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Incorporating the ICESCR into the WTO: Challenges and Opportunities

Introduction

Arguably, two of the most important changes in international relations since the end of World War II have been the development of international human rights law and the world economic order.¹ Yet, despite the vast array of institutions and treaties produced by these two legal regimes, there has been little progress at bringing these two disciplines together. Indeed, the World Trade Organization’s (WTO) Dispute Settlement Bodies (DSB) has never explicitly referenced human rights in their decisions.

This separation may not come as a surprise. Since WWII, economic and human rights law have developed separately, pursuing goals that may not be obviously related. However, economic globalization, along with the institutionalization of trade law through the establishment of the WTO, may demand an end to this isolationism. This is particularly compelling in the field of socio-economic rights, which increasingly presents the potential for conflicts with WTO obligations.

Today, the DSB is the most effective interstate adjudicatory body in the world.² This reputation has led a diverse array of groups to look to the WTO to resolve international issues outside the discipline of international trade (for example, environmental and labor issues). Although the WTO has waded into some of these issues,³ it has yet to explicitly

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¹ By “world economic order” I am referring to the Bretton Woods institutions – the International Monetary Fund and the World Bank – as well as World Trade Organization. However, regional economic pacts have also had a significant impact on the post-war world, most notably the European Union.
deal with human rights concerns.\(^4\) This may need to change. The WTO can plausibly claim to exert little influence over so-called first-generation human rights (civil and political rights), but the effect of WTO law on second-generation rights (socio-economic rights) is undeniable. The rights embodied in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are regularly involved in trade issues (for example, Article 6: the right to work; Article 11: the right to an adequate standard of living, which includes adequate food, clothing and housing; and Article 12: the right to health).\(^5\)

Although not explicitly referring to any rights in the ICESCR, the WTO has involved itself in socio-economic rights issues in the past.\(^6\) Future handling of human rights issues may well require a more explicit reference to major human rights treaties and declarations. The WTO’s legitimacy will be threatened if it continues to adjudicate cases involving the human rights obligations of its Member States without taking into account (even referencing) those obligations.

This paper seeks to describe the WTO’s approach to the rights enshrined in the ICESCR thus far and assess steps that can be taken by the DSB to incorporate the ICESCR into the corpus of WTO law. It is my contention that the WTO has an obligation to its Member States, international law and morality to explicitly incorporate the ICESCR and other human rights instruments into its decision-making. Furthermore, the WTO’s legitimacy, and therefore its ability to continue to provide benefits to the world, depends on it confronting these issues in a transparent manner. Although the WTO and the DSB


may wish to avoid non-trade issues, the widespread acceptance of economic, social and
cultural rights as human rights requires the institution to ensure due consideration to the
ICESCR in its adjudication of disputes.

This paper is separated into four parts. Part I discusses the backgrounds of the
WTO and the ICESCR and conflicts between the two regimes. Part II identifies the
importance of legitimacy to the WTO and a possible threat to that legitimacy posed by the
status quo. Part III describes the way in which health issues, implicating the ICESCR’s right
to health, have been handled by the WTO thus far. Finally, Part IV discusses potential
avenues for incorporating the ICESCR into WTO jurisprudence.

**Part I: Background of the ICESCR and the WTO**

*The International Covenant on Economic, Social and Cultural Rights*

Following the tragedies of World War II, the international community created the
United Nations, in part “to reaffirm faith in fundamental human rights.” After the adoption
of the UN Charter, some states and organizations pressed for the adoption an International
Bill of Rights. While the Universal Declaration of Human Rights (UDHR) was adopted soon
after the UN Charter (in 1946), ratification of binding human rights treaties took longer.
The West demanded that the proposed Bill of Rights be bifurcated into two treaties – one
for civil and political rights, the International Covenant on Civil and Political Rights
(ICCPR), and one for economic, social and cultural rights, the ICESCR. Thirty years after
the UDHR, both covenants came into effect. However, both were controversial. Ratification

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8 Louis Henkin, ET AL., HUMAN RIGHTS 217 (2d ed. 2009).
of both covenants was slow in the 1970s and 1980s. Yet, following the end of the Cold War, ratification accelerated and most countries have ratified both treaties.9

The ICESCR has been more controversial than the ICCPR in the United States. The rights embodied in the ICCPR are similar to the rights enshrined in the US Bill of Rights and are typically considered fundamental rights in the US. Thus, in 1992, the US ratified the ICCPR.10 However, the US government has been less receptive to recognizing economic, social and cultural rights as fundamental rights.11 This, perhaps more than anything else, led to the bifurcated International Bill of Rights.12 An example of the US’s position towards the ICESCR is former Assistant Secretary of State Elliot Abrams’s statement, “‘the rights that no government can violate, i.e., civil and political rights, should not be watered down to the status of rights that governments should do their best to secure, i.e., economic, social and cultural rights.’”13 Because of this view, the US has failed to ratify the ICESCR, despite signing it in 1977.14

The World Trade Organization

Following WWII, the same enthusiasm for institutionalism that led to the creation of the UN also manifested itself in economic relations. The Bretton Woods conference led to the creation of the International Monetary Fund (IMF) and World Bank to help stabilize the struggling economies of Europe. The third piece of the new international economic order was the proposed International Trade Organization (ITO). While debating the establishment of the ITO, the negotiating parties adopted the General Agreement on Tariffs

9 164 countries are parties to the ICCPR and 160 countries are parties to the ICESCR. Id. at 215.
10 Id.
12 Id. at 546.
13 Id. at 547 (quoting Elliot Abrams).
14 Henkin, supra note 8, at 215.
and Trade, which was to be the foundational treaty of the ITO (and eventually became the foundation for the WTO). Ultimately, the establishment of the ITO was derailed, primarily due to US concerns over sovereignty.\textsuperscript{15} Thus, from 1947 until the establishment of the WTO in 1995, international trade law was governed by a treaty with no enforcement mechanism. Although there was a dispute settlement procedure in GATT, the system was weak because any member, including the accused violator, could veto the arbitration.\textsuperscript{16} The lack of a real dispute settlement mechanism led to an \textit{ad hoc} trade regime dominated by the United States and the United Kingdom.\textsuperscript{17}

