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ELTE LAW WORKING PAPERS
2024/02

General principles concerning the competence of international fora in the practice of the World Trade Organisation

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DOI: 10.58360/20241016-Bazanth

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DOI: 10.58360/20241016-Bazanth

I. Introduction

The application of procedural principles within the practice of international fora is critical to maintaining the balance between judicial authority and the constraints imposed by the consent of the parties themselves. In the context of the World Trade Organization (WTO), these principles play an important role in guiding the dispute settlement process. Despite the WTO's quasi-judicial nature, principles such as competence-competence, *iura novit curia*, and *ne ultra / infra petita* retain their significance, shaping how the WTO panels and the Appellate Body exercise their jurisdiction.

This article explores how these procedural principles intersect with the competence of WTO adjudicative bodies, particularly in the context of their jurisdictional aspects. It examines the extent to which these principles are applied, often with more restraint compared to other international fora, and how they contribute to the distinct nature of the WTO's dispute resolution mechanism. By analysing relevant case law and key provisions of the WTO's Dispute Settlement Understanding (DSU), the article provides insights into how these principles are interpreted and applied in practice, ensuring the integrity and predictability of this specialised dispute settlement process.

Through this examination, the article demonstrates that while the WTO's approach to these principles may be more conservative and less invasive than in other settings, it remains effective in maintaining the delicate balance between judicial decision-making

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and the limitations imposed by the parties' consent, thereby upholding the promise of due process in the international trading system.

II. Procedural general principles under examination

This article deals with a specific portion of general principles, namely those *general principles of procedure* which *concern the competence of international courts* and whose functioning has a *jurisdictional aspect*. As a preliminary matter, a clarification of these notions is due. In a general sense, 'general principles of procedural law' in the context of adjudication cover all rules relating to international judicial action during all types of judicial, arbitral, or quasi-judicial proceedings.[1] General principles concerning the competence of courts and having a jurisdictional aspect will refer to those general principles which have a direct link to the consent requirement for establishing jurisdiction.[2] This article will deal with the intersection of these two groups, and will study three general principles which concern the way how courts delineate their powers conferred on them by the parties.

Following an introduction to the WTO's dispute settlement mechanism, the subject matter of this study, the article will first analyse examples when WTO Panels and Appellate Bodies have referenced the competence-competence *(Kompetenz-Kompetenz*, *compétence de la compétence*) principle. This principle embodies the court's right to decide as to the existence and limits of its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.[3] Next, it will turn to the examination of the principle of *iura novit curia* in WTO case-law. The latin maxim *iura novit curia*, which translates to 'the court knows the law', is a legal doctrine that allows judges to apply the

[1] Robert Kolb, 'General Principles of Procedural Law', in Andreas Zimmermann, and others (eds), The Statute of the International Court of Justice: A Commentary (2nd Edition, 2012, Oxford), pp 965-966. DOI: https://doi.org/10.1093/law/9780199692996.003.0051
[2] Sir Gerald Fitzmaurice, Law and Procedure, vol. II (1986 Cambridge), pp 524, 529.
[3] *Nottebohm* (Liech. v. Guat.), Preliminary Objections [1953] I.C.J. 111, at 119, 120 (18 Nov.).

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law independently of the parties' arguments and submissions.[4] Lastly, the principle of *ne ultra petita* will be assessed in WTO jurisprudence, which stipulates the limits of jurisdiction as the court's "*duty not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions*".[5]

These three principles closely interrelate and complement each other as *ne ultra petita* and *iura novit curia* both broaden and constrain the court's general power to deal with issues pertaining to its competence as envisaged by competence-competence. Based on similar considerations, Attila Tanzi uses the term 'cognate principles' when addressing the relationship of these principles.[6]

Before delving into the actual analysis of WTO case-law demonstrating the application of these general principles, the coming section will provide the reader with a short introduction to the WTO dispute settlement system and those articles of its legal framework which are the most relevant with respect to examining the institution's exercise of its competences.

