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# The inherent jurisdiction of WTO tribunals: The select application of public international law required by the judicial function

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# THE INHERENT JURISDICTION OF WTO TRIBUNALS: THE SELECT APPLICATION OF PUBLIC INTERNATIONAL LAW REQUIRED BY THE JUDICIAL FUNCTION<sup>†</sup>

*Andrew D. Mitchell\**  
*David Heaton\*\**

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## INTRODUCTION

This Article explores whether World Trade Organization (WTO) panels and the Appellate Body (WTO Tribunals) have the power to apply certain rules of public international law by reason of their judicial character, and because the application of these rules is necessary for the proper exercise of their judicial function. In other words, it seeks to answer the following questions: Do WTO Tribunals have inherent jurisdiction? And, if so, what are some of the rules applicable under and limitations on this jurisdiction?

In the broader context of international law, inherent jurisdiction recognizes the practical needs of an international dispute settlement system by giving an international tribunal the powers it needs to discharge its judicial function. However, this creates an apparent tension with the notion of consent on which international dispute settlement is based, since the powers exercised in this context are not specified by the parties to the treaty establishing the tribunal. International tribunals have exercised inherent jurisdiction on the basis of the need to protect their judicial character and ensure the administration of international justice, which they perceive as inherent in their role as courts. In doing so, they have applied both customary international law and general principles of law.

This is also true in the more specific context of WTO Tribunals. Examples of WTO Tribunals applying rules of international law, apparently in the exercise of inherent jurisdiction, abound: WTO Tribunals have applied the principles of international evidence law, held themselves competent to deal with *amicus curiae* briefs, held that they have *la compétence de la compétence*, and heard preliminary objections to their jurisdiction. However, to avoid controversy, WTO Tribunals generally exercise inherent jurisdiction without saying that they are doing so explicitly—and without specifying *why* they can exercise such powers. This silence is undesirable because it means that the exercise of these powers is not properly scrutinized. It has meant also that WTO Tribunals have not expressly considered the scope of this jurisdiction, such that they risk applying it too narrowly or too broadly.

Often, WTO Tribunals appear to direct little thought to the *basis* on which certain rules are applied. Sometimes, in their reasoning, they

make the point that nothing in the WTO Covered Agreements<sup>1</sup> prevents a WTO Tribunal from applying a particular rule of international law. Conversely, in rejecting the application of a rule of international law, they state that something in the agreements *does* prevent a WTO Tribunal from taking such action. But to return to the questions raised above, why might such rules apply in the first place? And, if such rules can apply, what are the limits on their application? This Article answers these questions, and in so doing suggests limits on the application of such principles, thus promoting “security and predictability [in] the multilateral trading system.”<sup>2</sup>

We argue that WTO Tribunals do have inherent jurisdiction but that recognition of this jurisdiction does not give them *carte-blanche* to use any international law principles to resolve WTO disputes. Inherent jurisdiction permits WTO Tribunals to apply only international law rules that satisfy three conditions. First, the application of the international law rule must be necessary for the WTO Tribunal to properly exercise its adjudicatory function. Second, the rule in question must have no substantive content of its own. Third, its application must not be inconsistent with the Covered Agreements. This third condition is particularly important: it requires careful scrutiny of the Covered Agreements in general terms and with regard to the effect of the proposed application of a principle in a given case.

This Article thus makes a contribution to the question of the extent to which public international law (that is not embodied in the Covered Agreements) can apply within the WTO. While it does not seek to answer the broader question of the full extent to which public international law *beyond* that which can be seen as part of a WTO Tribunal’s inherent jurisdiction is applicable in WTO dispute settlement, the questions it does answer are important in their own right. A proper application of inherent jurisdiction will help resolve questions on the use of principles such as estoppel, due process, and comity. Resolution of these questions is particularly pertinent at the moment, as some of these principles will likely be relevant to resolving the current *U.S.—Tuna/Dolphin (Mexico)* case.<sup>3</sup> The Article concludes by considering the application of principles to conflict situations, such as the conflict between North American Free Trade Agreement (NAFTA) and WTO provisions in the pending *U.S.—Tuna/Dolphin (Mexico)* dispute.

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1. Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Annex 2, Marrakesh Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter Marrakesh Agreement]).

2. *Id.* art. 3.2.

3. See Request for Consultations by Mexico, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/1 (Oct. 28, 2008).



## I. INHERENT JURISDICTION IN INTERNATIONAL LAW

### A. *What Is Inherent Jurisdiction?*

When talking of “jurisdiction,” as Thirlway has stated, one must immediately inquire “jurisdiction to do what?”<sup>4</sup> In answering, three relevant elements of jurisdiction can be identified:<sup>5</sup>

- subject-matter jurisdiction (the particular types of claims and proceedings that may be brought before a court or tribunal—as Trachtman puts it, “jurisdiction over claims”);<sup>6</sup>
- applicable law (the law that a court or tribunal may interpret and apply);<sup>7</sup> and
- inherent jurisdiction (the court or tribunal’s intrinsic powers, derived from its nature as a judicial body).<sup>8</sup>

In the *Northern Cameroons* and *Nuclear Tests* cases, the International Court of Justice (ICJ) explained that its inherent jurisdiction is the basis of certain powers it exercises and principles and rules of international law it applies. The Court stated in *Northern Cameroons*:

There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore  
 . . . .<sup>9</sup>  
 . . . .

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4. Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–89: Part Nine*, 1998 BRIT. Y.B. INT’L L. 1, 6.

5. Cf. Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 35 J. WORLD TRADE 499, 501–02 (2001) (distinguishing between jurisdiction over claims and applicable law).

6. Joel Trachtman, *Jurisdiction in WTO Dispute Settlement*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT—THE FIRST TEN YEARS 132, 134 (Rufus Yerxa & Bruce Wilson eds., 2005). Trachtman emphasizes that “[i]t is . . . necessary to distinguish between jurisdiction over claims and jurisdiction to apply law.” *Id.* at 135.

7. Bartels, *supra* note 5, at 501–02.

8. ANDREW D. MITCHELL, *LEGAL PRINCIPLES IN WTO DISPUTES* 97–102 (2008). It seems trite to say that there is confusion in the terminology used in this area. For clarity, this Article uses the term “jurisdiction” to refer to subject-matter jurisdiction; “applicable law” to refer to the jurisdiction of a WTO Tribunal to apply certain norms; and “inherent jurisdiction” (or “inherent power(s)”) to refer to applicable law deriving from the WTO Tribunal’s position as an international tribunal. Inherent jurisdiction is also sometimes called “implied” or “incidental” jurisdiction. Sometimes these different labels are used loosely and interchangeably. In other cases, the label chosen may be a careful decision reflecting the distinction between inherent and implied powers. For further discussion of this point, see *infra* Part II.B.1.

9. *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 29 (Dec. 2); see also *id.* at 64 (Wellington Koo, J., separate opinion); *id.* at 100–01 (Fitzmaurice, J., separate opinion).

. . . If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.<sup>10</sup>

The court expanded on the scope and source of this jurisdiction in the *Nuclear Tests* case as follows:

[I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required . . . to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character”. Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.<sup>11</sup>

More recently, Judge Higgins of the ICJ reaffirmed the existence of inherent jurisdiction, explaining it (at least partly) as a tool to fill gaps in an international tribunal’s constitutive instrument:

The Court’s inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the [constitutive instrument of the tribunal]. It was on such a basis that the Permanent Court had admitted the filing of preliminary objections to jurisdiction even before this possibility was regulated by the Rules of Court. . . . [The Court has] inherent power to protect the integrity of the judicial process.<sup>12</sup>

Similarly, as Orakhelashvili states, “the judicial nature of international tribunals and inherent powers following therefrom may produce a jurisdiction ‘supplement’ not directly foreseen under a given jurisdictional clause.”<sup>13</sup> Inherent jurisdiction is the source of such incidental powers as an international court or tribunal requires in order to maintain and

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10. *Id.* at 37.

11. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 259–60 (Dec. 20) (quoting *Northern Camerouns*, 1963 I.C.J. at 29).

12. *Legality of Use of Force (Serb. & Mont. v. Belg.)*, 2004 I.C.J. 279, 338–39 (Dec. 15) (Higgins, J., separate opinion).

13. Alexander Orakhelashvili, *Questions of International Judicial Jurisdiction in the LaGrand Case*, 15 LEIDEN J. INT’L L. 105, 115 (2002).

exercise its subject-matter jurisdiction in a judicial manner.<sup>14</sup> Despite a lack of any mandate to do so in the instrument creating the international tribunal or conferring upon it jurisdiction,<sup>15</sup> a tribunal may—under its inherent jurisdiction—apply principles or rules<sup>16</sup> of international law to these ends. An example is the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) recognition that it “possesses inherent jurisdiction to prosecute the crime of contempt,” although no provision for this is made in its statute.<sup>17</sup>

Even adopting Thirlway’s classification, international law applied under an exercise of inherent jurisdiction can be seen to form a subset of applicable law: under inherent jurisdiction, principles or rules of international law are applied directly to resolve a dispute, and not as an interpretive tool under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).<sup>18</sup> However, it is important to identify those principles of international law that are applied under inherent jurisdiction (as opposed to otherwise as applicable law) because the basis of their application is different. This basis has important implications for deciding which principles may be applied and the extent and manner in which they can be exercised. It seems to us axiomatic that any judicial decisionmaker should, as a matter of course and to ensure that they do not exceed their jurisdiction, identify the basis of their application of rules or principles of international law to a given dispute. This is especially true in the WTO, where, generally speaking, there is no mandate in the Covered Agreements to apply rules or principles of general international law.

### B. *The Scope of Inherent Jurisdiction in Public International Law*

As seen above, the ICJ has described its inherent jurisdiction as providing it with the power to take different types of action. For example, inherent jurisdiction enables the ICJ to take action as may be required to: (1) ensure that the exercise of its subject-matter jurisdiction is not

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14. *Id.* at 107.

15. *See, e.g., Legality of Use of Force*, 2004 I.C.J. at 339 (“The power of the Court to identify remedies for any breach of a treaty, in a case where jurisdiction was based solely upon the treaty concerned, has been regarded as within the Court’s inherent powers.”).

16. The distinction between principles of international law and rules of international law is far from clear cut and is not critical for present purposes. For more on the distinction, see MITCHELL, *supra* note 8, at 31–66, 83–84. What is important is that the rule or principle is sufficiently well defined.

17. *See, e.g., Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, ¶ 18 (Sept. 14, 2009).

18. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

frustrated; (2) “provide for the orderly settlement of all matters in dispute”;<sup>19</sup> (3) “ensure the observance of the ‘inherent limitations on the exercise of the judicial function’ of the Court”;<sup>20</sup> and (4) “‘maintain its judicial character.’”<sup>21</sup> According to Pauwelyn, the inherent jurisdiction of international tribunals would also include the ability of an international tribunal to perform a number of tasks:

(i) “to interpret the submissions of the parties” in order to “isolate the real issue in the case and to identify the object of the claim”; (ii) . . . to determine whether one has substantive jurisdiction to decide a matter (the principle of *la compétence de la compétence*; (iii) . . . to decide whether one should *refrain* from exercising substantive jurisdiction that has been validly established; and (iv) . . . to decide all matters linked to the *exercise* of substantive jurisdiction and inherent in the judicial function such as claims under rules on burden of proof, due process, and other general international rules on the judicial settlement of disputes.<sup>22</sup>

In addition, Brown has argued that international tribunals have applied the principle of due process, as well as good faith based principles such as estoppel and abuse of rights, under inherent jurisdiction to ensure that international justice is properly administered.<sup>23</sup>

Many see a difference between inherent and implied powers. Bohlander, for example, regards inherent powers as requiring no “express basic authorization” in an international tribunal’s constitutive statute, whereas implied powers exist “on the basis of an express authorization.”<sup>24</sup> If powers of the kind described above are conceptualized as “inherent,” their application by international tribunals requires such tribunals to recognize the existence of these principles and rules and apply

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19. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 259–60 (Dec. 20).

20. *Id.* (quoting Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 29 (Dec. 2)).

21. Nuclear Tests, 1974 I.C.J. at 259–60 (quoting Northern Cameroons, 1963 I.C.J. at 29).

22. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 447–48 (2003) (quoting Nuclear Tests, 1974 I.C.J. at 262); see also Appellate Body Report, United States—Anti-Dumping Act of 1916, n.30, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) [hereinafter Appellate Body Report, U.S.—1916 Act]; Appellate Body Report, Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Appellate Body Report, Mexico—Soft Drinks]; Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535, 555 (2001) [hereinafter Pauwelyn, *How Far Can We Go?*]; Thirlway, *supra* note 4, at 21.

23. See, e.g., CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 72–78 (2007).

24. Michael Bohlander, *International Criminal Tribunals and Their Power to Punish Contempt and False Testimony*, 12 CRIM. L.F. 91, 98 (2001).

them *directly* to resolve a question that cannot otherwise be resolved, and not in an interpretative fashion or by virtue of a provision in the relevant agreement. Implied powers, on the other hand, stem from an interpretation of the text of the relevant agreement. Below we consider the implications of this distinction for WTO Tribunals.

## II. INHERENT JURISDICTION IN WTO LAW

In this Part, we argue that WTO Tribunals, like other international tribunals, have inherent jurisdiction and in fact have exercised inherent powers on many occasions. This practice evinces WTO Tribunals' increasing awareness of their status as judicial organs and "self-enforces [their] early decision to function as a court or tribunal."<sup>25</sup> However, WTO Tribunals have been slow to recognize both the existence of the powers they are exercising and their basis in inherent jurisdiction. Thus, the exercise of these powers has been rather haphazard. We argue that, to the extent that a principle *is* applicable under inherent jurisdiction, that principle *may* apply in WTO dispute settlement as long as its application is consistent with the Covered Agreements. Any such principle will fall to be applied in the context of a given dispute. We therefore suggest that such a principle will be applicable under inherent jurisdiction where: (1) its application is necessary, in the sense that it is needed to achieve "a satisfactory settlement of the matter" or "a positive solution to a dispute";<sup>26</sup> (2) it has what we term no "autonomous substantive content"; and (3) the principle *and* its application in a particular dispute are not inconsistent with the language or object and purpose of the Covered Agreements. We explain each criterion and how this approach differs from others found in the literature on the subject. First, we consider briefly whether it is preferable to speak of inherent or implied powers.

### A. WTO Tribunals as Judicial Bodies with Inherent Jurisdiction

In determining claims, WTO Tribunals act independently, much like international courts.<sup>27</sup> They fix the boundaries of the dispute before them, marshal the evidence, determine the appropriate law, apply that law to the facts, and reach a decision.<sup>28</sup> Thus, WTO Tribunals are judicial

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25. Isabelle Van Damme, *Inherent Powers of and for the WTO Appellate Body* 55 (Ctr. for Trade & Econ. Integration, Graduate Inst. of Int'l & Dev. Studies, Working Paper, 2008).

26. DSU arts. 3.4, 3.7.

27. DSU art. 11; *see infra* Part II.B.2.a.

28. *See* DSU arts. 11–12; *see also* JEFF WAICYMER, WTO LITIGATION—PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 286 (2002) ("As with any adjudicatory body, the Panel seeks to evaluate the facts before it, identify the relevant legal principles and apply the law to those facts.").

tribunals that follow a judicial process. The Appellate Body effectively recognized as much in the *Mexico—Soft Drinks* decision, stating:

WTO panels have certain powers that are *inherent in their adjudicative function*. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.” Further, the Appellate Body has also explained that panels have “a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.”<sup>29</sup>

Importantly, the Appellate Body here acknowledges not only the inherent powers (or inherent jurisdiction)<sup>30</sup> but also the panels’ *direct application* of the international legal “rule” of *la compétence de la compétence*, which is not provided for in the text of any of the Covered Agreements.

As the Appellate Body’s statement implies, the panels’ (and the Appellate Body’s) “inherent . . . adjudicative function” exists—that is, WTO Tribunals are judicial—even though some features of WTO dispute settlement are not typical of international judicial bodies. These atypical features include, in particular, the requirement that reports must be adopted in order to be binding and the possibility of consensus not to adopt.<sup>31</sup> McRae states that “although the euphemism ‘quasi-judicial’ is sometimes used to describe the WTO dispute settlement process, in practice and in substance, it is a judicial process.”<sup>32</sup> Primarily, this is because these features do not affect the fact-finding or decisionmaking of WTO

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29. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 45 (internal citations omitted) (emphasis added). On the ability of WTO Tribunals to ensure that they have jurisdiction, see *infra* Part III.A.1.

30. Here we refer to the inherent jurisdiction of panels, although we would argue that this analysis applies *mutatis mutandis* to the Appellate Body itself. Parties have an appeal as of right (on points of law and legal interpretations) to the Appellate Body. DSU art. 17.1. Like those of panels, the Appellate Body’s reports are automatically adopted by the Dispute Settlement Body (DSB) absent negative consensus. *Id.* art. 17.14. The DSB acts in a judicial manner in conducting hearings and in making its reports. See also Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats—Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 201 (2001) (stating that “the Appellate Body is a court in all but name”).

