

Non-State Actors and Law-Making: Refreshing the Development of International Law?

Egle Svilpaite¹

Globalization as a Social Context and Challenge to Law

Today we often consider the world in terms of globalization. However, up to now lawyers have made few efforts to ‘curb’ globalization in legal terms, as law is still largely perceived as a national ‘product’. In international legal discourse, law still carries a label of ‘made by a state’, so in the context of global interdependency and interconnectedness, neither the national nor the international law-making function has been basically dissociated from the state-centred unitary order.² Following the adoption of the Statute of the International Court of Justice (ICJ), Article 38 became so deeply rooted into the theory and practice of international law that, rather than only providing a tool for the adjudication of disputes for the ICJ, it became the instrument for permanently freezing the boundaries of international community and international law-making to states as the makers and enforcers of law. State recognition was considered a constitutive factor for law-making and enforcement in both the national and international arenas. It is not difficult to trace this prevailing understanding of the authority of law back to the 19th century positivism that continued to dominate throughout the entire 20th century and to witness that we ‘have been brainwashed to see the state as an essential part of law’.³

However the process of globalization challenges these fundamentals because the expansion of business requires changes and alternatives to traditional national and international law instruments to enable them to handle new economic relations. Protectionist national legal rules became one of the major obstacles to globalization of trade, so many regulatory initiatives had to be undertaken on the transnational level. Consequently the WTO came as a long-pursued and inevitable solution, the main purpose of which was to stimulate economic growth by reducing barriers to trade and to provide a framework for the negotiation of trade relations.⁴ The WTO, and especially the introduction of an efficient dispute settlement body, supported global

¹ Research Fellow, University of Basel. This paper has been prepared within the framework of the NCCR project “Trade Regulation: From Fragmentation to Coherence” coordinated by the World Trade Institute, Berne (www.nccr-trade.org). This is a work in progress: all comments and suggestions are very much welcome.

² E.g. in one of the latest publications on the developments of treaty law Wolfrum *et al.*, *Developments of International Law in Treaty Making* (2005), the overwhelming majority of participants expressed very reserved views on the legal rule-making potential of non-state actors (for a different view see, e.g. contributions by Reisman or Roeben in the volume). Paulus described that as the biggest concern of contemporary international law, see Paulus, ‘Commentary to Andreas Fischer-Lescano and Gunther Teubner. The Legitimacy of International Law and the Role of the State’, 25 *Michigan Journal of International Law* (2003-2004) 1047.

³ T. Waelde. Edited version of the Lex Mercatoria Discussion on the OGEMID (Oil-Gas-Energy-Mining-Infrastructure Dispute Management), Discussion Forum between November 5, 2003 and November 11, 2003 (also published in OGEL vol. 2 issue 1, February 2004), accessible via <http://www.tldb.de/> (last visited 2006-09-21).

⁴ Agreement Establishing the World Trade Organization (Marrakesh agreement), Preamble and Article II.

denationalization of international trade regulation. On the other hand, globalization opened the floor to ‘privatization’ of law and reinforced private regulatory initiatives in a variety of forms from international standardization to business self-regulation. The evidences on changing modes of regulation speak for themselves. This paper is based on the thesis that diverse ‘private’ instruments and other non-state-made regulations are gradually filling in the gaps and successfully competing with traditional state-made law in international trade regulation. This thesis is tested through the evaluation of two phenomena in the WTO legal framework – the practice of applicable law that ‘softens’ boundaries of international law and the paradigm of self-contained regimes.⁵

The paper will examine the thesis in four stages, (1) by briefly observing characteristic features of one of the most distinctive ‘anational’ bodies of rules – *lex mercatoria*. (2) On the basis of the examples of the rules applicable in international dispute settlement, and particularly in the WTO legal system, I shall demonstrate that general international law is neither the only, nor, as some cases show, the predominant body of rules regulating and guiding the relations between parties to a dispute. (3) I shall further open up a debate on the necessity for a paradigm of self-contained regimes that I view as an indicator of a need for new developments in law-making in and behind traditional international law. (4) Finally, I will briefly contemplate on the future strategy by which international law might approach these developments. The principal conclusion based on the analysis of the relevant data is that fragmentation of international law is a sign of tendency for pluralization of law, therefore Article 38 of the Statute of the ICJ can no longer serve as a ‘lawmeter’ for boundaries of international law.

The Transformations of International (Trade) Law from the Perspective of Article 38 of the Statute of the ICJ

Softening and Expanding Boundaries of Law in Transnational (Trade) Regulation

Diversity of Rules: A Case of Lex Mercatoria

The plurality of rules and normative orders is not a new phenomenon.⁶ It is widespread in the practice of regulation in many communities and nations in America, Europe⁷, Africa, or Asia.⁸

⁵The ‘de-coronation’ of self-contained regimes to the status of special regimes was proposed by M. Koskeniemi in his submissions to the International Law Commission (ILC) study group on the fragmentation of international law, see *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group on the Fragmentation of International Law, finalized by Martti Koskeniemi, U.N. Doc.A/CN.4/L.682 (2006), available at <http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>, para 154.*

⁶For a general account on the pluralistic approach to law see W. Menski, *Comparative Law In a Global Context: The Legal Systems of Asia and Africa* (2006); for pluralism in economic relations regulation see Snyder, ‘Governing Economic Globalisation: Global Legal Pluralism and European Law’, 5 *European Law Journal* (1999) 334; for advocacy on the approach of legal pluralism of the EU law, see Barber, ‘Legal Pluralism and the European Union’, 12 *EJIL* 306; for an overview and critical approach on pluralistic reading of international law see Koskeniemi, ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’, 5 March 2005, Harvard, available at <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf> (last visited 2006-05-14).

