

RIGHT TO HEALTH IN GATS: CAN THE PUBLIC HEALTH EXCEPTION PAVE THE WAY FOR COMPLEMENTARITY?

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Introduction

The human rights aspect of international trade implications encompass a wide spectrum of ethical, social, political and legal issues, in particular the allegations of conflict between the trade regulations and respect for human rights.¹ In the early days of GATT, the debate on trade regulation and liberalisation and human rights (initiated by NGOs) suggested that WTO obligations undermine the advancement of human rights.² The General Agreement on Trade in Services (GATS) too came under fire soon after inception particularly for the way it affects various areas of public policy such as health, education and other public services.³ GATS creates a legal framework for liberalisation of international service trade and includes a number of services that have direct or indirect bearing on health policies and the right to health. The perceived negative impacts of services having direct public health policy implications such as hospital services, medical and dental services and services by midwives, nurses and physiotherapists have resulted in fewer commitments in these services sectors.⁴ The availability of functioning public health and healthcare facilities, services, goods, as well as programmes in sufficient quantity within the State party is the first requirement of the right to health. Consequently, only one third Members have (fully or partially) liberalised the hospital services sector and are reluctant to further liberalise this sector. Concerns have also been raised over negative health policy implications of other health-related services, such as environmental services (e.g., sanitation, sewage, and refuse disposal) or wholesale and retail distribution services (e.g., pharmaceutical products, tobacco, and alcohol).⁵ As a result, the number of commitments in these services sectors are not any better.^{6,7}

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¹ Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) EJIL 753, 754.

² Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover' (2002) Journal of International Economic Law 111.

³ David P. Fidler, Carlos Correa and Obijiofor Aginam, *Draft Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective* (World Health Organization 2004) 26.

⁴ For example, only 56 Members have made commitments in Hospital services and 28 Members have made in Other Health-Related Services sector. See <<http://i-tip.wto.org/services/ReportResults.aspx>> accessed 17 April 19

⁵ Fidler, Correa and Aginam, *supra* 3 at 162-163

⁶ To date, only 60 Members have made commitments in sewage services and 59 Members have made commitments in refuse disposal and sanitation services. See <<http://i-tip.wto.org/services/ReportResults.aspx>> accessed 17 Apr. 19

⁷ Until now, only 65 Members have made commitments in wholesale trade and 64 Members have made commitments in retailing services. See <<http://i-tip.wto.org/services/ReportResults.aspx>> accessed 17 April 19

World Trade Organisation (WTO) secretariat claims that GATS respects a member's right to protect public health by allowing a WTO member to adopt or enforce any measure necessary to protect human, animal or plant life or health. It acknowledges the importance of healthcare and reassures the Members that they can justify the breach of any GATS obligations under the health exception in GATS Article XIV(b). This paper argues that WTO can corroborate its claim by drawing on the right to health to interpret public health exception in GATS. There are generally two types of normative relationships in international law: relationships of interpretation and relationship of conflict. Where one norm assists in the interpretation of another, there is a relationship of interpretation. On the other hand, where two valid and applicable norms point to incompatible decisions so much so that a choice must be made between them, a relationship of conflict is deemed to exist. As there is no apparent legal and normative conflict between GATS and the right to health norms,⁸ this paper argues that a relationship of interpretation can be found through a right to health interpretation of public health exception in GATS. The Appellate Body has already established that WTO law is not to be read in clinical isolation from public international law and has considered contemporary international conventions in dispute settlements. Thus, a good faith interpretation of GATS public health exception taking into account the right to health not only provides coherency but also echoes the complementarity as found between the Marrakesh Agreement Establishing the WTO and the UN Charter. Finally, it will encourage further liberalisation of the health services sector if Members are reassured that they can retain the right to regulate public health services and fulfil their right to health obligation *ad libitum*.