31. See DSU art. 16.

32. Donald McRae, *What Is the Future of WTO Dispute Settlement?*, 7 J. INT’L ECON. L. 3, 8 (2004).

Tribunals. Furthermore, the exceptional rule of decisionmaking through negative consensus in Articles 6.1, 16.4, and 17.14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, or DSU) renders the establishment of panels and the adoption of reports essentially automatic.<sup>33</sup>

The Appellate Body's decision in *Mexico—Soft Drinks* is welcome recognition that WTO Tribunals, like all other international judicial tribunals, have inherent jurisdiction. The Appellate Body appropriately made clear that such inherent jurisdiction flows from the nature of the judicial function. And, crucially, as the Appellate Body's past application of powers flowing from its inherent jurisdiction demonstrates, these powers do not depend on specific provisions in the instrument establishing the court or tribunal (here the DSU and WTO Agreement) for their existence.<sup>34</sup> Nevertheless, as the Appellate Body's response to Mexico's invocation of inherent jurisdiction in *Mexico—Soft Drinks* shows, the powers to be exercised under inherent jurisdiction can be explicitly or impliedly *limited* by provisions of the constitutive document of the tribunal.<sup>35</sup>

#### B. A Principled Approach to Inherent Jurisdiction

Despite the recent recognition by the Appellate Body of the inherent powers of WTO Tribunals, these tribunals have generally been shy in recognizing their inherent jurisdiction. This shyness has a number of unfortunate consequences. First, WTO Tribunals have often overlooked key questions such as the legal basis for employing a particular rule and the meaning of a rule in public international law. Second, and more worryingly, they might have been inclined to distort provisions of the Covered Agreements in order to find a textual basis for a particular norm, rather than acknowledging that the norm derives from a principle that is not necessarily recorded explicitly in the agreements.

All this means that a systematic—and explicit—approach should be taken to the application of rules of international law under inherent jurisdiction. To that end, we argue that, while it is preferable to acknowledge that WTO panels and the Appellate Body are applying principles of

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33. See generally Pauwelyn, *How Far Can We Go?*, *supra* note 22, at 553.

34. See generally Herbert Briggs, *The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction*, in *VÖLKERRECHT UND RECHTLICHES WELTBILD FESTSCHRIFT FÜR ALFRED VERDROSS* 87 (FA Frhr v.d. Heydte et al. eds., 1960). Obviously, for inherent jurisdiction to exist the provisions must establish the body as a (de facto) international tribunal in the first place, as the DSU has for WTO Tribunals.

35. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶¶ 46–53 (examining the DSU to see whether or not what was effectively a principle of comity was compatible with the DSU); see discussion *infra* Part I.B.2.c.

international law directly, the same result (an acknowledgment of the importance that principles of international law play) can be achieved through an interpretative approach. We then argue, based on the principles that have been applied by panels and the Appellate Body to date, that there exist three conditions on applying principles in inherent jurisdiction—and that, if satisfied, a WTO Tribunal may apply such a principle under its inherent jurisdiction.

### 1. Inherent or Implied Powers in the WTO?

It is the DSU and WTO Agreement (as well as the Terms of Reference in a given case) that establish the existence of WTO Tribunals as international judicial bodies. The kinds of powers described above as potentially relevant under inherent jurisdiction,<sup>36</sup> but not provided for in the text of the Covered Agreements, could be applied directly under inherent jurisdiction. Van Damme describes them as “functional powers, only to be exercised when necessary for the purposes of fulfilling the judicial function and the values attached thereto in the context of a particular dispute settlement system.”<sup>37</sup>

But such powers might alternatively be thought of as *implied* from the provisions of the Covered Agreements establishing WTO Tribunals, taken as a whole and read in the light of their objects and purposes (one of which is the establishment of judicial dispute settlement).<sup>38</sup> This is effectively stating that the WTO Agreements impliedly authorize panels to do all that is necessary to fulfill their (judicial) function,<sup>39</sup> which is an application of the principle of utility.<sup>40</sup> The provisions establishing WTO Tribunals and regulating their activities are to be interpreted in light of the above (and other) principles of international law, as these principles are applicable between all Members and are “relevant” to dispute

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36. See discussion *supra* Part I.B.

37. Van Damme, *supra* note 25, at 12.

38. See *infra* notes 56–61 and accompanying text.

39. An analogy may be made in this respect to the implied powers of international organizations. Cf. *Reparations for Injuries Suffered in Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11) (holding that the United Nations impliedly has all the powers necessary for the fulfilment of its functions).

40. BROWN, *supra* note 23, at 66. As Brown notes, this is an application of the second rule encompassed by the principle of utility: that “the instrument as a whole, and each of its provisions, must be taken to have been intended to have some end,” and that this end should be given effect. *Id.* at 44 (quoting Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part Three*, 1991 BRIT. Y.B INT’L L. 1, 44). In addition, the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have both held that *compromis* conferring jurisdiction, without expressly mentioning the ability to award compensation, nonetheless authorize an award of compensation by the relevant court to settle the dispute finally. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 26 (Apr. 9); *Factory at Chorzów (F.R.G. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 20–21 (July 26).

resolution.<sup>41</sup> Interpreting the WTO Agreement provisions in light of these principles would generally lead to the same result as a direct application of a principle. For example, a panel could simply apply principles of international evidence law to hold that a party asserting a fact must prove it. Alternatively, under an interpretative approach, a panel could hold that Articles 11 and 12.7 of the DSU require panels to receive, assess, and evaluate evidence and to explain their findings of fact. However, because the provisions do not specify precisely how this is to be done, they could be interpreted in light of international law principles of evidence,<sup>42</sup> which would thus impliedly authorize panels, for example, to reject an assertion of fact that is unsupported by any evidence. Essentially, the assertion of an implied power *per se* may be viewed as an exercise of inherent powers.<sup>43</sup>

The distinction between application and interpretation is not concrete and it may in some cases be difficult to determine whether a WTO Tribunal is applying international law or simply using international law to interpret a WTO provision. The answer to this question may not make a large difference from a practical perspective. As noted, WTO Tribunals tend not to make clear the basis upon which they exercise inherent jurisdiction yet regularly exercise such powers. This is not to say that a rigid theoretic distinction between inherent and implied powers is always without utility.<sup>44</sup> As Brown states, “it is the source of inherent powers that provides guidance as to the limitations that exist to restrict the exercise of such powers.”<sup>45</sup> The Appellate Body in *Mexico—Soft Drinks* appears to have preferred the application of inherent powers in relation to *la compétence de la compétence* and the ability of panels to regulate their procedure. The inherent powers approach appears to be a less strained interpretation of the Covered Agreements, although it still

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41. VCLT, *supra* note 18, art. 31(3)(c). Because the principles discussed here are of general application to dispute settlement situations, it seems to us to make little difference that some WTO Members are not states. We consider that such principles would apply to any internationally recognized entity engaged in international judicial dispute settlement.

42. Cf. Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (Apr. 25, 1997) [hereinafter Appellate Body Report, *U.S.—Wool Shirts and Blouses*] (mentioning, but not making clear, the role of international principles of evidence in relation to the burden of proof).

43. Van Damme, *supra* note 25, at 11.

44. *Id.*; see also BROWN, *supra* note 23, at 67 (stating that “it is important to distinguish between these sources to find the most appropriate justification for the exercise of inherent powers”).

45. BROWN, *supra* note 23, at 67. However, for the reasons stated in the Article, the manner in which we propose analyzing whether or not a principle is applicable under a WTO Tribunal’s inherent jurisdiction will limit the application of principles, based largely on the Covered Agreements themselves. Obviously, the principles themselves must also be applied within their own legal limits.

requires careful scrutiny of those agreements before applying any principle, as occurred in *Mexico*. Less strained interpretations are preferable as they ensure the legitimacy of the interpretative and adjudicative process. Further, WTO Tribunals have, generally speaking, not based their reasoning on implied powers.<sup>46</sup> As Gaeta observes, international courts generally (we interpolate: although not WTO Tribunals, until *Mexico—Soft Drinks*) have tended to apply inherent powers, rather than read implied powers into their statutes.<sup>47</sup> Even Trachtman,<sup>48</sup> adopting an interpretative approach, concedes that “other international law may be used in construction in order to *complete the procedural structure of the DSU* itself and to ensure an ‘objective assessment of the matter’ under Article 11 of the DSU.”<sup>49</sup> “Completing the procedural structure of the DSU” seems to us to suggest more than interpretation, even where this leads to the implication of powers. On the other hand, Bohlander’s approach seems to offer a useful distinction. He argues that, where the Covered Agreements provide some guidance on how a panel should resolve an issue, it seems plausible to use an approach based on interpretation and implied powers.<sup>50</sup> This will depend on the principle at issue and the extent of the guidance in the Covered Agreements. But where the Covered Agreements are *silent* on an issue, to argue that inherent jurisdiction has *no* role to play—that is, that principles of international law cannot *ever* be applied directly by WTO Tribunals non-interpretatively—often unduly strains the notion of interpretation. In such situations, an approach embracing inherent jurisdiction is preferable.

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46. There has been a dearth of reasoning on the point, as noted above. However, those instances referred to in Part III.A, *infra*, where WTO Tribunals have (we suggest) unduly stretched the Covered Agreements, could be seen as an implied power approach. *But see* BROWN, *supra* note 23, at 70 (noting that the power of WTO panels to accept amicus briefs can be seen to be an implied power).

47. Paola Gaeta, *Inherent Powers of International Courts and Tribunals*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 353, 360 (Lal Chand Vohrar et al. eds., 2003).

48. Trachtman argues that *all* other law is excluded by Articles 3.1, 3.2, 11, 7.1 and 7.2 of the DSU and Article XVI(1) of the Marrakesh Agreement. Trachtman, *supra* note 6, at 137–40 (citing Marrakesh Agreement, *supra* note 1, art. XVI(1)).

49. *Id.* at 136 (emphasis added) (using *U.S.—Wool Shirts and Blouses*, *supra* note 42, as an example). However, this decision does not make the basis of use of the principles of international evidence law entirely clear. Given the lack of any reference to Article 31(3)(c) of the VCLT (or suggestion of implications from certain DSU provisions) in the relevant passages, it seems that the Appellate Body was in fact applying a principle directly.

50. *See supra* note 24 and accompanying text.

## 2. Conditions on the Application of Principles in the Inherent Jurisdiction of WTO Tribunals

An international judicial tribunal's inherent jurisdiction cannot be exhaustively delineated.<sup>51</sup> The categories of principles that may be applied are also not necessarily closed.<sup>52</sup> In our view, however, the examples of exercises of inherent jurisdiction above,<sup>53</sup> and our own examination of specific principles that have been applied in the WTO below, show that three conditions for application of principles of inherent jurisdiction can be distilled: (1) necessity to resolve an issue; (2) lack of autonomous substantive content in the principle; and (3) consistency with the constitutive instruments of the international tribunal in question (the Covered Agreements in the context of the WTO). In addition, a principle must be recognized in customary international law or be a general principle of law. Inherent jurisdiction does not provide a vehicle for applying any rule an international tribunal wishes to apply. The analysis we suggest can therefore be applied to address issues such as the one raised by the Appellate Body in *E.C.—Sugar*, where it stated that “it is far from clear that the estoppel principle applies in the context of WTO dispute settlement.”<sup>54</sup>

### a. Application of a Principle Is Necessary for the Judicial Resolution of an Issue

For a principle to be applied under inherent jurisdiction, it must be impossible to come to a properly reasoned decision on a certain point or to take a certain step in reasoning without applying the principle. As Brown has observed, “[i]nternational courts cannot claim to possess an inherent power if that power is not necessary for the performance of its particular functions.”<sup>55</sup> The Appellate Body in *Mexico—Soft Drinks*

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51. This is, of course, not a reason for declining to acknowledge the existence and exercise of *any* aspects of inherent jurisdiction—tribunals can be called upon to deal with issues that they had not previously encountered. The fact that the universe of such principles is not closed has not stopped the ICJ from applying them to resolve disputes judicially and overtly.

52. Cf. *Legality of Use of Force (Serb. & Mont. v. Belg.)*, 1999 I.C.J. 279, 339 (Apr. 29) (Higgins, J., separate opinion) (observing that, in relation to an exercise of inherent jurisdiction to delist a case, “the real question is not . . . whether the present circumstances are exactly identical to the few examples where the Court itself has removed a case from the List (examples which will, in their turn, have been “new” at the relevant time and not falling into any previously established category)”). *Id.*

53. See *supra* Part I.B.

54. Appellate Body Report, *European Communities—Export Subsidies on Sugar*, ¶ 310, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005) [hereinafter Appellate Body Report, *E.C.—Sugar*].

55. BROWN, *supra* note 23, at 79 (citations omitted); see also *id.* at 70–71 (arguing that it is circular to attribute to an international court a power because it is called a court). However, as the use of the term “adjudicative function” by the Appellate Body shows, WTO

recognized powers inherent “in [panels’] *adjudicative function*.”<sup>56</sup> The function of panels according to Article 11 of the DSU is “to assist the DSB in discharging its responsibilities,” but also to make an “objective assessment of the matter before it.”<sup>57</sup> Panels must make “findings”<sup>58</sup> as to the facts of the case and “the applicability of and conformity with” the Covered Agreements of the measure challenged.<sup>59</sup> The dispute settlement system aims to achieve “a satisfactory settlement of the matter” or “a positive solution to a dispute.”<sup>60</sup> As the panel in *E.C.—Bananas III* put it, the function of WTO dispute settlement is “first and foremost . . . to settle disputes,”<sup>61</sup> a “private function”<sup>62</sup> relating to the parties to the dispute. Equally, however, Article 3.2 of the DSU makes clear that the dispute settlement system is intended to “clarify the existing provisions of [the covered] agreement.”<sup>63</sup> In addition, Article 10.1 of the DSU requires that the interests of Members who are *not* parties to the dispute are nevertheless “fully taken into account during the panel process.”<sup>64</sup> The DSU thus also contemplates a “public function” of WTO Tribunals in “ensuring the proper administration of international justice,”<sup>65</sup> including within the WTO regime.

The Appellate Body Report in *U.S.—Wool Shirts and Blouses* provides an example of a situation in which the exercise of inherent jurisdiction was necessary. As explained in greater detail below,<sup>66</sup> the Appellate Body would have been unable to rule on the U.S. argument that India had not proved its case had it not turned to principles of

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Tribunals can be considered judicial *because of the task assigned to them by the DSU*. Indeed, they are not called “courts” anywhere in the Covered Agreements. Brown seems to regard this as a merely functional justification, however this seems to be an oversimplification, because the function itself is informed by the desire in the DSU to establish bodies that function judicially.

56. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 45.

57. DSU art. 11.

58. *Id.* arts. 7.1, 11, 12.7.

59. *Id.* art. 11.

60. *Id.* arts. 3.4, 3.7.

61. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.32, WT/DS27/R (May 22, 1997) [hereinafter *E.C.—Bananas III*]; *see also* DSU art. 3.3 (“The *prompt settlement* of situations in which a Member considers that any benefits accruing to it . . . under the covered agreements are being impaired by measures taken by another Member *is essential to the effective functioning of the WTO.*”) (emphasis added).

62. BROWN, *supra* note 23, at 72.

63. Obviously, this clarification is expected to take place in the context of particular disputes. *See* Appellate Body Report, *U.S.—Wool Shirts and Blouses*, *supra* note 42, at 19 (stating that Article 3.2 of the DSU is not meant to encourage panels to clarify the provisions of the Covered Agreements “outside the context of resolving a particular dispute”).

64. DSU art. 10.1.

65. BROWN, *supra* note 23, at 72–73.

66. *See infra* Part III.A.3.

international law on burden of proof. Because the function of WTO Tribunals is judicial, it would have been inappropriate simply to ignore the argument or not to reason judicially to a conclusion.<sup>67</sup>

b. The Principle Has No “Autonomous Substantive Content”

It has often been stated that WTO Tribunals may apply “procedural” principles of international law.<sup>68</sup> As Brown has convincingly argued, however, the distinction between merely “procedural” and “substantive” law is difficult to sustain.<sup>69</sup> This is because a “procedural” principle has the ability to affect “substantive” rights. As Brown concludes, “if the criterion is whether the final outcome of the litigation is affected, then most rules can be characterized as substantive.”<sup>70</sup>

Rather than focusing on “procedural” principles, we suggest that a principle, to be applied in the exercise of inherent jurisdiction, cannot have “autonomous substantive content.” In other words, the relevant principle must relate to the application of another norm. A principle that would *not* fall into this category is that of self-determination, as the application of that principle will *of itself* result in a finding that (to some extent) certain peoples do, or do not, have a right to govern themselves. That one principle or rule contains all relevant substantive content. There are a number of contrasting examples that do fulfill this condition. The rules of burden of proof can sensibly be applied only in the context of determining whether *another norm*, such as a provision in the Covered Agreements, has been breached. Similarly, good faith based principles such as estoppel and *abus de droit* make sense only when applied in the context of another set of rights. *Abus de droit* presumes the existence of *another* right that has been abused. Similarly, estoppel conditions the exercise of a right on a state acting consistently with its representations regarding that right.

The distinction between what are generally regarded as “procedural” principles and principles without autonomous substantive content may be fine but, in our opinion, the latter formulation explains more accurately which principles it encompasses. As a result, it is practically easier to apply than a “substantive/procedural” distinction. One must simply

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67. DSU art. 12.7 (requiring the panel to set out “findings of fact” and “the basic rationale behind any findings and recommendations that it makes”).

68. See William J. Davey & André Sapir, *The Soft Drinks Case: The WTO and Regional Agreements*, 8 *WORLD TRADE REV.* 5, 13 (2009); Trachtman, *supra* note 6, at 136; see also WAINCYMER, *supra* note 28, at 295, 305, 309–10.

69. BROWN, *supra* note 23, at 7 (“[W]riters have sought to distinguish between the two for over a century, only to find that it is very difficult to draw a clear line.”).