Perhaps the most important achievement of the Uruguay Round, which led to the establishment of the WTO, was the creation of an effective dispute settlement mechanism to enforce the GATT and other WTO treaties. Since its establishment, the WTO’s dispute settlement mechanism has gained a reputation for being the most effective inter-state dispute settlement system in the world (except, perhaps, EU courts).\textsuperscript{18} The teeth of the DSB lies in its ability to authorize legal retaliatory tariffs by an injured party against a violator for the amount lost by the injured party due to the violator’s illegal actions. These retaliatory tariffs may be imposed on any of the violator’s products imported by the injured


\textsuperscript{18} See e.g., Supachai Panitchpakdi, \textit{The WTO at Ten: Building on Ten Years of Achievements}, in \textit{THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM}, 7, 8 (Alan Yanovich & Jan Bohanes eds., 2006) (former WTO Director General Panitchpakdi stated that the WTO DSB is “the most active international adjudicative mechanism in the world today”).
party. Although there have been critiques of this system,\textsuperscript{19} the strength of this remedy is
that it is simple, relying on the tit-for-tat method, shown to be most effective way to resolve
Prisoner’s Dilemma situations.\textsuperscript{20}

**Potentials for Conflict between the Two Regimes**

Some, like the WTO’s Director-General Pascal Lamy, have argued that WTO rules are
“based on the same values as humans rights.”\textsuperscript{21} Lamy proclaimed that the principles of
“individual freedom and responsibility, non-discrimination, rule of law, and welfare
through peaceful cooperation among individuals”\textsuperscript{22} exist in both human rights and trade
law. Yet, despite this optimistic view, it is clear that many believe WTO law poses a threat
to the full enjoyment of human rights. This fear may be particularly acute in the context of
the ICESCR given the level of connection between trade and socio-economic rights. On both
ideological and practical levels the ICESCR and WTO regimes may come into conflict.
Exploring ways to resolve this conflict is the purpose of this paper.

**Liberalism v. Collectivism**

One tension between the ICESCR and WTO regimes is that there is a perception that
they have contradictory ideological outlooks. This likely stems from both the context in
which the two regimes were formed, and the subject matter of the regimes. The ICESCR
was drafted during between the 1950s and 1970s in the UN at a time when collectivist
ideas were prevalent. In contrast, the WTO was formed in the 1980s and 1990s and
excluded major socialist states like Russia and China. Beyond the history of the regimes,

\textsuperscript{19} The biggest problem involves developing countries trying to enforce a DSB’s decision against a large
developed country as the impact of retaliatory sanctions against the developed country will be minimal, while
the cost to the developing country of the illegal barriers may be detrimental. See e.g., Jenkins, *supra* note 16, at 261.
\textsuperscript{22} Id. (quoting WTO Director-General Pascal Lamy).
the covered subject matter also creates conflict. Whereas human rights seek to protect individuals through state obligations, WTO law is concerned with “facilitating and promoting international trade.”

It may be unsurprising then that the WTO is generally concerned to reflect a liberal ideology, whereas the ICESCR is considered to reflect a collectivist ideology.

The ideological conflict between the two regimes is perhaps exacerbated by “[t]he Cold War legacy of economic and social rights [which] brought with it an association with discredited collectivist approaches to economic and social organisation.” This, combined with the Washington Consensus view that liberalizing trade benefits both rich and poor,

might lead WTO proponents to ignore (or even resist) a recognition of the human rights status of socio-economic rights in the organization. However, perhaps a better view of the ICESCR is as “an effective measure to alleviate and adjust the negative result of incomplete and distorted performance of liberal trade in form.”

Thus, despite differing ideological outlooks, the two regimes might benefit from some form of linkage.

**The Practical Effectiveness of the Two Regimes**

The other potential conflict between the regimes is the practical effectiveness of the two regimes. It is clear that enforcement of WTO law is more likely and effective than human rights law, where various constraints make “enforcement...untenable for all but the

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most egregious of violations.”27 This “raises a haunting specter for human rights”28 where states may choose to follow WTO law even when it conflicts with human rights obligations. Thus, despite the fact that there is no de jure hierachal distinction between WTO and ICESCR law (as both are treaty regimes), a de facto hierarchy favors WTO law.29 This directly conflicts with the conception of human rights as fundamental and has been expressly condemned by the UN Sub-Commission on the Protection of Human Rights, which reminded “all Governments of the primacy of human rights obligations over economic policies and agreements.”30

Yet, the effectiveness of the WTO judicial system also provides an opportunity for human rights law. If linkages can be found between the two regimes, human rights norms may gain strength in enforcement, which they do not currently enjoy. At least in the important realm of trade, respect for human rights could be policed. Some resist this idea,31 but the amount of attention given to the way in which the WTO should treat human rights law suggests there is some enthusiasm for such a connection.32

Part II: The WTO's Need for Legitimacy

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29 Id. at 4-5.
31 Former Secretary-General Kofi Annan argued against “using trade rules to achieve goals with respect to labour, the environment and human rights.” Roos, supra note 25, at 11.
32 See, e.g., Maassarani, supra note 27, at 270 (arguing the lack of strong human rights enforcement mechanisms “prompts arguments for increased linkages between trade and human rights”).
The WTO, like all international institutions, relies on legitimacy to function. Procedural legitimacy is defined as “the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process” (emphasis in original). The WTO’s framework enjoys a high level of de jure procedural legitimacy, as the decision making process is based upon the notion of one state, one vote. As far as de facto procedural legitimacy, the WTO’s record is mixed. Some have argued that during the Uruguay Round the developed countries marginalized developing countries as the “Quad” (the US, EU, Japan, and Canada) used its economic leverage to present the developing countries with a “Faustian choice...[a]gree to rules that are harmful, or remain altogether outside the global trading regime[.]” However, as the WTO matured, the developing world gained a stronger voice, ultimately standing up to the developed world at the Doha Round.

The other aspect of legitimacy is substantive legitimacy, which can be defined as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (internal quotations omitted). As this definition suggests, it can be hard to

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33 Thomas Franck argued that compliance with international law requires that states “perceive the rule and its institutional penumbra to have a high degree of legitimacy.” Thomas M. Franck, The Power of Legitimacy Among Nations 25 (1990) (emphasis in original).
34 See e.g., Ian Clark, Legitimacy in International Society 18 (2005).
35 Franck, supra note 33, at 19.
36 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Article IX (1).
measure substantive legitimacy. In the context of the WTO, a plausible conception of substantive legitimacy is the provision of a free trade system that is based on rules while respecting state sovereignty and other state obligations. For most of the existence of the GATT, substantive output of the trade regime was fueled by trade agreements between Member States aimed at dismantling trade barriers (mostly tariffs). However, this has not been the case for the last decade as the Doha Development Round, launched in 2001, has collapsed. The failure of the legislative branch of the WTO leaves the DSB as the only effective mechanism for providing the benefits sought by Member States. Indeed, the DSB have continued to operate despite the inability of Member States to conclude the Doha Round. Yet, once the dispute settlement mechanism becomes the primary vehicle for fulfilling the WTO's objectives, there exists a danger that the preferences of Member States will not be adequately reflected by the substantive output of the WTO, thereby threatening the organization's legitimacy. WTO trade rounds operate on the basis of the single undertaking, thereby allowing each Member to derail the process unless its preferences are reflected in the outcome. The DSB have no such protections.

