitly provide for solutions to possible conflicts, see article XXI (c) of the GATT.
agreements to which they are parties”. The separate legal personality and obligations of international organizations raise numerous complex issues, such as the applicability of international humanitarian law to UN peacekeeping missions or of human rights law to UN sanctions. That is, however, the natural consequence of endowing international organizations with their own personality. This, too, has been acknowledged by the ECHR that held that even an international organization that was granted sovereign powers by contracting parties of the European Convention on Human Rights is not responsible for a violation of the Convention as long as it is not a contracting party itself. The WTO is thus not bound by the ICESCR, as it is not a contracting party of the Covenant.

C. Obligations under General International Law

The fact that the WTO is not bound by the ICESCR does not imply, however, that the WTO can ignore the document in its entirety. As subjects of international law international organizations are bound by general international law. To the extent that ICESCR obligations constitute general principles or customary international

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law, they thus also bind the WTO. The WTO Secretariat has acknowledged the WTO’s human rights obligations under customary international law.\(^\text{47}\)

This statement comes with a caveat, however: most international law is dispositive and states are free to contract out of it.\(^\text{48}\) The exceptions to this rule are norms *iuris cogentis*.\(^\text{49}\) States could thus, by ratifying the WTO Agreements, have implicitly contracted out of any human rights standard under general international law that contradicts WTO law to the extent that that human rights standard is not *iuris cogentis*.

**D. Conclusion**

The analysis has shown that it is the state parties to the ICESCR that are bound by the Covenant, also when acting within the ambit of the WTO, not the WTO itself. The WTO is, however, subject to general international law to the extent Members have not contracted out of it.

**3. The ICESCR in WTO Dispute Settlement**

The second normative question that awaits an answer is to what extent the WTO dispute settlement system is empowered to apply the ICESCR. Logically this question divides into two parts: jurisdiction and applicable law. Jurisdiction refers to the types of claims that a tribunal can entertain; applicable law to the law the tribunal may apply.\(^\text{50}\) WTO dispute settlement organs do not have jurisdiction over ICESCR claims. According to this contribution, neither is the ICESCR part of the applicable law. However, the Covenant can be relied on in the interpretation of WTO law, even though this has not happened in practice.

**A. Jurisdiction**

The WTO dispute settlement system has been set up, according to article 1.1 of the Dispute Settlement Understanding (DSU), to rule on “disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding”. Appendix 1 lists the so-called “covered agreements”, namely the WTO Agreements except for the Trade Policy Review Mechanism and the plurilateral agreements unless otherwise notified to the Dispute Settlement Body.

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\(^\text{50}\) Note that not all authors use the terminology in an identical manner.
Settlement Body. The consultation and dispute settlement provisions of those agreements principally provide for complaints relating to violations of the covered agreements. The so-called “non-violation complaints” also provided for, granting the possibility to use dispute settlement procedures if benefits accruing under the agreements are nullified or impaired even without a violation, were barely used during the days of the GATT 1947 and are even more rarely invoked (let alone successfully) these days. Even if that were otherwise, it is highly unlikely that a violation of the ICESCR could be argued as a non-violation claim. WTO Dispute Settlement thus can only rule on claims of violations of WTO Agreements, not of violations of the ICESCR.

Joost Pauwelyn has argued, however, that the scope of jurisdiction of WTO dispute settlement can be enlarged ad hoc to include violations of non-WTO law if the parties to a case so agree. This seems erroneous: article 1 does not allow for jurisdictional exceptions. Such exceptions are also politically undesirable: the WTO is a specialized dispute settlement procedure with expertise in a particular

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52 See articles XXII, XXIII of the GATT (referred to (at times with variations) in article 19 of the Agreement on Agriculture, article 11 of the SPS Agreement, article 14 of the TBT Agreement, article 8 of the TRIMs Agreement, articles 7, 8 of the Agreement on Preshipment Inspection, articles 7, 8 of the Agreement on Rules of Origin, article 7 of the Agreement on Import Licensing Procedures, article 30 of the Agreement on Subsidies and Countervailing Measures, article 14 of the Agreement on Safeguards, article 64 of the TRIPS Agreement, article 8.8 of the Agreement on Trade in Civil Aircraft) as well as article 17.1 of the Anti-Dumping Agreement, article 19.1 of the Customs Valuation Agreement, articles XXII, XXIII of the GATS and article XXII of the Agreement on Government Procurement.
55 This includes non-WTO provisions incorporated by the covered agreements.
56 Allegedly this can be done by agreeing on non-standard terms of reference under article 7.3 of the DSU. J. Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?”, 95 AJIL 535, 554 (2001). See also Canada – European Communities – Article XXVIII Rights, DS12/R, which was decided before the entry into force of the DSU.
regime of international law. It would be inappropriate to use the procedure outside of that expertise.

The latter argument also disfavors an enlargement of the scope of WTO dispute settlement *de lege ferenda*. The appeal of such an enlargement is obvious: enforcing the ICESCR via the strong WTO dispute settlement procedure could give a boost to compliance with human rights law. However, such a change is both practically unlikely and conceptually undesirable. Countries did not agree to a court enforcing the ICESCR. There is no reason to assume that they would look upon the enforcement of the Covenant in WTO dispute settlement in a different light.58 Conceptually, the international trade culture is a culture of trade-offs, anathema to human rights law.

