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**Trade and Environment: A Mutually Supportive
interpretation of WTO Agreements in light of Multilateral
Environmental Agreements**

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Abstract

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; 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.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,200 words.

Introduction

International trade and environmental law are two distinct but interrelated parts of the international legal system. Trade and environmental law intersect because increased production and trade can negatively affect the environment and measures to protect the environment can restrict trade.¹ This tension could result in conflict between the World Trade Organization (**WTO**),² the organisation at the heart of the multilateral trading system, and the institutions administering the 250 Multilateral Environment Agreements (**MEAs**) aimed at preserving and protecting the environment.³ The challenge for the WTO and environmental institutions is to develop international trade and environmental policies and law in a “mutually supportive” manner in order to protect the environment whilst upholding an open and non-discriminatory multilateral trading system. For the WTO, “mutual supportiveness” means ensuring that its laws and policies are consistent with its objective of sustainable development.⁴

The purpose of this paper is to consider how the WTO can make better use of the principle of “mutual supportiveness” as an interpretative tool. The paper is divided into three parts. Part one considers the history of the trade-environment tension and the efforts of the WTO to understand and reconcile the relationship between the WTO and MEAs. Part two examines WTO panels’ jurisdiction to consider MEAs and compares the different approaches taken in the WTO cases *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (**United States – Shrimp**)⁵ and *EC – Measures*

¹ Kuijper, Pieter Jan *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.

² 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).

³ World Trade Organization “The Doha mandate on multilateral environmental agreements (MEAs)” <www.wto.org>.

⁴ Sustainable development is an objective of the WTO as set out in the preamble to the WTO Agreement.

⁵ *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*].

Affecting the Approval and Marketing of Biotech Products (EC – Biotech).⁶ Part three 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. The paper concludes that WTO dispute panels should be more explicit about the grounds for considering MEAs in order to mutually support trade and environment objectives.

I Mutually supporting trade and environment policies

A. Tension between trade and environment

Trade-environment tensions arise in international law because the policies can conflict. MEA policies are directed at protecting and preserving the environment. MEAs can impose mandatory restrictions on trade to protect the environment (**trade measures**). For example, article III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**) prohibits trade in specified endangered species.⁷ MEAs can also expressly permit trade measures. For example, article II of the Kyoto Protocol sets out trade measures that member states may implement to reduce greenhouse gases.⁸ Domestic states may also implement trade measures, not expressly required by a MEA, in pursuit of MEA objectives.⁹

In contrast, WTO policies tend to be directed at liberalising trade and reducing trade barriers. The fundamental WTO principles are: non-discrimination (most-favoured-nation (**MFN**)¹⁰ and national treatment¹¹), free trade through reduction of trade barriers¹² and

⁶ *EC – Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 Sept 2006 (Panel Report) [*EC – Biotech*].

⁷ 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*] article III.

⁸ 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) article II.

⁹ For example, the United States Endangered Species Act of 1973 16 USC 35 § 1531, subject of the dispute in *United States – Shrimp*, above n 5, imposed a framework to regulate shrimp vessels in order to protect endangered species of turtles, in pursuant of a number of international agreements including CITES.

¹⁰ For example, the most-favoured-nation (MFN) principle under article I of the General Agreement on Tariffs and Trade 1867 UNTS 187 (opened for signature 15 April 1994, entered into force 1 January 1995)

fair competition.¹³ These provisions aim to reduce restrictive trade practices but can affect member states' domestic environmental policies.

The WTO agreements do 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, article XX(b) of the General Agreement on Tariffs and Trade (**GATT**)¹⁴ allows measures that are “necessary to protect human, animal or plant life or health” and article 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 article 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”.¹⁵ Trade measures, even if taken pursuant to MEAs, must conform to the WTO trade principles.

[*GATT*] requires states to treat imported products of all member states the same (i.e. treat every state as the “MFN”).

¹¹ For example, *GATT*, above n 10, article III which requires states to treat foreign products the same as like products produced domestically (i.e. give foreign goods “national treatment”).

¹² Such as tariffs, import bans, quotas on imports. For example, *GATT*, above n 10, article XI which prohibits bans or quantitative restrictions on imports and exports, other than customs and taxes.

¹³ 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: WTO “Principles of the Trading System” <www.wto.org>.

¹⁴ *GATT*, above n 10.