70. *Id.* at 8.

ask whether the principle works sensibly on its own or can operate *only* in relation to another norm or set of norms.

c. The Principle Is Not Inconsistent with the Text and Purposes of the Covered Agreements

A final condition for the exercise of any inherent power by a WTO Tribunal is the consistency of that principle with the provisions of the Covered Agreements, interpreted in the light of their object and purpose.<sup>71</sup> While the principles explained above do not necessarily have a textual basis in *any* statute of an international tribunal in which they have been applied, any direction to an international tribunal in its constitutive instrument(s) to do or not to do a certain thing must be heeded.<sup>72</sup> The Appellate Body has stated that “[n]othing in the DSU gives a panel the authority either to disregard or to modify . . . explicit provisions of the DSU.”<sup>73</sup> Waincymer cautions that a panel should not exercise its discretion in a manner inconsistent with other rights under the DSU.<sup>74</sup> More generally, Brown observes that “a *clause contraire* in the constitutive instrument of an international court” or “procedures actually provided for in the constitutive instrument [that are] inconsistent with the exercise of that power” form “limitation[s]” on the exercise of inherent jurisdiction.<sup>75</sup> Van Damme concurs with this view, noting that a tribunal may

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71. In practical terms, attention will need to be directed largely although not exclusively to the DSU and the Marrakesh Agreement.

72. Even those taking the widest possible view of the application of international legal norms in WTO dispute settlement, a view far wider than ours, acknowledge that the provisions, necessary implications, and object and purpose of the Covered Agreements must exclude the application of other norms to the extent of any inconsistency. For example, as the panel in *Korea—Measures Affecting Government Procurement* explained:

Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it. To put it another way, to the extent there is *no conflict or inconsistency*, or an expression in a covered WTO agreement *that implies differently*, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000) (footnotes omitted) (emphasis added).

73. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 92, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter Appellate Body Report, *India—Patents*] (cited with approval in Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 46).

74. WAINCYMER, *supra* note 28, at 295.

75. BROWN, *supra* note 23, at 80. Brown considers that the latter situation, that of a provision provided for but inconsistent with the application of a principle, would be “more difficult to show,” but suggests that the time frames prescribed for WTO disputes may cause such difficulties. *Id.* Curiously, he does so without reference to *Mexico—Soft Drinks*, to which

exercise inherent powers “absent contradictory language in the constitutive document.”<sup>76</sup>

The provisions of the Covered Agreements and their objects and purposes may therefore have the effect of rendering inapplicable in the WTO a principle that has been applied elsewhere. The approach of the Appellate Body in *Mexico—Soft Drinks* is instructive. Mexico argued that “[t]here is nothing in the DSU . . . that explicitly rules out the existence of” a WTO panel’s power to decline to exercise its jurisdiction even in a case that is properly before it.<sup>77</sup> The Appellate Body was at pains to rebuff this argument. It relied principally on Articles 3.2, 7, 11, 19.2, and 23 of the DSU to establish that panels had an “obligation” to exercise their jurisdiction, absent a “legal impediment” thereto.<sup>78</sup> Thus the principle<sup>79</sup> espoused by Mexico, that as a matter of discretion panels may lawfully decline to exercise their jurisdiction, was inconsistent with the specific provisions of the DSU, and therefore inapplicable in WTO dispute settlement.<sup>80</sup>

Further, a principle that is not inconsistent with the DSU and other Covered Agreements generally may still, in a given case, have the effect of derogating from an explicit provision or leading to a result inconsistent with its purposes. For example, the principle that a party must prove a fact it affirmatively asserts<sup>81</sup> is generally compatible with the Covered Agreements and frequently applied by panels and the Appellate Body.<sup>82</sup> This principle, however, could not be applied in relation to export subsidies within the scope of Article 10.3 of the *Agreement on Agriculture*, because that Article requires a Member whose measure is challenged (that is, the Member *defending* the action) to “establish that no export subsidy . . . has been granted in respect of the quantity of exports in

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he had earlier referred to on a different point. *Id.* at 62. In addition, Brown states that “the particular functions of each international court will determine the scope of its inherent powers.” *Id.* at 79.

76. Van Damme, *supra* note 25, at 13.

77. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 47.

78. *Id.* ¶¶ 48–53. We acknowledge that this analysis was made in terms of inherent powers, rather than inherent jurisdiction, but we suggest that this makes no difference to the approach taken.

79. We assume for the moment that comity is indeed a principle of international law. See *infra* Part III.B.1.a.i.

80. For a discussion on comity, see *infra* Part III.B.1.a.i.

81. *U.S.—Wool Shirts and Blouses*, *supra* note 42, at 16–17.

82. This and other evidentiary principles are discussed in more detail *infra* Part III.A.3.

question.”<sup>83</sup> Indeed, the Appellate Body has recognized this as a “reversal of the usual rules.”<sup>84</sup>

Inconsistency with the Covered Agreements can arise relatively easily. This is in part because the DSU is intended to ensure the speedy resolution of disputes, so it contains more prescriptive provisions, especially as regards timeframes, than other constitutive documents of international tribunals, such as those of the ICJ or ICTY. This is also due to the emphasis placed by the Covered Agreements on the right of a Member to bring a claim and the automatic and compulsory jurisdiction of WTO Tribunals. Finally, the decision in *Mexico—Soft Drinks* appears to have interpreted the WTO Agreements as being inconsistent with making a “determination”<sup>85</sup> under a non-WTO agreement, thereby excluding under our approach any principles that require this.<sup>86</sup> The discussion of specific principles in Part III, below, illustrates this.

### III. SPECIFIC PRINCIPLES

Many authors discussing the question of whether and how non-WTO law applies in the WTO have advocated an all<sup>87</sup> or nothing<sup>88</sup> approach—either non-WTO law can be applied to all aspects of a dispute where it is relevant, interpretatively or directly, or no non-WTO law can be applied. The analysis has often proceeded without examining individual principles. Our analysis above suggests a partial answer to the question of the extent to which non-WTO law can apply in the WTO, in that panels have inherent jurisdiction. What law can apply under inherent jurisdiction is limited, as noted above, to principles that are necessary to judicially resolve a certain matter in a dispute.<sup>89</sup> As this approach is nuanced, it is

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83. Agreement on Agriculture art. 10(3), Marrakesh Agreement, *supra* note 1, Annex 1A.

84. Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Second Recourse by New Zealand and the United States to Article 21.5 of the DSU)*, ¶ 74, WT/DS103/AB/RW2 (Dec. 20, 2002) (cited with approval in Appellate Body Report, *United States—Subsidies on Upland Cotton (Recourse by Brazil to Article 21.5 of the DSU)*, ¶ 190, WT/DS267/AB/RW (June 2, 2008) [hereinafter Appellate Body Report, *U.S.—Upland Cotton (21.5—Brazil)*]).

85. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 56.

86. However, if a matter were before an international tribunal that could apply general international law, such principles *could* be applied. This is due to the distinction (noted by Trachtman) between the international law that is generally applicable to a situation and the applicable law *in WTO dispute settlement*. Unlike generalist international tribunals, WTO Tribunals have limited jurisdiction in terms of both claims and applicable law. Trachtman, *supra* note 6, at 136.

87. See, e.g., Pauwelyn, *How Far Can We Go?*, *supra* note 22, at 535.

88. See, e.g., Trachtman, *supra* note 6, at 132.

89. See discussion *supra* Part II.B.2.a.

necessary to examine specific principles and rules of international law with a view to establishing whether they can apply in the WTO.

Bartels, who takes a middle view of the application of international law in the WTO,<sup>90</sup> examines quite generally whether some specific principles of international law may apply in the WTO<sup>91</sup> and suggests that it is difficult to evaluate this applicability in the abstract.<sup>92</sup> While it may indeed be difficult, it is possible (as Bartels later does) to look at principles that have been applied elsewhere or suggested by commentators to be applicable under inherent jurisdiction and to evaluate whether or not they could apply in the WTO, using the three conditions we have explained above. Some norms are by their nature incompatible with the DSU or other Covered Agreements and the possibility of their application in the WTO can be rejected outright. Other principles are, however, generally compatible with the Covered Agreements. In such cases, it is useful to examine some of the possible situations in which they might arguably apply. This Part therefore examines several principles with a view to establishing whether, and if so how, they can be applied by WTO Tribunals as an incident of their inherent jurisdiction.

#### A. Principles that Have Been Applied in WTO Jurisprudence

##### 1. *La Compétence de la Compétence*

Brown calls *la compétence de la compétence* “perhaps the best known example of an inherent power.”<sup>93</sup> It is a power that has been recognized by the Permanent Court of International Justice (PCIJ),<sup>94</sup> the ICJ, and almost all other international tribunals.<sup>95</sup> The ICJ has stated that “an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.”<sup>96</sup>

Applying the three criteria above, the power of a WTO Tribunal to decide whether or not it has jurisdiction over a particular claim is necessary, at least where raised by one of the parties or the WTO Tribunal, as if it does not have jurisdiction then it can make no judicial determination

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90. See Bartels, *supra* note 5, at 504–09.

91. *Id.* at 514–18.

92. See *id.* at 511.

93. BROWN, *supra* note 23, at 63.

94. See, e.g., Interpretation of Greco–Turkish Agreement (Greece v. Turk.), 1928 P.C.I.J. (ser. B) No. 16, at 20 (June 7).

95. See BROWN, *supra* note 23, at 63 (referring to the Inter-American Court of Human Rights, Iran–United States Claims Tribunal, International Centre for Settlement of Investment Disputes (ICSID) tribunals, and International Criminal Tribunal for the Former Yugoslavia (ICTY)).

96. Nottebohm (Liech. v. Guat.), 1953 I.C.J. 111, 119 (Nov. 18).

on the merits at all. The ability to examine whether a tribunal has jurisdiction also has no autonomous substantive content: the criteria of jurisdiction themselves are provided by the relevant agreements. For example, in the case of a compliance panel, Article 21.5 of the DSU normatively establishes the panel's jurisdiction: a measure must be one "taken to comply" with a previous DSB ruling to fall within the scope of compliance proceedings. The inherent power to examine jurisdiction merely enables application of this norm. Finally, there is nothing in the DSU or elsewhere that suggests that a WTO Tribunal cannot ascertain whether it has jurisdiction. Indeed, the requirements in the DSU that the complaining party specify the relevant Covered Agreements,<sup>97</sup> "the reasons for the request" (for consultations), and "the measures at issue"<sup>98</sup> provide criteria through which a panel can ensure that a complaint is properly before it. Article 4.7 of the DSU also makes clear that the holding of consultations is a prerequisite to the exercise of a panel's powers, which the Appellate Body has held is generally the case.<sup>99</sup> Equally, in Article 21.5 proceedings, the compliance panel must, if in doubt or if the parties put jurisdiction in issue, establish that there is in fact "disagreement as to the existence or consistency with a covered agreement of measures taken to comply."<sup>100</sup> Under the three criteria, then, the exercise of *la compétence de la compétence* is clearly an incident of inherent jurisdiction that can and does apply within WTO dispute settlement.

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97. DSU arts. 7.1, 7.2.

98. *Id.* art. 6.1; *see also id.* art. 4.5; *cf. id.* art. 4.4 (relating to requests for consultations).

99. *See, e.g.,* Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, ¶ 131 n. 30, WT/DS46/AB/R (Aug. 2, 1999) (stating that Articles 4 and 6 of the DSU (and Articles 4.1 to 4.4 of the Agreement on Subsidies and Countervailing Measures [hereinafter ASCM], Marrakesh Agreement, *supra* note 1, Annex 1A) "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel"); *see also* Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse by the United States to Article 21.5 of the DSU)*, ¶ 58, WT/DS132/AB/RW (Oct. 22, 2001) [hereinafter Appellate Body Report, *Mexico—Corn Syrup (21.5—U.S.)*] (stating that "as a general matter, consultations are a prerequisite to panel proceedings").

100. *See, e.g.,* Panel Report, *United States—Subsidies on Upland Cotton (Recourse by Brazil to Article 21.5 of the DSU)*, ¶¶ 9.19–9.27, 9.44–9.55, WT/DS267/RW (Dec. 18, 2007); *see also* Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Recourse by Canada to Article 21.5 of the DSU)*, ¶¶ 61–77, WT/DS257/AB/RW (Dec. 5, 2005) [hereinafter Appellate Body Report, *U.S.—Softwood Lumber (IV) (21.5—Canada)*]; Panel Report, *Australia—Measures Affecting Importation of Salmon (Recourse by Canada to Article 21.5 of the DSU)*, ¶¶ 7.1, 7.21, WT/DS18/RW (Feb. 18, 2000) [hereinafter Panel Report, *Australia—Salmon (21.5—Canada)*]; Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather (Recourse by the United States to Article 21.5 of the DSU)*, ¶¶ 6.1–6.7, WT/DS126/RW (Jan. 21, 2000) [hereinafter Panel Report, *Australia—Leather (21.5—U.S.)*].

As *Mexico—Soft Drinks* demonstrates,<sup>101</sup> the Appellate Body has accepted that this inherent power exists and is applicable in WTO dispute settlement. Previously, in *U.S.—1916 Act*,<sup>102</sup> *Mexico—Corn Syrup (21.5—U.S.)*,<sup>103</sup> and *U.S.—Byrd Amendment*,<sup>104</sup> the Appellate Body had made this clear, stating that panels could and indeed were required to examine matters going to the root of their jurisdiction. The basis for the ability of WTO Tribunals to do so, however, was not explained. In *U.S.—1916 Act*, the Appellate Body stated in a footnote that it “note[d] that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.”<sup>105</sup> It referred extensively to the practice of the PCIJ, ICJ, and Iran—United States Claims Tribunal. It did not, however, explain *why* this “rule” is widely followed in international tribunals generally, or why it should also apply to WTO Tribunals.<sup>106</sup> Significantly, *Mexico—Soft Drinks* explained for the first time that this power was “inherent in the adjudicative function” of WTO Tribunals.<sup>107</sup> As it is desirable that the basis of principles applied by WTO Tribunals be made clear, the Appellate Body is to be applauded for taking this step in *Mexico—Soft Drinks*.

## 2. Hearing of Preliminary Objections and Delivering Preliminary Rulings

The principle that an international tribunal has discretion to “hear . . . preliminary objections regarding the court’s jurisdiction . . . separately

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101. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 44; *see supra* note 14 and accompanying text.

102. Appellate Body Report, *U.S.—1916 Act*, *supra* note 22, ¶ 54.

103. Appellate Body Report, *Mexico—Corn Syrup (21.5—U.S.)*, *supra* note 99, ¶ 36.

104. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 207, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) [hereinafter Appellate Body Report, *Byrd Amendment*]. The Appellate Body held that *it* had the power to examine whether or not the panel had exceeded its mandate. The only rationale offered, however, was that “*the issue of a panel’s jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal.*” *Id.* ¶ 208 (emphasis added).

105. Appellate Body Report, *U.S.—1916 Act*, *supra* note 22, ¶ 54 n. 30.

106. *Id.* The obvious inductive leap being that WTO Tribunals *are* international tribunals, and *a fortiori* have this competence.

107. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 45. This classification as being “inherent in the adjudicative function” extended to the “margin of discretion [of panels] to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.” *Id.* Although the Appellate Body did not itself characterize the issue as one of “inherent jurisdiction,” it recognized that certain powers of a panel spring from its adjudicative function. *Id.* ¶ 45 (quoting Appellate Body Report, *E.C.—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 152 n.138, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter Appellate Body Report, *E.C.—Hormones*]). This is equally the basis of, and thus supports, an inherent jurisdiction approach.

from the merits”<sup>108</sup> also falls within inherent jurisdiction.<sup>109</sup> Article 12.6 of the DSU appears to contemplate that the “first [written] submission” of parties will deal with the whole of the matter, thus suggesting that “subsequent” submissions may not be necessary. While panels have the ability to depart from the Working Procedures<sup>110</sup> (under Article 12.1 of the DSU), neither the DSU nor the Working Procedures mention preliminary meetings dealing with issues of jurisdiction.<sup>111</sup> Certainly, the DSU does not contemplate expressly or impliedly preliminary *rulings* from either panels or the Appellate Body. Despite this, and without detailed consideration of the source of the relevant power, panels<sup>112</sup> and the Appellate Body<sup>113</sup> have held themselves competent to receive and request submissions and hold preliminary meetings on issues of jurisdiction, especially in the context of DSU Article 21.5 disputes. Such a power is on all fours with the criteria enunciated above. It is necessary to ensure the effective exercise of the judicial function (for example, in informing the parties of whether or not they need to address certain measures in their substantive submissions),<sup>114</sup> and it is often facilitative of *la compétence de la compétence*. It is a relatively “procedural” power, having no autonomous substantive content, in that the decision of whether, where, and when to schedule meetings and render rulings is merely facilitative of the application of other norms. Nothing in the DSU *prevents* such an exercise of discretion by WTO Tribunals. While it may seem a relatively minor power, it would nonetheless be advantageous to recognize as its basis WTO Tribunals’ inherent jurisdiction.

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108. BROWN, *supra* note 23, at 63.

109. Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 279, 338–39 (Dec. 15) (Higgins, J., separate opinion). She referred to part of the PCIJ’s statement when it was confronted with a preliminary objection to its jurisdiction but found that no provision in its rules existed to deal with this. *Id.* The PCIJ stated that it was “at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.” *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 16 (Aug. 30).

110. See DSU app. 3.

111. Cf. Rules of Court, 1978 I.C.J. Acts & Docs. 5, 143 (making explicit provision for objections to jurisdiction to be handled in a preliminary manner).

112. See, e.g., Panel Report, *Australia—Salmon (21.5—Canada)*, *supra* note 100; Panel Report, *Turkey—Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/R (May 31, 1999).

113. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 83, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Report, *U.S.—Shrimp*]; Appellate Body Report, *Thailand—Anti-Dumping on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 74, WT/DS122/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Report, *Thailand—H-Beams*].