Should substantive legitimacy be lost, states may choose to leave the institutionalized structure of the WTO in favor of an ad hoc system akin to the pre-WTO trade regime. Such a regime would be less rules-based and could create regional blocs that favor insiders rather than the most efficient producers. Thus, the DSB must take into

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40 For example, in the area of environmental obligations, the WTO Appellate Body considered the Rio Treaty in *US-Shrimp*. In the context of human rights, it has been argued that, despite the lack of explicit references to human rights, the Preamble of the Marrakesh Agreement, which established the WTO, is “consonant and consistent” with human rights objectives. See Roos, *supra* note 25, at 16.

41 WTO negotiations cannot be completed until agreement is reached on everything in the agenda.

42 One could argue the move from multilateral to regional trade agreements (RTAs) has already started since the breakdown of the Doha Round. The Economist noted that in 1990 there were about 70 RTAs compared with over 300 today. *Building Blocks, ECONOMIST*, Dec. 12, 22, 2012, available at
account the obligations of Member States, including human rights obligations embodied in
treaties such as the ICESCR. Failure to do so will lead to decisions that are suspect, which
will diminish the substantive legitimacy of the WTO. So far, the DSB have been reluctant
to refer specifically to the ICESCR or any human rights treaty. However, there is reason to
believe the DSB has taken human rights obligations into account in the past. Furthermore,
there is reason for optimism that in the future the DSB will be more receptive to human
rights-based arguments, as it may well be the case that that international law and the
WTO’s jurisprudence allows (and perhaps mandates) consideration of human rights
instruments in DSB proceedings.

Part III: The ICESCR in the WTO Today: The Case of the Right to Health

Introduction

As mentioned above, the WTO’s domain (trade law) necessarily interacts with at
least some of the socio-economic rights embodied in the ICESCR. Although never explicitly
referencing the ICESCR, or any human rights instrument, the WTO and the DSB have
nevertheless laid down rules concerning rights contained in the ICESCR in the constitutive
treaties of the WTO and the case law of the DSB.

In order to explore past interactions between WTO law and the ICESCR, I will use
the example of the right to health, embodied in Article 12 of the ICESCR. In the context of

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43 For this paper, I assume that WTO Members expect their human rights obligations to be reflected in the
substantive output of the WTO, thus impacting the substantive legitimacy of the organization. I assume that
ratification of a treaty like the ICESCR evinces this desire. However, it should be noted that some countries,
especially developing countries, may be suspicious of incorporating the ICESCR into WTO law out of concerns
that developed countries will use their human rights obligations as way to justify disguised protectionism.
See Roos, supra note 25, at 18.
WTO cases, the important question is whether a state’s attempt to “full[y] realiz[e]”\textsuperscript{44} the “highest attainable standard of physical and mental health”\textsuperscript{45} contradicts a state’s WTO obligations. Thus, the principal international law issue is how to reconcile conflicts between a state's obligations under ICESCR Article 12 and WTO obligations.

Health issues have come up in both WTO case law and treaty law and thus provide a way to assess the WTO’s past treatment of socio-economic rights. Furthermore, perhaps the most widely publicized controversy involving the WTO is the application of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement to pharmaceutical patents. Thus, assessing the assimilation of the right to health into WTO law is not merely an academic exercise. The WTO has addressed health concerns in the past and will have to do so in the future.

**The Health Exception Clause: Article XX(b)**

**A Known Harm: The Case of Asbestos**

As part of the GATT’s exception clauses, Article XX(b) is one of the clearest expressions of the WTO’s concern for health issues. Subject to Article XX’s chapeau, XX(b) allows a Member State to enact measures “necessary to protect human, animal or plant life or health”\textsuperscript{46} in derogation of WTO obligations. *EC-Asbestos* is the leading case on XX(b).

*EC-Asbestos* concerned EC regulations banning the importation of construction materials containing asbestos. While the Appellate Body (AB) was able to uphold the restrictions on a separate basis (discussed below), the AB also held that the restrictions were permissible under XX(b). The main issue was whether the restrictions met the

\textsuperscript{44} ICESCR, Article 12(2).

\textsuperscript{45} Id. at Article 12(1).

\textsuperscript{46} General Agreement on Tariffs and Trade as amended, Jan. 1 1995, Article XX(b).
necessity requirement of XX(b). The AB drew upon previous cases to enunciate the standard for necessity as applied to XX(b).

In *US – Section 337 Tariff Act* a GATT Panel (later cited approvingly by the WTO’s Appellate Body) enunciated the general standard of necessity for Article XX exceptions:

[A] contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.47

Thus, the key to the necessity inquiry is an assessment of reasonable alternatives. A GATT Panel performed this inquiry in an Article XX(b) case, *Thailand-Cigarettes*. In that case, Thailand had imposed restrictions on the importation of cigarettes and maintained comparatively higher taxes for imported cigarettes. The Panel ultimately held that the measures were not justified by XX(b). However, it refined the *US – Section 337 Tariff Act* necessity standard for application to XX(b) cases, stating that the measures could only be considered necessary “only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives”48 (emphasis added).