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

B. Mutual supportiveness

Mutual supportiveness is a tool to achieve common objectives of trade and environment.¹⁶ The concept arose out of the need to provide “coherence, balance and interaction between trade and environment”.¹⁷ Like the principle of systemic integration, mutual supportiveness is based on the notion that international law is a connected whole rather than a collection of self-contained regimes.¹⁸ Any one part of the international legal system is therefore affected or influenced by other developments within that system.¹⁹ Mutual supportiveness is about the relationship between the different parts of the legal system and their common objectives.²⁰

The concept’s first appearance in a major international environmental instrument was in Agenda 21,²¹ the action plan on sustainable development resulting from the 1992 the United Nations Conference on Environment and Development in Rio de Janeiro (also known as the “Earth Summit”).²² Agenda 21 provides that governments should strive to “promote and support” policies that “make economic growth and environmental protection mutually supportive”²³ and the international economy should support environment and development goals by “making trade and environment mutually

¹⁶ Boisson de Chazournes, Laurence and Moïse Mbengue, Makane “A Footnote as a Principle: Mutual Supportiveness and its Relevance in an Era of Fragmentation” in Holger P. Hestermeyer and ors (ed), *Coexistence, Cooperation and Solidarity - Liber Amicorum Rüdiger Wolfrum*, (vol 2, Martinus Nijhoff Publishers, The Netherlands, 2012) 1615 at 1625.

¹⁷ Boisson de Chazournes, Laurence and Moïse Mbengue, Makane, above n 16, at 1618.

¹⁸ Mutual supportiveness is similar to the concept of systemic integration which is a conflict avoidance technique that facilitates the coordination or harmonisation of international law. See for example: McLachlan, Campbell “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 ICLQ 279. But for differences see: Boisson de Chazournes, Laurence and Moïse Mbengue, above n 16.

¹⁹ Study Group of the International Law Commission *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* UN Doc, A/CN.4/L.702 (18 July 2006) adopted by the General Assembly: UN Doc A/Res/61/34 (4 December 2006) at 14.

²⁰ Boisson de Chazournes, Laurence and Moïse Mbengue, Makane, above n 16, at 1617.

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

²² Pavoni, Riccardo “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.

²³ Agenda 21, above n 21, at paragraph 2.9(d). See also paragraph 2.10(d).

supportive”.²⁴ Since its debut in Agenda 21 it has occurred frequently throughout different international instruments relating to trade and environment.²⁵

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 complimentary or mutually reinforcing.²⁶ Mutual supportiveness requires member states to coordinate their international and domestic policies on trade and environment.²⁷ As an interpretative tool, mutual supportiveness is similar to the principle of harmonisation or presumption against conflicts.²⁸ However, mutual supportiveness is more than a presumption against conflicts.²⁹ Mutual supportiveness is also more than taking account of relevant treaties as interpretative tool. Rather, mutual supportiveness is a “solution” to conflict³⁰ or a “neutral and unbiased principle” to aid interpreters to find an “equitable

²⁴ Agenda 21, above n 21, at paragraph 2.3B. See also paragraphs 2.19 and 2.21(a).

²⁵ For example: WTO *Decision on Trade and Environment* (Adopted by Ministers at the Meeting of the Uruguay Round Trade Negotiations Committee, Marrakesh, 1994) MTN/TNC/45(MIN) (15 April 1994) [*Marrakesh Decision*]; CTE *Report (1996) of the Committee on Trade Environment to the Singapore Ministerial Conference* WT/CTE/1 (Geneva, 12 November 1996) [*CTE Report (1996)*]; Doha WTO Ministerial Declaration WT/MIN(01)/DEC/1 (14 November 2001) [*Doha Declaration*] at [6] and [31]; preamble to the 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) [*CPB*]; preamble to the 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 to the 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 to the Convention on Persistent Organic Pollutants 2256 UNTS 119 (opened for signature 23 May 2001, entered into force 17 May 2004); article 20 of the 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); preamble and article 4(3) of the 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, not yet in force) available at <www.cbd.int>. For an overview of the use of mutual supportiveness in international legal instruments see: Pavoni, Riccardo, above n 22; and Boisson de Chazournes, Laurence and Moïse Mbengue, Makane, above n 16.

²⁶ Boisson de Chazournes, Laurence and Moïse Mbengue, Makane, above n 16, at 1618.

²⁷ *Ibid*, at 1622.

²⁸ Kuijper, Pieter Jan, above n 1, at 7.

²⁹ *Ibid*; Boisson de Chazournes, Laurence and Moïse Mbengue, Makane, above n 16, at 1617.

³⁰ Kuijper, Pieter Jan, above n 1, at 14.

balance between the competing interests and values” of different regimes.³¹ In this way mutual supportiveness requires interpreters to look at trade and environment law in relation to the wider normative framework of public international law.³² Rather than merely avoid conflicts, the interpretation of the treaty should support the objectives of both treaties.³³

C. Mutual supportiveness as a law-making function within the WTO

Since its establishment the WTO has recognised the impact of trade on the environment and vice versa. Whilst not specifically mentioning “mutual supportiveness”, the preamble to the Marrakesh Agreement Establishing the WTO (**WTO Agreement**)³⁴ does refer to sustainable development. The preamble provides that members 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, 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 [emphasis added].