114. See, e.g., Panel Report, *Australia—Salmon (21.5—Canada)*, *supra* note 100, ¶ 7.10.

### 3. Evidentiary Principles

Another example of the application of inherent jurisdiction by the Appellate Body is its invocation of principles regarding the burden of proof. It is a well-accepted principle of international law (arguably a general principle of law) that a party must prove a fact it affirmatively asserts, subject to various nuances in certain circumstances.<sup>115</sup> As explained above, the application of a “rule” on the burden of proof was necessary because the Covered Agreements do not address this, yet the Appellate Body had to respond to an argument that a party had not proved its case. A rule regarding the burden of proof also has no autonomous substantive content—it is predicated on another norm demonstrating *what* needs to be proved and merely allows a decisionmaker to determine who is responsible for doing so. Such a rule is also not inconsistent with the provisions of the DSU—which requires panels to objectively examine evidence, make factual findings, and explain the reasons for these.<sup>116</sup> Yet they do not provide who has to prove what. A rule on burden of proof thus operates consistently with these provisions.

The Appellate Body dealt with the burden of proof issue in a very interesting manner. In *U.S.—Wool Shirts and Blouses*, India argued that the panel was wrong to assign it any burden of proof.<sup>117</sup> The Appellate Body responded by stating:

In addressing this issue, we find it difficult, indeed, to see how any *system of judicial settlement* could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that *various international tribunals*, including the International Court of Justice, *have generally and consistently accepted and applied the rule* that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is *a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions*, that the burden of proof rests upon the

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115. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 329 (photo. reprint 2006) (1953); SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005*, at 1040–42 (4th ed. 2005); *see also* Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), ¶ 204 (Judgment of Feb. 26, 2007), *available at* <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited Mar. 12, 2010); *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 17 (Apr. 9).

116. DSU arts. 11, 12.7.

117. Appellate Body Report, *U.S.—Wool Shirts and Blouses*, *supra* note 42, at 3. India also argued that “the issue of the burden of proof is an issue of substantive law and must be answered solely on the basis of the substantive law of the WTO in the light of the customary rules of interpretation of public international law.” *Id.*

party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.<sup>118</sup>

Unlike in the later *Mexico—Soft Drinks* decision regarding the principle of *la compétence de la compétence* and the panel's ability to regulate procedure (including rules of evidence), the Appellate Body in *U.S.—Wool Shirts and Blouses* did not explicitly treat the “rule” regarding burden of proof as a matter of powers “inherent” in its functions. Yet it did implicitly assert that the “system of judicial settlement” requires such rules.<sup>119</sup> Unfortunately, the Appellate Body did not make clear the significance of other international tribunals' practice and similar practice in the other jurisdictions to which it referred. However, the mere reference to the practice of other international tribunals and the practice in other jurisdictions supports the view that the Appellate Body exercised inherent jurisdiction in *applying* this rule of international law. It suggests that the rule stems not merely from the provisions of the DSU (an examination of which was conspicuously absent),<sup>120</sup> but from the judicial function, which is common to both international and domestic adjudication.

#### 4. Dealing with Amicus Curiae Briefs

Brown regards the ability of an international tribunal, at its discretion, to “accept . . . the submission of amicus curiae briefs . . . in the absence of an express power to do so” as an application of inherent jurisdiction.<sup>121</sup> That a court may, but need not, accept an amicus curiae brief appears to be a general principle of law.<sup>122</sup> While not provided for directly in the Covered Agreements, a rule allowing tribunals to deal with such briefs is necessary if these briefs are to be dealt with judicially and not arbitrarily. Such a rule relates only to whether or not such briefs

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118. *Id.* at 14 (citations omitted) (emphasis added). The Appellate Body first made reference to a book that summarizes the practice of the ICJ on this point, and then to several legal dictionaries, books on proof in civil systems, and Article 9 of the New French Code of Civil Procedure. *Id.* at 14–15. In addition, the Appellate Body referred to GATT panel practice that had “clearly put the burden of establishing a violation of the GATT 1947 obligations at issue on the complaining party.” *Id.* at 16–17.

119. *Id.*

120. The Appellate Body did refer to Article 3.8 of the DSU. *Id.* at 13. However, it said that that article was not at issue. *Id.*

121. BROWN, *supra* note 23, at 76.

122. *See id.* at 76–77 (referring to the practice of WTO Tribunals, the Inter-American Court of Human Rights, North American Fair Trade Agreement (NAFTA) tribunals, and ICSD tribunals). Indeed, the practice occurs frequently in domestic courts around the world.

can legitimately be considered. In this way, the rule has no autonomous substantive content because it merely facilitates the application of other norms that are the subject of the dispute. Nothing in the DSU expressly prevents acceptance either by panels or by the Appellate Body of amicus curiae briefs. The Appellate Body has rejected arguments to the contrary. For example, in *U.S.—Shrimp*, after examining Articles 12 and 13 of the DSU the Appellate Body held that the power of a panel to seek information under Article 13 did not amount to a prohibition on the reception by a panel of non-requested information.<sup>123</sup> Furthermore, it noted that

[t]he thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to “make an objective assessment of the matter . . .”<sup>124</sup>

It seems then, that the Appellate Body may have treated the panels’ ability to receive amicus curiae briefs as a case of *implied* power.<sup>125</sup> Umbricht regards the Appellate Body’s actions as “a broad reading of Article 13 DSU.”<sup>126</sup> Yet the Appellate Body also stated that “[a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*” and referred to “[t]he amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation.”<sup>127</sup> Howse concludes that “the Appellate Body did *not* base the authority to accept amicus curiae briefs on the right to ‘seek’ information . . . in Article 13,”<sup>128</sup> and instead relied on Articles 12 and 13, as well as on the overall purpose of the DSU to establish the existence of the power.<sup>128</sup> In addition, Articles 12 and 13 of the DSU, read in the light of the DSU’s purposes, appear to represent a reasonable textual basis for a power of panels to receive amicus curiae briefs.<sup>129</sup> Because the DSU does contain provisions

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123. Appellate Body Report, *U.S.—Shrimp*, *supra* note 113, ¶¶ 102–08.

124. *Id.* ¶ 106.

125. *Id.* ¶¶ 106–07.

126. Georg C. Umbricht, *An “Amicus Curiae Brief” on Amicus Curiae Briefs at the WTO*, 4 J. INT’L ECON. L. 773, 775 (2001).

127. Appellate Body Report, *U.S.—Shrimp*, *supra* note 113, ¶ 108.

128. Robert Howse, *Membership and Its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUR. L.J. 496, 498 (2003).

129. Umbricht, *supra* note 126, at 784–85.

regulating receipt of information by a panel, an implied power approach is appropriate.

In *U.S.—Lead and Bismuth II*, the Appellate Body held that its own ability to receive amicus curiae briefs stemmed from its “broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements, which is”<sup>130</sup> based on DSU Article 17.9.<sup>131</sup> In a footnote, it also referred to Rule 16(1) of the *Working Procedures for Appellate Review*, which allows a division to “develop an appropriate procedure . . . where a procedural question arises that is not covered by the *Working Procedures*.”<sup>132</sup> Although the Appellate Body stated that its power to receive amicus curiae briefs existed “under the DSU,” it did not link this to any specific provision.<sup>133</sup> In *E.C.—Sardines*, the Appellate Body again advanced this reasoning.<sup>134</sup>

In our opinion, it strains the wording of Article 17.9 of the DSU to read into it an ability to accept amicus curiae briefs. This is the case at least where there is no overt adoption of procedures in a given case under Rule 16(1) of the *Working Procedures for Appellate Review*, as occurred in the *E.C.—Asbestos* case.<sup>135</sup> However, this is not to say that the Appellate Body must decline all amicus curiae briefs.<sup>136</sup> In our view, rather than relying on Article 17.9,<sup>137</sup> the Appellate Body should acknowledge that in exercising discretion to receive (or decline) amicus curiae briefs, it is in fact exercising its inherent jurisdiction.<sup>138</sup> At least in

130. Appellate Body Report, *United States—Imposition of Countervailing Duties of Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 39, WT/DS138/AB/R (May 10, 2000) [hereinafter Appellate Body Report, *U.S.—Lead and Bismuth II*]. The Appellate Body seemed to accept the amicus curiae briefs submitted to it in *U.S.—Shrimp* because the United States had annexed them to its submission, without extensive consideration of the basis of its power to do so. See Appellate Body Report, *U.S.—Shrimp*, *supra* note 113, ¶¶ 88–91. For additional cases in which the Appellate Body accepted amicus briefs, see Appellate Body Report, *Thailand—H-Beams*, *supra* note 113, ¶ 63, 74, 78; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, ¶¶ 50–57, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Report, *E.C.—Asbestos*].

131. DSU art. 17.9 (stating simply that “[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information”).

132. Appellate Body Report, *U.S.—Lead and Bismuth II*, *supra* note 130, ¶ 39 n. 33.

133. *Id.* ¶ 42.

134. Appellate Body Report, *European Communities—Trade Descriptions of Sardines*, ¶¶ 157, 159, WT/DS231/AB/R (Sept. 26, 2002).

135. See Appellate Body, *Working Procedures for Appellate Review*, art. 16.1, WT/AB/WP/5 (Jan. 4, 2005); Appellate Body Report, *E.C.—Asbestos*, *supra* note 130.

136. Cf. Umbricht, *supra* note 126, at 787–90 (contemplating the possibility that amicus briefs are allowed at the panel level but not at the Appellate Body level).

137. But see Howse, *supra* note 128, at 499 (stating that he “cannot see any flaw in this reasoning”).

138. In support of this view, see Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in 9 THE

the WTO, where the provisions do not touch upon the issue, this seems to us the most plausible explanation.

### 5. Due Process

It has been claimed that due process “is probably the greatest contribution ever made to modern civilization by lawyers or perhaps any other professional group.”<sup>139</sup> Looking beyond WTO law, due process can be seen to involve rules regarding bias, fair hearings, and reasons as well as a rational basis for decisions. The bias rule requires that decisionmakers not act in circumstances in which a fair-minded observer would have a reasonable apprehension of bias, arising, for example, from the decisionmaker’s interest in the outcome.<sup>140</sup> The hearing rule requires both that a decisionmaker provide to persons whose interests may be adversely affected by a decision an opportunity to present their case,<sup>141</sup> and that there are sufficient facts on the record for the decisionmaker to arrive at a proper conclusion.<sup>142</sup> Finally, under the “no evidence” rule, decisionmakers must base their decisions on “logically probative evidence.”<sup>143</sup> Their reasons must be adequate and intelligible, must deal with the

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EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 35, 49 (J.H.H. Weiler ed., 2000) (“[T]he discretion to consider such briefs has become widely (if not entirely universally) assumed as an appropriate judicial right, implicit in the function of a tribunal to make a judgment having heard all the relevant facts and arguments.”); MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 66 (2d ed. 1999); see also Umbricht, *supra* note 126, at 785 (recognizing this possibility, noting the view that “the mission of the Appellate Body itself inherently entails the power to allow amici in order to be able to reach an ‘objective assessment’”). However, Umbricht also argues to the contrary, suggesting that acceptance of amicus curiae briefs will “disturb[] a carefully designed balance within the dispute settlement process” and has been implicitly rejected by the Appellate Body’s decisions on the point. *Id.* at 787.

139. P.S. ATIYAH, LAW AND MODERN SOCIETY 42 (1983).

140. AUSTRALIAN LEGAL DICTIONARY 126 (Peter E. Nygh & Peter Butt eds., 1997); see also CHENG, *supra* note 115, at 279–80. The bias rule is embodied in a number of provisions of the DSU. See DSU art. 8.2 (panelists should be selected with a view to ensuring their independence); *id.* art. 8.3 (citizens of Members involved in the dispute as parties or third parties should not serve as panelists unless the parties agree otherwise); *id.* art. 9 (panelists serve in their individual capacity and Members shall “not give them instructions nor seek to influence them”); *id.* art. 17.3 (Members of the Appellate Body “shall be unaffiliated with any government” and that they “shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest”); *id.* art. 18.1 (*ex parte* communications with Appellate Body Members are not permitted). See generally MITCHELL, *supra* note 8, ch. 5.

141. AUSTRALIAN LEGAL DICTIONARY, *supra* note 140, at 546. This rule encompasses requirements such as providing reasonable notice of the decision, informing affected persons of the case to be met, disclosing adverse material so that it may be challenged, and permitting representation at hearings.

142. CHENG, *supra* note 115, at 298.

143. AUSTRALIAN LEGAL DICTIONARY, *supra* note 140, at 788.

substantial points raised by the parties,<sup>144</sup> and may not be internally contradictory.<sup>145</sup>

International courts and tribunals have long recognized that they must ensure due process in their proceedings. For example, the ICTY Appeals Chamber has explained that “each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”<sup>146</sup> Equally, however, the ICTY has noted that variations in the understanding of concepts such as due process and fair trial mean they must be understood in the “context of the legal system in which the concepts are being applied.”<sup>147</sup> Our concern here is not to examine exhaustively the limits of the principle of due process,<sup>148</sup> but to examine the basis upon which it is and should be applied in WTO jurisprudence.

#### a. Application of Due Process Under Inherent Jurisdiction

Under the approach we outlined above, the application of the principle of due process falls within the inherent jurisdiction of a panel unless such principles are already incorporated in provisions of the DSU or other Covered Agreements. The DSU provides significant guidance to WTO Tribunals as to how dispute settlement proceedings should be conducted—thus effectively ensuring that the case a Member has to answer is sufficiently clear,<sup>149</sup> that parties have sufficient opportunity to state

144. See *Westminster City Council v. Great Portland Street Estates*, [1985] 1 A.C. 661, 673 (H.L.) (U.K.); *In Re Poyser & Mills' Arbitration*, [1964] 2 Q.B. 467, 478 (U.K.); *Earl of Iveagh v. Minister of Housing & Local Gov't*, [1962] 2 Q.B. 147, 160 (U.K.).

145. See *Mahon v. Air New Zealand Ltd.*, [1984] A.C. 808, 821 (P.C.); *Minister for Immigration & Ethnic Affairs v. Pochi* (1980) 44 F.L.R. 41, 67–68 (Austl.).

146. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on the Prosecutor's Appeal on Admissibility of Evidence, ¶ 24 (Feb. 16, 1999); see also CHENG, *supra* note 115, at 279 (recognizing that the existence of the bias rule as a general principle of law “is hardly . . . open to question and [that] its application extends beyond purely judicial procedures”).

147. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victim and Witness, ¶ 30 (Aug. 10, 1995).

148. See MITCHELL, *supra* note 8, ch. 5.

149. See DSU arts. 4.4, 6.2 (requiring measures at issue to be specified in the request for consultations and panel request respectively); *id.* arts. 12.6, 15.1 (requirements for submissions to be made to and received by panels). The Appellate Body has held that, pursuant to Article 6.2 of the DSU, a panel request must specifically identify the relevant WTO provisions and, in some cases, the relevant sub-provisions, and clearly specify the measures at issue. See Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 124, WT/DS98/AB/R (Dec. 14, 1999); Appellate Body Report, *India—Patents*, *supra* note 73, ¶¶ 90–93. This “fulfil[s] an important due process objective—[the panel request] give[s] the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case.” Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, at 22, WT/DS22/AB/R (Feb. 21, 1997).

their views,<sup>150</sup> and that WTO Tribunals deal with the arguments put to them by Members.<sup>151</sup> Some of the constituent rules of the principle of due process, however, are not explicitly covered in the DSU. Examples include the ability of a party to secure representation by non-governmental counsel or to raise a defense after it has made its first submission. The application of the principle of due process is therefore necessary to come to a conclusion about some issues that may arise in panel proceedings. As emphasized by the ICTY, the principle of due process is informed by the system in which it is applied.<sup>152</sup> It has no autonomous substantive content, in the sense that it merely regulates the way in which the panel exercises its functions in coming to factual and legal determinations under the Covered Agreements. Finally, nothing in the DSU is inconsistent with the requirements of due process. As the reasoning of the Appellate Body shows, the DSU is predicated on WTO Tribunals acting in accordance with due process.

This view has academic support. Some commentators have suggested that international tribunals may be required to exercise their inherent jurisdiction to apply general principles of law that protect fundamental procedural norms.<sup>153</sup> For example, Carlston states:

Express provisions are usually made in rules of procedure with a view to safeguarding fundamental procedural rights . . . While observing the provisions of the instrument—which is the basic law for the tribunal—the tribunal is also expected to conform its operations to the basic procedural norms. Accordingly, the fundamental procedural norms, whether or not expressly provided for, comprise (1) “certain fundamental rules of procedure” (2)

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150. See DSU art. 12.1, app. 3 (panel to conduct two meetings with the parties unless otherwise agreed and parties to provide written submissions); *id.* art. 15 (panels submit to parties the whole of their draft reports for interim review); *Working Procedures for Appellate Review*, Jan. 4, 2005, WT/AB/WP5h, §§ 21, 22, 27, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm) (last visited Mar. 13, 2010) (allowing parties to make submissions and attend hearings on appeals).

151. See DSU art. 7.2 (requiring panels to “address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute”); *id.* art. 12.7 (requiring panels to “set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes”); *id.* 17.12 (requiring the Appellate Body to “address each of the issues raised . . . during the appellate proceeding”).

152. See *Tadić*, Case No. IT-94-I-T, ¶ 30.

153. See CHENG, *supra* note 115, at 291. But see DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 44 (revised ed. 1975) (“[I]t might be going too far to say that a tribunal is bound, in the absence of provisions in the arbitral agreement, to follow these rules.”). Although commentators call these rules “procedural,” this does not detract from the proposition that they have no autonomous substantive content.

which are “inherent in the judicial process,” and (3) generally recognized in all procedure.<sup>154</sup>

Thus, WTO Tribunals have this inherent power even without WTO provisions specifically empowering them to ensure due process in their determinations of procedural matters.<sup>155</sup> Furthermore, WTO Tribunals can also exercise their inherent jurisdiction in situations not contemplated by the DSU.

