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CONTENTS

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TRADE AND ENVIRONMENT: A MUTUALLY SUPPORTIVE INTERPRETATION OF WTO AGREEMENTS IN LIGHT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

Laura Stuart*

This paper considers how the WTO can make better use of the principle of "mutual supportiveness" as an interpretative tool. It examines the success of the WTO in enhancing the relationship between trade and environment and between the WTO agreements and Multilateral Environmental Agreements (MEAs), compares the different interpretative approaches in the United States – Shrimp *and* EC – Biotech *decisions,*[1] *and argues that a mutually supportive approach that allows consideration of MEAs that are not binding on WTO parties does not change the rights and obligations of WTO members.*

I INTRODUCTION

International trade law and international environmental law are two distinct but interrelated parts of the international legal system. International trade laws are designed to facilitate the free flow of trade whereas international environmental law aims to solve specific global environmental issues.

* Barrister and Solicitor of the High Court of New Zealand. This article is an adapted version of a paper completed in partial satisfaction of the requirements of an LLM degree from Victoria University of Wellington. Many thanks to Sir Geoffrey Palmer for his supervision and inspiring passion for the environment.

1 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 6 November 1998 (Report of the Appellate Body) [*United States – Shrimp*]; and *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006 (Reports of the Panel) [*EC – Biotech*].

Trade and environmental law intersect because increased production and trade can negatively affect the environment and measures to protect the environment can restrict trade.[2]

Tensions between the two fields of law can arise because of their potentially conflicting policy objectives. Mechanisms used to protect the environment can restrict trade (trade restrictive mechanisms are known as "trade measures"). There are different types of trade measures. Some Multilateral Environmental Agreements (MEAs) directed at protecting and preserving the environment may impose mandatory restrictions on trade to protect the environment. For example, art III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) prohibits trade in specified endangered species.[3] MEAs can also expressly permit trade measures to protect the environment. For example, art II of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) sets out measures that member states may implement to reduce greenhouse gases.[4] States may also implement domestic law trade measures, not expressly referred to by a MEA, in pursuit of MEA objectives. For example, the United States Endangered Species Act of 1973,[5] the subject of the dispute in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*United States – Shrimp*),[6] imposed a framework to regulate shrimp vessels in order to protect endangered species of turtles, pursuant to a number of international agreements including CITES. In contrast to such environmental goals, policies of the World Trade Organization (WTO),[7] the organisation at the heart of the multilateral trading system, are directed at liberalising trade and reducing trade barriers. The fundamental WTO principles are: non-discrimination (most-favoured-nation (MFN)[8] and national treatment),[9] free

2 Pieter Jan Kuijper *Conflicting Rules and Clashing Courts, The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO* (International Centre for Trade and Sustainable Development, 2010, Geneva) at 15.

3 Convention on International Trade in Endangered Species of Wild Fauna and Flora 993 UNTS 243 (opened for signature 3 March 1973, entered into force 1 July 1975) [CITES], art III.

4 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 (opened for signature 11 December 1997, entered into force 16 February 2005), art II.

5 United States Endangered Species Act of 1973 16 USC 35 § 1531.

6 *United States – Shrimp*, above n 1.

7 The World Trade Organization (WTO) is established under the Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 154 (opened for signature April 15 1994, entered into force 1 January 1995) [WTO Agreement]. The WTO was established during the Uruguay Round (1986–1994) and evolved out of its predecessor, the General Agreement on Tariffs and Trade 55 UNTS 194 (opened for signature 30 October 1947, entered into force 1 January 1948) [GATT 1947].

8 For example, the most-favoured-nation (MFN) principle under art I of the General Agreement on Tariffs and Trade 1867 UNTS 187 (opened for signature 15 April 1994, entered into force 1 January 1995) [GATT 1994] requires states to treat imported products of all member states the same (that is: treat every state as the "MFN").

trade through reduction of trade barriers[10] and fair competition.[11] These provisions aim to reduce restrictive trade practices, but at the same time they reduce member states' flexibility to impose domestic environmental policies.

This overlap between trade and environmental policies means that although the WTO is not an environmental institution it has significant influence in shaping both international and domestic environmental policy. This influence presents itself through the exceptions to the WTO principles. The WTO agreements allow member states to impose trade measures to achieve non-trade objectives, including environmental objectives. However, the relevant provisions are designed to ensure that member states cannot use non-trade objectives as disguised barriers to trade. For example, art XX(b) of the General Agreement on Tariffs and Trade (GATT 1994)[12] allows measures that are "necessary to protect human, animal or plant life or health" and art XX(g) allows measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". However, the chapeau to art XX limits the circumstances in which members can impose trade measures. The measures must not be "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".[13] Trade measures, even if taken pursuant to MEAs, must conform to the WTO principles.

The trade-environment tension poses a challenge for the WTO and the institutions administering the approximately 250 MEAs aimed at preserving and protecting the environment.[14] How do these

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9 For example, GATT 1994, above n 8, art III which requires states to treat foreign products the same as like products produced domestically (that is: give foreign goods "national treatment").

10 Such as tariffs, import bans, quotas on imports. For example, GATT 1994, above n 8, art XI, which prohibits bans or quantitative restrictions on imports and exports, other than customs and taxes.

11 Fair competition includes non-discrimination as well as avoiding unfair practices such as dumping and subsidies. See for example Agreement on Subsidies and Countervailing Measures 1869 UNTS 14 (opened for signature 15 April 1994, entered into force 1 January 1995). For a summary of the WTO principles see World Trade Organization "Principles of the Trading System" (2014) <www.wto.org>.

12 GATT 1994, above n 8.

13 Other examples include: General Agreement on Trade in Services 1869 UNTS 183 (opened for signature 15 April 1994, entered into force 1 January 1995), art 14; Agreement on the Application of Sanitary and Phytosanitary Measures 1867 UNTS 493 (opened for signature 15 April 1994, entered into force 1 January 1995), art 2 [SPS Agreement]; Agreement on Technical Barriers to Trade 1868 UNTS 120 (opened for signature 15 April 1994, entered into force 1 January 1995), preamble; and Trade Related Aspects of Intellectual Property Rights 1869 UNTS 299 (opened for signature 15 April 1994, entered into force 1 January 1995), art 27 [TRIPS Agreement].

14 World Trade Organization "The Doha mandate on multilateral environmental agreements (MEAs)" (2014) <www.wto.org>.

institutions, particularly the WTO, uphold a system that supports both trade and environmental objectives? The challenge is not just to avoid conflicting international trade and environmental policies and laws but to develop those policies and laws in a "mutually supportive" manner in order to protect the environment whilst upholding an open and non-discriminatory multilateral trading system. Further, the weight given to environmental objectives and the involvement of MEAs in environment-trade disputes depends on the WTO dispute resolution panel's approach to interpreting WTO law. Because of the influence that the WTO rules have over environmental policy, it is important that the WTO takes responsibility for influencing the direction of trade-environment conflicts in a manner that is consistent with MEA objectives.

In this paper I propose that the principle of "mutual supportiveness" should be both the foundation of policy development within the WTO as well as an interpretative tool for environment-related trade disputes. A mutually supportive approach to treaty interpretation would ensure that MEAs are appropriately utilised and given recognition as sources of expertise on environmental concerns. This would enable MEAs to play a greater role in shaping outcomes of trade-environment disputes and would ensure that the outcomes of disputes are consistent with the WTO objective of sustainable development.[15]

The substance of this paper is divided into four parts. First, in part II I introduce the concept of fragmentation in international law and introduce the principle of mutual supportiveness. Then in part III I consider the work of the WTO to understand the trading system's role in supporting environmental objectives and to strengthen the relationship between the WTO and MEAs. In part IV, I examine WTO panels' jurisdiction to consider MEAs and compare the different approaches taken in the WTO cases *United States – Shrimp*[16] and *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*EC – Biotech*).[17] In part V I argue that a mutually supportive approach that allows consideration of MEAs that are not binding on WTO parties does not change the rights and obligations of WTO members. I conclude that WTO dispute panels should be more explicit about the grounds for considering MEAs in order to mutually support trade and environmental objectives.

II INTERNATIONAL LAW, FRAGMENTATION AND PRINCIPLES FOR COHESION

The international legal framework is a complex beast. There are a number of sources of international law which are constantly evolving.[18] There is no hierarchy between those sources, nor

15 Sustainable development is an objective of the WTO as set out in the preamble to the WTO Agreement.

16 *United States – Shrimp*, above n 1.

17 *EC – Biotech*, above n 1.

18 Article 38 of the Statute of the International Court of Justice 33 UNTS 993 (opened for signature 26 June 1945, entered into force 24 October 1945) provides a list of sources of law that the Court shall apply,

a single decision-making authority responsible for developing and enforcing laws.[19] International laws are binding and effective only in so far as states acknowledge their existence and consent to being bound.[20] To add to the complexity some laws apply generally, while others, namely international agreements, apply only to those states which have agreed to be bound. The proliferation of international agreements over the last century has resulted in a complicated web of overlapping agreements where states have differing obligations depending on their bilateral, multilateral and regional commitments. The increasing level of complexity and the emergence of "specialist" regimes, focusing on particular areas such as trade or environment, have raised concerns about the "fragmentation" of international law[21] and the institutions possessing authority to develop and apply the law.[22] While there are benefits from fragmented specialised regimes – for example accelerating uniformity between states[23] and addressing specific issues such as environmental harm[24] – because these regimes are single-issue focused, there is increased risk of conflict among the different regimes.[25]

A large body of literature is devoted to conflict avoidance and increased co-ordination between institutions,[26] emphasising the importance of ensuring that international law develops in a cohesive manner. Apparent in this body of literature is the emergence of proposals to apply principles such as "comity", "institutional sensitivity" and "systemic integration". Comity can be loosely defined as

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consisting of: international conventions; international custom; general principles of law recognised by civilized nations; and, as a subsidiary means for determination of rules of law, judicial decisions and teachings of the most highly qualified publicists of various nations.