⁷For examples see R. David, ‘Introduction’, in: K. Zweigert and U. Drobnig (eds.), *International Encyclopedia of Comparative Law*, Vol. 2, The Legal Systems of the World – Their Comparison and Unification (1981).

⁸For examples see Menski, *supra* note 7.

For global trade law, *lex mercatoria* serves as one of the best examples of the alternative to state regulation.

The Law Merchant created by the trade community to serve the needs of international trade as early as the 12th and 13th centuries has been successfully developed and applied by the traders throughout the centuries. There are two important distinctive features attributed to *lex mercatoria*. *First*, is the role of a state or persons exercising the authority in its development and functioning. As mentioned above – the state/principal had little if anything to do with the creation and implementation of the rules. It has evolved historically in the form of trade customs, practices and usages, as well as decisions of special merchant courts that were applicable to international commercial transactions⁹. The *second* distinctive feature of this body of commercial rules is their global character. The main aim and reasons behind the creation of an autonomous legal system for trade were its down to earth regulation ‘which most readily meets the expectation of the relevant business community’,¹⁰ and universal application without recourse to national law. These characteristics explain its association with ‘global law without the state’.¹¹ Therefore, it comes as no surprise that globalization of trade and investment, among other reasons, led to a resurrection of the idea of global trade law in 20th century, and the reasons were no different from those of the medieval merchants¹² as ‘present time traders were adopting alternative solutions to avoid the application of national law to their transactions.’¹³

The main criticism directed against *lex mercatoria* relates to the blurred body of rules, lack of authorization or recognition by states, and defective enforcement, together resulting in lack of certainty and predictability.¹⁴ Scholars as well as practitioners supporting the normative aspirations of *lex mercatoria*, have given numerous answers to this criticism.¹⁵ Responding to the pretence of state monopoly to regulate, G. Teubner characterized *lex mercatoria* as law that does not belong to the competence of traditional law-making institutions, but is the result of ‘self-reproducing, worldwide legal discourse’,¹⁶ the centre of which is the self-regulatory contract that ‘establishes a whole private legal order with a claim to global validity’ and arbitral tribunals that

⁹ See e.g. Cutler, *Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy* (2003), at 108ff.

¹⁰ T. Waelde, *supra* note 3.

¹¹ Teubner, ‘Foreword’ as well as ‘Global Bukowina’: Legal Pluralism in the World Society’, in: Teubner (ed.), *Global Law Without a State* (1997).

¹² The revitalization of this idea in the 1950s and 1960s was attributed to B. Goldman and C. Schmitthoff, see Berger, ‘The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law’, in: Berger (ed.), *The Practice of Transnational Law* (2001), at 6ff.

¹³ A. M. López Rodríguez, ‘Lex Mercatoria’, available at <http://www.rettid.dk/artikler/20020046.pdf> (last visited 2006-05-07). For a general account on modern *lex mercatoria* see K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (1999).

¹⁴ See e.g. Dasser, ‘Lex Mercatoria - Critical Comments on a Tricky Topic’, in: Appelbaum, Felstiner, Gessner (eds.), *Rules and Networks, The Legal Culture of Global Business Transactions*, (2001); for an overview of critique see Berger, ‘The New Law Merchant’, *supra* note 11.

¹⁵ Teubner, *supra* note 11, p. 11- 19; see also publications in Berger (ed.), *The Practice of Transnational Law* (2001); Mertens, ‘Lex Mercatoria: A Self-Applying System Beyond National Law?’ in: Teubner (ed.), *Global Law Without a State* (1997).

¹⁶ Teubner, *supra* note 11, p. 12.

control the external validation of the contract.¹⁷ The alleged deficiencies of Law Merchant were subjected to a major empirical analysis in 1998-2000, when K. Berger and other researchers undertook an enquiry into the practice of transnational commercial law in order to ‘provide ... for the first time with reliable empirical data as to the use of transnational commercial law in international legal practice’.¹⁸ The studies as well as publications of Berger revealed that new *lex mercatoria* or transnational commercial law¹⁹ ought not to be perceived as a complete body of rules but rather, as ‘an open-ended list’ of general principles of law and rules that develop gradually over time.²⁰ As Teubner aptly remarked on the critique of incompleteness of *lex mercatoria* - softness of this body of rules, that is ‘more a law of values and principles than a law of structures and rules’, should be seen as its typical feature that makes it ‘more flexible and adapting to changing circumstances’.²¹ According to the CENTRAL enquiry, the alleged incompleteness and enforcement concerns ‘do not play a major role in legal practice’ (in fact, blacklisting, scandals and other sanctions of the market, as well as recourse to state enforcement measures via 1958 New York Convention on arbitration fulfil the enforcement function in a manner equivalent to that of the state enforcement mechanisms), whereas criticisms about vagueness, legal certainty and completeness arise mainly due to the lack of general information on and experience with this body of rules.²²

