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• Introduction

The line of equilibrium between the authority of World Trade Origination (WTO) as an international institution and the sovereignty of its Members is one of the most controversial issues in the context of current international law. WTO by establishing “the common institutional framework for the conduct of trade relations”\(^1\) sets out laws and regulations that affect vastly the sovereignty of its Members. Furthermore, the institutional framework provides the WTO Members with mechanisms by which they can challenge the sovereignty of each other in case of non compliance with the WTO laws. In that, through the Dispute Settlement System (DSS), the WTO Members can review and assess measures that are very pertinent to sovereignty of each

other\textsuperscript{2} and the WTO panels and the Appellate Body (WTO tribunals)\textsuperscript{3} rule on compatibility of the measures with WTO Agreements. This process can be interpreted as the obligation of the WTO DSS to “clarify the existing provisions”\textsuperscript{4} of the WTO Agreements.

WTO tribunals, in order to review the measures alleged to be inconsistent with the WTO provisions, have developed and established general principles that would assist the complaining party to challenge the sovereignty of another WTO Member.

On January 26, 2009, the WTO panel circulated its report on *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*\textsuperscript{5} (China — Intellectual Property Rights). The principal significance of this report is that the report considerably reviews some measures – prohibition of protection of works that are against the public order or criminal

\textsuperscript{2} For example WTO Members can challenge measures regulating criminal acts of citizens. These measures are relevant to the sovereignty of the Member and therefore, by challenging the measure they challenge the sovereignty of the Member by resorting to the DSS.

\textsuperscript{3} The term “tribunal” is used to denote the quasi adjudicative nature of the WTO dispute settlement system.


\textsuperscript{5} WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted March 20, 2009 (Panel Report); It is important to note that for the first time a dispute has been raised under Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) entitled “Enforcement of Intellectual Property Rights” and the panel’s conclusion could have considerable impacts on jurisprudence of future disputes regarding enforcement of IPRs in WTO regime and in particular in regard to countries where legal protections of IPRs are not well developed.
threshold of infringement of some Intellectual Property Rights (IPRs) – that are within the very core of sovereignty of China.

The object of this paper is to examine whether the panel and parties of the dispute, in analysis of the provisions of Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)\(^6\) incorporated in Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),\(^7\) could have applied the general principles established and/or developed within the WTO jurisprudence\(^8\) and in particular in regard to Article XX of General Agreement on General Agreement on Tariffs and Trade (GATT)\(^9\) and Article XIV of General Agreement on Trade in Services (GATS)\(^10\).

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\(^8\) The term “jurisprudence”, in this note, is referred to interpretation of the provisions of GATT 1947 and WTO Agreements established and developed before and after establishment of the WTO within the dispute settlement system. The focus of the paper is only to examine the general principles that have been developed and/or established within the jurisprudence of WTO by WTO tribunals and not the general principles developed by other international courts.

The paper argues that the provision of WTO Agreements cannot be read in “clinical isolation”\(^\text{11}\) and WTO tribunals should “consider” the “normative environment”\(^\text{12}\) of the WTO Agreements as an international treaty. A fortiori, in order to have a secure, predicable and coherent legal system, WTO tribunals have discretion to apply the general principles unless such application results in adding or diminishing rights and obligations of the WTO Members.\(^\text{13}\) The paper draws a distinction between general principles applicable to WTO proceedings: “inevitable” and “non-inevitable” general principles. Application of some general principles is inevitable to WTO proceedings and WTO tribunals are required to apply them (inevitable principles) even though parties of a dispute have not raised them in the panel request or notice of appeal, such as the general principle of due process. Application of some other general principles, on the other hand, is dependent on evidentiary concerns of parties to a dispute (non-inevitable principles) and WTO


\(^\text{11}\) Infra n. 46.

\(^\text{12}\) Infra n. 118.

\(^\text{13}\) See Article 3.2 of DSU; See also Article 19.3 of DSU (stating that “[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”); See also Alan Yanovish and Werner Zdouc, Procedural and Evidentiary Issues, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE 248 (Daniel Bethlehem et al. eds., 2009) (affirming the role of the Ministerial Conference (MC) or the General Council (GC) to adopt interpretations of the provisions of WTO Agreements applicable to all WTO Members under Article IX:2 of Marrakesh Agreement Establishing the World Trade Organization).
tribunals cannot consider them unless the parties raise them, such as the general principle of Most Favored Nation (MFN) or general principle of necessity.

WTO tribunals in short of sufficient laws, in order to “fill the gap”\(^\text{14}\) of the existing provisions in disputes arising before them, can apply general principles of international law. The application of the general principles of international law within WTO jurisprudence, however, is not unrestricted.

