THE USE OF THE PRECAUTIONARY PRINCIPLE IN WTO DISPUTE SETTLEMENT

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PART 1: INTRODUCTION

1.1. Subject and Aim

The subject of this thesis is the use of the precautionary principle in WTO dispute settlement.

The aim is to display how and to what extent the WTO panels and the Appellate Body take into account the precautionary principle in interpreting the WTO covered agreements.

1.2. Background and Topicality

1.2.1. Globalization and the Need to Protect the Environment

Over the past six decades we have experienced fundamental changes with regards to trade of goods and services. As a result of the development of cross-border interactions between countries, national economies are increasingly integrated into what is now a complex global economic system.[1]

This trend towards economic globalization emerged in the wake of World War II, with the global recognition of the need to establish an international trade-system specifically promoting liberalization of free trade in goods and services between nations. Consequently, numerous countries have since entered into the globalized economic system by becoming parties to international trade agreements, which are today administered by the World Trade Organization (WTO).[2]

1.2.2. The Challenge of Balancing Free Trade and Environmental Protection

The world has seen severe changes in the global environment, which are closely linked to global trends in international trade. Serious environmental threats, such as depletion of the stratospheric ozone layer, air and water pollution, extinction of endangered species, deforestation and global warming have increased rapidly in the last sixty years. The growing global economic activity is partly responsible for the environmental damage, which in the last years has become increasingly self-evident to the international community. Therefore, trade liberalization and environmental protection may, prima facie, be seen as two contradicting objectives.

However, at a basic level, economic activity is dependent on the environment in terms of, inter alia, sustainable management of natural resources and energy production.[3] There is therefore a need for harmonization between free trade and environmental protection.
Potential conflicts between the rules on free trade within the WTO and environmental norms imposing restricting freedom of trade seems inevitable, as the latter in reality may effectively

[1] International Institute of Sustainable Development (IISD): International Trade and Environment: A Handbook – Second Edition: http://www.iisd.org/publications/pub.aspx?pno=754, p. 1.
[2] Patricia Birnie, Alan Boyle, and Catherine Redgwell: "International Law & the Environment" (New York: Oxford University Press, 3rd edition, 2009), p. 753.
[3] IISD, supra note 1, pp. 1-2.

act as a barrier to trade. Consequently, as international environmental law is gradually being shaped into a system of legally binding rules, WTO is facing major challenges in balancing trade and environmental concerns.

1.3. Legal Methodology

1.3.1 WTO Law and International Environmental Law: Traditional Sources[4]

1.3.1.1 The WTO Regime and Sources of Law

The General Agreement on Tariffs and Trade adopted in 1947 (1947 GATT) was a treaty designed to operate under the umbrella of the International Trade Organization (ITO). However, since the negotiators were unsuccessful in establishing the ITO, 1947 GATT entered into force on a "provisional" basis in 1948 and was the main treaty regulating international trade for more than four decades.[5]

As a result of the 8th negotiation meeting between the GATT contracting parties known as the Uruguay Round (1986-94), the 1947 GATT was replaced by the 1994 Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) which entered into force January 1, 1995.[6] In addition to the establishment of the WTO, the WTO Agreement created GATT which simply refers to the provisions of the terminated 1947 GATT[7] (supplemented by a number of understandings), and incorporated trade agreements that had been created after the 1947 GATT into the new treaty regime.[8]

The function of the WTO is, inter alia, to oversee the "implementation, administration and operation" of these "multilateral trade agreements" [9] which are legally bound upon all WTO members. Thus, the main sources of WTO law are the WTO Agreement and the multilateral trade agreements covered in the treaty (WTO covered agreements).

1.3.1.2 International Environmental Law and Legal Sources

In the 1960s, due to the increasing global environmental degradation, protection of the environment went from being a national interest to an international concern. Essentially, two important documents triggered the world's response to the emerging environmental threats. First, the Stockholm Declaration adopted in 1972 recognized the importance of, and the common need to, preserve and enhance the global environment.[10] Second, the Brundtland

[4] The term "sources of law" in this sub-chapter must not be confused with neither relevant sources of international law (as a legal system) nor with relevant law before the WTO Dispute Settlement Body, as will be mentioned later in this thesis.
[5] Malcolm D. Evans: "International Law" (New York: Oxford University Press, 3rd edition, 2010), p. 732
[6] Ibid.
[7] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) (WTO Agreement), Article 1(a).
[8] Ibid, Article II.
[9] Ibid, Article III(1).
[10] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), adopted at the United Nations Conference on the Human Environment on June 16, 1972

Report (1987) confirmed the interdependence of protection of the environment and human development.[11] After the Stockholm Declaration and the Brundtland Report, the number of multilateral environmental agreements (MEAs) and non-binding declarations increased rapidly.

Thus, the main sources of international environmental law are legally binding MEAs and non-binding principles deriving from declarations ("soft law"). However, since a great deal of environmental principles have been reiterated in numerous provisions under international conventions, first and foremost MEAs, they have in fact become legally binding, in terms of specific rights and obligations of the treaty parties. This raises the debate as to whether certain environmental principles have reached the status of customary international law.

One such apparent example is the precautionary principle, the purpose of which is to encourage States to take appropriate protective action before full scientific proof of risk to the environment and human health.[12] It is widely argued that there is a sufficient degree of consensus on the precautionary principle as a customary rule of international law.[13] Since international law is a rather dynamic system, non-legal principles can in some cases change into customary rules quickly.[14] Nevertheless, this thesis will not attempt to argue whether the precautionary principle has attained status as customary international law. The subject of this thesis will be scrutinized under the presumption that the precautionary principle is an established customary rule of international law.

1.3.2. The Significance of the Vienna Convention on the Law of Treaties

It is important to keep in mind that WTO law and international environmental law are both *rules of international law*, and not different *systems* as such. Understanding the fundamental relationship between rules of international law is hence a prerequisite in order to explain specific tensions between these two branches. As this thesis will focus on how WTO law relates to non-written rules of international law, i.e. the precautionary principle, conflict-avoiding techniques, first and foremost treaty interpretation, are of particular importance.

The established principles of treaty interpretation are partly codified in Articles 31-33 of the Vienna Convention on the Law of Treaties. Article 31(3)(c) is particularly relevant in the context of treaties vs. general international law (international custom and general principles) as it requires "any relevant rules of international law" to be taken into consideration when interpreting a treaty.[15] As the provision expresses the fact that agreements are part of international law, the question in this thesis is not *whether,* rather *how and to what extent* international environmental principles, in this case the precautionary principle, are applicable in WTO disputes.

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[11] Our Common Future: Report of the World Commission on Environment and Development (Brundtland Report), published on 20 March 1987

[12] Halina Ward: Science and Precaution in the Trading System – Seminar Note (IISD Publication Centre, 1999), online: http://www.iisd.org/publications/pub.aspx?id=402, p. 2.

[13] Evans, supra note 5, p. 695: Bernie, Boyle and Redgwell, supra note 2 pp. 125-127. However, see EC Commission of the European Communities: Communication from the Commission on the Precautionary Principle (EC Communication), adopted on 2 February 2000, p. 11. The EC argues that the precautionary principle has attained the status of a *general principle* of international law."

[14] Bernie, Boyle and Redgwell, supra note 2, p. 108.

[15] United Nations Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, entered into force on 27 January 1980, Article 31(3)(c)

1.3.3 Choice of Legal Methodology

This thesis will encompass the fields of WTO and environmental law, as well as public international law. In order to examine the role of the precautionary principle in WTO dispute settlement, traditional sources of international law will be analyzed.

The primary WTO sources that will be used are, first, the WTO Agreement which is an "umbrella agreement" consisting of the covered agreements that are automatically binding on all members of the organization.[16] Second, two of these covered agreements, GATT and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) are important as they regulate the application of trade restricting measures. As the titles of these conventions describe, the provisions under GATT apply to measures in general, whereas the SPS provisions are only applicable with respect to sanitary and phytosanitary (SPS) measures.[17]

Moreover, the Dispute Settlement Understanding (DSU) regulating the dispute settlement system is an important WTO treaty to consider. Article 1(1) stipulates that the DSU shall apply to *disputes brought pursuant to* the consultation and dispute settlement provisions of the … "*covered agreements*"".[18] The scope of jurisdiction of the WTO judiciary (the ad hoc panels and the Appellate Body) is hence limited to the "covered agreements", i.e. the WTO treaties. The DSU does not, however, prevent the use of other rules of international law in the interpretation of the WTO covered agreements.[19]

In this respect, the WTO judiciary is obligated to respect the customary rules of treaty interpretation. For the purpose of this thesis it is hence necessary to examine the content and scope of the principles of treaty interpretation enshrined in the VCLT. In this context, the precautionary principle, which is (arguably) deemed to be an established rule of customary international law binding upon the States, may be applicable in the interpretation of the WTO covered agreements.

Furthermore, the WTO adjudicators established to clarify the provisions under the WTO covered agreements, provide rulings which are compulsory binding on the members. Their decisions must also, insofar they are relevant, be taken into consideration by later Panels.[20] Hence, WTO judiciary represents one of the strengths of the WTO, and the extent to which the WTO adjudicators take non-WTO norms into account have considerable impact on how

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[16] WTO Agreement, supra note 7, Article II.
[17] Also see General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (GATT), Article I; WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (1999) 1867 U.N.T.S. 493 (SPS Agreement), Article 1
[18] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (DSU), Article 1. Also see Article 3(2) which stipulates that the DSU "serves to preserve the rights and obligations of Members under *the covered agreements*."
[19] See e.g. DSU Article 3(2).
[20] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 15

WTO relates to general international law.[21] For the purpose of this thesis, selected reports concerning conflicts with regards to protection of the environment and human health will be analyzed.