The revival of this body of rules is also directly linked with novel regulatory practices, such as the codification of principles of international commercial contracts (UNIDROIT) or the rules on international trade in goods (INCOTERMS). These sets of recommended rules acquire a binding nature through the provisions of the contracts and agreements that incorporate them or may even be applied by the arbitrators as a general practice in cases when parties fail to agree on applicable law. The proliferating practice of self-regulation of business values, ethics and rules through codes of conduct,²³ social responsibility,²⁴ and international cooperation on adopting international standards²⁵ clearly open new avenues and give fresh impetus for the development of

¹⁷ Teubner, *Ibid.*, p. 16-17; See also generally Fischer- Lescano and Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* (2004) 999.

¹⁸ Berger *et al.*, ‘The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration’, available at <http://www.tldb.de/> (2006-09-20) also in: Berger (ed.), *The Practice of Transnational Law* (2001) 91-115, at 93.

¹⁹ For a proposal to rename *lex mercatoria* as transnational commercial law see The CENTRAL Enquiry, *supra* note 17; Berger, *The Creeping Codification of the Lex Mercatoria* (1999).

²⁰ Berger, ‘The Concept of the "Creeping Codification" of Transnational Commercial Law’, available via <http://www.tldb.de/>.

²¹ Teubner, ‘Global Bukowina’, *supra* note 11, at 20-21.

²² The CENTRAL Enquiry, at 110.

²³ See e.g. Electronic Industry Code of Conduct, available at <http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supcode.pdf>; for other examples of other codes of conduct see e.g. <http://www.business-humanrights.org/Categories/CompanyPolicySteps/Policies/Codesofconductcorporate> (last visited 2006-09-21).

²⁴ See e.g. Global Compact initiative uniting ‘companies together with UN agencies, labour and civil society to support universal environmental and social principles’; <http://www.unglobalcompact.org/index.html> (last visited 2006-09-21)

²⁵ See e.g. The International Accounting Standards Board, which is a privately-funded accounting standard-setter that aims at ‘developing, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require transparent and comparable information in general purpose financial statements’

a new *lex mercatoria* or transnational commercial law. All these developments might be described as self-organized and self-regulatory processes of society in the creation of trade law that directly and indirectly influence the functioning of international law.

Applicable Law in International Disputes

It has been widely asserted that the establishment of specialized regimes with international yet functionally specific dispute settlement bodies caused fragmentation of international law. It could be argued that fragmentation, among other reasons, is also caused by the narrowly or vaguely defined terms of reference or clauses on applicable law in international disputes.

Article 38 of the Statute of the ICJ was considered to be a general standard of applicable law in international relations. It was also elevated to being the provision on sources of international law. However, in cases where constituent treaties of international courts and tribunals contain clauses on applicable law, few resemble the wording of Article 38 of the Statute of the ICJ. These special provisions, often consisting of two or three succinctly drafted sentences, indicate the preferences of subjects of international relations as to the legal rules governing their affairs and may curtail application of rules of international law. Founding states of the international tribunals directly or indirectly opened a path to the plurality of the sources of law whereby state-made law became not the only law applicable to the relations of states and other actors. International treaties authorize international tribunals to decide cases on the basis of ‘national law’,²⁶ ‘laws or customs of war’,²⁷ ‘interests of justice’,²⁸ ‘general principles of law’,²⁹ ‘rules of the organization’,³⁰ ‘internationally recognized rules and standards’,³¹ ‘terms of contracts’ that are concluded between states and private companies,³² or decisions, procedures and practices of the institutions of international organizations.³³

(<http://www.iasb.org.uk/about/index.asp>) or the Codex Alimentarius Commission, which was created in 1963 by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO) ‘to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme’ (http://www.codexalimentarius.net/web/index_en.jsp).

²⁶ E.g. International Criminal Court Tribunal (Article 21 (1) (c) of the Rome Statute of the International Criminal Court); according to data provided by The Project on International Courts and Tribunals Judicial Tribunal of the Organization of Arab Petroleum-Exporting Countries applies international and Islamic law, see Matrix prepared The Project on International Courts and Tribunals, available at <http://www.pict-cti.org/matrix/matrixintro.html> (last visited 2006-09-03).

²⁷ Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

²⁸ Article 28 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 27 of the Statute of International Criminal Tribunal for Rwanda.

²⁹ *Ibid.*

³⁰ Article 33 of the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States.

³¹ According to Article 21 of the Rome Statute of International Criminal Court, the Court is entitled to assess consistency of general principles of law derived by the Court from national laws of legal systems with ‘international law and internationally recognized norms and standards’.

