
Article

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A Call for Coherence in International Law

Praises for the Prohibition Against "Clinical Isolation" *in WTO Dispute Settlement*

Gabrielle MARCEAU *

I. INTRODUCTION

Interdependencies between States, on all levels are rapidly increasing. Thus, the thrusts of policy and legal instruments that States are enacting are subject to closer examination and more stringent challenges not only within each State but also between States. This calls for greater coherence between various policies adopted by States and the legal regimes that sustain them. This need for greater coherence exists within the multilateral trade system (a specialized sub-system of law) as well as between the multilateral trade system and other sub-systems of international law and with principles and rules of general international law and institutions. Basic rules and principles of treaty interpretation, such as the presumption against conflicts and the necessity for effective interpretation, are expressions of this need for a coherent approach to international law matters generally.

The pressing call for States to evolve within the parameters for "sustainable development" is another expression of this need for greater co-ordination and coherence between trade, development and environment policies. If the initial rationale for trade liberalization was peace and economic growth, sustainable development is about ensuring continued peace and the effective well-being of future generations. This article focusses the discussions on the call for coherence between the areas of trade, development and environment as part of this broader concern for sustainable development in the context of the World Trade Organization (WTO) dispute settlement.

Incorporated into the preamble of the Agreement Establishing the World Trade Organization, the concept of sustainable development,¹ as defined in the Rio Declaration² and Agenda 21,³ emphasizes both environmental protection and the

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¹ Marrakesh Agreement Establishing the World Trade Organization (hereinafter WTO Agreement) 131 I.L.M. 1125 (1994).

² Rio Declaration on Environment and Development, 14 June 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992) (hereinafter Rio Declaration).

³ Agenda 21, U.N. Conference on Environment and Development (UNCED), Annex II, U.N. Doc. A/CONF.151/26/Rev.1 (1992) (hereinafter Agenda 21).

eradication of poverty.⁴ Many people are challenging the existing General Agreement on Tariffs and Trade (GATT)/WTO system as being impermeable to this need for sustainable development. Although arguably insufficient and outdated, the old basic provisions of Article XX were, and still are, a recognition that tensions may exist between market access rights and other legitimate policies (such as environment) and constitute a call for some coherent approach to resolving these tensions.

The issue of WTO trade disputes involving environmental policies is complex, as it subsumes many diverse but interrelated aspects of human, animal and plant survival together with the urgency for a far-reaching solution to the alleviation of poverty and human economic misery. For a variety of reasons, many countries have resisted further consideration of environmental issues at the WTO. Concern has been raised that environmental standards may be used as a form of disguised protectionism. Developing countries, in particular, note that high, and sometimes discriminatory, environmental standards reduce market access and impose costs that affect their economic development. This, in turn, may reduce the resources available to implement and enforce strong national environmental policies. While these concerns are valid, the spectre of protectionism should not undermine efforts to negotiate provisions to increase the coherence of trade, development and environmental laws and policies, called for by the WTO dispute settlement mechanism.

Section II of this article discusses environment-related disputes under both the old GATT system and the WTO, and focuses on the interpretation and reach of Article XX of GATT. The new WTO case law on Article XX seems to recognize the need for WTO Members to address and collaborate to define further criteria and parameters of our sustainable development.

Section III examines the challenge posed to the WTO dispute settlement mechanism in the event that WTO Members take no further negotiated action to address trade and environmental issues at the WTO. It raises arguments and counter-arguments for using public international law to interpret WTO rights and obligations, and examines how existing multilateral environmental agreements (MEAs) and principles of general or customary international law may influence the Panels and the Appellate Body's interpretation of the WTO environmental provisions. Here, recent WTO Appellate Body decisions including *Gasoline*,⁵ *Hormones*,⁶ *Computer Equipment*,⁷ *Poultry*⁸ and *Shrimp*⁹ are discussed.

⁴ As recognized by the Appellate Body in *Shrimp*, as note 9 below, para. 129, footnote 107 "this concept has been generally accepted as integrating economic and social development and environmental protection". See e.g., Handl, G. (1995): *Sustainable Development: General Rules Versus Specific Obligations* in W. Lang (ed.) *Sustainable Development and International Law* p. 35; World Commission on Environment and Development (1987): *Our Common Future* (Oxford: Oxford University Press), p. 43.

⁵ Appellate Body Report on *United States—Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996 (WT/DS2) (hereinafter *Gasoline*).

⁶ Appellate Body Report on *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, adopted 13 February 1998 (WT/DS26, 48) (hereinafter *Hormones*).

⁷ Appellate Body Report on *European Communities—Customs Classification of Certain Computer Equipment*, adopted 5 June 1998 (WT/DS62, 67, 68) (hereinafter *Computer Equipment*).

⁸ Appellate Body Report on *European Communities—Measures Affecting the Importation of Certain Poultry Products*, adopted 23 July 1998 (WT/DS69) (hereinafter *Poultry*).

⁹ Appellate Body Report on *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 November 1998 (hereinafter *Shrimp*).

Finally, in section IV, there is an examination of the different legal instruments that could be negotiated by WTO Members—should they so desire—with a view to reducing the potential for disputes involving environmental policies. Proposals to address procedural and substantive matters are suggested in brief.

By way of qualification, the field of trade and environment is broad and complex. It is not the goal of this article to assess the strengths and weakness of the many proposals put forward at the WTO Committee on Trade and Environment (CTE) or elsewhere. Nor is it intended that the possible implications of further including environmental considerations into the multilateral trading system be examined. Rather, acknowledging that some WTO Members have identified the environment as an issue of importance, the purpose of this article is to describe the evolution of the GATT and WTO case law on trade and the environment. The aim is to identify how non-WTO international law could be used in future WTO disputes to improve coherence between the implementation of trade and environment policies; and to identify WTO mechanisms available to WTO Members should they collectively consider that further efforts are required to ensure coherence in response to trade and environmental tensions at the WTO.

II. GATT/WTO PROVISION AND CASE LAW ON TRADE AND ENVIRONMENT DISPUTE SETTLEMENT

While some provisions of the Results of the Uruguay Round Multilateral Trade Negotiations (including the WTO agreements) deal explicitly or implicitly with environment, none have been so widely debated as Article XX of the GATT.¹⁰ This provision provides an exception to the core GATT obligations and, thus, forms a crucial interface between the multilateral trading system and other important societal policy objectives. Article XX recognizes the tension that sometimes exists between, on the one hand, the multilateral trading system, which promotes a liberal economic order, and, on the other hand, the government's right to regulate other social, developmental and environmental policies. This tension finds expression in a number of WTO agreements, including the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Agriculture, the GATT, and in trade disputes involving health, environmental and developmental considerations. In each of these areas, key policy considerations are therefore how to strike a balance between the need for open markets and the need to regulate markets to promote other legitimate objectives, and how to ensure some coherence between States' various policies.

¹⁰ References to health and the environment exist in other WTO Agreements, including the TBT Agreement (Preamble and Art. 2.2); the SPS Agreement; the GATS (Art. XIV); the TRIPS Agreement (Art. 27.2); and the preamble to the WTO Agreement). This article does not examine each of these environmental and health provisions. However, the arguments made in relation to the general GATT exception in Art. XX could be made, with variations, in relation to these other provisions.

This section provides an overview of the main GATT disciplines and Article XX exceptions. We discuss the main GATT trade and environment disputes, noting that, historically, GATT panels have adopted a rather narrow interpretation of Article XX and a restrictive use of outside sources of law to interpret GATT obligations. It concludes by discussing the evolution in jurisprudence that occurred with the establishment of the WTO and its powerful dispute settlement mechanism in 1995. Since 1995, the WTO's Appellate Body has made a number of important contributions to trade and environment disputes. First, the Appellate Body has ensured that the WTO system remains "connected" with the broader body of international law by acknowledging that WTO agreements cannot be interpreted in "clinical isolation" of public international law.¹¹ Second, in two cases—*Gasoline* and *Shrimp*—it has adopted a more textual and progressive approach to the Article XX exceptions.

A. THE PROVISIONS OF THE GATT

The starting point for any discussion of trade and environment disputes must be the provisions of the GATT 1947. After the Great Depression and the Second World War, the GATT sought to reduce tariff measures in order to increase trade between countries, enhance economic welfare and promote peace. Under Article I of the GATT, tariffs are reduced through reciprocal concessions applied in a non-discriminatory manner which independent of the origin of the goods (the "most-favoured-nation" (MFN) obligation). This obligation and the Article II requirement that tariffs must not exceed negotiated bound rates, constitute Part I of the GATT. To ensure that these Part I obligations are not evaded, other related obligations (including the "national treatment" obligation, which prohibits countries from treating imported products in any less favourable a manner than domestic like products, and the ban on imposing quantitative restrictions such as trade bans and quotas) are included in Part II of the GATT.¹²

In accordance with these obligations, countries must not discriminate between products imported from different countries (the MFN principle), or between imported and domestically produced products (national treatment), where these products are similar or "like". A fundamental issue then, and one that is at the heart of the trade and environment debate, is to determine what constitutes "like" products, as it is only

¹¹ In addition, in their decisions, Panels and the Appellate Body have acknowledged that interpretative principles such as *in dubio mitius* and other general principles of international law such as the one against the *abus de droit* may be relevant to the interpretation of WTO agreements.

¹² The prohibition against quantitative restrictions is a reflection that tariffs are the GATT's border protection "of choice". Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs, which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade-distorting effect, their allocation can be problematic and their administration may not be transparent. Art. XI:1 states:

"1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

where two products are "like" that the MFN and national treatment obligations will apply.

These obligations are subject to an exception found in Article XX of the GATT. This Article contains a list of domestic policies that may qualify for an exception to the rules mentioned above. Although Article XX does not mention "protection of the environment" explicitly—it was drafted before environmental considerations had reached global proportions—it does recognize that some environmental policies may indeed clash with specific trade rules. The relevant provisions of Article XX state:

"General Exceptions

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

...

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

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

..."

As an exception to the substantive GATT obligations, Article XX provides the focal point for many environment-related trade disputes.

As noted, one important issue in these disputes arises from the concept of "like" products and from the use of environmental regulations designed to promote environmentally sound production and consumption. Much environmental policy is based on the concept of life-cycle analysis, which exhorts governments and consumers to reduce environmental impacts at each stage of a product's life-cycle: production, use and consumption, and disposal. Environmental labels, for example, seek to provide consumers with information about the way products are produced. Voluntary labelling schemes inform consumers of environmentally friendly products, and compulsory government-sponsored schemes alert consumers to products that involve significant impacts on health or the environment. Similarly, in some cases, importing countries may ban products on the basis that they involve risks to health in the importing country, or are produced by the exporting country in a way that is considered by the importing country to be environmentally unsound. While these policies may be regarded as a legitimate environmental policy, they may also give rise to tensions between trading partners. In the context of the GATT, this issue arises initially under Article III and, inevitably, ends up as an issue to be resolved under Article XX.

This section examines the GATT case law and, in particular, how the *Tuna* cases treated regulations that discriminated between products on the basis of how they were produced.¹³ The following section examines how, in the context of the WTO, this jurisprudence has been developed by the Appellate Body.

¹³ *United States—Restrictions on Imports of Tuna*, 3 September 1991, non adopted, BISD 39S/155 (hereinafter *Tuna I*); *United States—Restrictions on Imports of Tuna*, 10 June 1994, non adopted, DS 29/R (hereinafter *Tuna II*).

B. THE GATT APPROACH TO TRADE AND ENVIRONMENT DISPUTES

A number of cases under the GATT (including *Salmon-Herring*,¹⁴ *Thai Cigarettes*¹⁵ and *Tuna-Dolphin*) have considered the Article XX exceptions. In these cases, the GATT panels have generally adopted fairly conservative interpretations of the Article XX exceptions. Moreover, in general, they have been reluctant to use external sources of law, including other treaties and principles of international law, to assist in the interpretation of GATT provisions.

The unadopted panel decisions in *Tuna I* and *Tuna II* addressed the vexed process and production method (PPM) issue when they examined the United States' ban on tuna imports caught by methods that endangered dolphins. In *Tuna I*, the Panel determined that because the GATT is concerned with trade in products, any regulatory distinction *not* reflected in the physical characteristics of products (for example, a distinction based on the manner in which tuna was caught) was incompatible with Article III of the GATT. It stated:

"Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product ..."¹⁶

Under the GATT, panels were examining whether the "violation" of Articles III or XI was indeed "necessary" pursuant to Article XX(b) or "primarily aimed at the conservation of natural resources" pursuant to Article XX(g). Finally, in examining the consistency of the US measure with Article XX(b) the *Tuna II* Panel concluded that:

"measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX(g)."¹⁷

¹⁴ *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98 (hereinafter *Salmon-Herring*). In *Salmon-Herring*, a Panel upheld the United States' claim that Canada's ban on unprocessed herring and salmon exports violated the prohibition on quantitative restrictions in Art. XI:1 of GATT and rejected Canada's argument that, as part of a fisheries management programme, its export ban was permissible under Art. XX.

¹⁵ *Thailand—Restrictions on Importation of and International Taxes on Cigarettes*, adopted 7 November 1990, BISD 37 S/200–228 (hereinafter *Thai Cigarettes*). In *Thai Cigarettes*, a Panel upheld a challenge by the United States to Thailand's restrictions on the import of cigarettes under Art. XI:1 of the GATT. It also determined that Thailand's excise, business and municipal taxes on cigarettes were inconsistent with the national treatment obligations under Arts III:1 and III:2 and that the trade restriction could not be justified under Art. XX(b) as a measure "necessary to protect human ... life or health". The Panel noted that the requirement of "necessity" would only be met if "there was no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives". *Id.*, at para. 75. The Panel went on to note that (*id.*, at para. 77):

"A non-discriminatory regulation implemented on a national basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objective it now pursues through an import ban on all cigarettes whatever their ingredients."

See also *United States—Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345, at para. 5.26.

¹⁶ *Tuna I*, at para. 5.15.

¹⁷ *Tuna II*, at para. 5.27.

After the *Tuna* cases, it became accepted by some that Article III did not permit the GATT contracting parties to adopt regulations that distinguish between products on the basis of how these goods were produced (PPMs), rather than on the basis of their physical characteristics. For some, such PPM regulatory distinctions could not even be covered by the exceptions of Article XX, as it would be virtually impossible for a country to prove that the violation of Article III—through the requirement of policy conformity—was the only solution for a country to ensure the respect of such an environmental policy.

In addition, the GATT panels have been reluctant to use external sources of law, including other treaties and principles of international law, to assist in the interpretation of the GATT provisions. The Panel, in the second of the two *Tuna-Dolphin* cases, declined to use international environmental treaties to interpret Article XX. It noted:

"that the parties based many of their arguments on the location of the exhaustible natural resource in Article XX(g) on environmental and trade treaties other than the General Agreement. However, it was first of all necessary to determine the extent to which these treaties were relevant to the interpretation of the text of the General Agreement ..."¹⁸

It went on to note that:

"the Vienna Convention provides for a general rule of interpretation (Article 31) and a supplementary means of interpretation (Article 32). The Panel first examined whether, under the general rule of interpretation of the Vienna Convention, the treaties referred to might be taken into account for the purposes of interpreting the General Agreement. The general rule provides that 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' is one of the elements relevant to the interpretation of a treaty. However the Panel observed that the agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and that they did not apply to the interpretation of the General Agreement or the application of its provisions. Indeed, many of the treaties referred to could not have done so, since they were concluded prior to the negotiation of the General Agreement. The Panel also observed that under the general rule of interpretation in the Vienna Convention account should be taken of 'any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation'. However, the Panel noted that practice under the bilateral and plurilateral treaties cited could not be taken as practice under the General Agreement, and therefore could not affect the interpretation of it. The Panel therefore found that under the general rule contained in Article 31 of the Vienna Convention, these treaties were not relevant as a primary means of interpretation of the text of the General Agreement."¹⁹

With the creation of the WTO on 1 January 1995, this jurisprudence, both in relation to the interpretation of Article XX and to the use of external sources of law to interpret WTO obligations, was to evolve significantly.

¹⁸ *Tuna II*, at para. 5.18.

¹⁹ *Tuna II*, at para. 5.19.

C. THE WTO APPROACH TO TRADE AND ENVIRONMENT DISPUTES

In 1994, the WTO Agreement integrated the GATT, the Tokyo Round Agreements and the Uruguay Round Agreements into one institutional and legal framework. The text of the old GATT now constitutes the main component of what is called the GATT 1994, which is itself part of the WTO Agreement.

The creation of the WTO brought with it a change in approach to trade and environment matters. A number of factors encouraged this change. The first was that negotiators of the WTO agreements replaced the reference in the GATT Preamble that encouraged "full use of the world's resources", with a reference in the WTO Agreement Preamble to "optimal use of the world's resources in accordance with the objective of sustainable development". As noted by the Appellate Body, this change in orientation must "add colour, texture and shading to [the] interpretation of the agreements annexed to the *WTO Agreement*" (emphasis as original).²⁰ Second, the Uruguay Round negotiations expanded the scope of the multilateral trading system to cover intellectual property and services and added new disciplines over national laws in a number of areas, including health and technical regulations. This, in turn, increased the need for a careful balance to be struck between WTO disciplines and other national laws and policies. Third, the Uruguay Round negotiations occurred alongside the United Nations Conference on Environment and Development (UNCED), which reflected growing international concern about the increasing and unsustainable impacts of human society on the Earth's ecosystems and growing inequality in the patterns of development. Fourth, Ministers at Marrakesh agreed a Decision on Trade and Environment, in which they took note of the Rio Declaration on Environment and Development and Agenda 21, and resolved to establish a Committee on Trade and Environment to, *inter alia*, "make appropriate recommendations on whether any modifications to the multilateral trading system are required" to promote sustainable development. Finally, the WTO Agreement included a new Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which established a comprehensive and powerful dispute settlement system, including a Standing Appellate Body to adjudicate trade disputes. The DSU replaced the old GATT system of dispute settlement, which required consensus of all contracting parties before a decision was adopted, with a "reversed or negative consensus" rule, in which decisions are adopted unless all WTO Members decide by consensus not to adopt. Consequently, decisions of Panels and the Appellate Body are effectively binding and the WTO system plays a much greater role in interpreting and developing international law than dispute settlement did under the GATT. The multilateral trading system's expanded mandate and "bindingness", in turn, elevated the need for coherence between its rules and those of other national, regional and international systems. Arguably, these developments influenced the ensuing WTO jurisprudence on trade and the

²⁰ *Shrimp*, at para. 153.

environment, commencing with the first case to be considered under the new WTO system: the *Gasoline Case*.

1. *The Gasoline Case*

Gasoline involved a challenge by Venezuela and Brazil to a US domestic regulation adopted under the Clean Air Act, on the basis that this regulation imposed more stringent standards against imported gasoline than against US domestically produced gasoline. The case is important in a number of respects. First, it noted that the WTO agreements must not be interpreted in "clinical isolation" from public international law.²¹ The Appellate Body cited Article 3.2 of the DSU, which requires panels and the Appellate Body to use "customary rules of interpretation" to interpret the provisions of the WTO agreements. Article 3.2 provides that the dispute settlement system of the WTO "serves to clarify the existing provisions of those [WTO] agreements in accordance with customary rules of interpretation of public international law."