B. Applicable Law

The limitation of jurisdiction to WTO law does not imply, however, that WTO dispute settlement organs cannot apply non-WTO law. Parties are free to limit the law that a tribunal may apply with the exception of *ius cogens* that remains applicable under any circumstances. The question of the law a tribunal can apply is distinct from that of its jurisdiction59 and has to be tackled only if the latter has been answered in the affirmative.60

The notion of “applying” a norm also needs to be distinguished from using a norm for purposes of interpreting a provision of WTO law. If a norm is part of the applicable law, a state can rely on it to defend the measures it takes. Whether the defense is successful is a matter of resolving the conflict between the provision allegedly breached and the norm relied on in defense. Relevant rules for resolving such conflicts are, e.g., contained in article 30 of the Vienna Convention on the Law of Treaties or such rules as *lex superior, lex posterior or lex specialis*. If a norm can

59 It can also be the subject of a different provision. See e.g. articles 36, 38 of the ICJ Statute, with commentaries by C. Tomuschat and A. Pellet in A. Zimmermann et al. (eds), *The Statute of the International Court of Justice* (Oxford: OUP 2006); article 34.1 of the Protocolo de Olivos para la Solución de Controversias en el MERCOSUR, but also *Laudo No 1/2005*, para. 9.
61 None of these rules are particularly appropriate for resolving inter-systemic conflicts, as pointed out by R. Michaels and J. Pauwelyn, “Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law”,
only be used to interpret WTO law, a state would always have to find a WTO provision to defend its measures and could then rely on the norm to interpret the WTO provision in its favor.

The DSU does not contain a clause explicitly entitled “applicable law”. It does, however, contain a rule on the “terms of reference” for dispute settlement panels. Article 7 of the DSU offers two options in this regard: standard and special terms of reference. Under the standard terms of reference, panels examine cases “in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)”.62 Non-standard terms of reference have not gained practical relevance, as they have been used only once, according to Petros Mavroidis.63

It is the subject of some dispute what exactly the language in article 7 of the DSU implies. For some authors it does not settle the question of applicable law. Petros Mavroidis states that “the question whether a WTO Panel can consult sources of law other than the covered agreements ... is not prejudged in a categorical manner by the DSU”.64 Lorand Bartels and Joost Pauwelyn would agree.65

However, it is difficult to see the function article 7 of the DSU serves if it is not to limit the law that panels can apply. The wording clearly indicates that the provision regulates the applicable law.66 This is in line with the obligation of panels under article 11 of the DSU to make an objective assessment of “the applicability of and conformity with the relevant covered agreements” and the prohibition of “add[ind] and diminish[ing] the rights and obligations provided in the covered agreements” in

62 Article 7.1 DSU.
articles 3(2) and 19(2) of the DSU. Accordingly, states cannot successfully invoke an obligation under the ICESCR as a defense against a claim of a violation of WTO obligations in WTO dispute settlement.

The same holds true for those provisions of the ICESCR that can claim customary law status or can be regarded as general principles. As to customary international law, the DSU mandates the use of customary rules of interpretation. It is doubtful whether all of customary international law applies. According to one study not one of over 200 WTO era and 120 GATT era reports found any custom other than good faith to be applicable. Even if one were to concede that customary international law applies in WTO dispute settlement as a source of law in addition to WTO law, such law would only apply “to the extent that the WTO treaty agreements do not ‘contract out’ from it” in the words of a 2000 panel report. An argument based on the customary status of an ICESCR norm thus could not prevail as a defense against a claim of violation of WTO law. A claim based on general principles would fare equally. Even though studies found WTO dispute settlement to apply general principles extensively, their use is largely limited to interpretation or procedural matters. The best way to conceptualize such use is to regard it as part of the inherent jurisdiction of WTO tribunals.

C. Use of the ICESCR for Interpretation

Under article 3.2 of the DSU, WTO dispute settlement clarifies the provisions of the WTO Agreements “in accordance with customary rules of interpretation of public international law”. Thus, while the applicable law in WTO dispute settlement is

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68 Several of the authors considering non-WTO law to be applicable concur with this result, because of a different conception of applicable law. See e.g. P. Mavroidis, “Article 7 DSU”, in: R. Wolfrum et al., WTO – Institutions and Dispute Settlement, para. 6 (Leiden: Martinus Nijhoff 2006).
limited to WTO law, that law cannot be read “in clinical isolation from public international law”, but has to be interpreted according to the customary rules of interpretation of public international law. The act of interpretation is the act of selecting the pertinent meaning from the plethora of meanings, limited by – as is emphasized in article 3.2 of the DSU – the scope of possible meanings of the words used. If non-WTO law can be taken into account in this process the meaning most palatable to that law can be chosen and conflicts between legal regimes largely avoided, all the more so because determining the limit of the scope of meanings of the words used is far from being a scientific process.