The preamble 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.³⁵

1 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**

³¹ Pavoni, Riccardo, “above n 22, at 665.

³² Ibid, at 665.

³³ Kuijper, Pieter Jan, above n 1, at 14-15.

³⁴ WTO Agreement, above n 2.

³⁵ World Trade Organization, “Trade and Environment” <www.wto.org>.

Decision).³⁶ 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.³⁷ The Marrakesh Decision also established a specialist environmental committee – the Committee on Trade and Environment (CTE).³⁸ The aim of the CTE is to make “international trade and environmental policies mutually supportive”.³⁹ In particular 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”.⁴⁰

Although the CTE has not recommended any amendments to the WTO rules,⁴¹ it has devoted considerable time to researching the relationship between trade and environmental measures.⁴² The CTE’s work programme covers a wide range of activities including: holding information sessions with Secretariats of MEAs; sharing domestic experiences with trade measures; and updating a “Matrix on Trade-related Measures Pursuant to Selected Multilateral Environmental Agreements” which identifies MEAs with trade measures⁴³ and an environmental database containing information on domestic environment-related trade measures.⁴⁴

³⁶ Marrakesh Decision, above n 25.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ World Trade Organization, “Items on the CTE’s Work Programme” <www.wto.org>.

⁴² For a list of the ten items see: World Trade Organization, “Items on the CTE’s Work Programme” <www.wto.org>.

⁴³ CTE and CTESS *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).

⁴⁴ The most updated list is: CTE *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.

2 *The Doha Round*

At the fourth Ministerial Conference held in Doha in 2001, members agreed to commence a new round of negotiations including, for the first time, negotiations on trade-environment issues.⁴⁵ Enhancing mutually supportive trade and environmental policies is one of the objectives of the Doha Round.⁴⁶ The negotiating topics are: the relationship between the WTO rules and MEAs; collaboration between the WTO and MEA secretariats; and the elimination of tariffs and non-tariff barriers on environmental goods and services.⁴⁷ In 2011 the Chairperson released a report⁴⁸ on the status of the negotiations containing a draft Ministerial Decision on Trade and Environment (**draft Ministerial Decision**).⁴⁹ The draft Ministerial Decision affirms members' commitment to sustainable development to enhance coherence and mutual supportiveness between the WTO and MEAs.⁵⁰ The draft clarifies the term "specific trade obligations" (**STO**)⁵¹ and includes a number of commitments including encouraging the sharing of domestic experiences with STOs;⁵² collaborating with MEA secretariats through information exchange and granting MEA secretariats observer status in the CTE;⁵³ providing technical assistance and capacity building to developing countries;⁵⁴ establishing a group of experts on trade and environment to aid members' implementation of MEA STOs;⁵⁵

⁴⁵ Doha Declaration, above n 25, at [31]. The Doha Declaration also restates the continuing work agenda for the Committee on Trade and Environment (**CTE**) as set out in the Marrakesh Decision. In particular, the CTE was given mandate to focus on three items: the effect of environmental measures on market access and the win-win-win situations; the relevant provisions of the TRIPS Agreement; and labelling requirements for environmental purposes: Doha Declaration, at paragraph 32(i).

⁴⁶ Doha Declaration, above n 25, at [31].

⁴⁷ Ibid. The negotiations take place in the CTE Special Sessions (**CTESS**).

⁴⁸ *CTESS Report (2012) of the Committee on Trade and Environment* TN/TE/20 (21 April 2011) [*CTESS Report (2012)*].

⁴⁹ Preamble to the *Draft Ministerial Decision on Trade and Environment*, in annex 1 of the CTESS Report (2012), *ibid*, [*Draft Ministerial Decision*].

⁵⁰ Ibid.

⁵¹ A Specific Trade Obligation (**STO**) set out in a Multilateral Environmental Agreement (**MEA**) requires a MEA party to take, or refrain from taking, a particular trade action: *ibid*.

⁵² Ibid, at [1].

⁵³ Ibid, at [2], [3] and [4].

⁵⁴ Ibid, at [5](c).