What are those customary rules of interpretation of public international law? In *Gasoline*, the Appellate Body stated that "customary rules of interpretation" would include Article 31 of the Vienna Convention on the Interpretation of Treaties, which "has attained the status of a rule of customary or general international law".²² More importantly, in doing so, the Appellate Body has acknowledged that the WTO is not a hermetically closed regime,²³ impermeable to the other rules of international law. In other words the Appellate Body has "connected" the GATT/WTO sub-system of law to the rest of international legal order and imposed on Panels and WTO Members the obligation to interpret the WTO Agreement as any other international treaty, thereby putting an end to what Kuyper has termed "GATT Panels' ignorance"²⁴ of the basic rules of treaty interpretation. The implications of prohibition against "clinical isolation from public international law" are more fully discussed in section II of this article.

Second, the Appellate Body offered an interpretation of Article XX that was more textually accurate than the approach adopted by earlier GATT panels and which focuses on the need to consider that market access rights and the rights of a country to protect the environment must be reconciled in the context of the WTO call, in its Preamble, for sustainable development. In this sense, Article XX provides the interface

²¹ *Gasoline*, at p. 17. See also McRae, D. (1996): *The Contribution of International Trade Law to the Development of International Law*, Recueil des Cours, T-260.

²² *Gasoline*, at p. 17.

²³ A concept distinct from a so-called "self-contained" regime or "closed" sub-system which refers to a sub-system of international law that contains all the necessary secondary norms and that explicitly prohibits application of secondary norms. "That is to say that the system's countermeasures are not the normal countermeasures of international law, ... but are entirely separate from those normal countermeasures and are regulated so as to limit the freedom of States to have recourse to them." On the discussion of why the GATT/WTO could be argued to be a self-contained regime, see Kuyper, P.J. (1994): *The Law of GATT as a Special Field of International Law*, N.Y.I.L., p. 227.

²⁴ Kuyper, as note 23, above.

between the multilateral trading system and other systems of law and policy. In *Gasoline*, the earlier GATT jurisprudence was followed by the Panel, which concluded that the US regulation violated Article III:4 and that these violations did not satisfy the requirements of Article XX. On appeal, the Appellate Body upheld the Panel's decision that the US measure ultimately failed to qualify for the protective application of Article XX, but used a different legal reasoning. Whereas the Panel found that the US measure was not justified under Article XX(b), (d) or (g), the Appellate Body allowed the measure under Article XX(g) and went on to examine the consistency of the measure with the Article XX chapeau. In the first thorough examination of the Article XX chapeau in its 50-year history, the Appellate Body determined that the US measure did not satisfy the chapeau requirements, in that it was applied in a discriminatory and abusive manner and constituted a disguised restriction on trade.

A number of aspects of the Appellate Body's interpretation of Article XX should be recalled. First, the Appellate Body noted the need to "balance" the market-access commitments embodied in the substantive GATT provisions, against the right of countries to invoke the Article XX exception. According to the Appellate Body:

"The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the *policies and interests* embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose." (Emphasis as original.)²⁵

This balancing approach was also reflected in the Appellate Body's reading of the Article XX chapeau. Here, the Appellate Body seems to introduce a test of reasonableness into the analysis:

"The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions' of [what was later to become] Article [XX]. This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned." (Emphasis as original.)²⁶

Second, the Appellate Body clarified what is to be considered under Article XX. Previous decisions (including the *Tuna* panels and the panel decision in *Gasoline*) had considered whether the violation of one of the GATT provisions (e.g. Articles I, III or XI) could benefit from the provisions of Article XX. The Appellate Body, by contrast, established that it is not merely the compatibility of that aspect of the measure that

²⁵ *Gasoline*, at p. 18.

²⁶ *Gasoline*, at p. 22.

violates one of the substantive GATT requirements which must be examined under Article XX, but rather the compatibility of the entire measure.²⁷ This is significant, as, generally, it is more difficult to prove that the "discriminatory" aspect or the "less favourable treatment" provided by the measures, rather than the broader measure itself, can be justified on environmental grounds. The Appellate Body noted:

"The initial issue we are asked to look at relates to the proper meaning of the term 'measures' as used both in the chapeau of Article XX and in Article XX(g). The question is whether 'measures' refers to the entire Gasoline Rule or, alternatively, only to the particular provisions of the Gasoline Rule which deal with the establishment of baselines for domestic refiners, blenders and importers The Panel here was following the practice of earlier Panels in applying Article XX to provisions found to be inconsistent with Article III:4: the 'measures' to be analysed under Article XX are the same provisions infringing Article III:4.²⁸ One problem with the reasoning in that paragraph is that the Panel asked itself whether the 'less favourable treatment' of imported gasoline was 'primarily aimed at' the conservation of natural resources, rather than whether the 'measure', i.e. the baseline establishment rules, were 'primarily aimed at' conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue. The result of this analysis is to turn Article XX on its head The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment'.²⁹

Third, the Appellate Body established a two-tiered test for applying the Article XX exceptions:

"In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis under Article XX is, in other words two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX."³⁰

Fourth, the Appellate Body clarified the meaning of both Article XX(g) and the chapeau of Article XX. In relation to Article XX(g), the Appellate Body stated that a measure would qualify as "relating to the conservation of natural resources", if the measure exhibited a "substantial relationship" with, and was not merely "incidentally or inadvertently aimed at", the conservation of natural resources. Under Article XX(g) a measure against must also be made effective "in conjunction with restrictions on domestic production or consumption". In relation to the latter requirement, the Appellate Body stated that:

²⁷ *Gasoline*, at p. 19:

"The chapeau of Article XX makes it clear that it is the 'measures' which are to be examined under Article XX(g), and not the legal finding of 'less favourable treatment'. ... The baseline establishment rules, taken as a whole (that is, the provisions relating to establishment of baselines for domestic refiners, along with the provisions relating to baselines for blenders and importers of gasoline), need to be related to the 'non-degradation' requirements set out elsewhere in the Gasoline Rule."

²⁸ *Gasoline*, at pp. 13–14.

²⁹ *Gasoline*, at p. 16.

³⁰ *Gasoline*, at p. 22.

"identity of treatment—constituting real, not merely formal, equality of treatment was not needed. On the other hand, if *no* restrictions on domestically produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals." (Emphasis as original.)³¹

The Appellate Body determined that the US measure satisfied these requirements, marking the first time that Article XX(g) had been used to justify an environmental measure. By adopting a less narrow interpretation of Article XX(g), it increased the likelihood that future measures would need to be considered under the chapeau.

Finally, when considering the US measure under the chapeau, the Appellate Body, noting the factual findings of the panel, argued that there were reasonably available alternatives that could have been used by the United States that would have avoided discrimination against imported gasoline.³²

"There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners ..."³³

The Appellate Body concluded that the omission by the United States to explore co-operation with Brazil and Venezuela to mitigate administrative problems, and to count the costs imposed on foreign refineries as it did with US refineries, provided sufficient evidence that the US measure constituted "unjustifiable discrimination" and a "disguised restriction on international trade".³⁴ These concepts were further discussed in the following *Shrimp* case.

2. *The Shrimp Case*

After *Gasoline*, the next WTO case to consider Article XX was the *Shrimp* dispute. This dispute arose from a challenge by India, Malaysia, Pakistan and Thailand to a US import ban on shrimp products from countries without certain national policies to protect endangered sea turtles from drowning in shrimp trawling nets. The US regulation effectively required exporting countries to adopt a national policy

³¹ *Gasoline*, at p. 21.

³² In fact, the discussion on the meaning of the terms used in the chapeau of Article XX was not very extensive and the Appellate Body used the facts mentioned by the Panel in support of its conclusion that the US measure was not "primarily" aimed at (Art. XX(g)) the protection of clean air to conclude that the two different standards maintained by the US regulation violated the provisions of the chapeau of Article XX. In *Gasoline*, at page 27, the Appellate Body stated: "While the anticipated difficulties concerning verification and subsequent enforcement are doubtless real to some degree, the Panel viewed them as insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners. ... We agree with the finding above made in the Panel Report."

³³ *Gasoline*, at p. 25.

³⁴ *Gasoline*, at pp. 28–29.

ensuring the use of a certain process and production method including turtle excluder devices (TEDs) to protect sea turtles.

On this occasion, the Appellate Body considered that the US measure was based on a policy covered by Article XX(g), but then determined that the law was inconsistent with the language of the Article XX chapeau on the basis that it was *applied* in a manner that led to arbitrary and unjustifiable trade discrimination. The legal reasoning of the Appellate Body to support this conclusion marks the most complete discussion of Article XX yet, and therefore deserves careful consideration. Moreover, it made extensive reference to other sources of international law when interpreting the GATT, thereby reinforcing its conclusion in *Gasoline* that the WTO Agreement must not be interpreted in clinical isolation from public international law.

The Appellate Body commenced its decision with a critical appraisal of the earlier *Shrimp* Panel decision. The Panel had formulated a broad test for examining measures under the chapeau—one which would exclude any measure that sought to change the policies of exporting countries (including, in this case, those relating to PPMs used to catch shrimp). The Appellate Body reversed this finding, recalling its two-tier test established in *Gasoline*:

“The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.”³⁵

Then the Appellate Body stated that such types of measures, where a country conditions access to its market upon the respect of certain policies, are not *a priori* incapable of justification under Article XX. It stated:

“It appears to us, however, that *conditioning access* to a Member’s domestic market on whether exporting Members comply with, or adopt, a *policy or policies unilaterally prescribed* by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.” (Emphasis added.)³⁶

Then the Appellate Body proceeded to the examination of the measure at issue pursuant to its *Gasoline* two-tier test. Therefore, it examined Article XX(g) to determine whether sea turtles were an “exhaustible natural resource”, whether the US measure “related to” the conservation of this resource, and whether these measures

³⁵ *Shrimp*, at para. 119.

³⁶ *Shrimp*, at para. 121.

were also made effective in conjunction with "restrictions on domestic production or consumption".

The Appellate Body accepted that endangered sea turtles are "an exhaustible natural resource". In arriving at this conclusion, the Appellate Body stated that the concept of natural exhaustible resources, drafted 50 years ago, must be interpreted in an "evolutionary" manner:

"The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment From the perspective embodied in the Preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'." (Emphasis as original.)³⁷

The International Court of Justice has indeed made use of such an "evolutionary" approach in some cases,³⁸ including in the recent 25 September 1997 *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. It is unclear, however, why the Appellate Body in *Shrimp* felt the need to adopt this approach, as endangered sea turtles would arguably fall within the ordinary meaning of "exhaustible natural resources" in 1993-1994, date of the conclusion of the *WTO Agreement*. Moreover, a number of previous panels had recognized that a variety of renewable resources—salmon, herring, dolphin, and clean air—all constituted exhaustible natural resources for the purpose of Article XX(g).³⁹

To determine the meaning of "natural resources", the Appellate Body stated that it is "pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources."⁴⁰ It then went on to examine the use of the term "natural resources" in a number of international conventions, including the 1982 United Nations Convention on the Law of the Sea⁴¹ (UNCLOS), the Convention on Biological Diversity,⁴² the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals,⁴³ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora⁴⁴ (CITES). As examined further in section III of this article, the use of these treaties to

³⁷ *Shrimp*, at para. 129.

³⁸ See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., at 31. See also *Aegean Sea Continental Shelf Case* (1978) I.C.J. Rep., 3. The Appellate Body also quoted Jennings, Robert and Arthur Watts (eds) (1992): *Oppenheim's International Law* (9th edition, vol. I) (London: Longmans, p. 1282 and Jimenez de Arechaga, E. (1978-I): *International Law in the Past Third of a Century*, 159 *Recueil des Cours* 1, p. 49.

³⁹ *Tuna I*, at para. 4.9; *Salmon-Herring*, at para. 4.4; and *Gasoline* (Panel Report), at para. 6.36.

⁴⁰ *Shrimp*, at para. 129.

⁴¹ (Original footnote.) Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 *International Legal Materials* 1261 (hereinafter UNCLOS).

⁴² (Original footnote.) Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 *International Legal Materials* 818. Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.

⁴³ Convention on the Conservation of Migratory Species of Wild Animals, 29 August 1979, 19 I.L.M. 15.

⁴⁴ Convention on International Trade in Endangered Species of Wild Flora and Fauna, 3 March 1973, 27 U.S.T. 1087, T.I.A.S. No. 8247 (hereinafter CITES).

interpret WTO provisions raises a number of important questions about how non-WTO conventions and other rules of international law are used by panels and the Appellate Body to interpret WTO legal texts.

After determining that sea turtles were "exhaustible natural resources", the Appellate Body examined whether the US measure was sufficiently related to the policy goal of conserving these resources. Following an examination of the "general design and structure of the measure", the Appellate Body concluded that the measure "related to" the goal of conserving exhaustible natural resources as required by Article XX(g). The US measure exhibited a "means/ends relationship" with the legitimate policy of conserving an exhaustible and endangered species that was observably a close and real one.⁴⁵

Finally, the Appellate Body noted that the measures were made effective in conjunction with domestic regulations requiring the use of TEDs. Consequently, the US measure satisfied the requirements of Article XX(g).⁴⁶

Having decided that the measure satisfied the requirements of Article XX(g), the Appellate Body then proceeded to examine the compatibility of the US measure with the provisions of the chapeau. It reiterated that the purpose of the chapeau of Article XX is "generally the prevention of the abuse of the exceptions of Article XX".⁴⁷ The Appellate Body stated that there are three standards contained in the chapeau. First, the measure must not constitute *arbitrary* discrimination between countries where the same conditions prevail. Second, the measure must not constitute *unjustifiable* discrimination between countries where the same conditions prevail. Third, the measure must not constitute a disguised restriction on international trade.⁴⁸ In relation to the first two components, which can be read together, the Appellate Body noted that three elements must exist. One is that the application of the measure must result in *discrimination*, either between different exporting Members, or between exporting Members and the importing Member. Another is that the discrimination must be *arbitrary* or *unjustifiable* in character. Finally, this discrimination must occur *between countries where the same conditions prevail*.

In fact, the Appellate Body interpreted the wording of Article XX in a "purposive" manner, noting that when drafting the WTO Preamble, the negotiators repeated the wording of the preamble of the GATT 1947, but added a reference to sustainable development. The Appellate Body stated:

⁴⁵ See *Shrimp*, at para. 135: "Article XX(g) requires that the measure sought to be justified be one which 'relat[es] to' the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources." *Id.* at para. 140: "This requirement is in our view directly connected with the policy of conservation of sea turtles." *Id.*, at para. 141: "In [its] general design and structure, the measure is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtles. The means are, in principle, reasonably related to the ends."

⁴⁶ *Shrimp*, at para. 145.

⁴⁷ *Shrimp*, at para. 150.

⁴⁸ *Shrimp*, at para. 150.

"Those negotiators evidently believed, however, that the objective of 'full use of the resources of the world' set forth in the Preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990s. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words: ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development ..."⁴⁹

The Appellate Body continued:

"We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preamble language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble."⁵⁰

We also note that since this preamble language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the CTE)." (Emphasis as original.)⁵¹

After identifying the preamble reference to sustainable development as relevant to its interpretation of Article XX, the Appellate Body went on to examine the specific terms of Article XX. In its analysis, it continued and further developed its approach in *Gasoline* by requiring a balance to be struck between the violation of GATT/WTO rules on market access, and the right for a country to take measures for the protection of its environment:

"Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a *balance of rights and obligations* between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. ... The chapeau was installed at the head of the list of 'General Exceptions' in Article XX to prevent such far-reaching consequences." (Emphasis added.)⁵²

⁴⁹ *Shrimp*, at para. 150.

⁵⁰ *Shrimp*, at para. 153.

⁵¹ *Shrimp*, at para. 154.

⁵² *Shrimp*, at para. 156. Some parallels could be drawn with the international law principle of "proportionality" (see section V, below).

In light of this "balancing test", the Appellate Body referred to a line of "equilibrium" that must be drawn when examining a measure under the chapeau:

"The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of *equilibrium* between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ." (Emphasis as original).⁵³

After examining the US measure under Article XX(g), the Appellate Body continued to review the measure under the Article XX chapeau. After noting that the chapeau "projects both procedural and substantive requirements", it went on to determine that the measure was applied in a manner that caused both arbitrary and unjustifiable discrimination. A number of factors were identified to support this conclusion. First, the measure failed to provide exporting countries with sufficient *flexibility*:

"Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement programme) as that applied to, and enforced on, United States domestic shrimp trawlers. As enacted by the US Congress, the *statutory* provisions of the US regulation do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries. However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.⁵⁴

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.⁵⁵

In other words, shrimp caught using methods identical to those employed in the United States have been excluded from the United States' market solely because they have been caught in waters of countries that have not been certified by the United States. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as

⁵³ *Shrimp*, at para. 159.

⁵⁴ *Shrimp*, at para. 161.

⁵⁵ *Shrimp*, at para. 164.

that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differentially situated."⁵⁶ (Emphasis added.)

Second, the Appellate Body noted that the United States failed:

"to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members."⁵⁷

Here, the Appellate Body noted that the United States had negotiated and concluded a regional agreement for the conservation of sea turtles—the Inter-American Convention. This, according to the Appellate Body, provided convincing evidence that an alternative course of action was "reasonably open" to the United States for securing the legitimate policy objective of its measure:

"The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention together marked out the equilibrium line to which we referred earlier. The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programmes for the conservation of sea turtles. Moreover, the Inter-American Convention emphasizes the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the *WTO Agreement* generally, in maintaining the balance of rights and obligations under the *WTO Agreement* among the signatories of that Convention."⁵⁸

The Inter-American Convention thus provides a convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest 'weapon' in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve co-operative efforts to protect and conserve sea turtles⁵⁹ before imposing the import ban." (Emphasis added.)⁶⁰

Third, the United States had negotiated seriously with some Members but not with others that export shrimp to the United States. This fact was regarded by the Appellate Body as "plainly discriminatory and, in our view, unjustifiable".⁶¹

⁵⁶ *Shrimp*, at para. 165.

⁵⁷ *Shrimp*, at para. 166.

⁵⁸ *Shrimp*, at para. 170.

⁵⁹ (Original footnote.) While the United States is a party to CITES, it did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by States. In this context, we note that the United States, for example, has not signed the Convention on the Conservation of Migratory Species of Wild Animals or UNCLOS, and has not ratified the Convention on Biological Diversity.

⁶⁰ *Shrimp*, at para. 171.

⁶¹ *Shrimp*, at para. 172.

Finally, the Appellate Body noted that the United States only offered the appellees four months to implement the TEID requirement, whereas other countries in the Caribbean and Western Atlantic area had been given a longer period of time. Together, the Appellate Body noted, these differences in treatment constituted "unjustifiable discrimination".

In addition to this finding, the Appellate Body concluded that the US measure was applied in a way that caused "arbitrary discrimination". It cited "rigidity and inflexibility" in the US certification process,⁶² the lack of "formal written, reasoned decisions",⁶³ and a denial of "basic fairness and due process"⁶⁴ as justification for this result.

D. CONCLUSION

These two decisions, *Gasoline* and *Shrimp*, mark a step forward by the WTO Appellate Body in addressing the relationship between trade and environment policies in WTO dispute settlement. It can be said now that Article XX's requirement that a reasonable balance be struck between Members' market access rights and the right of Members to take measures pursuant to other policies that may clash with market access⁶⁵ is a recognition that the GATT/WTO subsumes a need to ensure coherence between different State policies. This necessity to resolve tensions between trade and other policies must also be examined in the light of the general international law principle against conflicts of laws and thus in pursuance of greater coherence amongst systems of laws.