Additionally, other Panels and Appellate Body reports as well as secondary sources, such as reports by the ICJ and the ILC, ECtHR case law and environmental reports and declarations will be used where relevant, in order to clarify and elaborate the discussed topics. Monographs and legal articles will also be used for these purposes, yet they are not of equal value.

1.4. Delimitations and Definitions

1.4.1. Delimitations

Although it can be difficult to separate political issues in international law from the legal ones, this thesis will attempt to focus exclusively on the legal issues.

Conflict of norms must not be confused with "conflict of laws". The latter relates to conflicts between two legal systems, and concerns the proper choice of law.[22] Moreover, his thesis will examine conflicts in the applicable law, and inherent normative conflicts will hence not be touched upon.

Furthermore, "conflict of norms" shall rather refer to conflict between norms that are legally binding upon States. Thus, the interplay between norms and elements of pre-normative character will not be addressed.

Only conflicts between WTO treaty and customary rules of international environmental law, namely the precautionary principle, will be examined. WTO challenges with respect to trade-restricting provisions MEAs will not be touched upon. However, some MEAs will be mentioned where relevant, as they contain rules derived from the precautionary principle.

Finally, there are several tools in avoiding and resolving conflicts of norms in international law. This thesis will focus solely on the general rule of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties as a conflict-avoiding technique.

1.4.2. Relevant Definitions

For the purpose of the thesis, the term "international law" will refer to "public international law". Public international law is narrowly defined as a legal system of rules that regulates the rights and obligations of States, and the relationship between States and international governmental organizations, such as the United Nations and the World Trade Organization.[23]

[21] Jeffrey Lagomarsino: "WTO Dispute Settlement and Sustainable Development: Legitimacy through Holistic Treaty Interpretation" (Pace Environmental Law Review, Vol. 28, 2011, 545-657), p. 545-546.
[22] Joost Pauwelyn: "Conflict of Norms in Public International Law. How WTO Relates to other Rules of International Law" (New York: Cambridge University Press, 2003), p. 8 on defining "conflict of norms".
[23] Public international law must not be confused with "private international law" which concerns procedural rules dealing with conflict between different legal systems.

The terms "norms", "rules" and "principles" and will be used interchangeably, but will refer to rules that are legally binding upon the States, unless otherwise noted.

The "WTO adjudicators" or the "WTO judiciary" are used a generic term for the Panels and the Appellate Body.

Finally, the use of the terms "conventions", "agreements" and "treaties" will refer to written agreements concluded between States and governed by international law.[24]

PART 2: TREATIES AND CUSTOMARY INTERNATIONAL LAW

2.1. Fragmentation of International Law

Since its inception, international law has developed into a fragmented system consisting of various regimes with their own regulations, institutional settings and judicial bodies dealing with their respective objectives and needs. However, they are not considered to be self-contained regimes, but rather "specialized regimes" within the framework of general international law. The problem that seems unavoidable is the risks of conflict between the specialized rules, as they often have no clear connection to one another.[25]

Fragmentation of international law stems from several factors that characterize the international legal system. First, international law is decentralized, in that there is no supreme legislative authority creating the rules – the law-makers are the States. Nor does it have a central executive or a world judiciary.[26] Second, international law is a horizontal system, in which the States also are subjects to the rules they create. However, since all States are entitled to full sovereignty and equality, they do not have to comply with a rule unless they have consented to do so (pursuant to the principle of pacta tertiies nec nocent nec prosunt). Thus, international law is based on State cooperation, and not subordination, which is typical in municipal legal systems.[27] Third, international law lacks an inherent hierarchy of legal sources,[28] which will be further examined in part 2.2.1.

The danger of fragmentation as a trend in international law has been addressed by the International Law Commission (ILC). In 2002, the ILC established a Study Group to examine specific topics under this issue. The conclusions of the work of the Study Group were adopted by ILC in 2006.[29] In applying international law where two or more norms are valid and

[24] See VCLT, supra note 15, Article 2(1)(a)
[25] Anja Lindroos and Michael Mehling: "Dispelling the Chimera of "Self-Contained Regimes". International Law and the WTO" (European Journal of International Law, Vol. 19 No 2, 2005, 857-877), pp. 857-858.
[26] Joost Pauwelyn, supra note 22, p. 13; Peter Malanczuk and Michael Barton Akehurst: "Akehurst's Modern Introduction to International Law" (New York Routledge Taylor & Francis Group, 7th edition, 1997), p. 3.
[27] Joost Pauwelyn: "The Role of Public International Law in the WTO: How Far Can We Go?" (The American Journal of International Law, Vol. 95, 2001, 535-578), p. 536.
[28] Ibid, p. 535.
[29] ILC Study Group: Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (Fragmentation Report), A/CN.4/L.682, 3 April 2006, Appendix, 2006, p. 2.

applicable, the report states that one must define the exact relationship between the norms. Such relationships can fall into two general categories: relationships of conflict and relationships of interpretation.[30]

2.2. Relationship Between Treaties and Customary International Law

2.2.1. Treaties and Customary Rules as Sources of International Law

The primary sources of international law are set out in Article 38(1) in the Statute of the International Court of Justice (ICJ Statute), which include:

a. *"international conventions"*
b. *"international custom (...) accepted as law",* and
c. "general principles of law recognized by civilized nations".[31]

Perhaps the most distinct difference between "international conventions" and "international custom" is their respective binding force. A convention becomes legally binding upon a State only when the State has signed and ratified it.[32] Hence, treaties are binding only to the parties to them.[33]

Customary international law, on the other hand, binds *all* states. However, for international customs to be "accepted as law" requires (i) widespread and uniform State practice (ii) which is carried out with the belief that the practice is mandatory as a matter of law (opinio juris).[34] Thus, the creation of customary rules of international law also entail a form of acquiescence as the customs need to be "accepted as law" by a sufficient number of States. Therefore, as treaties and customary international law derive essentially from the same source, i.e. State consent, it is presumed that they are equal in value.[35]

What determines the applicable law in cases of conflict will therefore be the content of the rules, rather than their source. Whereas treaty provisions often contain specific rules, international customs are characterized as more vague and ambiguous. Pursuant to the *principle of lex specialis* (law governing a specific subject matter), treaties will therefore normally prevail above customary international law, even though the latter is lex posterior (more recent law).[36]

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[30] Ibid, para. 2.
[31] Statute of the International Court of Justice (ICJ Statute), adopted 26 June 1945, entered into force 24 October 1946, Article 38(1).
[32] VCLT, supra note 15, Article 14(1). A State may also consent to be bound to a treaty by acceptance, approval, or accession, see Articles 14(2) and 15.
[33] Ibid, Article 34.
[34] John H. Currie, Craig Forcese, Valerie Oosterveld: "International Law. Doctrine, Practice and Theory" (Toronto: Irwin Law Inc., 2007), p. 121.
[35] Pauwelyn, supra note 22, pp. 94-95. The only element of hierarchy between the sources of international law is the rules with the status of "jus cogens". Those are peremptory norms that no treaty, custom or principle can overrule, see VCLT Article 53.
[36] Joost Pauwelyn: supra note 27, p. 536; Joost Pauwelyn: supra note 22, p. 133; John Bernetich: "Sovereignty and Regulation of Environmental Risk under the Precautionary Principle in WTO Law" (Vermont Law Review, Vol. 35, 2010-2011, 717-739), p. 719. An exception to lex specialis is when a treaty norms in contrary to a jus cogens, in which the former is void and terminates (pursuant to the principle of lex superior), see footnote 30 and part. 2.2.3.1.

Hence, in the case of the relationship between WTO rules and the precautionary principle, the former are applicable as lex specialis if there is a genuine conflict between the two. Consequently, if lex specialis is used as a conflict-solving tool in cases of conflicts between a WTO rule and a customary rule, the result will in most cases be in favor of the former. Hence, there is a need to first examine whether the conflict may be avoided before concluding that the norms are in fact contradictory.

2.2.2. Solving Conflicts vs. Avoiding Conflicts

A conflict between international norms may occur in two ways. The first type is referred to as "inherent normative conflict", which is a situation whereby one of the two norms invalidates or terminates the other norm, or when a norm is illegal under the other. A typical situation is where a norm conflicts with jus cogens, under which the former rule would be void.[37] The second type of conflict, and the one that is relevant for the purpose of this thesis, is "conflict in the applicable law". In this case there is no hierarchy between the norms in question, and for that reason both rules continue to exist, but in any given case one has to choose which one that prevails over the other.[38]

Furthermore, defining "conflict" in the applicable law seems to be a matter of ongoing discussion. Although I will not touch upon this debate in detail, it is necessary to suggest a proper definition for this thesis. The definition that is arguably prevalent in international law is rather narrow: "A conflict in the strict sense if direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its *obligations* under both treaties" (emphasis added).[39] Pursuant to this approach, conflict between two norms can only arise in a case where both norms entail an obligation upon the country concerned. In this sense, contradiction between, inter alia, a prohibiting norm and a permissive norm is a "divergence", and not a conflict. This strict and technical definition also seems to be prevailing in WTO case law.[40]

However, since the WTO covered agreements impose not only obligations to liberalize trade, but also certain rights to restrict trade (e.g. SPS and TBT Agreements), several commentators have frequently stressed the need for WTO to adopt a broader definition of "conflict".[41] Pauwelyn suggests that there is a conflict between two applicable norms "if one (of them) constitute, has led to, or may lead to, a breach of the other"[42], typically in a case where one rule prohibits a type of conduct and the other permits the same conduct.