³² Article 38 (b) of the Statute of the International Tribunal for the Law of the Sea (the Seabed Dispute Chamber shall apply ‘the terms of contracts concerning activities in the Area in matters relating to those contracts’)

³³ Article 38 (a) of the Statute of the International Tribunal for the Law of the Sea (Seabed Disputes Chamber applies rules, regulations and procedures of the Authority); Article XVI (1) of the Marrakesh agreement provides that

On the other hand, clauses governing applicable law are missing from many constituent treaties of international tribunals. This ‘defect’ could well be written off to the benefit of application of the general international law, if there existed a consensus in theory and practice on (the unity of) the international law system. However, even the proponents of the system of international law speak the language of intentions, but not law in action, therefore tribunals, such as the WTO or ECHR, themselves decide on applicable law in the dispute settlement. The applicable law in WTO dispute settlement is determined using several methods. The WTO judiciary always try to find a legal basis for their findings in the texts of the treaties, balancing their mandate of jurisdiction on the basis of Article 3.2³⁴ and Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).³⁵ Implying from Article 3.2 of the DSU as well as from terms of reference,³⁶ the principle body of rules applicable between the parties to a dispute consists of covered WTO agreements. Another body of rules applicable by the WTO consists of rules, by reference *specifically incorporated* into the covered agreements. This body of rules could be conditionally called ‘rules for specific performance’, as they shall be applied between the parties only for the purpose and within the limits prescribed by the relevant WTO agreement. They include rules of interpretation of customary international law,³⁷ or agreements to which reference is made in the provisions of the WTO covered agreements.³⁸

However in a case when a provision on applicable law is missing, international judges have to make an important choice as to *where* to find applicable law in a case of a legal lacuna, thereby determining the boundaries of application of non-WTO law, including general international law. It is remarkable that international trade regulation within the framework of the WTO agreements has very few direct written intersections with the body of rules and system of international law. In principle, Article 3.2 of the DSU is the most oft-cited example of linkage between the rules of general international law and those of international trade, whereas the remainder of the institutional and substantial framework is confined predominantly to the

‘Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO *shall be guided* by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.’ (Emphasis added); see also Court of Justice of the Andean Community (Art. 1 of the Treaty Creating the Court of Justice of the Cartagena Agreement: ‘The legal system of the Cartagena Agreement consists of: a. The Cartagena Agreement, its Protocols and additional instruments; b. This Treaty and its Amending Protocols; c. The Decisions of the Andean Council of Foreign Ministers and of the Commission of the Andean Community; d. The Resolutions of the General Secretariat of the Andean Community; and e. The Industrial Complementarity Agreements (...).’ (http://www.comunidadandina.org/INGLES/normativa/ande_rie2.htm)).

³⁴ Stating that the dispute settlement system ‘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’.

³⁵ Authorising them to ‘make such other findings *as will assist* the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’. (emphasis added)

³⁶ Article 7 of the DSU.

³⁷ Article 3.2 of the DSU.

³⁸ E.g., a reference to the Convention on the Privileges and Immunities of the Specialized Agencies is made in Article VIII, para 4 of the Marrakesh agreement, and references to the Paris or Berne conventions on intellectual property in Article 1.3 of the TRIPS agreement.

language and logic of trade. The question of constraint of the WTO law by rules and especially the politics of general international law has become a major battlefield in international scholarship³⁹. However despite numerous discussions in publications, including reports by the working groups of the International Law Commission,⁴⁰ the relationship between international law and WTO law is not yet finally settled.⁴¹ The application of international law is complicated by the so-called autonomy clauses, whereas use of soft law and non-state normative instruments by the WTO and by other international tribunals extends the boundaries of law towards its *individual and independent development, away from state-made international law*.

Autonomy Clause in International Legal Order

There are a number of tribunals the founding treaties of which provide for ‘hard’ or ‘soft’ (implied) prevalence of their regime-specific rules over other rules of international law and that can, therefore, be conditionally called autonomy clauses. This type of provision is found in the statutes of, e.g., the International Tribunal for the Law of the Sea,⁴² the International Criminal Court⁴³ or NAFTA.⁴⁴ The de facto regime of the autonomy clause in relation to international law has been imposed by the judiciary of the EC⁴⁵ or was pragmatically invoked by the ECHR on the basis of autonomy of concepts of the European Convention on Human Rights.⁴⁶

The autonomization of legal order can be also observed in the practice of the WTO judicial bodies. An aspiration for autonomy can even be detected in the three most oft-cited decisions adopted by the WTO panels and Appellate Body (AB), which are usually used by the

³⁹ See e.g. Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings’, 35 *Journal of World Trade* (2001) 499; J. Cameron and K.R. Gray, ‘Principles of International Law In the WTO Dispute Settlement Body’, 50 *International and Comparative Law Quarterly* (2001) 248; Palmetier and Mavroidis, ‘The WTO Legal System: Sources of Law’, 92 *AJIL* (1998) 398; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 440 ff; Trachtman, ‘The Domain of WTO Dispute Resolution’, 40 *Harvard International Law Journal* (1999) 333.

⁴⁰ See e.g. Report of the Study Group on the Fragmentation of International Law, *supra* note 5.

⁴¹ For the latest publications in this field see, e.g. A. Lindroos and M. Mehling, ‘Dispelling the Chimera of ‘Self-Contained Regimes’: International Law and the WTO’, 16 *EJIL* (2006) 857, 859; B. Simma, D. Pulkowski ‘Of Planets and the Universe: Self-Contained Regimes in International Law’, 17 *EJIL* (2006) 483.