From a trade and environment perspective, regardless of whether the Appellate Body's approaches in *Gasoline* and *Shrimp* are welcomed by WTO Members, it is now open to the membership to define which measures are permitted as valid environmental actions, and which actions should be prohibited as disguised protectionism pursuant to Article XX. The Appellate Body noted that the chapeau suggests both procedural and substantive elements. However, as a practical matter, the Appellate Body provided governments with little guidance about what is required before a measure will pass Article XX. What kinds of PPM-based measures are permitted under Article XX? To what extent, for example, must WTO Members engage in multilateral discussions, provide financial and technical assistance or exhaust other options before implementing trade sanctions? What kinds of special efforts must be made to protect the rights of developing countries? What other disciplines should be placed on unilateral action to ensure that powerful countries do not use it as a way of transferring the cost of environmental protection to the weaker members of the international community of nations?

⁶² *Shrimp*, at para. 177.

⁶³ *Shrimp*, at para. 180.

⁶⁴ *Shrimp*, at para. 181.

⁶⁵ The need to ensure that those exceptions are applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. *Gasoline*, at p. 22.

Clearly, further accommodation of environmental measures in the WTO is possible without undermining its open, non-discriminatory character. The Appellate Body's concept of a "line of equilibrium" is an important one as it reinforces the need for a careful balance to be struck between WTO obligations and the right of WTO Members to pursue other policies. However, defining the "line of equilibrium" is no easy task. The challenge in future cases will be to establish this balance in a way that promotes multilateral co-operation, predictability and the rule of law, and that ensures the coherence of trade and other policies. It must balance the urgent need for action to address environmental problems and the obligation to maintain and increase trade opportunities, in particular for developing countries. It must also promote international co-operative action and ensure that developed countries, when seeking to address international environmental problems, honour their commitment to assume obligations of common but differentiated responsibility.

As noted in section III, in the absence of any new WTO provisions, this line of equilibrium will be established on an *ad hoc* basis by the practice of States, and the decisions of Panels and the Appellate Body through the development of rules on a case-by-case basis. Alternatively, as noted in section IV, WTO Members can introduce greater clarity about how the rules of the multilateral trading system and other systems of law and policy can be reconciled by interpreting or amending WTO rules, or adopting new agreements.

III. THE CHALLENGE TO THE WTO DISPUTE SETTLEMENT MECHANISM IN THE EVENT MEMBERS TAKE NO FURTHER ACTION TO ADDRESS TRADE AND ENVIRONMENT ISSUES

The potential for clashes between trade and environment policies and other policies undermines the predictability and stability of international relations in both trade and environmental fora. Yet even if Members are unable to agree on how to reconcile tensions between trade and environment policies, either at the CTE or future negotiations, the WTO dispute settlement mechanism must continue to "cope" with environment-related disputes using existing WTO provisions.

In the absence of negotiated guidelines or other measures to reconcile these tensions, WTO Panels and the Appellate Body will probably develop rules on a case-by-case application of Article XX and the other environmental provisions in the WTO. The issue, then, is how Article XX and other environmental provisions within the WTO system should, or will, be interpreted and applied to strike a balance (an equilibrium line) between competing trade and environment policy goals in order to maximize their joint contribution to the sustainable development of WTO Members? In undertaking this task, which legal principles and instruments could be used to guide the interpretation of Article XX and to assess the WTO-compatibility of trade measures used to achieve environmental goals?

This section addresses the issue by examining the nature of the WTO system and the extent to which Panels and the Appellate Body may use outside sources of law to resolve

this tension. The starting point in this analysis is to note that there exists a spectrum of views about the extent to which the WTO system is, and should be, integrated into the broader body of international law. At one end of this spectrum is the view that the WTO and its dispute settlement system is essentially a closed system that is independent of public international law rules and principles. This view is critical of the Appellate Body's use of outside legal rules and obligations to interpret the WTO texts. At the other end of the spectrum is the view that the WTO dispute settlement system is essentially a court of "general jurisdiction" that may enforce a variety of legal rights and obligations in addition to those specifically set out in the WTO agreements. Between these poles, lies the approach suggested in this article. While non-WTO legal rules may be used when interpreting and applying WTO provisions, the specific and circumscribed mandate and jurisdiction of WTO adjudicating bodies does not extend so far as to permit them to enforce independent rights and obligations embodied in public international law.

Here, we will make a distinction between three types of WTO situations. First, are the WTO "covered agreements", which must be applied and enforced by WTO adjudicating bodies. Second, are legal rights and obligations that are formed outside the WTO system, but that are *explicitly referenced* within the WTO texts. Depending on the wording of the reference, these may be either enforced as part of the covered agreements or used as a necessary tool of interpretation by WTO adjudicating bodies. Third, are all other international rules that, according to customary rules of interpretation, may, and in certain cases must, be used to interpret WTO provisions. This article examines a number of recent Appellate Body decisions, the Vienna Convention's customary rules of interpretation and other principles of public international law to interpret WTO obligations. Finally, we also examine whether non-WTO rules could be used as evidence that WTO obligations have as a factual matter been complied with.

A. THE WTO IS NOT A CLOSED SYSTEM

It is clear from the provisions of the DSU and from existing WTO jurisprudence that the WTO is not a closed system that is impervious to other sources of international law. A number of factors support this conclusion. First, the existence of environmental, health, social, security and other exceptions to WTO obligations links the WTO with other systems of law and policy. That exceptions such as Article XX fail to provide Members, Panels and the Appellate Body with detailed criteria for judging trade and environment disputes does not permit them to avoid their responsibility to adjudicate.⁶⁶ As recognized by the Appellate Body in *Shrimp*:

⁶⁶ See Bourgeois, J. (1998): *WTO Dispute Settlement in the Field of Anti-Dumping Law*, *Journal of International Economic Law* 1 (1998) 259, at 271. As noted by Jacques Bourgeois, a distinction here must be made between concepts that were left vague by WTO negotiators and those that were left unregulated. Only the latter would permit a Panel or the Appellate Body to refuse jurisdiction on the basis of a *non-liquet* (i.e. issue not accessible to legal adjudication due to the absence of law on the matter or for other reasons such as political impediment). The existence of Article XX, and of environmental exceptions elsewhere in the WTO agreements, implies that Panels and the Appellate Body are charged with a duty to entertain trade and environment disputes, even in the presence of significant uncertainty about how the relevant WTO provisions apply. See also Trachman, Joel (1999): *The Domain of WTO Dispute Resolution*, 1999 *Harvard International Law Journal* (September).

"Pending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and *in the absence up to now* of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the WTO Agreement generally, *we must fulfill our responsibility in this specific case*, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX."⁶⁷ (Emphasis added.)

Obligated to adjudicate disputes, even when involving the interpretation of the most obscure provisions of the WTO Agreement, and to do so in an "objective manner" (Article 11 of the DSU), Panels and the Appellate Body have no alternative other than to look for information that will lead them to the reasonable and objective meaning of the terms of the treaty that they must ultimately interpret, apply and enforce. The scarcity of information within the WTO Agreement, such as when dealing with environment issues, necessarily obliges the honest and objective interpreter to take into account any relevant information, even outside the WTO provisions themselves.

Second, as noted already, Article 3.2 of the DSU requires the WTO agreements to be interpreted in light of customary rules of interpretation, and the Appellate Body has stated that these agreements must not be interpreted in clinical isolation of public international law. This reference to the massive body of rules existing in public international law cannot be denied.

Third, it can be argued that Article 31 of the Vienna Convention, as discussed below, in certain cases *requires* any interpretative body, such as Panels and the Appellate Body, to use or to take into account outside legal materials when interpreting WTO obligations.

Fourth, the WTO Agreement Preamble commits WTO Members to the "optimal use of the world's resources in accordance with the objectives of sustainable development". The objective of sustainable development can only be understood in light of contemporary law and policy that defines and supports this goal. In this context, it may be worth noting the Marrakesh Decision on Trade and Environment where WTO Members took note of the Rio Declaration on Environment and Development and which provides parameters for the concept of sustainable development.

It is also worth recalling the statement of the International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.⁶⁸

"53. ... The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

⁶⁷ *Shrimp*, at para. 155.

⁶⁸ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J., 25 September 1997. For an analysis of that I.C.J. case, see Boyle, Allan (1997): *The Gabčíkovo-Nagymaros Case: New Law in Old Bottle*, Yearbook of International Environmental Law, vol. 8, pp. 13-20.

'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.' (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, para. 29.)

140. ... Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. *Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*" (Emphasis added.)

Finally, if interpreted and developed in isolation from the rest of international law, the WTO would risk formal "conflicts" with other international rules, contrary to the general international law presumption against conflicts and for effective interpretation of treaties. It seems clear that this first approach cannot be sustained.

B. THE WTO IS NOT A COURT OF GENERAL JURISDICTION

While it is clear that the WTO is not impermeable to other legal rights and obligations, the extent to which these may be applied within the WTO system is less clear. Do WTO panels and the Appellate Body have the remit to *enforce* rules arising outside the boundaries defined by the WTO agreements?

Public international law embodies a rich array of legal rules and principles. It has been argued that a variety of these provide "sources of law" that may be applied by Panels and the Appellate Body when adjudicating WTO disputes. Palmeter and Mavroidis have argued⁶⁹ that Article 7 of the DSU substitutes, *mutatis mutandis*, Article 38 of the Statute of the International Court of Justice. Consequently they argue that—in addition to WTO texts, Panel and Appellate Body reports—custom, the writings of publicists, general principles of law, and other international instruments may be applied by the WTO dispute settlement system which is not a self-contained regime.⁷⁰

While this approach would provide a strong link between the WTO system and the broader body of international law, it threatens, if unqualified, to turn the WTO

⁶⁹ Palmeter, David and Petros Mavroidis (1998): *The WTO Legal System: Sources of Law*, A.J.I.L., vol. 92, no. 3, 398.

⁷⁰ Schoenbaum, Thomas (1998): *WTO Dispute Settlement: Praises and Suggestions for Reform*, I.C.L.Q. vol. 47, p. 647 maintains a similar position and argues that Art. 19 of the DSU contains an "implied powers clause which should be interpreted broadly so that the Panels and Appellate Body can decide all aspects of a case". On the other hand, Trachman, Joel (1999): *The Domain of WTO Dispute Resolution*, 1999 Harvard International Law Journal (September) argues that Panels and the Appellate Body cannot apply and enforce non-WTO provisions except those referred to in the TRIPS Agreement and in waivers. Although this author agrees with the general statement of Trachman, she would suggest that his classification and isolation of waivers and disputes involving TRIPS may not be complete.

into a court of general jurisdiction like the International Court of Justice. This result would seem difficult to reconcile with the precise language of the DSU, with existing Appellate Body decisions, and with sound policy-making.

Both Article 7 and Article 11 of the DSU suggest that the WTO dispute settlement system has a limited mandate. Article 7 provides:

"Terms of Reference of Panels"

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the Panel:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

2. Panels shall address the relevant provisions in *any covered agreement or agreements* cited by the parties to the dispute." (Emphasis added.)

Article 7(2) seems to limit a panel's terms of reference to the "covered agreements", which are defined in Annex I of the DSU to include only the WTO agreements.⁷¹

Article 11 of the DSU also suggests a limited jurisdiction for Panels. It requires a Panel to:

"make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and 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.)

It seems, therefore, that under the DSU not all sources of law may be applied or enforced by WTO adjudicating bodies.⁷² Moreover, two countries, not Members of the WTO cannot simply agree to bring their case before a WTO Panel, as they could before the International Court of Justice, for instance. The WTO dispute settlement mechanism is limited to disputes involving full Members of the WTO. And even in cases between WTO Members, these countries could not agree between themselves to vest a WTO panel with the authority to examine non-WTO matters.

The limited jurisdiction of WTO adjudicating bodies can be argued to have been confirmed in recent Appellate Body decisions. In *Poultry*, Brazil claimed that the European Communities had not provided it with the full allocation of a tariff quota on frozen chicken imports, contrary to obligations under the EC schedules and their bilateral "Oilseeds Agreement". Here, the Appellate Body acknowledged that the Oilseeds Agreement was not "applicable law" and, thus, could not be enforced by WTO dispute settlement mechanism. It stated:

⁷¹ The text in French is even more clear because it repeats "accords visés" twice.

⁷² See also, Trachman, Joel (1999): *The Domain of WTO Dispute Resolution*, Harvard International Law Journal (September).

"In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the *Vienna Convention* As such, it [the Schedule of the EC] forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC—Oilseeds*. As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*, the Oilseeds Agreement is not one of those legal instruments.⁷³ It is Schedule LXXX, rather than the Oilseeds Agreement, which contains the relevant obligations of the European Communities under the *WTO Agreement*. Therefore, it is Schedule LXXX, rather than the Oilseeds Agreement, which forms the legal basis for this dispute and which must be interpreted in accordance with 'customary rules of interpretation of public international law' under Article 3.2 of the DSU."⁷⁴

This seems to provide that even agreements negotiated under the auspices of the WTO Agreement, such as those negotiated under Article XXVIII of the GATT, remain useful tools of interpretation but as such cannot be *enforced* by any WTO adjudicating body (unless, as discussed below, the WTO provision explicitly provides otherwise).⁷⁵

Finally, sound policy mitigates against permitting WTO Panels and the Appellate Body to enforce outside obligations. While the WTO should ensure that its interpretation and application of WTO rules are consistent with public international law, permitting it to enforce outside rules by providing remedies for breach of public international law would threaten to overload the multilateral trading system. Further, it may avert focus from the need to improve dispute resolution and enforcement in other sub-systems of international law, such as the Multilateral Environmental Agreements.

⁷³ *Poultry*, at para. 79.

⁷⁴ *Poultry*, at para. 81. The Appellate Body continued and stated that such an Oilseed Agreement could be used pursuant to Art. 32 of the *Vienna Convention*, as part of the circumstances of the negotiation of the Schedule. It should be noted that the arbitrators in the *Hormones* Arbitration Report (para. 51, WT/DS26/ARB) under Art. 22 of the DSU considered that based on Art. 30 of the *Vienna Convention* the only applicable provisions were those of the Schedules of the WTO Agreement and not the text of the bilateral agreement between the EC and the United States. We discuss briefly below what could be argued to be the scope of the expression "principles of interpretation of public international law" referred to in Art. 3.2 of the DSU. Interesting questions remain as to the legal nature of many documents negotiated under the auspices of the GATT. The "Modalities Paper" is not explicitly referenced in the WTO Agreement on Agriculture or in Members' Schedules. A different situation appears to exist with the "Telecom Reference Paper", which is cited in some Members' Schedules.

⁷⁵ See the ruling of the Chairman in *United States—Margin of Preferences*, 9 August 1949, BISD II/11 to the effect that a bilateral agreement cannot be enforced by a GATT Panel. The issue of the WTO compatibility of a regional trade agreement with WTO provisions, including Art. XXIV, is not really different as, should Panels have wide jurisdiction to assess the overall compatibility of regional trade agreements, they would still be examining whether a Member's specific measure or its regional trade agreement with other Members is compatible with the WTO agreements, taking into account the possible exceptions authorized by Art. XXIV. In all cases, Panels would not be "enforcing" the provisions of the regional trade agreement, something that could be done by the parties to the regional trade agreement only pursuant to the dispute settlement procedures of the regional trade agreement itself. On the relationship between the dispute settlement procedures under regional trade agreements and that of the GATT or the WTO, see Marceau, Gabrielle (1997): *Dispute Settlement Mechanisms—Regional or Multilateral Agreement: Which One is Better?*, J.W.T., vol. 21, no. 3, p. 169.

Rather than overloading the WTO trading system, it is necessary to define carefully the respective competence of different legal systems, invest the political capital required to build effective dispute resolution in those systems that lack it, and to explicitly define integrated guidelines, both procedural and substantive, to deal with the linkages.

While we suggest that the WTO should not enforce non-WTO rules independently,⁷⁶ it may, in certain cases, enforce outside sources of law where these are explicitly referenced in the WTO texts and when such action is mandated by the terms of the WTO provisions; they would, however, be enforced through WTO provisions.

The use of outside law (non-WTO) will depend on the terms of the WTO provisions at issue. Numerous references to outside rules and standards can be found in the WTO agreements.⁷⁷ In some cases, the WTO provision should be interpreted as requiring the outside obligation to be enforced within the WTO system; in others, the outside provision will merely provide interpretive material that must be used by WTO adjudicating bodies when enforcing another WTO obligation.

The TRIPS Agreement, for example, incorporates into its text, obligations arising in a series of pre-existing intellectual property treaties.⁷⁸ Article 2 states "[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19 of the Paris Convention (1967)". The provisions of the Paris Convention, and the rights and obligations arising there, thus, have been explicitly cited in the TRIPS Agreement as WTO obligations. Incorporated into the fabric of the TRIPS Agreement, Panels and the Appellate Body would apply these provisions, but through the WTO provisions or as WTO obligations.⁷⁹

This latter situation may be contrasted with one in which, rather than incorporating an obligation from an outside agreement into the text of a WTO agreement, an outside obligation is explicitly referenced to define or delimit an obligation whose locus is within a WTO agreement. This is often the case when

⁷⁶ However, see below the brief discussion on non-violation complaints.

⁷⁷ For instance, the TBT Agreement requires consideration of international standards and conformity assessment systems defined by the ISO and other organizations. The SPS Agreement refers to standards set by the Codex Alimentarius Commission, the International Office of Epizootics and organizations operating within the framework of the International Plant Protection Convention. The Agreement on the Interpretation of Art. VII of the GATT 1994 (Valuation Agreement) refers to the work of the World Customs Organization. Art. XX(h) of GATT refers to any intergovernmental commodity agreements. Art. XXI on security exception to the GATT refers to "obligations under the United Nations Charter for the maintenance of international peace and security". Palmetier and Mavroidis have argued that Annex 1(k) of the SCM Agreement also refers somewhat indirectly to the provisions of the Organisation for Economic Co-operation and Development (OECD) Arrangement on Guidelines for Officially Supported Export Credits. See *The WTO Legal System: Sources of Law*, A.J.I.L. vol. 92, p. 398 (1998).

⁷⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement).

⁷⁹ It is interesting to note for instance that the request for consultations by the European Communities against the United States in the dispute *United States—Section 211 Omnibus Appropriations Act of 1998* (WT/DS176) provides that: "The European Communities and their Member States consider that Section 211 United States Omnibus Appropriations Act is not in conformity with the United States of America's obligations under the TRIPS Agreement, notably its Article 2 in conjunction with the Paris Convention, Article 3, Article 4, Articles 15 to 21, Article 41, Article 42 and Article 62." Another type of drafting is that used by the European Communities in the dispute *United States—Section 110(5) of US Copyright Act* (WT/DS160/5) where a Panel was requested to "to find that the United States of America fails to conform to the obligations contained in the TRIPS Agreement, including, but not limited to, Article 9(1) of the TRIPS Agreement". Art. 9 of the TRIPS Agreement obliges Members to comply with Arts. 1–21 of the Berne Convention.

pursuant to Article IX of the Agreement Establishing the WTO, Members adopt a waiver which will then refer to another outside treaty (or set of obligations) to justify or explain the purpose, object and scope of the WTO waiver. This situation arose in *Bananas III*,⁸⁰ where the Panel and Appellate Body examined the Lomé Convention to determine the scope of a Lomé waiver granted to the European Community from certain of its obligations under the GATT 1947. Here, the Appellate Body upheld the Panel's statement that:

"since the GATT contracting parties incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, *we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.*"⁸¹ (Emphasis added.)