#### b. Article 11 of the DSU and Due Process

As part of their judicial function, panels are required to make an “objective assessment” of the dispute before them. Article 11 of the DSU provides in relevant part that

a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.<sup>156</sup>

While in some cases an application of this provision in the due process context is credible, in others the reluctance of WTO Tribunals to embrace their inherent jurisdiction has led to implausible interpretations of the “objective assessment” requirement.

#### i. “Objective Assessment” Reasonably Interpreted

In some cases, Article 11 and the requirement to make an “objective assessment” seems to have been interpreted and applied appropriately and reasonably (even though application of principles of due process would have led to the same result). For example, in the appeal in *E.C.—Hormones*, the European Communities claimed that the panel “disregarded or distorted” evidence and therefore failed to make an objective assessment as required by Article 11.<sup>157</sup> The E.C. argued that the panel did not refer to the opinion of particular experts, misquoted some statements, and mischaracterized others.<sup>158</sup> The Appellate Body responded

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154. V.S. MANI, INTERNATIONAL ADJUDICATION PROCEDURE 12 (1980) (quoting KENNETH S. CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 34 (1946)).

155. Cf. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.8, WT/DS246/R (Dec. 1, 2003) [hereinafter Panel Report, *E.C.—Tariff Preferences*] (relying on certain DSU provisions to explain this “inherent authority”).

156. DSU art. 11.

157. Appellate Body Report, *E.C.—Hormones*, *supra* note 107, ¶ 131.

158. *Id.*

that the requirement under Article 11 that panels make an objective assessment of the facts of the case includes “an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence.”<sup>159</sup> A panel that deliberately disregards or willfully distorts or misrepresents evidence will therefore fail to make an objective assessment, causing a denial of “fundamental fairness, . . . due process of law or natural justice.”<sup>160</sup> In the case at hand, the Appellate Body found that the panel had misinterpreted some evidence, but that this did not rise to the level of arbitrarily ignoring or manifestly distorting evidence in violation of Article 11.<sup>161</sup> Here, it seems to us that the E.C. was raising an issue that can reasonably be seen as going to the “objectivity” of a panel’s analysis, and so the Appellate Body was correct to consider it under Article 11.

ii. Due Process Beyond “Objective Assessment”: A Strained Interpretation of Article 11 of the DSU

Some applications of due process by the Appellate Body to date have been unnecessarily vague and have strained the wording of the DSU, in particular Article 11. In *Chile—Price Band System*, Chile argued that the panel had violated due process by holding that a measure violated a provision of the Covered Agreements not mentioned in Argentina’s Request for Panel Establishment.<sup>162</sup> The Appellate Body explained the relationship between due process and Article 11 as follows:

[I]n making “an objective assessment of the matter before it” [as required by Article 11], a panel is . . . duty bound to ensure that due process is respected. *Due process is an obligation inherent in the WTO dispute settlement system.* A panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response.<sup>163</sup>

The Appellate Body appears here to be implying *all content of the principle* of due process into Article 11 and into the words “objective assessment,” or, at the least, into the text of the Covered Agreements. The reference to due process as an “obligation inherent in the WTO dispute settlement system,” however, suggests, contrary to the Appellate

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159. *Id.*

160. *Id.*

161. *Id.* ¶ 253(e).

162. Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶¶ 176–77, WT/DS207/AB/R (Sept. 23, 2002) [hereinafter Appellate Body Report, *Chile—Price Band System*].

163. *Id.* ¶ 176 (emphasis added).

Body's explicit reasoning, that panels must accord due process and that the Appellate Body may review the panel's conduct in this regard *independently* of Article 11 and its requirement of "objective assessment." That is, the Appellate Body and panels may, because the WTO dispute settlement system requires it both for legitimacy and to ensure that judicial process is maintained, directly apply principles of due process.

The Appellate Body's view that due process is implicit in Article 11 seems to have been confirmed in the *Canada—Hormones Suspension* decision. There, the Appellate Body stated that it was examining "the European Communities' claims that the panel failed to respect the principle of due process *and, consequently*, also failed to make an objective assessment of the matter under Article 11 of the DSU."<sup>164</sup> In addition, the Appellate Body stated that it "has found that *due process is required by Article 11* of the DSU"<sup>165</sup> and quoted its statement to this effect in *U.S.—Gambling*: "as part of their duties, under Article 11 of the DSU, to 'make an objective assessment of the matter' before them, panels must ensure that the due process rights of parties to a dispute are respected."<sup>166</sup>

Some of the same confusion as to the precise basis of the application of the principle of due process seems to remain. However, as the Appellate Body earlier stated in *Canada—Hormones Suspension*:

The Appellate Body has previously found that the obligation to afford due process is "inherent in the WTO dispute settlement system"<sup>167</sup> and it has described due process requirements as "fundamental to ensuring a fair and orderly conduct of dispute

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164. Appellate Body Report, *Canada—Continued Suspension of Obligations in the E.C.—Hormones Dispute*, ¶ 415, WT/DS321/AB/R (Oct. 16, 2008) [hereinafter Appellate Body Report, *Canada—Hormones Suspension*] (emphasis added). This is despite the E.C.'s own submissions referring to due process directly. The E.C. submitted that "the consultation of experts by the Panel[] for the purposes of scientific and technical advice including their selection must respect general principles of law, and in particular the principle of due process." *Id.* ¶ 425. Furthermore, the E.C. argued that weight placed by the panel on the experts to whom the E.C. objected "is a violation of the relevant rules on conflict of interest, of its rights of due process *and* of the requirement for the Panel [] to perform an 'objective assessment' of the matter before [it]." *Id.* ¶ 425 (emphasis added). The E.C. thus appears to have advanced not a cumulative argument, that a breach of due process is a breach of Article 11 of the DSU, but an argument that the due process norms were *directly applicable*. See *id.* ¶ 428 (where the United States also seems to treat due process as a separate norm from Article 11 of the DSU).

165. *Id.* ¶ 434 (emphasis added).

166. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 273, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *U.S.—Gambling*].

167. Appellate Body Report, *Canada—Hormones Suspension*, *supra* note 164, ¶ 433 (quoting Appellate Body Report, *Chile—Price Band System*, *supra* note 162, ¶ 176); see also Appellate Body Report, *Mexico—Corn Syrup (21.5—U.S.)*, *supra* note 99, ¶ 107.

settlement proceedings”.<sup>168</sup> *In our view, the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU.*<sup>169</sup> Due process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute.<sup>170</sup>

Further, in agreeing in *Canada—Hormones Suspension* with the E.C. that the appointment of an expert who was not impartial would breach due process, it referred to “due process protection”<sup>171</sup> and “due process rights,”<sup>172</sup> rather than the need for “objectivity.” The Appellate Body held that the manner in which the panel had used the evidence of two experts was “not compatible with the *due process obligations* that are *inherent* in the WTO dispute settlement system.”<sup>173</sup> Further, the Appellate Body made an express finding that “the Panel infringed the European Communities’ due process rights,”<sup>174</sup> *in addition to* a finding that

[b]ecause the appointment and consultations with Drs. Boisseau and Boobis [the two experts concerned] compromised the Panel’s ability to act as an independent adjudicator, the Panel cannot be said to have made “an objective assessment of the matter” as required by Article 11 of the DSU.<sup>175</sup>

What can be surmised? The Appellate Body’s reasoning at times acknowledges due process as arising from the judicial function of WTO Tribunals, contains reference to due process as a “principle,” and contains no reference to the Article 31(3)(c) of the VCLT. Such a reference might be expected if the Appellate Body were interpreting Article 11 of the DSU by means of a principle of international law. Even so, the Appellate Body at other times seems to view due process through the lens of Article 11. Yet to link the application of some of the content of the principle of due process to the panel making an “objective assessment” distorts those words. The panel’s analysis in *Chile—Price Band System*

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168. Appellate Body Report, *Canada—Hormones Suspension*, *supra* note 164, ¶ 433 (quoting Appellate Body Report, *Thailand—H-Beams*, *supra* note 113, ¶ 88).

169. Appellate Body Report, *Canada—Hormones Suspension*, *supra* note 164, ¶ 433.

170. *Id.*

171. *Id.* ¶ 436.

172. *Id.* ¶¶ 480–81.

173. *Id.* ¶ 469 (emphasis added). The Appellate Body was of this view because the experts concerned had been involved in a prior comparator risk assessment, which was said to compromise their objectivity. *Id.*

174. *Id.* ¶ 481.

175. Appellate Body Report, *Canada—Hormones Suspension*, *supra* note 164, ¶ 482.

is reasoned and based on facts that were before it.<sup>176</sup> It was not the panel's own assessment or objectivity, but the denial to Chile of the *ability to present arguments* that concerned the Appellate Body. Applying a principle of due process—that a panel may only rule on the claims actually made (effectively the *non ultra petitum* rule) and that a party has a right to respond to claims on which the panel ruled<sup>177</sup>—would more plausibly have reached the same result: that the finding could not stand.<sup>178</sup> Similarly, it seems artificial to state that because one expert of several whose evidence a panel considered was not impartial, the *panel's actual assessment* was not “objective.”<sup>179</sup> The results in both cases are clearly correct, but they could have been reached much more convincingly and logically by acknowledging that due process requirements arise and are applied under the Appellate Body's inherent jurisdiction.

The Appellate Body's decision in *U.S.—Gambling* affords another example where explicit reliance on due process under inherent jurisdiction would have been desirable. There, the Appellate Body held that a defense advanced by the United States for the first time in its second written submission did not violate Article 11 by depriving Antigua and Barbuda of a full and fair opportunity to respond. It held that the principle of due process “obliges a responding party to articulate its defense

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176. Panel Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶¶ 7.105–7.108, WT/DS207/R (May 3, 2002); see also Appellate Body Report, *Chile—Price Band System*, *supra* note 162, ¶ 173.

177. The Appellate Body did invoke this rule. See Appellate Body Report, *Chile—Price Band System*, *supra* note 162, ¶ 174. It bears noting that the Appellate Body could have simply rested its decision on the finding that Article 11 of the DSU requires a panel to make findings on “the matter before it,” which excludes claims that are not before it. *Id.* ¶ 173. However, the Appellate Body did not reason in this manner, and instead attempted to engage with the principle of due process.

178. It could be argued that making a finding on the basis of a provision not contained in the Request for Panel Establishment is ruling on “the matter before [a panel].” DSU art. 11. However, if the crux of this issue is the denial of the chance to make submissions on the point to the other party, which seems to have been one of the Appellate Body's concerns, due process beyond Article 11 is involved.

179. See Appellate Body Report, *Canada—Hormones Suspension*, *supra* note 164, ¶¶ 425, 481–82. The link that the Appellate Body seeks to draw is one between the panel's ability to be an “independent adjudicator” and its objectivity—of itself, this does not seem completely implausible. See *id.* ¶¶ 431, 481. The reasoning, however, does seem implausible. The major concern of the Appellate Body is with the *appearance* of bias. It states that “there was an objective basis to conclude that the institutional affiliation with JECFA [an organization that had conducted a comparator safety analysis of the hormones at issue] of [the two experts], and their participation in JECFA's evaluations of the six hormones at issue, was likely to affect or give rise to justifiable doubts as to their independence or impartiality.” *Id.* ¶ 481 (emphasis added). Yet the Appellate Body, in trying to assimilate these *justifiable doubts* and an “objective analysis,” states that this “[actually] compromised the adjudicative independence and impartiality of the Panel.” *Id.* (emphasis added). That is, in trying to squeeze this aspect of due process within Article 11 of the DSU, a finding of apprehended bias becomes—without justification—a finding of *actual* bias.

promptly and clearly” and may oblige a panel either to refuse to consider a defense to which “the complaining party had no meaningful opportunity to respond”<sup>180</sup> or to adjust its timetables to allow additional time to respond.<sup>181</sup> In these circumstances, it is not possible to fall back on the words “the matter before it” in Article 11 to explain why panels must ensure due process—the challenged arguments were clearly before the panel, so the connection to Article 11 is tenuous. In this case, the Appellate Body found no breach of Article 11 because Antigua was aware of the possibility that the United States would offer such a defense, raised no objection when it was offered, and acknowledged that it did have an opportunity to respond.<sup>182</sup>

In *U.S.—Zeroing*, the Appellate Body missed an opportunity to elaborate on the inherent jurisdiction of WTO Tribunals to apply the principle of due process beyond the “objective assessment” requirement under Article 11 of the DSU.<sup>183</sup> The E.C. alleged that the Article 21.5 panel acted in a manner inconsistent with the basic requirements of due process under its inherent jurisdiction by failing to rule on the propriety of its composition under Articles 8.3 and 21.5 of the DSU.<sup>184</sup> The Appellate Body affirmed the panel’s ruling that under the DSU in the event of disagreement between the parties the composition of the panel rested within the *exclusive* mandate of the Director-General,<sup>185</sup> which was properly exercised in the case in question.<sup>186</sup> No provision in the DSU envisaged any role for the panels that would give them authority to make a finding on the discharge by the Director-General of its competence in this regard.<sup>187</sup> Accordingly, there was no need to rule on the substance of the E.C.’s claim.<sup>188</sup>

Finally, in some cases, it seems that due process requirements will preclude the exercise of judicial economy. For example, in the appeal in

180. Appellate Body Report, *U.S.—Gambling*, *supra* note 166, ¶¶ 272–73.

181. *Id.* ¶ 273.

182. *Id.* ¶ 276.

183. See generally Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)—Recourse by the European Communities to Article 21.5 of the DSU*, WT/DS294/AB/RW (May 14, 2009) [hereinafter Appellate Body Report, *U.S.—Zeroing (21.5—E.C.)*].

184. See Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)—Recourse by the European Communities to Article 21.5 of the DSU*, ¶ 8.9, WT/DS294/RW (Dec. 17, 2008) [hereinafter Panel Report, *U.S.—Zeroing (21.5—E.C.)*]; see also Appellate Body Report, *U.S.—Zeroing (21.5—E.C.)*, *supra* note 183, ¶ 16.

185. DSU art. 8.7; see Panel Report, *U.S.—Zeroing (21.5—E.C.)*, *supra* note 184, ¶ 8.17.

186. Appellate Body Report, *U.S.—Zeroing (21.5—E.C.)*, *supra* note 183, ¶ 172.

187. See Panel Report, *U.S.—Zeroing (21.5—E.C.)*, *supra* note 184, ¶ 8.16, *aff’d*, Appellate Body Report, *U.S.—Zeroing (21.5—E.C.)*, *supra* note 183, ¶ 172.

188. Appellate Body Report, *U.S.—Zeroing (21.5—E.C.)*, *supra* note 183, ¶ 172.

*E.C.—Sugar*, the Appellate Body referred to the requirement in Article 11 of the DSU that panels “make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”<sup>189</sup> The Appellate Body found that the panel failed to comply with this requirement and therefore exercised “false judicial economy” because, in not ruling on certain claims under Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM), the panel “precluded the possibility” of the complainants obtaining the special remedy under Article 4.7 of the ASCM available for successful claims under Article 3.<sup>190</sup> Again, the link to Article 11 of the DSU is rather tenuous—what was objectionable was that the panel had not completely considered arguments made by a party. But it had considered such arguments “objectively” in that it had decided in a reasoned manner *whether or not* it needed to rule on them.<sup>191</sup> The Appellate Body’s right to review the panel’s due process obligations in the exercise of its inherent jurisdiction would have provided a more logical basis for this decision than Article 11.

It cannot be denied that the Appellate Body places a great deal of faith in Article 11 of the DSU, including in circumstances where that provision, properly interpreted, has nothing to say about the due process question at issue. In these situations, the Appellate Body should instead rely on its inherent jurisdiction to review panels’ compliance with due process. This would avoid an interpretation of Article 11 of the DSU that threatens the WTO’s institutional legitimacy, and would also require the principles relied upon—and so their boundaries—to be made clear in the Appellate Body’s decisions. Usefully, this would also allow Members to anticipate the application of these principles in future decisions, which would enhance the security and predictability of the WTO system.

### B. *Potentially Applicable Principles*

Beyond those principles that have been actually applied, as discussed above in Part III.A, certain other principles have been mentioned in panel reports and in the literature. Particularly controversial are those based on notions of good faith, which are applicable under inherent jurisdiction because they are tools of international tribunals to ensure that justice is done. Some of these principles—comity, utility, estoppel, and abuse of rights—are explored below. These principles are also potentially relevant to resolving the vexed issue of whether or not Free Trade

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189. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶¶ 330–31.

190. *Id.* ¶ 335.

191. Panel Report, *European Communities—Export on Subsidies on Sugar*, ¶ 7.381, WT/DS265/R (Oct. 15, 2004) [hereinafter Panel Report, *E.C.—Sugar*].

Agreements (FTAs) can apply in, or have any effect at all on, WTO dispute settlement. This issue is especially pertinent due to the decision by Mexico to proceed in the *U.S.—Tuna/Dolphin (Mexico)* dispute,<sup>192</sup> despite the United States having invoked NAFTA Article 2005(4)<sup>193</sup>—a choice of jurisdiction clause. We thus examine first the potential application of these principles in the WTO generally, and second the effect that the application of such principles might have if an FTA choice of jurisdiction clause were invoked.

### 1. Judicial Propriety: Comity and Utility

The principles of comity and utility in international law stem from notions of the judicial propriety of rendering a decision in the circumstances of a case. Both allow an international tribunal to decline to exercise jurisdiction (which has been established and would otherwise be exercisable) on the basis of the need to prevent abuse of an international tribunal's position as an international adjudicatory body.<sup>194</sup> The ICJ observed in *Northern Cameroons* that “even if the Court, when seized, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction.”<sup>195</sup> As demonstrated by the decision of the ICJ not to address the merits in *Northern Cameroons* and the *Nuclear Tests*

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192. See generally Request for the Establishment of a Panel by Mexico, *U.S.—Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, WT/DS381/6 (Mar. 10, 2009).