III. An introduction to the WTO dispute settlement system

The WTO dispute settlement system, a quasi-judicial adjudicatory mechanism,[7] is one of the central pillars of the multilateral trading system. It plays a critical role in ensuring that

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[4] Bin Cheng, G Schwarzenberger (1953) General principles of law: As applied by international courts and tribunals. Stevens. London, p 299; F Rosenfeld (2017) Iura Novit Curia in International Law. 6 EIAR 132, p 132.
[5] Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, ICJ Reports (1950), pp. 395, 402; Continental Shelf (Libya/Malta), Judgment, ICJ Reports (1985), pp. 13, 23, para 19; Hugh Thirlway, The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume I, (Oxford 2013) 771. DOI: https://doi.org/10.1093/law/9780199673384.001.0001
[6] Attila M. Tanzi, The Principle Jura Novit Curia In International Judicial And Arbitral Proceedings, A Window on International Adjudication (2024) 226. DOI: https://doi.org/10.1163/A9789004699137_02
[7] Kati Kulovesi, 'Fragmented Landscapes, Troubled Relationships: The WTO Dispute Settlement System and International Environmental Law' (2008) 19 Finnish Yearbook of International Law 29–62, 36. DOI: https://doi.org/10.5040/9781472565280.ch-003

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international trade flows smoothly and predictably by providing a formal process for resolving disputes between member countries. The WTO dispute settlement system is rooted in the General Agreement on Tariffs and Trade (GATT) of 1947, which was the precursor to the WTO.

During the development of GATT, the Uruguay Round (1986-1994) was a comprehensive set of negotiations that led to the establishment of the WTO in 1995. One of the key objectives of the Uruguay Round was to strengthen the dispute settlement mechanism to make it more effective, reliable, and legally binding. The result was the creation of the WTO Dispute Settlement Understanding (*Understanding on Rules and Procedures Governing the Settlement of Disputes* – DSU)[8], a comprehensive set of rules and procedures that govern the resolution of trade disputes under the WTO. Under the DSU, the Dispute Settlement Body (DSB) is tasked to oversee and administer the dispute settlement process.

All multilateral trade agreements under the auspices of the WTO are covered by the DSU, meaning that it applies to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of both the WTO Agreement, as well as any other covered agreement.[9] The process begins with consultations where the complaining party requests discussions with the respondent to attempt an amicable resolution.[10] If these consultations fail after up to 60 days, the complaining party can request the establishment of a panel by the DSB.[11] The panel, composed of three

[8] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (entered into force 1 January 1995).

[9] Covered agreements are the agreements listed in Appendix 1 to the WTO Dispute Settlement Understanding, namely: (i) the Agreement Establishing the World Trade Organization, (ii) the Multilateral Agreements on Trade in Goods, (iii) the General Agreement on Trade in Services, (iv) the Agreement on Trade-Related Aspects of Intellectual Property Rights, (v) the Understanding on Rules and Procedures Governing the Settlement of Disputes, and (vi) the Plurilateral Trade Agreements listed under point (C) of Annex 1, subject to the adoption of a decision by the parties to each agreement.

[10] Art 4 of the DSU.

[11] Art 4(7) of the DSU.

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independent experts, examines the case to determine if there has been a violation of the covered agreement invoked.

The panel conducts proceedings that include written submissions from both parties and oral hearings, and after reviewing the evidence, the panel issues a report with its findings. Before the report's adoption by the DSB, either party can appeal the panel's findings to the WTO Appellate Body, which reviews claimed errors in law and can uphold, modify, or reverse the panel's decision. It is the Appellate Body's report which is adopted by the DSB and becomes binding on the parties.[12]

Once a ruling is made, the respondent is required to comply by adjusting its measures to conform with WTO obligations and this process is monitored by the DSB. If the respondent fails to comply within the set timeframe, the complaining party can seek compensation or request authorisation from the DSB to suspend concessions or other obligations, which must match the harm caused by the violation.[13] The DSB continues to monitor the situation until full compliance is achieved.

If we turn to the concrete provisions of the DSU, we shall see, that certain articles *prima facie* seem to have an influence on how the procedural general principles under examination will operate. In order to understand the references in the cases under analysis, their short introduction is necessary.

Article 6(2) of the DSU outlines the requirements for a proper request for the establishment of a panel. The request must "*identify the specific measures at issue*" and "*provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*". The complainant is therefore required to indicate the provisions of the covered agreements that are allegedly being violated. This clarity and precision required also define the scope of the panel's mandate as – shown below – it will be limited to addressing the claims and measures specifically identified in the request.

[12] Art 17(14) of the DSU.
[13] Art 22 of the DSU.

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Article 7 of the DSU concerns the panels' Terms of Reference (ToR), the instrument setting out the mandate and procedures for the establishment and operation of panels. The ToR states "*the relevant provisions in the covered agreement(s) cited by the parties to the dispute, in light of which the Panel shall examine the matter referred to the DSB*." The ToR therefore further defines the scope of the panel's examination, limiting it to the specific measures and legal claims identified by the parties in their submissions. Article 7 thus ensures that the panel's examination is focused and directly related to the issues raised by the parties.