19 Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Oxford University Press, Oxford, 1994) at 8 as cited in Campbell McLachlan "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279 at 282.

20 At 8.

21 See for example Study Group of the International Law Commission *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission as finalized by Martti Koskenniemi* A/CN.4/L.682 (2006) at [7]–[8].

22 Marina Foltea divides fragmentation into two categories: the laws themselves and the institutions responsible for those laws: Marina Foltea *International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity?* (Cambridge University Press, Cambridge, 2012) at 4–5.

23 Study Group of the International Law Commission, above n 21, at [7].

24 At [15].

25 At [15].

26 For a good summary of literature see Foltea, above n 22. See also Gabrielle Marceau "A Call for Coherence in International Law" (1999) 33 JWT 87; McLachlan, above n 19; Joost Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, United Kingdom, 2003); and Study Group of the International Law Commission, above n 21.

one "organization consenting to the law of another regime, except where that law offends the consenting organization's fundamental policies".[27] Institutional sensitivity is the "receptivity" of one institution to other sources of international law.[28] Systemic integration is based on the understanding that treaties are part of international law and therefore must be interpreted in the context of the wider normative environment.[29] Whilst these principles may have varying nuances, they all essentially revolve around the same fundamental idea, that no institution is an island and, in order to operate in a well-functioning international society and achieve the ultimate goal of creating a better world, they must recognise and respect the rights of others and act in a manner supportive of this end goal. The focus of this paper is on utilising the principle of "mutual supportiveness": the principle is one of many tools that should be utilised in order to achieve a healthy international ecosystem.

Mutual supportiveness is a concept designed to achieve common objectives of trade and environment.[30] The concept arose as a means of aligning the two fields of law which were developing in separate forums.[31] The concept's first appearance in a major international environmental instrument was in Agenda 21,[32] the action plan on sustainable development resulting from the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (UNCED).[33] Agenda 21 provides that governments should strive to "promote and support" policies that "make economic growth and environmental protection mutually supportive"[34] and the international economy should support environment and development goals by "making trade and

27 Claire R Kelly "Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on Other Actors and Regimes" (2006) Berkeley Journal of International Law 79 at 93.

28 Foltea, above n 22, at 31.

29 McLachlan, above n 19.

30 Laurence Boisson de Chazournes and Makane Moïse Mbengue "A Footnote as a Principle: Mutual Supportiveness and its Relevance in an Era of Fragmentation" in Holger P Hestermeyer and others (eds) *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers, The Netherlands, 2012) vol 2 1615 at 1625.

31 Boisson de Chazournes and Mbengue, above n 30, at 1616.

32 Agenda 21 (adopted at United Nations Conference on Environment and Development) A/CONDF.151/26/Rev.1 (1992).

33 Riccardo Pavoni "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?" (2010) 21 EJIL 649 at 651.

34 Agenda 21, above n 32, at [2.9(d)]. See also [2.10(d)].

environment mutually supportive".[35] Since its debut in Agenda 21 this concept has been used frequently in different international instruments relating to trade and environment.[36]

Like the principle of systemic integration,[37] mutual supportiveness embodies the notion that international law is a connected whole rather than a collection of self-contained regimes. The different fields of law are interwoven to make up the legal ecosystem which is constantly growing and evolving. The consequence of any one field of law being connected to the wider international legal ecosystem is that each field is affected or influenced by other developments within that system.[38] In the trade-environment context, changing attitudes towards environmental issues in the international community and the development of MEAs should influence the implementation and interpretation of WTO law. Mutual supportiveness aims to attain the higher goals of a well-functioning legal ecosystem by providing "coherence, balance and interaction between trade and environment".[39]

At a law-making level, mutual supportiveness encompasses the need to ensure that trade and environmental policies and treaties not only co-exist in harmony but are also complementary or mutually reinforcing:[40] for example, the inclusion of WTO objectives which are consistent with

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35 At [2.3B]. See also [2.19] and [2.21(a)].

36 For example: *Decision on Trade and Environment* MTN/TNC/45(MIN), 15 April 1994 (Adopted by Ministers at the Meeting of the Uruguay Round Trade Negotiations Committee, Marrakesh, 1994) [*Marrakesh Decision*]; *Report (1996) of the Committee on Trade and Environment to the Singapore Ministerial Conference* WT/CTE/1, 12 November 1996 (Geneva) [*CTE Report (1996)*]; *Doha WTO Ministerial Declaration* WT/MIN(01)/DEC/1, 14 November 2001 [*Doha Declaration*] at [6] and [31]; Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2226 UNTS 208 (opened for signature 29 January 2000, entered into force 29 December 1993), preamble [CPB]; Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 2244 UNTS 337 (opened for signature 11 September 1998, entered into force 24 February 2004), preamble; International Treaty on Plant Genetic Resources for Food and Agriculture 2400 UNTS 303 (opened for signature 1 November 2001, entered into force 29 June 2004), preamble; Convention on Persistent Organic Pollutants 2256 UNTS 119 (opened for signature 23 May 2001, entered into force 17 May 2004), preamble; Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2440 UNTS 311 (opened for signature 20 October 2005, entered into force 18 March 2007), art 20; and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (opened for signature 2 February 2011, entered into force 12 October 2014), preamble and art 4(3). For an overview of the use of mutual supportiveness in international legal instruments see: Pavoni, above n 33; and Boisson de Chazournes and Mbengue, above n 30.

37 Mutual supportiveness is similar to the concept of systemic integration – the latter is a conflict avoidance technique that facilitates harmonisation of international law. It is based on the understanding that treaties are part of international law and therefore must be interpreted in the context of the wider normative environment. See for example: McLachlan, above n 19.

38 Study Group of the International Law Commission, above n 21, at [15].

39 Boisson de Chazournes and Mbengue, above n 30, at 1618.

40 At 1618.

environmental objectives and exceptions to WTO rules that provide sufficient flexibility to enable member states to implement effective measures to protect the environment. These features form a basis from which a mutually supportive regime can develop and can be reinforced by collaboration between the WTO and environmental organisations.

As an interpretative tool, mutual supportiveness may be a combination of the principles of systemic integration and harmonisation or the presumption against conflicts of law, as recognised by WTO panels and the Appellate Body.[41] However, mutual supportiveness is not just a presumption against conflicts and is more than taking account of relevant treaties as an interpretative tool.[42] Rather, mutual supportiveness is a "solution" to conflict[43] or a principle to aid interpreters to find an "equitable balance between the competing interests and values" of different regimes.[44] Mutual supportiveness requires interpreters to look at trade and environment law in relation to the wider normative framework of public international law.[45] Rather than merely avoiding conflicts, the interpretation of the treaty should support the objectives of both treaties.[46]

III MUTUAL SUPPORTIVENESS AS A LAW-MAKING FUNCTION WITHIN THE WTO

Initially driven by external factors, the WTO transitioned from the trade-centric mentality of its predecessor, the General Agreement on Tariffs and Trade (GATT 1947),[47] to proactively discuss how the multilateral trading system can support environmental objectives. This part looks at some of the developments that instigated this transformation.

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41 Jan McDonald "Politics, Process and Principle: Mutual Supportiveness or Irreconcilable Differences in the Trade-Environment Linkage" (2007) 30 UNSW Law Journal 524 at 530. The Panel summarises the application of the presumption against conflicts by Panels and Appellate Bodies in *Turkey – Restrictions on Imports of Textile and Clothing Products* WT/DS34/R, 31 May 1999 (Report of the Panel) at [9.93].

42 Kuijper, above n 2, at 7; and Laurence Boisson de Chazournes and Makane Moïse Mbengue, above n 30, at 1617:

> … the concept of harmonization implicitly accepts that normative conflicts may arise if the presumption against conflict is rebutted while mutual supportiveness "plays down that sense of conflict", not to say excludes in *toto* the idea of conflict.

43 Kuijper, above n 2, at 14.

44 Pavoni, above n 33, at 665.

45 At 665.

46 Kuijper, above n 2, at 14–15.

47 GATT 1947, above n 7.

A Group on Environmental Measures and International Trade

In 1971 the Secretary-General of the United Nations Conference on the Human Environment requested that the GATT Council of Representatives assist in the preparation for that Conference.[48] The Secretariat of the GATT 1947 produced a paper examining the impact that different anti-pollution measures could have on international trade and cautioned governments against imposing protective measures that conflict with the GATT principles.[49] As a result of the preparation, the GATT Council of Representatives established an environment focus group called the Group on Environmental Measures and International Trade (the EMIT Group) which was mandated to examine "trade policy aspects of measures to control pollution and protect the human environment".[50] In turn, the UN Conference recommended that GATT monitor the development of trade measures to protect the environment and recommended that the EMIT Group could consider issues where environmental standards have negative impacts on trade.[51] Although there was willingness among contracting parties to consider environment-trade issues (primarily prompted by concern that trade measures for the benefit of the environment could negatively impact trade, particularly developing countries),[52] the EMIT Group did not meet for two decades as its mandate was limited to examining, on request, specific environmental matters relevant to the GATT.[53] The rationale for its limited mandate was to avoid duplicating other organisations' work on the environment[54] and at the time of its establishment the Secretariat was not aware of any specific problems that could be placed before the EMIT Group.[55]

Again in the early 1990s a number of external developments, including the UNCED in 1992, prompted the GATT Council of Representatives to refocus on the environment.[56] In 1991 the

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48 *Industrial Pollution Control and International Trade* L/3538, 9 June 1971 (Note by the GATT Secretariat) [L/3538].