⁵⁵ Ibid, at [5](d) and *Proposed Elements Relating to a Group of Experts*, in annex 1.A of the CTESS Report (2012), above n 48.

encouraging members to use MEA experts during consultation procedures under article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);⁵⁶ and encouraging members to request panels to seek information from MEA experts during proceedings under article 13 of the DSU.⁵⁷

The work of the CTE and CTESS is crucial to achieving mutual supportiveness between WTO and environmental policies. In its first report the CTE endorsed multilateral solutions to environmental problems and emphasised the mutually supportive relationship of the WTO agreements and MEAs.⁵⁸ The Doha Declaration expressly recognises that sovereign states should be allowed to impose measures to protect “human, animal or plant life or health” or the environment as long as the measures are consistent with the principles of the WTO agreements.⁵⁹ The reference to sustainable development and environmental protection in these instruments illustrates that WTO members acknowledge the importance of balancing trade activities with environmental protection.⁶⁰ However, it appears that most of the work is more an exercise to understand the trade-environment relationship. The slow progress of negotiations and the lack of any recommended amendments to the WTO agreements, may demonstrate the sensitivity of the area and the caution that WTO members are taking in order to avoid giving too much protection to the environment at the expense of free trade. The existence of the CTE and the draft Ministerial Decision at least offer hope that there is political will within the WTO to resolve some of the trade-environment issues consistent with sustainable development objectives.

⁵⁶ 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.

⁵⁷ *Ibid*, at [5](e) and *Proposed Elements on Dispute Settlement*, in annex 1.B of the CTESS Report (2012), above n 48. Article 13 of the Dispute Settlement Understanding authorises panels to seek information, technical advice and expert opinions from non-WTO sources.

⁵⁸ CTE Report (1996), above n 25, at [171].

⁵⁹ Doha Declaration, above n 25, at [6].

⁶⁰ *United States – Shrimp*, above n 5, at [129] and [152]-153].

II Mutual supportiveness as an interpretative technique

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.

The first three sections consider WTO panels’ jurisdiction and its ability to consider MEAs and explain why panels should consider MEAs. The fourth section briefly describes how panels may consider MEAs under article 31 of the Vienna Convention on the Law of Treaties (**Vienna Convention**).⁶¹ The fifth and sixth section compares the different approaches taken in two WTO cases.

A. Jurisdiction of the WTO

The DSU provides for the establishment of panels⁶² 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 and procedures of the DSU apply to disputes under the “covered agreements” listed in appendix 1 of the DSU. The covered agreements only include WTO agreements.

The limited jurisdiction of panels is supported by articles 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, articles 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

⁶¹ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 April 1980) [*Vienna Convention*].

⁶² Dispute Settlement Understanding, above n 56, article 6(1).

with the covered agreements and can only recommend that the DSB enforce the rules of the covered agreements.⁶³

B. Applicable law

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.⁶⁴ 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.⁶⁵ 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,⁶⁶ requires consideration of other sources of international law, potentially including MEAs, when interpreting treaties.⁶⁷

Even without express reference in article 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.⁶⁸ The WTO is not a closed system and cannot operate outside of existing customary international rules of law.⁶⁹ Therefore, customary international law applies automatically and the DSU does not

⁶³ Marceau, Gabrielle “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.

⁶⁴ Pauwelyn, Joost “How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits” (2003) 37 JWTL 997 at 1000.

⁶⁵ *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.

⁶⁶ Articles 31, 32 and 33 of the Vienna Convention, above n 61, are considered customary international law: *United States – Gasoline*, above n 65, at 23 and *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 Oct 1996 (Report of the Appellate Body) [*Japan – Alcoholic Beverages*] at 104.

⁶⁷ Condon, Bradley J *Environmental Sovereignty and the WTO: Trade Sanctions and International Law* (Transnational Publishers Inc, New York, 2006) at 33. See also: Pauwelyn, Joost “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/DS163/R, 1 May 2000 (Report of Panel) [*Korea – Government Procurement*] at [7.96] and [7.101].

⁶⁸ Pauwelyn, Joost, above n 64, at 1001-1002.

⁶⁹ *Korea – Government Procurement*, above n 67, at [7.96]; Pauwelyn, Joost, above n 64, at 1002.

need to expressly state whether non-WTO law is applicable.⁷⁰ Further, international law cannot be excluded unless WTO members expressly contract out of the international law.⁷¹ The DSU does not expressly contract out of non-WTO law.⁷² 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.⁷³ 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.⁷⁴ Panels that do not consider MEAs could be inconsistent with international rules on interpretation as well as the DSU.⁷⁵

C. Consideration of MEAs is good for the environment

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

⁷⁰ Pauwelyn, Joost, above n 64, at 1002.

⁷¹ *Korea – Government Procurement*, above n 67, 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...”

⁷² Pauwelyn, Joost, above n 64, at 1000.

⁷³ Marceau, Gabrielle, above n 63, at 216.

⁷⁴ *Ibid*, at 216-217; Marceau, Gabrielle “A Call for Coherence in International Law” (1999) 33 J W T 87 at 109; *United States – Gasoline*, above n 65, at 21.

⁷⁵ Pauwelyn, Joost, above n 67, at 562.