This approach is perhaps more suitable in cases where a treaty provision may conflict with general international law, hereunder customary rules. The chosen definition does not, however, suggest that norms imposing different state conduct always conflict; they may either

[37] Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer: "The World Trade Organization: Legal, Economic and Political Analysis. Chapter 31: Joost Pauwelyn: The Application of Non-WTO Rules of International Law in WTO Dispute Settlement" (New York: Springer Science+Business Media Inc., 2005), p. 1420. Also see VCLT Article 53, which stipulates that "(a) treaty is void if (…) it conflicts with a peremptory norm of general international law.
[38] Ibid, p. 1420.
[39] Erich Vranes: "The Definition of "Norm Conflict" in International Law and Legal Theory" (The European Journal of International Law, Vol. 17 No 2, 2006), p. 401, citing Jenks.
[40] Ibid, p. 395.
[41] See e.g. Vranes and Pauwelyn.
[42] Pauwelyn, supra note 22, pp. 175-176, 275.

conflict or *accumulate*.[43] Consequently, the definition allows the use of treaty interpretation as a technique in avoiding conflicts of norms, and is particularly relevant in situations of conflict between treaties and customary international law.

2.2.3. Treaty Interpretation as a Conflict-Avoiding Technique

2.2.3.1. The General Rule of Interpretation

The general rule of treaty interpretation is set out in Article 31 in the Vienna Convention on the Law of Treaties.[44] The core elements of treaty interpretation are stipulated in Article 31(1):

"A treaty shall be interpreted *in good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and in the light of its *object and purpose*" (emphasis added).

The first principle suggesting that a treaty must be interpreted "in good faith", merely reflects the principle of pacta sunt servanda, meaning that the treaty "is binding upon the parties to it and must be performed by them in good faith".[45]

Furthermore, paragraph (1) draws on three different approaches to treaty interpretation: interpretation in accordance with (i) the textual meaning (objective approach), (ii) the intention of the parties (the subjective/contextual approach), and (iii) object and purpose of a treaty (teleological approach). Within the meaning of paragraph (1), however, they are not mutually exclusive, but necessarily dependent on one another.[46] As ILC puts it: "the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose."[47] Essentially, a proper interpretation of a treaty starts with the actual term and arrives at the contextual meaning.[48]

Article 31(2) refers to the relevant sources that shall be taken into account when determining "the context" within the meaning of paragraph (1). In addition to the text, preamble and annexes of the treaty they comprise agreements "relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", and other instruments "which was by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." Accordingly, a unilateral document is not to be considered as a part of "the context" unless it was made in the connection with the treaty, and accepted by the parties as such.[49]

In addition to the context of the treaty, Article 31(3) stipulates that certain sources outside the treaty shall be taken into consideration. Particularly relevant to conflicts between treaties and customary international law is "the principle of integration" set out in paragraph (3)(c), which

[43] Ibid, p. 200.
[44] VCLT, supra note 15 Article 31.
[45] Ibid, Article 26.
[46] Evans, supra note 5, p. 184.
[47] ILC Draft Articles on the Law of Treaties with Commentaries (ILC Draft Articles), adopted by the International Law Commission in 1966, p. 221, para. 12.
[48] Isabelle Van Damme: "Treaty Interpretation by the WTO Appellate Body" (The European Journal of International Law, Vol. 21, No. 3, 2010 EJIL 2010, 605-648), p. 620.
[49] ILC Draft Articles, supra note 47, p. 221, para. 3.

permits the contextual use of other "relevant rules of international law".[50] What is extraordinary about the principle of integration is that it expresses the notion of treaties as a part of the wider corpus of international law.[51] Article 31(3)(c) will be further examined in part 2.3.2.2.

The ILC has underlined that Article 31 is entitled "General *rule"* (and not "General *rules*"), and for that reason Article 31 is designed to make treaty interpretation a unity process.[52] Accordingly, the rule does not aim to infer any hierarchy between the principles. The ILC also points out that the general rules comprises "principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have attended to attach to the expressions that they employed in a document."[53]

Although numerous countries have not yet signed and ratified the VCLT, the general rule in Article 31 is widely accepted as customary international law, which has also been expressly acknowledged by the ICJ. Accordingly, the general rule is legally binding on all States, and not only the parties to the VCLT.[54]

2.2.3.2. Article 31(3)(c): The Principle of Integration

Originally, the general rule in Article 31(1) included a temporal element. In addition to the context of the treaty, the meaning of the terms was to be determined "in the light of the general rules of inter- national law *in force at the time of its conclusion".* Consequently, the provision allowed the interpreter to refer only to rules that existed at time the treaty was concluded. However, considering the dynamic nature of international law, in particular the possible changes of parties' intentions, the ILC decided to remove the temporal element, and transfer the rule to paragraph (3)(c),[55] which now reads:

"There shall be taken into account, together with the context (…) any relevant rules of international law applicable in the relations between the parties".

Article 31(3)(c) contains three cumulative requirements. First, the norm referred to must be a "rule(…) of international law". Hence, broader principles or considerations with a pre-normative character are not comprised by the provision. On the other hand, the words do not make any restrictions as to the sources of international law. Thus, the interpreter may use all primary sources, i.e. conventions, customary international law and general principles.[56], This

[50] Other sources referred to in paragraph (3) include "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".
[51] Pauwelyn supra note 22, p. 253.
[52] ILC Draft Articles, supra note 47, p. 220, para. 8.
[53] Ibid, p. 218, para. 4
[54] See e.g. ICJ Report, *Kasikili/Sedudu Island (Botswana/Namibia*), Judgment Report, ICJ Reports 1999, para. 18. The ICJ also refers to previous reports where the Article 31 has been recognized as reflecting customary international law. Furthermore, the rule in Article 31 is only a partly codification of the customary rules on treaty interpretation. Other the rules, such as the principle of effectiveness and the prohibition of abusive interpretations were excluded by the ILC. Van Damme, supra note 48, p. 621.
[55] ILC Draft Articles, supra note 47, p. 22, para. 16.
[56] Pauwelyn, supra note 22, p. 254.

approach is supported by international and regional tribunals, and also affirmed by a WTO panel.[57]

Second, Article 31 (3)(c) applies only to sources that are "relevant" to the subject matter of the provision in question. According to the wordings, the source must at least shed light on the meaning of the rule. If there is no connection between them, the relevance standard is not met.[58]

Third, the rules must "applicable in the relation between the parties". In this connection, it has been frequently argued whether "the parties" refers to all the parties to the treaty or only those involved in the dispute. Customary rules of international law, however, are binding on all States; they will always be applicable between "the parties", notwithstanding the unclear meaning of the term.[59]

It is widely argued that more attention must be drawn to the principle of integration in order to achieve a more coherent practice of interpretation in international law.[60] As for the WTO in particular, the Commission on Trade and Environment has stressed the need for the WTO adjudicators to take an evolutionary approach to treaty interpretation:

"Article 31(3)(c) has an important bearing on trade and environment disputes, whereby environmental rules might have a basis in treaty were customary international law. In addition, the references to environment and sustainable development in the WTO Agreements might also provide entry points for the other rules of international law."[61]

Nevertheless, it is important to keep in mind that Article 31(3)(c) is *not* a separate rule of treaty interpretation, but a part of the larger interpretation process. As noted above, the starting-point is always the language of the terms in their context and in the light of the object and purpose of the treaty.[62]

PART 3: THE DISPUTE SETTLEMENT SYSTEM AND WTO APPROACHES TO THE PRECAUTIONARY PRINCIPLE

3.1. The WTO – A Self-Contained Regime?

As was suggested by the ILC Study Group in the 2006 report, the phrase "self-contained" is in effect a misnomer; no legal regime is self-contained in that it is never clinically isolated

[57] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC-Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847, para. 7.67. The panel expressly confirmed that customary rules of international law are "rules" within the meaning of Article 31(3)(c).
[58] Pauwelyn, supra note 22, pp. 263-264.
[59] Ibid, pp. 257-263.
[60] See e.g. Campbell McLachlan: "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (International and Comparative Law Quarterly, Vol. 54 Issue 2, 2005, 279-319), pp. 280-281.
[61] WTO Committee on Trade and Environment: Report on Trade, Environment, and the WTO Dispute Settlement Mechanism, adopted in 2005, p. 6.
[62] Campbell McLachlan, supra note 60, p. 311.

from the rest of the law. As for the WTO as a treaty regime, the principle of lex specialis applies in many respects, but the institution is not a closed system. [63]

The WTO as a self-contained regime was also expressly rejected by the Appellate Body in the US-Gasoline case, where the tribunal said that that the GATT "is not to be read in clinical isolation from public international law".[64] Since then, subsequent practice of the panels and the Appellate Body has more or less followed the same approach,[65] which this thesis will return to in part 3.2.2.