Building upon these cases, the Appellate Body in *EC-Asbestos* crafted a highly deferential standard for analyzing national regulations related to health. Canada argued that an alternative measure known as “controlled use” was more consistent with GATT obligations than an outright prohibition of asbestos products. The EC (specifically, France)

had stated its health policy objective to be “the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres.”\(^49\) Thus, the question was whether the alternative proposed by Canada would reasonably achieve this objective. The AB and Panel found that there was evidence to suggest that even controlled use of asbestos could still present a “significant residual risk of developing asbestos-related diseases.”\(^50\) Thus, the AB found that the controlled use alternative “would not allow France to achieve its chosen level of health protection...[and] would, thus, not be an alternative measure that would achieve the end sought by France.”\(^51\)

In so holding, the AB in \textit{EC-Asbestos} endorsed the idea in \textit{Thailand-Cigarettes}, that Article XX(b) “clearly allowed contracting parties to give priority to human health over trade liberalization.”\(^52\) Moreover, the AB did not dictate to the EC an appropriate level of health protection. The AB held that the only important inquiry was whether there were less restrictive alternatives to achieve a Member State’s health objectives. Members, it seems, are free to set health levels beyond what other states may believe to be appropriate. Although controlled use was available and was less restrictive, the AB held that it would not be an appropriate alternative to meet the stated goals of France – to eliminate or reduce asbestos-related health risks. This holding, then, seems to incorporate an understanding that health concerns are solely to province of national governments and that WTO obligations will not be used to prevent a state from achieving its desired health objectives.

\(^{49}\) \textit{EC-Asbestos}, para. 172.
\(^{50}\) \textit{Id}. at para. 174.
\(^{51}\) \textit{Id}.
\(^{52}\) Roos, \textit{supra} note 25, at 17.
While this holding seems consistent with a concern for the right to health, it must be noted that “the decisions of the GATT panels and the Dispute Settlement Bodies on the protection of human life or health exception do not expressly refer to human rights.”

A Potential Harm: The Case of Hormones

The other important statement of the level of deference afforded government decisions on health issues in WTO disputes is *EC-Hormones*, which involved EC restrictions on the importation of meat containing growth hormones, justified on health grounds. This case did not involve Article XX as it was brought under the Sanitary and Phytosanitary (SPS) Agreement, rather than GATT. The SPS Agreement covers issues involving food products. However, this case is instructive as it deals with government regulations based on potential health risks (the presence of hormones in meat) and SPS Article 5.5 is similar to Article XX. Furthermore, the Appellate Body in *EC-Asbestos* explicitly discussed *EC-Hormones* in its decision.

While the *Asbestos* case seems to take a highly deferential approach to health-based legislation, that case was made easier by the overwhelming evidence of the harmfulness of asbestos. *EC-Hormones* is a more difficult case as it deals with a health risk that is not universally recognized – the presence of hormones in meat. At best, there is mixed scientific evidence.

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53 *Id.*
54 “With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.” Agreement on the Application of Sanitary and Phytosanitary Measures, Article 5(5).
55 *EC-Asbestos* at paras. 167 and 178.
The Appellate Body made a finding, consistent with the deferential approach to government health regulations, that the risk assessment required by the SPS Agreement could be satisfied by a non-majority scientific opinion.\(^57\) Furthermore, the AB held that “especially where the risk involved...is perceived to constitute a clear and imminent threat to public health and safety” a determination of the relationship between the risk assessment and the government’s measure “can only be done on a case-to-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects.”\(^58\) Thus, *EC-Hormones* recognizes the right of a Member State to choose measures to protect *potential* health risks on non-majority scientific opinions, as long as the Member has engaged in a risk assessment and there is *some* scientific support for its regulation.

While the Appellate Body’s opinion points to a high degree of deference to national governments’ decisions in the face of a potential harm and scientific uncertainty, the EC’s restrictions on meats containing growth hormones were ultimately ruled to be contrary to the EC’s WTO obligations. The Appellate Body agreed with the Panel that none of the EC’s scientific evidence “indicates that an identifiable risk arises for human health from such use of these hormones if good practice is followed.”\(^59\) The EC produced an expert, Dr. Lucier, who disagreed with the majority of the scientific community, but the AB found that Dr. Lucier’s opinion was not the “result of scientific studies carried out by him or under his supervision focusing specifically on residues of hormones in meat from cattle fattened with such hormones” and, thus, “that the single divergent opinion expressed by Dr. Lucier is not

\(^{57}\) *EC-Hormones* at para. 194.

\(^{58}\) *Id.*

\(^{59}\) *Id.* at para. 196.
reasonably sufficient to overturn” the findings of the more relevant scientific studies.\(^60\)

After losing at the WTO, the EC refused to remove its restrictions on meats containing growth hormones, which resulted in the US and Canada imposing retaliatory tariffs.

Thus, the outcome of this case might be distressing to those who believe WTO rules should not be used to deny a government’s ability to protect its citizens’ health. While the language in the AB’s opinion suggests a deferential approach to health regulations, it seems that the AB is still willing to delve into the purported bases for restrictions and rule against a state’s health-protective measures if the AB finds the state’s justifications unsatisfactory. Yet, *EC-Hormones* did help establish a high level of deference for national health policies, as the AB noted in *EC-Asbestos*.\(^61\) Together, *EC-Asbestos* and *EC-Hormones* established that WTO law is consistent with “broad regulatory discretion”\(^62\) regarding health-protective measures.

**The “Likeness” Issue: Article III:4**

The Appellate Body’s holding in *EC-Asbestos*, points to a view of Article XX(b) that is highly deferential to national governments and the need to address health concerns. However, the importance of *EC-Asbestos* goes beyond applying the Article XX(b) standard articulated in *Thailand-Cigarettes*. Indeed, *EC-Asbestos* is most noteworthy for its approach to “like products” in Article III:4. This portion of the opinion is important because, beyond addressing health concerns in the health exception clause, the AB sought to address the health risks of asbestos in its discussion of the substantive WTO provisions themselves.

\(^{60}\) *Id.* at para. 198.

\(^{61}\) *EC-Asbestos* at para. 178 (citing *EC-Hormones* for the proposition that “[a] Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion”).

The Article III:4 controversy in EC-Asbestos was whether construction materials containing asbestos fibers and those containing other fibers were “like products.” If so, the EC’s restrictions would run afoul of Article III:4 (National Treatment), which states, “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin.” The Panel held that the construction materials were “like,” focusing primarily on end-use. Some observers, like Professors Howse and Teitel, have criticized this decision as ignoring the known risks of asbestos for the sake of free trade.

The Appellate Body reversed the Panel’s holding on “likeness,” finding that “on account of the different health effects that stemmed from the different physical characteristics of, respectively, asbestos and substitute products that were permitted in France, these two groups of products were ‘unlike’: there was thus no violation of National Treatment.” Although not explicating incorporating the right to health into WTO law interpretation, the AB held that the health effects of a product could be considered, not only when a Member tried to justify a regulation based on an exception, but also when determining whether a violation of WTO law had occurred in the first place. Because of this, EC-Asbestos has been called a “landmark ruling.”