Non-WTO law and thus the ICESCR can seep into the interpretative process through several argumentative means: through the application of a customary “presumption against conflict”, the principle of harmonious interpretation or via the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), acknowledged to contain customary rules of interpretation of public international law. The latter route for inserting non-WTO law is both the one WTO dispute settlement organs have preferred and the one that internationalists have pinned their hopes on to combat the tendency of international law towards fragmentation. It is article 31(3)(c) of the VCLT in particular that enables an interpreter to glance at the wider realm of international law. Thereby it can serve the purpose of systemic integration and contribute to an international legal order that is more consistent in that it takes the normative environment of rules into account.
account. The provision provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” and that

“[t]here shall be taken into account, together with the context:

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

As the ILC points out, such rules “may include other treaties, customary rules or general principles of law.” It should be noted that recourse to these documents in interpretation is compulsory, not optional.

The provision conditions recourse to any rule of the ICESCR that may be “relevant” in a WTO case on the rule being “applicable in the relations between the parties”. A rule is “relevant”, according to the Appellate Body, “if it concerns the subject matter of the provision at issue”, which the Appellate Body examined under rather strict standards in *EC and Certain Member States – Large Civil Aircraft*.

Not only the strict standard for relevance is apt to cause scholars grieve, but also the proviso on applicability “between the parties”. Some authors argued the relevant “parties” to be the parties to dispute settlement. However, article 2(1)(g) of the VCLT defines parties to be states who consented to the treaty (to be interpreted) and for which it is in force. If that means, on the other hand, that a rule needs to be in force between all the parties of the WTO to be relevant in the interpretation of WTO law – as the panel in *EC – Biotech* argued, other treaties cannot be taken into account in the interpretation of WTO law, given that the WTO Agreements, unlike other international agreements, allow separate customs territories to become members. The ILC criticized the panel report accordingly and even the panel

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84 Art. 31(1) of the VCLT.
85 ILC, Conclusions of the Work of the Study Group on the Fragmentation of International Law, para. 18 (2006); see also EC – Biotech, WT/DS291/R, para. 7.67.
87 EC and certain member States – Large Civil Aircraft, WT/DS316/AB/R, paras 846-855.
89 WT/DS291, 292, 293/R, para. 7.68.
90 See Art. XII:1 of the WTO Agreement for details.
itself seems to have had some doubt, as it held slightly later in the very same report that irrespective of article 31(3)(c) of the VCLT “a panel may consider other relevant rules of international law when interpreting the terms of WTO agreements if it deems such rules to be informative”.\(^{92}\)

The fact that the *EC – Biotech* panel seems to distinguish between taking a rule into account together with the context when interpreting a treaty in its context and taking a treaty into account when determining the ordinary meaning exposes a basic misunderstanding about the interpretative process. Treaty terms *have* to be interpreted, a choice between the different meanings that each term offers *has* to be made. Article 31(3)(c) of the VCLT forces interpreters to take account of other international law rules in this process as context.\(^{93}\) Arguments gained from this exercise may or may not be convincing. They are, however, helpful and certainly as convincing as the alternatives that offer themselves. Interpreting a treaty term with a view to the ICESCR may seem inappropriate to a non-state party, but interpreting it with a view to the Oxford English Dictionary certainly cannot evoke a better democratic, legal or logical pedigree.\(^{94}\)

The Appellate Body of the WTO explicitly revisited the issue of the interpretation of the term “the parties” in article 31(3)(c) of the Vienna Convention in its May 2011 report on *EC and Certain Member States – Large Civil Aircraft*, even though merely *obiter dictum*. It stated that it had not yet ruled on whether the term refers to all WTO members or merely a subset of them and staked out a position between two extremes on the blank slate it had just drawn. On the one hand, WTO law should be interpreted to reflect the common intention of all WTO members.\(^{94}\) On the other, individual WTO member’s international obligations and the drive for “systemic integration” also deserve due consideration.\(^{95}\) “The parties” should thus be

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93 This effect of the provision also seems to be misunderstood by the panel in *Argentina – Poultry Anti-Dumping Duties*, WT/DS241/R, para. 7.41.
94 In footnote 1916 of the report the Appellate Body curiously cross-references its interpretation relating to article 31(3)(b) of the VCLT according to which agreement of all Members as to the interpretation of a treaty taking account of subsequent practice may – according to the circumstances – be deduced from the silence of members. It seems difficult to interpret article 31(3)(c) of the VCLT along the same lines, but the reference certainly implies that the Appellate Body is ready to require something less than full adherence of all WTO members to the relevant treaty.
interpreted to refer to a large number of WTO members. This is in line with the Appellate Body's approach in US – Shrimp, in which it interpreted WTO law with reference to such diverse international instruments as UNCLOS, the Convention on Biological Diversity and the Agenda 21. As 84% of the WTO membership is bound by the ICESCR, the Covenant clearly fulfills this requirement.

**D. Empirically: the ICESCR in Dispute Settlement?**

Despite the fact that the ICESCR is thus a legitimate source to turn to when interpreting WTO obligations, there is no dispute settlement practice in this regard. Economic, social and cultural rights were only brought up as an aside and in passing. Nicaragua referred to the Covenant in a third-party submission in 2001 in a case at the core of which was the question of ownership of the Havana Club trademark taken over by the Cuban government. Cuba, in a discussion of the case in the Dispute Settlement Body in 2009, relied on the right to self-determination to argue the illegality of the Cuba embargo of the United States.