Lastly, Article 11 sets out expectations with respect to the panels' handling the matters before them and the conduct of their assessments. It mandates panels to "*make an objective assessment of the matter before* [them], *including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements* (...)". As it will be shown, this provision is a cornerstone of the dispute settlement process and the ultimate threshold also for the Appellate Body to assess whether a panel has exceeded its competence in its ruling, thus the main earmark for the operation of the principles subject to this article.

IV. Procedural general principles invoked by the WTO in its practice

a. The WTO's treatment of its competence with reference to the *competence-competence* principle

It can be observed in general that Panels and Appellate Bodies do not seem to make frequent use of the competence-competence principle, especially not with explicit reference to it. The principle was invoked by its name only in two cases,[14] and it was

[14] *Russia – Traffic in Transit*, Confidentiality Ruling of 16 May 2018 at 5.3-4. and footnotes 18-19; and Panel Report at 7.53. and footnotes 144-145; as well as *India – Tariff*, Panel Decision of 7 July 2021 on India's preliminary objection, at 3.15-16. and footnotes 46-49.

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applied in four others without the explicit mention of the concept. Despite this seldom application, three different types of the principle's use are showcased in these cases.

The first occurred at the very first invocation of competence-competence in the 2000 Appellate Body Report in the *US – 1916 Act* case, in which the Appellate Body addressed the European Communities' argument that the United States' appeal must be rejected as its jurisdictional objection before the Panel was not raised in a timely manner. Although the Appellate Body admitted that objections to jurisdiction should be raised as early as possible in order to ensure due process, with reference to a tribunal's right to consider jurisdictional issues on its own initiative, it shared the Panel's view that some issues of jurisdiction may be addressed by the Panel at any time.[15]

The second type of the principle's application, and the most common one, displays the panel's power to determine the extent of its own jurisdiction. This most general formulation of the principle was invoked two times in *Russia – Traffic in Transit*. In its Confidentiality Ruling of 16 May 2018, the Panel was requested to rule on Russia's objection alleging that during the proceedings a third party has failed to comply with certain procedural obligations concerning the confidential treatment of material presented in the proceedings.[16] Rejecting the United States' argument that such a claim is outside of its terms of reference given that it alleges a violation of the DSU by a third party, the Panel proceeded to examine the matter by referencing its inherent jurisdiction, deriving automatically from the exercise of its adjudicative function, "*to determine all matters arising in relation to the exercise of their substantive jurisdiction and inherent in the judicial function*".[17] The basis invoked for this inherent jurisdiction was the competence-

[15] Appellate Body Report, *United States — Anti-Dumping Act of 1916*, WT/DS136/AB/R ; WT/DS162/AB/R, 28 August 2000, para 54.
[16] Confidentiality Ruling of 16 May 2018, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 16 May 2018, para 5.3
[17] Confidentiality Ruling of 16 May 2018, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 16 May 2018, para 5.4.

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competence principle.[18] Later on in its Panel Report, the WTO Panel once again referenced the principle and its inherent jurisdiction to determine matters relating to its substantive jurisdiction when it proceeded to analyses the self-judging nature of Article XXI(b)(iii) of the GATT.[19]

We can find cases, however, where the WTO DSB addressed the relationship between competence-competence and the DSU, and although confirming an inherent adjudicative power to determine its jurisdiction, it made such power subject to compliance with the provisions of the DSU. In *Mexico – Taxes on Soft Drinks,* Mexico argued before the Appellate Body that such inherent powers serve as a basis for panels to decline exercising jurisdiction, even in cases properly before it.[20] The Appellate Body, after referencing the substance of competence-competence and noting panels' freedom to exercise judicial economy, held that such inherent jurisdictional powers do not provide WTO panels with the possibility to decline to exercise jurisdiction in cases where jurisdiction was validly established as that „*would seem to 'diminish' the right of a complaining Member to 'seek the redress of a violation of obligations' within the meaning of Article 23 of the DSU*."[21]

The Panel in *India – Tariff* likewise found a limitation on competence-competence in the DSU when ruling on India's preliminary objections alleging that deficiencies in the Panel's composition would affect the validity of its jurisdiction. The Panel, referencing the above holding from *Mexico – Soft Drinks* and the uniform approach of WTO panels to decline addressing objections regarding the propriety of their composition, stated that

[18] Confidentiality Ruling of 16 May 2018, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 16 May 2018, fn. 19.
[19] Panel Report, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para 7.53 and footnotes 144-145.
[20] *Mexico — Tax Measures on Soft Drinks and Other Beverages*, Mexico's appellant's submission at para. 65 and the Appellate Body Report at para 47.
[21] Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006, para 53.