3.2. WTO Dispute Settlement System

3.2.1. The WTO Dispute Settlement Body

The Dispute settlement system is administered by the Dispute Settlement Body (DSB), which is a WTO political body established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) adopted by the WTO in 1994.[66]

The main function of the DSB is to settle disputes that arise between the WTO members, where it has the exclusive authority to establish ad hoc panels, and adopt reports from the panels and the Appellate Body.[67] The DSB is also responsible for monitoring the implementation of the rulings and recommendations by the WTO adjudicators, and to ensure that the countries concerned comply with a rule.[68]

Before a case is taken before a panel, the parties to the dispute are first required to undertake consultation procedures in order to reach a consensus on the issue.[69] If the consultations are unsuccessful, the complaining party may request for the establishment of a panel to hear the case. The report of the panel will include rules and recommendations which must be adopted by the parties involved in the dispute.[70]

However, a party may appeal the panel decision (or certain rulings of the decision) to the Appellate Body, which is a permanent adjudicating body with the authority to uphold, modify or reverse the rulings of the panel.[71] The report of the Appellate Body is final and compulsory binding upon the parties to the dispute, meaning that it has to be accepted and adopted unconditionally, unless the DSB in consensus decide not to do so.[72]

[63] ILC Report, supra note 29, paras. 165, 192-193; Pauwelyn, supra note 27, p 539.
[64] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 17
[65] Yenkong Ngangjoh Hodul: Perspectives on Legal Issues in WTO Jurisprudence in the First Half of 2010 (Manchester Journal of International Economic Law, Vol. 7, Issue 2, 2010, 106-118), p. 110.
[66] DSU, supra note 18, Article 2(1).
[67] Ibid, Article 2(1).
[68] http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
[69] DSU, supra note 18, Article 4.
[70] Ibid, Articles 6(1), 11 and 16(1). The panel report must also be adopted by the DSB to take effect, Article 16(4).
[71] Ibid, Articles 16(4), 17(1) and (13).
[72] Ibid, Article 17(14).

3.2.2 General International Law as Reference Materials for the Interpretation of WTO Agreements

The DSU does not contain any provisions expressly recognizing the precautionary principle as a relevant rule in WTO law. However, Article 3 refers to the customary principles of treaty interpretation. Paragraph 2 reads:

"The Members recognize that (the Dispute Settlement System) serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*. (emphasis added)"

Article 3(2) does not make an express reference to VCLT Article 31.[73] However, the Appellate Body has clarified the linkage between the text of DSU Article 3(2) and the general rule of treaty interpretation. In the US-Gasoline case, the court said as follows:

"Article 31 is a "general rule of interpretation (which) has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements (…)".[74]

This recognition of the rules on treaty interpretation as a part of international customary law has been reiterated in numerous subsequent panels and Appellate Body reports. Despite the lack of an explicit reference to Article 31 in the DSU, it is clear that the WTO acknowledges the general rule of treaty interpretation as applicable to the WTO judiciary.

DSU Article 3(2) further provides that interpretation of WTO agreements must only be "in accordance" with customary international law of treaty interpretation. Thus, the panels and the Appellate Body are free to decide how to interpret the WTO covered agreements as long as the interpretation process is in conformity with the general rule. In this sense, Article 3(2) simply confirms the principle of *jura novit curia*, that the court knows the law and is therefore the competent body to choose the applicable law in a particular case.[75]

However, Article 3(2) also contains an important interpretation limitation, namely that WTO adjudicators can only "clarify" the rules in the WTO agreements. In US-Wool Shirts and Blouses the Appellate Body states that Article 3(2) is not "meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute."[76] Consequently, the courts shall only seek to find the clear content of the provisions – the interpretation cannot result in a change of the meaning of the rule than the parties originally intended.

This limitation of interpretation is further emphasized in Article 3(2), requiring that recommendations and ruling by the panels and the Appellate Body must not "*add to or*

[73] One may question why the DSU negotiators did not make an explicit reference to the rules on treaty interpretations provided in Articles 31 to 33 of the VCLT. However, as there are some WTO members that are not (recognized) States, they cannot be parties to the VCLT, Damme, supra note 48, p. 608, footnote 2.
[74] US-Gasoline, supra note 64, p .17.
[75] Damme, supra note 48, p. 607-608.
[76] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (US-Wool Shirts and Blouses)*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323, p. 19.

diminish the rights and obligations provided in the covered agreements". The latter sentence is reiterated in Article 19(2) regarding the recommendations of the panels and the Appellate Body in particular.

3.3. The Precautionary Principle and Potential Gateways in WTO Law

3.3.1. The Precautionary Principle

The most well-known example of the precautionary principle is enshrined in Principle 15 of the Rio Declaration on Environment and Development (Rio Declaration), which reads as follows:

"Where there are threats of serious or irreversible damage, *lack of full scientific certainty* shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (emphasis added).[77]

The most striking feature of the precautionary principle is that it applies only when a State does not have "full scientific certainty" that a human action or policy will cause environmental damages.[78] Accordingly, the principle "shifts" the burden of proof in that it removes a possible justification of State action, or rather inaction, when the environment may be at stake.[79]

However, requiring "full" scientific proof would allow the precautionary principle to be invoked in all cases of environmental management. The standard of proof of risk has accordingly been lowered in a number of international conventions and court decisions. In the European Union for instance, the precautionary principle may be invoked where "scientific evaluation does not allow the risk to be determined with *sufficient certainty*".[80]

Therefore some scientific evidence of potential harmful effects to the environment is required. In this respect, the European Court has emphasized that protective measures may be taken before "the reality and seriousness of the risks become fully apparent" but they cannot "properly be based on a purely hypothetical approach to risk, founded on mere conjecture which has not been scientifically verified".[81] On the other hand, the WTO has stated that there is no requirement that the scientific proof is based on "the view of a majority of the relevant scientific community".[82] As one commentator suggests:

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[77] United Nations Declaration on Environment and Trade (Rio Declaration), adopted on 12 August 1992, Principle 15. Although the word "shall" is used in Principle 15, it does impose any legal obligation upon the States to take precautionary measures. The Rio Declaration is non-binding instrument reciting guidelines in which the States may adopt in resolving environmental problems.

[78] Accordingly, it differs from the principle of prevention in that the latter usually comes into play when there is sufficient scientific proof.

[79] Laurent A. Ruessmann: "Putting the Precautionary Principle in its Place: Parameters for the Proper Application of a Precautionary Approach and the Implications for Developing Countries in Light of the Doha WTO Ministerial" (American International Law Review, Vol. 17, No. 5, 2002), p. 909.

[80] EC, Communication, supra note 13, p. 4, para. 4: Also see e.g. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (EC-Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 120; Bernie, Boyle and Redgwell, supra note 2, p. 156.

[81] Pfizer Animal Health v Council of the EU (2002) II ECR 3305, paras. 139, 143.

[82] EC-Hormones, supra note 80, para. 194.

"If the evidence is sufficiently conclusive to leave little or no room for uncertainty in the calculation of risk, then there is no justification for the precautionary principle to be applied at all".[83]

Furthermore, the Principle 15 in the Rio Declaration is silent when it comes to the determination of an appropriate level of risk, which is indeed an issue that is better answered by politicians than courts and scientists. Accordingly, it is up to the States to establish a level of protection of health and environment they consider appropriate for their own society.[84]

Finally, the EC has pointed out that the precautionary principle is more relevant to *risk management,* rather than risk assessment. Whereas the latter is a scientific evaluation of potential harm, risk management suggests that "scientific uncertainty precludes a full assessment of the risk and when decision-makers consider that the chosen level of environmental protection or of human, animal and plant health may be in jeopardy." This approach gives the State a broader margin of discretion in determining the level of protection.[85]

3.3.2. WTO Rules Relevant to the Precautionary Principle

3.3.2.1. The Principles of Non-Discrimination as Fundamental Rules in WTO

In order to promote fair and equal competition between the member States, the WTO aims to not only reduce existing barriers, but to also prevent new ones from developing. In this sense, the principle of non-discrimination is a cornerstone of the WTO.[86] This principle consists of two "sub"-principles; the rule of most-favored nation and the national-treatment rule, and they are laid down in GATT, Article I and III, respectively. Both provisions are rather comprehensive, and they will hence be explained in short terms:

GATT Article I, concerning customs duties and other charges, requires that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and *unconditionally to the like product* originating in or destined for the territories of all other contracting parties."[87] In other words, special treatment to the goods or services of one WTO member is *prohibited* unless it is given to all WTO members.[88]

GATT Article III requires that internal taxes and other internal charges "should not be applied to imported or domestic products so *as to afford protection to domestic production*."[89] Moreover, imported products "shall not be subject (…) to internal taxes or other internal charges of any kind *in excess of* those applied (….) to like domestic products.[90] Finally, the

[83] Bernie and Boyle, supra note 2, p. 156, footnote 282.
[84] Ibid, p. 161; Pzifer case, supra note 81, para. 151.
[85] Dr. Hans-Joachim Priess and Dr. Christian Pitschasy: "Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva's Walls?" (Fordham International Law Journal, Vol 24, Issue 1, 2000, 519-553), p. 530.
[86] IISD, supra note 1, p. 26.
[87] GATT, supra note 17, Article I (1).
[88] There are two exceptions to the most-favoured nation rule: 1. Regional trade agreements. 2. Developing countries, se IISD, supra note 1, p. 28.
[89] GATT, supra note 17, Article III(1).
[90] Ibid, Article III(2).

products "shall be accorded treatment *no less favourable* than that accorded to like products of national origin."[91] In short, Article III imposes an obligation upon a member to treat imported products equally to the same products manufactured in the importing State.[92]

A national regulation in a member State that is found to be inconsistent with the principle of non-discrimination is to be either withdrawn or modified within a reasonable amount of time.[93]

3.3.2.2. GATT Environmental Exceptions: Article XX (b) and (g)

The general exceptions to GATT rules are laid down in Article XX. The introductory clause, commonly known as "the chapeau" stipulates that "nothing in the General Agreement (GATT) shall be construed to prevent the adoption or enforcement by any contracting party of measures" justified under paragraphs (a) to (j). The Appellate Body has stated that exceptions can be made to all of the obligations in GATT.[94]

With respect to the environment a member may invoke an exception to the GATT rules if the measure falls within the scope of paragraph (b) or (g). Pursuant to (b) the measure for which the exception is being invoked must be "*necessary* to protect human, animal or plant life or health". The "necessary " test entails an obligation for the member invoking the exception to demonstrate (i) the necessity to protect its domestic environment, (ii) that the measure in question is necessary for this purpose, and (iii) that the measure is the least trade-restrictive alternative reasonably available to protect the member's environment.[95]