Professors Howse and Teitel noted the importance of the AB’s Article III:4 decision in EC-Asbestos, arguing that even though the exception in Article XX(b) exists, “WTO Members should not be lightly assumed to have undertaken in the first place substantive

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63 GATT, Article III:4.
64 EC-Asbestos at paras. 104-08.
65 Howse & Teitel, supra note 24, at 58.
66 Id.
67 Id.
obligations that are inconsistent with the right to health, when those obligations can be read and applied otherwise.” While it is unclear whether the appellate judges in EC-Asbestos considered the right to health, the AB’s holding appears to acknowledge a danger in assuming Member States had agreed to WTO obligations that conflict with their obligations to protect the health of their citizens (embodied in the ICESCR’s right to health). Even though saved by the exceptions clause, the Panel held the EC’s restrictions inconsistent with WTO law. It is therefore important that the AB reversed the Panel’s decision because, in doing so, the AB signaled a willingness to incorporate concerns outside of trade (such as health risks) into its interpretations of the WTO’s substantive provisions, perhaps hinting at a receptiveness to incorporate human rights obligations in the future.

The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement

Controversy Surrounding TRIPS

The TRIPS Agreement has been controversial since the Uruguay Round when developing countries were pressured to accept intellectual property. At its most basic level, the TRIPS Agreement “sets the minimum standards for intellectual property protection at the global level” without regards to the “field of technology.” This means that pharmaceutical patents are covered by TRIPS. Today, the relationship of TRIPS to essential medicines is the most publicized problem surrounding the WTO. Basically, “the

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68 Id. at 58-59.
69 Beyond cases involving health concerns, some have suggested “if the extrinsic effect of a product on human health can be taken into account in the determination of product likeness, then, by analogy, the extrinsic effect of a product on human rights might also be taken into account.” Roos, supra note 25, at 13. However, this expansive view of EC-Asbestos does not seem to have gained traction thus far.
alleged conflict between the TRIPS Agreement and access to medicine is the claim that patents on pharmaceuticals raise prices, thereby reducing the accessibility of drugs.”

This conflict between a strong global patent system and the need for essential medicines raises an issue concerning the right to health. It is undeniable that today “prevention, treatment and control of most diseases rely on medication as an integral, vital, indispensible part of the therapy.” The Committee on Economic, Social and Cultural Rights (CESCR) has recognized this in General Comment No. 14, stating, “The creation of conditions which would assure to all medical service and medical attention in the event of sickness...includes...the provision of essential drugs.” Furthermore, Resolution 2000/7 of the U.N. Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights warned, “TRIPS could affect the enjoyment of the right to health – in particular through its effect on access to pharmaceuticals.” Thus, it seems clear that the human rights community considers the provision of drugs to be essential to attaining the highest standards of health.

Unlike the previous examples, the health issues in TRIPS have not been primarily handled by the DSB. The DSB may have had an opportunity to consider the application of the right to health to TRIPS in a recent case, EU and a Member State – Seizure of Generic Drugs in Transit, where India argued that TRIPS provisions must be read in light of the

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ICSCR’s right to health.\textsuperscript{75} However, India and the EU reached a settlement and the case was not litigated.\textsuperscript{76}

Instead, there has been pressure on the legislative side of the WTO to incorporate some recognition of the right to health into the TRIPS agreement. In particular, the Doha Development Round’s emphasis on the developing world ensured the issue of essential pharmaceutical patents would be discussed.

**The Pre-Doha TRIPS Regime**

Prior to the Doha Round, concerns about access to essential medicines manifested in Article 31 of TRIPS. While not referencing health issues, “Article 31 TRIPS provides the flexibility for WTO Members to compulsory-license patented goods.”\textsuperscript{77} In order for a Member to issue a compulsory license, there are conditions that must be met, “including reasonable compensation to the rights-holder, and provided the license only applies to the market of the WTO Member in question.”\textsuperscript{78} However, some conditions could be waived by the state “in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.”\textsuperscript{79}

The language of Article 31 raises two issues. The first is defining what constitutes a national emergency for the purposes of Article 31(b). Some have considered this term to

\textsuperscript{75}Hestermeyer, supra note 28, at 18.
\textsuperscript{76}“Pursuant to the announced Understanding, the European Union will no longer intercept in-transit generic medicines unless there is adequate evidence to satisfy customs authorities that there is a substantial likelihood of diversion of such medicines to the EU market.” Brook K. Baker, *Settlement of India/EU Dispute re Seizures of In-Transit Medicines: Why the Proposed EU Border Regulation Isn’t Good Enough* 3 (PIJIP, Research paper No. 2012-02, 2012).
\textsuperscript{77}Howse & Teitel, supra note 24, at 60-61.
\textsuperscript{78}Id.
\textsuperscript{79}Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Article 31(b).
have sufficient ambiguity to require outside sources for interpretation – perhaps even human rights instruments.\(^80\)

However, the more immediate problem for global health is that Article 31 only allows compulsory licenses for a country's *domestic* market. Thus, a country with no domestic drug manufacturing could not avail itself of the compulsory licensing scheme in Article 31 and countries that do manufacture drugs could not compel pharmaceutical firms to license their drugs to other countries. Hence, Article 31 does not help the poorest countries, which need cheap drugs but tend to lack domestic drug production capabilities.

These problems led the WTO's legislative branch to devote much attention to TRIPS and access to essential medicines. The resulting action taken by the WTO has, arguably, come close to recognizing a right to health.

**The Doha Declaration on the TRIPS Agreement and Public Health**

In 2001, at the WTO ministerial meeting in Doha, the Doha Declaration on the TRIPS Agreement and Public Health stated, "the TRIPS Agreement does not and should not prevent members from taking measures to protect public health" and "affirm[ed] that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."\(^81\) By explicitly calling for TRIPS to be interpreted in light of the "right to protect public health," one might think that this Declaration suggests incorporation of ICESCR Article 12 into TRIPS jurisprudence. However, the ICESCR is not referenced and it is unclear what legal force this Declaration carries. In seems that in the subsequent Council for TRIPS Decision on compulsory licensing of drugs, "it was dealt with as a technical trade

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\(^{80}\) Xiong, *supra* note 70, at 140.

\(^{81}\) Doha Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, para. 4.
issue only, and certainly not as an international human rights obligation of Western Member States to promote access to essential medicines in poorer countries.”