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deficiencies in the determination of a panel's composition, even if shown to exist, would not affect whether a Panel has validly established jurisdiction.[22]

Lastly, in *Mexico – Corn Syrup*, in an Article 21.5 proceeding, the Appellate Body shed light on an aspect of competence-competence which obliges adjudicators to address certain fundamental issues, even in absence of specific requests from the parties, in order to ensure themselves of the existence of their competence. In this case Mexico asked the Appellate Body to reverse the Panel Report for the Panel's failure to address certain contentions put forward by Mexico related to the lack of consultations and alleged DSU violations by the United States. Referring to the proper exercise of jurisdiction, the Appellate Body held that there exist certain issues of a fundamental nature which must be addressed by panels even if the parties to the dispute remain silent on those issues.[23] Panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters, but must deal with them – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.[24] The Appellate Body deemed consultations pursuant to Articles 3.7 and 6.2 of the DSU to be of such character.

As it was shown, the application of the competence-competence principle within WTO dispute settlement reflects a nuanced and varied approach. While the principle is not frequently invoked by name, its influence is evident across several cases, each illustrating different facets of the principle's utility and scope. However, the principle is not absolute and is subject to limitations imposed by the DSU, which ensures that the inherent powers of adjudicative bodies do not undermine the rights of member states. The competence to determine their own jurisdiction allows panels and the Appellate Body to address

[22] Panel Decision on India's preliminary objection, *India – Tariff Treatment on Certain Goods in the Information and Communications Technology Sector*, WT/DS588/R/Add.1, 7 July 2021, paras 3.15-16 and footnotes 46-49.
[23] Appellate Body Report (Article 21.5 – US), *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/AB/RW, 22 October 2001, para 36.
[24] Appellate Body Report (Article 21.5 – US), *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/AB/RW, 22 October 2001, para 36.

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jurisdictional issues autonomously, but always within the bounds of the DSU, thus balancing the need for judicial discretion with the imperative of procedural fairness.

b. Iura novit curia's invocation by the WTO

Within the WTO's dispute settlement mechanism, this principle is frequently invoked to underscore the autonomy of Panels and the Appellate Body in interpreting the legal provisions at issue. As it will be shown, *iura novit curia* typically manifests in two primary forms: first, by affirming that Panels are not constrained by the legal interpretations advanced by the parties, and second, by establishing that parties bear no burden of proof in providing legal interpretations, as the adjudicatory bodies themselves hold the responsibility to accurately interpret the relevant agreements. The following section explores the application of *iura novit curia* across various WTO cases, highlighting its role in shaping the decision-making process of Panels and the Appellate Body, as well as its limitations when weighed against the procedural requirements for making a *prima facie* case.

The most commonly known formulation of *iura novit curia*, namely that the adjudicating body is not bound by the parties' legal argument, frequently appears in the WTO's case-law as well. It usually takes one of two forms: it is invoked either to express that the panels are not bound by the parties' legal interpretations, or to highlight that there exists no burden of proof on the parties when it comes to providing the panels with interpretations of the invoked provisions.

Regarding the first category, in *US – Tuna II*, a case concerning the US' 'dolphin safe' labelling scheme for canned tuna, the Panel decided to adopt the interpretation of the 'less favourable treatment' test in Article 2.1 of the TBT Agreement as submitted by both parties, in light of the fact that both the US and Mexico agreed that it is Mexico that bears the burden of showing *prima facie* that the measure in question violated that test.