Right to Health and GATS: Scope for Complementarity

The call for embracing human rights agenda from within the international trade law is not new. From Petersmann to Howse and Teitel and Marceau have scoped the international trade and human rights regimes, identifying areas of tension and means of possible reconciliation.⁹ In fact, Powell and Bloche went on to claim that the WTO jurisprudence has already accommodated the human rights into the utilitarian trade

⁸ PhD thesis, S. Gola, 'The Impact of International Trade in Healthcare Services under GATS on the Right to Health: A Study of Medical Tourism in India' available <<https://www.research.manchester.ac.uk/portal/en/theses/the-impact-of-international-trade-in-healthcare-services-under-gats-on-the-right-to-health-a-study-of-medical-tourism-in-india%28e5e87fe8-b008-4cc2-8a42-2ad95bdde591%29.html>> accessed 19 February 2019

⁹ See, Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration,' (2002) 13(3) EJIL 622. Makau W. Mutua and Robert L. Howse, 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization,' (2000) *Human Rights In Development Yearbook 1999/2000: The Millennium Edition* 51, 56; Robert Howse and Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization*, Dialogue on Globalisation, Occasional Papers No. 30 (Friedrich-Ebert-Stiftung, April 2007) 9; Marceau, *supra* note 1 at 755, 778.

rules.¹⁰ The present paper builds on this scholarship advocating the conjugation of the two regimes which for long have evolved in splendid isolation. Whereas the scholarship thus far has looked at human rights and international trade regimes in general and attempted to identify the ways in which one can complement the other, this paper narrows down the field by examining two specific norms representing their respective regimes, i.e., the right to health and GATS. As noted earlier, a number of services can have direct or indirect implications for human rights. When a WTO Member decides to make full commitments, it is then obliged to fully open its market to foreign service-suppliers giving them equal treatment as its domestic service providers. Thereafter, if it imposes any trade restrictive measure (be it a public health policy, law or administrative order) to promote its right to health obligation, such measure may be challenged if it violates any GATS obligation. In these circumstances, the WTO Member imposing the trade restrictive measure can justify such measure on the basis of health exception under the GATS. This exception provides that a non-complaint measure may be justified if it is 'necessary to protect human, plant, animal life or health'.¹¹ The present paper focuses on the inter-connection between the right to health and the health exception in GATS to assess whether the good faith interpretation of health exception clause can pave the path for complementarity between the two regimes through the application of the right to health as a mean to interpret 'human life or health'.

Good Faith in the WTO

Despite the lack of a definition in positive terms, most commentators concede that principle of good faith has a great deal of normative appeal and it is a well-accepted fundamental norm in many domestic and international legal systems.¹² The WTO Appellate Body (AB) has identified good faith as 'at once a general principle of law and a principle of general international law'.¹³ Consequently, good faith has played an important role in WTO law, on different level and under different guises. It is mentioned explicitly in Trade Related Aspects of Intellectual Property Rights (TRIPS)

¹⁰ Stephen P. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, <https://works.bepress.com/stephen_powell/10/> accessed 21 April 2019; M. Gregg Bloche, *WTO Deference to National Health Policy: Towards An Interpretive Principle* (2002) 5(4) *Journal of International Economic Law* 825-848, 827.

¹¹ GATS Article XIV: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(b) necessary to protect human, animal or plant life or health;

¹² Andrew Mitchell, 'Good Faith in WTO Dispute Settlement,' (2006) 7 (2) *Melbourne Journal of International Law* 339 <<http://www5.austlii.edu.au/au/journals/MelbJIL/2006/14.html>> accessed 21 April 2019

¹³ Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations'*, WT/DS108/AB/R (adopted 20 March 2000) para 166.

Agreement,¹⁴ and Understanding for the Settlement of Dispute (DSU).¹⁵ Implicitly, good faith has gained some importance in understanding of other agreements through the link in Article 3.2 of the DSU to the interpretive principles of customary international law and thereby to Article 31 of the VCLT.¹⁶ Not only has the AB viewed good faith as an ‘organic’ and ‘pervasive general principle...that underlies all treaties,’ but also in several decisions presumed good faith, corresponding to the traditional understanding of good faith in general international law.¹⁷

Applicable Law and Role of Customary Rules of Interpretation in WTO

The declaration by the AB that the WTO law was ‘not to be read in clinical isolation from public international law,’¹⁸ is nothing but a confirmation of what Article 3.2 of the DSU states, i.e., that the DSU ‘serves to *preserve the rights and obligations* of Members under the covered agreements, and to *clarify the existing provisions* of those agreements *in accordance with customary rules of interpretation of public international law*.’¹⁹ This can be understood as follows: a) the applicable law in WTO are the covered agreements in Appendix 1 to the DSU and include, through incorporation, provisions of various other international agreements, which should also be regarded as sources of WTO law²⁰ and; b) the WTO adjudicating bodies who are assigned the task of interpretation can interpret the provisions of the WTO Agreements ‘in accordance with customary rules of interpretation of public international law.’ The reference to customary international law has been understood by the WTO Panels and ABs to be an implicit reference to the relevant provisions (Article 31-32) of the VCLT.²¹