49 At 12.

50 *Minutes of Meeting Held in the Palais des Nations, Geneva, on 9 November 1971* C/M/74, 9 November 1971 at 4; *Group on Environmental Measures and International Trade* L/3622, 16 November 1971; and *Group on Environmental Measures and International Trade* L/3622/Rev.1, 14 January 1972.

51 *United Nations Conference on Human Environment* A/CONF.48/14 (3 July 1972) (held in Stockholm, Sweden, 5–16 June 1972), recommendations 105 and 103.

52 L/3538, above n 48, at 3.

53 At 3.

54 At 3.

55 At 3.

56 There were a number of developments and discussions happening in other forums that influenced the GATT Council's involvement in environmental issues. These included the upcoming 1992 United Nations Conference on Environment and Development, the dispute between the United States and Mexico, *United States — Restrictions on Imports of Tuna* 39th Supp GATT BISD 155, DS 21/R, 3 December 1991 (Report

European Free Trade Association (EFTA)[57] requested that the EMIT Group be reconvened to clarify the relationship between international trade and the environment.[58] The EFTA's reasons for its request were that trade and environment had become topical, other organisations were raising the issue, GATT needed to prepare for effective participation at the UNCED, and GATT would lose credibility if it could not find a solution "to one of the most pressing issues internationally debated".[59] The EMIT Group was reactivated in November 1991, 20 years after its first establishment, to consider three items: the relationship between trade provisions in MEAs and the multilateral trading system, transparency of national environmental regulation likely to have trade effects, and trade effects of new packaging and labelling requirements aimed at protecting the environment.[60]

The EFTA's request marked the beginning of a new era for the GATT. Although the EFTA's request was partially motivated by the wish to uphold GATT's reputation, it also recognised that trade was not an end in itself but part of a wider purpose. The EFTA referred to the preamble to the GATT 1947 to support its request. The preamble provides that the contracting parties recognise:

> … that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods … .

The EFTA noted that a "sound and viable environment is part of the standard of living and development" and that sustainable development and the sustainable management of resources are important to the standards of living and development and "developing the full use of the resources

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by the Panel not adopted), which highlighted the trade-environment issues, and the World Commission on Environment and Development's report, *Our Common Future*, which first employed the term "sustainable development". *Report of the World Commission on Environment and Development: Our Common Future*, annex in *Development and International Co-operation: Environment Report of the World Commission on Environment and Development* UN GAOR, 42nd sess, A/42/427 (20 March 1987). See World Trade Organization "Early years: emerging environment debate in GATT/WTO" (2004) <www.wto.org>.

57 At the time the European Free Trade Association consisted of Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. See The European Free Trade Association <www.efta.int>.

58 The contracting parties raised the issue at the GATT Council's 46th meeting and subsequently made a formal statement request: General Agreement on Tariffs and Trade 46th session *Summary Record of the Second Meeting Held at the Centre William Rappard, Geneva on Thursday, 13 December 1990, at 10.15 a.m.* SR 46/2, 1991 at 5; and *Trade and Environment: Statement by the Delegation of Austria on Behalf of the EFTA Countries* Spec (91) 27, 12 June 1991 [Spec (91) 27] at 2.

59 Spec (91) 27, above n 58, at 2.

60 *Report of the Meeting of the Group on Environmental Measures and International Trade 27 November 1991* TRE/1, 17 December 1991 (General Agreement on Tariffs and Trade, Group on Environmental Measures and International Trade).

of the world".[61] This idea that the objectives of the GATT 1947 incorporated environmental objectives was developed further after the UNCED. At the 48th session the GATT Council chairperson noted the contracting parties' enthusiasm for ensuring that trade and environmental policies were mutually reinforcing.[62] Importantly, the chairperson noted that:[63]

> … GATT's competence was limited to trade policies and those trade-related aspects of environmental policies which might result in significant trade effects for GATT contracting parties. In respect neither of its vocation nor of its competence was the GATT equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment. Nevertheless, the multilateral trading system did have a central role to play in supporting an open international economic system and fostering economic growth and sustainable development, especially in the developing countries, to help address the problems of environmental degradation and the over-exploitation of natural resources.

This recognition of the trading system's role in achieving a wider objective of sustainable development, together with contracting parties' enthusiasm for Agenda 21,[64] influenced the direction of the EMIT Group's work agenda. Following the UNCED, the scope of the EMIT Group's work was extended when the GATT Council of Representatives directed the EMIT Group to look into Agenda 21 matters relating to making trade and environmental policies mutually supportive.[65]

Although the EMIT Group was limited to non-binding discussions, its reactivation sparked much needed discussions not just about the impact on trade of measures to protect the environment, but also about the role of the multilateral trading system in supporting sustainable development and GATT's role in promoting trade policies that are compatible with environmental objectives. In his 1994 report the EMIT Group chairperson noted that the Group had a common understanding on a number of points that would shape the direction of future environment discussions:

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61 Spec (91) 27, above n 58, at 2.

62 *Summary Record of the First Meeting, Held at the International Conference Centre, Geneva on Wednesday, 2 December 1992 at 3.15 p.m.* SR 48/1, 5 January 1993 (General Agreement on Tariffs and Trade, Contracting Parties, 48th session) [SR 48/1] at 13. The GATT Council chairperson noted that members "were determined that GATT should play its full part in ensuring that policies in the fields of trade, the environment and sustainable development were compatible and mutually reinforcing".

63 At 13.

64 Agenda 21, above n 32.

65 SR 48/1, above n 62, at 13–14. The EMIT group was asked to look at the matters in Agenda 21 relating to accelerating sustainable development and the objectives for governments in ch 2.21, particularly 2.21(b), and the principles in ch 2.22. Those sections encourage GATT contracting parties to meet sustainable development objectives by engaging on trade and environment issues. See also: *Report by Ambassador H Ukawa (Japan), Chairman of the Group on Environmental Measures and International Trade, to the 49th Session of the Contracting Parties* L/7402, 2 February 1994 [L/7402] at annex II. However, the EMIT Group's follow-up discussions on this were cut short due to the priority of completing the Uruguay Round: L/7402 at [5].

- The GATT was not an environmental forum and therefore did not have the capability to review national environmental priorities, set standards or develop environmental policies;[66]
- The multinational trading system and sustainable development do not need to contradict but if there are problems, they need to be resolved without undermining the trade rules;[67] and
- Trade rules should not be an unjustified obstacle to implementing environment measures.[68]

The chairperson also noted that:[69]

> … an open, secure and non-discriminatory trading system underwritten by the GATT rules and disciplines can facilitate environmental policy-making and environmental conservation and protection by helping to encourage more efficient resource allocation and to generate real income growth.

What started out as a response to external developments prompted the contracting parties to actively engage in trade and environmental issues and to view the issues in light of wider objectives of sustainable development.

B The Marrakesh Agreement

As a result of the traction gained from the EMIT Group and the UNCED, environmental preservation became one of the primary objectives of the WTO as stated in the preamble to the Marrakesh Agreement Establishing the WTO (WTO Agreement).[70] The preamble provides that members recognise:[71]

> … that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment* and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The preamble in the draft Final Act contained the words "developing the optimal use of the resources of the world at sustainable levels and expanding the production and trade in goods and

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66 L/7402, above n 65, at [9].

67 At [10].

68 At [11].

69 At [11].

70 WTO Agreement, above n 7.

71 Preamble (emphasis added).

services" but did not refer to sustainable development or environmental preservation and protection.[72] It is suggested that there was resistance to including the environment in the preamble by some developing countries that were also against establishing a permanent environment committee within the new Multilateral Trade Organization. This resistance came from concerns that focus on the environment would put developing countries at a disadvantage.[73] Pressure from environmental groups on the United States Government is thought to have influenced the change in the preambular text.[74] The inclusion of environmental objectives "was intended to ease concerns of environmentalists about the aims of the proposed organization".[75]

Whilst not specifically mentioning "mutual supportiveness", the preamble does refer to sustainable development and the objectives of protecting and preserving the environment. The importance of this reference has been noted by the Appellate Body, which stated that the preambular language "reflects the intentions of negotiators" and "must add colour, texture and shading" to the interpretation of the WTO agreements.[76] The express reference to the environment illustrates that members recognise that increased trade and lowering trade barriers are not the ultimate objectives; rather raising living standards alongside sustainable development and protection and preservation of the environment are the overarching objectives of the WTO.[77] These words contrast with the GATT 1947 preamble which uses the phrase "developing the full use of the resources of the world and expanding the production and exchange of goods".[78] The change of wording from "full use" to "optimal use" suggests that member states recognise that limitations should be placed on the use of resources in order to achieve the wider objective.[79] Further, the express reference to protecting and preserving the environment is an important contrast from the GATT 1947 language and allows the WTO to accommodate the principle of mutual supportiveness within its existing framework.