The paper contends that the general principle of necessity has been developed under Article XX of GATT and Article XIV of GATS to balance the sovereignty of WTO Members and the rights bestowed under the WTO Agreements to WTO Members. The general principle of necessity is applicable when a measure taken by a WTO Member is inconsistent with WTO provisions; and the measure is very relevant to the sovereignty of the WTO Member, i.e., measures to protect human, animal life or public morals; and the WTO Member tries to justify the measure by applying one of the exceptions articulated in the WTO Agreements and lastly, the relevant languages of necessity should exist in the exception provisions. The paper claims that if the requirements are met, the general principle of necessity is applicable to other provision of WTO

\(^{14}\) For a critical view on this matter see Jan Wouters, Bart De Meester and Cedric Ryngaert, Democracy and International Law, in 34 Netherlands Yearbook of International Law 137, 192 fn 72 (2003) (stating the “serious concerns” of WTO Members regarding the ability of WTO tribunals to fill the gap in short of sufficient law); The United States in Special Session of DSB was of a view that WTO tribunals should not fill the gap in short of law. Because the gap “may reflect an absence of any consideration by negotiators of the particular detail at issue.” See DSB (Special Session), Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, TN/DS/W/82 (25 October 2005).
Agreements including Article 17 of the Berne Convention incorporated in Article 9 of the TRIPS Agreement provided that the parties of the dispute raise the defense in their arguments.

In general, Part I will explain the relevant measures at issue and the holdings of the panel. The focus of the paper is “the protection and enforcement of copyright under China Copyright Law” and application of the general principle of necessity to that measure. Part II will discuss the existence of general principles of international law within the WTO legal regime as well as scope and applicability of the general principle of necessity within the WTO jurisprudence. The paper focuses on the analysis of the panel in the report rather than the outcome of the dispute.

- **Part I: Summary of Measures, Arguments of parties and Holdings of the report**

The measures at issue in this dispute are pertinent to the essential provisions of the TRIPS Agreement and enforcement of IPRs in WTO Members’ legal system. The United States was concerned about three substantial measures taken by China that would impair the benefits stipulated in the TRIPS provisions: 1) protection and enforcement of copyright under China Copyright Law; and 2) disposal of infringing goods; and 3) thresholds for criminal procedures and penalties.

The paper only summarizes the first measure and relevant arguments of the parties and the panel’s findings in that regard. The first measure in this dispute concerned the “[d]enial of [copyright] and related rights protection and enforcement to works that have not been authorized for publication or distribution within China.”

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15 United States, Request for the Establishment of a Panel by the Untied States, WT/DS362/7, August 21 2007 (panel request); *See also* Panel Report, p.3.
Republic of China (China Copyright Law) states that “[w]orks the publication and/or dissemination of which are prohibited by law shall not be protected by this Law.”

The United States claimed that the Article 4(1) “on its face”, “denies the protection of the [China] Copyright Law to certain categories of works ….” The United States argued that the authors’ works that publication or distribution of which are prohibited by China’s law are deprived from rights specified in Article 10 as well as “remedies specified in Article 46 and 47 of the China Copyright Law.” As a result, the United States maintained that “the authors of such works do not enjoy the minimum rights that are ‘specially granted’ by Article 5(1) of the Berne Convention” as incorporated by Article 9.1 of the TRIPS Agreement.

China in response made two main arguments against the United States’ claim: an interpretative and substantive argument. Initially, China made a distinction between “copyright” and “copyright protection”. China argued “Article 4(1) of the [China] Copyright Law does not lead to a denial of ‘copyright’ but only of ‘copyright protection’.” China contended that “after

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16 Panel Report, para. 7.1.
17 Id. para. 7.29. (emphasis added).
18 Id. para. 7.16.
19 Article 10 of the China Copyright Law “encompasses the rights contemplated by the provisions of the Berne Convention.” See Panel Report, para. 7.16.
20 Panel Report, para. 7.16.
21 Id. para. 7.16.
22 Article 5(1) of the Berne Convention state: “Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”.
23 Panel Report, para. 7.61.
‘protection’ is denied under Article 4(1), the underlying recognition – the ‘enjoyment’ of, or ‘entitlement’ to, copyright – would continue.” The panel considered the distinction as “inapposite” and found that the Article 4(1) of China Copyright Law “on its face” “denies the protection of Article 10 to certain works, including those of WTO Member nationals, as the United States claims.” Therefore the panel concluded that Article 4(1) “is inconsistent with article 5(1) of the Berne Convention.” Secondly, China as a substantive argument raised the “public order” defence under article 17 of the Berne Convention. China contended that “all rights granted to authors under the Berne Convention … are limited to Article 17 of that Convention, that Article 17 is not an exhaustive codification of the sovereign right to censor, and that article 17 is drafted using very expansive language ‘that effectively denies WTO jurisdiction in this area’.”

The United States responded that Article 17 does not deny “all enforceable copyright protection to all works that have not been approved for publication or distribution.” The panel recognized

24 Id. para. 7.62.
25 Id. para. 7.66.
26 Id. para. 7.50.
27 Id. para. 7.50.
28 Id. para. 7.117.
29 Article 17 of the Berne Convention under the title of “Possibility of Control of Circulation, Presentation and Exhibition of Works” states: “[t]he provisions of this Convention cannot in any way affect the right of the Government of each country of the union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.”
30 Panel Report, para. 7.120. [footnote omitted]
31 Id. para. 7.121.
the right of WTO Members “‘to control, or to prohibit’ the ‘circulation, presentation, or exhibition’ of any work or production clearly includes censorship for reasons of public order.”

However, the panel concluded that the terms articulated in Article 17 neither “correspond to the terms used to define substantive rights granted by the Berne Convention” nor allow “the denial of all copyright protection in any work.”

The panel noted that China was “unable to explain why censorship interferes with copyright owner’s rights to prevent third parties from exploiting prohibited works.” The panel concluded that Article 4(1) of China Copyright Law “is inconsistent with Article 5(1) of the Berne Convention … as incorporated by Article 9.1 of the TRIPS Agreement.”