Nonetheless there is a distinction between *application* and *interpretation* of law.²² Since the customary rules of interpretation are not the ‘applicable law’ and can only be used to interpret applicable WTO law, i.e., the covered agreements, a Member would first have to find a WTO provision to defend its measures and only then it could rely on

¹⁴ Articles 24.4, 24.5, 48.2 and 58 TRIPS

¹⁵ Articles 3.10 and 4.3 DSU

¹⁶ Helge Elisabeth Zeitler, ‘“Good Faith” in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism’ (2005) 8(3) Journal of International Economic Law 721, 723.

¹⁷ *Ibid.* at 721, 724.

¹⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS/2/AB/R (adopted 29 April 1996) p17

¹⁹ Emphasis added

²⁰ Petros C. Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’, (2008) 102(13) The American Journal of International Law 421, 422.

²¹ *Ibid.* at 425.

²² *Ibid.*

the non-WTO norm to interpret the WTO provision in its favour.²³ That is, if a Member wishes to rely on the right to health to justify a trade restrictive measure, it can only do so through first invoking the public health exception in GATS Article XIV(b) and then use the right to health as an interpretive tool. The fact that WTO is not bound by the ICESCR (and consequently by the right to health norms) does not imply that it can ignore the document in its entirety.²⁴ The following sections will examine how the good faith interpretation will assist the adjudicating body in applying the right to health to the interpretation of public health exception under GATS Article XIV(b).

Public Health Exception – A Mechanism for Raising Right to Health in GATS

General exceptions in the WTO agreements are a recognition of a sovereign nation's ability to promote the purposes enlisted therein even when such actions otherwise conflict with various international trade related obligations.²⁵ The general exceptions provide a mechanism whereby specific important State interests and obligations not otherwise compatible with WTO agreements can find expression so long as they are not a disguised trade restriction.²⁶ GATS Article XIV (b) recognises the importance of human health by permitting the Members to take measures necessary to protect human life or health. The term 'human life or health' is very crucial from the human rights perspective as the concept of 'human life and health' encompasses a wide range of socio-economic rights relating to a person's well-being but essentially the right to health falls within its scope.²⁷ The extent to which a WTO Panel or AB might consider a right to health measure as necessary to protect 'human life or health' has to be placed within the context of the overall methodology for interpreting and applying the general exception clauses.²⁸ The wording of general exception under GATS Art XIV (b) is identical to that of GATT Art XX(b). Therefore, the ABs decisions under GATT Article XX are relevant for the analysis of GATS Article XIV.²⁹ The AB in *US – Gambling* stated that GATS Article XIV, like GATT Article XX, provides for a 'two-tier analysis': first, a determination whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. It requires the nexus between the measure and the interest specified in paragraphs through the terms such as 'relating to' and 'necessary'.

²³ Holger P. Hestermeyer, 'Economic, Social and Cultural Rights in the World Trade Organisation: Legal Aspects and Practice', Legal Studies Research Paper Series: Paper No. 2014-43 (Kings College London Dickson Poon School of Law) <<http://ssrn.com/abstract=2516696>> accessed 21 April 2019

²⁴ *Ibid.*

²⁵ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge MIT Press, 1989), p. 206

²⁶ Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreement: Using General Exception Clauses to Protect Human Rights* (UN High Commissioner's Report) (HR/PUB/05/5) (New York and Geneva, 2005) p.4

²⁷ *Ibid.* at.5

²⁸ *Ibid.* at14

²⁹ *US – Gasoline*, para 291

Once a measure is found to fall within one of the paragraphs of Article XIV, then it must be considered whether that measure satisfies the requirement of the chapeau of Article XIV.³⁰