A case involving generic drugs and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is the first in which the prospect of a proper use of the ICESCR to interpret WTO law was raised. In EU and a Member State – Seizure of Generic Drugs in Transit India argues in its 2010 request for consultations that the TRIPS Agreement provisions cited must be read in the light of the ICESCR’s right to health. However, the case will likely be resolved outside of dispute settlement.

**E. Conclusion**

96 A systematic argument can also be adduced for this position: article 31(2)(a) of the VCLT refers to “all the parties”, article 31(2)(b) to “one or more parties”, “the parties” thus implies more than one, but less than all parties. The argument is not as strong as the one made in the text relating to the purpose of article 31(3)(c), as the wording of para. 2 of the provision could have been chosen to indicate the contrast between lits. a and b. See H. Hestermeyer, *Human Rights and the WTO*, 219-222 (Oxford: OUP 2007).

97 Appellate Body, *US – Shrimp*, WT/DS58/AB/R. The Appellate Body did not refer to Art. 31(3)(c) of the VCLT to justify its mode of argumentation.

98 *US – Section 211 Appropriations Act*, WT/DS176/R, paras. 5.5-5.6 (erroneously pointing to the right to participate in the cultural life of a country as recognizing implicitly IP rights and wrongly citing the ICESCR’s supposed equivalent provision to article 17 of the Universal Declaration on Human Rights). On the background of the case see C. Denny, “WTO Referees Rum Punch-up”, in: Guardian, 18 July 2000.

99 WT/DSB/M/271 of 25 September 2009, para. 7.

100 WT/DS408/1, 3. Brazil’s internal right to health had already been mentioned in the *Brazil – Tyres* dispute, see WT/DS332/R; WT/DS332/19 of 10 March 2009; WT/CTE/M/40 of 2 September 2005.

The ICESCR’s role in WTO dispute settlement is limited. It can neither be enforced, nor applied. References to the ICESCR are, however, permitted for the purpose of interpreting WTO law. In practice this has not yet happened. Cuba and Nicaragua have both referred to the ICESCR or its rights in the context of dispute settlement, but none of them for the purposes of a thorough interpretative exercise of WTO law. The situation might change with India’s 2010 request for consultations explicitly stating that TRIPS Agreement provisions have to be read in the light of article 12(1) of the ICESCR, but the dispute likely will be resolved by way of a mutually acceptable solution.

4. ICESCR Discourse: The ICESCR in Political WTO Organs

This section will study the use of the ICESCR in the discourse of the WTO’s political organs. It is interested in whether, by whom and how economic, social and cultural rights are brought up within the WTO. This focus determines the scope of the study. It is interested in legal arguments from one regime brought up in another, not in factual arguments. By way of example this means that a WTO member’s argument in the WTO’s General Council in favor of the Kimberley process certification scheme for rough diamonds based on the suffering caused by civil wars is outside the scope of the study. An argument based on the right to health, however, is within its scope.

The WTO makes available numerous documents, including minutes of meetings, in its official online database. GATT documents are available to a more limited extent. For the purposes of this study the database was searched for pertinent terms such as “economic, social and cultural rights” and irrelevant uses of the term (such as in addresses) were disregarded. The selection of search terms and the elimination of “irrelevant” hits introduce limited elements of subjectivity into the research. Nevertheless the outcome reveals recognizable and important facts and trends.

A. The GATT Years

The GATT database makes but two explicit mentions of economic, social and cultural rights. Both of them were made in speeches by Latin American representatives (Guatemala and Venezuela). The first occurred at the beginning of the Tokyo Round in 1973 referring to the many statements made in promotion of the “economic, social, cultural and political rights of the under-developed countries”.

102 For an excellent study without that legal focus (and hence by necessity selective) see A. Aaronson and J. M. Zimmerman, Trade Imbalance (Cambridge: CUP 2008).
emphasizing the importance of the new trade round for developing countries. Similarly, during the waning days of the GATT in the negotiations for the WTO, the minister for foreign affairs of Guatemala pointed out that his country can only succeed in its drive towards consolidating democracy if it guarantees economic, social and cultural rights. For this purpose Guatemala requires economic growth and access to world markets and looks towards the WTO to achieve this more successfully than GATT.

Additionally, GATT documents mention several of the rights now contained in the ICESCR independent of the Covenant itself and at times before the Covenant was drafted. Such references to economic, social and cultural rights are, however, episodic. They occurred, e.g., when article 55 UN Charter was invoked, a basis for the negotiations leading up to the GATT, or in an argument to support the principle of one country, one vote. In the 1980s, Latin American countries invoked the right to self-determination in opposition to US trade measures against Nicaragua and Cuba.

Worker’s rights, today guaranteed by articles 6-8 of the ICESCR, constitute an exception to the almost complete absence of economic, social and cultural rights in the GATT debates. It was, however, the International Labor Organization (ILO) and its normative work, not the ICESCR that was commonly referred to. From the negotiation of the GATT / Havana Charter on, workers’ rights were part of the discussion. In fact, the Havana Charter of the International Trade Organization contained an article on fair labor standards, envisaging a cooperation between the planned International Trade Organization and the ILO. That article was lost with the failure of the Havana Charter. Workers’ rights did, however, remain on the agenda and countries continued to propose their inclusion into the trade order e.g.