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Nevertheless, with reference to *iura novit curia*, the Panel highlighted that it is aware that it is not bound by the legal interpretations offered by the parties or the third-parties in the case.[25]

Panels' freedom to develop their own reasoning was further highlighted in the already mentioned *Russia – Traffic in Transit* case. During the interim review of the Panel Report, Ukraine took the view that in absence from specific arguments advanced, the Panel erred in drawing inferences from certain provisions not relied on by Russia. The Panel stated in response that although it shall not make a case for a party when a party failed to do so, "*it remains within the competence of a panel to develop its own legal reasoning to support its own findings on the matter under consideration*".[26] The Panel went even further and held that even if a party puts forward a particular argument, the interpretation of the relevant WTO Agreement adopted by the Panel cannot be limited by the particular interpretations advanced by the parties.[27]

A similar line of argument was put forward by the Appellate Body in *EC – Hormones* concerning an import ban on meat and meat products from cattle treated with six types of hormones. The European Communities claimed that the Panel unjustifiably based its finding on Article 5.5 of the SPS Agreement whereas the complainants did not make such a claim. Addressing the difference between basing a ruling on a provision not cited and by applying arguments not put forward by the parties, the AB highlighted that "*nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties - or to develop its own legal reasoning - to support its own findings and conclusions on the matter under its consideration*".[28] In both of these cases the panels made reference to their

[25] Panel Report (Article 21.5 – Mexico), *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/RW, 14 April 2015, para 7.59 and footnote 152.
[26] Panel Report – Addendum, Interim Review, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 5 April 2019, para 2.111.
[27] Panel Report – Addendum, Interim Review, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 5 April 2019, para 2.111.
[28] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, 16 January 1998, para 156.

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mandate under Article 11 of the DSU to carry out an objective assessment of the matter. Such mandate might be impossible in certain cases if its reasoning was restricted solely to arguments presented by the parties.[29]

We also see ample example for the lack of a burden of proof. In *US – Zeroing*, a dispute concerning the U.S. practice of zeroing in anti-dumping duty calculations, the Panel Report stated that „(...) *for issues of legal interpretation, 'there is no burden of proof as such' and it is always for the panel to provide the appropriate legal interpretation independently of what is put forward by any party. We agree that there is no burden of proof for issues of legal interpretation of provisions of the covered agreements*." The lack of any responsibility on the parties to provide legal interpretations together with their claims, with reference to the principle of *iura novit curia*, was affirmed also in *India – Solar Cells*,[30] *EC – Tariff Preferences*,[31] *EC – Export Subsidies on Sugar*,[32] and *EC and certain member States — Large Civil Aircraft*.[33]

In *Australia – Tobacco Plain Packaging*, the Panel went even further and although the parties did not present specific arguments in this regard, with reference to *iura novit curia*, it considered it appropriate to take account of a GATT document adopted in 1958 in order to interpret the terms of Article IX:4 of the 1994 GATT agreement. The above examples provide for cases which alleviate parties from obligations with respect to providing legal arguments, or even if they do, highlight panels' independence from the points put forward.

Contrariwise, the Appellate Body Report adopted in *US – Gambling* seems to provide a stricter approach with respect to the sufficiency of party submission. This case centered around US measures considered by Antigua and Barbuda to have had the cumulative

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[29] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, 16 January 1998, para 156.
[30] Panel Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R, 22 February 2016, fn. 269 to para 7.104.
[31] Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004, para 105 and fn. 220.
[32] Panel Report, *European Communities — Export Subsidies on Sugar*, WT/DS265/R,15 October 2004, para 7.121.
[33] Appellate Body Report (Article 21.5 – US), *European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/RW, 15 May 2018, para 5.47.

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impact of preventing the supply of gambling and betting services from another WTO Member to the United States on a cross-border basis. The analysis of the Panel was conducted under Article XVI of GATS, under which Antigua was required to make a *prima facie* case alleging a violation by the US in order for the Panel to properly continue with its analysis.[34] The US contended that the Panel improperly made Antigua's *prima facie* case of inconsistency with Article XVI of the GATS as Antigua did not put forward corresponding arguments in this respect. As the applicable rule, the Appellate Body held that "*a complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments*." In lack of finding the requisite arguments needed for a *prima facie* case from Antigua, the Appellate Body found an error in the Panel's examination and reversed the corresponding findings.[35]

In a similar vein, in *Indonesia – Import Licensing Regimes* concerning Indonesia's import licensing regimes and quotas for horticultural products and animals, interpreting the GATT 1994 and the Agreement on Import Licensing Procedures, the Appellate Body made a finding to the effect that a Panel cannot be expected to conduct all possible ways of analysis of a claim not put forward by the applicant. By reference to *iura novit curia*, Indonesia argued that the Panel was not obliged to follow Indonesia's own approach of assessing the import licensing regimes as presented in its defences and should have followed the 'mandatory sequence' as set out in prior WTO case-law. The Appellate Body held that "*a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis*".[36]

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[34] Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, paras 143-144.
[35] Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, paras 154-156.
[36] Appellate Body Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R; WT/DS478/AB/R, 9 November 2017, para 1.7.