The panel also in response to the Untied States’ claim that “China fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available under its law, as required by Article 41.1 of the TRIPS Agreement”, noted that “[w]here copyright

32 Id. para. 7.126 [emphasize added].

33 Id. para. 7.126 [emphasize added]; See also id. paras. 7.131-132; China also argued that “such copyright protection is a ‘legal and material nullity’, as economic rights are pre-empted by public prohibition.” Id. para. 7.134.

34 Id. para. 7.133.

35 Id. para. 7.139.

36 Id. para. 7.161; Article 41.1 of the TRIPS Agreement (stating “[m]embers shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”).
protection is denied to a work under Article 4(1) of the Copyright Law, the judicial authorities have not such authority” to provide for enforcement procedures against acts of infringement of copyright “under Chapter V of the [China] Copyright Law.” The panel, therefore, concluded, “this set of enforcement procedure, including remedies, is not available to the right holders as required by Article 41.1 of the TRIPS Agreement.”

The second measure dealt with protective measures taken by China’s Customs authorities against “goods suspected of infringing trademark, copyright and related rights and patent rights upon importation and exportation.” Under the relevant regulations, when the confiscated goods are infringing IPRs and can be used for the social public welfare, “Customs shall hand such goods over to relevant public welfare bodies for the use in social public welfare undertakings. ... Where the infringing features are impossible to eradicate, Customs shall destroy the goods.” The last measure in the dispute was concerned about “criminal procedures and penalties” applicable to certain cases of “willful trademark counterfeiting and copyright piracy” on a “commercial scale”, as specified by Article 61 of the TRIPS Agreement.

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37 Id. para. 7.179.
38 Id.
39 Panel Report, para. 7.193; The Regulations on Customs Protection of Intellectual Property Rights (Customs IPR Regulations) and its implementation provide the legal steps that Customs should take. See Article 27 of Custom IPR Regulations and Article 30 of Implementing act. Id. para. 7.193-4.
40 Id. paras. 7.193 – 7.196.
41 Id. para. 7.494; See also Article 61 of the TRIPS Agreement (“[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of wil[l]ful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies
• **Part II: Relevance and Application of Principles Developed Within the Jurisprudence of WTO in This Dispute**

This part of the paper discusses whether the parties and the panel in their arguments and analysis could have resorted to “general principles” that are not specifically mentioned in the terms of reference of the panel? Afterward, the paper discusses as to whether WTO tribunals have any “obligation” to apply such general principles in upcoming disputes rising before them.

To respond to these questions, first, the nature and origin of general principles and their relationship within WTO legal regime should be examined. Secondly, the limitations of WTO tribunals in referring to those principles should be discussed. Specifically, what matters is whether WTO tribunals are *allowed* to apply such “general principles” even though such principles have not been mentioned in the panel request or notice of appeal. On the other hands, the paper discusses whether citing to such general principles is prohibited under WTO Agreements as “making laws”\(^{42}\) which is expressly prohibited under Articles 3.2 and 19.3 of DSU.\(^ {43}\) Thirdly, if we could argue that the WTO tribunals are permitted to refer to such principles, then the issue is whether the necessity principle is among general principles or general principles of international law applicable within WTO jurisprudence.


\(^ {43}\) *Supra* n. 14.
a. International Law & WTO legal system and the role of WTO tribunals to clarify existing WTO provisions

The provisions of WTO Agreements cannot be interpreted without consideration of other laws and principles of public international law. The Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, one of its first decisions, emphasized that the WTO laws cannot “be read in clinical isolation from public international law.” This is one of the significant features of modern international law that when countries consent to a treaty, unless otherwise stipulated, a treaty cannot be entirely considered as a “self-contained [regime] in the sense that the application of general international law would be generally excluded.”

Otherwise, such rigid approach not only causes an ineffective interpretation of the existing WTO provisions and impairment of institutional benefits of the WTO Members, but also results in insecurity and unpredictability of the multilateral trading system. In that matter, in *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, the Appellate Body expressed that:

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45 *Id.* p. 17.

46 Report of the Study Group of the International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, para. 172, 58th session, A/CN.4/682 (ILC Fragmentation Report) (stating “None of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded.”).

“WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.”

Nevertheless, this doesn’t mean that WTO tribunals are able to “adjudicate” non-WTO laws. The Appellate Body in The Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Taxes on Soft Drinks)\(^{49}\) addressed that “[w]e see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes”.\(^{50}\) As expressed in Article 3.2 of the DSU, the role of WTO DSS is “to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements.”\(^{51}\)

The main concern is how to solve this puzzle. On one hand, WTO tribunals cannot solely look into WTO provisions and they should consider other relevant rules and principles of public international law, and on the other hand, consideration of non-WTO laws should not result in

\(^{48}\) Id. p. 31, (footnote omitted).


\(^{50}\) Id. para. 56.