Article XX (g) provides that the measure must be "relating to conservation of exhaustible natural resources if such measure made effective in conjunction with restrictions on domestic production or consumption." The member must demonstrate (i) that the measure in question concerns "exhaustible natural resources", (ii) that the measure relates to the "conservation" of such resources, (iii) a connection between the measure and the conservation, and (iii) that the measure is "made effective in conjunction with" restrictions on the country's own production or consumption.[96]

Although a measure would otherwise meet the requirements imposed in paragraph (b) and (g) (or any of the other exception rules), it would still be illegal under the chapeau of Article XX if the measure is "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." The Appellate Body has stated that a balance must be struck between the right of a member to invoke an exception and the duty of that State to respect the rights of the other States.[97]

Moreover, the standards set out in the chapeau are necessarily broad in scope and reach. Accordingly, the issue whether a measure is discriminatory in an "arbitrary" or "unjustifiable"

[91] Ibid, Article III(4).
[92] IISD, supra note 1, p. 28.
[93] DSU, supra note 18, Article 19(1).
[94] US-Gasoline, supra note 64, p. 24.
[95] Bernie, Boyle and Redgwell, supra note 2 pp. 760-761, IISD, supra note 1, pp. 29-30.
[96] Bernie, Boyle and Redgwell, ibid, pp. 761.
[97] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 156.

manner, or is a "disguised restriction", has to be determined on a case-by-case basis as the measure may vary.[98]

Essentially, the restriction rule in the chapeau is to be read in light of its purpose: to prevent abuse or misuse of the exception rules. The chapeau expressly addresses the manner in which the measure in question is applied, rather than the measure itself or its specific content, and can as such be understood as similar to the general principle of good faith.[99]

Both the chapeau of Article XX and the individual paragraphs entail a *burden of proof* that lies upon the party asserting the justification of the measure. However, the Appellate Body has underscored that there is a difference of threshold between the two. In general the party that has the burden of proof faces a heavier task in showing that a measure is not "a disguised or unjustified discrimination (…) or disguised restriction on international trade".[100] Consequently, taking a precautionary approach in applying the chapeau is arguably more difficult than in the case of application of the individual exception rules.

3.3.2.3. Articles 2, 3 and 5 of the SPS Agreement

Unlike GATT, the SPS Agreement imposes a *right* for WTO members to take sanitary and phytosanitary measures (SPS measures) that may affect international trade.[101] Such measures must have the purposes of protecting human, animal or plant life or health within the member State's territory from risks of inter alia pests, diseases, disease-carrying or disease–causing organisms, additives, toxins and contaminants.[102]

Similar to the chapeau of Article XX, Article 2(1) requires that SPS measures shall neither discriminate the Members in an "arbitrarily or unjustifiably" manner, nor constitute a "disguised restriction on international trade". Pursuant to paragraph 2, such measures must be "necessary for the protection of human, animal or plant life or health", and it shall not "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection,"(Article 5(6)). However, Article 5(6) presumes that it is up to the member applying the measure to choose its own appropriate level of protection.[103]

Additionally, a measure is deemed to be necessary to protect human, animal and plant life or health if it is based on "international standards, guidelines or recommendations", Article 3(1) and (2).[104] However, pursuant to Article 3(3), a member may establish measures that result in a "higher level of (…) protection" than implied in the standards, guidelines or recommendations, which may also include a zero risk.[105]

Moreover, SPS measures shall be based on "scientific principles" and adopted with "sufficient scientific evidence" (Article 2(2)). In determining whether a measure meets these

[98] Ibid, para. 120.
[99] US-Gasoline, supra note 64, p. 22; Ibid, para. 158.
[100] US-Gasoline, ibid.
[101] SPS Agreement, supra note 17, Article 1(1).
[102] Ibid., Article 1(2), Annex A(4)(1).
[103] Bernie, Boyle and Redgwell, supra note 2, p.779. Also see Appellate Body Report, *Australia – Measures Affecting Importation of Salmon (Australia-Salmon)*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 125.
[104] Also see SPS Agreement, Annex A(3) on international standards, guidelines and recommendations.
[105] See also EC-Hormones, supra note 80, para. 124; SPS Agreement, supra note Article 5(4).

criteria, there must be an "adequate relationship" between the measure and the scientific evidence, which is "sufficient" when it is gathered through scientific methods".[106]

Article 5(7) is particularly relevant to the precautionary principle as it allows SPS measures to be provisionally adopted if they are based on "available pertinent information", and where "relevant scientific evidence is insufficient".[107] The Appellate Body has found that "if the body of available scientific evidence, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5(1), the relevant scientific proof is "insufficient.[108] Article 5(7) is not an *exception* rule, but must be applied as a qualified *exemption* from the obligation under Article 2(2), that the measure must be maintained with sufficient scientific evidence.[109]

3.3.2.4. The Importance of WTO Agreement Preamble in Context of Environmental Issues

Unlike the WTO covered agreements, the preamble of the WTO Agreement contains an explicit reference to environment. It provides that the parties are to recognize that their relations in international trade of goods and services should be "conducted (…) in accordance with the objective of sustainable development, seeking both to protect and preserve the environment."[110]

However, as opposed to the provisions under the WTO Agreement, the preamble does not have a binding force upon the WTO members. On the other hand, by presenting the purposes of the WTO Agreement, the preamble reflects the intentions of the WTO members when the treaty was negotiated. Considering the legal relevance of the preamble, the Appellate Body has expressed that it must add color, texture and shading to the interpretation of the WTO covered agreements.[111]

Additionally, more directly related to the preamble's references to environmental protection, the Appellate Body has said that "the importance of coordinating policies on trade and the environment" has been specifically acknowledged, and that "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement." The members can however only take such measures in accordance with the requirements of the WTO covered agreements.[112]

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[106] Appellate Body Report, *Japan – Measures Affecting Agricultural Products (Japan-Agricultural Products II)*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, para. 84; Appellate Body Report, *Japan – Measures Affecting the Importation of Apples (Japan-Apples)*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391, para. 8.92.

[107] Article 5(7) also include two other criteria: The member must "seek to obtain additional information necessary for more objective assessment of risk, and "review the (…) measure accordingly within a reasonable time".

[108] Japan-Apples, supra note 106, para. 179.

[109] Japan-Agricultural Products II, supra note 106, para. 80.

[110] WTO Agreement, supra note 7, Preamble (1).

[111] Shrimp-Turtle, supra note 97, para. 153.

[112] US-Gasoline case, supra note 64, p. 30.

PART 4: THE USE OF THE PRECAUTIONARY PRINCIPLE IN THE WTO DISPUTE SETTLEMENT: CASE STUDY

4.1. Prior to WTO: GATT Panels - Tuna-Dolphin I and II

Before turning to the WTO reports, two GATT panel decisions are worth mentioning since they were the first to draw attention to the conflicting link between international trade and environmental protection. The so-called Tuna-Dolphin I and II cases pondered whether United States had violated 1947 GATT Article XI(1) by establishing certain measures forbidding or restricting importation of tuna from countries using methods that also killed dolphins during the fishing process. The panels made a strict approach to 1947 GATT, suggesting, inter alia, that the exceptions under Article XX are "limited and conditional", and must be interpreted "narrowly".[113]

As for the environmental exceptions, the panel stated that the criteria set out in paragraph (b) and (g) refer to the trade measure in question, and not to domestic standards adopted in a country. The panels also set high thresholds of the requirements set out in Article XX(b) and (g) by stating that United States did not have the authority to protect resources beyond its and MMPA provisions were therefore not "necessary" within the scope of Article XX(b). Nor were the MMPA provisions justified under paragraph (g), as the terms "relating to "and" in conjunction with", according to the panel, meant primarily aimed at "the conservation of exhaustible natural resources".[114]

Due to the lack of proper consideration of international environmental rules (in particular MEAs) in the interpretation processes, the Tuna-Dolphin reports have become infamous for being rigidly trade focused. As neither decision was adopted by the DSB, they were not legally binding under GATT. The reports are nevertheless considered significant as they demonstrated the weakness of the old GATT regime in cases of conflict with environmental norms.[115]

4.2. Selected WTO Panels and Appellate Body Reports

4.2.1. Selected Reports Related to GATT

4.2.1.1 1996 US – Gasoline Case

Facts and Rulings

The Appellate Body report US-Gasoline concerned a dispute between United States on the one side, and Venezuela and Brazil on the other. The issue was whether the US "the Gasoline

[113] GATT Panel Report, *United States – Restrictions on Imports of Tuna (Tuna-Dolphin I)*, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155, para. 5.22.
[114] Ibid, paras. 5.27-5.33; GATT Panel Report, *United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)*, DS29/R, 16 June 1994, unadopted, para. 6.1.
[115] Bernie, Boyle and Redgwell, supra note 2, pp. 765, 771.

Rule" prohibiting production and importation of conventional gasoline, was inconsistent with GATT Article III(4),[116] and not justified under Article XX.[117]
The panel agreed with the complainants in that the Gasoline Rule was inconsistent with the national treatment principle set out in GATT Article III(4), and justified neither under paragraph (b) nor (g) of Article XX.[118] The Appellate Body reversed the Panel rulings on paragraph(g), but found that "the Gasoline Rule" was contrary to the chapeau.[119]

Article XX(g)

In its findings the Appellate Body referred to the rules of interpretation in VCLT Article 31-33. It emphasized the rule provided in Article 31(1), stipulating that the words of a treaty "are to be given the ordinary meaning, in their context and in the light of the treaty's object and purpose".[120] Particularly with respect to the meaning of "relating to the conservation of exhaustible natural resources", the Appellate Body reaffirmed the findings of the panel (and the GATT panels in Tuna-Dolphin I and II); that the measure must be "primarily aimed at" such conservation.