As the Lomé waiver referred to the Lomé Convention, the Panel and the Appellate Body were obligated to examine the Convention in order to determine the scope of the Lomé waiver. The Panel and the Appellate Body did not, however, apply or enforce the provisions of the Lomé Convention itself, but used them to determine the scope of the WTO right included in the Lomé waiver.⁸²

Therefore, it is suggested that with regard to the use of non-WTO obligations, an important distinction seems to arise between the "application" (and enforcement) of WTO provisions and their "interpretation". Pursuant to Article 1 of the DSU, the DSU shall apply to disputes brought under the "covered agreements" listed in Annex 1 of the DSU. Pursuant to Article 7 of the DSU the mandate of panels is to examine claims made under any of the "covered agreements".⁸³ Therefore, it seems that under the DSU only provisions of the "covered agreements" can be the "applicable law" applied and enforced by Panels and the Appellate Body. The only jurisdiction of Panels and the Appellate Body is that defined in the DSU, because they are creations of the WTO and the DSU and they do not have any independent existence. Panels and the Appellate Body are not courts of potentially general jurisdiction.

⁸⁰ Appellate Body Report on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27 (hereinafter *Bananas III*).

⁸¹ *Bananas III* at para. 162.

⁸² After the initial draft of this article, the author was fortunate enough to receive a draft paper by Joel Trachtman for the *Harvard Journal of International Law* (see note 72, above). Although he does not develop this point in detail, Trachtman has challenged Palmeter and Mavroidis' position. He argues that, while *only* WTO law may be applied by Panels and the Appellate Body, they may refer to substantive non-WTO law where it is incorporated into WTO law by treaty language, as in the case of the TRIPS, or by waiver, as in the case of the Lomé waiver. It is unclear from Trachtman's analysis whether he considers these to be the only cases where non-WTO law is available. Arguably, in addition to waivers, other General Council Decisions may incorporate non-WTO law. Moreover, from his analysis it seems that he considers that in neither of these cases would the non-WTO law be "applicable" by WTO adjudicating bodies. He does not distinguish between the case of the TRIPS, in which the outside obligations may arguably be enforced, and the case of the Lomé waiver, where the outside obligations were merely used to interpret a right embodied in the waiver itself. In this author's opinion, at least in the case of direct incorporation such as in the TRIPS Agreement, the rights and obligations embodied in the cross-referenced treaty would be directly applicable by Panels and the Appellate Body as WTO obligations.

⁸³ Note what "Covered Agreements" would include pursuant to para. 1(b) of the GATT 1994 and to Art. XVI:1 of the Agreement Establishing the WTO as well as actions taken under the Agreement Establishing the WTO.

A last word of prudence may be said on the possibility of enforcing non-WTO rules and obligations through the application of the "non-violation claims", which allows a WTO Member to claim compensation from another Member for measures that do not violate GATT/WTO obligations. Some may see in this provision the possibility of asking Panels and the Appellate Body to adjudicate violation of obligations under international environmental treaties if such violations nullify the benefits accruing under the WTO Agreement. Under Article XXIII:1(b) and (c) of the GATT and Article 26 of the DSU, a Member may initiate dispute settlement procedures when the "application [by another Member] of any measure, whether in conflict with the provisions of this Agreement [non-violation complaints], or the existence of any other situation [situation complaints] nullify or impair the benefits accruing, directly or indirectly, to that Member under the WTO Agreement". Some may argue⁸⁴ that the non-respect of any international norm (even if the non respect of such norm would not constitute a violation of a WTO provision) could give rise to a right of compensation, should demonstrate that that non-respect of that norm nullifies or impairs that Member's benefits under the WTO in that sector.

Although the scope of non-violation (or situation) complaints appears to be very wide, the GATT case law has imposed stringent restrictions on their adjudication. For instance, in order to be compensated, such reproached behaviour should not have been reasonably expected at the time of the concerned Member's tariff negotiations in the sector for which nullification of benefits is claimed. In the first (*India*) *Patent case*, the Appellate Body stated that: "*In the absence of substantial legal rules in many areas relating to international trade, the 'non-violation' provision of Article XXIII:1(b) was aimed at preventing contracting parties from using non-tariff barriers or other policy measures to negate the benefits of negotiated tariffs*".⁸⁵ (Emphasis added.) Therefore, it is doubtful that WTO Members could easily require the WTO adjudicating bodies to assess the effects of alleged violations of rules not negotiated in the WTO forum such as environmental norms, through the "back-door" use of the old non-violation claims.

Therefore, as a general rule, only WTO rights and obligations can constitute the applicable law and be enforced before WTO adjudicating bodies and these WTO provisions are those identified in the covered agreements.⁸⁶ However, even if not applied or enforced, and therefore not strictly a source of WTO obligation, non-WTO treaties, practices, customs and general principles of law may be relevant in the interpretation of WTO provisions and, therefore, can become fairly influential in defining the parameters and the content of WTO obligations.

⁸⁴ See, for instance, Schoenbaum, Thomas (1997): *WTO Dispute Settlement: Praise and Suggestions for Reform*, I.C.L.Q., vol. 47, p. 647.

⁸⁵ Appellate Body Report on *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WTDS50/AR), adopted 16 January 1998, at para. 41.

⁸⁶ It should be noted that accession protocols are an integral part of the WTO Agreement.

The following section examines under which circumstances and which type of non-WTO provisions may be used and, sometimes, must be taken into account, to assist the interpretation of the WTO agreements.

C. WTO ADJUDICATING BODIES CAN USE NON-WTO LEGAL RIGHTS AND OBLIGATIONS TO INTERPRET WTO PROVISIONS (AND SOMETIMES MUST TAKE THEM INTO ACCOUNT)

As noted above, Panels and the Appellate Body will be required to examine outside sources of law where they are expressly used to define or delimit a WTO obligation—as was the case with the Lomé waiver in *Bananas III* or with the many other references to non-WTO provisions such as in the TBT and the SPS Agreements⁸⁷ or the GATS,⁸⁸ when referring to international standards bodies and norms.⁸⁹ International norms and standards referred to in the TBT, the SPS Agreements or the GATS are to be used by Members as a “basis” for their own domestic norms and measures.⁹⁰ Therefore, the international standards are not applied or enforced by WTO adjudicating bodies, but are only used to assess the reasonableness of the domestic norms.⁹¹

Although it is suggested that they cannot enforce non-WTO rules independently, WTO adjudicating bodies must, in a number of situations, use other rules of international law to assist them when interpreting and applying the WTO agreements.

1. Customary Rules of Interpretation of Public International Law

Panels and the Appellate Body are required by Article 3.2 of the DSU to use “customary rules of interpretation of public international law” to interpret the provisions of the WTO agreements. What are those customary rules of interpretation of public international law?

In *Gasoline* the Appellate Body stated that “customary rules of interpretation” would include Article 31 of the Vienna Convention on the Interpretation of Treaties, which “has attained the status of a rule of customary or general international law”.⁹² In subsequent cases, including *Japan—Alcoholic Beverages*, *Poultry* and *Computer Equipment*,

⁸⁷ Art. 3.2 of the SPS Agreement and Art. 2.4 of the TBT Agreement.

⁸⁸ Art. VI:5(b) of the GATS.

⁸⁹ For a list of examples where WTO agreements refer to non-WTO material, see note 74, above.

⁹⁰ See the wording of the provisions in question and the statement of the Appellate Body in *Hormones*, para. 160/168 with regard to the relevance of international standards.

⁹¹ As mentioned above, the situation of the TRIPS Agreement is different. In the case of the TRIPS Agreement the outside norms (the various intellectual property treaties referred to in the TRIPS Agreement) are enforced by WTO adjudicating bodies as WTO obligations, pursuant to the prescriptions of the TRIPS provisions. For instance, Art. 2.1 of the TRIPS: “Members shall comply with Articles 1 through 12 ... of the Paris Convention ...”

⁹² *Gasoline*, at p. 17.



the Appellate Body confirmed that Articles 31 and 32 of the Vienna Convention⁹³ were relevant when interpreting the WTO agreements.⁹⁴

It is yet not clear which other provisions of the Vienna Convention could be considered public international law customary rules of interpretation. Strictly speaking, in the Vienna Convention, the provisions on the interpretation of treaties are mentioned in Articles 31, 32 and 33. The other provisions of the Vienna Convention refer to other aspects of the performance of treaties. However, and this point will be further developed in the sections below, it is suggested that, when interpreting a treaty, Panels and the Appellate Body are obliged (Article 31.3(c) of the Vienna Convention) to take into account all other rules of international law. This would include many customs, general principles of laws and treaties, including provisions of the Vienna Convention in certain circumstances. For instance, the Appellate Body in *Desiccated Coconut*⁹⁵ and the Panel in *Hormones*⁹⁶ referred to Article 28 of the Vienna Convention against the retroactive application of treaties. In *Poultry*, the Appellate Body declined to use Article 30 on successive application of treaties.⁹⁷ However, in the *Hormones* Arbitration Report on Article 22.7 of the DSU, the arbitrators made use of Article 30 of the Vienna Convention on the successive application of treaties.⁹⁸

In addition to the provisions contained in the Vienna Convention, the Panels and the Appellate Body have also referred to some general principles of interpretation, such

⁹³ In full, Arts 31 and 32 provide:

"Article 31: General Rule of Interpretation

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

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

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

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

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

Article 32: Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

⁹⁴ Appellate Body Report on *Japan—Taxes on Alcoholic Beverages*, adopted 1 November 1996 (WT/DS8, 10, 11) (*Japan—Alcoholic Beverages*), at pp. 11–12; *Poultry*, at para. 26; *Computer Equipment*, at para. 84.

⁹⁵ *Brazil—Measures Affecting Desiccated Coconut*, adopted 20 March 1997 (WT/DS22/AB), at p. 15.

⁹⁶ *Hormones*, US Panel Report, para. 8.25 and Canada Panel Report, para. 8.28. The Panel Report was upheld on this issue.

⁹⁷ *Poultry*, at para. 79.

⁹⁸ *Hormones* Arbitration Report (WT/DS26/AB/R), 12 July 1999.

as the principle of effective interpretation,⁹⁹ the presumption against conflicts¹⁰⁰ and the interpretative principle of *in dubio mitius*.¹⁰¹

What, then, are the implications for Panels and the Appellate Body to be obliged to respect such customary rules of interpretation, in particular those rules mentioned in Articles 31 and 32 of the Vienna Convention, when interpreting the WTO agreements?

2. *The Use of Articles 31 and 32 of the Vienna Convention*

Article 31.1 of the Vienna Convention provides the basic rule of treaty interpretation and is evidence of customary international law on the interpretation of treaties. It requires the WTO Agreement, as any other treaty, to be interpreted according to the ordinary meaning of their text, read in context, and in light of the object and purpose of the agreements. Article 31.2 explores what can be considered as "context". Article 31.3 refers to actions taken by the parties, following the conclusion of the treaty. And Article 31.3(c) extends further, requiring consideration of, *inter alia*, "any relevant rules of international law applicable in the relations between the parties". Arguably, this provision aims to promote "coherence" in the interpretation of treaty obligations, so that the treaty and other relevant international law rules are interpreted in a way that is mutually supportive and avoids conflict, in compliance with the international law presumption against conflicts. The use of this provision of Article 31.3(c) is discussed further in the next section.

Article 32, in turn, provides rules of interpretation to be applied to support the interpretation resulting from the application of Article 31 or where the procedures under Article 31 provide an unsatisfactory interpretation.

Together, Articles 31 and 32 of the Vienna Convention offer the following six bases for any objective interpreter such as Panels and the Appellate Body to refer to outside legal principles and instruments when interpreting WTO provisions:

1. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty (forming part of the context, Article 31(2)(a));
2. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (forming part of the context, Article 31(2)(b));

⁹⁹ See, for instance, in *Gasoline*, as note 5, above, at p. 18: "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"; Appellate Body Report on *Japan—Alcoholic Beverages*—p. 12; Appellate Body Report on *United States—Restrictions on Imports of Cotton and Man-Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 16.

¹⁰⁰ *Guatemala—Anti-Dumping Investigation Regarding Portland Cement From Mexico*, adopted 25 November 1998, WT/DS60/AB/R. (*Guatemala—Cement*), para. 65. *Indonesia—Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998 (WT/DS54, 55, 59, 64), paras 14.28 ff.

¹⁰¹ *Hormones*, note 154:

"The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of States. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."

- 3.any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (to be taken into account together with the context, Article 31(3)(a));
- 4.any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (to be taken into account together with the context, Article 31(3)(b));
- 5.any relevant rules of international law applicable in the relations between the parties (to be taken into account together with the context, Article 31(3)(c));
- 6.supplementary means of interpretation including, for example, a legal instrument forming the "circumstances of the conclusion of the treaty under interpretation" (pursuant to Article 32).

So far, Panels and the Appellate Body have used a limited number of these bases to interpret WTO agreements, although they are not always explicit about which ones they are invoking. In *Computer Equipment*, for example, the United States claimed that the European Communities was not authorized to raise its bindings on certain computer items contrary to its tariff bindings and prior practice. The Appellate Body blamed the Panel for not having considered the International Convention on the Harmonized Commodity Description and Coding System and its Explanatory Notes, not a covered agreement of the WTO:¹⁰²

"We are puzzled by the fact that the Panel, in its effort to interpret the terms of Schedule LXXX, did not consider the Harmonized System and its Explanatory Notes. We note that during the Uruguay Round negotiations, *both the European Communities and the United States were parties to the Harmonized System* Neither the European Communities nor the United States argued before the Panel that the Harmonized System and its Explanatory Notes were relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the Harmonized System and its Explanatory Notes."¹⁰³ (Emphasis added.)

In its Report, the Appellate Body referred generally to Article 31 of the Vienna Convention, but did not make a reference to any specific sub-paragraph. There are references to the Harmonized System in Members' Schedules, so it could be argued that there is an explicit reference in the terms of the WTO provisions (the Schedules). Moreover, the provisions of Article 31.2(a) of the Vienna Convention referring to any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty (forming part of the context) would be relevant. In addition, it could be argued that Article 31.3(c) would also be relevant. The Appellate Body went on to state: "The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice

¹⁰² International Convention on the Harmonized Commodity Description and Coding System, done at Brussels, 14 June 1983.

¹⁰³ *Computer Equipment*, at para. 89.

of all parties.”¹⁰⁴ (Emphasis added.) In referring to past practice, Article 32 would be the applicable provision of the Vienna Convention, as it refers to circumstances surrounding the conclusion of the treaty. The Appellate Body also stated that the Panel should have examined the “subsequent practice” of the parties.¹⁰⁵ Subsequent practice must be considered by Panels and the Appellate Body under Article 31.3(b).

As noted already, in *Poultry*, the Appellate Body had to consider the relevance of a non-WTO agreement, i.e. a bilateral agreement concluded under the auspices of Article XXVIII of the GATT between the two WTO Members in dispute and which formed the basis of the tariff bindings at issue. The Appellate Body upheld the decision of the Panel to apply Brazil’s primary obligations under the WTO tariff bindings, and not those contained in the bilateral Oilseeds Agreement. The Oilseeds Agreement, however, was used to interpret the substantive WTO provisions, but only pursuant to the limited provision of Article 32 of the Vienna Convention, referring to the circumstances of the conclusion of the WTO treaty. The Appellate Body stated:

“We recognize that the Oilseeds Agreement was negotiated within the framework of Article XXVIII of the GATT 1947 with the authorization of the contracting parties and that both parties agree that the substance of the Oilseeds Agreement was the basis for the 15,500 tonne tariff-rate quota for frozen poultry meat that became a concession of the European Communities in the Uruguay Round set forth in Schedule LXXX. Therefore, in our view, the Oilseeds Agreement may serve as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat.” (Emphasis as original.)¹⁰⁶

As discussed further in the next section, it could be argued that that bilateral agreement should have been considered under the provisions of Article 31.2(a) of the Vienna Convention. Under certain circumstances, a bilateral agreement might also be considered under Article 31.3(c) of the Vienna Convention as “any relevant rules of international law applicable in the relations between the parties”.

In *Shrimp*, the Appellate Body used a variety of non-WTO international rules to interpret WTO provisions. As noted above in section II, the Appellate Body examined the use of the term “natural resources” in a number of international conventions.¹⁰⁷ It referred to other international conventions when assessing the meaning of sustainable development referred to in the Preamble of the WTO Agreement.¹⁰⁸ It referred to international (and regional) treaties when assessing whether the US measure had been applied in unjustifiable discrimination, in particular with reference to the way consultations had been conducted and ought to be conducted under other international convention.¹⁰⁹ This was something of an effort to trace practice of States under other international treaties (arguably pursuant to Articles 31.2(b) and Article 32

¹⁰⁴ *Computer Equipment*, at para. 93.

¹⁰⁵ *Computer Equipment*, at para. 90.

¹⁰⁶ *Poultry*, at para. 83.

¹⁰⁷ *Shrimp*, at paras 127–134.

¹⁰⁸ *Shrimp*, at para. 154.

¹⁰⁹ *Shrimp*, at paras 166–176.

of the Vienna Convention) with regard to the need to perform across the board consultations.

In this context, it is worth recalling that the Appellate Body acknowledged that the interpretation of a treaty can be affected by subsequent developments in international law, including, arguably, new customs, general principles of law and treaties.

Evolutionary interpretation

In *Shrimp*, when interpreting the term "exhaustible natural resources" in Article XX(g), the Appellate Body referred to a number of non-WTO sources of international law, after having noted that that concept had evolved. The Appellate Body stated:

"The words of Article XX(g), 'exhaustible natural resources' were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the Preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement*—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of sustainable development ...'.¹¹⁰

From the perspective embodied in the Preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'." (Emphasis as original.)¹¹¹

The "evolutionary interpretation" is often challenged as being in contradiction with the principle of *pacta sunt servanda* and contrary to the general rule that the intention of the parties at the time of the conclusion of the treaty should be the basis for interpretation. However, the provisions of the Vienna Convention itself recognize that events subsequent to the conclusion of a treaty may be relevant and affect the good faith interpretation of treaty provisions.

Although the ordinary meaning of a treaty's terms should reveal the common intention of the parties at the time of its conclusion, Paragraph 3 of Article 31 refers to events subsequent to the conclusion of the treaty, albeit considered to be authentic elements of interpretation. Paragraph 3(a) refers to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. Paragraph 3(b) of Article 31 refers to any subsequent practice which establishes the agreement of the parties regarding its interpretation. Then comes Article 31.3(c).

¹¹⁰ *Shrimp*, at para. 129.

¹¹¹ *Shrimp*, at para. 130. It is also worth recalling this passage from *Japan—Alcoholic Beverages*, at p. 34: "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind." See also the conclusion of the ECJ in *CICFIT* (Rec. 1982, p. 3415, at 3430): "Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied" (emphasis added).

The drafting history of Article 31.3(c) is interesting and explains the reasons why it can be argued that an interpreter may need to use an "evolutionary interpretation". As it is drafted today, Paragraph 3(c) of Article 31 refers to "any relevant rules of international law applicable in the relations between the parties". This reference used to appear in Paragraph 1 of the text adopted by the International Law Commission (ILC) in 1964, together with a reference to "in force at the time of its [the treaty] conclusion". When this provision was discussed at the sixteenth session, some members suggested that it failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and, therefore, it was inadequate.¹¹² After discussions, the ILC considered that the formula used was not necessary. It is reported that "[the ILC] considered that the correct application of the temporal element would normally be indicated by interpretation of the term in good faith". It was also decided to put the reference to "any other relevant rule of international law" in Paragraph 3 (dealing with subsequent events), thus leaving the door open for an interpretation that would take into account international law rules that take place after the conclusion of a treaty: the so-called "evolutive interpretation".