\(^{51}\) Id. (emphasis added); See also Article 3.2 of the DSU.
“adjudication of non-WTO disputes.” The *Mexico – Taxes on Soft Drinks* is an outstanding example of such complexity.52

The Negotiators of Marrakesh Agreement in Article 3.2 of the DSU emphasized that clarification of the provisions of WTO Agreements is the main function of WTO DSS. The process of clarification of existing provision of WTO Agreements has been expressed in Article 3.2 of the DSU. It articulates that WTO DSS shall clarify the provisions “in accordance with customary rules of interpretation of public international law.”53 Such interpretative method, nevertheless, was not mentioned in the old GATT system.54 The next section will discuss the restraints of treaty interpretation in WTO DSS in terms of adding or diminishing of rights and obligations of WTO Members.

b. Treaty Interpretation and WTO DSS

This part aims at discussing the existing limitations of treaty interpretation by WTO tribunals. It shows that whether WTO DSS, through the [established] interpretative method, is allowed to embrace/consider principles of international law within the WTO legal system. Put differently, the main issue is whether consideration of general principles of public international law is perceived as “making law” or adding or diminishing of “the rights and obligations” of WTO Members which are strictly forbidden by the Article 3.2 of the DSU?

52 See generally Appellate Body Report on The *Mexico – Taxes on Soft Drinks*. In that case Mexico argued that the United States in involved in another dispute under the North America Free Trade Agreement (NAFTA) and WTO DSS should reject its jurisdiction.

53 Article 3.2 of the DSU.

From interpretative/linguistic point of view, existence of some vagueness and indeterminacy within every law and regulation is “inevitable”\textsuperscript{55}. It is obvious that the negotiators of WTO Agreements were not able to foresee all possible rules and principles relevant to an upcoming case before the WTO DSS. Additionally, it is very likely that in order to reach to a consensus/agreement, the negotiators \textit{deliberately} defined some rules and regulations in vagueness. An example can shed light on this matter. Article XXIII of the GATT provides for situations in which a WTO Member can raise a claim before the WTO DSS. The paragraphs “a” and “b” of the provision are clear. Article XXIII states that if any benefit of a WTO Member “directly or indirectly … is being nullified or impaired …as the result of (a) the failure of another contracting party to carry out its obligations under … [the GATT] Agreement, or (b) the application by another … [Member] of any measure, whether or it conflicts with the provisions of this Agreement”, that Member can resort to WTO DSS. However, the paragraph (c) of the provision is bluntly broad and vague. It states in case of “existence of any other situation” a WTO Member can raise a claim before WTO tribunals. Such vagueness was deliberately put in the Article to reach to a consensus to ratify the treaty and they left that indeterminacy to be clarified by the WTO DSS in the future.

As noted, WTO DSS, the most dynamic organ of the institution, has a role to interpret the existing provisions, for example in regard to Article XXIII of the GATT, to clarify the meanings of different terms such as “impairment of ‘benefits’” or “other situation”. Such clarification through available interpretive methods is an obligation for WTO panels and the Appellate Body

\textsuperscript{55} THOMAS M. FRANK, THE POWER OF LEGITIMACY AMONG NATIONS 52 (Oxford University Press 1990).
to provide the system with “security and predictability.” In order to “to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements” Article 3.2 of DSU specifically equips the WTO DSS with the interpretative tools. The Article obliges WTO adjudicative bodies to interpret the Agreements “in accordance with customary rules of interpretation of public international law.”

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56 See Article 3.2 of the DSU (“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it 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.”). [emphasis added]; See also The Appellate Body Report, Japan – Alcoholic Beverages II, p. 34 (the Appellate Body underlined that “WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the “security and predictability” sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.”); See also Appellate Body Report, United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, para. 82, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3 (US – Corrosion-Resistant Steel Sunset Review); See also panel Report, United States – Sections 301-310 of the Trade Act of 1974, para. 7.75, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815. (US – Section 301).

57 Article 3.2 of DSU.

58 The term adjudicative body is used because of “quasi adjudicative” nature of DSS.

59 Article 3.2 of DSU.
Such obligation, however, has some constraints. Recommendations and rulings resulted from the ratification of panels and the Appellate Body by the DSB “cannot add to or diminish the rights and obligations provided in the covered agreements.”

WTO DSS has developed a specific hermeneutics in its jurisprudence. At the moment, within the WTO legal regime, Articles 31 and 32 of the VCLT are considered as “customary rules of interpretation of public international law”.

The Appellate Body in US – Gasoline, citing different cases before International Court of Justice, European Court of Human Rights and Inter-American Court of Human Rights

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61 However, this doesn’t mean that Articles 31 and 32 are the only solution to interpret WTO laws. Article 3.2 of the DSU has expressly referred to “customary rules of interpretation of public international law” and not specifically to provisions of the VCLT; Regarding the status of Articles 31 and 32 of the VCLT see also Appellate Body Report, US – Gasoline, p. 17 and Appellate Body Report, Japan – Alcoholic Beverages II, p. 104 (stating “that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status [of a rule of customary or general international law].”); See also footnote 584 of ILC Fragmentation Report, supra n. 47 (referring to Articles 31 and 32 of the VCLT as customary international law in different international tribunals citing to “…Territorial Dispute case (Libyan Arab Jamahiriya/Chad) I.C.J. Reports 1994 p. 6; Kasikili/Sedudu Island case (Botswana/Namibia) I.C.J. Reports 1999 p. 1059; LaGrand case (Germany v. United States of America) I.C.J. Reports 2001 p. 501, para. 99. See also Golder v. the United Kingdom, Judgment of 21 February 1975, ECHR Series A (1975) No. 18, p. 14, para. 2+9; Restrictions to the Death Penalty Cases, Judgment of 8 September 1983, Advisory opinion, Int-Am CHR, OC-3/83, ILR, vol. 70 p. 449.”).

expressed the view that Article 31(1) of the Vienna Convention of the Law of Treaties (VCLT) has obtained the “status of customary or general international law.” The Appellate Body stated that Article 31(1) of VCLT “forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by Article 3(2) of the DSU to apply in seeking to clarify the provisions of the” WTO Agreements.