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72 *Agreement Establishing the Multilateral Trade Organization* in annex IV of *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* MTN.TNC/W/FA, 20 December 1991 (Multilateral Trade Negotiations, The Uruguay Round, Trade Negotiations Committee) at 91.

73 John Croome *Reshaping the World Trading System: A History of the Uruguay Round* (World Trade Organization, Geneva, 1995) at 361. John Croome was a senior official in the GATT Secretariat until 1993.

74 Friedl Weiss, Erik MG Denters and Paul JIM de Waart (eds) *International Economic Law With a Human Face* (Kluwer International Law, The Hague, 1998) at 206.

75 Croome, above n 73, at 361.

76 *United States – Shrimp*, above n 1, at [153] and [155].

77 World Trade Organization "Trade and Environment" <www.wto.org>.

78 GATT 1947, above n 7, preamble at [2].

79 Mirina Grosz *Sustainable Waste Trade under WTO Law: Chances and Risks of the Legal Frameworks' Regulation of Transboundary Movements of Wastes* (Martinus Nijhoff Publishers, The Netherlands, 2011) at 331.

C The Committee on Trade and Environment

In accordance with its objective of sustainable development, members signed the Marrakesh Ministerial Decision on Trade and Environment 1994 (Marrakesh Decision).[80] The Marrakesh Decision expressly refers to the WTO Agreement preamble. It also states that the multilateral trading system and environmental protection should not be contradictory and expresses a desire to coordinate trade and environmental policies.[81] The Marrakesh Decision also established a specialist environmental committee – the Committee on Trade and Environment (CTE).[82] The aim of the CTE is to make "international trade and environmental policies mutually supportive".[83] In its first report the CTE endorsed multilateral solutions to environmental problems and emphasised the mutually supportive relationship of the WTO agreements and MEAs.[84]

The CTE is mandated to "identify the relationship between trade measures and environmental measures, in order to promote sustainable development" and "make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system".[85] This last mandate allows the CTE to initiate changes to the WTO framework to better accommodate sustainable development objectives, although no formal recommendations have been made.

Initially the CTE had 10 items on its work programme.[86] At the fourth Ministerial Conference held in Doha in 2001 this was extended to include three additional items: technical assistance to help developing countries participate more effectively in the CTE, national environmental reviews, and a forum for debating the environmental and developmental aspects of the negotiations so that the objective of sustainable development can be achieved.[87] Three existing items also became items of focus: how environmental requirements affect market access, labelling requirements for environmental purposes, and the links between the WTO Agreement on Trade Related Aspects of Intellectual Property[88] and the environment.[89] Although the CTE has not recommended any

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80 Marrakesh Decision, above n 36.

81 Marrakesh Decision, above n 36.

82 Marrakesh Decision, above n 36.

83 Marrakesh Decision, above n 36.

84 CTE Report (1996), above n 36, at [171].

85 At [171].

86 For a list of the ten items see: World Trade Organization "Items on the CTE's Work Programme" <www.wto.org>.

87 Doha Declaration, above n 36, at [33] and [51].

88 TRIPS Agreement, above n 13.

amendments to the WTO rules,[90] it has undertaken extensive research into the relationship between trade and environmental measures and has acted as a forum for members to debate environmental issues.[91] Three of the CTE's agenda items have also matured into items for negotiation by the "Special Sessions" of the CTE (CTESS) during the Doha Round.

D The Special Sessions of the CTE

Enhancing mutually supportive trade and environmental policies is one of the objectives of the Doha Round.[92] At the Doha Ministerial Conference members agreed to commence a new round of negotiations including, for the first time, negotiations specifically devoted to trade-environment issues.[93] The negotiating mandates discussed in the CTESS are set out in para 31 of the Doha Ministerial Declaration:[94]

(i) the relationship between the WTO rules and MEAs;

(ii) collaboration between the WTO and MEA secretariats; and

(iii) the elimination of tariffs and non-tariff barriers on environmental goods and services.

Despite the breadth of the negotiating topics the CTESS is limited by the scope of these negotiating mandates. Paragraph 32 of the Declaration provides that the negotiation outcomes must be "compatible with the open and non-discriminatory nature of the multilateral trading system" and cannot change the scope, or alter the balance, of the rights and obligations in any way.[95] The negotiations surrounding the first mandate are further limited "to the applicability of such existing

89 Doha Declaration, above n 36, at [32]. The CTE reported its progress on the Doha items to the fifth Ministerial Conference in Cancún in 2003: *Report to the 5th Session of the WTO Ministerial Conference in Cancún, Paragraphs 32 and 33 of the Doha Ministerial Declaration* WT/CTE/8, 2003 (World Trade Organization Committee on Trade and Environment).

90 World Trade Organization "Items on the CTE's Work Programme" (2014) <www.wto.org>.

91 Along with collaborating with MEA secretariats and sharing national experiences on trade-environment issues, the CTE has maintained a "Matrix on Trade-related Measures Pursuant to Selected Multilateral Environmental Agreements" which identifies MEAs with trade measures and an environmental database containing information on domestic environment-related trade measures: *Matrix on Trade-Related Measures Pursuant to Selected Multilateral Environmental Agreements* WT/CTE/W/160/Rev.6; TN/TE/S/5/Rev.4, 4 October 2013 and *Environmental Database for 2011* WT/CTE/EDB/11, 21 August 2013. The database provides an overview of the domestic environment related measures notified under the WTO agreements and mentioned in trade policy reviews and environment related provisions in regional trade agreements.

92 Doha Declaration, above n 36, at [31].

93 At [31].

94 At [31].

95 At [32].

WTO rules as among parties to the MEA in question".[96] This means that the negotiations can only clarify how the WTO rules apply to WTO members that are MEA members. This prevents members from agreeing to outcomes that would enable MEAs, not binding on WTO members, to alter the scope of the WTO members' rights and obligations. As a result, the CTESS cannot clarify the relationship between the WTO rules and MEAs where the WTO members are not MEA members. The limited scope of the negotiations demonstrates the sensitivity of the area and the caution that some WTO members are taking in order to avoid giving too much weight to MEAs at the expense of the WTO principles. Lack of clarification by the CTESS of this will mean that the WTO dispute settlement panels must continue to determine the issue on an ad hoc basis. Unfortunately, as will be discussed below, the Dispute Settlement Panel and Appellate Body are yet to develop a consistent approach. The limited scope of the Doha mandate is therefore a missed opportunity to endorse the use of MEAs to interpret the WTO rules consistent with the principle of mutual supportiveness.

In 2011 the CTESS chairperson released a report on the status of the negotiations containing a Draft Ministerial Decision on Trade and Environment (Draft Ministerial Decision) on the first two negotiating items and a compilation of what members consider environmental goods in respect of the third item.[97] The Draft Ministerial Decision incorporates different proposals put forward by members.[98] The Draft Ministerial Decision affirms members' commitment to sustainable development to enhance coherence and mutual supportiveness between the WTO and MEAs. The draft includes a number of commitments including encouraging the sharing of domestic experiences with "specific trade obligations" (STOs);[99] collaborating with MEA secretariats through information exchange and granting MEA secretariats observer status in the CTE;[100] and providing technical assistance and capacity building to developing countries.[101] Also included is the African Group's proposal to establish a group of experts on trade and environment to aid members' implementation of MEA STOs;[102] Switzerland's proposal to encourage members to use MEA experts during consultation procedures under art 4 of the Understanding on Rules and Procedures Governing the

96 At [31(i)].

97 *Report (2012) of the Committee on Trade and Environment* TN/TE/20, 21 April 2011 [*CTESS Report (2012)*].

98 *Draft Ministerial Decision on Trade and Environment*, in annex 1 of the CTESS Report (2012), above n 97, [*Draft Ministerial Decision*].

99 At [1]. According to the Draft Ministerial Decision a specific trade obligation is a trade measure set out in a MEA which requires a MEA party to take, or refrain from taking, a particular trade action.

100 At [2], [3] and [4].

101 At [5(c)].

102 At [5(d)] and *Proposed Elements Relating to a Group of Experts*, in annex 1A of the CTESS Report (2012), above n 97.

Settlement of Disputes (DSU);[103] and the European Union's proposal to require members to request panels to seek information from MEA experts during proceedings under art 13 of the DSU.[104] A number of issues are yet to be agreed upon by the members such as whether the panels should be required or encouraged to seek expert assistance[105] and the precise definition of "STO" (or whether it is necessary at all).[106]

Since 2011 no further progress has been made on the negotiations or finalising the Draft Ministerial Decision. However, in early 2014 the Director-General as chairperson of the Trade Negotiations Committee reported to the General Council that preparing for concluding the Doha Round is a priority of the Committee.[107] The chairperson noted that the environmental negotiations were an important part of the Doha Round and were high on political agendas of the delegations.[108] In March 2014, at the request of the Trade Negotiating Committee, the chairperson of the CTESS issued a report on recent consultations on the Doha Round issues, stating that there appears to be interest by many delegations to commence work on the negotiations on the third item – removing trade barriers on environmental goods.[109] The chairperson also suggested that the Draft Ministerial Decision could be revisited.[110] Although progress has stalled since 2011, the interest from delegation and endorsement by the chairperson, along with the existence of the Draft Ministerial

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103 Understanding on Rules and Procedures Governing the Settlement of Disputes 1869 UNTS 401 (opened for signature 15 April 1994, entered into force 1 January 1995) [Dispute Settlement Understanding]. Article 4 of the Dispute Settlement Understanding requires members to follow certain consultation procedures to resolve trade issues before panels can be established.