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Lastly, probably the broadest application of the principle occurred in *Indonesia – Iron or Steel Products* in 2018, when the Appellate Body was dealing with appeals in a dispute concerning a measure imposed by Indonesia on imports of certain flat-rolled iron or steel products and the investigation and determinations leading thereto. Indonesia's appeal alleged that the Panel exceeded its terms of reference and failed to carry out an objective assessment of the matter before it when concluding that the measure in question is not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. In dealing with this claim, the Appellate Body highlighted three different facets of *iura novit curia*. First, the Appellate Body made reference to a Panel's competence to assess the applicability of a covered agreement even if not raised by the parties themselves and noted that under Article 11 of the DSU it is indeed required to carry out an objective assessment of the applicability of the provisions invoked even if not disputed by the parties.[37] Second, referring to the obligation of conducting an objective assessment as per Article 11 of the DSU, the Appellate Body recalled the holding in EC – Hormones that "*nothing in the DSU limits the faculty of a panel freely to* (...) *develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration*".[38] And third, with respect to how measures in question are characterised by the Panel's decision, it noted that such characterisation is not dependent on or restricted by the submissions of the parties or the labels given under municipal law.[39] Providing such an outline for the elements of the Panel's discretion, the Appellate Body came to the conclusion that the Panel did not err in carrying out its own assessment of whether the measure at issue constitutes a safeguard measure.[40]

[37] Appellate Body Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R; WT/DS496/AB/R, 15 August 2018, para 5.19.
[38] Appellate Body Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R; WT/DS496/AB/R, 15 August 2018, para 5.19.
[39] Appellate Body Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R; WT/DS496/AB/R, 15 August 2018, para 5.19.
[40] Appellate Body Report, *Indonesia — Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R; WT/DS496/AB/R, 15 August 2018, paras 5.24-25.

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The principle of *iura novit curia* plays a crucial role in WTO dispute settlement by ensuring that Panels and the Appellate Body retain the authority to independently interpret and apply the law, free from the constraints of the parties' legal arguments. However, as evidenced in cases like *US – Gambling* and *Indonesia – Import Licensing Regimes*, this autonomy is not without limits. The requirement for parties to make a *prima facie* case remains a fundamental procedural safeguard, ensuring that Panels do not overstep their mandate by substituting their analysis for the arguments the parties fail to present. Ultimately, *iura novit curia* within the WTO framework seem to strike a delicate balance between judicial discretion and procedural fairness, reinforcing the integrity and objectivity of the dispute settlement process.

c. Setting the limits of the subject-matter: the WTO's use of *ne ultra petita* and *ne infra petita*

These principles guide the boundaries of what panels or the Appellate Body may address within a dispute, ensuring that decisions are confined to the claims and issues presented by the parties while also obligating the adjudicating body to consider all relevant claims. This section explores the application and different formulations of these principles in various WTO cases, highlighting their interplay with other procedural doctrines such as judicial economy and the competence-competence rule.

In *US – Certain EC Products*, although without explicit reference to *ultra petita*, the Appellate Body held that the Panel erred in finding a violation of Article 23.2(a) of the DSU concerning WTO members' obligation not to have recourse to unilateral action in lack of a *prima facie* case established in this respect by the European Communities. The Appellate

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Body came to this conclusion based on the lack of reference to the provision or any claim of violation by the EC in this respect, and the lack of evidence or arguments adduced.[41]

In the *Chile – Price Brand System* case, the Appellate Body had to address Chile's claim that the Panel erred in making a finding on a claim which was not made by Argentina, thereby in violation of Article 11 of the DSU. The Appellate Body retrospectively coined the finding in *US – Certain EC Products* as a formulation of the *ne ultra petita* rule when with reference to that earlier case it held that making a "*finding on a provision that was not before it, the Panel* (…) *did not make an objective assessment of the matter before it, as required by Article 11* [and] (…) *in doing so*, [it] *acted ultra petita*."[42] It thus held that by assessing a sub-provision under which the complainant did not articulate a claim, a panel will fail in the duty to respect due process because it will fail to accord to a party a fair right of response.[43]

The issue in the earlier quoted *EC – Hormones* case concerned not only the AB's treatment of *iura novit curia*, but also issues of *ne ultra petita* as the European Communities alleged that Panel findings were not based on corresponding claims. The AB rejected this argument by specifying that it is the terms of reference which determines whether panels can address certain legal claims and if a claim falls within it, adducing legal arguments supporting or contradicting such claim would not be *ultra petita* activity on the panel's part.[44] This approach was narrowed in *Chile – Price Brand System* as the Appellate Body found a legal error in the Panel's analysis based on its finding not being part of 'the matter

[41] Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, 9 December 2002, paras 112-114.
[42] Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products,* WT/DS207/AB/R, 23 September 2002, para 173.
[43] Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002, paras 174-176.
[44] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 16 January 1998, para 156.