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106 MIN(73)SR/Add.4 of 22 October 1973, 172.
107 MTN.TNC/MIN(94)/ST/98 of 14 April 1994, 2.
108 By Lebanon in E/PC/T/PV/3 of 17 October 1946.
110 C/M/188 of 28 June 1985; C/M/204 of 19 November 1986; SR.43/ST/10 of 18 December 1987.
111 The term “workers’ rights” can be found 60 times, the term “labour standards” or “labor standards” even 211 times in the Stanford GATT Digital Library. “Right to work” is mentioned 13 times.
112 References to the ILO abound. See e.g. PREP.COM(86)/SR/8 of 13 August 1986; C/M/156 of 7 May 1982 or SR.10/3 of 3 November 1955.
114 Article 7 of the Havana Charter.
in the Tokyo and Uruguay Rounds.\textsuperscript{115} Each of these attempts met with fierce resistance, however, by developing countries that regarded the inclusion of workers’ rights as a direct threat to their comparative advantage relating to the cost of labor. With more developing countries joining the GATT, the attempts to include workers’ rights in the trade order thus was bound to fail.

With the exception of workers’ rights, references to economic, social and cultural rights during the GATT years are sparse. Where such rights (outside of workers’ rights) were mentioned, they were usually referred to by developing countries rather than the developed world and in the context of negotiations, rather than to defend a legal position \textit{de lege lata}, the exception being the defense against embargos based on the right to self-determination.

\textit{B. The WTO}

WTO Members have mentioned economic, social and cultural rights explicitly by name somewhat more frequently than their GATT counterparts. With roughly 20 explicit references to these rights,\textsuperscript{116} almost all of them in this millenium, they do, however, remain statistically insignificant. Even though more documents mention rights contained in the ICESCR without explicitly referring to the Covenant itself or the notion of economic, social and cultural rights, this does not change the fact that references to such rights remain highly unusual. A \textit{caveat} has to be added as to workers’ rights: much like during the days of the GATT, these are referred to in a statistically more significant number. This quantitative finding should not detract attention from the fact, however, that economic, social and cultural rights have gained some prominence in the debates on food and health.

Outside of these two core discussions, references to economic, social and cultural rights occurred on varied occasions. The analysis of national law undertaken both during accession negotiations and in trade policy reviews is one of them. Thus, ICESCR membership was mentioned in documents relating to WTO accession by Belarus and Cape Verde\textsuperscript{117} and the right to education under national law was mentioned in Andorra’s accession negotiations (in the discussion of the education services regime)\textsuperscript{118} and in Ghana’s trade policy review (in the context of child


\textsuperscript{116} Not counting several versions of the same document, references of the rights contained in the ICESCR without mentioning the Covenant itself and references in dispute settlement.

\textsuperscript{117} WT/ACC/BLR/1 of 16 January 1996; WT/ACC/CPV/3 of 13 January 2004. Belarus also referred to social and economic rights such as social security in Belarus in response to a question on national treatment of foreigners. WT/ACC/BLR/7 of 19 December 1997.

\textsuperscript{118} WT/ACC/AND/3 of 4 March 1999.
labor).\textsuperscript{119} The EU’s generalized system of preferences as well as its arrangements with ACP states imposing human rights conditionalities also relating to the ICESCR were referred to.\textsuperscript{120} Conference reports circulated in the WTO and technical cooperation activities equally mention the Covenant.\textsuperscript{121} Much like in the times of GATT, countries attacked embargoes based on economic, social and cultural rights. Thus, Cuba attacked US trade measures relying on the right to self-determination\textsuperscript{122} and Burundi criticized trade sanctions imposed against it after a military coup\textsuperscript{123} as depriving the people of Burundi of basic rights such as the right to food, health, education, employment and others.\textsuperscript{124} Finally, trade negotiations offered a forum for bringing up human rights concerns. Thus, Bolivia and Venezuela expressed their desire that trade negotiations should be conducive to economic social and cultural rights or even include them as obligations for the WTO and prevent a conflict between the two regimes.\textsuperscript{125} More concretely, Bolivia noted a proposal in the Trade Negotiations Committee to address issues relating to the financial crisis by way of the Trade Policy Review mechanism. It wondered whether other circumstances would be taken into account and gave as an example its own situation, as climatic conditions in 2006-2008 forced Bolivia to impose export restrictions to protect its population’s right to food and health.\textsuperscript{126}

The two most significant debates, in which the ICESCR was mentioned, concerned agriculture and the TRIPS Agreement. Article 20(c) of the Agreement on Agriculture envisages that negotiations on continuing agricultural reform take non-trade concerns into account. The negotiations started in 2000 and in July 2000 a