104 Draft Ministerial Decision, above n 98, at [5(e)] and *Proposed Elements on Dispute Settlement*, in annex 1B. Article 13 of the Dispute Settlement Understanding authorises panels to seek information, technical advice and expert opinions from non-WTO sources.

105 At [5(e)]. Switzerland has proposed that the CTE should encourage members involved in disputes regarding the relationship between WTO rules and MEAs and STOS to draw on expert advice.

106 At 5 and 7:

> A specific trade obligation (STO) set out in a multilateral environmental agreement (MEA) is understood to be one that requires an MEA Party to take, or refrain from taking, a particular trade action [trade-related action].

Japan proposed "trade-related action" so that STOs would include trade measures explicitly provided for in MEAs and trade measures not explicitly provided for but imposed pursuant to achieving a particular result as required by an MEA.

107 *Minutes of the Meeting Held in the Centre William Rappard on 14 March 2014* WT/GC/M/150, 2014 (World Trade Organization General Council) at [1.7].

108 At [125].

109 *Report by the Chairman, Ambassador Selim Kuneralp to the General Council, 14 March 2014* TN/TE/21, 2014 (World Trade Organization Committee on Trade and Environment Special Session) at [7].

110 At [8].

Decision at least offers hope that there is political will within the WTO to resolve some of the trade-environment issues consistent with sustainable development objectives. The outcome of the negotiations will be crucial to achieving mutual supportiveness between WTO and environmental policies as it will determine how the WTO, its members and the Dispute Settlement Panel approach trade-environment issues. The reference to sustainable development and environmental protection in the WTO instruments illustrates that WTO members acknowledge the importance of balancing trade activities with environmental protection.[111]

IV MUTUAL SUPPORTIVENESS AS AN INTERPRETATIVE TECHNIQUE

In the event that a case concerning trade measures designed to protect the environment does come before the WTO, the WTO Panel should take a mutually supportive approach to interpreting the WTO rules in order to give proper weight to environmental considerations. A mutually supportive interpretation would require interpreters to consider the "object and purpose" of the WTO agreements in light of the wider normative context. This would include the development of the international community's environmental concerns as demonstrated through the establishment of MEAs to protect and preserve the environment.

In the first three sections of this part, I explain why panels should consider MEAs and examine the WTO panels' jurisdiction to consider MEAs. In the fourth section I briefly describe how panels may consider MEAs under art 31 of the Vienna Convention on the Law of Treaties.[112] In sections E and F I compare the different approaches taken in two WTO cases.

A Consideration of MEAs is Good for the Environment

While it is important that the WTO negotiations mutually support trade and environmental objectives, it is equally critical that panels take a mutually supportive approach to interpreting the WTO agreements.

Consideration of MEAs is more likely to result in an environmentally friendly outcome compared with focusing only on WTO instruments. Because the WTO is not an environment forum, it does not have the expertise and the competence to make qualitative decisions on environmental issues.[113] MEAs are likely to better inform Panels of the contemporary environmental issues and indicate environmental concerns or values accepted by the international community.[114] Proper

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111 *United States – Shrimp*, above n 1, at [129] and [152]–[153].

112 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

113 CTE Report 1996, above n 36, at [8].

114 In *United States – Shrimp*, above n 1, the Appellate Body referred to various MEAs as evidence of environmental concerns. See discussion below.

weight may not be given to environmental issues if Panels ignore MEAs in their interpretation of the WTO agreements. For example, the reference to CITES in *United States – Shrimp* helped the Appellate Body determine the status of five species of turtles.[115] MEAs may also be more risk-averse legal frameworks, and may therefore have a lower threshold for imposing trade measures when faced with potential risks to the environment. For example, the Cartagena Protocol on Biosafety (CPB)[116] affirms the use of the precautionary principle in its preamble.[117] A mutual supportive interpretation between trade and environment norms, which refers to MEAs, is particularly important because trade can present many unknown risks to the environment.[118]

Not giving serious consideration to the relevance of MEAs also potentially undermines the status of these MEAs. This could send the signal to members that their WTO obligations trump environmental concerns. Further, it could create uncertainty for states considering whether implementing a trade measure pursuant to an MEA is inconsistent with their WTO trade obligations.

WTO panels should also take heed of the work being undertaken within the CTE and take the progress as a signal that WTO members acknowledge the importance of achieving mutually supportive trade and environment outcomes. The fact that mutual supportiveness has made numerous appearances throughout WTO instruments strengthens the argument that panels should use it as a basis for interpreting WTO agreements.[119] Failure to consider properly MEAs would not only be inconsistent with the work of the CTE but would completely undermine its efforts. There is little point of the CTE working with MEAs to reconcile the trade-environment relationship if panels are not willing to consider MEAs when interpreting the scope of those obligations.

B Jurisdiction of the WTO

The DSU provides for the establishment of panels[120] and sets out the rules for dispute settlement. Disputes brought to the WTO must relate to trade issues under WTO agreements. WTO panels do not have standing to hear non-WTO claims. Article 1 of the DSU provides that the rules

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115 *United States – Shrimp*, above n 1, at [132].

116 CPB, above n 36.

117 The precautionary principle is based on the premise that a lack of scientific evidence should not prevent member states from taking action to, for example, protect the environment. In *EC – Measures Affecting Meat and Meat Products (Hormones)* WT/DS26/AB/R, 16 January 1998 (Report of the Appellate Body) the Appellate Body declined to determine whether the precautionary principle is a principle of general or customary international law but noted that while the principle was reflected in art 5.7 of the SPS Agreement, it does not override the obligations arts 5.1 and 5.2 to carry out proper a risk assessment: at [123]–[125].

118 Kuijper, above n 2, at 16.

119 Pavoni, above n 33, at 652.

120 Dispute Settlement Understanding, above n 103, art 6(1).

and procedures of the DSU apply to disputes under the "covered agreements" listed in app 1 of the DSU. The covered agreements only include WTO agreements.

The limited jurisdiction of panels is supported by arts 7 and 11. Article 7(1) provides that panels are to examine the disputed matter in light of the relevant provisions in the covered agreements. Article 7(2) provides that panels shall address the relevant provisions in the covered agreements. Further, arts 7(1) and 11 provide that panels are to make findings to assist the Dispute Settlement Body (DSB) to make recommendations or rulings provided for in the covered agreements. The specific reference to the covered agreements makes it clear that panels must assess whether the trade measures comply with the covered agreements and can only recommend that the DSB enforce the rules of the covered agreements.[121]

C Applicable law

The international framework and the WTO framework itself support the consideration of MEAs.

While panels do not have jurisdiction to apply and enforce non-WTO law, panels may consider non-WTO law to assist the interpretation of WTO agreements.[122] Article 3.2 of the DSU expressly recognises that the WTO is not isolated from international law but is part of a wider set of institutions.[123] Article 3.2 provides that the dispute settlement system aims to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Customary international law, part of which is codified in the Vienna Convention,[124] requires consideration of other sources of international law, potentially including MEAs, when interpreting treaties.[125]

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121 Gabrielle Marceau "WTO Agreements Cannot Be Read in Clinical Isolation from Public International Law (AB Report in US – Gasoline)" in World Bank Seminar *Legal Aspects of International Trade* (The International Bank for Reconstruction and Development/The World Bank, Washington, 2001) 215 at 218.

122 Joost Pauwelyn "How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits" (2003) 37 JWTL 997 at 1000.

123 *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 20 May 1996 (Report of the Appellate Body) [*United States – Gasoline*] at 17.

124 Articles 31, 32 and 33 of the Vienna Convention, above n 112 , are considered customary international law: *United States – Gasoline*, above n 123, at 23; and *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996 (Report of the Appellate Body) [*Japan – Alcoholic Beverages*] at 104.

125 Bradly J Condon *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* (Transnational Publishers Inc, New York, 2006) at 33. See also Joost Pauwelyn "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 AJIL 535 at 542–543. The Panel has accepted that customary international law applies to WTO agreements: *Korea – Measures affecting Government Procurement* WT/DS/163/R, 1 May 2000 (Report of the Panel) [*Korea – Government Procurement*] at [7.96] and [7.101].

Even without express reference in art 3.2 to customary rules of interpretation, panels would still be required to interpret WTO provisions in light of other international law. This is because the WTO agreements are part of international law.[126] The WTO is not a closed system and cannot operate outside of existing customary international rules of law.[127] Therefore, customary international law applies automatically and the DSU does not need to state expressly whether non-WTO law is applicable.[128] Further, international law cannot be excluded unless WTO members expressly contract out of international law.[129] The DSU does not expressly contract out of non-WTO law.[130] Therefore, unless WTO members expressly state that a particular MEA does not apply, panels can potentially consider it.

Panels should also consider MEAs when interpreting WTO agreements as part of good treaty interpretation. Article 11 requires panels to make an "objective assessment of the matter". Because there is likely to be little information regarding environmental issues in WTO agreements, interpreters would need to look beyond the WTO agreements in order to make an objective assessment.[131] Further, the reference to sustainable development in the WTO Agreement preamble suggests that the WTO members intended that the covered agreements would be interpreted in a manner that is consistent with environmental international law and developments. Doing so will avoid the WTO becoming increasingly isolated and being inconsistent with international environmental law objectives.[132] Panels that do not consider MEAs could be inconsistent with international rules on interpretation as well as the DSU.[133]

D Consideration of MEAs under art 31 of the Vienna Convention

When interpreting the WTO agreements panels must comply with customary international law on treaty interpretation.[134] A starting point for panels is generally the interpretation rules in the Vienna Convention. The general rules on treaty interpretation are set out under art 31 of the Vienna

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126 Pauwelyn, above n 122, at 1001–1002.