On the specifics of the application of TRIPS to essential medicines, the Declaration stated that, inter alia, each Member can determine what constitutes a national emergency and called for the Council for TRIPS to address the compulsory licensing restrictions. The interpretive declaration on defining national emergencies is highly deferential and seems to allow a state to declare an emergency based on public health, providing an avenue for incorporating ICESCR obligations into TRIPS, even though human rights were not explicitly discussed in the Declaration.

Pursuant to the Declaration, the Council for TRIPS took up the issue of compulsory licensing restrictions in 2003 and “waived a provision of the WTO-TRIPS agreement that stipulated that production under compulsory licensing must be predominately for the domestic market.” However, the 2003 Decision has, thus far, proven insufficient to address the problem of access to essential medicines in developing countries. Only one country, Rwanda, has declared its intention to use the compulsory licensing regime to import drugs (from Canada). Yet, Oxfam has noted that rich countries “seem to be in no hurry to make [the regime] work” and Doctors Without Borders has found the Canadian legislation to be “unworkable.” Professors Howse and Teitel argue that the inability to secure the right to these medicines, given the efforts of the WTO’s legislative branch, “is a

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82 Coomans, supra note 23, at 374.
83 Doha Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, paras. 5(c) and 6, respectively.
84 Xiong, supra note 70, at 140.
85 Coomans, supra note 23, at 374.
86 Howse & Teitel, supra note 24, at 63.
87 Id.
serious threat to the legitimacy of the WTO," particularly because of the negative impact on the right to health.\(^88\)

The challenge of providing developing countries with access to cheap essential medicines threatens to undermine the legitimacy of the WTO because of the gravity of epidemics in the developing world and the publicity the issue has received around the world. Perhaps a better way of implementing an effective compulsory licensing scheme would be to explicitly tie the scheme to the right to health and incorporate the ICESCR into the DSB’s jurisprudence. The CESCR has already stated, “it is incumbent upon developed States...to develop international intellectual property regimes that enable developing States to fulfil at least their core [economic, social and cultural] obligations.”\(^89\) Identifying the human rights imperative of creating an effective compulsory licensing regime within the WTO’s legislative branch would put some teeth behind the WTO’s legislative efforts, especially if the DSB recognized the need to create an effective regime as part of a Member’s WTO obligations.

**Part IV: Closing the Gap between the WTO and the ICESCR**

The previous Part discussed the extent to which the right to health, ICESCR Article 12, has been incorporated into WTO law. As mentioned, there has been no explicit incorporation of the right to health or any human right. However, the DSB as well as the General Assembly have taken steps that, arguably, recognize the need for Members to be free to pursue regulations to further a socio-economic right. The health example shows

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\(^{88}\) *Id.* at 63-64.

that the WTO has not always been willing to second-guess state regulations involving socio-economic rights in favor of free trade.

However, the previous examples also show the limits that result from WTO’s failure to recognize the right of Members to protect socio-economic human rights. Although cases like *EC-Asbestos* point to a deferential standard on domestic socio-economic regulation, *EC-Hormones* shows that the Appellate Body will not blindly accept any justification from states. The TRIPS example also is worrying. Although WTO Members came together to seek a solution to a well-known human rights crisis – the lack of access to drugs in epidemic-ridden countries – the compulsory licensing regime has so far been a failure. These problems threaten the legitimacy of the WTO and call for an explicit incorporation of human rights instruments into WTO jurisprudence. This is especially important for the ICESCR as socio-economic rights frequently come into contact, and clash, with trade obligations.

**The Public Morals Exception Clause: Article XX(a)**

Before discussing the traditional international law means of incorporation (*jus cogens* status, treaty interpretation and customary law), the GATT may already provide an avenue for incorporating human rights instruments into WTO law. The first exception, Article XX(a), allows a party to adopt measures inconsistent with GATT obligations if they are “necessary to protect public morals.”

The DSB have been reluctant to establish a definitive meaning to “public morals,” instead recognizing that public morals “can vary in time and space, depending on a range of

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90 GATT, Article XX(a).
factors, including prevailing social, cultural, ethical and religious values.”91 This evolutionary approach could provide an opportunity for the DSB to incorporate human rights into WTO law by arguing that such an interpretation is warranted by the “dramatically increasing prominence of human rights in the global community since the drafting of the GATT in 1947”92 and perhaps necessitated to “enabl[e] WTO Members to comply with their respective national and international human rights obligations.”93 By recognizing the flexibility of the first exception in Article XX, the DSB has provided itself a way to incorporate the ICESCR and other human rights instruments without recourse to non-WTO international law (such as the VCLT). However, the DSB has yet to extend Article XX(a) to cover human rights.

The ICESCR as Jus Cogens

Incorporating the ICESCR into WTO law would be easiest if the rights embodied therein were considered jus cogens – or “norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”94 As this definition, from Article 53 of the VCLT, suggests, no international law may derogate a jus cogens norm – which includes WTO law.95

However, it is extremely difficult to determine when a norm has reached the status of jus cogens. As of yet, there does not appear to be a mechanism to establish when a norm has become jus cogens. However, it is likely that all would agree it would be best if the decision were left out of the purview of the DSB.96 What, then, has been established as jus

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91 Roos, supra note 25, at 17 (quoting US-Gambling).
92 Roos, supra note 25, at 17.
93 Petersmann, supra note 62, at 74.
95 Gao, supra note 26, at 421.
96 Id. at 422.
It seems clear that at least the laws prohibiting the following are *jus cogens*:

“aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.”

While most would agree these prohibitions deserve the status of “compelling law,” no such consensus exists in the realm of human rights. Some argue that international human rights are *jus cogens* norms “[b]ecause of their fundamental nature.” However, given the controversies surrounding some human rights, “it is clear that it would be impossible to maintain that all civil and political rights are *ius cogens*, let alone the more controversial economic, social and cultural rights.”

Although there is no definitive list of *jus cogens* norms, it seems unlikely that the rights embodied in the ICESCR could be agreed to be *jus cogens*, even though many states have agreed to the status of socio-economic rights as fundamental human rights.