193. See Minutes of DSB Meeting of April 20, 2009, ¶¶ 77, 80, WT/DSB/M/267 (June 26, 2009) (stating that the United States is “very concerned” about Mexico’s complaint as “the United States had invoked Article 2005(4) of the North American Free Trade Agreement (NAFTA)” and “Mexico’s approach would mean that NAFTA Article 2005(4) would never apply”). Mexico argues that this dispute does not fall within the NAFTA dispute settlement provisions. *Id.* ¶ 79.

194. Perhaps the best-known example of judicial propriety is the absent third party rule. Under this rule, the ICJ has held that it will not examine the merits of a dispute between two states where the rights and obligations of a third, absent state form the “essence” of the dispute. See *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, at 101–02, 104–05 (June 30); *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240, 261–62 (June 26). Although the jurisdiction of the Court exists in such situations, the Court will refuse to exercise it. As Sir Gerald Fitzmaurice has put it, an objection to the jurisdiction of the Court is “a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim,” whereas an objection to the *admissibility* of a claim is “a plea that the tribunal should rule the claim to be inadmissible on some ground *other than its ultimate merits*.” Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure*, 1958 BRIT. Y.B. INT’L L. 1, 12–13 (citations omitted) (emphasis added).

195. *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 29 (Dec. 2); see also *id.* at 64 (Wellington Koo, J., separate opinion); *id.* at 100–01 (Fitzmaurice, J., separate opinion).

case, the ICJ's inherent jurisdiction allows it to make a decision "not to adjudicate further" in a matter.<sup>196</sup>

a. Comity

i. Comity in International Law

Comity is concerned with when it is appropriate for an international tribunal to stay proceedings until related proceedings in another forum are resolved. Comity is a consequence of the establishment of *lis pendens*,<sup>197</sup> itself a principle of international law.<sup>198</sup> According to principles of comity, in the absence of express provision by treaty, an international tribunal has discretion not to hear a matter (or continue to do so)—that is, not to exercise its jurisdiction—although jurisdiction exists, on the basis that other judicial proceedings involving the same case should first be resolved. The International Center for the Settlement of Investment Disputes (ICSID) arbitrators in the *Pyramids Case* stated:

When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, *in the interest of international judicial order*, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal . . . Every court has *inherent powers* to stay proceedings when justice so requires, and this Tribunal's discretion to do so is established by Article 44 of the [ICSID] Convention.<sup>199</sup>

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196. Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 279, 338 (Dec. 15) (Higgins, J., separate opinion).

197. *Lis pendens* means "pending suit," and as a principle concerns the specific situation of a suit based on the same claim and involving the same parties pending in another forum or jurisdiction. See August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes* 3 LAW & PRAC. INT'L CTS. & TRIBUNALS 37, 43–44 (2004).

198. CAMPBELL MCLACHLAN, LIS PENDENS IN INTERNATIONAL LITIGATION 357, 406 (2009) (arguing that research shows *lis pendens* is a recognized general principle of international law).

199. S. Pac. Prop. (Middle East) Ltd. v. Arab Republic of Egypt (Decision on Jurisdiction of 27 November 1985), 3 ICSID (W. Bank) 112, 129–30 (1998) (emphasis added). This was an arbitration between Egypt and Southern Pacific Properties concerning the expropriation by Egypt of certain properties and indemnification for resultant loss. Article 44 of the ICSID Convention provides in relevant part: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 44, Oct. 17, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159. The reference to Article 44 of the ICSID Convention thus does not render the principle

The arbitral tribunal therefore stayed the dispute until the parallel proceedings before the French Cour de Cassation had been resolved.<sup>200</sup> Commentators regard this as an instance of exercise of inherent jurisdiction. Shany regards comity as a principle of international law potentially applicable in order to avoid conflicts of jurisdiction amongst international tribunals.<sup>201</sup> McLachlan suggests that the question whether in a situation of litispence an international tribunal should stay its exercise of jurisdiction “may perhaps be better formulated as one of the inherent power of an international tribunal to manage its proceedings.”<sup>202</sup>

## ii. Comity in the WTO?

Assuming that comity is a recognized principle of public international law, it satisfies the first two requirements set out above for application under inherent jurisdiction in the WTO. First, comity is necessary for judicial resolution of issues that are not explicitly provided for in the DSU: namely, whether a WTO Tribunal can decline to exercise its jurisdiction or suspend proceedings due to related proceedings in other fora. In the ICSID context, the *Pyramids* arbitrators regarded the application of comity as necessary to ensure the proper administration of international justice—to prevent the possibility of inconsistent decisions in the same case and to ensure that the international judicial system was respected. These considerations are just as relevant in any system of international dispute settlement, including the WTO. Second, the principle of comity does not have its own autonomous substantive content. It regulates the exercise by an international tribunal of its functions to decide the underlying dispute, according to the applicable substantive law.

Despite satisfying the first two conditions for application in the WTO, comity flounders when it comes to consistency with the Covered Agreements. In *Mexico—Soft Drinks*, the Appellate Body described Mexico’s argument as being that

although the Panel had the authority to rule on the merits of the United States’ claims, it *also had the “implied power” to abstain from ruling on them*, and “should have exercised this power in the circumstances of this dispute.” Hence, the issue before us in this appeal is not whether the Panel was legally precluded from ruling on the United States’ claims that were before it, but,

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expounded by the Tribunal otiose. Indeed, this provision simply makes explicit what the Appellate Body has held to be implicit in its references to the “discretion” of WTO Tribunals to manage proceedings.

200. *S. Pac. Prop. Ltd.*, 3 ICSID at 130.

201. YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 278 (2003).

202. McLACHLAN, *supra* note 198, at 359.

rather, *whether the Panel could decline, and should have declined, to exercise jurisdiction* with respect to the United States' claims under Article III of the GATT 1994 that were before it.<sup>203</sup>

Interestingly, the Appellate Body did not refer to any other international jurisprudence supporting this proposition in its reasoning, although Mexico had argued that such a power existed in "other international bodies and tribunals."<sup>204</sup> Mexico's arguments in *Mexico—Soft Drinks* amounted effectively to an invocation of comity in all but name.<sup>205</sup>

Comity, however, is an example of a principle that is generally incompatible with the provisions in the DSU. Indeed, Shany recognized that its application might be incompatible with the strict time limits in the DSU.<sup>206</sup> For example, Article 20 of the DSU requires that the period of a dispute shall as a general rule not exceed nine months (or twelve months in the case of an appealed panel report). Further, Article 12.8 requires that panels as a general rule deliver their report within six months. Article 12.9, while allowing for extensions, also states: "In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months."<sup>207</sup> Declining jurisdiction in favor of another dispute settlement forum, especially in the context of international dispute settlement, would more than likely cause these time limits to be exceeded. This suggests that application of comity is incompatible with the provisions of the DSU.

In response to Mexico's argument, the Appellate Body examined the obligations of panels under Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU.<sup>208</sup> The Appellate Body held that the words "shall address" in Article 7.2 indicated that "panels are *required* to address the relevant provisions" in any Covered Agreement cited by the parties.<sup>209</sup> The Appellate Body appears to have thought that, while panels can exercise judicial economy consistently with Article 7.2, the failure to address "the entirety

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203. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 44 (emphasis added).

204. *Id.* ¶ 10.

205. *See id.* Mexico argued that a panel could as a matter of discretion decline to exercise its jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law" under which claims cannot be judicially enforced in the WTO, such as NAFTA provisions or the situation where one of the disputing parties refuses to take the matter to the "appropriate forum." *Id.* Mexico contended, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute concerning the conditions provided under the NAFTA for access of Mexican sugar to the United States market, and that only a NAFTA panel could resolve the dispute between the parties. *Id.*

206. SHANY, *supra* note 201, at 279–80.

207. DSU art. 12.9.

208. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 47.

209. *Id.* ¶ 49 (emphasis added).

of the claims that are before”<sup>210</sup> a panel will not fulfill this requirement.<sup>211</sup> This ruling has been rightly criticized as “internally contradictory,”<sup>212</sup> as the Appellate Body elsewhere appears to have reserved its position: “Mindful of the precise scope of Mexico’s appeal, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.”<sup>213</sup> The Appellate Body also relied on Article 11 of the DSU, saying that failure to exercise jurisdiction will result in a panel “abstain[ing] from making any finding on the matter before it,”<sup>214</sup> thereby failing to comply with the requirement to make an “objective assessment” of the matter. However, this Article 11 argument seems relatively weak. The panel in *Mexico—Soft Drinks* analyzed whether it should exercise jurisdiction.<sup>215</sup> In so doing, a panel would, presumably, provide reasons for its decision that it lacked or could not exercise jurisdiction. Why would this not be a “finding” on the matter in the ordinary sense of that word? Indeed, it has not been suggested that, where panels

210. *Id.* ¶ 46.

211. It is perhaps instructive to compare the provisions dealing with the law to be applied by panels to those of the ICJ statute, in which the broad inherent powers noted above have been recognized. Article 36(1) of the Statute of the International Court of Justice states: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1055, 3 Bevens 1153. Article 36(2) through 36(5) makes provision for jurisdiction by virtue of optional clause declarations, and Article 36(6) confers jurisdiction to decide jurisdiction upon the Court. Article 38 deals with applicable law, and states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*Id.* art. 38. The difference between these provisions and the DSU suggests that the inherent powers exercised by panels will indeed be more circumscribed than those of the ICJ.

212. Van Damme, *supra* note 25, at 29.

213. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 54 (citations omitted).

214. *Id.* ¶ 51.

215. See Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.8, WT/DS308/R (Oct. 7, 2005).

rule that a certain measure falls outside their jurisdiction, they are not complying with Article 11 of the DSU.<sup>216</sup>

The Appellate Body also emphasized the “comprehensive nature of the right of Members to resort to dispute settlement” under Article 23.1.<sup>217</sup> While this Article simply requires Members to make any WTO-law based complaints under the Covered Agreements *before the WTO* (and not before another forum), taken with the compulsory nature of WTO jurisdiction<sup>218</sup> this argument gains strength. Deferring jurisdiction to another forum would compromise this purpose. In particular, though, Article 3.3, states that the “*prompt* settlement of situations” in which a Member believes its benefits are being infringed “is *essential to the effective functioning* of the WTO” seems to weigh decisively against deferring jurisdiction to another forum, because such deferral will almost invariably ensure that disputes are *not* settled promptly.<sup>219</sup> The Appellate Body used Article 3.3 to argue that “[t]he fact that a Member may initiate a WTO dispute whenever it considers that ‘any benefits accruing to [that Member] are being impaired by measures taken by another Member’ implies that that Member is *entitled* to a ruling by a WTO panel.”<sup>220</sup>

As Davey and Sapir note, the Appellate Body’s conclusion seems correct but “overbroad.”<sup>221</sup> We would add that a Member could conceivably be entitled to a ruling *that the panel cannot exercise its jurisdiction*. In *Mexico—Soft Drinks*, the Appellate Body also invoked Articles 3.2 and 19.2 of the DSU, stating (apparently with uncertainty) that

[a] decision by a panel to decline to exercise validly established jurisdiction would seem to “diminish” the right of a complaining Member to “seek the redress of a violation of obligations” within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU.<sup>222</sup>

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216. Panels have on occasion held that they do not have jurisdiction or that measures or claims fall outside of their jurisdiction (especially in the context of Article 21.5 of the DSU). See, e.g., Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶¶ 14.3, WT/DS54/R, DS55/R, DS59/R, DS64/R (July 2, 1998); Panel Report, *Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, ¶¶ 7.22–7.32, WT/DS211/R (Aug. 8, 2002); Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶¶ 7.3–7.9, WT/DS362/R (Jan. 26, 2009).

217. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 52.

218. The party against whom a complaint is made has (effectively) already consented to the establishment of the panel. See DSU arts. 3.3, 3.10, 6.1, 7, 11, 12, 23.1, 23.2(a). There is no need to consent to the bringing of each case, as there is before the ICJ.

219. DSU art. 3.3.

220. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 52.

221. Davey & Sapir, *supra* note 68, at 12.

222. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 53.

If, however, the other provisions of the DSU examined above had in fact allowed jurisdiction to be deferred, then to do so would not diminish their rights and obligations.<sup>223</sup>

Nevertheless, the outcome in *Mexico—Soft Drinks* was correct. Unlike, say, the instruments establishing investor–state arbitral panels that apply international law,<sup>224</sup> the above analysis shows that the DSU contains provisions that prevent a panel from *declining as a matter of discretion* to exercise its jurisdiction due to parallel proceedings in another forum. Davey and Sapir explain that “the general conclusion that Panels with jurisdiction should make basic rulings on a case seems correct, subject to the caveat that there is no legal impediment that would cause a different result.”<sup>225</sup>

## b. Utility

### i. Utility in International Law

The principle of utility is concerned with whether or not it would be appropriate to render judgment when the object of the claim has ceased to exist or been achieved independently of the dispute settlement process. It is important that the ICJ has not denied that jurisdiction *exists* in such circumstances. In holding that it will not examine cases because their object has ceased to exist, the ICJ has held a dispute inadmissible—that is, it has held that although jurisdiction exists, it is inappropriate to exercise that jurisdiction.<sup>226</sup> In *Northern Cameroons*, the ICJ declined to exercise its jurisdiction because its judgment would have had no “practical consequence in the sense that it [could] affect existing legal rights or obligations of the parties”<sup>227</sup>—the Court’s judgment would have been “remote from reality.”<sup>228</sup> In the *Nuclear Tests* case, the Court refused to

223. MITCHELL, *supra* note 8 (citing Wolfgang Weiss, *Security and Predictability Under WTO Law*, 2 *WORLD TRADE REV.* 183, 193–94 (2003)).

224. See, e.g., Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.–Peru, art. 40(1), Nov. 14, 2006, available at <http://treaty-accord.gc.ca/text-texte.asp?id=105078> (last visited Mar. 13, 2010).

225. Davey & Sapir, *supra* note 68, at 12; see also Trachtman, *supra* note 6, at 140 (“[I]t does not seem that a WTO panel would defer to other non-WTO adjudicating bodies in any circumstance where it was not clearly instructed by WTO law to do so.”).

226. See *supra* note 194 and accompanying text.

227. *Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 15, 34 (Dec. 2). This was because the Trusteeship over the Northern Cameroons, which Northern Cameroons alleged the United Kingdom had breached, had been wound up by the General Assembly. *Id.* at 33–34. The Court was unwilling to give a judgment “solely for a finding of a breach of the law,” which neither party would be able to take any step to enforce. *Id.* at 34–35, 38. This appears to be a finding of a lack of utility in the judgment—that “the substantive interest . . . disappeared with the termination of the Trusteeship Agreements.” *Id.* at 36. The Court explicitly linked the lack of utility a judgment would have had to its judicial position. *Id.*

228. *Id.* at 33.

address the merits because Australia's "objective . . . ha[d] in effect been accomplished" through a binding declaration by France.<sup>229</sup> Because "the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties,"<sup>230</sup> Australia's claim on the merits lacked an "object" and "no longer [fell] to be determined."<sup>231</sup>

## ii. Utility in the WTO

An analogy in the WTO context to a claim becoming "without object" is the expiration or cessation of the measures at issue in a dispute. The approach of the ICJ, it seems, would be to suspend and delist proceedings. Can a WTO panel suspend proceedings or cease to exercise its jurisdiction altogether (perhaps only in relation to some of the measures at issue) where a Member withdraws a particular measure? Obviously, to avoid some of the difficulties pointed out by the Appellate Body in *Mexico—Soft Drinks*, the panel would have to issue a report to the effect that it was no longer considering the claim and provide reasons for doing so. The parties would therefore have a "ruling." The question is, however, whether such a ruling is within a panel's mandate.

The text of the DSU is instructive but inconclusive. Its title and Article 3.3 indicate that a central aim is "the settlement of disputes." In addition, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute" and that "[i]n the absence of a mutually agreed solution, the *first objective* of the dispute settlement system is usually *to secure the withdrawal* of the measures concerned *if these are found to be inconsistent*" with the Covered Agreements.<sup>232</sup> On the other hand, Article 3.2 of the DSU recognizes that the dispute settlement system both preserves the rights of Members *and* serves "to clarify the existing provisions of those agreements."<sup>233</sup> WTO practice appears to be that, absent an agreement to cease the panel or appellate proceedings, a panel has discretion to decide "how it takes into account subsequent modifications or a repeal of the measure at issue,"<sup>234</sup>

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229. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 272 (Dec. 20). This decision has, deservedly, been the subject of much academic criticism. Whatever may be the position as to whether or not France's declaration was binding and therefore rendered Australia's claim without object, what is important for the present analysis is the acknowledgement and application of inherent jurisdiction by the court to decline to further adjudicate the case.

230. *Id.* at 271.

231. *Id.* at 272.

232. DSU art. 3.7 (emphasis added).

233. *Id.* art. 3.2.

234. See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse by Ecuador to Article 21.5 of the DSU*, ¶¶ 261–73, WT/DS27/AB/RW2 (Nov. 26, 2008) [hereinafter Appellate Body Report, *E.C.—Bananas (21.5—Ecuador II)*].

and is able to rule, i.e., make a finding, on the measures if they cease after the establishment of the panel but before it reports to the DSB. However, a panel may not make a recommendation as to a withdrawn measure.<sup>235</sup> As the Appellate Body has pointed out, nothing in the DSU provides that a panel's jurisdiction ceases if measures expire.<sup>236</sup> Thus, there is no doubt that a panel has the jurisdiction to rule on such measures. But can a panel decline to exercise this jurisdiction because a measure has expired?