127 *Korea – Government Procurement*, above n 125, at [7.96]; and Pauwelyn, above n 122, at 1002.

128 Pauwelyn, above n 122, at 1002.

129 *Korea – Government Procurement*, above n 125, at [7.96]:

> … the relationship of the WTO Agreements to customary international law … applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it.

130 Pauwelyn, above n 122, at 1000.

131 Marceau, above n 121, at 216.

132 At 21 and 216–217.

133 Pauwelyn, above n 125, at 562.

134 Dispute Settlement Understanding, above n 103, art 3.2.

Convention. Articles 31(1) and 31(3)(c) provide an avenue for panels to incorporate the principle of mutual supportiveness into treaty interpretation. Article 31(1) requires treaties to 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.

The requirement of "good faith" means that the interpretation must give effect to the treaty to avoid making the terms redundant.[135] Article 31(3) requires, together with the context, the following matters to be taken into account:

> (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.

Unlike art 32, the rules under art 31 are not supplementary interpretation tools.[136] There is also no hierarchy or order in which the rules should be followed.[137] This gives the interpreter the flexibility to use the rules relevant to the particular circumstances.

Both articles can aid panels to interpret the WTO Agreement as mutually supportive of trade and environmental objectives. Under art 31(1) panels may find MEAs useful when determining the meaning of terms in WTO agreements in light of the object and purpose of the WTO Agreement. In applying a mutually supportive approach panels would interpret the WTO terms consistently with international environmental law in order to give effect to the objective of sustainable development.[138] Under art 31(3)(c) MEAs could provide contextual background as relevant rules of international law.

A good illustration of the different approaches to art 31(1) and 31(3)(c) can be seen in the decisions of the Appellate Body in *United States – Shrimp* and the Panel in *EC – Biotech*. The Appellate Body's approach is arguably the better approach, as it is consistent with the principle of mutual supportiveness. In *EC – Biotech*, the Panel interpreted both articles narrowly, making them inadequate to support the principle of mutual supportiveness.

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135 *Japan – Alcoholic Beverages*, above n 124, at 13. See also Condon, above n 125, at 18–19.

136 Under art 32 the preparatory work of the treaty and the circumstances of its conclusion may be referred to if interpreting the terms in accordance with art 31 would result in a meaning that is ambiguous or obscure or manifestly absurd or unreasonable.

137 Study Group of the International Law Commission, above n 21, at [428].

138 This is the approach taken in *United States – Shrimp*, above n 1, discussed below.

1 United States – Shrimp

India, Malaysia, Pakistan and Thailand took an action against the United States' restrictions on the import of shrimp and shrimp products, under s 609 of the Public Law 101–102, which were designed to protect turtles from environmentally unfriendly fishing techniques. In order to determine whether the trade measure was justified, the Appellate Body had to first determine whether turtles fell within the meaning of "exhaustible natural resources" under GATT 1994 art XX(g).

The Appellate Body's decision is consistent with the principle of mutual supportiveness because it expressly acknowledged the wider social and environmental context that international trade operates in. First, the Appellate Body took note that in "modern biological sciences" living species can be exhaustible.[139] Secondly, the Appellate Body held that the treaty must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment".[140] The Appellate Body looked to the WTO Agreement preamble as evidence that members were aware of the importance of environmental protection.[141] From this perspective the Appellate Body held that the term "natural resources" is generic and therefore capable of evolving.[142] Thus, the Appellate Body found it necessary to refer to other "modern" international instruments that referred to "living natural resources".[143]

The Appellate Body gave due consideration to international environmental law, citing several MEAs to support its finding that the international community acknowledges the importance of protecting living natural resources. The Appellate Body referred to a number of instruments including the United Nations Convention on the Law of the Sea,[144] the Convention on Biological Diversity (CBD),[145] Agenda 21,[146] and the Convention on the Conservation of Migratory Species of Wild Animals.[147] This, together with the preamble of the WTO Agreement, indicated that the

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139 *United States – Shrimp*, above n 1, at [128].

140 At [129].

141 At [129].

142 At [130].

143 At [129].

144 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

145 Convention on Biological Diversity 1760 UNTS 79 (opened for signature on 5 June 1992, entered into force 29 December 1993) [CBD].

146 Agenda 21, above n 32.

147 *United States – Shrimp*, above n 1, at [130]–[131]; and Convention on the Conservation of Migratory Species of Wild Animals 1651 UNTS 333 (opened for signature 23 June 1979, entered into force 1 November 1983) [CMSWA].

definition of "natural resources" could include turtles.[148] The Appellate Body then relied on the fact that the turtle species were listed as endangered in the CITES[149] as evidence that the turtles were "exhaustible".[150] The United States had not implemented trade measures pursuant to an MEA, yet the Appellate Body still found it important to consider international environmental law because the trade measures were in place in order to protect the environment.

In considering whether the trade measure was consistent with the chapeau to art XX, the Appellate Body again referred to the WTO Agreement preamble noting the objective of sustainable development.[151] The Appellate Body also noted that the preamble had been amended from seeking to achieve "full use" to "optimal use" of the world's resources.[152] This was evidence that members understood that exploitation of resources should be consistent with sustainable development.[153] The Appellate Body noted that the preambular language reflects the negotiators' intentions and provides context for the interpretation of the WTO agreements.[154] The Appellate Body ultimately found that the trade measures were unjustifiable discrimination because the United States was effectively trying to impose its own domestic measures on other member states and had not properly engaged in negotiating an agreement to protect turtles.[155] It based its conclusion on the fact that several international instruments state that unilateral actions to address environmental issues should be avoided in favour of international consensus.[156]

It is unclear what interpretative rule the Appellate Body's consideration of the MEAs was based on. It is suggested that the Appellate Body's approach could fit within several different rules under art 31.[157] The Appellate Body did not mention the Vienna Convention in its interpretation of art

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148 At [131].

149 CITES, above n 3.

150 *United States – Shrimp*, above n 1, at [132].

151 At [152].

152 At [152].

153 At [152]–[153].

154 At [155].

155 At [161]–[172].

156 At [168]. The Appellate Body noted at [154] that the Marrakesh Decision refers to principle 12 of the United Nations Conference on Environment and Development *Rio Declaration on Environment and Development* A/CONF.151/26 (vol 1) (13 August 1992), Agenda 21, the CBD, the CMSWA and the CTE Report 1996 all advocate concerted action rather than unilateral actions to address environmental issues.

157 Margaret A Young "The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case" (2007) 56 ICLQ 907 at 920. Young suggests that the Appellate Body may have used art 31(1) based on the ordinary meaning of "exhaustible natural resources" and the object and purpose of the WTO Agreement; art 31(2) based on reference to the WTO Agreement as context; 31(3)(b) based on subsequent

XX(g).[158] For example, the Appellate Body did not explain whether it based its findings on CITES because the disputing parties were all CITES members or simply because CITES has broad membership and therefore represents international consensus on the standard of "exhaustibility".[159] This omission leaves open the question whether panels may consider MEAs under art 31(3)(c) if not all the disputing parties are MEA members. However, it is not mandatory for the panel to identify rules of interpretation. As noted above, interpreters should consider other international law as good interpretative practice. This is incorporated in the whole of art 31. What is important is that the Appellate Body used the MEAs and the other international environmental instruments because they were evidence of international consensus on the need to protect living resources through multilateral action. As will become clear below, this approach is more likely to provide a mutually supportive outcome for trade and environment because the Appellate Body did not restrict itself to a narrow interpretation of the Vienna Convention and avoid considering MEAs.

2 EC – Biotech

EC – Biotech involved a dispute between Canada, the United States, Argentina and the EC regarding the EC's import policies on genetically modified products. The Panel had to consider, among other issues, the relevance of the CPB,[160] CBD and other international instruments in aiding the interpretation of certain terms in annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[161] The Panel embarked on a rigid application of the Vienna Convention, distinguishing between international law relevant under art 31(3)(c) and non-binding international law that can be used to interpret the ordinary meaning under art 31(1).[162]

In respect of art 31(3)(c) the Panel considered that "relevant rules of international law" included treaties, customary international law and, based on the finding in *United States – Shrimp*,[163] general

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practice as seen in the international instruments; and art 32 based on reference to contemporary concerns about the environment.

158 The Appellate Body did refer to art 31(3)(c) in a footnote regarding the interpretation of the chapeau to art XX: "our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.": *United States – Shrimp*, above n 1, at [158], n 157.

159 Henrik Horne and Petros C Mavroidis "MEAs in the WTO: Silence Speaks Volumes" (2011) at 15 available at <www.econ-law.se>.

160 CPB, above n 36.

161 SPS Agreement, above n 13. The Panel also considered the applicability of the precautionary principle as a general principle of international law. However, the Panel declined to express a view as to whether the principle was a general principle of international law: *EC – Biotech*, above n 1, at [7.86]–[7.89].