The Interpretation Approach: VCLT Article 31(3)(c)

Lacking agreement on the *jus cogens* status of the ICESCR, incorporation into WTO law is likely to be done through treaty interpretation based on Article 31(3)(c) of the Vienna Conventional on the Law of Treaties (VCLT). Some, like Professor Pauwelyn, argue that when human rights law and trade law come into conflict, the WTO should favor the former (discussed below). However, many see this as problematic. The issue is that “[t]he Dispute Settlement Bodies are not tribunals of general jurisdiction” and under the Dispute Settlement Understand (DSU), the agreement that created the DSB, the “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and

98 Gao, *supra* note 26, at 421.
99 Harrison, *supra* note 4, at 58.
100 Roos, *supra* note 25, at 12.
obligations provided in the covered agreements.”

Hence, taking up human rights issues unconnected to trade issues may run afoul of the DSB’s limited jurisdiction and applying human rights law may conflict with the role contemplated in the DSU. However, the use of human rights law to interpret the WTO’s constitutive agreements may avoid these issues, and may be the only way to incorporate the ICESCR into WTO law. Indeed, this appears to be the approach taken by the DSB in other areas of non-WTO international law.

**VCLT Article 31(3)(c)**

The basis for the interpretation approach to incorporation of the ICESCR stems from the United Nations’ Vienna Convention on the Law of Treaties – the definitive treaty on treaty interpretation. The most important provision in the VCLT for this purpose is Article 31(3)(c). Article 31 covers general rules of interpretation and 31(3)(c) states, “There shall be taken into account, together with the context...any relevant rules of international law applicable between the parties.”

The purpose behind the VCLT was to promote “‘coherence’ in international law.” Thus, the text and policy behind 31(3)(c) suggests that it would be possible for the DSB to interpret WTO law in light of other international law, like the ICESCR.

Article 31(3)(c) clearly should apply to interpretations of WTO law as WTO law is part of international law. However, beyond this, the WTO itself has affirmed the principle of 31(3)(c). The DSU calls for the WTO to “clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international

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101 Dispute Settlement Understanding, April 15, 1994, Article 3(2).
103 Harrison, *supra* note 4, at 190.
104 VCLT, Article 31(3)(c).
105 Xiong, *supra* note 70, at 128.
law.”"106 It is clear that the interpretation rules in the VCLT, a UN treaty, have achieved the status of customary international law.107 Moreover, DSB decisions make clear the applicability of the VCLT in interpreting WTO law.108

**The Meaning of “between the parties”**

The greatest potential impediment to the interpretation approach to incorporation is the requirement in 31(3)(c) that the outside law be “applicable between the parties.”109 It is unclear what is necessary to meet this requirement. There appear to be at least two ways to interpret this provision.

The first way is premised on the belief that “a treaty...can only be interpreted with reference to elements that reflect the common intentions of all the parties to the treaty, not a few of them.”110 This idea has support in WTO case law. In *EC-Biotech*, a Panel rejected the European Communities’ suggestion that the “parties” requirement is limited to the parties to the dispute.111 Instead, the Panel suggested the adoption of a more restrictive test mandating all WTO Members be parties to a non-WTO treaty used in interpretation of WTO law.112 The Panel’s rationale was based upon the idea that a sovereign state likely would not want to be bound to a mandatory interpretation rule that could result in state being affected by treaties it did not adopt.113 This interpretation of 31(3)(c) would be problematic for incorporation of the ICESCR (or, indeed, any human rights instrument) as

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106 DSU, Article 3(2).
107 Xiong, supra note 70, at 126.
109 VCLT, Article 31(3)(c).
112 *Id.* at para. 7.68.
113 *Id.* at para. 7.71.
not all WTO Members are parties to the ICESCR. Hence, the DSB would be precluded from using the ICESCR to interpret WTO law.

However, other statements by the DSB seem to point to a second interpretation of 31(3)(c)’s “parties” requirement – that the outside law need only be in force between a large number of the organization’s members. The Appellate Body’s 2011 decision in *EC and Certain Member States – Large Civil Aircraft* contains a discussion of the “parties” requirement noting “a delicate balance must be struck between...taking due account of an individual WTO Member’s international obligations and...ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.”

Although *dictum*, the AB’s discussion suggested that non-WTO law could be applied when binding on a large number of Members. The AB has applied such an approach, albeit without referencing the VCLT, in *US-Shrimp* where non-WTO international instruments such as UNCLOS, the Convention on Biological Diversity and the Agenda 21 were used to elaborate on ambiguous WTO provisions. Similar to those instruments, the vast majority of WTO Members, 84%, are also parties to the ICESCR. Thus, it seems likely that the DSB, if they chose to do so, could easily justify using the ICESCR to interpret WTO law, thereby incorporating some consideration of the human rights obligations of most of its Members.

**Benefits of the Interpretation Approach**

Perhaps the greatest benefit of the interpretation approach to incorporating the ICESCR is that the DSB has already employed this approach in referring to non-WTO law in

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116 *Id.* at 18.
117 *Id.*
other circumstances. So far, it does not appear that this approach has elicited a strong backlash from Members. By approaching incorporation incrementally, the DSB can elaborate on established WTO provisions in light of the ICESCR on a case-by-case basis. Such an approach is almost certainly more likely to be accepted by the diverse states that compose the WTO’s membership.

The Conflict of Norms Approach

A different approach to incorporation suggests that, when conflicts arise between international human rights law and international trade law, the DSB should resolve the matter in favor of the human rights law. Thus, this approach is not limited to interpretation, but goes further in advocating the DSB to actually apply international human rights law. This approach has been discussed by Professor Pauwelyn in his book, Conflict of Norms in Public International Law. There, Pauwelyn raised the possibility that “[i]n the event of conflict involving WTO provisions, WTO provisions may not always prevail, including before a WTO panel.”118 Should the Dispute Settlement Bodies adopt this approach, the problems with the interpretation approach could be avoided, namely that “a treaty...can only be interpreted with reference to elements that reflect the common intentions of all the parties to the treaty, not a few of them.”119 However, the challenge with the conflict of norms approach lies in the limited jurisdiction of the DSB.