The International Court of Justice (ICJ) has also made use of such an "evolutionary" approach in some cases,¹¹³ including in the recent 25 September 1997 *Hungary/Slovakia* decision, where it stated: "Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law." In particular, in Paragraph 140, the ICJ stated:

"In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, *to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties* to maintain the quality of the water of the Danube and to protect nature Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities *but also when continuing with activities begun in the past*. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development." (Emphasis added.)¹¹⁴

Some authors also recognize that good faith interpretation may sometimes require the use of the evolutive interpretation. Sinclair, in the context of Article 31.3(c), stated that:

¹¹² *Yearbook of the International Law Commission*, 1966, Vol. II, p. 222.

¹¹³ See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep. 31. The ICJ stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case* (1978) I.C.J. Rep. 3; *Avis consultatif de la Cour Permanente de Justice concernant les décrets de nationalité promulgués en Tunisie et au Maroc*, Avis Consultatif, C.P.J. série B no. 4, p. 24. The Appellate Body also quoted: Jennings, Robert and Arthur Watts (eds) (1992): *Oppenheim's International Law* (9th edition), vol. I (London: Longmans), p. 1282, and E. Jimenez de Arechaga (1978-1): *International Law in the Past Third of a Century*, 159 *Recueil des Cours* 1, p. 49.

¹¹⁴ See also the word of prudence in the individual opinion by Judge Abjinooin and the need to use the evolutive interpretation within the application of Art. 31 of the Vienna Convention and the principle of *pacta sunt servanda*.

"[t]here is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as 'public policy' or 'the protection of morals.'"¹¹⁵

Boyle's interpretation of the *Hungary/Slovakia* ICJ case is also that the Court relied on some evolutive interpretation of the obligations of the parties:

"When dealing with international environmental law, the Court ... relied instead on cryptic references to new norms of international law concerned with the environment and 'set forth in a great number of instruments during the last two decades' (para. 40). One can only guess at the instruments that the Court had in mind, but they presumably included at least the Stockholm and Rio Declarations as well as the large body of environmental treaty law. It tells us much about the nature of contemporary international lawmaking that the Court seemed happy to treat a number of these new norms as law, that parties must take into account of, without further reference to state practice or authority."¹¹⁶

In the NAFTA context, an Arbitration Group recently concluded that the use of the term "GATT" in the cross-reference from the provisions of the FTA and NAFTA had to be interpreted to mean the GATT as it evolved into the WTO Agreement.¹¹⁷

Finally, it should be recalled that the conclusion of subsequent treaties relating to the subject-matter(s) covered by a previous treaty may be evidence of State practice, itself a source of interpretation pursuant to Article 31.3(b). As further developed below, it can be argued that such subsequent treaty shall also be taken into account pursuant to Article 31.3(c).

Despite these examples, the full extent to which Panels and the Appellate Body are required to use non-WTO rules to interpret the WTO agreements remains somewhat unclear. The identification of these rules and their parameters, to the extent not agreed by Members, will have to be determined by Panels and the Appellate Body on a case-by-case basis, by reference to doctrine, other tribunals' and expert assessments and the facts of each case.

The point is that in trade and environment cases, interpreters will be faced with the ambiguity and insufficiency of the terms of Article XX(b) and XX(g) and Article XX generally. Together with the WTO call for sustainable development in the Preamble to

¹¹⁵ Sinclair, Sir Ian (1984): *The Vienna Convention on the Law of Treaties* (2nd edition) (Manchester: Manchester University Press), at 139. See also Kamil Yassen, Mustafa (1973): *Interprétation des traités d'après la Convention de Vienne*, Recueil de Cours de Droit (La Haye), at page 67:

"18. ... Mais d'autres catégories [de traités] peuvent de par leur nature se prêter à une interprétation évolutive, notamment les traités normatifs qui énoncent des règles de droit ... Même écrites, les règles de droit ne sont pas à l'abri de l'évolution subséquente de l'ordre juridique dont elles font parties. 19. C'est surtout le cas des dispositions qui prévoient des notions évolutives par nature telles que l'ordre public ou les bonnes mœurs ... 20. Quant aux termes qui visent des concepts juridiques, c'est encore le traité qui en fait usage qui détermine si ces termes désignent un concept figé, immuable ou un concept évolutif. Il en est ainsi des termes 'mer territoriale', 'plateau continental', 'haute mer'. Il est donc possible qu'un traité permette d'interpréter l'un ou l'autre de ces termes qu'il emploie en fonction du droit international à l'époque de cette interprétation."

¹¹⁶ Boyle, Allan (1997): *The Gabcikovo-Nagymaros Case: New Law in Old Bottle*, Yearbook of International Environmental Law, vol. 8, pp. 13–20, at p. 14.

¹¹⁷ Arbitral Panel Established Pursuant to Art. 2008 of the North American Free Trade Agreement, Final Report: *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* (2 December 1996).

the WTO Agreement, an informed interpreter will be aware of the right of WTO Members to adopt certain non-abusive environmental policies that may affect other WTO Members' market access rights. Consequently, the objective interpreter may be required to take into account and use non-WTO provisions as they exist at the time of the interpretation in order to define the parameters of evolutive concepts such as "sustainable development" and measures "necessary for the protection of health", which will "add colour, texture and shading" to the interpretation of relevant WTO provisions. Although, arguably, this approach would be consistent with an effort to maintain a balance and some coherence between environment and trade actions, it does not offer much predictability! It leaves the assessment of this "line of equilibrium" to be done on a case-by-case basis. Inevitably, in the absence of Members' instructions to the contrary, WTO adjudicating bodies will be faced with arguments invoking the provisions of other international treaties. So how can Panels and the Appellate Body react to them?

3. *The Use of Article 31.3(c) to Assist in the Interpretation of WTO Agreements*

Article 31.3(c) of the Vienna Convention provides that: "There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties."

Several points can be made. First, the term "any relevant rule of international law" seems to provide a wide mandate to examine public international law. In *Shrimp*, the Appellate Body had already stated that its task was to "interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law".¹¹⁸ (Emphasis added.) In *Hormones*, the Panel stated: "To the extent that this principle [precautionary] could be considered as part of customary international law and be used to interpret Articles 5.1 and 5.2 ...".¹¹⁹ It can be argued that when interpreting WTO provisions, Panels and the Appellate Body are obliged to "take into account" a broad range of relevant rules of international law, including treaties, customary rules and general principles of international law, in fact, all sources of international law obligations as defined by Article 38 of the Statute of the ICJ.

Second, the relevance of such "rule of international law" would have to be decided. In the absence of further instructions from WTO Members, the determination of which rules are "relevant" would need to be made on a case-by-case basis, by examining criteria such as the subject of the dispute and the content (subject-matter) of the rules under consideration. The size of the membership of that non-WTO treaty cannot be the single decisive criterion. For instance, a treaty signed amongst a limited number of countries, say on the control of a specific disease that exists in only these countries, would remain "relevant" to a dispute that involves trade measures taken in the context of the control of that disease.

¹¹⁸ *Shrimp*, at para. 158.

¹¹⁹ Panel Report in *Hormones*, para. 8.157.

Another more sophisticated criterion, such as the *potential membership* of that non-WTO rule, may be preferred, as it will refer to a norm potentially accepted by the international community. In this context, it is worth noting that Article 3 of Annex 1 of the SPS Agreement, Articles 4 and 5 of the TBT Agreement and Article VI:5 of the GATS refer to standards developed in relevant international (or even regional) organizations as being those organizations whose membership is *open to all Members* of the WTO. One may conclude to different levels of relevance.

Third, after relevant rules have been identified, a question would then remain as to which of these are "applicable in the relations between the parties". How might this term limit the relevant rules that are available as interpretive material? There are at least three possible interpretations.

One narrow interpretation would read "parties" as meaning all WTO Members. In other words, for a non-WTO treaty to be used to interpret WTO obligations, it and the WTO agreement would require identical membership. This approach seems to have provided the basis for the *Tuna II* Panel's decision to exclude any consideration of CITES, because it was a multilateral agreement signed only by some of the parties to the GATT.¹²⁰ While this approach provides a conceptually clear rule, it suffers from a number of problems. It would greatly reduce the number of outside treaties and legal principles that could be used to interpret WTO obligations under Article 31.3(c). Few international agreements, if any, will have identical membership, although some may have a wider membership. Yet to request that such non-WTO treaty have at least the WTO membership would also create illogical situations. As WTO membership grows, fewer international agreements will match its membership. This would lead to the paradoxical result that the WTO, at least in theory, would become more isolated from other international systems of laws as its membership grows. In addition, there may be principles and provisions in an international treaty (with smaller membership) which have become a customary rule of international law binding on all countries, even if non-signatory to that treaty. Moreover, from a legal perspective, the "identical membership" approach (at the WTO membership) does not seem to be consistent with that adopted by the Appellate Body in *Shrimp*, which examined CITES and a number of other multilateral environmental agreements (MEAs), many of which did not have the same membership as the WTO.¹²¹

A second, broader interpretation of the terms "applicable in the relations between the parties" would allow the use of treaties between a smaller or different group—more than one WTO Member, but fewer than the whole WTO membership—to interpret WTO obligations. This interpretation is supported by the different usage of "parties" throughout Article 31 and in Article 31.3(c). Article 31.2(a) refers to "any

¹²⁰ *Tuna II*, at para. 5.19.

¹²¹ The Appellate Body did not specify which Art. 31 provision it relied on when using these international environmental agreements to interpret the Art. XX(g) term "exhaustible natural resources". However, these agreements could be characterized as "relevant rules on international law applicable in the relations between the parties" under Art. 31.3(c).

agreement relating to the treaty which was made between *all the parties*", and Article 31.2(b) refers to an instrument by "*one or more parties*" and accepted by "*the other parties*". Therefore, it could be argued that the use, without these qualifications, of "*the parties*" in Article 31.3(b) and (c) allows consideration of treaties signed by a subset of the WTO membership that contains fewer than all the parties, but more than one of the parties. An argument by Palmerer and Mavroidis also lends weight to this approach. They argue that "*the parties*" refers to the parties to a dispute.¹²² This position reinforces the view that Article 31.3(c) may be used where treaties have different membership. However, their approach, while illustrating their interpretation, can only be considered a partial one, as the Vienna Convention is not used exclusively in the case of disputes. A better approach is that "*parties*" may refer more generally to a subset of all the parties to the treaty under interpretation, i.e. the specific countries the relations of which are under examination in light of the treaty at issue.

The counter-argument to this latter proposition is that it is unacceptable that some WTO Members agree to alter their WTO obligations without the consent of the other Members (*pacta sunt servanda*), as the WTO Agreement is a multilateral agreement.

In response to this counter-argument, it should be emphasized that when an interpreter uses a non-WTO source of law, say a treaty between some WTO Members, it will do so for the purpose of interpreting the WTO provisions and not to enforce the provisions of that non-WTO treaty or to amend the WTO Agreement.¹²³

Therefore, it may be argued that in the case of a dispute between, say the United States and the European Communities, an interpreter may consider as relevant and effective, the provisions of another treaty to which the United States and the European Communities are party. This use of a bilateral treaty to help interpret the obligations of two WTO Members in dispute seems to be accepted by the Appellate Body. In *Computer Equipment*¹²⁴ the Appellate Body scolded the Panel for not having considered the provisions of the Harmonized System to which both the United States and the European Communities were party.¹²⁵

Third, it may be asked whether a treaty signed by only *one* of the parties to a dispute could be considered "*a relevant rule of international law applicable in the relations between the parties*"? Does the fact that one of the disputants is a non-party to the treaty affect the

¹²² Palmerer, David and Petros Mavroidis, *The WTO Legal System: Sources of Law*, A.J.I.L., vol. 92, no. 3, 398.

¹²³ Regarding the possibility of two Members amending the WTO Agreements amongst themselves only, reference should be made to Art. XI of the Agreement Establishing the WTO, which contains rules for its amendment. A question remains as to whether the provisions of Art. 41 of the Vienna Convention would still be of any use. Indeed, nothing in international law prohibits two parties to a treaty from amending the provisions of their treaty as between themselves only, as long as such amendment does not affect the rights and obligations of third countries parties to that same treaty. Art. 41 of the Vienna Convention provides that: "*Agreements to modify multilateral treaties between certain of the parties only: Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: ... (b) the modification in question is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.*" (Emphasis added.)

¹²⁴ *Computer Equipment*, para. 89.

¹²⁵ The Appellate Body also referred to non-WTO treaties with a differing membership from that of the WTO in *Poultry and Shrimp*.

use of the treaty in interpreting WTO obligations? The acceptance by one party of an outside treaty may provide some, albeit more limited, assistance in interpreting WTO obligations. Such an interpretation would necessitate a broad interpretation of "in the relations between" to require something less than strict legal application of the treaty to both the parties. While not being subject to specific legal obligations under the treaty, the treaty may be considered as "applying in the relations between" the parties because a non-party would still be directly affected by it.¹²⁶ For instance, in the case of a treaty that includes a trade ban against non-parties, it could be argued that the trade ban has application (or has an impact) in their "relations" without the non-party being subject to specific legal obligations. One may also consider the situation of an "objective regime" having an effect (and sometimes imposing obligations) on non-parties. This approach, while providing access to a broader source of interpretive material to encourage coherence in treaty interpretation, could be argued to unduly restrict the rights of non-parties to a non-WTO treaty. Why should countries that have declined to sign a treaty have their WTO obligations affected by it? At the same time, it can be argued that Article 31.3(c) only requires "relevant rules" to be "taken into account" and does not specify that these rules must be given a certain amount of weight. Panels and the Appellate Body would still retain the flexibility to use outside treaties on a case-by-case basis, giving them the weight they deserve in the circumstances of the dispute. This seems to have been the approach of the Appellate Body in *Shrimp*, when it used a number of MEAs, to which not all disputants were party, to interpret the term "exhaustible natural resources" in Article XX(g).¹²⁷ Nevertheless, an argument can be made for using an outside treaty to interpret WTO obligations. In *Computer Equipment*, the Appellate Body stated that "the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties".¹²⁸ (Emphasis in original.)

While the latter two approaches may allow recourse to a larger body of international law to interpret WTO obligations, the use of treaties with differing membership may result in different tools being used to interpret WTO obligations in disputes between different countries. A dispute between one set of parties may involve recourse to different relevant rules than a dispute between another set of parties when interpreting Article XX. For instance, in *Poultry*, the Appellate Body referred to the bilateral Oilseeds Agreement between the disputants, even though this agreement would not be applicable in a dispute on the same matter involving another WTO Member, even if the EC's tariff commitment was the same for all WTO Members.

One may argue that, in practice, the use of different tools will not pose problems because the extent of any differences in interpretation is unlikely to be significant, as

¹²⁶ Vienna Convention, Art. 26.

¹²⁷ *Shrimp*, at footnote 111. The Appellate Body examined the term "exhaustible natural resources" in light of both the Convention on Biological Diversity and the Convention on the Conservation of Migratory Species of Wild Animals. It noted, in relation to the former, that both Thailand and the United States had signed but not ratified the convention. It also noted, in relation to the latter, that India and Pakistan had ratified, but that Malaysia, Thailand and the United States are not parties to the convention. The Appellate Body did not explicitly refer to Art. 31.3(c).

¹²⁸ *Computer Equipment*, at para. 93.

the ordinary meaning of the words imposes boundaries on interpretive license. Moreover, to the extent that differences exist, these may be tolerated in the WTO system for a number of reasons. First, there is no "formal" WTO jurisprudence and reports are binding on the parties only.¹²⁹ Formal interpretations that are binding on all WTO Members are reserved exclusively to the whole membership through the General Council (Article IX of the WTO Agreement); interpretations by Panels and the Appellate Body do not have this universal application. Second, the purpose of the dispute settlement mechanism is to settle the dispute between the specific parties.¹³⁰

Finally, what must Panels and the Appellate Body do with these relevant rules of international law? Article 31.3(c) requires Panels and the Appellate Body to "take into account" any relevant rules. In other words, relevant rules must be *considered* by a treaty interpreter. This ensures that WTO obligations are clarified in a way that promotes coherence in international law. This proposal is compatible with the international law presumption against conflicts. At the same time, any interpretation must respect the parameters embodied in Article 26 of the Vienna Convention, that a treaty is binding only on its contracting parties (*pacta sunt servanda*). The answer to this dilemma is that the purpose of this obligation to "take into account" non-WTO rules is not to impose, apply or enforce these non-WTO rights and obligations. Instead, the purpose is to take them into account, where relevant, in interpreting the WTO rights and obligations in order to ensure that the WTO sub-system of international law develops coherently with other systems of law in light of the international principle of interpretation against conflicts¹³¹ and for effective interpretation.¹³²

¹²⁹ Appellate Body Report on *Japan—Taxes on Alcoholic Beverages*, adopted 1 November 1996 (WT/DS8, 10, 11), at 12.

¹³⁰ Art. 3.7 of the DSU. See also Appellate Body Report on *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses*, adopted 23 May 1997 (WT/DS33), at 13.

¹³¹ The presumption against conflict is reinforced in particular in cases where separate agreements are concluded between the same parties, as it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary. See also Jenks, Wilfred (1953): *The Conflict of Law-Making Treaties*, The British Yearbook of International Law, B.Y.I.L. at 425 *et seq.* In international law, for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties must have some overlap in membership. Second, the treaties must cover the same substantive subject-matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. Jennings, Sir Robert and Sir Arthur Watts (eds) (1992): *Oppenheim's International Law*, vol. I, Pts 2–4, at 1280; Fitzmaurice, Sir Gerald (1957): *The Law and Procedure of the International Court of Justice*, B.Y.I.L. at 237; and Sinclair, Sir Ian (1984): *The Vienna Convention on the Law of Treaties*, at 97. The possibility of conflict between a WTO provision and a provision of another treaty, was addressed very briefly by the Appellate Body in *United States—Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, (WT/DS56/ABR), adopted 22 April 1998, where it concluded that there was no "irreconcilable" conflict between the provisions of Argentina's Memorandum of Understanding with the International Monetary Fund and the provision of Art. VIII of the GATT 1994. An interesting question remains as to what a panel would do were it to reach the conclusion that such an irreconcilable conflict existed and that a non-WTO provision should prevail. Should the panel decline jurisdiction? Do WTO adjudicating bodies have the authority to reach such a conclusion? If not, what would be the consequence? Where else could the parties take the dispute? This author suggests that such irreconcilable conflicts will not often take place in trade and environment disputes because Art. XX leaves enough space for the interpreter to conclude that the GATT rules are compatible with some of the environmental policies and obligations embodied in environmental treaties.

¹³² The principle of effective interpretation (*l'effet utile* or *ut res magis valeat quam pereat*) reflects the general rule of interpretation, which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance, one provision should not be given an interpretation that will result in the nullification of the effect of another provision of the same treaty. The same interpretative principle should be used in interpreting different treaties, so that the provision of one treaty is not interpreted so as to nullify the effect of another treaty. In this way, all terms of a treaty are given their full effect. For a discussion of this principle, see also the *Yearbook of the International Law Commission*, 1966, vol. II A/CN.4/SER.A/1966/Add.1, p. 219. See also *Corfu Channel Case* (1949) I.C.J. Reports, p. 24; *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)* (1994) I.C.J. Reports, p. 23; Jennings, Robert and Arthur Watts (eds) (1994): *Oppenheim's International Law* (9th edition), vol. 1, pp. 1280–1281; Dalziel, P. and A. Pellet (1994): *Droit International Public*, (5th edition), para. 17.2; Carreau, D. (1994): *Droit International*, para. 369.

In light of these arguments, and the recent approach of the Appellate Body, it can be argued that Article 31.3(c) requires the interpreter to consider and use, when relevant, a broad range of non-WTO legal instruments to interpret the WTO agreements. However, it should be emphasized that the weight and value to be given to those non-WTO provisions would be left to each interpreter on a case-by-case basis. Nonetheless, Article 31.3(c) imposes an "obligation to take into account" those other rules of international law with a view to avoiding conflicts between them and ensuring greater coherence of international rules.