162 Young, above n 157, at 908–909.

163 *United States – Shrimp*, above n 1, at [158] and [158], n 157.

principles of international law.[164] The Panel recognised that the CPB could be relevant international law.[165] However, the Panel interpreted "the parties" under 31(3)(c) to refer to all parties to the treaty.[166] Therefore, in order to be relevant all WTO members must be signatories to the international agreement. This means that the rules that can be considered under art 31(3)(c) would be limited to those rules that are equally applicable to all WTO members, thus supporting a consistent approach regarding the rights and obligations of all members.[167]

Canada and Argentina had signed but not ratified the CPB and the United States was not a member, although the United States had participated in some aspects of negotiating.[168] Therefore, the Panel held that the CPB was not a relevant rule of international law "applicable in the relations between the parties".[169] Further, the United States had not ratified the CBD and therefore it was only binding on the EC, Canada and Argentina and was not relevant to all the WTO members.[170] The Panel declined to consider whether the MEAs would be relevant rules of international law even if all of the disputing parties were parties to the MEAs and there was consensus between the disputing parties that the WTO law should be interpreted in light of the MEAs.[171]

The Panel then considered whether MEAs which are not binding on all the disputing parties can be used to interpret WTO rules as the Appellate Body had done in *United States – Shrimp*.[172] The Panel considered that non-binding instruments could be considered under art 31(1) of the Vienna Convention.[173] The Panel found that in *United States – Shrimp* the Appellate Body had used the international instruments as interpretative aids under art 31(1).[174] Thus, instead of considering whether MEAs are relevant rules of international law under art 31(3)(c), the Panel was of the view that it could use MEAs to inform the ordinary meaning – in the same way that dictionaries do – under art 31(1).[175] However, the Panel did not use the CBD or the CPB to interpret the SPS

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164 *EC – Biotech*, above n 1, at [7.67].

165 At [7.67].

166 At [7.68].

167 At [7.70].

168 At [7.75].

169 At [7.75].

170 At [7.75].

171 At [7.72].

172 At [7.72].

173 At [7.92].

174 At [7.94].

175 At [7.92].

Agreement. The Panel stated that it had "carefully considered the provisions" but found it unnecessary and inappropriate to rely on the CBD and CPB provisions to aid the interpretation of the SPS Agreement.[176] The Panel did not elaborate on its reasons for its decision. MEAs therefore were not used by the Panel as interpretative tools.

The Panel did request several international organisations to identify appropriate international conventions, standards and guidelines to aid its interpretation of the ordinary meaning.[177] The use of the other international instruments demonstrates that the Panel was willing to interpret the SPS Agreement in light of relevant accepted practices in the international community. However, the Panel qualified this by stating that if an interpreter did not find the non-WTO law informative, the interpreter need not rely on it.[178] Therefore, the Panel was able to select definitions from the various international standards, as well as the use of dictionaries, to interpret of the SPS Agreement. The Panel has been criticised for its selective choice of which definitions to use.[179]

3 How the Panel's decision affects MEAs in treaty interpretation

The Panel's approach in *EC – Biotech* is inconsistent with the principle of mutual supportiveness for two reasons. Firstly, the Panel significantly limits the types of international laws that could be relevant under art 31(3)(c). Because it is unlikely that an MEA will have identical membership to the WTO Agreement, the Panel's interpretation would mean that MEAs would rarely be taken into account.[180] This view would therefore "isolate" the WTO as few agreements, if any, would be applicable.[181] The alternative view is that not all WTO members need to be a member of an MEA in order for the MEA to be applicable. This view is supported by the fact that the term "parties" in other parts of art 31 is qualified by phrases such as "all the parties",[182] "one or more parties" and "other parties".[183] Therefore "parties" alone may not amount to all WTO members.[184] MEAs with different membership to the WTO Agreement could still be applicable if it was proven that they

176 At [7.95].

177 At [7.96].

178 At [7.92].

179 For a comprehensive critique of the Panel's approach see Young, above n 157.

180 Nathalie Bernasconi-Osterwalder "Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech" (paper presented to the British Institute of International and Comparative Law and the Institute of International Economic Law's Seventh Annual WTO Conference, London, May 2007) at 4–5; and Marceau, above n 26, at 124.

181 Marceau, above n 26, at 124.

182 Vienna Convention, above n 112, article 31(2)(a).

183 Article 31(2)(b).

184 Marceau, above n 26, at 125.

were widely accepted treaties. Both the CBD and the CPB had large membership, arguably fairly reflecting the principles and standards accepted by the international community.[185] Further, the fact that the United States had signed the CBD suggests its acceptance of the CBD principles. The Panel's failure to consider properly the two MEAs could give the impression to the international community that an MEA, focusing on a specific field of environmental protection – even with broad membership – is irrelevant within the WTO.[186]

Secondly, the Panel reduces the consideration of MEAs under art 31(1) to use effectively as dictionaries. Under the Panel's interpretation non-binding MEAs can only play a narrow interpretation role as dictionaries even if the subject matter of the MEA is directly relevant to the disputed matter and the WTO provisions. This is inconsistent with the principle of mutual supportiveness as it undermines the status of MEAs as authorities on international environmental law.[187] The Panel's approach is also inconsistent with the Appellate Body's approach in *United States – Shrimp*. The Appellate Body did not use the MEAs as dictionaries but rather used them to show evidence of international acceptance of the specific terms. In critiquing the Panel's approach, the International Law Commission considered "taking 'other treaties' into account as evidence of 'ordinary meaning' appears a rather contrived way of preventing the 'clinical isolation' as emphasized by the Appellate Body".[188] The principle of mutual supportiveness is not the mere use of MEAs under art 31(1) as dictionaries. Rather, mutual supportiveness requires the WTO law to be interpreted within its normative context – that is the wider international framework. MEAs paint a fuller picture of where the international community's values and concerns lie and an interpretation of WTO agreements should be informed by this. The Panel's narrow reading of the art 31 undermines its very purpose of facilitating coherence between treaties.

If the Panel had taken a mutually supportive approach, it could have considered the CBD and the CPB.[189] The Panel could have considered the MEAs under art 31(1) to help inform the object and purpose of the WTO agreements.[190] After clarifying the relationship between the WTO agreements and the MEAs, the Panel could have then decided that the MEAs were not particularly helpful in shedding light on the specific terms within the WTO agreements.[191] Even if the MEAs

185 Bernasconi-Osterwalder, above n 180, at 5. As of 22 May 2007, the CBD counted 190 parties, and the CPB had 141 parties.

186 Kati Kulovesi *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International, The Netherlands, 2011) at 178.

187 Bernasconi-Osterwalder, above n 180, at 5.

188 Study Group of the International Law Commission, above n 21, at [450].

189 Young, above n 157, at 927.

190 At 921.

191 Bernasconi-Osterwalder, above n 180, at 12.

were of no assistance, the MEAs could have been helpful in shedding light on the internationally accepted standards regarding the treatment of genetically modified products.[192] Such an approach would have gone some way towards reconciling the WTO agreements and MEAs. By failing to do so the Panel missed an opportunity to mutually reinforce trade and environment law.

V DOES A MUTUALLY SUPPORTIVE INTERPRETATION ALTER WTO MEMBERS' RIGHTS AND OBLIGATIONS?

The Panel's reluctance to consider the CBD and the CPB appears to be based on the principle codified in art 26 of the Vienna Convention that a treaty is only binding on those who have agreed to be bound.[193] This is the principle of *pacta tertiis nec nocent nec prosunt*.[194] The Panel stated:[195]

> But even independently of our own interpretation, we think Article 31(3)(c) cannot reasonably be interpreted as the European Communities suggests. Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.

The Panel may also have been referring to arts 3.2 and 19.2 of the DSU which provide that the recommendations and findings of panels and the Appellate Body and the recommendations and rulings of the DSB "cannot add to or diminish the rights and obligations provided in the covered agreements". These articles make it clear that the DSB cannot import rights or obligations into WTO agreements. Therefore, the Panel's understanding of treaty interpretation could mean that a mutually supportive approach under 31(3)(c) could allow MEAs to alter the rights and obligations of WTO members that are not party to the MEA.[196]

In the first section of this Part I explain that the Panel's concerns are unfounded because a mutually supportive interpretation of the WTO agreements (and reference to MEAs that are not binding on all WTO members) would not alter the rights and obligations of WTO members. In the second section I explain how a mutually supportive approach is based on the widely accepted evolutive approach to treaty interpretation. In section C I suggest when panels should consider non-binding MEAs under art 31(3)(c) and 31(1).

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192 Pavoni, above n 33, at 666.

193 Marceau, above n 26, at 127.

194 Pauwelyn, above n 26, at 257.

195 *EC – Biotech*, above n 1, at [7.71].

196 Pavoni, above n 33, at 665.

A Consideration does not Amount to Enforcement

The Panel in *EC – Biotech* seems to have mistaken consideration of the non-binding MEAs under art 31(3)(c), as amounting to enforcement of those MEAs or, at the very least, changing the scope of the WTO obligations. However, art 31(3)(c) only requires MEAs to be taken into account.[197] This is quite different to importing MEA obligations into the WTO agreements or stretching the interpretation of the WTO provision beyond its ordinary meaning in order to be consistent with the MEAs. Such an interpretation could reduce the provision useless.[198] In *United States – Shrimp* the Appellate Body referred to the MEAs not because the disputing parties were members but because the existence of the MEAs provided evidence of a problem and the MEAs provided context. This did not impact on the disputing members' sovereignty because the Appellate Body did not import the MEA obligations into the WTO law and impose those obligations on the parties.