According to the Appellate Body, the panel had ignored the fact that paragraph (g) must be read in conjunction with other provisions of GATT. As other provisions have terms with different meanings, it cannot have been the intentions of the GATT negotiators to give them the same threshold.[121] Consequently, the Appellate Body modified the meaning of "primarily aimed at" to include measures that have a "substantial relationship" which is not "merely incidentally or inadvertently aimed at" conservation of natural resources.[122]

The Appellate then turned to the question whether the baseline establishment rules under the Gasoline Rule are "made effective in conjunction with restrictions on domestic production or consumption", in which the tribunal answered in the affirmative. In its reasoning, the Appellate Body pointed out Article 31(1) as the basis for the interpretation the second criteria under paragraph (g). It found that if the term "made effective in conjunction with" is to have the same threshold as the term "no less favourable" under Article III(4), there would be no inconsistency between the measure at issue and the national treatment rule in the first place.[123]

The Chapeau of Article XX

However, the Appellate Body found that the baseline establishment rules were not satisfied under the chapeau of Article XX, since they, in their application, constituted "unjustifiable discrimination" and a "disguised restriction on international trade".[124] According to the tribunal, the introductory words of the chapeau "nothing in this Agreement" must mean that the measure for which the exception is being invoked relate to *all obligations* under GATT.[125] In its reasoning, the Appellate Body again referred to the contextual aspect of the general rule

[116] GATT Article III(4) stipulates that imported products are to be treated "no less favourable than that accorded to like products of national origin."
[117] US-Gasoline, supra note 64, p.2.
[118] Ibid, p. 7.
[119] Ibid. p. 29.
[120] Ibid, p. 17.
[121] Ibid, pp. 17-18.
[122] Ibid, p. 19.
[123] Ibid, p. 21.
[124] Ibid, p. 29.
[125] Ibid, p. 24.

of treaty interpretation, and stated that "interpretation (of Article XX) must give meaning and affect to all terms of (GATT)".[126]

Concluding Remarks

Thus, the Appellate Body clarified the uncertainty with respect to the general rule of treaty interpretation as a basis for interpretation of GATT (and other WTO agreements). It gave decisive weight to the ordinary meaning of the GATT language and the context of the treaty *at the time of its conclusion* in order to find the intentions of the parties. The Appellate Body nevertheless overlooked the preamble of the WTO Agreement with respect to environmental protection as relevant material in finding the contextual meaning of Article XX. Although the provisions under GATT were formulated in 1947, the 1994 GATT must be read in connection with WTO Agreement.

The Appellate Body did however mention the WTO preamble and the Decision on Trade and Environment[127], yet in its conclusion it emphasized that the members have "a large autonomy to determine their own policies on the environment (…), their environmental objectives and the environmental legislation they enact and implement", as long as they respect the obligations under the WTO covered agreements.[128] This statement is somewhat related to the precautionary principle, but may be considered as an obiter dictum.

Another weakness of the findings of Appellate Body, particularly with regards to Article XX(g), relates to the lack of references to other rules of international law, hereunder the precautionary principle, as provided in Article 31(3)(c). If the tribunal had taken these factors into account, its rulings may have been profoundly sounder.

4.2.1.2 1998 Shrimp – Turtle Case

Facts and Rulings

The Shrimp-Turtle case concerned a dispute between India, Malaysia, Pakistan and Thailand and the United States. The issue was whether Section 609 of the US Public Law 101-162 (Section 609), which entailed a ban on imports of shrimps from countries that did not protect sea turtles from being caught in the fishing process, was contrary to 1994 GATT Article XI(1)[129], and not justified under Article XX.[130]

The panel established to resolve the dispute answered in the affirmative.[131] The Appellate Body disagreed with the panel in the interpretation of Article XX stating that the trade measures under Section 609 were "measures" for the purpose of the chapeau. However, although the Appellate Body also found that Section 609 fulfilled the requirements in

[126] Ibid, p. 23.
[127] The Ministerial Decision on Trade and Environment, adopted at the Meeting of the Trade Negotiations Committee in Marrakesh on 14 April 1994.
[128] US-Gasoline, supra note 64, p. 30.
[129] GATT Article XI(1) provides that "(n)o prohibitions or restrictions other than duties, taxes or other charges (…) shall be instituted or maintained" on the importation and exportation of products.
[130] Shrimp-Turtle, supra note 97, para. 1.
[131] Ibid, para. 5.

paragraph (g), it was an "arbitrary and unjustifiable discrimination" contrary to the requirements of the chapeau.[132]

Article XX(g)

One of the central issues concerned the interpretation of "exhaustible natural resources". The Appellate Body found that the sea turtles Section 609 aimed to protect fell within the term of paragraph (g). In its reasoning the tribunal said:

"The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter *in the light of contemporary concerns* of the community of nations about the *protection and conservation of the environment*." (emphasis added).[133]

Although the Appellate Body highlighted the importance of the ordinary meaning of the words of Article XX earlier in the report[134], it also made a crucial point; the national communities are rather dynamic in nature, thus their policies, knowledge and concerns change over time. Unlike in previous reports, the Appellate Body in this case took an evolutionary approach to the interpretation of paragraph (g).[135]

This point was made even clearer as the tribunal said that "natural resources" is not a static term but is "rather (…) evolutionary".[136] The tribunal also considered the WTO preamble, and stated that the negotiators during the Uruguay Round were "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges "the objective of *sustainable development*"." [137]

Although the Appellate Body did not discuss the role of Article 31(3)(c), it did in fact refer to agreements external to GATT and relevant to the interpretation of "exhaustible natural resources", such as the UN Convention on the Law of the Sea (UNCLOS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Consequently, "exhaustible natural resources" was given a broader definition to encompass not only non-living resources, but also *living* creatures that are *in danger of becoming extinct*.[138]

The Chapeau of Article XX

The Appellate Body then went on to the meaning of chapeau of Article XX. It turned to the preambles of the WTO Agreement and 1947 GATT to seek clarification of the parties' intentions, and pointed out the essential differences of their articulation. While the former stipulates that the members are to recognize "the full use of the resources of the world", the latter refers to an "optimal use (…) in accordance with the objective of sustainable

[132] Ibid, paras. 186-187.
[133] Ibid, para. 129.
[134] Ibid, para. 114.
[135] Ilona Cheyne: "Gateways to the Precautionary Principle in WTO Law" (Journal of Environmental Law, 2007, Vol.19 No 2, 155-172), p. 164.
[136] Shrimp-Turtle, supra note 97, para. 130.
[137] Ibid, para. 129; Cheyne: supra note 135, p. 164.
[138] Shrimp-Turtle, ibid, paras. 130-134.

development".[139] Again, the Appellate Body noted that the preamble of the WTO Agreement "demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development", and hence the preamble "must add colour, texture and shading to our interpretation of (…) GATT 1994."[140]

In order to determine whether Section 609 resulted in an "unjustifiable discrimination", the Appellate Body stated that the conservation of highly migratory species, such as sea turtles, demands cooperative efforts before a member can take unilateral action. Later the tribunal expressly mentioned Article 31(3), and made extensive references to materials external to the WTO.

First, it considered the Decision of Trade and Environment which refers to the environmental objectives provided in Rio Declaration and Agenda 21. It then took account of provisions in the Convention on Biological Diversity and Convention on the Conservation of Migratory Species of Wild Animals. These instruments stipulate that environmental problems are to be solved through international consensus.The Appellate Body found that the United States had in fact negotiated with some of the WTO members on exports of shrimps into the country, by negotiating and concluding the Inter-American Convention. However, this was not sufficient since the appellees were not part of this agreement. On this basis, the Appellate Body considered Section 609 to be an "unjustifiable discrimination".

Concluding Remarks

With respect to Article XX(b), the Appellate Body took a broad approach to the term "exhaustible natural resources" to also include endangered species. Although the court did not expressly mention the precautionary principle, its reasoning is consistent with the rule in the sense that one cannot be certain of the environmental consequences of allowing species to become extinct.[141]

Additionally, it can be argued that the Appellate Body implicitly referred to precautionary principles by referring to the importance of sustainable development in the WTO Preamble.[142]

However, as the Appellate Body shows in reading the chapeau, references to international environmental instruments may not always work in favor of the precautionary principle.[143] Nevertheless, since the Appellate Body frequently emphasizes the importance of balancing trade and environmental protection, the Shrimp-Turtle case represents a turning point in this controversy.

Considering the high threshold in the chapeau, it be argued that the Appellate Body did in fact interpret GATT in accordance with other sources of international law, and that the chapeau of Article XX may stand as an obstacle for members to take precautionary trade measures.

[139] Ibid, para. 152.
[140] Ibid, para. 152-153. Also see part 4.3.5. in this thesis.
[141] Cheyne, supra note 135, p. 164.
[142] Sustainable development may be regarded as an "umbrella principle" encompassing other norms such as the precautionary principle and the polluter-pays principles, Ronnie Harding and Elizabeth Fisher: Perspectives on the Precautionary Principle (Sydney: The Federation Press, 1999), p. 155.
[143] Cheyne, supra note 135, p. 166.