⁴² Article 293 of the United Nations Convention on the Law of the Sea entrenches one of the strictest autonomy clauses, precluding application of rules of international law if they are incompatible with the Convention without any reservations.

⁴³ Article 21 of the Rome Statute of the International Criminal Court (Statute, Rules of Procedure, etc. come as priorities).

⁴⁴ The international law governing dispute can be applied by the Arbitral Tribunal provided that it is ‘applicable’; Article 1131 (1) of the North American Free Trade Agreement (<http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp#PartV>, (2006-09-22)).

⁴⁵ Famous dictum of Case 6/64 *Costa v. ENEL* [1964] ECR 585: ‘By contrast with ordinary international treaties, the EEC treaty has created its own legal system ...’.

⁴⁶ See generally Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’, 15 *EJIL* (2004) 279.

universalists⁴⁷ to support their cause for unity of international law. However, as the cases show, a possibility of reference to international law is conditioned with numerous expressions safeguarding the autonomy of the WTO legal system. In 1996, in the *US–Gasoline* case, the AB overturned the interpretation of the GATT by the panel stating that the Agreement should not be read in ‘clinical isolation’ from public international law *to the extent* that Article 3.2 of the DSU requires that the rules of interpretation of customary international law are taken into account.⁴⁸ In *US–Shrimp* (1998) the AB confirmed that it has frequently sought ‘*additional* interpretative guidance, as appropriate, from the general principles of international law’⁴⁹ (emphasis added). In the *Korea–Government Procurement* (2000) case, the panel confirmed that the relationship of the WTO agreements to customary international law is broader than a mere interpretation of the WTO agreements in accordance with customary rules of international law; however its conclusion was conditional: ‘... [T]o the extent that there is *no conflict* or *inconsistency*, or an *expression* in a covered WTO agreement that *applies differently*, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO’.⁵⁰ (emphasis added).

Meanwhile, in other WTO cases it is impossible to identify a single pattern or system of reliance on and reference to rules of international law. Instead, as if it were a sub-system of international law, and filling in the gaps by reference to general international law,⁵¹ the WTO judiciary bodies extensively base their reasoning on the reasonableness and logic of the establishment of a missing rule.⁵² They also often make recourse to their previous decisions, GATT and WTO practice⁵³, or refer to general principles of law,⁵⁴ or consult the practice of other

⁴⁷ In their latest article Simma and Pulkowski categorized the supporters of a unified legal order as universalists, whereas supporters of an order consisting of ‘the sum total of loosely interrelated subsystems’ as particularists, see B. Simma and D. Pulkowski, *supra* note 41, at 495.

⁴⁸ *US-Standards of Reformulated and Conventional Gasoline*, WT/DS2/AB/R (20 May 1996). As Trachtman observed, ‘it did not mean that general international law is fully integrated into WTO dispute settlement’, see Trachtman, ‘The World Trading System, the International Legal System and Choice’, 12 *European Law Journal* (2006) 469, at 483.

⁴⁹ *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (6 November 1998), para 151.

⁵⁰ WT/DS163/R, para 7.96.

⁵¹ Such almost exceptional reliance on provisions of international law was demonstrated, e.g. in the *Brazil–Desiccated Coconut* case, where the AB established a principle of non-retroactivity of treaties on the basis of textual analysis of Article 28 of the Vienna Convention stating that it contains a general principle of international law concerning the non-retroactivity of treaties (*Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (21 February 1997), part IV, para D). A similar rule with reference to Article 28 of the Vienna Convention as well as preparatory materials was invoked in the case *Canada–Patent Term*, to support the AB's own findings (*Canada – Term of Patent Protection*, WT/DS170/AB/R (18 September 2000), paras 71-74).

⁵² E.g. *US–Wool Shirts and Blouses*, WT/DS33/AB/R (25 April 1997) (establishing principle of judicial economy); *US–Steel*, WT/DS138/AB/R (10 May 2000) (allowing amicus curiae briefs). L. Bartels also asserts this position, see Bartels, *supra* note 39, at 514-517.

⁵³ See e.g. *US–Wool Shirts and Blouses*, WT/DS33/AB/R (25 April 1997) (formulating the principle of judicial economy, and stating that Panel’s finding is ‘consistent with the DSU as well as with practice under the GATT 1947’, see part VI). See also Appellate Body - *European*

international tribunals.⁵⁵ Remarkably, in several cases where reference to international law has been made it is difficult to draw a conclusion in favour of application or least the predominance of international general law over the trade regime, as numerous researchers allege, for the simple reason that the content of the alleged principle of international law is established not on the basis of other rules of international law, but by the reasoning of the tribunal itself (thereby treating it on the level of general principles of law that are often developed by arbitral tribunals and traders practice).⁵⁶ In addition, in many cases, international law is not ‘applied’ or ‘relied’ upon, but merely ‘recalled’.⁵⁷ Thus the rules of general international law are often invoked by way of ‘borrowing’ their rationality and adapting it to the system-specific needs, rather than subordinating and building the trade regime on the logic of unity of international law.⁵⁸

Application of Soft Law

Another important aspect of applicable law in international dispute resolution is the increasing reliance on and application of so-called ‘soft law’. Soft law terminology is intended to describe a body of rules that have no binding force, but do however generate a certain legal and practical effect. This concept, which has traditionally been associated with the decisions of international organizations, has in the last few years been extensively used to denote any type of regulation that would not qualify as a traditional source under Article 38 of the Statute of the ICJ, such as resolutions, declarations, codes of conduct, guidelines or action programmes produced basically by international organizations, as well as other non-state actors. Although the role and especially the status of soft law instruments remains tentative owing to their diversity, the lack of agreement

Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (09 September 1997) para 12.