Consideration of MEAs is more likely to result in an environmentally friendly outcome compared with focusing only on WTO instruments. The WTO is not an environment forum and does not have competence in environmental issues.⁷⁶ MEAs are likely to better inform panels of the contemporary environmental issues and indicate environmental concerns or values accepted by the international community.⁷⁷ Proper weight may not be given to environmental issues if panels ignore MEAs in their interpretation of the WTO agreements. MEAs may also be more risk adverse and therefore have a lower threshold for imposing trade measures when faced with potential risks to the environment.⁷⁸ Therefore, mutual supportiveness is particularly important between trade and environment because trade can pose many unknown risks to the environment.⁷⁹

Not giving serious consideration to the relevance of MEAs also potentially undermines the status of the MEA. 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.⁸⁰ Failure to properly consider 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.

⁷⁶ CTE Report 1996, above n 25, at [8].

⁷⁷ In *United States – Shrimp*, above n 5, the Appellate Body referred to various MEAs as evidence of environmental concerns. See discussion below.

⁷⁸ For example the CPB, above n 25, affirms the precautionary principle in its preamble.

⁷⁹ Kuijper, Pieter Jan, above n 1, at 16.

⁸⁰ Pavoni, Riccardo, above n 22, at 652.

D. Consideration of MEAs under article 31 of the Vienna Convention

When interpreting the WTO agreements panels must comply with customary international law on treaty interpretation.⁸¹ A starting point for panels is generally the interpretation rules in the Vienna Convention. The general rules on treaty interpretation are set out under article 31 of the Vienna 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.⁸² 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 article 32, the rules under article 31 are not supplementary interpretation tools.⁸³ There is also no hierarchy or order in which the rules should be followed.⁸⁴ This gives the interpreter the flexibility to use the rules relevant to the particular circumstances.

⁸¹ Dispute Settlement Understanding, above n 56, article 3.2.

⁸² *Japan – Alcoholic Beverages*, above n 66, at 13. See: Condon, Bradly J, above n 67, at 18-19. This is the principle of effectiveness

⁸³ Under article 32 the preparatory work of the treaty and the circumstances of its conclusion may be referred to if interpreting the terms in accordance with article 31 would result in a meaning that is ambiguous or obscure or manifestly absurd or unreasonable.

⁸⁴ Study Group of the International Law Commission, above n 19, at [428].

Both articles can aid panels to interpret the WTO agreement mutually supportive of trade and environment objectives. Under article 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 consistent with international environmental law in order to give effect to the objective of sustainable development.⁸⁵ Under article 31(3)(c) MEAs could provide contextual background as relevant rules of international law.

A good illustration of the different approaches to article 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.

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 section 609 of the Public Law 101-102, 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 article 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. Firstly, the Appellate Body took note that in “modern biological sciences” living species can be exhaustible.⁸⁶ 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”.⁸⁷ The Appellate Body

⁸⁵ This is the approach taken in *United States – Shrimp*, above n 5, discussed below.

⁸⁶ *United States – Shrimp*, above n 5, at [128].

⁸⁷ *Ibid*, at [129].

looked to the WTO Agreement preamble as evidence that members were aware of the importance of environmental protection.⁸⁸ From this perspective the Appellate Body held that the term “natural resources” is generic and therefore capable of evolving.⁸⁹ Thus, the Appellate Body found it necessary to refer to other “modern” international instruments that referred to “living natural resources”.⁹⁰

The Appellate Body gave due consideration to international environmental law, citing several MEAs to support its finding that the international community acknowledge 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,⁹¹ the Convention on Biological Diversity (**CBD**),⁹² Agenda 21,⁹³ and the Convention on the Conservation of Migratory Species of Wild Animals.⁹⁴ This, together with the WTO Agreement preamble indicated that the definition of “natural resources” could include turtles.⁹⁵ The Appellate Body then relied on the fact that the turtle species were listed as endangered in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**)⁹⁶ as evidence that the turtles were “exhaustible”.⁹⁷ 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.

⁸⁸ Ibid, at [129].

⁸⁹ Ibid, at [130].

⁹⁰ Ibid at [129].

⁹¹ United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

⁹² Convention on Biological Diversity 1760 UNTS 79 (opened for signature on 5 June 1992, entered into force 29 December 1993) [**CBD**].

⁹³ Agenda 21, above n 25.

⁹⁴ *United States – Shrimp*, above n 5, at [130]-[131]. 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**].

⁹⁵ Ibid, at [131].

⁹⁶ CITES, above n 7.

⁹⁷ *United States – Shrimp*, above n 5, at [132].

In considering whether the trade measure was consistent with the chapeau to article XX, the Appellate Body again referred to the WTO Agreement preamble noting the objective of sustainable development.⁹⁸ 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.⁹⁹ This was evidence that members understood that exploitation of resources should be consistent with sustainable development.¹⁰⁰ The Appellate Body noted that the preambular language reflects the negotiators’ intentions and “must add colour, texture and shading” to the interpretation of the WTO agreements.¹⁰¹ 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.¹⁰² 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.¹⁰³

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 article 31.¹⁰⁴ The Appellate Body did not mention the Vienna

⁹⁸ Ibid, at [152].