4.2.1.3. 2001 EC – Asbestos Case

Facts and Rulings

The EC-Asbestos case concerned a claim brought by Canada against the EC that the French Decree No. 96-1133 (the Decree) prohibiting asbestos and asbestos containing products, including imports of such products, violated, inter alia, GATT Article III(4), and were not justified under Article XX.[144] The panel established to resolve the dispute found that the Decree was inconsistent with Article III(4), but justified as such by the chapeau and paragraph (b) of Article XX.[145] The Appellate Body upheld the panel's conclusion that the Decree met the requirements under paragraph (b), but also found that the measure was consistent with Article III(4).[146]

Article III(4)

One of the main issues was whether asbestos and so-called "PCG" fibers, were "like products" within the meaning of Article III(4). In the interpretation of the term, the Appellate Body considered in detail its contextual meaning.[147] First it observed a previous case concerning interpretation of Article III(2), which stated that "like" is a relative term and cannot be given a precise definition. The meaning must be determined, inter alia, in light of the circumstances that prevail in any given case. Second, the Appellate Body held that other WTO provisions containing the requirement "like products" are relevant in the interpretation. Considering the textual differences in these provisions, the term "like" in general does not have to mean "identical", but can also refer to "similar".[148]

As for "like products" in Article III(4) in particular, the panels stated that the domestic and imported products in question must be in a competitive relationship. Although the Appellate Body adopted the panel's broad approach, it also held that other criteria, inter alia, physical property, nature and quality of the products, must be considered in the evaluation. In the particular circumstances of the case, the tribunal stated that asbestos fibers are more toxic, and thus a greater risk to human health, than PCG. Along with an extensive evaluation of other relevant evidence, the Appellate Body concluded that asbestos fibers and PCG were not "like products".[149]

Article XX(b)

Another key issue in EC-Asbestos concerned whether the Decree was "necessary to protect human (…) life or health" within the meaning of Article XX(b). Even though the provision does not include requirement of a risk assessment, the Appellate Body noted that the measure in question must be based on relevant scientific proof of a risk to human health. The risk may however, be determined either in quantitative or qualitative terms. In the particular

[144] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243 paras. 1, 18.
[145] Ibid, para. 4.
[146] Ibid, para. 192.
[147] The Appellate Body did not expressly mention the general rule, but it implied that Article III(4) shall be interpreted in accordance with "the normal customary international law rules of international law", para. 115.
[148] Ibid, paras. 88-89.
[149] Ibid, paras. 97-98, 100-101, 114, 125. The Appellate Body also considered three other criteria; consumers' tastes and habits, end-uses and tariff classification, see paras. 119-124.

circumstances of the case, the Appellate Body found the Decree to be clearly aimed at protecting human health.[150]

As for determining whether the measure is "necessary" to protect human health, the Appellate Body emphasized the members' undisputed right to determine, either quantitatively or qualitatively, the level of protection that they find appropriate in any given situation. As the tribunal accepted France's attempt to eliminate the spread of asbestos-related health risks, it also implied that determination of the level of protection might also include a zero-risk.[151]

Concluding Remarks

In this case France had presented sufficient evidence of risk, and did therefore not have to invoke the precautionary principle as a reason for justifying the Decree under Article XX(b). The reasoning of the court however, is important because it allows the members to take a precautionary approach when determining the appropriate level of protection.[152]

On the other hand, the report also shows that the precautionary principle falls short as reference material in the interpretation of "protect", that is in terms of burden of proof; while the Appellate Body includes a requirement of a risk assessment, the precautionary principle presupposes that there is scientific uncertainty.[153]

4.2.2. Reports Related to SPS Agreement

4.2.2.1 1998 EC – Hormones Case

Facts and Rulings

In 1997 the United States asked for the establishment of a panel to determine whether certain measures under an EC directive that banned imports of meat and meat products derived from cattle treated with certain natural hormones for growth promotion purposes were contrary to, inter alia, Articles 3(1), 3(3), and 5(1) of the SPS Agreement. The panel concluded that the measures were inconsistent with all three provisions. EC appealed to the Appellate Body, which upheld that the measures were contrary to Articles 3(3) and 5(1), but reversed the panel's conclusion with regards to Article 3(1).[154]

The Precautionary Principle in Articles 3(3) and 5(7)

This was the first case where the WTO judiciary was asked to clarify whether the precautionary principle was an established customary rule of international law. The EC claimed that the panel had erred in properly taking account of the principle in interpreting the SPS provisions, since the rule had become "a general customary rule of international law or at least a general principle of law".[155]

[150] Ibid, paras. 115, 157, 167, 161-162.
[151] Ibid, para. 168.
[152] Cheyne, supra note 135, p. 163.
[153] Priess and Pitschasy, supra note 85, p. 539.
[154] EC-Hormones, supra note 80, paras. 2,6, 253.
[155] Ibid, para. 16.

The Appellate Body decided not to take a position as to the legal status of the precautionary principle, as it considered it to be "unnecessary, and probably imprudent" and "still awaiting authoritative formulation". Nevertheless, the court upheld the panel's statement by suggesting that although the precautionary principle was reflected in both Articles 3(3) and 5(7) as well as in paragraph 6 in the SPS preamble, it was neither written nor given a specific meaning in the SPS Agreement. As a result, it could therefore not relieve the obligation of the WTO judiciary to interpret the SPS provisions in accordance with the customary rules of treaty interpretation as provided in Article 31. The Appellate Body emphasized that the terms in the SPS Agreement must be given the ordinary meaning in accordance with treaty context and in the light of its object and purpose, in which the precautionary principle could not override.[156]

Articles 2(2), 3(3) and 5(1)

As the precautionary principle alone could not influence the contextual interpretation of the SPS Agreement, the Appellate Body dismissed the argument that Article 3(3) is not to be read in connection with Article 5(1). Even though a member, in accordance with Article 3(3), may choose a higher level of SPS protection than of international standard, recommendations and guidelines, it is not "an absolute or unqualified right". The level of protection must be based not only on "sufficient scientific evidence" (Article 2(2)), but also a "risk assessment" (Article 5(1)). Therefore, the EC was required to present sufficient scientific proof that the meat from hormone-treated farm animal included a risk to cancer.[157]

With respect to the meaning of "risk assessment", the Appellate Body disagreed with the Panel by stating that it entails a scientific examination and not a political decision. The term "risk management" is never used in the SPS Agreement, and the rule of treaty interpretation obligates the interpreter to read "the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used."[158]

Moreover, the Appellate Body agreed with the panel's contextual reading of Articles 5(1) and 2(2). Since both the *assessment of risk* to human, animal or plant health and *the measure* itself shall be based on "sufficient scientific evidence", there must be a "rational relationship" between the two. Put in other words, the results of the risk assessment must "reasonably support the SPS measure" in question.[159]

Despite the seemingly low threshold of "sufficient" scientific evidence, the Appellate Body found that although EC had shown that certain hormones have carcinogenic potential, they had not evaluated the hormones used specifically for growth promotion purposes.[160] In this sense, EC had failed in carrying out a proper risk assessment based on "sufficient scientific evidence" within the meaning of Article 5(1) and (2). Accordingly, the SPS measure taken by EC was contrary to Article 5(1) and also inconsistent with Article 3(3).[161]

[156] Ibid, para. 123-125.
[157] Ibid, paras. 173-174.
[158] Ibid, para. 181.
[159] Ibid, paras. 180, 193.
[160] Ibid, paras. 199-200.
[161] Ibid, para. 209.

Concluding Remarks

Although the Appellate Body recognized the obligation to interpret the SPS Agreement in accordance with the general rule of treaty interpretation, it did not take into account Article 31(3)(c). The disputing parties did not invoke the provision, furthermore, the question as to whether the precautionary principle is an established rule of customary international law was not addressed.

It may be argued that the Appellate Body implicitly understood the precautionary principle as a non-binding norm, since it read "risk assessment" as a scientific evaluation and not a political decision. Nonetheless, the Appellate Body should have taken a position as to whether the principle has become a customary rule of international law binding on the parties involved in the dispute. Due to the fact that precautionary principle finds reflection in Articles 3(3), 5(7) and the SPS preamble, which may constitute an opinio juris of the members, the Appellate Body ought to have considered this issue since it would give clarity to the SPS provisions.[162]

If the Appellate Body had come to the conclusion that the precautionary principle is an established international customary rule, the SPS Agreement would prevail regardless, due to its legal status as lex specialis, however the point is that the tribunal overlooked this argument.[163]

Moreover, as the EC had not invoked Article 5(7), and the Appellate Body refrained from determining whether the SPS measures were justified by the exemption rule. However, considering the tribunal's contextual interpretation of the SPS provisions, a member may invoke Article 5(7) only if the measure in question is based on a risk assessment, even when the measure is based on "available pertinent information".[164] It can therefore be argued that the Appellate Body sees the precautionary principle as an approach, and not as a rule.

4.2.2.2. 2006 EC – Biotech Case

Facts and Rulings

In the EC-Biotech panel report, the United States, Canada and Argentina requested the establishment of a panel to determine the legitimacy of certain safeguard measures adopted by a number of EC members. The measures prohibited or restricted imports or marketing of agricultural biotech products in order prevent the release of genetically modified organisms (GMOs) into the environment. The complainant claimed that the measures were inconsistent with, inter alia, SPS Agreement Articles 5(1) and 5(7). The panel concluded that the measure was not based on a risk assessment, and hence contrary to Article 5(1). Additionally, the EC had also acted inconsistently with Article 5(7).[165]

[162] Lagomarsino, supra note 21, p. 565.
[163] Pauwelyn, supra note 22, p. 482. Also see pp. 133-143, where the author nuances the relationship between treaties and custom.
[164] Priess and Pitschasy, supra note 85, p. 546.
[165] EC-Biotech, supra note 57, paras. 1.3.-2.1., 3.2.-3.6. The complainants also challenged the legitimacy of the alleged general EC moratorium on approvals of biotech products and certain EC Directives containing measures on the approval of specific biotech products, EC-Biotech.