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before the DSB', even though it specifically noted that the Panel's terms of reference were broad enough to include such a claim.[45]

Additionally, in the recent case of *Turkey – Additional Duties*, when addressing the applicability of covered agreements, the Panel concluded that under Articles 11 and 7.2 of the DSU it must consider all provisions cited by both parties to provide a comprehensive analysis. However, referencing *ultra petita* and its inconsistency with Article 11 of the DSU, the Panel held that it can only make findings on the claims explicitly included in the United States' panel request.[46] Therefore, the Panel could only consider the provisions raised by Türkiye to determine their relevance to the case, without making a judgment on their consistency with the measures at issue.[47]

In contrast to the previous cases, in *China — HP-SSST*, where China's appeal argued that the Panel has made a case for the complainants by ruling on a claim that had not been articulated by them, and in relation to which they had raised no arguments, the Appellate Body ruled the Panel's approach not to be *ultra petita*. It held that once a complainant has made out a *prima facie* case, a panel is required to develop its own reasoning in order to make an objective assessment in accordance with Article 11 of the DSU.[48] Holding that Japan and the EU articulated their claim and made their *prima facie* case, the Appellate Body concluded that developing further legal arguments for such a case is not *ultra petita* on the part of the Panel.[49]

[45] Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002, para. 173.
[46] Panel Report, *Turkey - Additional Duties on Certain Products from the United States*, WT/DS561/R, 19 December 2023, para 7.20 and fn. 131.
[47] Panel Report, *Turkey - Additional Duties on Certain Products from the United States*, WT/DS561/R, 19 December 2023, para 7.20 and fn. 131.
[48] Appellate Body Report, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R; WT/DS460/AB/R, 14 October 2015, para 5.236.
[49] Appellate Body Report, *China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R; WT/DS460/AB/R, 14 October 2015, para 5.238.

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We may also find examples for the DSB setting out the minimum requirements for its own procedure. In *Mexico – Corn Syrup* the Appellate Body put forward the complementary rule of *ne ultra petita*, the principle of *ne infra petita*, according to which courts have an obligation to address all claims put forward by the parties. When addressing the issues as was detailed above with respect to the competence-competence rule, the Appellate Body held that "*a panel comes under a duty to address issues* (…) *as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute*."[50] This ruling underscores that WTO panels are obligated to thoroughly address all claims and issues raised by the parties, ensuring due process and the proper exercise of their judicial function.

Ne infra petita, however, seems to be at odds with a very specific aspect of the Appellate Body's practice, namely how it addresses the boundaries of its competence with reference to the principle of judicial economy. Judicial economy pertains to the "*efficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimise duplication of effort and to avoid wasting the judiciary's time and resources*".[51] The WTO's nuanced approach to judicial economy draws for us the very thin line between complying both with *ne ultra petita* and *ne infra petita* and might raise questions as regards compliance with the *ne infra petita* rule as described earlier.

In *US — Wool Shirts and Blouses*, the Appellate Body was dealing with the issue of whether Article 11 of the DSU entitles a complaining party to a finding on each of the legal claims it makes to a panel.[52] The Appellate Body held that there is no DSU provision or relevant GATT practice which would require a panel to examine all legal claims made by the

[50] Appellate Body Report (Article 21.5 – US), *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/AB/RW, 22 October 2001, para 36.
[51] Fulvio Maria Palombino, 'Judicial Economy' (2020) Max Planck Encyclopedias of International Law [MPIL] para 2.
[52] Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, p 17.