In order to interpret a treaty, the principles set out in Article 31 of the VCLT call for taking into account of text, context, object and purpose of the treaty. As emphasized, WTO laws cannot be

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63 The Appellate Body in footnote 34 of US – Gasoline report (referring to “Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), (1994), I.C.J. Reports p. 6 (International Court of Justice); Golder v. United Kingdom, ECHR, Series A, (1995) no. 18b (European Court of Human Rights); Restrictions to the Death Penalty Cases, (1986) 70 International Law Reports 449 (Inter-American Court of Human Rights)” and etc.).


65 Id.

66 The note does not aim to discuss principles of treaty interpretation within WTO jurisprudence; See Article 31 of VCLT:

(“General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
interpreted “in clinical isolation from public international law.” This view requires WTO DSS to read WTO laws in harmony with public international laws and in particular “general principles” of international law. Put differently, the role of WTO DSS to “clarify” existing provisions of WTO Agreements means to “read” them along with other obligations under public international law and in particular “general principles” of international law. This, however, as noted doesn’t mean to adjudicate non-WTO laws within WTO DSS.

c. General Principles of Public International law within WTO Jurisprudence

In this section, first the paper aims to examine the relationship between principles and rules. Secondly, it will explain the relationship of those principles with WTO laws. Thirdly, it will argue that considering the nature of a principle, it is within the discretion of WTO DSS to include those general principles of international law in WTO jurisprudence and such practice should not be considered as “making law” which is prohibited under Article 3.2 of the DSU.

Principles are underling foundations of rules. Ronald Dworkin defines principles as “a standard that … is a requirement of justice or fairness or some other dimension of morality.” He distinguishes principles from rules by emphasizing on has two distinctive characteristics of

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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

4. A special meaning shall be given to a term if it is established that the parties so intended.”


rules.\textsuperscript{69} First, he argues that rules apply in “all-or-nothing” manner.\textsuperscript{70} Secondly, Rules “set out legal consequences that follow automatically when the conditions provided are met”.\textsuperscript{71} Principles, in Dwrokin’s opinion, do not contain any of these characteristics. On the other hand, Cheng states that principles are “in general, propositions underlying the various rules of law which express the essential qualities of judicial truth itself, \textit{in short of Law}.”\textsuperscript{72} Cheng’s view is closer to the jurisprudence of WTO.\textsuperscript{73}

General principles of international law are one of the recognized sources of international law expressed in Article 38(1)(c) of the Statue of International Court of Justice (ICJ).\textsuperscript{74} The statute in Article 38 specifies applicable laws in disputes arising before the ICJ. The Article refers to “[1] … international conventions, whether general or particular, establishing rules expressly

\textsuperscript{69} For more information on differences between rules and principles see ANDRES MITCHEL, \textsc{Legal Principles in WTO Disputes} 7-10 (Cambridge University Press 2008); \textit{See also} THEODORE M. BENDITT, \textsc{Law As Rule and Principles: Problems of Legal Philosophy} 74-75 and 168 (Stanford University Press 1978).

\textsuperscript{70} Dworkin, \textit{supra} n. 69, at 25.(explaining that “If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”).

\textsuperscript{71} \textit{Id}.

\textsuperscript{72} BIN CHENG, \textsc{General Principles of Law As Applied by International Courts and Tribunals} 6-26 (Gortius Publication Ltd. 1987) (emphasis added).

\textsuperscript{73} See infra n. 83.

\textsuperscript{74} Article 38(1)(c) as one of the sources of international law states (“the general principles of law recognized by civilized nations.”); For more information on background of the Article 31(1)(c) see CHENG, \textit{supra} n. 73, pp. 6-26.
recognized by the contesting states; [2] … international custom, as evidence of a general practice accepted as law; [3] … the general principles of law recognized by civilized nations.”

The question arises as to whether sources of international law specified in Article 38 of the Statute of ICJ are applicable within WTO legal regime? It is obvious that the Statue directly addresses the “ICJ” to apply those sources when a dispute arises before it. The scope of this provision, however, is not limited to cases before the ICJ. In that, Article 38 of the Statue is simply assertion of the sources of international law and the sources of international law that international tribunals including WTO tribunals should take into account in cases arising before them.

Although not many WTO tribunals in their reports have referred explicitly to the Article 38 of ICJ, they have acknowledged its content – treaty provision, customary international law and general principles and doctrines. The note, however, does not suggest that the content of

75 Article 38 of the Statute of the ICJ.

76 For the opposite view see Gerald Fitzmaurice cited by MITCHEL, supra n.68, p. 19.


Article 38 of the ICJ is the “applicable law” within WTO jurisprudence. Such approach might lead to “adjudication” of non-WTO laws.