The following section offers some thoughts on the use of multilateral environmental agreements, as tools to interpret WTO provisions, when dealing with trade and environment disputes, taking into account the previous discussion on Article 31.3(c) of the Vienna Convention.

4. *The Use of MEAs under Article 31.3(c) to Interpret WTO Agreements*

First, it should be emphasized that there has not been one GATT or WTO formal dispute challenge against trade measures imposed pursuant to an MEA. On the one hand, this may reveal some sort of common understanding between WTO Members on the legal value of these MEAs and their relationship with the WTO Agreement. On the other hand, given the number of proposals from Members to amend Article XX of the GATT and the vigorous debates in the Committee on Trade and Environment (CTE), it is difficult to conclude that consensus exists on this question. In any case, the following discussion on the relationship between MEAs and the WTO system is interesting, because it is an application of the need to ensure coherence between economic and environmental policies and, consequently, between the different legal regimes we have created to govern these policies.¹³³ Ensuring this coherence is a fundamental in order to ensure the effectiveness of international law systems generally and to guide our behaviour towards sustainable development.

(a) *Trade measures in environmental treaties*

There are now hundreds of treaties dealing with environmental issues. Many of these have implications for international trade. As economic activity relies on and affects the environment, MEAs regularly encourage and sometimes require States to enact measures that affect the way economic activity within or between States is conducted. In addition, a narrower category of MEAs uses specific trade measures to address environmental harm by regulating the transboundary movement of certain environmentally harmful products.¹³⁴ Environmentalists would argue that these trade

¹³³ Moreover, this discussion on the relationship between trade and environment treaty provisions may encourage further discussions on the relevance of the so-called "WTO saving clauses" in environmental treaties.

¹³⁴ There are more than 180 MEAs existing, of which over 20 incorporate trade measures, from Brack, D. (1997): *Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate*, 6:2 *Review of European Community and International Environmental Law (RECIEL)*, 112.

measures provide an important policy measure in MEAs for a number of reasons. First, they are used to regulate trade in environmentally harmful products, and to create a regulatory framework to manage and minimize environmental risk. The Basel Convention, for example, includes trade-related obligations to ensure that hazardous waste is properly managed, transported and treated.¹³⁵ Similarly, CITES regulates trade in endangered species to foreclose markets for illegal products and, thus, remove the financial incentive for illegal poaching.¹³⁶ Second, trade bans may encourage wide participation in MEAs by limiting the right of non-parties to trade in a particular product—such as hazardous waste—with parties to the MEA. Generally, these trade bans are narrowly tailored to target only those products associated with the environmental harm that is addressed by the MEA. Third, trade measures remove the competitive advantage that States may gain by remaining outside the MEA and, therefore, reduce their ability to avoid the costs of environmental obligations while enjoying the environmental benefits provided by the action of other States. The WTO Committee on Trade and Environment identified, in 1996, about 20 MEAs currently in effect that contain trade provisions. Three in particular—the Montreal protocol, CITES and the Basel Convention—impose an obligation on its parties to ban the import of various substances from countries that are not parties to these treaties.

The issue of which types of MEAs might be used as “relevant rules of international law applicable in the relations between the parties” to interpret WTO obligations under Article 31.3(c) is a complex one, which involves factual and legal considerations. The purpose of this section is not to provide any sort of answer to this question, but simply to offer some thoughts on what could be used as relevant parameters for further discussion.

It is also useful to examine the practical situations in which a Panel or the Appellate Body might be requested to interpret WTO obligations, such as Article XX, in light of the provisions of an MEA.¹³⁷ Below, are considered six main situations: a first set for cases involving an MEA adopted by both disputants, and (1) where the disputed measure is *required* by an MEA; (2) where the disputed measure is not required, but is *explicitly permitted*; and (3) where the disputed measure is *taken in furtherance* of the goals of an MEA. The second set of cases involves an MEA that has *not* been adopted by both disputants, and (4) where the dispute measure is *required* by an MEA; (5) where the disputed measure is not required, but is *explicitly permitted*, and (6) where the disputed measure is *taken in furtherance* of the goals of an MEA.

The discussion below assumes that Article 31.3(c) of the Vienna Convention does not limit “any relevant rules of international law” to only those treaties that have a membership identical to that of the WTO. It is also assumed that compliance with the

¹³⁵ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 28 I.L.M. 649, Art. 4(2)(c).

¹³⁶ CITES, as above, at Arts III, IV and V.

¹³⁷ It is worth recalling that the provisions of the Vienna Convention are not to be used exclusively in case of dispute. However, it may be simpler for the benefit of the present discussion to refer to disputants, although the same logic would apply when interpreting the provisions of the WTO for purposes other than a dispute.

specific provisions of an MEA would often satisfy the *Shrimp* requirement for a "nexus" between the policy pursued and the choice of measure (Article XX(g)).

(b) *Situations involving an MEA adopted by both disputants*

(1) First, the creation of an MEA with broad membership could provide a strong indication that a genuine environmental problem exists, and that the international community has agreed that a certain response is required. In some cases, it may indicate that the international community has agreed that, in certain prescribed circumstances, trade measures are a justifiable response to the risk of environmental harm. The Basel Convention, for example, prohibits shipments between parties to the convention unless it can be demonstrated that the importing nation "will manage the waste in an environmentally sound manner".¹³⁸ Here, export bans, which would arguably contravene Article XI of the GATT, have been identified by the international community as being an important tool for dealing with the threats of environmental damage arising from the creation, transportation and disposal of hazardous waste. Similarly, CITES uses a permit and listing system to prohibit trade in listed wildlife and wildlife products unless a scientific finding is made that the trade in question will not threaten the existence of the species.¹³⁹ The existence of an MEA with broad membership or open to all WTO Members could have some systemic consequences, which should be reflected in the interpretation of Article XX.¹⁴⁰

Therefore, it is suggested that in a situation where an MEA *requires* certain trade measures between its parties (an initial legal fact to be determined) and these parties are also WTO Members, there is the potential for a "conflict" between the MEA's obligations and those of the WTO (e.g. the Article XI prohibition against import bans). In this context, it can be argued that Article XX should be interpreted to take into account the presumption against "conflicts".¹⁴¹ It should be recalled that in international law a conflict exists between two provisions when one provision prohibits an action that the other provision requires. This presumption suggests that potential conflicts should be resolved by interpreting the action taken pursuant to the MEA, binding both disputants, as *prima facie* compatible with Article XX. In other words, it could be argued that a trade measure required by the terms of the MEA would be "presumed" to satisfy the requirements of Article XX. Indeed, it could be argued that the obligation contained in Article 31.3(c) to take into account other

¹³⁸ Basel Convention, as above, at Art. 4(2)(e).

¹³⁹ CITES, as above, at Arts III 2(a), 3(a) and IV(a).

¹⁴⁰ In this context, it should be recalled that many WTO Members have proposed different criteria that could be used by WTO adjudicating bodies faced with such an issue.

¹⁴¹ Note also that the public international law presumption against conflicts has also been applied by the Appellate Body in *Canada—Certain Measures Concerning Periodicals*, adopted 30 July 1997, WT/DS31/AB/R, (hereinafter *Canada—Periodicals*), at 19; in *Bananas III*, when dealing with the overlapping coverage of GATT 1994 and GATS, paras 219–222; and by Panels in *Indonesia—Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998 (WT/DS54, 55, 59 and 64), at para. 14.28, but only when dealing with appearance of conflicts between some WTO provisions. Except in the case of *Argentina—Footwear* (WT/DS57) discussed above, this presumption has not yet been applied by the Appellate Body to a conflict between a WTO provision and non-WTO agreement.

"rules of international law applicable to the parties" recognizes that such conflict with other treaties should be avoided in the interpretation of the treaty under examination.

(2) Second, an MEA may still be relevant where trade measures are not required by the MEA, but are instead *explicitly permitted*. Here the interpreter is not faced with a situation of strict conflict between the WTO prohibitions (say against quantitative restrictions) and the MEA's requirements, as there are no such requirements. Instead, it is a situation where the "effective interpretation" of treaty provisions should lead the interpreter to conclude that the measure explicitly permitted under the MEA satisfies the provisions of Article XX. The principle of effective interpretation ensures that no provision of a treaty is left without any effect or becomes a nullity (to take an expression used by the Appellate Body in *Gasoline*.¹⁴² To interpret the GATT/WTO as nullifying rights negotiated under other treaties, such as under those provided for in an MEA, would violate the principle of effective interpretation that ensures that the ordinary meaning of all terms of a treaty are given their full meaning. Therefore, a trade restriction explicitly permitted by an MEA could be argued to be presumed to satisfy the requirements of Article XX.

(3) Third, where the measure challenged is not required or explicitly permitted, but one that a party claims is taken *in furtherance* of the MEA's goals, the situation is more complex. Nonetheless, that MEA may still constitute a "relevant rule of international law", which, in some circumstances, a Panel shall be obliged to take into account when interpreting and applying the provisions of Article XX for a specific WTO Member. That the international community has identified an environmental problem as sufficiently serious to warrant an international response lends weight to a claim that a measure that furthers its goals is based on environmental motivations. The fact that the said measure is applied along the framework contained in that MEA can also be of some relevance to assess whether the measure was applied in compliance with the provisions of the chapeau of Article XX. The function of the Panel is to assess whether the measure is adopted for environmental considerations and applied without being a disguised restriction on international trade. It is difficult to see how a Panel could refuse to examine the relationship between the measures challenged and the provisions of a relevant MEA, in furtherance of which, it is claimed to have been adopted.

Here it is important to recall that Article XX permits certain unilateral action to be taken to promote environmental goals, even in the absence of an MEA on the subject-matter. It would be illogical if a WTO Member, acting in furtherance of the goals of a relevant MEA (and party to such an MEA), were to be in a worse position than if no such MEA had existed. This assessment will be a factual one and will depend on the specific measure at issue and the specific provisions of such an MEA. This was the situation in which the United States and the complainant parties (all CITES signatories) found themselves in the *Shrimp* dispute. The US allegation that its measures were adopted in furtherance of the CITES goals was considered by the Panel and the Appellate Body, but

¹⁴² *Gasoline*, at p. 18.

the US measure was thought to be discriminatory and a disguised restriction on trade, and, therefore, not to comply with the provisions of the chapeau of Article XX.

(c) *Situations involving an MEA that has not been adopted by both disputants*

(4) Questions arise where one of the parties to the dispute is *not* also a party to the MEA concerned with the subject-matter covered by the measure for which Article XX is invoked. Although, so far, there have been no challenges to trade measures used in MEAs, the most likely source of a WTO challenge will come from a WTO Member non-party to that MEA when it becomes subject to a trade ban imposed by a WTO Member pursuant to an MEA. Let's examine the situation where the measure would be *required* by the MEA.¹⁴³ At least four interpretations are possible. First, it may be argued that the MEA is not a "relevant rule of international law applicable in the relations between the parties", as one of the parties to the dispute is not a party to the MEA. Second, in line with the arguments made above (third situation), it may be argued that the MEA is still relevant as a "rule applicable in the relations between the parties" to be used to interpret Article XX on the basis that it affects the parties' relations, even though only one of them is strictly subject to its provisions. Here, the MEA would have less value in the interpretation of WTO rules than, say, a treaty to which both (or all) WTO Members are party. In this case, even in the absence of a presumption of consistency, the MEA would be available to assist the interpretation of WTO obligations. Third, it may be argued that for the MEA country, compliance with the MEA is to be viewed as "practice" of one Member. In *Computer Equipment*, the Appellate Body stated that the practice of only one Member was relevant when interpreting WTO provisions.¹⁴⁴ An interpretation of Article XX so that such practice is respected should be favoured. Fourth, it can be argued that for the country party to the MEA and to the WTO, there is a "conflict" or an "inconsistency" between its WTO and MEA obligations. As the GATT/WTO should be interpreted with a view to avoiding such conflicts of obligations, a Panel should take into account that WTO Member's MEA obligations when interpreting the applicability of Article XX in that specific case.

(5) A further situation is where the disputed measure is not required, but is *explicitly permitted*.

(6) For (5) and where the disputed measure is *taken in furtherance* of the goals of an MEA, at least two interpretations are still possible. First, it may be argued that the MEA is not a "relevant rule of international law applicable in the relations between the parties", as one of the parties to the dispute is not a party to the MEA. Second, it may be argued that the MEA is still relevant as a "rule applicable in the relations between the parties" to be used to interpret Article XX on the basis that it affects the parties' relations, even though only one of them is strictly subject to its provisions. Here, the MEA would have less value in

¹⁴³ For example, the Basel Convention prohibits the export of certain products from parties to *non-parties*.

¹⁴⁴ *Computer Equipment*, at para. 93.

the interpretation of WTO rules than would, say, a treaty to which both (or all) WTO Members are party. In addition, as discussed further in the next section, the existence and the content of such a relevant MEA could always be used as factual elements for helping the Panel or the Appellate Body assessing whether the measure at issue and its application complied with the prescriptions of Article XX. As mentioned before, since Article XX permits certain unilateral actions to be taken to promote environmental goals, even in the absence of an MEA on the subject-matter, it would be illogical if a WTO Member acting in furtherance of the goals of a relevant MEA were to be in a worse position than if no such MEA existed.

Finally, the above proposals (in particular the situations referred to in paragraphs (1) and (2) for measures required or explicitly permitted by the MEA), whereby the interpretation of Article XX should be done so as to ensure the avoidance of conflict and in ensuring the effectiveness of relevant MEAs, should not be understood as a setting aside of the two-tier stage test imposed by the Appellate Body in *Gasoline* when interpreting the Article XX. Rather, in certain circumstances, the existence of such an MEA and the measures taken in compliance with it, would lead to a presumption that the measure is necessary for the protection of health (Article XX(b)) or relating to the conservation of natural resources (Article XX(g)) and that such a measure has not been applied with discrimination or as a disguised restriction on trade. Of course, the more detailed the MEA will be on the enforcement of such type measure, the more it can be argued that such a detailed MEA is evidence of a consensus between the two parties or even of an international consensus on that matter.

5. *The Use of an MEA as Evidence of a Practice and as Factual Elements Relevant to an Article XX Assessment*

It can also be argued that an examination of the relationship between the measure at issue and the prescription of a particular MEA could be used as evidence of compliance with the terms of the WTO agreements. Of course, interpreting law and applying it to the facts rarely divides neatly into a two-stage process, and much legal analysis will involve mixed questions of fact and law. In all of the above-mentioned situations, and in particular those mentioned in (3), (4), (5) and (6) (where, legally, it may be more difficult to argue that an MEA measure would benefit from a presumption of consistency with Article XX), the existence of an MEA could be used as part of the *factual analysis* of the circumstances of a dispute and the reasons why a Member adopted that particular trade measure and why it applied it that way. This examination should occur as part of a case-by-case analysis of the facts of the case. For instance, reference to or compliance with an MEA could be used as one of the elements to establish that discrimination in the application of the measure should not be characterized as "unjustifiable", or that its application was not a "disguised restriction on international trade" for the purposes of the Article XX chapeau. The issue would be whether the content of the MEA has been so widely accepted as to provide sufficient evidence that the challenged Member has acted in a justifiable manner.

In *Shrimp*, for instance, the Appellate Body did refer to the United States' "behaviour" under other treaties (the Inter-American Convention) in order to conclude that its actions with regard to India, Thailand, Pakistan and Malaysia constituted unjustifiable discrimination.¹⁴⁵ Reference to other international treaties could serve to explain the historical or factual context in which a Member found itself and the background that may explain either the policy basis of a measure or the manner and circumstances of its application.

As mentioned before, compliance with a non-WTO treaty can also be viewed as evidence of State practice, even if of one party only, which is relevant when interpreting whether that Member is covered by the provisions of Article XX of the GATT.¹⁴⁶

Such examination of each MEA, on a case-by-case basis, cannot be done without keeping in mind the fundamental conclusion of the Appellate Body with regard to the need to ensure that some *flexibility* is left to all sovereign countries to comply with the policy requirements authorized under the sub-paragraphs of Article XX. The respect of such flexibility ensures that the application of the measure at issue is always done with the object of ensuring that the policy pursued is really one of the sub-paragraphs of Article XX and not a disguised restriction on trade.

6. *To What Extent Can WTO Adjudicating Bodies Interpret MEAs?*

Previous sections suggested that, pursuant to Article 31.3(c) of the Vienna Convention, WTO adjudicating bodies are required to use non-WTO rules to *interpret* WTO obligations. Using MEAs to interpret WTO obligations is also likely to require Panels and the Appellate Body to interpret the MEAs themselves, even if only to determine whether the MEA invoked is relevant or requires such and such action. It may be asked to what extent can the WTO adjudicating bodies undertake this analysis and when does *interpreting* an MEA border on *applying* it in a way that is inconsistent with the WTO dispute settlement mechanism's mandate?

Article 31 of the Vienna Convention requires Panels and the Appellate Body to take into account other public international law rights and obligations. In doing so, they have the mandate to interpret the relevance of other sources of law in order to perform their obligation to interpret WTO rights and obligations. In *Bananas III*, the Appellate Body upheld the Panel's statement that they "had no alternative but to examine the provisions" of the non-WTO agreement "in so far as it is necessary" to interpret the WTO rules (the Lomé waiver referred to the Lomé Convention).¹⁴⁷ The implication is that their role is limited to interpreting the non-WTO rule to the extent necessary to dispose of the matter at hand. In a case involving a measure required, permitted or in furtherance of an MEA, the dispute settlement mechanism could at least make a determination about the *fact* of a

¹⁴⁵ *Shrimp*, at paras 169–176.

¹⁴⁶ *Computer Equipment*, at para. 93.

¹⁴⁷ *Bananas III*, at para. 162.

relevant MEA. In other words, the Panel could examine the MEA to determine that the parties are covered by the MEA and/or that the MEA includes relevant rules of international law applicable between the parties, without going on to determine whether the specific measure challenged satisfies the terms of the MEA. Additional criteria to be negotiated by Members could oblige Panels and the Appellate Body to verify other aspects of such MEAs.

In conclusion, if Panels and the Appellate Body are considered to be required to take into account a broad range of international rules when interpreting WTO provisions, it seems that to the extent necessary for this task, they will have to interpret and examine such non-WTO provisions.

7. *The Relationship between the Dispute Settlement Mechanism of MEAs and those of the WTO*

The right, and sometimes the obligation, of Panels and the Appellate Body to interpret an MEA should not be viewed as usurpation of the authority of MEA Secretariats (or other MEA bodies) to supervise and administer the enforcement of such MEAs. Some MEAs have dispute settlement mechanisms in place that should be used to enforce the provisions of such MEAs. The relationship between the dispute settlement mechanism of an MEA and that of the WTO bears some parallels with the relationship between the dispute settlement mechanism of a regional trade agreement and that of the WTO.¹⁴⁸

It seems accepted practice that States may adhere to different but parallel dispute settlement mechanisms for parallel obligations. Very rarely, however, will two disputes be based on identical and parallel violations. If it were the case (for instance, an MEA provision prohibiting violations to the WTO, and the WTO prohibiting quantitative restrictions), it seems clear that before the WTO adjudicating bodies only a WTO violation could be invoked, and before the MEA body(ies), only violations of the MEA could be invoked. Situations involving conflicts between the object of two dispute settlement mechanisms (for instance if under the MEA a party sought to enforce a trade restriction and under the WTO another party sought to remove that restriction) are unlikely. It is difficult to see how this sort of conflict could be resolved, except with reference to a supreme body that does not yet exist. However, usually the dispute settlement mechanisms of MEAs differ and are less stringent than those of the WTO. To the extent that the MEA and the WTO dispute mechanisms are not mutually exclusive, there may be risk of abuse of procedures, but no strict incompatibility between the two systems.