The following sections will apply the authoritative interpretive methodology provided in the VCLT to assess the right to health applicability of the public health exception in GATS. Article 31(1) calls for interpretation in good faith, giving ordinary meaning to the terms of the treaty in their context, in light of the object and purpose of the treaty. Article 31(2) stipulates that the context includes the preamble of the treaty. Finally, Article 31(3)(c) mandates that ‘any relevant rules of international law’ ‘applicable in the relations between the parties’ must be ‘taken into account’. Therefore, in examining whether the right to health can be applied in interpreting the public health exception under GATS, the core interpretive tools would be an assessment of: the ordinary meaning given to the terms; their context including the preamble and; any applicable rules of international law between the parties. Article 31(3)(b) provides for the use of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. WTO law so becomes an important interpretive tool.³¹ Therefore relevant WTO case law will be analysed as indicative of subsequent practice in WTO. Such an approach to interpretation is also mandated under DSU Article 3.2 and consistently applied by both the WTO Panels and ABs.³²

Giving Ordinary Meaning to the Terms

To begin with, a treaty shall be interpreted in good faith and be given ordinary meaning to its terms in their context and in the light of its object and purpose. The first stage of the two-tier test of the interpretation and application of GATS Article XIV(b) requires that the human rights measure must be ‘necessary’ to protect ‘human life or health’. Since Article XIV(b) is an exception to GATS general provisions, the ‘object and purpose’ of the treaty itself is likely to be of limited use in its interpretation.³³ As noted earlier, the term ‘human life or health’ is very broad and encompasses a wide range of socio-economic rights relating to a person’s well-being including the right to

³⁰ *US – Gambling*, para 292

³¹ UN High Commissioner’s Report, *supra* 25 at.5

³² For example, the AB interpreted GATS Article II:1 according to VCLT Article 31 by looking at the ordinary meaning of word ‘affecting’ in *EC – Bananas III* (Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 9 September 1997) para 220); and the Panel applied VCLT Article 31-33 in deciding *US – Gambling* (Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (adopted 10 November 2004) para 6.8 – 6.10).

³³ UN High Commissioner’s Report, *supra* 25 at.5

health. Once identifying that the trade restrictive measure falls within the ambit of public health exception, i.e., that the measure is aimed at protecting human life or health, the DSB will be left with the question of the interpretation of what is 'necessary'. First of all, it is not the necessity of the policy objective that is to be examined, but the necessity of the measure to achieve the policy objective.³⁴ Time and again, the AB has stated that the WTO Members have large autonomy to determine their own policies on the environment,³⁵ the level of protection of health that it considers appropriate in a given situation,³⁶ and the level of enforcement that it desired.³⁷ The standard of necessity is an objective one.³⁸ Applying the interpretation rules in the VCLT, the AB in *Korea – Beef* first looked at the ordinary meaning of the term 'necessary' and found that it 'normally denotes something that cannot be dispensed with or done without, requisite, essential, needful'.³⁹

In the context of GATT Article XX (d), the AB deduced that the term 'necessary' referred to a range of degrees of necessity; at one end as 'making contribution to' and the other end as 'indispensable'. It stated that a necessary measure has to be closer to 'indispensable' than simply 'making contribution to'.⁴⁰ It further stated that determination of whether a measure is 'necessary' involves a process of 'weighing and balancing'.⁴¹ This process of weighing and balancing also includes determination of the extent to which a WTO-consistent alternative measure is reasonably available, i.e., contributes to the realisation of the end pursued.⁴² A measure which is not 'indispensable', may nevertheless be determined to be 'necessary'. As a WTO Member is at liberty to determine the level of health protection it considers appropriate,⁴³ the Member making the argument based on the right to health under the public health exception would be justified in arguing if the human life or health is at stake. The more vital or important the values pursued are, the easier it would be for the AB to accept the necessity of the measure to achieve the specified policy objectives.⁴⁴ A measure suitable or capable to achieve the sought objective, but is uncertain in its efficacy, can

³⁴ Working Party on Domestic Regulation, "*Necessity Test*" in the WTO: Note by the Secretariat (S/WPDR/W/27, 2 December 2003) (WTO 2003).

³⁵ *US – Gasoline*, page 28

³⁶ Appellate Body Report, *European Communities – Measures Affecting Asbestos-Containing Products (EC – Asbestos)*, WT/DS/135/AB/R (adopted 12 March 2001) para 168.