⁵⁴ E.g. the content of the burden of proof established with reference to national practice: *US-Wool Shirts and Blouses*, WT/DS33/AB/R (25 April 1997); *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998).

⁵⁵ See e.g. *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (29 April 1996) (reference to ICJ practice); *US-Wool Shirts and Blouses*, WT/DS33/AB/R (25 April 1997) (general invocation of practice of international tribunals, including the ICJ).

⁵⁶ E.g. in *US—Wool Shirts and Blouses*, the AB relied heavily on the practice of national jurisdictions, as well as that of international tribunals establishing the content of the principle of burden of proof (WT/DS33/AB/R (25/04/1997)); *Mexico-Tax Measures on Soft Drinks and Other Beverages* tribunal built a requirement of burden on proof on general logic and AB reports (WT/DS308/R (7 October 2005), paras 8.16-8.20).

⁵⁷ See e.g. *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (15 February 2002), para 259; *United States - Anti-Dumping Act of 1916*, WT/DS136/R (EC) (31 March 2000), para 6.53, 6.63.

⁵⁸ Remarkable in this respect are the words of the WTO Director-General at the ESIL conference (19 May 2006, Sorbonne, Paris) that ‘The WTO respects general international law, while at the same time *adapting it to the realities of international trade*. In *joining* the international legal order, the WTO has ended up *producing* its own unique system of law.’ (Emphasis added), see http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm (last visited 2006-08-15). As Trachtman stated recently, ‘general international law as applicable law would be an unwelcome guest’, see: Trachtman, ‘The World Trading System’, *supra* note 50, at 484.

on their legal effect both between the states and in the doctrine, and the multiple functions they serve, it is clear from the examples below that they challenge the regulatory monopoly of the states filling in the gaps in regulation, providing additional explanatory force or serving other important normative functions.

Soft Law as a Binding Instrument

The practice of international tribunals shows that the decisions of international organizations or non-governmental organizations, as well as other types of soft law are used for regulating behaviour in international dispute settlement. First, as mentioned above in part A(2) the decisions of international organizations qualify as applicable law in a number of international tribunals.

Second, soft law is often incorporated into international treaties and applied by parties to such treaties. For example, international standards play a critical role in the functioning of two covered agreements in the WTO legal framework. Article 3(1) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provides that ‘Members *shall base* their sanitary or phytosanitary measures *on international standards, guidelines or recommendations*, where they exist’ (emphasis added). The Agreement on Technical Barriers to Trade (TBT Agreement) also obliges Member States to use international standards as ‘a basis for their technical regulation’, even in those cases where the completion of a relevant international standard is ‘imminent’⁵⁹. In the *EC–Sardines* case, the WTO panel and the AB, having analysed the correspondence of EC Regulation with Codex Stan 94, contrary to the suggestions of the EC, concluded that an international standard, *even if adopted not on the basis of consensus*, constitutes a relevant standard in the meaning of Article 2.4 of the TBT agreement. Seen from this perspective, standards incorporated into the relevant agreement have a *legitimizing* function at the international level. This function is even more striking in the assessment of the changing pattern of law-making in transnational relations, knowing that the standards to which these international agreements refer are adopted by and within the framework of international intergovernmental bodies (e.g. the International Telecommunications Union) as well as derive from the practice of non-governmental organizations (e.g., the International Organization for Standardization). What is more important, according to the explanatory guidelines in Annex 1 to the TBT agreement, is that standards are *non-binding* instruments agreed between interested parties,⁶⁰ and, additionally, are subject to changes beyond the *direct control and consent* of the WTO and its Member States.

Soft Law as a Constituent Part of a Legal Framework

In those cases in the WTO legal framework where the reliance on soft law is not directly provided by international agreement, soft law is often treated as international instrument of regulation that shall be used for effective international affairs management alongside international treaties. In 2004, at the meeting of the Committee on Trade and Environment of the WTO, the position on the regulatory environment of fisheries management was summarized by listing documents of soft law, such as the UN Code of Conduct for Responsible Fisheries and the

⁵⁹ Article 2.4 of the TBT Agreement.

⁶⁰ The word ‘standard’ is defined in Annex 1(2) to the TBT Agreement as a: ‘Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory’.