Further, following this "consideration is enforcement" reasoning, other non-binding agreements could not have any influence on the interpretation of WTO agreements otherwise they would alter the WTO obligations. In effect, the WTO agreements would exist in a vacuum, unaffected by developments in international law. This is an unsustainable view given that the WTO is itself part of international law and the DSU expressly mentions use of customary international law to interpret the WTO agreements.[199] As discussed earlier, because the WTO is part of the international legal system, it must be affected by all other developments within that system. Therefore, considering non-binding MEAs does not amount to changing the WTO obligations, but could merely reflect the evolution of the WTO agreements alongside the evolution of the international community's values or norms. The Report of the Study Group of the International Law Commission explains:[200]

> Interpretation does not "add" anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment … . Interpretation *does not add or diminish rights or obligations* that would exist in some lawyers' heaven where they could be ascertained "automatically" and independently of interpretation. All instruments receive meaning through interpretation – even the conclusion that a meaning is "ordinary" is an effect of interpretation that cannot have a priori precedence over other interpretations.

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197 Marceau, above n 26, at 126.

198 Condon, above n 125, at 18–19.

199 Study Group of the International Law Commission, above n 21, at [447].

200 At [447].

An objective interpretation of the WTO agreements must consider the normative context and therefore will always be influenced by considerations external to the WTO agreements, including both scientific evidence on environmental issues and MEAs aimed at addressing those issues.

B The Evolutive Approach

A mutually supportive approach is consistent with the well-established evolutive approach. The evolutive approach allows the interpreter to move away from an inter-temporal interpretation, regarding the parties' intentions at the time of the conclusion of the treaty, and to look at the treaty provisions in light of its current context.[201] An evolutive approach may be taken when it is clear that the parties intended such an interpretation. This will be the case when, for example, the treaty contains a term which is generic and evolving, the treaty's object and purpose is "progressive", or the specific obligations are general and therefore subject to changing circumstances.[202]

In international jurisprudence there is a clear link between the evolutive approach and mutual supportiveness. In *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*[203] the International Court of Justice (ICJ) invoked the evolutive approach, interpreting a 1977 treaty on a joint hydroelectric power project, in light of new environmental norms and standards in order to reconcile economic development with protection of the environment.[204] The ICJ stated that the disputing parties should find a solution that takes account of the treaty objectives alongside the "norms of international environmental law and the principles of the law of international watercourses".[205] In the *Iron Rhine Railway Arbitration*[206] the Arbitral Tribunal preferred the evolutive approach over the inter-temporal rule[207] and considered that Belgium's economic interests had to be reconciled with the Netherland's environmental concerns, taking into account new environmental norms.[208] The Arbitral Tribunal also stated that economic development law and environmental law are "mutually reinforcing".[209] In *United States – Shrimp* the Appellate Body used the evolutive approach when it determined that the generic term "natural resources" is "by definition evolutionary";[210] when it

201 Pauwelyn, above n 26, at 266–267.

202 McLachlan, above n 19, at 317–318.

203 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

204 At [140].

205 At [141].

206 *Iron Rhine Railway Arbitration* (*Belgium v The Netherlands) (Award)* (2005) 27 RIAA 127.

207 At [81].

208 At [221]–[223].

209 At [59].

210 *United States – Shrimp*, above n 1, at [130] and [130], n 109. The Appellate Body supported its approach by reference to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South*

considered that the objective of sustainable development demonstrated international acknowledgement of environmental concerns;[211] and when it determined that turtles are exhaustible.[212] These cases all refer to the need to balance economic development with environmental concerns and invoke the evolutive approach to interpret old treaties in light of new international environmental norms. A mutually supportive interpretation of generic terms or obligations and "progressive" objectives in light of MEAs that reflect contemporary environmental values is no different to the evolutive approaches in these cases.

An argument against the evolutive approach is that the terms of WTO agreements are specific to the WTO and still need to be interpreted in the light of the context of the WTO agreements under art 31(1).[213] Although other international law may shed light on the meaning of generic terms, context plays an important part role in influencing the term's meaning.[214] The use of the same words in different treaties may have entirely different meanings, depending on their negotiating history and context and the object and purpose of each treaty.[215] MEAs are drafted within an entirely different setting and the objectives are quite different from trade objectives. Determining the meaning of a term in a WTO agreement by reference to an MEA could therefore replace the intentions of the WTO members with the intentions of the MEAs members.[216]

However, the fact that the WTO's objective is sustainable development may indicate that the parties intended that the interpretation of WTO agreements would be influenced by international environmental law because the WTO agreements themselves do not contain provisions on the environment. This is consistent with the Appellate Body's finding in *United States – Shrimp* that the preamble adds "colour, texture and shading" to the provisions.[217] Further, the WTO members would have made it clear if the WTO provisions were not intended to be interpreted in light of other international law. The WTO agreements could provide definitions or be more prescriptive regarding

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West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16 at 31.

211 At [129] and [152].

212 At [132].

213 Kazuki Hagiwara "The Principle of Integration in Sustainable Development through the Process of Treaty Interpretation: Addressing the Balance between Consensual Constraints and Incorporation of Normative Environment" (Thesis (LLM), University of Ottawa, 2013) available at University of Ottawa Research <www.ruor.uottawa.ca> at 101.

214 At 101.

215 McLachlan, above n 19, at 300.

216 Hagiwara, above n 213, at 105.

217 *United States – Shrimp*, above n 1, at [153] and [155].

the scope and applicability of the rights and obligations. The use of generic language, without further qualifications, is evidence that this was not the case.

C When should MEAs be considered under arts 31(1) and 31(3)(c)?

If consideration of MEAs does not alter the rights and obligations of WTO members, there should be no reason for panels to resist a mutually supportive approach. Panels should always consider MEAs when the subject-matter of the MEA is directly relevant to the WTO obligation and the issue in dispute. In order to promote the principle of mutual supportiveness in treaty interpretation, panels should also be more explicit about the legal basis for considering MEAs.

1 Article 31(1)

MEAs should always be considered under art 31(1) when determining the meaning of WTO provisions in light of the object and purpose of the WTO Agreement. Because the objective is sustainable development, the WTO agreements should be interpreted to be consistent with environmental objectives. MEAs can provide the context for interpreting the ordinary meaning of terms that may have evolved as the international community's views on the environment change. Specific terms in MEAs could also be considered if the terms reflected the common understanding of the WTO members. Thus, although not all WTO members may have explicitly consented to such a meaning, its general usage in international law could be seen as acceptance or tolerance by those members.[218]

2 Article 31(3)(c)

To meet the threshold for consideration under art 31(3)(c) the rule must be applicable between the parties. The threshold should not be identical membership as required by the Panel in *EC – Biotech*. Requiring identical membership, before a MEA could be considered a "relevant rule", would in fact suggest that reference to MEAs when interpreting WTO provisions does change the scope of the WTO law. This would mean that the scope of the WTO rights would change as soon as the MEA reaches the threshold to become a "relevant rule". As noted above, the better interpretation is that MEAs do not affect the scope of WTO members' rights and obligations but serve to show evidence of environmental issues and international consensus. This would enable a larger number of MEAs to be applicable under art 31(3)(c). While not all MEAs would be applicable, some MEAs may be applicable if proven that the MEA reflects the common intentions of WTO members. Article 31(3)(c) sits within the context of 31(3)(a) and (b), relating to subsequent agreements and subsequent practice, both of which require evidence of consensus.[219] MEAs that are applicable only between a small subsection of WTO members may not be "applicable between the parties" because

218 Pauwelyn, above n 26, at 257–263.

219 At 258.

it would be difficult to establish that the MEA rules reflect WTO members' common intentions.[220] However, an MEA could still reflect the common intentions even if the MEA was not binding on all the WTO members.[221] MEAs with wider membership can more easily demonstrate international acceptance of environmental norms or environmental issues.

V CONCLUSION

The principle of mutual supportiveness is essential for achieving the WTO's sustainable development objectives because it ensures that trade and environment laws are compatible and mutually reinforcing. The CTE is slowly but proactively taking measures to reconcile trade and environmental policies and strengthen the relationship between the WTO and MEAs. The recurring reference to mutual supportiveness throughout different WTO instruments may lend weight to the argument that it is becoming a relevant principle within international law.[222] In order to further this, the CTESS must progress its negotiations to finalise the Draft Ministerial Decision.

The CTE's progressive approach to trade-environment issues and the relationship between the WTO rules and MEAs is yet to be consistently reflected in the approach of the Panel and Appellate Body's interpretation of the law. The Appellate Body's approach in *United States – Shrimp* is consistent with mutually supportiveness. However, this progress could be undone by the Panel's restrictive interpretation of arts 31(1) and 31(3)(c) of the Vienna Convention. The Panel's failure to adopt the mutually supportive approach potentially undermines the work of the CTE and the WTO's objective of sustainable development.

If a trade-environment dispute comes before the DSB, the panel should take the opportunity to clarify the relationship between the WTO agreements and MEAs. The panel should uphold the principle of mutual supportiveness by expressly stating that WTO provisions must be interpreted in light of their normative context which includes MEAs. The panel should also make it clear that MEAs do not need to be binding on all WTO members in order to be taken into account and that such an approach does not change the rights and obligations of WTO members. This would ensure that MEAs are appropriately utilised and given recognition as sources of expertise on environmental concerns and would ultimately support both trade and environmental objectives.

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220 At 257.

221 At 260.

222 Pavoni, above n 33, at 652.