It is clear that “[t]he Dispute Settlement Bodies are not tribunals of general jurisdiction.”120 The DSB’s jurisdiction is limited to resolving disputes arising from WTO treaties. The DSU makes clear that, in doing so, the DSB may not “add to or diminish the

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118 Pauwelyn, supra note 110, at 491.
119 Id. at 257.
120 Roos, supra note 25, at 12.
rights and obligations provided in the covered agreements.”\textsuperscript{121} However, the Appellate Body in \textit{Mexico–Taxes on Soft Drinks} stated that, although Panels may rule on their jurisdiction, “it does not necessarily follow...that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute.”\textsuperscript{122} This ruling suggests that, while WTO panels may not be able to entertain cases based \textit{solely} on human rights law, they could rule on human rights issues involved in a trade issue as part of their “‘implied’ or ‘incidental’ mandate...in order to settle disputes.”\textsuperscript{123} This raises the specter of non-WTO law coming before WTO panels as part of a resolution of WTO disputes, particularly as a defense against breach of WTO law.\textsuperscript{124}

Assuming it possible to bring human rights law to the DSB, the next question is how a conflict between human rights norms and WTO trade law norms should be resolved. Pauwelyn argues that, to answer this question, one must look at the nature of the norms involved – whether they are reciprocal or integral. Reciprocal obligations are bilateral obligations; meaning \textit{inter se} modifications of the treaty are permissible.\textsuperscript{125} Integral obligations are multilateral obligations; meaning the “binding effect is collective,” thus rendering \textit{inter se} modifications impermissible.\textsuperscript{126} Pauwelyn maintains that WTO obligations are reciprocal in nature, noting that “WTO rules constitute a promise to each and every WTO member individually, not the collectivity or common conscience of WTO

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\textsuperscript{121} DSU, Article 3(2).
\textsuperscript{123} Harrison, \textit{supra} note 4, at 188.
\textsuperscript{124} Pauwelyn, \textit{supra} note 110, at 491.
\textsuperscript{125} \textit{Id.} at 52-53.
\textsuperscript{126} \textit{Id.} at 53.
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members taken together.” When a Member breaches its WTO obligations, all Members may be affected, but Pauwelyn argues that the effect of a breach only impacts economic interests, not rights. This means modifications to WTO treaties may be permissible. In contrast, human rights are integral in nature as “their principle purpose will be to foster a common interest, over and above any interests of the States concerned individually.” Thus, according to Pauwelyn, when a Panel is faced with a conflict between WTO law and human rights law, “WTO provisions will have to give away.” Because integral obligations cannot be modified, the reciprocal obligations must be subordinated when a conflict exists.

If it is important to Members to have their ICESCR obligations incorporated into WTO law, Pauwelyn’s approach might be preferable to the interpretation approach. Certainly, treating human rights as integral norms, and thus superior to WTO norms, would explicitly affirm the WTO’s belief in the fundamental nature of human rights. Also, by adopting this approach, the WTO could immediately dispel any doubts about the place of human rights in WTO dispute settlement. The interpretation approach is fraught with uncertainty as it, necessarily, progresses slower, on a case-by-case basis. However, the problems of incorporation (below) are probably greatest in the conflict of norms approach, as human rights obligations immediately subordinate WTO law in the WTO’s dispute settlement machinery.

Problems of Incorporation

WTO Member States not Parties to the ICESCR

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127 Id. at 69-70.
128 Id. at 70.
129 However, Pauwelyn does note that certain rules in the WTO regime are integral because the organization could not function without the rules. Id.
130 Id. at 63 (quoting the Commentary to the 2001 Draft Articles on State Responsibility).
131 Id. at 491.
Among the problems that may arise from applying the ICESCR to the WTO, perhaps the greatest concern stems from the possibility of binding non-ICESCR signatory WTO Member States to the ICESCR. While the vast majority of WTO Member States are ICESCR signatories, some are not, most notably the United States. Thus, there is a risk that if the ICESCR is incorporated into WTO law, the WTO will gain legitimacy with states trying to meet international trade and human rights obligations while simultaneously alienating non-ICESCR signatories. It cannot be denied that losing the United States, one of the founding members of the GATT and WTO and the world's largest economy, would be a tremendous blow the WTO's effectiveness and thus its ability to provide substantive benefits to its Members. However, perhaps using the interpretive approach would help assuage concerns, as the process would develop incrementally over time and would only elaborate on established WTO provisions. This would, at least, be more palatable than the alternative of immediately adopting ICESCR obligations as superior to WTO obligations in WTO courts.

The Lack of Competence of the WTO in Human Rights

Another major problem with incorporating human rights law into WTO law, especially with Pauwelyn’s conflict of norms approach, is that the DSB lacks competence in human rights law. Panels and the Appellate Body are composed of experts in the field of trade law. Thus, when confronted with a Member's assertion that its derogation of WTO obligations is based on human rights obligations; the DSB will be faced with two “unpalatable alternatives… either to defer excessively to the claims made by that member, or venture into areas of fact and law in which they have no special expertise.”132

132 Roos, supra note 25, at 19.
Yet, the DSB has already ventured into areas outside its expertise – such as environmental and health issues. In those areas, the WTO has relied on testimony from experts as well as international agreements on the subjects. As in the health context, the DSB could articulate a deferential standard (EC-Asbestos), while still providing some oversight to prevent disguised protectionism (as in EC-Hormones).

Conclusion

In light of the collapse of the Doha Round, the WTO faces a legitimacy crisis. If the organization is perceived to lack the ability to provide substantive benefits, its Members will lose enthusiasm for the WTO’s mandate and the organization will ultimately collapse. The WTO, therefore, needs to find ways (outside of the standard legislative process) to satisfy its Members expectations. One way to do that is by recognizing the non-WTO international obligations of its Members and incorporating an understanding of those obligations into WTO law. A large majority of WTO Members are parties to the ICESCR. Given the relationship between trade and socio-economic rights, conflicts between the two regimes are inevitable. Thus, incorporating recognition of ICESCR obligations into WTO law would be beneficial for the WTO’s perceived legitimacy. The WTO has shown a willingness to consider non-WTO law in the past. However, even in cases involving socio-economic rights like the right to health, the WTO has been reluctant to explicitly reference human rights. This reluctance has limited the effectiveness of non-WTO law considerations and creates uncertainty for future state actions.

Thus, it is this paper’s contention that the WTO should explicitly incorporate the ICESCR into the corpus of WTO law. As it is unlikely that ICESCR obligations are jus cogens, there are three principal ways of doing this: through the public morals exception in GATT
Article XX(a), through interpretation using VCLT Article 31(3)(c) and thorough an acceptance of the ICESCR's superiority in a conflict of norms situation. These approaches all have benefits and limits and should be applied carefully. However, the longer the WTO resists addressing human rights obligations, the more likely it is that substantive legitimacy will erode and Members will look elsewhere to achieve their goals. The WTO possesses the tools to incorporate the ICESCR. All it needs is the will.