⁹⁹ Ibid.

¹⁰⁰ Ibid, at [152]-153].

¹⁰¹ Ibid, at [155].

¹⁰² Ibid, at [161]-[172].

¹⁰³ Ibid, at [168]. The Appellate Body noted at [154] that the Marrakesh Decision refers to principle 12 of the Rio Declaration on Environment and Development (adopted at United Nations Conference on Environment and Development) A/CONF.151/26 (Vol 1) (1992), Agenda 21, the CBD, the CMSWA and the CTE Report 1996 all advocate concerted action rather than unilateral actions to address environmental issues.

¹⁰⁴ Young, Margaret A “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 article 31(1) based on the ordinary meaning of “exhaustible natural resources” and the object and purpose of the WTO Agreement; article 31(2) based on reference to the WTO Agreement as context; 31(3)(b) based on subsequent practice as seen in the international instruments; and article 32 based on reference to contemporary concerns about the environment.

Convention in its interpretation of article XX(g).¹⁰⁵ 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”.¹⁰⁶ This omission left open the question of whether panels may consider MEAs under article 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 article 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 constrain 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 Cartagena Protocol on Biosafety (**CPB**),¹⁰⁷ CBD and other international instruments in aiding the interpretation of the Agreement on the Application of Sanitary and Phytosanitary Measures (**SPS Agreement**).¹⁰⁸ The panel embarked on a rigid application of the Vienna Convention,

¹⁰⁵ The Appellate Body did refer to article 31(3)(c) in a footnote regarding the interpretation of the chapeau to article 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 5, at [158] footnote 157.

¹⁰⁶ Horne, Henrik and Mavriodis, Petros C “MEAs in the WTO: Silence Speaks Volumes” (2011) <www.econ-law.se> at 15.

¹⁰⁷ *CPB*, above n 25.

¹⁰⁸ *SPS Agreement*, above n 15. 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: at [7.86]-[7.89].

distinguishing between international law relevant under article 31(3)(c) and non-binding international law that can be used to interpret the ordinary meaning under article 31(1).¹⁰⁹

In respect of article 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*,¹¹⁰ general principles of international law.¹¹¹ The panel recognised that the CPB could be relevant international law.¹¹² However, the panel interpreted “the parties” under 31(3)(c) to refer to all parties to the treaty.¹¹³ 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 article 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.¹¹⁴

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.¹¹⁵ Therefore, the panel held that the CPB was not a relevant rule of international law “applicable in the relations between the parties”.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Thus, the panel left open the issue of whether the CPB would be taken into account if all the parties to the dispute were CPB members.

¹⁰⁹ Young, Margaret A, above n 104, at 908-909.

¹¹⁰ *United States – Shrimp*, above n 5, at [158] and footnote 157.

¹¹¹ *EC – Biotech*, above n 6, at [7.67].

¹¹² *Ibid*, at [7.67].

¹¹³ *Ibid*, at [7.68].

¹¹⁴ *Ibid*, at [7.70].

¹¹⁵ *Ibid*, at [7.75].

¹¹⁶ *Ibid*, at [7.75].

¹¹⁷ *Ibid*, at [7.75].

¹¹⁸ *Ibid*, at [7.72].

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*.¹¹⁹ The panel considered that non-binding instruments could be considered under article 31(1) of the Vienna Convention.¹²⁰ The panel found that in *United States – Shrimp* the Appellate Body had used the international instruments as interpretative aids under article 31(1) of the Vienna Convention.¹²¹ Thus, instead of considering whether MEAs are relevant rules of international law under article 31(3)(c), the panel could use the MEAs as dictionaries under article 31(1).¹²² However, the panel did not use the CBD or the CPB to interpret the SPS 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.¹²³ 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 decide to use several different international standards, expressly referred to in the SPS Agreement, to aid its interpretation.¹²⁴ 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.¹²⁵ 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.¹²⁶

¹¹⁹ Ibid, at [7.72].

¹²⁰ Ibid, at [7.92].

¹²¹ Ibid, at [7.94].

¹²² Ibid, at [7.92].

¹²³ Ibid, at [7.95].

¹²⁴ Ibid, at [7.96].

¹²⁵ Ibid, at [7.92].

¹²⁶ For a comprehensive critique of the panel’s approach see: Young, Margaret A, above n 104.