FAO International Plans of Action, as international instruments the aim of which is to ‘provide an increasingly coherent framework for effective fisheries management’ together with various regional fisheries agreements.⁶¹ Similarly, the measures, comprising an ‘international policy and regulatory framework’ relevant to biosecurity in food and agriculture were defined as consisting of ‘legally binding instruments, soft law and policy declarations (...)’.⁶² The regulatory function of soft law instruments has been reinforced by the judiciary. According to the WTO AB, standards adopted by international standardization bodies make ‘an important contribution ...improving the efficiency of production and facilitating the conduct of international trade’.⁶³

Soft Law as an Aid to Interpretation

In numerous other references, the WTO panels and AB make use of instruments traditionally qualified as soft law for guidance on interpretation. In the *Turkey–Textiles*⁶⁴ and *US–Line Pipe*⁶⁵ cases, the judiciary invoked reports of the International Law Commission, while in others it used declarations and other documents adopted by international organizations and conferences. For example, the content of the notion ‘exhaustible natural resources’ was determined by the AB, with reference inter alia to Agenda 21, adopted by the United Nations Conference on Environment and Development and Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals.⁶⁶ Other international tribunals do follow similar practice.⁶⁷

Divorce in the Family: Self-Contained Regimes

Another factor that adds to the evidence for the pluralization of law is aspiration towards independent decision-making that is often associated with the concept of a self-contained regime, i.e. a regime created under public international law that completely opts out of the general

⁶¹ WTO Committee on Trade and Environment UNEP Workshop on fisheries subsidies and sustainable fisheries management, Geneva, 26-27 April 2004, Summary of the Chairs, WT/CTE/W/236, 17 June 2004 (04-2631), para 12.

⁶² WTO Committee on Sanitary and Phytosanitary Measures. Biosecurity in food and agriculture. G/SPS/GEN/239, 14 March 2001 (01-1237). The instruments under soft law include, e.g. the FAO International Code of Conduct on Responsible Fisheries (1995), ICES Code of Practice on the Introductions and Transfers of Marine Organisms (1994), IUCN Guide to Designing Legal and Institutional Frameworks on Alien Invasive Species.

⁶³ *EC–Trade Description of Sardines*, WT/DS/231/AB/R (26 September 2002), para 215.

⁶⁴ *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999), paras 9.42 – 9.43.

⁶⁵ *US–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (15 February 2002), para 259.

⁶⁶ *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para 130.

⁶⁷ For the EC practice, see e.g. *Grimaldi* case, Case C-322/88, *Salvatore Grimaldi v. Fonds des Maladies Professionnelles*, [1989] ECR I-4407, para 19; for the case law of the European Court of Human Rights see, e.g. case of *Brennan v. the United Kingdom* (App. No. 39846/98), Judgment 16 October 2001, para 39; Case *Price v. United Kingdom* (App. No. 33394/96), Judgment 10 July 2001, para 63 ff.

international law.⁶⁸ As is not unusual for lawyers, opinions on the existence and status of these regimes diverge. Fearing the collapse of the fragile international legal order, many international lawyers argue in favour of ‘the presumption against the creation of wholly self-contained regimes’.⁶⁹

In the times of globalization, it is clearly unreasonable to speak of completely isolated regimes, functioning on a global level, independent of their social, political and other environment. States as well as other actors participate in many forums that must interact and interrelate to be able to change over time, so as to become more efficient and to reflect the needs of society. Therefore no regime could pull completely away from the framework of international law on the basis of which (e.g. international treaty) it was created. However the aspirations these special regimes are pursuing are not towards diversification in terms of their colours, which a painter blends with his or her brush into a complete picture, but rather the autonomy of a system, designed to function without external control from general international law.

It is important to acknowledge that, as is the case with *lex mercatoria*, the main actors who have brought these changes to the environment of international law ‘individualizing’ and ‘autonomizing’ international regulation, were and are international tribunals. Dispute settlement institutions interpret the agreements not only by applying the relevant treaty provisions, but also by engaging in judicial activism that results, in R. Steinberg’s words, in making the ‘*new law*’⁷⁰ rather than falling back on the rules of general international law. The most famous sprout for independent functioning of the entire regime originated from the decisions of the European Court of Justice, proclaiming the autonomous nature of the EC legal order as well as the supremacy of the EC law⁷¹ under the flag of establishing a “*new legal order of international law*”⁷² (emphasis added). The judicial bodies of the WTO did not make such loud statements, however they introduced into the WTO legal system principles, missing in the letter of original treaties, most of which could be derived from transnational commercial law or national jurisdictions (e.g. principle of good faith,⁷³ or due process norms,⁷⁴ e.g. allowing submission of *amicus curiae*

⁶⁸ On the birth of the concept as well as its development see generally, B. Simma, ‘Self-Contained Regimes’, XVI Netherlands Yearbook of International Law (1985) 111, for latest developments see Simma and Pulkowski, *supra* note 41, at 491 ff.

⁶⁹ E.g. M. Koskeniemmi denies in principle any possibility of creating a specialized international legal regime outside the framework of general international law, whereas J. Pauwelyn claims that the agreements creating special institutionalized regimes ‘form part of the wider body of international law’ and therefore the question of self-contained regimes becomes one of degree; see accordingly Report of the Study Group on the Fragmentation of International Law, *supra* note 6 and Pauwelyn, *supra* note 39, at 38, 213ff; for an overview of the status of self-contained regimes see A. Lindroos and M. Mehling, *supra* note 41, at 861; Simma and Pulkowski, *supra* note 41.

⁷⁰ Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, 98 *AJIL* (2004) 247, at 251 (emphasis added).

⁷¹ Case 6/64 *Costa v. ENEL* [1964] ECR 585.