The Appellate Body recognized the existence and applicability of general principles of international law within the WTO jurisprudence. In 1998, the Appellate Body in its report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*,\(^{79}\) considered good faith as one of the general principles of international law that generates obligations upon WTO Members. The Appellate Body expressed that “a general principle of international law, *controls* the exercise of rights by states.”\(^{80}\)

The Appellate Body, also, recalled the principle of good faith as “pervasive”\(^{81}\) that “underlies all treaties.”\(^{82}\)

The Appellate Body in its report was of the view that general principles of international law can “controls the exercise of rights”\(^{83}\) of WTO Members. Such an approach confers a considerable weight to general principles of international law and gives them a pragmatic meaning in the WTO jurisprudence. WTO Members can refer to those general principles in their dispute because


\(^{80}\) Id. para. 158 (emphasis added).

\(^{81}\) See also Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations*, para. 166 (*US – FSC*) (characterizing good faith as a “pervasive principle” of general international law).


\(^{83}\) Supra n. 81.
they generate obligations. Those general principles have legal values in the system and WTO tribunal, if find it necessary, can apply them.

The scope of the general principles of international law, nonetheless, is not clear-cut among WTO Members, WTO tribunals and academics. Some principles are applicable to every case and are very well recognized by WTO Members and WTO DSS. For example, the principle of good faith,\(^{84}\) the principle of due process,\(^{85}\) the principle of non-retroactive application of treaties,\(^{86}\) or principle of effectiveness in interpretation of treaties.\(^{87}\)


(stating that “… [we] must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of \textit{pacta sunt servanda} articulated in Article 26 of the Vienna Convention. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.”).


Yet, existence and application of some general principles of international law within the WTO jurisprudence have not been well established, such as, the scope and applicability of precautionary principle or the principle of res judicata.

Some general principles such as the principle of non-discrimination or MFN are specifically mentioned and defined in the WTO Agreements and some general principles have been established and developed by WTO tribunals by means of referring to rules of customary international law and general principles of international law, i.e. principle of effective interpretation or proportionality. The scope and application of the latter are the concerns of the note.

Article 17 of the Berne Convention, incorporated in Article 9 of the TRIPS Agreement, expressly recognizes the right of members to limit some aspects of protection of copyrights within their territories. Article 17 states that:

"The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."

When a country finds it necessary, under the Berne Convention, it can “permit”, “control” or “prohibit” the “circulation, presentation or exhibition” of a work or production. This results in


90 Article 17 of the Berne Convention (emphasis added).
not complying with the relevant provisions of the Berne Convention and subsequently the TRIPS Agreement.

“Public order” is one the main reasons that countries, by resorting to it, can limit protection of copyrights of a production. China, in its relevant laws,\(^{91}\) identified the following items as prohibited subjects. Works that:

“(1) are against the fundamental principles established in the Constitution;
(2) jeopardize the unification, sovereignty and territorial integrity of the State;
(3) divulge State secrets, jeopardize security of the State, or impair the prestige and interests of the State;
(4) incite hatred and discrimination among ethnic groups, harm their unity, or violate their customs and habits;
(5) propagate cults and superstition;
(6) disrupt public order and undermine social stability;
(7) propagate obscenity, gambling, or violence, or abet to commit crimes;
(8) insult or slander others, or infringe upon legitimate rights and interests of others;
(9) jeopardize social ethics or fine national cultural traditions;
(10) other contents banned by laws, administrative regulations and provisions of the State.”\(^{92}\)

The panel confirmed China and the United States’ assertion of existence of public order defence in regard to Article 17 of the Berne Convention.\(^{93}\) As noted, the notion of necessity should define the limitation articulated in Article 17. Put differently, if a competent authority within a WTO Member finds it “necessary” that distribution of a copyrighted material disrupts the public order, it can prohibit circulation, presentation, or exhibition of that work.

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\(^{91}\) Article 25 of the Regulations on the Administration of Films, Article 3 of the Regulations on the Administration of Audiovisual Products and Article 26 of the Regulations on the Administration of Publications. See Panel Report, paras. 7.79-80.

\(^{92}\) Panel Report, para. 7.79 (footnote omitted).

\(^{93}\) Id. para. 7.126.
WTO tribunals have developed a detailed process to scrutinize the necessity of a measure not complying with WTO Agreements. Such jurisprudence mainly has been established under general exceptions under Article XX of GATT and XIV of GATS. For instance, Article XIV(a) of GATS specifically provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures … necessary to protect public morals or to maintain “public order”.94

Such detailed process is essential when an international institution aims to challenge measures that might affect the sovereignty of a state. The general exceptions of GATT and GATS are relevant because they have the same characteristics in terms of application of the general principle of “necessity”.

The Appellate Body in Brazil – Retreaded Tyres95 identified different stages in analysis of the principle of necessity under Article XX(b) of the GATT. The Appellate Body requires a panel to apply a two tier test. First, panels must “assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of importance of the interest or values at stake.”96 Such contribution to the achievement of the goal does not need to be “indispensable”.97 Secondly, “if this analysis yields a preliminary

94 Footnote 5 of the GATS Agreement in regard to public order defence states that (“[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”).


96 Id. para.156.

97 Id. para.210.
conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternative, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.”

The necessity test is a “general principle” which is applicable when the law is not evidently “determined”. One of the main features of general principles, as noted, is that in short of existence of sufficient rules, it “controls the exercise of rights by states.”