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

The panel's approach 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 article 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.¹²⁷ This view would therefore "isolate" the WTO as few agreements, if any, would be applicable.¹²⁸ 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 article 31 is qualified by phrases such as "all the parties",¹²⁹ "one or more parties" and "other parties".¹³⁰ Therefore "parties" alone may not amount to all WTO members.¹³¹ MEAs with different membership to the WTO Agreement could still be applicable if proven that they were widely accepted. Both the CBD and the CPB had large membership, arguably fairly reflecting the principles and standards accepted by the international community.¹³² Further, the fact that the United States had signed the CBD suggests its acceptance of the CBD principles. The panel's failure to properly consider the two MEAs could give the impression to the international community that an MEA, focusing on a specific field of environmental protection, with broad membership is irrelevant within the WTO.¹³³

Secondly, the panel reduces the consideration of MEAs under article 31(1) to use 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

¹²⁷ Bernasconi-Osterwalder, Nathalie, (Center for International Environmental Law) "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; Marceau, Gabrielle, above n 74, at 124.

¹²⁸ Marceau, Gabrielle, above n 74, at 124.

¹²⁹ Vienna Convention, above n 61, article 31(2)(a).

¹³⁰ Vienna Convention, above n 61, article 31(2)(b).

¹³¹ Marceau, Gabrielle, above n 74, at 125.

¹³² Bernasconi-Osterwalder, Nathalie, above n 127, at 5. As of 22 May 2007, the CBD counted 190 parties, and the Biosafety Protocol had 141 parties.

¹³³ Kulovesi, Kati *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International, The Netherlands, 2011) at 178.

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.¹³⁴ 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".¹³⁵ The principle of mutual supportiveness is not the use of MEAs under article 31(1) as interpretative aids. 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 article 31 of the Vienna Convention undermines its very purpose of facilitating coherence between treaties.

If the panel had taken a mutual supportive approach, it could have considered the CBD and the CPB.¹³⁶ The panel could have considered the MEAs under article 31(1) to help inform the object and purpose of the WTO agreements.¹³⁷ 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.¹³⁸ However, even if the MEAs did not aid the interpretation of specific terms, the MEAs could have been helpful in shedding light on the internationally accepted standards regarding the treatment of genetically modified products.¹³⁹ Such an approach would have gone some way towards reconciling the WTO

¹³⁴ Bernasconi-Osterwalder, Nathalie, above n 127, at 5.

¹³⁵ Study Group of the International Law Commission, above n 19, at 228.

¹³⁶ Young, Margaret A, above n 104, at 927.

¹³⁷ Young, Margaret A, above n 104, at 921.

¹³⁸ Bernasconi-Osterwalder, Nathalie, above n 127, at 12.

¹³⁹ Pavoni, Riccardo, above n 22, at 666.

agreements and MEAs. By failing to do so the panel missed an opportunity to mutually reinforce trade and environment law.

III 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 article 26 of the Vienna Convention that a treaty is only binding on those who have agreed to be bound.¹⁴⁰ This is the principle of *pacta tertiis nec nocent nec prosunt*.¹⁴¹ The panel expressed:¹⁴²

“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 articles 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 right 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 are not party to the MEA.¹⁴³

The first section of this part explains 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

¹⁴⁰ Marceau, Gabrielle, above n 74, at 127.

¹⁴¹ Pauwelyn, Joost *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, United Kingdom, 2003) at 257.

¹⁴² *EC – Biotech*, above n 6, at [7.71].

¹⁴³ Pavoni, Riccardo, above n 22, at 665.

members. The second section explains how mutually supportive approach is based on the widely accepted evolutive approach to treaty interpretation. The third section then suggests when panels should consider non-binding MEAs under articles 31(3)(c) and 31(1).

A. Consideration does not amount to enforcement

The panel in *EC – Biotech* seems to have mistaken consideration of the non-binding MEAs as amounting to enforcement of those MEAs or, at the very least, changing the scope of the WTO obligations. However, article 31(3)(c) only requires MEAs to be taken into account.¹⁴⁴ 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 would be inconsistent with the principle of effectiveness because it could reduce the provision to “inullity”.¹⁴⁵ Therefore, taking MEAs into account cannot change the meanings of provisions; but is more limited to supporting the panel’s interpretation of the ordinary meaning.¹⁴⁶

Further, following the panel’s reasoning, other non-binding treaties 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. Surely, 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.¹⁴⁷ As discussed in part two, 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

¹⁴⁴ Marceau, Gabrielle, above n 74, at 126.

¹⁴⁵ Condon, Bradly J, above n 67 at 18-19.

¹⁴⁶ Hagiwara, Kazuki “The Principle of Integration in Sustainable Development Through the Process of Treaty Interpretation: Addressing the Balance Between Consensual Constraints and Incorporation of Normative Environment” (LLM Thesis, University of Ottawa, 2013) available at University of Ottawa Research <www.ruor.uottawa.ca> at 109. This is the approach that the Appellate Body took in *United States – Shrimp* when it referred to international environmental instruments to support its interpretation of “natural resources” to include living resources: at [130]-[131].