³⁷ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea – Beef)*, WT/DS/161,169/AB/R (adopted 11 December 2000) para 180

³⁸ *US – Gambling*, para 304

³⁹ *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, page 1895.

⁴⁰ *Korea – Beef*, paras 160 - 161

⁴¹ *Korea – Beef*, paras 164

⁴² *EC – Asbestos*, para 172

⁴³ *EC – Asbestos*, para 168.

⁴⁴ UN High Commissioner's Report, *supra* 25 at 15

still meet the necessity standard⁴⁵ so long as it contributes significantly to the objective sought to be achieved.⁴⁶ In such cases, a panel should adopt a less onerous version of necessary, i.e., that the human rights measure which is not indispensable may nevertheless be necessary if it makes a significant contribution to the attainment of the objective.

Context including the Preamble

The terms of a treaty are to be interpreted in their context, which comprises the preamble of the treaty along with its text. The preamble to the Marrakesh Agreement Establishing the WTO echoes the terms 'higher standards of living,' 'full employment,' and 'economic development' in Article 55(a) of the UN Charter. UN Charter, Article 55(a) formed the basis for the 1946 decision of the United Nations Economic and Social Council (ECOSOC) to establish a working party to draft the Charter for an International Trade Organization (ITO), which was the precursor to the GATT 1947, which was then replaced by the WTO in 1995. Hence, a number of objectives in the WTO preamble may be read to complement certain human rights, especially labour rights and elements of social and economic rights.⁴⁷ In this instrumental sense, WTO can be viewed to support human rights objectives as the resources generated by trade liberalisation can be spent on implementing human rights obligations.⁴⁸

Any applicable rules of international law between the parties

Article 31 (3)(c), which mandates that 'any relevant rules of international law' 'applicable in the relations between the parties' must be 'taken into account' is equally relevant. As noted earlier, good faith also serves a subjective function which establishes a general standard of behaviour for treaty interpreters by requiring that they act reasonably and fairly.⁴⁹ Therefore a treaty interpreter should also in good faith apply 'any relevant rules of international law'. Article 31(3)(c) provides wide

⁴⁵ Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, WT/DS308/AB/R (adopted 6 March 2006) para. 74

⁴⁶ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)* WT/DS332/AB/R (adopted 3 December 2007) para 210

⁴⁷ Makau W. Mutua and Robert L. Howse, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, Human Rights in Development Yearbook 1999/2000: The Millennium Edition 51, 64 (2000).

⁴⁸ Lorand Bartels, *Trade and Human Rights*, Max Planck Encyclopaedia of Public International Law, <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1550?rsk=RXQ8FS&result=10&prd=EPIL> 2013> (accessed 20 March 2018).

⁴⁹ Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew Mitchell, M Sornarajah and Tania Voon (eds.), *Good Faith and International Economic Law* (OUP, 2015) 38.

discretion to the DSBs to examine public international law sources.⁵⁰ Albeit the instances of application of Article 31(3)(c) by DSBs are few, it does not mean that the international law has not been used to interpret WTO norms.⁵¹ For example, in *EC – Hormones* the AB applied the *in dubio mitius* principle to interpret Article 3.1 of the SPS Agreement. Acknowledging *in dubio mitius* as a widely recognised ‘supplementary means of interpretation’ in international law, the AB observed that it ‘applies in interpreting treaties, in deference to the sovereignty of states.’⁵²

The AB has also reviewed or otherwise has made reference to an agreement outside the WTO agreements on a number of occasions, e.g., it reviewed Lomé Convention in its interpretation of Lomé waiver incorporated within GATT 1994 in *EC – Banana III* to determine special rights and obligations of a group of WTO Members.⁵³ Similarly, in *US – Shrimp*, the AB made reference to contemporary international environmental law including the 1982 United Nations Convention on the Law of the Sea and the Convention on Biological Diversity for defining ‘exhaustible natural resources’ in Article XX(g) GATT 1994. Furthermore, The AB affirmed that concepts embodied in a treaty are ‘by definition evolutionary’ requiring interpretation in light of changes in law.⁵⁴

Although ‘application in relations between the parties’ has been interpreted narrowly by the WTO Panels to exclude the application of non-WTO norms,⁵⁵ this narrow approach is inconsistent with *US – Shrimp* wherein the AB examined a number of multilateral environmental agreements including the Convention on International Trade in Endangered Species 1973 and the United Nations Convention on the Law of the Sea 1982. The AB did not refer to all the parties and the fact that not all the

⁵⁰ Gabrielle Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties’ (2001) 35 (6) *Journal of World Trade* 1081, 1087.