Bearing in mind that repealed or expired measures might still affect the trade interests of other WTO Members, especially in subsidies cases, ruling on an expired measure appears legitimate. Under Article 5 of the ASCM, subsidies remain actionable so long as they cause "adverse" effects to the interests of other Members.<sup>237</sup> With respect to the consultations stage under Article 4 of the DSU, the Appellate Body in *U.S.—Upland Cotton (21.5—Brazil)* concluded:

We do not think it would advance the purpose of consultations if Article 4.2 were interpreted as excluding *a priori* measures whose legislative basis may have expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement. Nor, indeed, do we find textual support in the provision itself for doing so. Thus, we do not read Article 4.2 of the DSU as precluding a Member from making representations on measures whose legislative basis has expired, where that Member has reason to believe that such measures are still "affecting" the operation of a covered agreement.<sup>238</sup>

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235. See *id.* ¶ 271; Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, ¶ 81 WT/DS165/AB/R (Dec. 11, 2000). In *U.S.—Certain E.C. Products*, the Appellate Body determined that the panel erred in making a recommendation with respect to an expired measure in an extremely brief passage of reasoning:

We note, though, that there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. *The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists.*

*Id.* (emphasis added).

236. Appellate Body Report, *E.C.—Bananas (21.5—Ecuador II)*, *supra* note 234, ¶ 270; *cf.* DSU art. 12.12 (providing that a panel is effectively disbanded if its work is suspended for twelve months).

237. ASCM, *supra* note 99, arts. 5, 7.1.

238. Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 263, WT/DS267/AB/R (Mar. 3, 2005).

The Appellate Body based its holding on “Article 3.3 of the DSU, which underscores the importance of the ‘prompt settlement’ of [dispute] situations” for the “effective functioning of the WTO”<sup>239</sup> The Appellate Body noted that the provision does not distinguish between existing and repealed or expired measures, but rather focuses upon “measures taken” by a Member, which “includes measures taken in the past.”<sup>240</sup> Furthermore, the Appellate Body noted that

Article 3.3 envisages that disputes arise when a Member “considers” that benefits accruing to it are being impaired by measures taken by another Member. By using the word “considers”, Article 3.3 focuses on the perception or understanding of an aggrieved Member. This does not exclude the possibility that a Member requesting consultations may have reason to believe that a measure is still impairing benefits even though its legislative basis has expired.<sup>241</sup>

More generally, in cases where the measures at issue do not have effects beyond their existence, or where such effects alone are not actionable, the Appellate Body has nonetheless held that “a panel is not precluded from making findings with respect to measures that expire during the course of the proceedings.”<sup>242</sup> However, the Appellate Body has also repeatedly stated that it is “within the *discretion* of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue.”<sup>243</sup>

Such an approach, on its face, seems contrary to the Appellate Body’s statement in *Mexico—Soft Drinks* that “a WTO panel ‘would seem . . . not to be in a position to choose freely whether or not to exercise its jurisdiction.’”<sup>244</sup> While this statement was obviously not made with expired issues in mind (that not having been the case in *Mexico—Soft Drinks*), it seems on its face equally applicable to situations of expired measures. But a panel having “discretion” whether or not to rule on an expired measure seems to us to have as its corollary exactly that which *Mexico* says cannot occur: a choice as to whether or not a ruling is made. Why, then, can a panel choose whether or not to exercise its jurisdiction in one situation and not another? What is the relevant distinction between these situations? The Appellate Body’s frequent references to the “discretion” of panels do not shed light on this

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239. *Id.* ¶ 264.

240. *Id.*

241. *Id.*

242. Appellate Body Report, *E.C.—Bananas (21.5—Ecuador II)*, *supra* note 234, ¶ 269.

243. *Id.* ¶ 267 (emphasis added).

244. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 53.

issue, especially given the lack of mention of any criteria, apart from due process, that guide exercise of this discretion.

It seems to us that the differing approaches to such situations are defensible and correct—but not for the reasons given by the Appellate Body to date. Given the emphasis of the DSU on settling disputes by withdrawing a measure and on the role of panels in elucidating the interpretation of the Covered Agreements, the expiration of measures<sup>245</sup> should be treated differently from a situation in which a panel defers jurisdiction to another forum *in a dispute whose object still exists*. This is most convincingly explained by the differing principles of public international law (comity versus utility) that govern these situations. Explicit application of these principles would usefully clarify how a panel's can utilize its mysterious "discretion." In situations where measures have expired, the Appellate Body could provide clarification by acknowledging that panels have inherent jurisdiction to apply the principle of utility and so not to rule on measures *because* they have expired. The application of this principle in the WTO, however, must be adapted to the DSU. Thus, the principle should be applied with greater regard for the explicit role of panels in clarifying the WTO agreements. This, taken with the ability under the DSU to make both a ruling *and* a recommendation, provides a solid basis for the Appellate Body's holdings to date.<sup>246</sup> A panel should generally rule, i.e., make a finding, on an expired measure but not recommend its removal altogether. Thus, the circumstances in which jurisdiction should be declined on the basis of utility will be rare.

## 2. Particularizations of Good Faith in Public International Law: Estoppel and Good Faith<sup>247</sup>

Several principles stemming from the international obligation to act in good faith may be capable of application by WTO Tribunals under their inherent jurisdiction. The ICJ has stated that "[u]nquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."<sup>248</sup> Good faith is both a general

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245. We refer here to the true expiration or withdrawal of measures, not situations in which one measure is replaced by another having the same effect, for example, a measure replaced for the purpose of avoiding a finding of WTO-inconsistency or in the context of consecutive dumping assessments. In this regard, the Appellate Body has stated that it may regard as "measures taken to comply" for the purposes of Article 21.5 of the DSU measures that have a very close nexus to the original measures. See Appellate Body Report, *U.S.—Softwood Lumber (IV) (21.5—Canada)*, *supra* note 100, ¶ 68.

246. See, e.g., *supra* note 235 and accompanying text.

247. See generally Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 346 (2006).

248. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 53 (July 6).

principle of law and a principle of customary international law.<sup>249</sup> Stemming from this obligation of good faith are the principles of estoppel<sup>250</sup> and abuse of rights,<sup>251</sup> both of which are well recognized as principles of customary international law and general principles of law. Article 3.10 of the DSU expressly incorporates an obligation, “if a dispute arises, . . . [to] engage in these procedures in good faith.”<sup>252</sup> The Appellate Body has also referred to requirements of “good faith” when dealing with the principle of due process. For example, in *Mexico—Corn Syrup (21.5—U.S.)* the Appellate Body relied on both “the principles of good faith and due process”<sup>253</sup> in order to hold that a Member who does not raise an objection promptly “may be deemed to have waived its right to have a panel consider such objections.”<sup>254</sup> As Mitchell has previously observed, however, this kind of reasoning is “without legal basis”—there is nothing in Article 3.10 of the DSU or good faith obligations at general international law that implies certain requirements to do with due process (in the present example, a time by which objections must be made).<sup>255</sup> The due process right of a party to know the case against it in time to answer that case, however, provides a much more logical basis for the Appellate Body’s comments.<sup>256</sup> We leave this issue to one side, and consider below the extent to which estoppel and abuse of rights can be applied by WTO Tribunals as part of their inherent jurisdiction.

#### a. Estoppel

The ICJ has observed that “the concepts of acquiescence and estoppel . . . both follow from the fundamental principles of good faith and equity.”<sup>257</sup> Estoppel effectively precludes a state (State A) from retracting a representation it makes to another state (State B), where State A has made that representation clearly and unambiguously, State B has relied

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249. See, e.g., GEORG SCHWARZENBERGER & EDWARD D. BROWN, A MANUAL OF INTERNATIONAL LAW 7 (6th ed. 1976); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), at 124, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/RES/2625 (Oct. 24, 1970) (“Every state has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.”); *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 268 (Dec. 20).

250. Mitchell, *supra* note 247, at 348.

251. *Id.* at 349.

252. DSU art. 3.10.

253. Appellate Body Report, *Mexico—Corn Syrup (21.5—U.S.)*, *supra* note 99, ¶ 50 n.45.

254. *Id.* ¶ 50.

255. See Mitchell, *supra* note 247, at 353–55.

256. Our argument is that both good faith and due process *can* be applied as aspects of inherent jurisdiction, but that they have *different content* and should not be conflated.

257. *Gulf of Maine (Can. v. U.S.)*, 1984 I.C.J. 246, 305 (Jan. 20). We do not consider here the potential application of acquiescence in the WTO.

on this representation, and State B would suffer detriment<sup>258</sup> or State A would gain a benefit<sup>259</sup> if the representation were groundless.<sup>260</sup>

#### i. Application of Estoppel under Inherent Jurisdiction

As Mitchell has stated previously, “WTO Tribunals have inherent jurisdiction to resolve procedural matters and can rule on claims of estoppel on this basis.”<sup>261</sup> Applying our criteria above, it may be necessary for a WTO Tribunal to address estoppel to safeguard the judicial process—to ensure that parties are not permitted to “blow hot and cold,”<sup>262</sup> which makes a mockery of judicial process and the administration of international justice.<sup>263</sup> Estoppel has no autonomous substantive content. As Bartels observes (of equitable doctrines in international law generally, including abuse of rights), it is a principle “under which the ability of a party to rely on an express treaty right is conditioned on its own conduct.”<sup>264</sup> It operates to control the assertion of rights and obligations *that otherwise exist* by parties. At least in general terms, estoppel appears to be consistent with the Covered Agreements. Its effect is to hold a party to a representation where another party has relied on that representation. Ensuring consistency in state relations, especially given that states act in a considered and often strategic manner, will, if anything, “provid[e] security and predictability to the multilateral trading system.”<sup>265</sup> Indeed, Kolb sees estoppel and abuse of rights as stemming

258. On the requirement of detrimental reliance, see *North Sea Continental Shelf* (F.R.G. v. Den.), 1969 I.C.J. 3, 26 (Feb. 20); *Temple of Preah Vihear* (Cambodia v. Thail.), 1962 I.C.J. 6, 32–33 (June 15). See also *id.* at 62 (Fitzmaurice, J., separate opinion); Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.39, WT/DS241/R (Apr. 22, 2003) [hereinafter Panel Report, *Argentina—Poultry*] (stating that “inconvenience” was insufficient to ground an estoppel, that the party asserting the estoppel must have been “induced to act in reliance on the alleged statement,” and that it is necessary to show that the party “would have acted any differently” had the statement not been made).

259. For the proposition that benefit of the representing party is sufficient to ground an estoppel, see *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.), 1990 I.C.J. 92, 118 (Sept. 13) (Application by Nicaragua for Permission to Intervene).

260. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 153, 643–44 (7th ed. 2008); CHENG, *supra* note 115, at 141–42; D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 1957 BRIT. Y.B. INT’L L. 177, 202; Jörg Müller & Thomas Cottier, *Estoppel* in II *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 116, 117 (Rudolf Bernhardt ed., 2003).

261. Mitchell, *supra* note 247, at 361.

262. *Cave v. Mills*, 7 Hurlstone & Norman 913, 927 (1862), *quoted in* CHENG, *supra* note 115, at 141–42.

263. See Bartels, *supra* note 5, at 518.

264. *Id.* at 517–18.

265. DSU art. 3.2; see also Report by the Arbitrator, *Canada/European Communities—Article XXVIII Rights*, at 8, DS12/R (Oct. 26, 1990) GATT B.I.S.D. 37S/80 (1990). This decision, the only General Agreement on Tariffs and Trade decision upholding a claim of estoppel, bears out this point.

from “the general duty of good faith the parties owe to one another when engaging in judicial proceedings,”<sup>266</sup> a duty applied to dispute settlement by Article 3.10 of the DSU. Given that estoppel is regarded as a manifestation of good faith in international law, DSU Article 3.10 could be seen as a warrant for application of estoppel within the WTO. However, to argue that estoppel is a necessary implication from Article 3.10 seems to us a stretch.<sup>267</sup>

The Appellate Body has studiously avoided deciding whether or not it will apply estoppel, perhaps in deference to Members’ views.<sup>268</sup> In *E.C.—Sugar*, while acknowledging the basis of estoppel in good faith,<sup>269</sup> it stated that “it is far from clear that the estoppel principle applies in the context of WTO dispute settlement.”<sup>270</sup> That being said, the Appellate Body, despite being faced with submissions that estoppel does not apply in the WTO (the acceptance of which would have disposed of the issue), instead assumed *arguendo* its application and rejected the claim of estoppel on the merits.<sup>271</sup> The panel in *Argentina—Poultry* acted in the same way.<sup>272</sup> However, the panel in *E.C.—Asbestos* appeared to assume that estoppel *does* apply in the WTO. In addressing a claim of estoppel, it stated:

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266. Robert Kolb, *General Principles of Procedural Law*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 793 (Andreas Zimmerman et al. eds., 2006).

267. We are of this view because the rules of estoppel, having been developed judicially, are technical and nuanced. To suggest that a requirement to act in “good faith” imports this specific principle seems to us to be reading a great deal into the words.

268. Perhaps surprisingly, some states have rejected the application of estoppel in WTO dispute settlement. The United States has consistently argued that “[e]stoppel is not a defense that Members have agreed on,” and therefore, it should not be considered. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶¶ 127, 310 (quoting the United States’ Third Participant’s Submission). Australia has also argued that “the principle of estoppel cannot be applied in WTO dispute settlement,” and further that in any case it “cannot apply as to a statement of a legal situation.” *Id.* ¶ 54 (quoting Australia’s Appellee’s Submission); *see also* Panel Report, *Argentina—Poultry*, *supra* note 258, ¶ 7.31. Mitchell, however, argues:

Once it is accepted that the WTO agreements (like all legal texts) cannot possibly cover every conceivable issue that could arise in the WTO and do not purport to do so, the fact that the WTO agreements do not refer explicitly to estoppel means very little. More specifically, the WTO agreements leave many procedural issues up to the WTO Tribunals.

Mitchell, *supra* note 247, at 360.

269. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶ 310.

270. *Id.*

271. *Id.* ¶ 313.

272. Panel Report, *Argentina—Poultry*, *supra* note 258, ¶ 7.38 n.58 (stating that since it “find[s] that the conditions identified by Argentina for the application of the principle of estoppel are not present, [it does] not consider it necessary to determine whether or not [it] would have had the authority to apply the principle of estoppel if the relevant conditions had been satisfied”).

From a legal point of view, the question seems to be whether there is *estoppel* on the part of the EC because they notified the Decree or because of their statements, including those during the consultations. *This would be the case* if it was determined that Canada had legitimately relied on the notification of the Decree and was now suffering the negative consequences resulting from a change in the EC's position.<sup>273</sup>

Some other panels appear to have struggled with the concept, made more complicated by the parties' arguments.<sup>274</sup> But in no WTO case has a claim of estoppel been substantively made out.<sup>275</sup> The main point to be taken from the jurisprudence is that the application of estoppel in the WTO is an open question, since the Appellate Body never acted on a chance it had to exclude it. Acknowledgement and open application by the Appellate Body and WTO Tribunals of their inherent jurisdiction would make clear that estoppel can, subject to the issues canvassed in the next section, be applied in the WTO.

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273. Panel Report, *E.C.—Asbestos*, *supra* note 130, ¶ 8.60 (second emphasis added). Indeed, the panel appears to raise estoppel on its own motion as a legal explanation for Canada's argument that the E.C. had effectively recognized that the Agreement on Technical Barriers to Trade (TBT Agreement) applied to its asbestos ban when it reported the ban to the TBT Committee. The panel, however, held to the contrary. *See id.* ¶ 8.63 (concluding that the TBT Agreement did not apply because *inter alia* there was no estoppel in these circumstances).

274. *See* Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Types Bed Linen from India*, ¶¶ 6.89–6.91, WT/DS141/RW (Nov. 29, 2002); GATT Panel Report, *EEC Member States' Import Regimes for Bananas*, ¶ 361, DS32/R (June 3, 1993). *See generally* Mitchell, *supra* note 247, at 358–62.

275. Members appear to have been arguing acquiescence, rather than estoppel, but using the word "estoppel." *See* Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶ 308; Panel Report, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico II*, ¶¶ 8.23–8.24, WT/DS156/R (Oct. 24, 2000) [hereinafter Panel Report, *Guatemala—Cement II*] (responding to Guatemala's arguments that there was "no obligation to object immediately" to alleged violations, where Guatemala appeared to have used interchangeably the terms "acquiescence" and "estoppel" when making these arguments). Judge Fitzmaurice in *Temple of Preah Vihear*, states that an acquiescence can function as an estoppel. *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 62 (June 15) (Fitzmaurice, J., separate opinion). But while the effect may be the same (to preclude a state asserting facts different from those it has allowed or caused another state to believe were true), acquiescence is a different principle. The notion of acquiescence as a basis for not allowing a claim in the WTO is much more difficult—it amounts to a claim that Members were required to have challenged measures within a certain amount of time of the Covered Agreements coming into effect. Its application in this way seems to be excluded by Article XVI(4) of the Marrakesh Agreement, according to which all Members undertake to ensure the conformity of their domestic law with their WTO obligations. *See* Marrakesh Agreement, *supra* note 1, art. XVI(4). In the panel report in *Argentina—Poultry*, a viable estoppel argument would have existed had the obligation relied upon to create the estoppel been in effect at the relevant time. *See* Panel Report, *Argentina—Poultry*, *supra* note 258, ¶ 7.38; *see also infra* Part III.B.2.a.iii.

ii. The Need for a Situational Analysis when  
Applying Estoppel in the WTO

The third criterion we listed above for the application of a principle under inherent jurisdiction is that, both in general *and in its specific application*, a principle be consistent with the Covered Agreements. Several provisions of the DSU render particular applications of estoppel impossible in the WTO. For example, Article 4.6 of the DSU states that consultations “shall be . . . without prejudice to the rights of any Member in any further proceedings.”<sup>276</sup> Thus, estoppel could not be applied to hold a Member to a representation made in the course of consultations.

iii. Applying Estoppel to Prevent a Claim

The question of whether or not estoppel can be used to preclude a claim from being brought *altogether* is a difficult one. The panel in *E.C.—Sugar* seemed to contemplate that an admission that a measure was not WTO-inconsistent *or* a clear statement that a Member would not bring a complaint could ground a claim of estoppel.<sup>277</sup> In our view, at least the latter, and probably not the former, is a statement of fact that is capable of triggering a claim of estoppel. A choice of jurisdiction clause (such as NAFTA Article 2005(4))<sup>278</sup> makes such a clear and unambiguous

276. DSU art. 4.6.

277. Panel Report, *E.C.—Sugar*, *supra* note 191, ¶ 7.73.

278. North American Free Trade Agreement, U.S.—Can.—Mex., Dec. 17, 1992, 32 I.L.M. 289, 694 (1993). Article 2005 provides:

1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.