The Legal Status of the Precautionary Principle

In this case the EC also invoked the precautionary principle as a "fully fledged and general principle of international law".[166] In this respect, the panel found it necessary to recall the position taken by the Appellate Body in the EC-Hormones case. Although the latter report was adopted in 1998, the panel noted that "the legal debate over whether the precautionary principle constitutes a recognized principle of general or customary international law is still ongoing."[167]

Similar to the Appellate Body in EC-Hormones, the panel considered it to be impudent to provide an answer to the question whether the precautionary principle has attained the status of international customary law, especially if it was unnecessary to do so. The panel thus decided to refrain from expressing a view on the matter.[168]

The Relevance of Non-WTO Rules

One of the most significant aspects of this report is the rather extensive review of the relationship between WTO law and other rules of international law. In this regard, the EC argued that, pursuant to VCLT Article 31(3)(c), the Panel is required to take into consideration the Convention on Biological Diversity and the Biosafety Protocol, of which both contain provisions reflecting the precautionary principle.[169]

The panel, however, adopted the narrow interpretation of "the parties" in the Tuna Dolphin II report[170]; that "the parties" in Article 31(3)(c) refer to the WTO members and not the parties to the dispute. Argentina and Canada had signed but not ratified the Biosafety Protocol, and the United States was a party to neither of the treaties, and they were therefore not applicable in the present case.[171]

The panel further noted that non-WTO rules which are not binding on the WTO members might be used as an *interpretative tool* in finding the "ordinary meaning" of the treaty terms, pursuant to Article 31(1). The court also underlined that it is not obliged to consider other rules of international unless they are deemed to be relevant in the interpretation process.[172] In the present case, however, the panel did not find it necessary or appropriate to rely on the provisions in the Biosafety Protocol and the Convention on Biological Diversity as referred to by the EC.[173]

Article 5(1) and 5(7)

The EC claimed that Article 5(7) does not require an SPS measure to be based on an assessment of risk. Read in connection with Article 5(1) which obligates the members to carry out a "risk assessment", Article 5(7) implies only that the SPS measure must be based on an "assessment" or "a more objective assessment". The panel, however, found that the meaning

[166] Ibid, para. 7.75. Due to the unclear meaning of the claim, the panel stated that it is prepared to consider whether the PP either a customary rule or a general principle of international law, para. 7.86.
[167] Ibid, paras. 7.86-7.88.
[168] Ibid, para. 7.89.
[169] Ibid, paras. 7.52-7.53.
[170] Tuna-Dolphin II, supra note 114, para. 4.27.
[171] EC-Biotech, supra note 57, paras. 7.65-7.75.
[172] EC-Biotech, supra note 57, paras. 7.92-7.93.
[173] Ibid, para. 7.95.

of "a more objective assessment (…) of risk" indeed refer to a risk assessment. Thus, for a measure to be justified under Article 5(7), the SPS measure must be based on a risk assessment as required under Article 5(1).[174]

Furthermore, the panel recalled the statement in Japan-Agricultural Product II, that Article 5(7) is not an exception rule to the general obligation under Article 2(2), stipulating that an SPS measure must be based on "sufficient scientific evidence", but a right for the members to adopt such measures on the basis of "available pertinent information". The panel also underlined that this right is a *qualified* one, in the sense that the four requirements in Article 5(7) are cumulative in nature.[175]

Accordingly, the panel found that the same line must be drawn between Article 5(7) and (1). In order to determine whether "scientific evidence is insufficient", a member must first examine whether sufficient scientific evidence in fact exists. That is to say that Article 5(7) contains an "implicit reference" to Article 5(1).[176]

The panel also referred to the Japan-Apples report, where the Appellate Body stated that "the application of Article 5.7 is triggered not by the existence of *scientific uncertainty*, but by the *insufficiency of scientific evidence*". The panel therefore rejected ECs argument that "scientific uncertainty" and "insufficiency of scientific evidence" are interchangeable terms.
As for the SPS measures at issue, the panel concluded that the EC had not carried out a "risk assessment" within the meaning of Article 5(1). The safeguard measures were therefore also contrary to Article 5(7).

Concluding Remarks

Due to the fact that the EC never invoked the provisions in the environmental treaties as applicable law before the panel, one may question why it did discuss the difference between non-WTO rules as applicable law and as an interpretative tool. In any case, according to the findings of the panel, the precautionary principle may be applied as assistance in finding the "ordinary meaning" of the treaty term. Nevertheless, it would be up to the court to consider the relevance of the principle as a reference material in any given case.

With respect to the interpretation of "risk assessment", the panel may have taken the same approach to the legal status of the precautionary principle as the Appellate Body in EC-Hormones, but the panel most likely should have expressed its opinion on this matter. If it had answered the question in the affirmative, the precautionary principle may have been considered as applicable law before the panel in the present case. Much like the case in EC-Hormones, the SPS provisions would most likely prevail as lex specialis. On the other hand, the panel could have been obliged to consider the precautionary principle as a reference material in the interpretation of the SPS provisions (pursuant to Article 31(3)(c)), which the Panel unfortunately did not take a stance on.

[174] Ibid, paras. 7.2930, 7.2988.
[175] Ibid, para. 7.2972. Also see Japan-Agricultural Products II, supra note, 106, para.80.
[176] EC-Biotech, ibid, para. 7.2994

PART 5: CONCLUSION

Whereas the mission of the WTO is to liberalize trade among its members by prohibiting barriers to trade, the precautionary principle is the notion that State should take protective actions. These may include trade restrictions when there is a risk of serious environmental harm. Consequently, WTO rules prohibiting trade barriers may be inconsistent with the precautionary principle. This apparent conflict is not limited to the relationship between the multilateral trade regime and international environmental law, and can be construed as one of several consequences of fragmentation of international law.

Subsequent to the Tuna-Dolphin reports published by the preceding GATT panels, the WTO Panels and the Appellate Body have taken a more consistent and internationally principled approach to treaty interpretation.[177] The US-Gasoline report, followed by later Panels and Appellate Body reports, confirmed that the WTO is just another branch of international law by recognizing that the WTO agreements must be interpreted in accordance with the customary principles of treaty interpretation enshrined in Article 31 of the VCLT. The issue is therefore not if, but how and in what circumstances the WTO judiciary considers non-WTO rules, in this context the precautionary principle as a customary rule of international law.

It is well established in WTO jurisprudence that the members have an autonomous right to determine a level of protection of health or environment whichever they consider appropriate, even if the chosen level includes a "zero risk". Considering that exercising discretion is at the heart of the precautionary principle, the WTO judiciary has shown a propensity to allow the members to take precautionary actions.[178]

On the other hand, the panels and the Appellate Body have also made it clear that this right is not absolute, neither in the context of GATT nor the SPS Agreement. Before the members can invoke either GATT Article XX(b) or SPS Agreement Article 5(7), they shall first examine whether sufficient scientific proof of risk exist, and that they also must show that there is a relationship between the risk assessment and the measure in question. Hence the WTO adjudicators restrict *how* the level of protection may be achieved. The precautionary principle is simply not applicable because it is only relevant when there is "sufficient scientific uncertainty" or a "reason to believe" that a State action may damage health or the environment.[179]

Shrimp-Turtle stands out as the Appellate Body did a broader interpretation of "exhaustible natural resources" in Article XX(g). Allowing the WTO preamble and international environmental rules, including non-binding principles, shaped the contextual meaning of the term. The report may also have shown the willingness of considering the precautionary principle in interpreting the chapeau of Article XX although the external sources used in the present case were to its disadvantage. The report has, however, been criticized for not respecting the obligation to interpret GATT in accordance with Article 31(1).[180]

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[177] Bernie, Boyle and Redgwell, p. 765.
[178] Ruessmann, supra note 79, p. 948; Cheyne, supra note 135, p. 171.
[179] Priess and Pitschasy, supra note 85, p. 552.
[180] See e.g. Joe McMahon and Margaret A. Young: "The WTO's Use of Relevant Rules of International Law; An Analysis of the Biotech Case" (International and Comparative Law Quarterly, Vol.56, 2007, 907-930), pp. 928-300.

Generally, it can be argued that the provisions under GATT are in point of fact not designed for allowing recourse of the precautionary principle because the treaty was written in 1947. Thus it predates the need to combat environmental damage as a matter of international concern. The SPS Agreement is a more recent agreement, and WTO judiciary has recognized that the precautionary principle is reflected in Articles 3(3) and 5(7). It has also noted, however, that the relevant SPS provisions relate to a "risk assessment", rather than "risk management", and hence restricted the members' access to invoke the precautionary principle as a recourse to take protective measures.

EC-Biotech may have shown potential in applying environmental treaties (MEAs) as relevant rules of international law pursuant to Article 31(3)(c). Seemingly the Panel made an unconstructive contribution by reiterating the GATT panels' comparatively narrow interpretation of "the parties", and as such refused to consider inferably relevant MEAs. In this sense, the Panel has been widely criticized by scholars for taking an "unnecessary parochial approach" or being "overly restrictive in its use of non-WTO sources."[181]

Of what is said above, the WTO judiciary has arguably taken a precautionary approach rather than referring to the precautionary principle as a legally binding rule, which may explain why the Panels and the Appellate Body have been reluctant to apply Article 31(3)(c). On the other hand, it may be argued that the precautionary principle as a relevant rule is gradually emerging in WTO jurisprudence; an issue where the lack of case of law on the matter confounds a definitive stance.[182]

[181] See e.g. Lagomarsino, supra note 21, p. 564; McMahon and Young, supra note 180, p. 928.
[182] Cheyne, supra note 135, p. 171

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