⁵¹ Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (Oxford: OUP 2009), at 368

⁵² Appellate Body Report, *European Communities - EC Measures Concerning Meat and Meat Products (Hormones) (EC-Hormones)* WT/DS26/AB/R; WT/DS48/AB/R, para 165 footnote 154.

⁵³ *EC – Bananas*

⁵⁴ The AB cited the ICJ advisory opinion in *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., at 31.

⁵⁵ For example, the panel in *EC – Biotech* disregarded the 1992 Convention on Biodiversity and the 2000 Biosafety Protocol. It held that only those rules which are applicable in the relations between the WTO Members are to be taken into account when interpreting WTO agreements. This restrictive interpretation of ‘parties’ implying that all WTO Members must be party to the non-WTO law under consideration has been severely criticised. Since few international agreements will have identical membership, Marceau noted that a requirement of identical membership for the application of a non-WTO rule to interpret WTO obligations would create illogical situations. The ILC also stated that such interpretation ‘makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31 (3) (c) would be allowed.’ For more, see Marceau, *supra* 1, at 781 and International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, (UN Doc. A/CN.4/L.682 dated 13 April 2006) para 450.

disputants had ratified or signed these conventions did not seem to pose any problem.⁵⁶ Interpretation of 'the parties' as referring to a large number of WTO Members is in line with the approach of AB in *US – Shrimp*, particularly in light of the fact that 145 of 164 WTO Members as well as 19 WTO observer governments are signatory to the ICESCR. Given that 88 percent of WTO Members are also bound by the ICESCR obligations, even a narrow interpretation of 'parties' necessitates the consideration of right to health in the interpretation of the public health exception.

Determination of whether a trade restrictive measure is 'necessary to protect human life or health' is the first step in the two-tiered analysis of the health exception. Having established that the measure is necessary for human life or health, the dispute panel is required to consider whether the challenged measure satisfies the requirements of the chapeau of GATS Article XIV. The AB has pronounced that '[T]he chapeau of Article XX is, in fact, but one expression of the principle of good faith'. Seeing *abus de droit*⁵⁷ (that prohibits the abusive exercise of a State's rights) as a good faith principle, the AB asserted that whenever the assertion of a right by a Member 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably'.⁵⁸ The requirement that a measure must not be applied arbitrarily or unjustifiably is again an obligation on the WTO Members to act in good faith. Therefore, it is imperative that the WTO Member applying the trade restrictive measure must do so in good faith and not use the right to health as a justification for a disguised restriction on trade in services.

Conclusion

The act of interpretation entails the act of selecting the pertinent meaning from the plethora of meanings. Although the DSB cannot add or diminish 'the rights and obligations provided in the covered agreements,' if a non-WTO law (right to health in this instance) is taken into account for interpretation of public health exception in the GATS, the public health exception can pave the path for the complementarity between WTO and human rights. This approach is not implausible as the discussion on the WTO jurisprudence (in particular *US – Shrimp*) elucidates. It is true that WTO Panel and AB reports do not create binding precedents. Yet, since AB reviews legal issues, its pronouncements are wider than the case at hand.⁵⁹ Moreover GATT rulings are

⁵⁶ Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 369 (Oxford: OUP 2009).

⁵⁷ A French term meaning 'abuse of right.'

⁵⁸ Appellate Body Report, *US – Shrimp* (WT/DS58/AB/R) (adopted 12 October 1998) para 158

⁵⁹ Mavroidis, *supra* 19, at 464.

regularly used by the Panels and ABs as if they were binding authorities.⁶⁰ Following AB's expansive and all-embracing approach in *US – Shrimp*, the use of right to health as an interpretive aid for public health exceptions in GATS and other WTO agreements would also bring internal coherence in WTO case law.

⁶⁰ Robert Howse, *The Use and Abuse of Other “Relevant Rules of International Law” in Treaty Interpretation: Insights from WTO Trade/Environment Litigation*, (IILJ Working Paper 2007/1), at 16.