\textsuperscript{119} WT/TPR/M/194/Add.1 of 31 March 2008 (also mentioning the right to health and shelter).
\textsuperscript{121} IP/C/W/304 of 12 September 2001; WT/COMTD/W/106/Rev.1 of 20 December 2002; G/TBT/W/247 of 3 November 2004; WT/L/725 of 5 June 2008.
\textsuperscript{122} TN/MA/W/71 of 15 May 2006.
\textsuperscript{123} Africans Vote for Sanctions Against Coup in Burundi, NY Times, 1 August 1996.
\textsuperscript{124} WT/MIN(98)/ST/78 of 18 May 1998.
\textsuperscript{125} TN/C/M/22 of 10 March 2006; WT/GC/M/112 of 4 March 2008.
\textsuperscript{126} WT/GC/M/117 of 23 February 2009 (continuing that Bolivia “had been unable to stop applying restrictions simply to satisfy the WTO or the markets, while overlooking the most fundamental and basic human rights of the most vulnerable sector of its population.”).
conference was held in Norway to discuss relevant non-trade concerns.\textsuperscript{127} Both Mauritius and Norway identified the ICESCR, namely its article 11, as a relevant non-trade concern.\textsuperscript{128} They repeated this position on other occasions, in particular when asked to list agreements they consider relevant for the negotiations on agriculture.\textsuperscript{129} Burkina Faso identified the defense of the right to food of its population as one of its objectives in agricultural negotiations and Switzerland recalled that the Food and Agriculture Organization Food Summit had established a right to food production.\textsuperscript{130} However, agreement on non-trade issues in agricultural negotiations has so far proved illusive.\textsuperscript{131}

As to the TRIPS Agreement, the focal point of the debate was the discussion about patents and access to medicines. The Agreement, with appropriate transition periods,\textsuperscript{132} obliges WTO members to grant patent protection for pharmaceuticals, resulting in a factual monopoly of the patent-holder, which cause concern for access to pharmaceuticals. Countries had already voiced public health concerns during the negotiations of the TRIPS Agreement, although they had not couched these concerns in human rights language.\textsuperscript{133} The WHO, too, had been working on the topic of patents and accessibility of pharmaceuticals.\textsuperscript{134} The larger public took note of the issue for the first time when the pharmaceutical industry filed a lawsuit against South Africa in South African courts in 1998. South Africa had enacted a law enabling its minister of health to limit patent rights to guarantee affordable medicines.\textsuperscript{135} Human rights bodies established a link with the right to health,\textsuperscript{136} a

\textsuperscript{128} G/AG/NG/W/36/Rev.1 of 9 November 2001 (also mentioning the General Comment on article 11 of the ICESCR).
\textsuperscript{130} TN/AG/R/10 of 9 September 2003.
\textsuperscript{132} Art. 65 of the TRIPS Agreement provides for a number of different transition periods that have expired by now. However, least-developed Members still benefit from an extended transition period currently set to expire on 1 July 2013. See IP/C/40 of 30 November 2005. See also WT/L/845 of 19 December 2011.
\textsuperscript{133} See e.g. MTN.GNG/NG11/5 of 14 December 1987; MTN.GNG/NG11/12 of 13 June 1989; MTN.GNG/NG11/14 of 12 September 1989; MTN.GNG/NG11/20 of 24 April 1990; MTN.GNG/NG11/21 of 22 June 1990; MTN.GNG/NG11/27 of 14 November 1990. See also Art. 8 of the TRIPS Agreement.
\textsuperscript{134} See e.g. C. Correa, *Health Economics The Uruguay Round and Drugs* (Geneva: WHO 1997).
link that also can be found in a presentation made at a 1998 seminar of the World Intellectual Property Organization. The topic of patents and medicines was brought up at the TRIPS Council of the WTO in 2001, which decided to hold a special discussion on the issue. During that discussion Venezuela stressed the right of WTO members to take measures pursuant to Art. 2, 12 ICESCR and the Dominican Republic pointed out that the Committee on Economic, Social and Cultural Rights would condemn the use of trade regulation impeding access to medicines. Bolivia and Kenya also mentioned concerns for the right to health. Bolivia suggested that human rights considerations prevail over commercial ones, an argument later seconded by Venezuela. Ecuador’s new constitution of 2008 explicitly adopts this supremacy of the right to health (among others) over international trade instruments into constitutional law - a position it communicated to other WTO members. A proposal by the African Group and other countries for a Ministerial Declaration on TRIPS and Public Health suggested mentioning that the decision was taken to discharge obligations under the ICESCR. Argentina and other developing countries also pointed out a possible threat of non-violation complaints to the right to health. The debate about patents and the right to health quieted down somewhat after the successful passage of a number of measures in the field by the WTO. Ongoing discussions about the implementation and effectiveness of some of these measures, as well as related capacity building measures, ensure that the right to health continues to be brought up from time to time.

138 IP/C/M/30 of 1 June 2001.
140 WT/MIN(03)/ST/48 of 11 September 2003. See also WT/GC/M/82 of 13 November 2003 (Zambia emphasizing the WTO could concentrate on recognizing the overriding right to health and food security before tackling the Singapore issues).
142 Article 421.
143 IP/C/M/59 of 25 May 2009.
146 WT/MIN(01)/DEC/2 of 14 November 2001; IP/C/25 of 1 July 2002; WT/L/478 of 12 July 2002; WT/L/540 and Corr. 1 of 1 September 2003 (the latter decision was transformed into a treaty amendment: WT/L/641 of 8 December 2005).
147 See e.g. IP/C/M/64 of 17 February 2011 (Brazil mentioning the right to access to medicines and the WHO mentioning its perspective on access in light of the right to health in the WHO Constitution); IP/C/W/549/Add.4 of 25 October 2010.
The debate about patents and access to medicines was rekindled when generic drugs exported from India to Brazil and not patented in either country were seized in transit by Dutch customs in 2008 as violating Dutch patent law.\textsuperscript{148} In a contribution to debates in the TRIPS Council widely shared by other developing countries India stated that this was not just a trade, but also a right to health issue.\textsuperscript{149} As described above the dispute resulted in consultations, but will likely not be the subject of a panel report.