The issue of the relationship between the dispute settlement mechanism of an MEA and that of the WTO will probably present itself differently. What may happen is that, under the provisions of an MEA, a country intending to impose a trade measure in compliance or in furtherance of the policies of an MEA is obliged to consult or negotiate with the other MEA member. For instance, would the refusal to consult with the MEA Member, under

¹⁴⁸ On this issue see Marceau, Gabrielle (1997): *Dispute Settlement Mechanism Regional or Multilateral: Which One is Better?* 31 J.W.T. 3, p. 169.

the MEA, have any consequence in the WTO dispute settlement process which may be triggered by another WTO Member after the (early) imposition of a trade measure?

If the MEA obliges its Members to use the MEA dispute settlement mechanism in case of disagreement, or if so requested by another MEA Member, the refusal to use such an MEA mechanism could constitute a violation of the MEA. Yet, in the absence of any MEA provision as to when the MEA dispute mechanism is to be used generally, and/or in relation with the WTO one, is there an obligation to "exhaust" the MEA mechanism before initiating a WTO dispute?¹⁴⁹ Or would this interpretation be viewed as inhibiting the right of a Member under the DSU to initiate a formal dispute whenever a Member considers that a benefit has been impaired or nullified?

One answer may be that in the absence of any explicit provisions to that effect, the WTO dispute settlement mechanism cannot be stopped. Another position may be that the principle of good faith would appear to oblige WTO Members and MEA Members to use first the more specific MEA mechanism, even when it overlaps with that of the WTO. However, with the DSU as drafted, it would be difficult for a WTO Panel or the Appellate Body to refuse to hear a case because the disputant parties could or should have exhausted the MEA mechanism. Arguably, such a refusal to use the MEA dispute settlement mechanism (which may constitute a violation of the MEA) would not constitute a violation of the WTO *per se*, but could be used when assessing the good faith of a party to the WTO dispute.

In *Shrimp*, the Appellate Body stated that the United States, contrary to Section 609, had failed to undertake "serious across-the-board negotiations" with those other Members. Such refusal was *one of the elements* used by the Appellate Body to conclude that the United States had applied its measures in a discriminatory manner. This is another type of situation where the provisions of an outside treaty and the *facts* relating to its administration have been used and taken into account when assessing whether a WTO Member can benefit from the application of Article XX. In this context, a more provocative argument would be that as the "obligation to consult prior to imposing unilateral measures" has attained the level of a general principle of law, the absence of prior consultation with a view to reaching a co-operation agreement within the MEA, is evidence of bad faith, and a violation of due process, contrary to the provisions of the chapeau of Article XX. It is yet to be determined, but some have argued that the obligation to negotiate with the affected countries results from the obligation of good faith, itself a general principle of law.¹⁵⁰

¹⁴⁹ Some parallels could be drawn with the discussion on the exhaustion of local remedy in international law, although the application of this principle in the WTO is an issue not yet resolved. On the issue of exhaustion of domestic remedy in GATT/WTO law, see Kuyper, Pieter Jan (1994): *The Law of GATT as a Special Field of International Law*, N.Y.I.L., p. 227; Kuyper, Pieter Jan (1995): *The New WTO Dispute Settlement System—The Impact on the European Community*, 29 J.W.T. 6, p. 49; Rutsel, Silvestre J. Martha (1996): *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, 30 J.W.T. 4, p. 107.

¹⁵⁰ A more provocative argument could be that as the obligation to consult has attained the level of a general principle of law, the absence of consultations with a view to reaching a co-operation agreement within the MEA, prior to the imposition of a unilateral measure, can be viewed as evidence of violation of due process and discrimination, contrary to the provisions of the chapeau of Article XX. However, it is yet to be determined but some have argued that the obligation to negotiate with the affected countries results from the obligation of good faith, itself a general principle of law. See Angelet, Nicolas (1993): *La Mise en oeuvre des mesures coercitives économiques des Nations Unies dans la Communauté européenne*, Revue belge de droit international, vol. XXVI, p. 500, at p. 525.

In conclusion, the existence of dispute settlement mechanisms in MEAs cannot be viewed as a limitation for WTO Panels and the Appellate Body to examine the content of relevant MEAs when interpreting WTO provisions.

8. *The Use of Other Rules and Principles—Including the Customary and General Rule of International Law—Under the Vienna Convention to Assist in the Interpretation of WTO Agreements*

Pursuant to Article 3.2 of the DSU, Panels and the Appellate Body are obliged to interpret and clarify WTO provisions in accordance with the customary rules of interpretation of public international law, which include those codified in the Vienna Convention, but also international law interpretive principles, such as the presumption against conflicts or the principle of *in dubio mitius*. The above section suggested that, pursuant to Article 31.3(c) of the Vienna Convention, itself a customary principle of interpretation, Panels and the Appellate Body shall also take into account any relevant rules of international law. This section submits that any interpreter shall also take into account any general principle of international law when interpreting WTO provisions.

It is not the purpose of this section to attempt to enumerate which principles may have reached the status of customary international law or general principle of law. Instead, the proposition is that as a general matter, in addition to treaties, other rules, such as general principles of law, may be relevant in WTO trade and environment disputes. A few illustrations are suggested.

The Appellate Body has already used a number of customary and general principles of international law to interpret WTO rules. In relation to the general principle of “good faith”, the Appellate Body in *Shrimp* stated:

“The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a State’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably’.¹⁵¹ An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.”¹⁵² (Emphasis added.)

In the *Hormones* dispute, the European Communities argued that the “precautionary principle” was a general principle of law that should be used to interpret the provisions of the SPS Agreement. The Appellate Body declined to reach any conclusion and wrote:

¹⁵¹ (Original footnote.)

¹⁵² *Shrimp*, at para. 158.

"The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.¹⁵³ We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation."¹⁵⁴

The Panel had stated:

"To the extent that this principle could be considered as part of customary international law and be used to interpret Articles 5.1 and 5.2 ... as a customary rule of public international law ... we consider that this principle would not override the explicit wording of Article 5.1 and 5.2 ..."¹⁵⁵

For instance, the principle of "sustainable development" is now contained in the first paragraph of the WTO Agreement Preamble as one of the WTO's objectives. Sustainable development cannot be interpreted in isolation from the existing international treaties on the subject-matter. While there is no definitive agreement on the meaning of the term "sustainable development", the Appellate Body in *Shrimp* referred to this principle and concluded that "it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement".¹⁵⁶ The Panel in *Tuna II* also referred to sustainable development.¹⁵⁷

Another example could be the principle of proportionality. Some may also argue that in fact the new "balancing text" or "line of equilibrium" invoked by the Appellate Body in its interpretation of the relationship between WTO rights under Articles I, III and XI and those of Article XX is an extension of the general principle for "proportionality".¹⁵⁸ However, the Appellate Body never said so.

Customary international law also requires States to avoid causing transboundary environmental harm. This principle was recognized by the ICJ in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1993-1996)*.¹⁵⁹ It can be argued that, interpreted in light of this principle, Article XX protects the right of States to take proportional trade measures as a response to transboundary harm, such as pollution or damage to shared resources, such as fisheries.

¹⁵³ (Original footnote.)

¹⁵⁴ (Original footnote.)

¹⁵⁵ Panel Report on *Hormones*, para. 8.157.

¹⁵⁶ *Shrimp*, at para. 150.

¹⁵⁷ *Tuna II*, at para. 5.42: "that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement". The ICJ in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* also referred to the need to interpret the treaty obligations of the party in light of such principle: "This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".

¹⁵⁸ It may also be argued that such a proportionality principle is recognized in Art. 2.2 of the TBT and Art. 5.6 of the SPS Agreements where prohibiting measures more restrictive than necessary to pursue a legitimate policy objective.

¹⁵⁹ *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Decision (1993-1996).

Finally, other principles have already been recognized in international law and could be invoked in environment-related disputes to interpret WTO rules.

The biggest difficulty when dealing with concepts such as international customs or general principles of international law, is, of course, to define them and their limits.¹⁶⁰ After having done so and unless otherwise instructed by Members, Panels or the Appellate Body would then be obliged to take into account such customs or general principles when interpreting a WTO provision.

D. CONCLUSION

In the absence of any instructions by Members as to which criteria should be used when dealing with trade and environment disputes at the WTO, Panels and the Appellate Body will need to address these issues on a case-by-case basis, using existing international rules to help them interpret the ambiguous and arguably out-dated provisions of Article XX. The current provisions for dealing with environmental issues in the WTO agreements are limited and do not provide Panels and the Appellate Body with very much guidance. Interpreting these provisions in the light of other relevant principles of international law as required by the Vienna Convention will add texture to the provisions. Nevertheless, there remain significant doubts about the appropriateness of dealing with an important issue such as the interface between trade and environmental policy through the development of *ad hoc* rules. This is compounded by the fact that, despite their considerable legal expertise, the WTO adjudication bodies lack the democratic accountability of national governments and, arguably, also the capacity to mediate between complex trade, development and environmental issues. Rather than leaving it to Panels and the Appellate Body to strike the right line of equilibrium between the right to market access on one hand, and the right to take measures to protect the environment on the other, Members may wish to agree further rules on trade and environment. In the event they do decide to agree further rules, they will need to consider the mechanisms available to them within the WTO system to further address environmental issues in the multilateral trading system.

IV. MECHANISM BY WHICH WTO MEMBERS CAN FURTHER ADDRESS ENVIRONMENTAL ISSUES IN THE MULTILATERAL TRADING SYSTEM

So far, Members using trade measures for environment purposes seem to have done so in a rather non-systemic manner, sometimes respecting the MEA's procedure but often not, thereby reducing the chance of a peaceful and negotiated solution. The new WTO Appellate Body and its pro-active adjudication process add to the uncertainties in an area such as trade and environment. Faced with these *ad hoc patching*

¹⁶⁰ In this context, it may be recalled that the United States in *Hormones* argued that "precautionary" was an approach, rather than a principle. *Hormones*, at para. 122.

solutions to fundamental and sometimes urgent problems, Members may want to determine some criteria or hierarchy of norms applicable to these matters. If WTO Members decide to further address environmental issues at the WTO, the question arises "How will they do it?" What legal and policy mechanisms are available to WTO Members to expand or delimit the role of environmental considerations at the WTO? The purpose of this final section is to explore some of the mechanisms that WTO Members may use to further address the relationship between environmental considerations and the multilateral trading system. Six main types of WTO legal instruments are discussed: (A) guidelines and "prescriptive decisions"; (B) a waiver; (C) an interpretation; (D) an amendment of Article XX or other provisions; (E) an understanding; and (F) plurilateral or multilateral agreements.

The Members' choice of legal instrument will depend on a number of factors, including the subject-matter and the extent to which they consider that current rules need to be revised or developed. For instance, a decision to confirm that certain trade measures in MEAs are consistent with the existing language of Article XX may require a different instrument than a proposal to undertake a more wholesale revision of the PPM issue. The type of instrument adopted will also affect the extent to which it formally binds WTO Members and whether it must be ratified by national parliaments before it is effective.

A. ISSUES THAT COULD BE ADDRESSED THROUGH THE ADOPTION OF NEW LEGAL INSTRUMENTS

There are a number of issues that WTO Members may seek to resolve with these legal instruments. These include a resolution of the MEA/WTO debate as well as a number of other matters, ranging from the use of environment and development experts in dispute settlement, to a more formal attempt to resolve the PPM issue in a way that equitably balances the right of market access with the right to take effective action against environmental degradation. A full discussion of these issues and how they may be achieved is beyond the scope of this article. The aim of this section is merely to show how the relevant WTO instruments discussed below may be used.

1. *Clarifying the Relationship between Relevant MEAs and WTO Rules*

A number of proposals considering this issue have already been considered by the CTE. One of these is referred to as the "*ex ante*" or "criteria" approach, under which Members specify the criteria which, if satisfied by an MEA, will satisfy the requirements of Article XX.¹⁶¹ Members could also use guidelines to reiterate the

¹⁶¹ Most *ex ante* proposals require the Member invoking the MEA to justify a measure to prove that it satisfies the Art. XX chapeau. However, because the most difficult aspect of Art. XX is, arguably, complying with the chapeau, the inclusion of the chapeau criteria in *ex ante* proposals reduces their efficacy.

application of Article 31.3(c) of the Vienna Convention as requiring Panels and the Appellate Body to take into account certain MEAs as evidence of international recognition of the authenticity of the environmental concerns as envisaged in Article XX. A General Council decision could also reiterate that compliance with an MEA containing prescriptive obligations could, as argued above, give rise to a presumption (arguably rebuttable) of compliance with Article XX.

Again, as noted above in relation to guidelines and other WTO instruments, WTO Members could also agree that certain MEA-based measures are presumed to be compatible with Article XX. In addition, in the context of dispute settlement, a multilateral agreement on the environment could set aside WTO jurisdiction in favour of the exclusive application of an MEA when, for instance, measures are taken directly pursuant to an MEA and the MEA contains a dispute settlement mechanism. Members would have to decide whether the MEA mechanism is exclusive or alternative to that of the WTO (see, for instance, such provisions as they exist in the NAFTA between the NAFTA and the WTO dispute settlement mechanism). It must be noted that because few MEAs contain binding dispute settlement mechanisms, it is doubtful that Members would forgo their right to invoke their rights under the WTO dispute settlement mechanism. Nevertheless, WTO Members could conceivably be required to exhaust their rights under the relevant MEA before either instigating trade measures or responding to the trade measures of others by bringing a claim at the WTO.

2. *Use of Other Principles of International Law to Interpret WTO Agreements*

General Council decision could also be used to declare the relevance and applicability of certain principles of international environmental law or to provide more WTO relevant parameters to these principles. A decision could also be used to confirm the crystallization or define and limit their application in the WTO system.

3. *Involvement of MEA Secretariats*

Members could encourage greater involvement of relevant MEA Secretariats. Even before the formal Panel process, MEA Secretariats could, for instance, be invited to send comments and participate in consultations or mediation. A decision could also encourage Panels to fully exercise their rights under Article 13 of the DSU to request information from MEA Secretariats.¹⁶² The advantage of early involvement of relevant MEA Secretariats is that these experts may be in a better position to assess compliance with an MEA—a factor that will also be relevant in the Panel process. In disputes where there is no relevant MEA, experts could be consulted—again at the early stage of the dispute—to collect evidence which could be used later should the matter not be settled.

¹⁶² The Appellate Body in *Shrimp* at paras 79–91 and 99–110, has interpreted this provision as allowing Panels to take into account even non-solicited submission from non-Members.

4. *Use of Environmental Experts*

First, guidelines or other decisions by the General Council could consider the early use of environment and development experts in dispute settlement. The encouragement to use a group of experts at the early stage of the dispute may improve the expert selection process at the Panel stage and oblige parties to identify expert issues. The use of experts, even before the formal DSU process, could be seen as an effort to settle the dispute in a mutually agreed manner. A decision could also encourage Members to select a trade-environment panelist, and could include a list of such experts as is done in other WTO areas.

Further use of environment and development experts may assist Panels in certain circumstances. An agreement on the environment could include specific provisions for the selection of experts and panelists for the Panel process. It could also define criteria for non-WTO Member submissions in order to ensure the representativeness and the authentic interest of those allowed to submit submissions to Panels. Provisions applicable to disputes could also be complemented by an amendment of the DSU, possibly by adding to Appendix 2 of the DSU a list of additional special procedures for disputes involving this new agreement.

5. *Alternative Dispute Resolution*

A WTO instrument could recall the provisions of Article 5 of the DSU on Mediation, Conciliation and Good Offices and encourage Members to exhaust all non-binding WTO remedies before invoking their right to formal, binding dispute settlement proceedings. Guidelines on Article 5 could encourage early notification and exchange of information, as is done in the areas of antisubsidies and antidumping measures. They could also provide an opportunity for affected stakeholders, relevant international organizations (such as UNEP, UNCTAD and UNDP) and the relevant MEA Secretariats to be consulted. To ensure they are not used to delay access to formal WTO procedures, the Article 5 procedures could run in parallel with the consultation period, or formal dispute settlement. Increased use of Article 5 procedures would have significant advantages for both developed and developing countries. As an informal process, it could operate outside the formal WTO structure and requires no changes to WTO rules. It could also allow the parties to come to a negotiated settlement without the need for formal and expensive, binding dispute settlement procedures.

6. *Reference to the International Court of Justice*

Another element that could be included in a multilateral agreement is provisions allowing certain matters to be referred to the ICJ. As the WTO dispute settlement mechanism can apply and enforce only WTO provisions, it could be argued that the

ICJ would be the best international forum to adjudicate certain matters where non-WTO obligations are applicable. At the least, in these circumstances, the ICJ might usefully provide a non-binding opinion on the relationship between the obligations of the WTO and the provisions of other treaties. Such a proposal would necessitate an amendment to Article 23 of the DSU, which obliges WTO Members to bring to the WTO any dispute relating to the WTO provisions.

For example, trade disputes involving a pre-determined list of environmental treaties could be subject to final review by the ICJ. Here, the model used under the Havana Charter could be adopted. This model would have allowed ITO Members, after referring a claim to the Executive Board and the Conference, to request a review of the final decision by the ICJ.

Possibilities also existed for an advisory opinion by the ICJ. If, for example, a WTO Member invoked an MEA as a basis for its otherwise WTO incompatible measure, the ICJ could be asked for an opinion on the consistency of the measure with the MEA, or the legal relationship of the MEA and WTO provisions. Such a referral could be done for the entire case or just for question of law, following, for instance, a referral made to the European Court of Justice.¹⁶³

Reference to the ICJ would necessitate an amendment to Article 23 of the DSU, which provides that the DSU mechanism is the exclusive procedure to be used by WTO Members to handle claims of WTO violations. Furthermore, any process involving recourse to the ICJ would have to envisage a very quick turnaround so as to avoid undue delay.

B. MECHANISMS FOR FURTHER ADDRESSING TRADE AND ENVIRONMENT AT THE WTO

1. *Guidelines and Prescriptive Decisions*

Article IX of the WTO Agreement sets out WTO decision-making procedures. It describes a series of different kinds of decisions (including general decisions, interpretations and waivers) that may be taken by the Ministerial Conference or the General Council.¹⁶⁴ The general decision-making process is set out in Article IX.1, which states that the WTO shall continue the GATT practice of decision-making by consensus. In the event that consensus cannot be reached, matters will be decided by a majority of votes cast, unless otherwise provided for in the various WTO agreements. General Council decisions are mostly used for procedural and administrative purposes. They cannot be used to amend or add obligations to the WTO Agreement and, consequently, do not need to be ratified by WTO Members.

The Article IX decision-making procedure provides WTO Members with substantial discretion. Thus, WTO Members may consider a number of kinds of

¹⁶³ Art. 177 of the EEC.

¹⁶⁴ Note that Art. XI of the WTO Agreement refers to the Ministerial Conference, but pursuant to the Art. IV.2, the functions of the Ministerial Conference may be conducted by the General Council.

decisions to further address environmental issues at the WTO. The most flexible of these would be a set of voluntary "guidelines" to offer parameters for environment-related disputes. Guidelines could be considered as voluntary norms that, as a practical or political matter, encourage Members to adopt certain practices, contribute to mutual understanding about how certain environmental issues should be resolved, and assist the clarification of existing WTO obligations. These would provide the most adaptable method to integrate further environmental considerations into WTO dispute settlement procedures. They may influence the interpretation of WTO agreements by Panels or the Appellate Body in the event of a dispute. In addition they offer the advantage of flexibility in being used by Members and each Panel on a case-by-case basis. Moreover, because they are non-binding, Members are more likely to allow them to cover a greater number of environmental issues than a more prescriptive decision.

