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**THE USE AND ABUSE OF OTHER “RELEVANT  
RULES OF INTERNATIONAL LAW” IN TREATY  
INTERPRETATION: INSIGHTS FROM WTO  
TRADE/ENVIRONMENT LITIGATION**

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# THE USE AND ABUSE OF OTHER “RELEVANT RULES OF INTERNATIONAL LAW” IN TREATY INTERPRETATION: INSIGHTS FROM WTO TRADE/ENVIRONMENT LITIGATION

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## Abstract

Among the central challenges of international legal order today is that which is typically referred to as "fragmentation"-the co-existence of multiple regimes and fora, whose legal subjects and objects partly converge and often diverge, where fora and norms can overlap and possibly collide in a single dispute. This paper is concerned with one particular dimension of "fragmentation" of norms - its challenges for treaty interpretation. What role should norms drawn from other international instruments and regimes have in the interpretation of a treaty where the dispute in question implicates interests and constituencies represented in both regimes? One of the most contentious and complex expressions of "fragmentation" has been the trade and environment debate, including the relationship of World Trade Organization law (WTO law) to international environmental law. The paper explores the diverse ways in which the WTO Appellate Body has used international law for interpretation of WTO rules in trade/environment disputes and the broader implications of its practice-for the legitimacy of the WTO, the normative effects of international environmental law, and the role of interpretation in the way in which the challenge of fragmentation is conceptualized and addressed. The Vienna Convention on the Law of Treaties (VCLT) requires that a treaty interpreter consider “any relevant rules of international law applicable in the relations between the parties.”(Article 31(3)(c).) However, the WTO Appellate Body developed its practice of using non-WTO international legal norms in trade/environment disputes without explicitly invoking 31(3)(c). As the paper will attempt to show, broader systemic coherence and legitimacy considerations informed the AB’s approach. The September 2006 ruling by a WTO panel of first instance in the *EC-Biotech* dispute deviates significantly from the AB’s approach, seeking to confine the consideration of non-WTO international legal norms to those that bind all Members of the WTO. In the case of a multilateral agreement such as the WTO with a very large membership (unlikely to overlap completely with other multilateral treaty regimes) the effect of the panel’s approach would be to reduce considerably the universe of norms that could be used as context to interpret a treaty. Examining the treatment of Vienna Convention 31(3)(c) by the International Court of Justice in the *Oil Platforms* case and in the Report of the Study Group of the International Law Commission (ILC) on Fragmentation, the paper argues that the broader approach of the WTO Appellate Body is better suited both to the demands of contemporary international legal order in general and to adjudicative legitimacy in the WTO.

# THE USE AND ABUSE OF OTHER “RELEVANT RULES OF INTERNATIONAL LAW” IN TREATY INTERPRETATION: INSIGHTS FROM WTO TRADE/ENVIRONMENT LITIGATION\*

Robert Howse<sup>†</sup>

## I. Introduction

Among the central challenges of international legal order today is that which is typically referred to as "fragmentation"-the co-existence of multiple regimes and fora, whose legal subjects and objects partly converge and often diverge, where fora and norms can overlap and possibly collide in a single dispute.<sup>1</sup> While there are some rules to deal with conflict of treaties and some principles of hierarchy (the status of *ius cogens* being the most obvious example) the positive features of international law as a system of rules are very under-determinative in addressing "fragmentation." In fact, "fragmentation" may reflect a tendency of juridification of transnational social relations and interests of all kinds, extending far beyond the kind of core state interests reflected in traditional international law and especially in the UN Charter. This paper is concerned with one particular dimension of "fragmentation" of norms-its challenges for interpretation. What kind of role should norms drawn from other international instruments and regimes have in the interpretation of a treaty where the dispute in question implicates interests

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\* Forthcoming in Merit Janow and Alan Yanovich, editors, *The WTO at Ten: Proceedings of the Columbia University Conference*, Cambridge University Press, 2007.

<sup>†</sup> Huge thanks to Ruti Teitel for inspiring conversation on interpretation and international law at the time when I was working out the ideas for this paper, many of which I first flagged in my oral remarks at the panel at the WTO at 10 Conference at Columbia. My thanks also to Bruno Simma, Martti Koskenniemi, Don Regan, Benedict Kingsbury and Joseph Weiler for advice, exchanges and discussions at various times on some of these issues and to Kingsbury for enormously useful comments on an earlier draft. My collaborations with Petros Mavroidis and Alice Palmer (the later on the *EC-Biotech* dispute) also have helped to develop my thinking. I presented earlier versions of this paper at the Yale Seminar on Law and Globalization and at a workshop at Fordham Law School, and am grateful to participants at those events for very useful comments, especially Dan Esty, Martin Flaherty, Roger Goebel, Oona Hathaway and Cathy Powell. As usual my research assistant, Antonia Eliason, provided indispensable help. Of course, I am solely responsible for the content of the paper, and especially its errors.