¹⁴⁷ Study Group of the International Law Commission, above n 19, at [447].

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:¹⁴⁸

“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.”

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 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 look at the treaty provisions in light of its current context.¹⁴⁹ 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.¹⁵⁰

In international jurisprudence there is a clear link between the evolutive approach and mutual supportiveness. In the *Case Concerning the Gabčíkovo-Nagymaros Project*

¹⁴⁸ Ibid.

¹⁴⁹ Pauwelyn, Joost, above n 141, at 266-267.

¹⁵⁰ McLachlan, Campbell, above n 18, at 317-318.

(*Hungary v Slovakia*)¹⁵¹ 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”.¹⁵² 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”.¹⁵³ In the *Iron Rhine Railway Arbitration*¹⁵⁴ the Arbitral Tribunal preferred the evolutive approach over the inter-temporal rule¹⁵⁵ and considered that Belgium’s economic interests had to be reconciled with the Netherlands’s environmental concerns, taking into account new environmental norms.¹⁵⁶ The Arbitral Tribunal also stated that economic development law and environmental law are “mutually reinforcing”.¹⁵⁷ In *United States – Shrimp* the Appellate Body used the evolutive approach when it determined that the generic term “natural resources” is “by definition evolutionary”;¹⁵⁸ when it considered the objective of sustainable development demonstrated international acknowledgement of environmental concerns;¹⁵⁹ and when it determined that turtles are exhaustible.¹⁶⁰ 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.

¹⁵¹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 [*Hungary v Slovakia*].

¹⁵² *Ibid.*, at [140].

¹⁵³ *Ibid.*, at [141].

¹⁵⁴ *Iron Rhine Railway Arbitration (Belgium v The Netherlands)*, 27 UNRIAA 127 (Decision of the Arbitral Tribunal, 24 May 2005) [*Belgium v The Netherlands*].

¹⁵⁵ *Ibid.*, at [81].

¹⁵⁶ *Ibid.*, at [221]-[223].

¹⁵⁷ *Ibid.*, at [59].

¹⁵⁸ *United States – Shrimp*, above n 5, at [130] and footnote 109: The Appellate Body supported its approach by reference to: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 16 at 31:

¹⁵⁹ *Ibid.*, at [129] and [152].

¹⁶⁰ *Ibid.*, at [132].

Arguing against the evolutive approach, the terms of WTO agreements are specific to the WTO and still need to be interpreted in light of the context of the WTO agreements under article 31(1).¹⁶¹ 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.¹⁶² 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.¹⁶³ 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.¹⁶⁴

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 sharing” to the provisions.¹⁶⁵ 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 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 articles 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

¹⁶¹ Hagiwara, Kazuki, above n 146, at 101.

¹⁶² Ibid.

¹⁶³ McLachlan, Campbell, above n 18, at 300.

¹⁶⁴ Hagiwara, Kazuki, above n 146, at 105.

¹⁶⁵ *United States – Shrimp*, above n 5, at [153] and [155].

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. This final section suggests the basis under articles 31(1) and 31(3)(c).

1 Article 31(1)

MEAs should always be considered under article 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 more accommodating to the incorporation of the objectives of MEAs. Specific terms in MEA could also be considered if the terms reflected the common understanding of the WTO members. Thus, although not all WTO members had explicitly consented to such a meaning, its general usage in international law could be seen as acceptance or tolerance by those members.¹⁶⁶

2 Article 31(3)(c)

To meet the threshold for consideration under article 31(3)(c) the rule must be applicable between the parties. 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.¹⁶⁷ MEAs that are only applicable between a small subsection of WTO members may not be “applicable between the parties” because it would be difficult to establish that the MEA rules reflect WTO members’ common intentions.¹⁶⁸ However, an MEA could still reflect the common intentions even if the MEA was not binding on all the WTO members.¹⁶⁹ MEAs with wider membership can more easily demonstrate international acceptance of environmental norms or environmental issues.

¹⁶⁶ Pauwelyn, Joost, above n 141, at 257-63.

¹⁶⁷ Ibid, at 258.

¹⁶⁸ Ibid, at 257.

¹⁶⁹ Ibid, at 260.

IV Conclusion

Mutual supportiveness can enhance the relationship between trade and environment. 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.¹⁷⁰ However, this 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 articles 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 of 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. Such an approach does not change the rights and obligations of WTO members. A mutual supportive interpretation, consistent with the objectives of MEAs will go some way towards reconciling trade and environmental policies.

¹⁷⁰ Pavoni, Riccardo, above n 22, at 652.

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