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complaining party.[53] Confirming the wide discretion panels should enjoy in their decision-making it stated that the aim of the dispute settlement system was to provide solutions to disputes and not „*to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute*".[54] With reference to judicial economy, it held that a panel is expected to address only those claims which must be addressed in order to resolve the matter referred to the DSB.[55]

This discretionary tool is illustrated by a significant amount of WTO case-law.[56] However, following this decision advocating for broader discretion, in *Australia –Salmon* the Appellate Body took a rather cautious approach and warned the panels against exercising false judicial economy. It said that the principle must be applied keeping in mind the aims of resolving the matter and securing a positive solution as the partial resolution of the issue would be false judicial economy. Specifying the delicate balance between the two notions, the Appellate Body asserted that "a *panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings*".[57] Case-law seems to suggest that this holding prompted panels to make broader findings in order to provide the Appellate Body with enough basis for its analysis.[58]

The WTO's application of the *ne ultra petita* and *ne infra petita* principles highlights the intricate balance panels and the Appellate Body must maintain in their decision-making

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[53] Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, pp 18-19.
[54] Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, p 19.
[55] Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 25 April 1997, p 19.
[56] For cases preceding the WTO's holding in *US – Wool Shirts and Blouses*, *see* fn. 27-28 in the Appellate Body Report. For a general overview of subsequent practice, *see* Alberto Alvarez-Jiménez, 'The WTO Appellate Body's Exercise of Judicial Economy' (2009) 12 (2) Journal of International Economic Law 393–415. DOI: https://doi.org/10.1093/jiel/jgp010; as well as the WTO's Repertory Of Appellate Body Reports on Judicial Economy accessible at: https://www.wto.org/english/tratop_e/dispu_e/repertory_e/j1_e.htm
[57] Appellate Body Report, *Australia — Measures Affecting Importation of Salmon,* WT/DS18/AB/R, 20 October 1998, para 223.
[58] Alberto Alvarez-Jiménez, 'The WTO Appellate Body's Exercise of Judicial Economy' (2009) 12 (2) Journal of International Economic Law 393–415, 397.

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processes. *Ne ultra petita* ensures that panels do not exceed their mandate by addressing claims or legal issues not explicitly raised by the parties, as seen in cases like *Chile – Price Band System*. Conversely, *ne infra petita* compels panels to address all claims properly put before them, ensuring a comprehensive evaluation, as emphasized in *Mexico – Corn Syrup*. However, this obligation must be balanced with the principle of judicial economy, where panels may limit their findings to those necessary for resolving the dispute, avoiding unnecessary rulings that do not contribute to a positive solution, as illustrated in *US – Wool Shirts and Blouses*. The nuanced application of these principles underscores the importance of carefully navigating the boundaries of competence in a way which upholds due process while also ensures effective and efficient dispute resolution within the WTO framework.

V. Conclusions

In conclusion, the interplay of procedural principles such as competence-competence, *iura novit curia*, and *ne ultra petita* within the WTO's dispute settlement system highlights the delicate balance between judicial authority and the boundaries set by the parties involved in a dispute. These principles ensure that WTO panels and the Appellate Body exercise their jurisdiction with both autonomy and restraint, adhering closely to the legal frameworks agreed upon by member states. It can be seen that the quasi-judicial nature of the WTO does not affect the applicability of these general principles of law, it is rooted in the decision-making function of the dispute resolution process itself.

The WTO's approach to these principles is notably rather restrictive compared to other international fora, we could not observe expansive application of the principles. For instance, under the *ne ultra petita* principle, WTO panels consistently refrain from examining claims that have not been explicitly presented by the parties. Instead, the panels may exercise judicial economy, choosing to address fewer claims than those

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presented when it suffices for the resolution of the dispute. Similarly, the competence-competence principle is applied with careful restraint. While the WTO panels identify certain issues that must be addressed *ex officio* – such as the requirement to hold prior consultations – they do not extend this to other matters unless explicitly requested by the parties. Moreover, the WTO's interpretation of *iura novit curia* is less invasive than in some permanent courts, such as human rights courts. WTO panels do not redefine the legal basis of an alleged inconsistency or reclassify it differently from the parties' submissions.

Additionally, the WTO's practice maintains a clearer distinction between fact and law compared to other international fora, ensuring that the adjudicative process is both precise and predictable.[59] Ultimately, the integration of these procedural principles within the WTO dispute settlement mechanism exemplifies the careful calibration of judicial discretion and adherence to party consent that is essential for the effective and legitimate functioning of international courts. This balanced approach not only upholds the rule of law but also ensures that the resolution of international trade disputes contributes to the stability and orderliness of the global environment.

[59] WTO, Introduction to the WTO Dispute Settlement System, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm. Last accessed: 28 August 2024.

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