...

4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

*Id.*

representation. Bowett states that, in such circumstances, the “[r]eliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation)” —that is, reliance *and* detriment—“lies in the reciprocal exchange of promises.”<sup>279</sup> This is borne out by the decision of the Permanent Court of International Justice in *Legal Status of Eastern Greenland* where Denmark contested Norway’s declaration of sovereignty over Eastern Greenland.<sup>280</sup> However, Norway had entered into several bilateral and multilateral international agreements in which Greenland was described as part of Denmark or according to which Denmark was allowed to exclude Greenland from the application of the agreements. The Court stated that “[i]n accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and she thereby debarred herself from contesting Danish sovereignty over the whole of Greenland.”<sup>281</sup>

Analogously, by entering into a choice of jurisdiction clause, parties represent unambiguously that they will not commence WTO dispute settlement in certain circumstances. Both parties rely on that representation in entering into the treaty. If the representation is groundless—that is, if a party initiates proceedings contrary to the provision—the other party will be faced with the detriment of a complaint in a forum it had sought to exclude. Thus, as a matter of general international law, it seems that parties would be estopped from bringing the claim in the excluded forum in such circumstances.

But this is not the end of the question. In *E.C.—Sugar*, the Appellate Body displayed unease at the prospect of estoppel being used to condition the right to bring a claim. In the main paragraph where it dealt therewith, it stated:

The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their “judgement as to whether action under these procedures would be fruitful”, by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue

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279. Bowett, *supra* note 260, at 193.

280. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

281. *Id.* at 68–69 (emphasis added). It is noteworthy that the PCIJ was, like the ICJ and unlike WTO Tribunals, empowered by its statute to apply international law generally.

of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.<sup>282</sup>

The Appellate Body here suggests limits on estoppel—yet if Members must act in good faith from the point of initiation of a dispute onwards, which obviously includes the *actual initiation* of a dispute, there is no reason why estoppel could not operate to prevent a claim being brought, even if the estoppel were based on representations that had occurred prior to initiation. It is not to the point that there is “little in the DSU that explicitly limits the rights of WTO Members to bring an action.”<sup>283</sup> As explained above, the nature of estoppel is that it conditions other substantive treaty rights. The question really seems to be whether or not estoppel is a “legal impediment to the exercise of a panel’s jurisdiction”<sup>284</sup> in the sense of *Mexico—Soft Drinks*, and whether such a legal impediment will stop the exercise by a WTO Tribunal of its jurisdiction.<sup>285</sup>

There is no doubt that the DSU evinces the objective of finding a solution to a dispute. The Appellate Body has held that parties have an “entitlement” to a ruling where they bring a complaint.<sup>286</sup> But equally, Article 3.10 of the DSU imposes a good faith requirement in no uncertain terms. And Article 3.10 is expressed in a way that qualifies engagement in WTO dispute settlement procedures generally, including the right to bring a claim. Indeed, the Appellate Body in *E.C.—Sugar* did recognize that this article *is* one of the few parts of the DSU that *does* “explicitly limi[t]” rights of Members to bring a claim. Thus an application of estoppel under inherent jurisdiction to preclude a claim being brought—estoppel being a manifestation of good faith in international law—is not inconsistent with the DSU in terms of the third criterion above. The alternative interpretative approach could be to say that the meaning of good faith is informed by general international law,<sup>287</sup>

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282. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶ 312.

283. *Id.*

284. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 54.

285. Davey & Sapir, *supra* note 68, at 13.

286. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 52. For analysis of the reasoning leading the Appellate Body to this conclusion, see *supra* Part III.B.1.a.ii.

287. The Appellate Body has described Article 3.10 as a “specific manifestation of the principle of good faith which . . . is at once a general principle of law and a principle of general international law.” Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, ¶ 166, WT/DS108/AB/R (Feb. 24, 2000).

including the principle of estoppel. Thus, an interpretation of Article 3.10 that required states to abide by their representations in situations where estoppel would require this achieves the same result. While it is no doubt a controversial proposition to advance, we thus believe that Article 3.10 and its good faith requirements indicate that an argument of estoppel is colorable in the WTO, even though its consequence would be that a claim could not be brought. Unlike principles of comity or utility, estoppel leads to the conclusion that a right *cannot* be exercised—it does not confer discretion on the decisionmaker. This means estoppel can form a “legal impediment” to the exercise of a panel’s jurisdiction. Had the *Protocol of Olivos* (a MERCOSUR protocol containing a choice of jurisdiction clause) been in force at the relevant time in *Argentina—Poultry*,<sup>288</sup> in our view the panel would not have been able to exercise jurisdiction.<sup>289</sup> We consider that, assuming that NAFTA Article 2005 has been properly engaged in the *U.S.—Tuna/Dolphin (Mexico)* dispute (itself a question of construction—but not direct application—of that Article), Mexico could similarly be held to be estopped from bringing as much of its claim as it has represented in NAFTA that it will not bring.

Interestingly, in *E.C.—Sugar*, Thailand suggests that difficulties may arise due to the bilateral nature of estoppel.<sup>290</sup> Similarly, Davey and Sapir “lean towards” the view that “the WTO system need not and should not concern itself with protecting claims of exclusive jurisdiction made by other systems, especially given that to do so could undermine the WTO system.”<sup>291</sup> But in our view, holding Members to a clear representation they make—albeit outside the Covered Agreements—is not so much about protecting the claims of other systems, although it does have this effect, as ensuring that *the WTO system* is not itself used abusively. Members that have made a representation about the exercise of their WTO rights, regardless of where, should be held to that representation if the requirements of estoppel are satisfied. Further, GATT Article XXIV and GATS Article V both contemplate customs unions as grounds for deviating from the concessions under the Covered Agreements. Thus,

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288. See Panel Report, *Argentina—Poultry*, *supra* note 258, ¶¶ 7.39–7.40.

289. We hasten to add that in holding that a representation that proceedings will not be brought was made *in an FTA*, a panel will not be making a “determination whether [another Member] had acted consistently or inconsistently with [those FTA] obligations,” which the Appellate Body appears to regard as outside the competence of WTO Tribunals. Appellate Body Report, *Mexico—Soft Drinks*, *supra* note 22, ¶ 56. It would merely be ascertaining whether or not such a representation had been made, just as the WTO Tribunals can examine an international agreement to see whether or not it complies with GATT art. XXIV. See, e.g., Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999).

290. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶ 85 (referring to Thailand’s Appellee’s Submission).

291. Davey & Sapir, *supra* note 68, at 16.

saying that the WTO has no concern with such agreements overstates matters. Davey and Sapir also suggest that Members' would lose their third-party rights if a panel declined jurisdiction, and that Article 23 of the DSU "would be undermined if disputes over WTO issues could not be brought to WTO dispute settlement."<sup>292</sup> Yet the bilateral nature of estoppel in fact means that third parties will not be deprived of their rights. Applying estoppel as we suggest will *not necessarily* mean that a dispute is not brought because all other Members (other than the Member who has undertaken not to bring a claim) remain free to challenge the measure, acting in good faith.

#### b. Abuse of Rights

The principle of abuse of rights is also a well-recognized manifestation of good faith in international law. Broadly speaking, it forbids a state from "exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State."<sup>293</sup> International law recognizes three broad categories of abuse of rights.<sup>294</sup> The first category involves instances in which a state exercises a right in a way other than that which was intended (for example, against the spirit of the law conferring the right). This includes the exercise of rights solely for malicious purposes or their exercise as a guise in order to evade the law.<sup>295</sup> The second category occurs when a state exercises a right in a manner impinging on another state's enjoyment of its rights when, "weighing the conflicting interests," the exercise of the right is not fair and equitable between the parties.<sup>296</sup> The third category includes instances in which a state exercises a discretionary right dishonestly, unreasonably, or without due regard for other states' interests. In all of these situations, the party alleging an abuse of rights must establish,<sup>297</sup>

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292. *Id.* In making this statement, however, Davey and Sapir do not consider how the requirements of good faith—and Article 3.10 of the DSU—interact with the other provisions thereof. See also Frieder Roessler, *Mexico—Tax Measures on Soft Drinks and Other Beverages (DS308)*, in *THE WTO CASE LAW OF 2006–2007*, at 25, 27–28 (Henrik Horn & Petros C. Mavroidis eds., 2009).

293. Alexandre Kiss, *Abuse of Rights*, in 1 *Encyclopedia of Public International Law* 4 (Rudolf Bernhardt ed., 2003); see also J.F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 38 (1991); G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 1975 *BRIT. Y.B. INT'L L.* 323, 333.

294. Kiss, *supra* note 293, at 5.

295. CHENG, *supra* note 115, at 122–23.

296. *Id.* at 125.

297. *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 7); *Certain German Interests in Polish Upper Silesia (F.R.G. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 at 30 (May 25).

through “clear and convincing evidence,” that the abuse has caused injury “of serious consequence.”<sup>298</sup>

#### i. Application of Abuse of Rights in Inherent Jurisdiction

For reasons similar to those that apply for estoppel, the principle of abuse of rights can be applied under WTO Tribunals’ inherent jurisdiction.<sup>299</sup> The principle of abuse of rights is equally necessary to prevent the judicial character of WTO Tribunals from being abused by Members. Like estoppel, it has no autonomous substantive content, but conditions the exercise of other rights. Its application is also consistent with the DSU, especially given the good faith obligation in Article 3.10, even when used to prevent a claim being brought.

An analysis of conflicting treaty obligations through the principle of abuse of rights could provide a further basis for declining to exercise jurisdiction when a choice of jurisdiction clause had been invoked. Invoking WTO dispute settlement proceedings despite such a clause would fall into the second category of abuse of rights, i.e., exercising a right unreasonably in disregard of the rights of another Member.<sup>300</sup> In our view, it would thus be within the inherent jurisdiction of a WTO Tribunal to refuse to rule on such a claim. The principle of abuse of rights prevents the exercise of a right altogether, so it can also form a legal impediment to a WTO Tribunal’s jurisdiction.

Abuse of rights was effectively argued by the E.C. in *E.C.—Sugar*, when it argued that “[t]he circumstances of this dispute are such that the exercise by the Complainants of their right to bring a claim against the C sugar regime is manifestly unreasonable and, therefore, inconsistent with Article 3.10 of the DSU.”<sup>301</sup> The E.C. maintained that the complainants were exercising their rights “in an ‘unreasonable’ and ‘abusive manner.’”<sup>302</sup> The Appellate Body gave this argument very short shrift, simply asserting that it saw “nothing in the Panel record to suggest that the Complaining Parties acted inconsistently with Article 3.10 of the DSU or the principle of good faith . . . [and] [a]ccordingly, [it] agree[d] with the Panel that the Complaining Parties acted in good faith.”<sup>303</sup>

298. Trail Smelter Arbitration (U.S. v. Can.), 3 R. Int’l Arb. Awards 1905, 1965 (1941).

299. See *infra* Part III.B.2.a.i–ii.

300. See Appellate Body Report, *U.S.—Shrimp*, *supra* note 113, ¶ 158.

301. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶ 37 (quoting the E.C.’s Appellant’s Submission).

302. *Id.* ¶ 304 (quoting the E.C.’s Appellant’s Submission); see also Panel Report, *Argentina—Poultry*, *supra* note 258, ¶ 7.24 (referring to Argentina’s First Written Submission) (Argentina suggesting that Brazil had engaged in an abusive exercise of rights by bringing the WTO complaint after the MERCOSUR complaint, but the panel not substantively addressing the issue).

303. Appellate Body Report, *E.C.—Sugar*, *supra* note 54, ¶ 319.

This perhaps demonstrates reluctance on the part of the Appellate Body and WTO Tribunals generally to hold that Members have acted in bad faith. However, holding that an exercise of a right would be abusive would not amount to a finding of *bad faith* on the part of a Member in the sense a subjective intention of *mala fides*, exhibited by entering into an agreement with no intention to uphold it.<sup>304</sup> It merely means that a Member, by its conduct, has restricted its ability to invoke that right. It would have been desirable for the Appellate Body to examine the claim of abuse of rights in terms of the substance of the doctrine, clarifying that it can be applied as an aspect of its inherent jurisdiction.

## ii. An Alternative Interpretative Approach

The Appellate Body has referred to the “general principle of *good faith* that underlies all treaties,”<sup>305</sup> which suggests that good faith underlies the Covered Agreements as a whole. In interpreting the chapeau of Article XX of the GATT, it stated that “[a]n abusive exercise by a Member of its own treaty right . . . results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.”<sup>306</sup> In its interpretation, it said it would seek “additional interpretative guidance, as appropriate, from the general principles of international law.”<sup>307</sup>

Similarly, in *Phoenix Action*, an ICSID Arbitral Tribunal recently stated that “[n]obody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.”<sup>308</sup> The Arbitral Tribunal ruled that it did not have jurisdiction over a claim against the Czech Republic because there had not been an “investment” made within the meaning of either the ICSID Agreement or the Israeli–Czech Bilateral Investment Treaty (BIT). In *Phoenix Action*, a Czech national had fled the Czech Republic to Israel due to a police investigation, leaving two Czech companies behind with frozen assets. He incorporated an Israeli company, which acquired the companies and made a claim against the Czech Republic seeking the unfreezing of various accounts and compensation.<sup>309</sup> The Arbitral Tribunal held that, while the purchase of the Czech companies by a foreign company normally would constitute an investment, they would not *interpret* “investment” in

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304. See also Mitchell, *supra* note 247, at 339, 359.

305. Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶ 81, WT/DS192/AB/R (Oct. 8, 2001).

306. Appellate Body Report, *U.S.—Shrimp*, *supra* note 113, ¶ 158 (citations omitted).

307. *Id.*

308. *Phoenix Action, Ltd. v. Czech Republic*, ISCID (W. Bank) No. ARB/06/5, ¶ 107 (2009). We are grateful to Jürgen Kurtz for bringing this case to our attention.

309. *Id.* ¶¶ 24–33.

the BIT or ICSID Agreement as referring to transactions “undertaken and performed with *the sole purpose* of taking advantage of the rights contained in such instruments,” that is, transactions that were “an abuse of the system.”<sup>310</sup> Furthermore, the Arbitral Tribunal felt bound “to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.”<sup>311</sup>

Given the Appellate Body’s statement that an abusive exercise of a right amounts to a *breach* of that same obligation, and given its willingness to consider the principle of abuse of rights when interpreting the Covered Agreements, it seems possible to hold that the provisions creating the entitlement of Members to bring a complaint *do not* allow a complaint to be brought where such a claim would be abusive. Such reasoning represents an alternative *interpretative* method by which good faith can be employed (applying VCLT Article 31(3)(c)) in a manner similar to the reasoning in *Phoenix Action*. This would be consistent with the context provided by Article 3.10, and—if our view on the application of estoppel and abuse of rights as incidents of inherent jurisdiction is not to be accepted—would allow the WTO to maintain its institutional integrity and not hear what is plainly an abusive claim.

#### CONCLUSION

The sophistication of the adjudicatory process and the proliferation of regional trade agreements with their autonomous dispute settlement regimes pose challenges to the WTO dispute settlement system, which seem insurmountable in view of the stalemate at the Doha Round trade negotiations. As a result, WTO Tribunals increasingly seem to fall back on principles and rules, the application of which is best explained by the concept of inherent jurisdiction—the bundle of principles and rules applicable by international courts by reason of their judicial character and because their application is necessary for the proper exercise of their judicial function. However, WTO Tribunals have exercised inherent jurisdiction without explicitly stating that they are doing so. This is undesirable since it means that the exercise of these powers is not properly scrutinized. It also obscures why panels and the Appellate Body have certain powers in the first place, and the limits on those powers.

This Article attempted to discern a principled approach from already noticeable judicial practice. In doing so, it identified three criteria that

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310. *Id.* ¶ 93; *see also id.* ¶¶ 116–17, 145.

311. *Id.* ¶ 113.

should guide the application of principles under inherent jurisdiction. First, the application of the principle in question must be necessary for the WTO Tribunal to properly discharge its judicial function. Secondly, the relevant principle must have no autonomous substantive content—in other words, it must relate to the application of another principle or rule. Finally, the application of the principle must not be inconsistent with the provisions of the Covered Agreements correctly interpreted in the light of their object and purpose. The application of these conditions justifies and regulates an approach using principles and rules apparently beyond the provisions of the DSU under inherent jurisdiction, instead of an approach relying on implied powers. The former concept requires no express basic authorization in the DSU and as such puts less strain on its interpretation. This is not an arbitrary normative preference: International courts generally have tended to apply inherent powers rather than read implied powers into their statutes. These criteria also inform the potential use of other principles in the WTO dispute settlement system such as the principles of comity, utility, estoppel, and abuse of rights. The incorporation of these principles into the weaponry of the WTO Tribunals in a principled and open manner holds, as one consequence, the promise of mitigation of the jurisdictional conflicts that the proliferation of free trade agreements has already brought about. Most importantly, it allows the WTO to preserve its institutional integrity and legitimacy and ensures that the reasoning of WTO Tribunals is transparent and accords with what they do.