In addition to guidelines to be used by Members and/or adjudicating bodies on a voluntary and indicative basis, Members could adopt decisions using more prescriptive language on various aspects of the trade and environment disputes. Whereas guidelines offer flexibility, prescriptive decisions offer clarity and predictability. More prescriptive language in a decision would, however, reduce the likelihood that Members would use them to address the most contentious trade and environment issues. In the area of dispute settlement, for instance, the Dispute Settlement Body adopted by consensus the Rules of Conduct for panelists,¹⁶⁵ the Working Practices Concerning Dispute Settlement Procedures¹⁶⁶ and the Procedures for Administering the Indicative List,¹⁶⁷ all of which have had an important impact on the functioning of the dispute settlement mechanism. This being said, there are a number of trade and sustainable development issues that either guidelines or a more prescriptive form of General Council decision may address. These are listed below to provide some context for the discussion about WTO mechanisms. These issues may, in addition, be addressed using some of the other mechanisms described below.

2. *Waiver*

A waiver is a decision by WTO Members to authorize a WTO Member to derogate from its obligations for a limited period of time. A waiver may, for example, be used to clarify the relationship between MEAs that use trade measures and the WTO. A Member could request a waiver for a specific measure taken under an MEA, or Members could agree a waiver that would allow for derogation from WTO obligations for a list of specific trade measures adopted directly pursuant to MEAs.

¹⁶⁵ WT/DSB/RC/1.

¹⁶⁶ WT/DSB/W/6.

¹⁶⁷ WT/DSB/W/6.

The procedure for waiver is set out in Article IX.3 and IX.4 of the WTO Agreement. Waivers to obligations under the GATT 1994 are also subject to the provisions of the GATT 1994 Understanding on Waivers.¹⁶⁸ As is the case with any General Council decision, a waiver should be adopted by consensus, although it is possible for a Member to call for a vote on such proposed decision.¹⁶⁹ Waiver decisions do not need to be ratified by each WTO Member.

A decision by the General Council granting a waiver must state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. A waiver for more than one year must be reviewed by the General Council not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the WTO membership must examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. On the basis of the annual review, the waiver may be extended, modified or terminated. Waivers to obligations such as those of Articles I, III or XI of the GATT 1994 for environmental purposes must terminate on the date of its expiry or two years from the date of entry into force of the WTO Agreement, whichever is earlier.

It can be seen that the procedure for adoption of WTO waivers is rather burdensome. Moreover, the use of a waiver can also be seen as setting up a hierarchy between WTO rules and MEAs and as implying that measures in MEAs are otherwise incompatible with the provisions of Article XX. Waivers, by their nature, are also only a temporary solution. Finally, a Member affected by the consequences of a waiver to the GATT 1994 provisions maintains the right to initiate non-violation procedures under Article XXIII of the GATT 1994 against the country that has obtained the waiver.

3. *Formal Interpretation by the General Council*

Formal interpretations by the General Council embody the WTO Members' agreement of how a WTO provision should be understood. An interpretation of Article XX could, again, be used to define in greater detail the meaning of its chapeau and the appropriate balance between market access rights under Articles I, III and XI on one hand, and the right to take unilateral action to protect the environment on the other. An interpretation may also be used to clarify some of the other issues described above (such as the extent to which MEAs and customary and general principles of law may be used to interpret the WTO agreements). WTO Members could also consider using an interpretation to clarify the relationship between the precautionary principle and various WTO provisions, including Article 5.7 of the SPS Agreement.

¹⁶⁸ Para. 3 of the GATT 1994 Understanding on Waivers provides: "Any Member considering that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of ... (b) the application of a measure consistent with the terms and conditions of the waiver may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding."

¹⁶⁹ Note that waivers are covered by the 15 November decision of the General Council inviting Members to adopt as much as possible decision waivers by consensus, before calling for a vote; WT/L/93.

An interpretation of Article XX would have to be based on a recommendation by the Council for Goods. Under Article X.2 of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt formal, binding interpretations of any provision of the WTO Agreement.¹⁷⁰ As any other decision of the General Council, any interpretation would be adopted by a consensus, although formally, a vote of three-quarters of the Members would suffice.¹⁷¹ An interpretation does not need to be ratified by each Member.

4. *Amendment of WTO Agreements*

Whereas interpretations nuance our understanding of existing WTO language, amendments alter the text. A number of proposals have been made to the CTE to amend Article XX. To resolve the MEA issues, some of these proposals have suggested the addition of a new sub-paragraph, setting out the conditions under which trade measures adopted under certain MEAs are a valid policy measure for the purposes of Article XX. These proposals often leave the measures to the provisions of the chapeau of Article XX. For the purposes of Article XX, an amendment would take effect for the Members that have accepted it upon acceptance by two-thirds of the Members and, thereafter, for each other Member upon acceptance by it.¹⁷²

In addition to an amendment of Article XX, WTO Members may consider amending the DSU to cater for trade and environment disputes. An amendment could, for example, introduce new consultation obligations and/or new obligations requiring Panels to consult with experts, MEA Secretariats or other outside sources of legal, scientific or technical information. Any Member may initiate a proposal to amend the DSU by submitting such proposal to the General Council. In contrast to the procedure for amending the GATT, a decision to approve amendments of the DSU must be made by consensus and these amendments shall take effect for all Members upon approval by the General Council.¹⁷³

¹⁷⁰ "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this agreement and of the multilateral trade agreements. In the case of an interpretation of a multilateral trade agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that agreement. The decision to adopt an interpretation shall be taken by a three-quarters majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Art. X."

¹⁷¹ This type of interpretation was sought by the European Communities during the *Bananas* battle on the aspect of the relationship between Arts 21.5 and 22.6 of the DSU, as note 26, above, but the request for a vote or a decision was pursued; see WT/GC/WW/133.

¹⁷² It is also generally possible for the Ministerial Conference or the General Council to decide by a three-quarters majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member that has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

¹⁷³ Art. XI:8:

"Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference."

Article X of the WTO Agreement allows amendment of WTO provisions. As a general rule, any WTO Member may propose an amendment of the WTO agreements by submitting a proposal to the General Council. The procedures vary, depending on the provisions being amended, but, again, are fairly burdensome. Ninety days after the proposed amendment has been formally tabled, Members must decide by consensus whether to send it to capital cities for formal acceptance. If Members cannot reach consensus, a formal vote may take place. If two-thirds of all WTO Members agree, the proposed amendment may still be sent to national capitals for acceptance.¹⁷⁴

5. *An Understanding*

An understanding could be used to clarify existing WTO provisions and to develop new, related rights and obligations. In the WTO context, the role and precise legal character of understandings remains somewhat unclear. The term "understanding" is generally used to refer to the six understandings incorporated into the GATT 1994.¹⁷⁵ These, together with the text of the old GATT 1947 and other decisions and protocols, form the new GATT 1994. Effectively, these are "mini-agreements", which clarify and, to some extent, add to the imprecise provisions of the old GATT 1947. As part of the GATT 1994, which itself is a component of the WTO Agreement, they were signed and ratified by all members and thus have the same value as any other provisions of the WTO Agreement. In addition, the term "understanding" has been used outside the GATT 1994 context to refer to the DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes), which is a development of Articles XXII and XXIII of the GATT 1947. Given the different usage of this term, it is unclear how understandings will be used during the next round of negotiations.

When people allude to the need to adopt an understanding on trade and the environment, they are probably referring to new provisions to elaborate when WTO Members may adopt trade-related environmental measures that conflict with market access provisions such as those of Articles I, III and XI of the GATT, i.e. an expansion of Article XX. It would constitute either an amendment to a WTO provision, which would have to be accepted and ratified by Members in line with the above procedure; or it would constitute a new agreement that would also require acceptance and ratification before it would be binding on all Members.

¹⁷⁴ Art. XI:7: "Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference."

¹⁷⁵ There are understandings on Art. II (other rights and obligations mentioned in Art. II:1); on balance-of-payments provisions (in Arts XII and XVIII:B); one on Art. XVII (State-trading), on Art. XXIV (regional trade agreements), on Art. XVIII (tariffs renegotiations) and on waivers.

6. *Plurilateral or Multilateral Agreement*

The new structure of the WTO "suggests a spirit of flexibility, which allows for texts to be added or subtracted over time and for the evolution of institutions necessary for implementation of the rules".¹⁷⁶ In keeping with this "spirit of flexibility", Members may choose to negotiate—either on a plurilateral or multilateral basis—a new agreement to reduce the risk of environment-related trade disputes. If Members so desire, an agreement can be used to achieve any or all the objectives mentioned above. If WTO Members are considering significant changes to further address environmental issues at the WTO, then a new agreement may be a useful vehicle.

Multilateral agreements apply to the whole WTO membership. Plurilateral agreements, by contrast, only bind some WTO Members.¹⁷⁷ It is conceivable that, because the trade and environment debate is so politicized, not all Members would agree on the introduction of a new agreement on trade-related environment issues. In the event that unanimity cannot be achieved, a plurilateral agreement could be adopted to bind only on those Members who sign it. It may offer an opportunity for some Members to test the viability of such an agreement. Both a plurilateral and a multilateral agreement would require a full negotiation and need to be ratified domestically.

The following section notes some models that could be used if Members decided to agree to further regulate matters addressed in environment-related trade disputes in either a plurilateral or multilateral agreement. The above-mentioned issues to be addressed by guidelines or other WTO instruments could also be included in any plurilateral or multilateral agreement.

(a) *An environmental monitoring body*

With a view to ensuring that full expertise is available to resolve environment-related WTO disputes, WTO Members may also consider creating a conciliatory, quasi-judicial body along the line of the Textile Monitoring Body (TMB).

The TMB was established to supervise the implementation of the Agreement on Textiles and Clothing (ATC) and to oversee disputes before formal recourse is had to the WTO dispute settlement system. In the event that Members are not able to resolve issues arising under the ATC through bilateral discussions, either Member may request the TMB to consider the matter and make recommendations to the Members. If a Member is unable to conform to the TMB's recommendations, it is required to provide the TMB with reasons for its failure to do so. In response, the TMB will offer further recommendations. If, after these recommendations, the matter still remains unresolved, then either Member may bring the matter before the formal WTO dispute settlement mechanism.

¹⁷⁶ Jackson, J. et al. (1995): *Legal Problems of International Economic Relations: Cases, Materials and Text* (3rd edition St. Paul, Minn.: West Publishing Co.), at p. 302.

¹⁷⁷ Art. II:3 of the Agreement Establishing the WTO provides that "the Plurilateral Trade Agreements do not create either obligations or rights for [WTO] Members that have not accepted them" (emphasis added).

A similar process could be established for environment-related trade disputes. Disputing parties could be obliged to first expose their complaint to a body of specialists who would make a recommendation about the dispute. After further discussions, any party not satisfied with the recommendations could pursue formal dispute settlement proceedings. Such an Environmental Advisory Body (EAB) would have the advantage of providing access to experts and enjoying more flexibility in its examination of the evidence and other relevant factors than a Panel. The composition of such an EAB could include the participation of the industry concerned as well as non-governmental organizations and other experts, together with regional representation. In order to ensure that this process does not unduly delay access to the dispute mechanism, provisions could include the possibility for the complainant party that has used the EAB mechanism to "skip" the consultation process under the DSU and to obtain immediate access to the formal dispute settlement procedure.

(b) *Dispute prevention and mediation*

Another set of procedures that could be used to prevent trade and environment disputes from escalating into formal WTO trade disputes are the "mediation, good offices and conciliation procedures" envisaged in Article 5 of the DSU. These provisions allow disputants to voluntarily undertake third-party assisted discussions at any stage during the course of a dispute and permit the Director-General, in an *ex officio* capacity, to offer these services. Despite their attractiveness, the Article 5 procedures have never been used. To prevent future conflicts from escalating into full trade disputes, WTO Members may wish to consider how to use WTO third-party assisted processes more effectively. In their various forms, "fact finding, conciliation, good offices and mediation" involve a third party to clarify the facts surrounding the dispute, to assist the disputants to communicate, to encourage them to re-evaluate their positions, to offer suggestions compromise and solutions, and, generally, to maintain a constructive environment for discussion. In the case of environment-related trade disputes, a third party could, for example, help the parties to consider options other than a trade ban, such as certification and labelling, or additional financial and technical assistance to address the environmental issue at its source.¹⁷⁸

¹⁷⁸ Building on Art. 5 procedures does not need to wait for a formal agreement on environment to be negotiated. WTO Members could develop guidelines to govern Art. 5 procedures as part of the DSU review. These could include provisions for notification and exchange of information. They could also provide an opportunity for affected stakeholders, including environment and development NGOs, and relevant international organizations, to be consulted. These consultations could be held in one or a number of the countries involved in the dispute to ensure that all affected stakeholders have an opportunity to express their interests. To ensure they are not used to delay access to formal WTO procedures, the Art. 5 procedures could run in parallel to the consultation period, or formal dispute settlement. As an informal process, it can operate outside the formal WTO structure and requires no changes to WTO rules. As an informal process operating outside the formal WTO structure, it may also address environmentalists' legitimate concerns about the WTO dispute settlement system becoming an international environmental court. By involving relevant stakeholders, it would engage the creativity of experts and the broader society to find a solution to the underlying environmental problem.

(c) *The SPS type model*

Under the SPS Agreement, measures satisfying certain requirements are presumed to comply with Article XX. This model could be applied to certain measures taken under MEAs. One could imagine a mechanism whereby a certificate of MEA compliance, issued by the relevant MEA Secretariat, would constitute a presumption that the measure is compatible with Article XX or the parallel provision of other relevant agreements such as Article XIV of the GATS. The presumption could be made rebuttable or not depending on various criteria based on the membership of the MEA, the type of measure or the type of environmental problem under consideration.¹⁷⁹

(d) *The antidumping type model*

A multilateral or plurilateral environmental agreement could also be based on the "trade remedies" model embodied in the antidumping Agreement. It could allow the imposition of a surtax on imported products where they are manufactured in a manner inconsistent with a list of pre-agreed environmental principles and obligations. The goal of this approach would be to adjust the price of products to internalize the environmental costs of its production.

Despite its superficial appeal, there are many difficulties with this approach to environment-related disputes, and developing countries have rightly regarded claims of "eco-dumping" with suspicion. First, the dumping model does not directly reduce the environmental harm; it only punishes the exporting country—unless the surtax is collected in a fund and then re-invested somehow to address the specific environmental concern. It would also be difficult for WTO dispute settlement bodies to assess the WTO compatibility of such a unilateral surtax determination: the taxing importing country would have to determine what the price of such product would have been if the exporting country had internalized the full costs (including compliance with the environmental standards) of production.

(e) *The red-yellow-green type model*

Finally, a model based on the approach followed by the Agreement on Subsidies and Countervailing Measures could be developed. The Subsidies Agreement imposes disciplines on the use of subsidies and regulates the actions that may be taken in

¹⁷⁹ For a rebuttable presumption, evidence of MEA certificate could reverse the burden of proof where it would be for the complaining country to prove that the measure, although compatible with Art. XX, remains more restrictive than necessary (remember that, as a general rule, the burden of proof is on the country invoking the provisions of the general exceptions). This would be in line with the provision of Art. 5.6 of the SPS Agreement. Note the footnote to this Art. 5.6 of the SPS Agreement, which provides that "a measure is *not* more trade-restrictive than required *unless* there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."

response to them. It establishes three categories of measures. Certain subsidies are prohibited (red subsidies); certain subsidies are expressly allowed (green subsidies); and, between these, a middle category of subsidies is considered "actionable", where a WTO Member can prove injury (yellow subsidies).

Based on the approach in the Subsidies Agreement, WTO Members could negotiate a list of environmental concerns that would fall into the red-yellow-green model. Unilateral action in response to environmental harm is clearly more justifiable where direct transboundary harm or irreversible damage is involved.¹⁸⁰ Under this approach, "green" environmental concerns (i.e. those allowing trade-related environmental measures) could include those already set out in MEAs and, possibly, instances of direct transboundary harm that would trigger the customary obligations of State responsibility for serious transboundary pollution and the right to self-protection.¹⁸¹ "Red" environmental concerns could include cases where the risk of environmental harm is small or where harm is likely to be purely domestic. "Yellow" environmental concerns could include those for which trade measures may be permitted in certain defined conditions, including those set out by the Appellate Body in *Shrimp*. In addition to the Appellate Body's conditions, other international law principles such as common but differentiated responsibility, good faith, precautionary principle and proportionality could also be used to shape criteria. Furthermore, different variables, such as the burden of proof, the duration of the measure and the allowable impact of the measure taken could be described. A similar approach could be adopted to address the issue of PPMs: which ones can be used and under which conditions without being the object of dispute settlement complaints; which ones are prohibited at all times and may be the object of rapid challenge process retaliation; and which ones may be used, under what conditions and subject to what compensation.

V. CONCLUSION

The GATT had already recognized, with the provisions of Article XX, that a balance must be struck between trade liberalization and other policies, such as the protection of health and the ecological systems on which our economies rely. The same ideas have been reinforced in the Preamble of the WTO Agreement, which replaced the GATT language, exhorting the "full use of the resources of the world", with the requirement that trade liberalization should be pursued "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development". This article has suggested that this balancing exercise between market

¹⁸⁰ For example, where there are irreversible threats of species extinction, Art. 14(1) of CITES, as note 49, above, permits countries to take stricter domestic measures than contemplated by CITES to prohibit the trade or taking of species, both listed and unlisted, which are endangered with extinction.

¹⁸¹ See also, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Rep. 14, 244, for a discussion of the absence of any general law duty to avoid using economic measures to influence the law and policy of other States. See also, Howse, R. (1998): *The Turtles Panel—Another Environmental Disaster in Geneva*, 32 J.W.T. 5, p. 73.

access rights and under policies of countries is in fact an application of a wider need for coherence in international law, recognized by basic rules of treaty interpretation and the international law presumption against conflicts between international treaties.

Environmental issues will continue to present a major challenge to the WTO and its Members. The uncertainty arising from trade and environment cases, such as the recent *Shrimp* dispute, are causing tensions within the multilateral trading system. Moreover, new areas of concern are arising. The growing tension between the United States and the European Union over beef hormones and genetically modified organisms indicate the potential for these problems to grow in the future. Unless further addressed within the WTO system, environmental issues may inhibit the smooth operation of the multilateral trading system and create both mistrust and public opposition. This is the responsibility of Members and it is for them to negotiate. This article has tried to examine how the dispute settlement could "cope" with trade and environment disputes, but WTO Members cannot simply dump the entire issue on the WTO dispute settlement mechanism.

Sustainable development requires a respect, a balance and some coherence between trade and market access rights for the alleviation of poverty, and the respect of ecology on which our system is based. This can be achieved only with further coherence between international treaties, international regimes and international organizations.¹⁸² Ensuring that trade, development and environmental policies are mutually supportive requires WTO Members to address the multifaceted and complex relationships between economic activity, environmental protection, government regulation and international co-operation. As an economic, political and legal dilemma, striking a balance and ensuring coherence among these important and sometimes competing considerations, is the real challenge of the next Round.

¹⁸² See the Marrakesh Declaration on the Contribution of the World Trade Organization to achieving Greater Coherence in Global Economic Policy-making and the recent collaboration agreement between the WTO, IMF and the World Bank (WT/L/194).