Even in these two core areas of debate references to economic, social and cultural rights remain an exception. The only field in which such rights are more commonly mentioned, even though usually based on the work of the ILO rather than the ICESCR, is the field of labor rights, which are mentioned in a statistically more relevant number each year in the WTO, with two “spikes” in 1996 and 1999.\textsuperscript{150}

As described above, labor rights were included in the still-born Havana Charter. Proposals to include them in the WTO order\textsuperscript{151} came to naught. Only the Preamble to the WTO Agreement refers to “raising standards of living, ensuring full employment and a large and steadily growing volume of real income”. The topic proved divisive also after the WTO was established: at the Singapore ministerial in 1996 some (in particular developed) members demanded negotiations on labor standards\textsuperscript{152} over the objection of developing countries, which saw such suggestions as attempts to undermine their comparative advantage in labor costs. Even though in the ministerial declaration members “renewed” their commitment to the observance of internationally recognized core labor standards, they also agreed that the ILO “is the competent body to set and deal with these standards” and that the

\textsuperscript{148} See M. Williams, \textit{Update 2 – India, EU heal drugs seizures dispute with interim agreement}, Reuters, 28 July 2011.
\textsuperscript{149} IP/C/M/61 of 12 February 2010. Note also Egypt’s concern about IP enforcement and the right to health in IP/C/M/60 of 28 September 2009.
\textsuperscript{151} See e.g. PREP.COM(86)W/43 of 25 June 1986 for an attempt by the US to introduce the topic into the negotiations.
\textsuperscript{152} See e.g. WT/MIN(96)/ST/5 of 9 December 1996 (the United States), WT/MIN(96)/ST/2 of 9 December 1996 (the EC), WT/MIN(96)/ST/4 of 9 December 1996 (Argentina) favoring using the WTO as a forum for the discussion and e.g. WT/MIN(96)/ST/8 of 9 December 1996 (Brazil), WT/MIN(96)/ST/16 (Cuba); WT/MIN(96)ST/76 of 11 December 1996 (Botswana) against such a link.
use of such standards for protectionist purposes or to defeat the comparative advantage of low-wage developing countries must be rejected.\textsuperscript{153} The issue was raised again at the 1999 Seattle ministerial conference.\textsuperscript{154} No agreement was reached.\textsuperscript{155} However, the wording of the Singapore ministerial declaration was reaffirmed in the Doha declaration.\textsuperscript{156}

The mostly developed countries that favor inclusion of labor standards in trade agreements have used other free trade agreements as an outlet to negotiate such standards, achieving their inclusion either within the agreements themselves or in parallel agreements.\textsuperscript{157} Within the WTO, however, it remains difficult for members to agree beyond the issue of a general commitment to a small set of core labor standards – and the question of international enforcement remains, according to the WTO website “a minefield”.\textsuperscript{158}

Beyond their substantive invocation, there is also some limited institutional cooperation in the field of economic, social and cultural rights. In fact, the WTO Secretariat has working relations with some 200 organizations from numerous fields.\textsuperscript{159} The prominence of the conflict between patents and access to medicines and increasing criticism of the WTO from human rights bodies led the WTO to be invited as an observer to sessions of the Committee on Economic Social and Cultural Rights.\textsuperscript{160} The practice continued for some time, but seems to be followed more sporadically in recent years.\textsuperscript{161} The WTO Secretariat also attends sessions of the ILO Governing Body as an observer and collaborates with the ILO in respect of the ILO’s Working Party on the Social Dimension of Globalization, in seminars and some other

\textsuperscript{153} WT/MIN(96)/DEC of 18 December 1996, para. 4.
\textsuperscript{154} The United States, EU and Canada submitted proposals in this respect. A. Aaronson and J. M. Zimmerman, \textit{Trade Imbalance}, 52 (Cambridge: CUP 2008)
\textsuperscript{156} WT/MIN(01)/DEC/1 of 20 November 2001, para. 8.
\textsuperscript{159} See http://www.wto.org/english/thewto_e/coher_e/igo_divisions_e.htm.
\textsuperscript{160} Starting with the twenty-first session at the end of 1999. UN Doc. E/2000/22, Chapter II para. 5.
\textsuperscript{161} UN Doc. E/2001/22, Chapter I para. 8 (22\textsuperscript{nd} - 24\textsuperscript{th} session); UN Doc. E/2002/22, Chapter I para. 8 (25\textsuperscript{th}, 27\textsuperscript{th} session); UN Doc. E/2003/22, Chapter I para. 10 (28\textsuperscript{th} – 29\textsuperscript{th} session); UN Doc. E/2004/22, Chapter I para. 9 (30\textsuperscript{th} – 31\textsuperscript{st} session); UN Doc. E/2005/22, Chapter I para. 6 (32\textsuperscript{nd} – 33\textsuperscript{rd} session); UN Doc. E/2007/22, Chapter I para. 8 (37\textsuperscript{th} session); UN Doc. E/2009/22, Chapter I para. 6 (40\textsuperscript{th}–41\textsuperscript{st} session). See also WT/BFA/W/98 of 8 July 2003.
projects. Neither the Committee, nor the ILO have observer status in the WTO, an issue that cannot be resolved currently as Arab states block the grant of observer status to any inter-governmental organization over the refusal to grant observer status to the Arab League. Cooperation with the ILO has been such a charged topic that the WTO Director-General Pascal Lamy told union leaders that “the WTO and its secretariat do not have a mandate to work on coherence between what is done in the WTO and what is done in the ILO” and Gabrielle Marceau wrote that “the two organizations have sometimes given the impression that they were turning their back to each other.” Nevertheless the ongoing cooperation mostly on the Secretariat level is reason for some hope.