At this point, the principal question is whether the jurisprudence developed under Article XX(b) of GATT is applicable to other WTO covered agreements in similar or the same circumstances?100

The Appellate Body in US – Gambling,101 due to two characteristics, found jurisprudence developed in Article XX of the GATT is “relevant” for analysis of Article XIV of the GATS. The Appellate Body was of the view that:

“[First,] [b]oth of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out

98 Id. para.156.
100 It should be noted that the nature of GATT and GATS Agreements is different from the TRIPS Agreement. GATT and GATS Agreements endeavor to remove trade barriers among WTO Members. The TRIPS Agreement, however, tries to protect the IPRs and create barriers to trade. This difference does not affect the nature of general principle of necessity.
therein are satisfied. [Secondly,] similar language is used in both provisions, notably the term “necessary” and the requirements set out in their respective chapeaux.”

The jurisprudence developed for the general principle of necessity by WTO tribunals, with regard to exceptions to general rules, is not limited to the general exceptions of GATT and GATS and it can be applied in other provision of the covered agreement provided all the following requirements are met:

1- the provision is relevant to exceptions of general rules; and
2- the term “necessary” or the similar language is used in the provision; and
3- the measures would be relevant to the core of sovereignty of a WTO Member.

Article 17 of the Berne Convention sets out the exception to implement provisions of Berne Convention and the “necessity test” is required to apply the exception. The provision, however, does not identify the content of the exception. It provides that when “the competent authority may find it necessary”, a government can “permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production.” The records of the diplomatic conferences of the Berne Convention and WIPO Guide to the Berne Convention, however, indicate that Article 17 refers to “to censorship and public order.”

\[102\] Id.

The main question is whether panels and parties of a dispute “may” refer to the principle of necessity test in the “panel request” when they apply Article 17 exception?

In order to respond the question, the next section will discuss the relationship between the general principle of necessity and terms of a reference of a panel.

d. The Panel Request and Referral to the General Principle of Necessity and the Scope of The Terms of Reference

The “panel request” will set the limits of terms of reference of panels to address the claims “at issue” and “legal basis” of the complaint. The WTO panels are obliged to address specifically “the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” The terms of reference of a panel only “establish the jurisdiction of the panel” but also they provide for “due process objective.” The question arises as to whether the general principle of necessity is within the terms of reference of a panel even though parties of a dispute have not mentioned it in the panel request?

As mentioned, “inevitable” general principles are so fundamental to WTO dispute proceedings that parties and WTO tribunals cannot deny their existence. For example, the principle of due process cannot be ignored even though WTO laws do not express all aspects of it within the WTO Agreements. The application of the principle of due process is not dependent on the parties’ reference in the “panel request” or “Notice of Appeal”. The Appellate Body in Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (Canada — Continued

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104 Article 6.2 of the DSU.
105 Article 7.2 of the DSU.
Suspension)\textsuperscript{107} was of a view that not only the principle of due process is “inherent in the WTO dispute settlement system”\textsuperscript{108}, but also panels are required to “to afford due process to the parties.”\textsuperscript{109} Otherwise, the Appellate Body might review the panel decision because of the violation of “objective assessment” obligation under Article 11 of the DSU. The Appellate in \textit{US – Gambling} emphasized that “as part of their duties, under Article 11 of the DSU, to ‘make an objective assessment of the matter’ before them, panels must ensure that the due process rights of parties to a dispute are respected.”\textsuperscript{110}

On the other hand, application of “non-inevitable” general principles depends on the natures of disputes and the evidentiary concerns of parties and their application is limited to the scope of the terms of reference. The general principle of “necessity” belongs to the latter.

As noted, the general principle of necessity, within the WTO context, is relevant to application of exceptions to general rules. A party applying it needs to prove existence of required circumstances of the exception. In context of the general exceptions, articulated in Article XX of the GATT, the Appellate Body in \textit{US – Gambling} states that the burden of proof lies on “the responding party” claiming that “its measure is necessary to achieve objectives relating” its \textit{[fundamental]} goal.\textsuperscript{111} Therefore, the responding party needs to assert the principle of necessity


in its “panel request” or “notice of appeal” to fall within the scope of jurisdiction of WTO panels or the Appellate Body.

As stated in the previous section, Article 17 of the Berne Convention, incorporated in Article 9 of the TRIPS, is an exception to the application of the treaty. The responding party, in its panel request, is required to prove that its “competent authority” has found it “necessary” that for example circulation of a production containing pornography is against the public order. Therefore, WTO tribunals cannot initially refer to the general principle of necessity if the responding party has chosen not to refer to it at the first place. Otherwise they would be in violation of Article 3.2 of the DSU stating that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” 112 And therefore, it results in changing of terms of reference of the panel and violation of Articles 6.2 and 7.2 of the DSU.

China in this dispute did not resort to the general principle of necessity and only argued “all rights granted to authors under the Berne Convention … are limited to Article 17 of that Convention.” 113 Article 4(1) of China Copyright Law denies “all enforceable copyright protection to all works” and it is not limited to circulation, presentation, or exhibition of any work or production. Therefore, it was not necessary for the United States or the panel to apply the general principle of necessity. The principle was applicable if Article 4(1) of China Copyright Law denied only circulation, presentation, or exhibition of any work or production and then China would argue the public order defence under Article 17 of the Berne Convention.