⁷² Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of 5 February 1963.

⁷³ E.g. *United States–Import prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998), para 158.

⁷⁴ *Ibid.*, paras 181-182.

briefs submitted by non-state actors, or the right of a state to be represented by private lawyers,⁷⁵ and opening proceedings to the general public reversing earlier practices). WTO judiciary have also clarified ambiguities in the agreements, including those that, according to Steinberg, the negotiators had intended to leave vague and ambiguous⁷⁶. Equally, the WTO judiciary decided on their own on the fact of existence of customary rules of international law.

Thus it seems that the WTO is building its own legal system first of all on the basis of self-reference, while in cases of gap filling or a need for stronger support for the arguments 'borrowing' or engaging in active exchange or dialogue⁷⁷ with sources equally from general principles of law, international law or other regulatory orders. The practice of international tribunals, including the ICJ, is often invoked simply for reasons of research economy, whereas reference to the general rules of international law adds *extra authority* to an argument in support of the judiciary's own logic of reasoning.⁷⁸ The tendency towards autonomous functioning indicates that the activity of certain international organizations is becoming not so much a matter of degree of integration and subordination to general international law, but resembling with the case of *lex mercatoria*, a matter of degree of self-establishment as well as self-development.

International Law for Globalization: Contemplation on the Strategy

As can be seen from the examples of *lex mercatoria* and the WTO, neither historically, nor in the process of globalization has transnational trade regulation been exclusively within the competence of the states. The functioning and proliferation of international tribunals and their practice of determining applicable law by way of 'borrowing' sources from non-state regulatory frameworks are the best examples of pluralization of sources of law within and behind international law as these tribunals consider themselves to be the best experts to establish the new rule of global or particular law. The quest for a *novel international law* and the aim of establishing and maintaining an autonomous regime opens a very important 'refreshment' perspective in international law. It shows a need to develop the law further removed from the way in which general international law regulates analogous situations. On the other hand it proves the capacity of non-state actors to regulate. Seen from this standpoint, both a state-centred approach to international law and the limitation of sources of international law to Article 38 are outdated concepts. Traditional international tribunals have moved in the direction of the application of globally constructed law in which classical international law plays a significant but not necessarily predominant part. This tendency also leads to rules of general international law losing their system engineering function as special regimes construct the system on their own.

Therefore the legal framework of the regulation of trans-border trade might be perceived from the perspective of a legal pluralism, where diverse sources of authority for law as well as diverse modes of enforcement of rules coexist, cooperate and compete among themselves as well as with the traditional modes of creation and enforcement of international rights and obligations. Fragmentation of international law is an express indication of *de facto* pluralization of sources and authorities of law. This pluralization takes place in a multitude of forms, such as privatization

⁷⁵ E.g. Appellate Body - *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB (09 September 1997).

⁷⁶ Steinberg, *supra* note 75, at 252-254.

⁷⁷ The term borrowed from Markesinis and Fedke, 'The Judge as Comparativist', 80 *Tul. L. Rev.* (2005).

⁷⁸ Simma and Pulkowski, *supra* note 41, at 510ff.

of law-making, self-regulation by business and other non-state actors or judicial law-making. The globalization of trade directly involves international organizations and other non-state actors and thereby expands the potential market for regulation. At the same time globalization broadens choices to opt out for a better rule or to become a competitor and supplier, i.e. to create a rule oneself.

On the other hand, it would be wrong to conclude that the state is losing its significance. The states do not lose their importance as law-makers, as they possess a very significant competitive power associated with legal certainty, predictability and unity of the legal system they create. For the past hundred years a state has been chosen by people as being the most efficient forum for centralization as well as unification of values balanced by law within national boundaries. However in the context of globalization, which transcends state borders and empowers numerous influential actors as well as challenges former values, a state legal system transforms into one of competing rationales.

In such a situation the strategies for the role of international law in a globalising social context can be pursued in two principal directions, either (1) segregation or (2) integration. Classical state-made international law can try to continue to ignore and resist new modes of rule-making. However, even in the case of total rejection, international law has no means to replace many instruments of non-state regulation as they already shape international law. Neither will this strategy eliminate de facto competition between regimes and consequently stimulate further fragmentation of international law. In addition, one of the major side effects of this 'status quo' strategy would be a missed opportunity to explain, regulate or possibly control that considerable part of trade intercourse that will remain in the private regulatory domain. It is precisely there that the power and dominance could be overtaken by market and law as a 'public good' might turn into a commodity. Therefore more rational seems to be a direction of the development of international law based on a variety of models of integration of new modes of regulation. The most far-reaching integration of non-state actors' law-making should lead, first of all, to reconstruction of a concept, sources and functions of international law. In this regard, P. Jessup's notion of transnational law to 'include all law which regulates actions or events that transcend national frontiers'⁷⁹ might be recalled. This notion could help to open an understanding of international order to diverse rules of law-making. However for this perspective to be successful a theory conceptualising pluralistic reality, its rule making as well as new methodology is needed.

⁷⁹ P. Jessup, *Transnational Law* (1950). See the elaboration of that idea in Trachtman, 'The International Economic Law Revolution', 17 *University of Pennsylvania Journal of International Economic Law* (1996) 33.