<sup>1</sup> See International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (2006), UN Doc. A/CN.4/1682 (13 April, 2006).

and constituencies represented in both regimes? One of the most contentious and complex expressions of "fragmentation" has been the trade and environment debate, including the relationship of WTO law to international environmental law. There is a considerable literature that looks at this problem from the perspective of the application of non-WTO rules as autonomous sources of law in WTO dispute settlement and the possible conflict of norms.<sup>2</sup> This is an issue that has often been confused with the use of non-WTO international law to help solve various challenges of interpreting WTO rules in the trade/environment context.<sup>3</sup> This paper is concerned with the latter, and is intended to explore the diverse ways in which the Appellate Body has used international law for interpretation of WTO rules in trade/environment disputes and the broader systemic implications of its practice—for the legitimacy of the WTO, the normative effects of international environmental law, and the role of interpretation in the way in which the challenge of fragmentation is conceptualized and addressed.

The positive law governing treaty interpretation, as codified in the Vienna Convention on the Law of Treaties (VCLT) Article 31(3), provides in a number of ways for other international legal norms to be taken into account in the interpretation of a treaty as part of its “context.” Such norms can include: “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.” In the context of “fragmentation” it is 31(3)(c) that is of most interest since (a) and (b)

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<sup>2</sup> See e.g., Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Intl. L. 535 (2001); Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 Harv. Intl. L. J. 333 (1999).

<sup>3</sup> Lindros and Mehling, for instance, in a recent article survey instances where non-WTO law has been used by panels and the Appellate Body, but without distinguishing between interpretative and other uses of such norms. (A Lindros and M. Mehling, “Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO, 16 EJIL (2006), 857.) The importance of distinguishing between interpretation and application of non-WTO norms is discussed in Mavroidis, Howse and Bermann, *WTO Law: Text, Cases, and Materials*, forthcoming, West Publishing, chapter on “Dispute Settlement: the Forum and Sources of Law.”

refer to norms internal to the regime of which the treaty being interpreted is part whereas (c) is clearly much broader.

What is striking is that the WTO Appellate Body developed its practice of using non-WTO international legal norms in treaty interpretation in trade/environment disputes without invoking Article 31(3)(c) of the VCLT. This paper will attempt to show that the AB's use of other rules and principles of international law in these cases depended on broader systemic and methodological considerations in treaty interpretation, including considerations related to legitimacy, of which 31(3)(c) is but a quite partial and limited reflection. More recently, the ruling of the panel in the WTO *EC-Biotech*<sup>4</sup> dispute has placed a new focus on 31(3)(c) notably the panel used 31(3)(c) to limit or constrain the kind of broad-based use of non-WTO law exhibited by the AB. In particular, the panel interpreted "applicable in relations between the parties" in 31(3)(c) to mean that 31(3)(c) has the effect on *restricting* a treaty interpreter from using as "context" of the treaty any international legal norm that is not binding on all the parties of the treaty being interpreted. In the case of a multilateral agreement such as the WTO agreements with a very large membership the effect of the panel's approach would be to reduce considerably the universe of legal norms that could be used as context to interpret a treaty. The final section of the paper will consider both the broad approach of the Appellate Body and the narrow approach of the EC-Biotech panel in light of the extensive treatment of 31(3)(c) in recent jurisprudence of the International Court of Justice (the *Oil Platforms* case) and also in the Report of the Study Group of the International Law Commission (ILC), "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law."

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<sup>4</sup> Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Biotech)*, WT/DS291/R, WT/DS292/R, WT/DS/293/R, adopted 29 September 2006.

## II. International Law in the Appellate Body Trade/Environment Jurisprudence

### A. Hormones

In the notorious *Hormones* case<sup>5</sup>, the United States and Canada challenged an EC ban on meat from animals injected with synthetic growth hormones. The EC ban was an attempt to harmonize Member state responses to public fears concerning the human health effects of consuming such meat. The United States and Canada challenged the ban on the grounds that it violated provisions of the WTO SPS (Sanitary and Phytosanitary Measures) Agreement requiring that food safety regulations of this kind be scientifically justified, including being based on a risk assessment. In the absence of a risk assessment that clearly supported the existence of the health risks on which the EC ban was premised, the EC invoked the precautionary principle, arguing that this principle was a general principle of international law or a customary rule of international law and that it allowed the EC to regulate in the absence of the degree of scientific certainty that would otherwise be required under the science-related obligations of the SPS Agreement. The panel found that the precautionary principle was only relevant to the provision of the SPS Agreement that allowed provisional measures on the basis of available information (i.e. without risk assessment) under certain conditions (SPS 5.7).<sup>6</sup> Oddly, the EC did not even plead this provision in *Hormones* defense. Be that as it may the panel seems to have viewed 5.7 as a *lex specialis* of the precautionary principle applicable to the SPS

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<sup>5</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

<sup>6</sup> These conditions are: relevant scientific evidence is “insufficient”; that the provisional regulation be on the basis of “available pertinent information”; that the regulating Member “seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.” This provision was subsequent to the EC *Hormones* case the subject of interpretation by the AB in its *Australia-Salmon* and *Japan-Apples* rulings. This will be discussed in detail below in the analysis of the *EC-Biotech* panel report.