5. Evaluation

Despite WTO members’ obligations under the ICESCR and the dispute settlement organs’ legal competence to take the Covenant into account for the purposes of interpreting WTO law when deciding cases, a closer examination reveals that references to economic, social and cultural rights in the WTO outside the area of workers’ rights remain sparse.

Where such rights are referred to, it is usually in a political context de lege ferenda, such as trade negotiations, or to describe a country’s national legal system. Only rarely are economic, social and cultural rights relied on explicitly to defend or attack specific trade measures. The most prominent case in that respect is the case of patents and access to medicines, in which intense pressure opened a door for using such arguments. It should also be noted that more often than not it is developing countries that refer to such rights, dispelling the myth that human rights arguments are the developed world’s domain. Here, too, workers’ rights are the exception, as they are heavily favored by developed countries.

The limited practical relevance of the ICESCR in dispute settlement is easily explained by the limited legal relevance of non-WTO law in such proceedings. As it is WTO bodies that act in this case, it dovetails to some extent with the WTO’s lack of treaty-based human rights obligations. Given WTO members’ obligations under the ICESCR when acting within the WTO, the almost complete absence of ICESCR-based arguments by those very members in the WTO’s political organs deserves some more thought, particularly in light of the more frequent references to workers’ rights.

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162 See http://www.wto.org/english/thewto_e/coher_e/wto_il_e.htm
The prevailing myth that the WTO as an organization is to blame for a culture hostile to human rights is certainly wrong: it is the representative of the states that fail to bring up considerations based on the ICESCR. This is the consequence of Director-General Pascal Lamy’s often-repeated tenet that the WTO is a “member-driven organization”. If the members bring up economic, social and cultural rights, they will form part of the debate. If not, they will not.

The argument that the lack of debate on economic, social and cultural rights shows that the two regimes do not interfere with each other is equally incorrect. While Dame Rosalyn Higgins rightly states that concerns of the fragmentation of international law are exaggerated, a thorough look at WTO debates shows that obvious arguments based on the ICESCR are not made. Even on the prominent topic of patents and access to medicines WTO members are far more likely to refer to article 8 of the TRIPS Agreement and health concerns than to the right to health. And while a search for Committee on Agriculture documents in English mentioning “right to food” brings up nine documents, 97 documents mentioned “food security” in 2001 alone. Members thus seem to raise their arguments as policy arguments rather than arguments under the ICESCR.

This choice is not necessarily harmful to economic, social and cultural rights. An argument based on human suffering can be just as effective as one based on the right to health. As the human rights movement has taught us, however, an argument based on legal obligations and legal rights can have more strength than one based on policy. States apparently recognize this in the field of workers’ rights. What, then, explains the reluctance to resort to arguments based on other economic, social and cultural rights?

Firstly, economic, social and cultural rights are comparative latecomers in the field of human rights. Until recently they were commonly regarded as merely “programmatic” and some legal systems still view them with suspicion. Labor rights, on the other hand, have a long history as justiciable rights.

Secondly, country representatives in the WTO are trade experts rarely schooled in economic, social and cultural rights. They move in a different system with its own rules and language. Labor rights are closer to their thinking, as they have traditionally been part of commercial law.

Thirdly and most importantly, national lobbies rarely exercise pressure on their governments to bring up concerns related to economic, social and cultural rights in the WTO. In contrast, labor rights benefit from the politically influential lobby of the unions that pressure governments to bring up relevant concerns in WTO debates.

168 A search for references to article 8 of the TRIPS Agreement and “health” brings up 149 documents in English.
169 Admittedly this term encompasses other concerns as well.
These shortcomings indicate a work plan for the future. The Committee on Economic, Social and Cultural Rights and several national courts have made much headway in clarifying the content of the respective rights, ensuring their recognition as justiciable. The adoption of the Optional Protocol will advance this process. More work, however, is necessary to overcome the second and the third shortcomings mentioned. National actors in the field of international trade law, both state representatives and relevant lobbies, lack knowledge about economic, social and cultural rights. Raising ICESCR-related concerns over international trade with them and involving them in discussions\(^{170}\) are vital components to ensure respect for economic, social and cultural rights in the WTO. National debate could also be enhanced by conducting human rights impact studies of trade agreements. Such an exercise would force relevant actors to include human rights considerations in their strategies.