112 Article 3.2 of DSU; See also Article 19.2 of DSU; See also supra n. 13.

113 Panel Report, para. 7.120 [footnote omitted].
The panel emphasized that “China [was] unable to explain why Article 4(1) of its Copyright Law provides for the complete denial of their protection with respect to particular works.”

- **Part III: Conclusion:**

The scope of “applicable law” within jurisprudence of the World Trade Organization (WTO) is one of the most controversial issues among WTO Members, WTO officials, practitioners and academics. One of the main concerns in regard to the “applicable law” within WTO legal system is applicability of general principles and general principles of international law by WTO tribunals. WTO tribunals, in their report, have referred to general principles in many instances. Nevertheless, the scope of application of those general principles is not clearly defined within the WTO legal regime.

One of the principal roles of WTO adjudicative bodies is to read and interpret the provisions in order to resolve the existing ambiguities in the text of WTO provisions. This feature makes the adjudicative system alive and provides the WTO legal system with a mechanism that can improve and correct itself as an institution.

WTO tribunals are able determine general principles of international law when the WTO laws are not clear or sufficient to resolve a dispute. As noted, WTO tribunals are granted with such discretion to fill that gap through “clarification” of existing provisions of WTO Agreements.

Furthermore, “security and predictability” of the WTO legal regime, articulated in Article 3.2 of DSU, is dependent on coherent and systemic interpretation of WTO Agreements by WTO Tribunals. General principles are underlying foundation of rules and they can “[control] the

114 Id. para. 7.133.
exercise of rights by states.”\textsuperscript{115} Recognition and application of general principles of international law as the “superconstitution”\textsuperscript{116} of international law can help WTO tribunals to have a coherent, more predictable and therefore more legitimate system.

Furthermore, WTO Agreements, as an international treaty, were originated in a “normative environment”\textsuperscript{117} consisting of bilateral and multilateral treaties, customary international laws, general principle of international law and general principles. This means that WTO Agreements, as the Appellate Body emphasized, cannot be interpreted in a “clinical isolation”.\textsuperscript{118}

WTO Members have consented to a dynamic institution that, in short of determinacy of a rule, can recognize and apply those general principles. This, however, does not mean that WTO tribunals, as emphasized in Article IX:2 of Agreement Establishing The World Trade Organization (WTO Agreement)\textsuperscript{119}, have discretion to “add or diminish the rights and obligations provided in the covered agreements.”\textsuperscript{120}

Application of general principles within the WTO context should be processed in a cautious manner. One of the main reasons is the automatic adaption of reports by Dispute Settlement


\textsuperscript{116} See \textit{Cheng}, supra n. 73, p.5 (Cheng referred to “some modern authors” including Scelle and Härle in the footnote 17 arguing that some general principles like good faith “have … acquired such an absolute and indisputable authority that States \textit{can not longer elaborate rules which are opposed to them.”}.

\textsuperscript{117} ILC Fragmentation Report, \textit{supra} n. 47, para. 413.


\textsuperscript{119} Article IX:2 of WTO Agreement provides that (“[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”).

\textsuperscript{120} Article 3.2 of DSU; \textit{See also} Appellate Body Report, \textit{India – Patents (US)}, para. 46 (WT/DS50/AB/R).
Body (DSB). DSB cannot reject a panel or the Appellate Body report, unless every Member, including the winner of a dispute, has against the report by consensus.\textsuperscript{121} That causes fear among WTO Members that WTO tribunals were able to change rights and obligations under the covered agreement without their consent. One of the consequences of such fear is that WTO tribunals have taken a rigorous textual approach to interpret the WTO Agreements.

In order to solve the dilemma of sovereignty in WTO, the DSS has established and/or developed the general principle of necessity to assess conformity of measures taken by WTO Members with WTO obligations.

As noted, the general principle of necessity is applicable when a measure taken by a WTO Member is inconsistent with WTO provisions; and the measure is very relevant to the sovereignty of the WTO Member, i.e., measures to protect human, animal life or public morals; and the WTO Member tries to justify the measure by applying one of the exceptions articulated in WTO Agreements and the relevant languages of necessity should exist in the exception provisions.

The nature of the general principle of necessity is not as the same as “inevitable” principles and the panel could have applied it, if China or the Untied States did raise it in their arguments. However, Article 4(1) of China Copyright Law “on its face”\textsuperscript{122} was in violation of Article 5(1) of the Berne Convention as incorporated by Article 9.1 of the TRIPS Agreement and it was not necessary for the panel to examine the necessity of the measure.

\textsuperscript{121} See Articles 6.1, 16.4, 17.14 and 22.6 of DSU.

\textsuperscript{122} Supra n.27.
Nevertheless, WTO tribunals in analysis of a dispute “should” follow the proposed analytical steps in application of general principle of necessity. WTO Tribunals are also able to ask parties about their opinion in regard to application of these general principles throughout the oral hearings. This might help the parties to organize their argument in a systematic manner and therefore they reduce fragmentation of WTO decisions and ultimately international law. The existence of formal concept of “stare decisis” is not well recognized within the WTO jurisprudence. WTO Tribunals, however, in order to bring “predictability and security” are not free to reject the established jurisprudence developed within the WTO legal regime.

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123 Adoptive interpretation is only established by the Ministerial Conference and the General Council. See supra n. 120.