Agreement. This *lex specialis* made the general precautionary principle inapplicable to the interpretation of the SPS Agreement as a whole. The panel also found that the precautionary principle might actually *conflict* with some of the requirements in provisions of SPS other than 5.7, such as those concerning the requirement of risk assessment. In the case of a conflict, the ordinary meaning of the treaty text would prevail over the precautionary principle.

The EC challenged these findings of the panel, among others, in its appeal to the Appellate Body. The panel had responded to the EC's invocation of the Precautionary Principle by interpreting the treaty text without reference to the Precautionary Principle and then asking whether those findings would in some way be overridden if the Precautionary Principle applied. In other words, the panel acted as if the Precautionary Principle was not part and parcel of the various sources of treaty interpretation to be applied in coming to the best reading of the text of the provisions in question but rather was being pleaded by the EC as a trump card that would suspend the obligations in the treaty as interpreted in accordance with the normal rules on treaty interpretation. In its explanation to the AB of the relevance of the Precautionary Principle, however, the EC argued that the Principle operated so as to *inform* the proper interpretation of the science-related provisions of the treaty not to override them. This is how the AB summarized the EC argument:

The basic submission of the European Communities is that the precautionary principle is, or has become, "a general customary rule of international law" or at least "a general principle of law". Referring more specifically to Articles 5.1 and 5.2 of the *SPS Agreement*, applying the precautionary principle means, in the view of the European Communities, that it is not necessary for *all* scientists around the world to agree on the "possibility and magnitude" of the risk, nor for *all* or most of the WTO Members to perceive and evaluate the risk in the same way. It is also stressed that Articles 5.1 and 5.2 do not prescribe a particular type of risk assessment and do not prevent Members from being cautious in their risk assessment exercise.<sup>7</sup>

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<sup>7</sup> *EC-Hormones*, para. 121.



It is thus fairly clear that the EC was arguing that the text of the SPS provisions in question was sufficiently open-ended that it could sustain an interpretation in light of the Precautionary Principle and *not* that the text properly interpreted was to be overridden by the Precautionary Principle.

In its Report, the AB first considered whether, in fact, the Precautionary Principle had the status of a general principle of international law or a rule of customary international law. It held:

The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. (para. 123; emphasis in original)

Several observations are in order here. First of all, the AB appears to have merged custom and general principles of law as sources in its formulation “a general principle of customary international *environmental* law.” This may actually reflect the difficulty in modern international law in distinguishing the normativity of general principles from that of custom, common or shared internal practice (the source of general principles) from common or shared external practice (the source of custom). Teitel has suggested international law generally may be evolving as a dynamic relationship between national and the transnational, internal and external legal and political behavior.<sup>8</sup>

Secondly, it is not clear what the AB means in suggesting a difference between a general principle of international law or a rule of customary international law as such in contrast to one of international *environmental* law. Perhaps the AB had in mind the possibility that, formulated at its highest level of abstraction, the principle of precaution (that of acting without adequate information in order to avoid irreparable harm) could be applied for example to justify pre-

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<sup>8</sup> Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 70 (2003).

emptive use of force, i.e. in a context entirely apart from its origins. However, the food safety interests in *Hormones* fall within the understanding of environmental interests in international law and policy.<sup>9</sup>

Third, the reason that the AB considered it “unnecessary” to determine the legal status of the Precautionary Principle was presumably because even if it were a general principle or a customary rule (or some hybrid) the Precautionary Principle would not override the text of the SPS treaty as interpreted in accordance with the customary rules of interpretation in public international law. The AB would, however, go on to consider the relevance of the Precautionary Principle in the *interpretation* of the SPS provisions in question; it is important to ask why the AB did not consider it necessary for these purposes to ascertain the status of the Precautionary Principle in international law.

As far as finding that the Precautionary Principle, whatever its status in international law, would not override the text of the SPS Agreement properly interpreted, this simply reflects the non-hierarchical relationship between customary law and general principles on the one hand and, on the other, the possibility for parties to a treaty to modify customary law obligations as among themselves.<sup>10</sup> However, a more adequate analysis of the matter by the AB would, arguably, have involved examining whether, in fact, the provisions in question reflected the intention of the parties to modify by treaty customary norms. If so, and to the extent so, the treaty text as

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<sup>9</sup> See UNEP, Environmental Impact Assessment Manual; Draft Declaration on Principles for Human Rights and the Environment (1994).

<sup>10</sup> French, in commenting on this aspect of EC-Hormones, suggests that the distinction between norms overriding a treaty and playing a role in its interpretation “is, arguably, an easier distinction to make conceptually than in practice” and that the AB has created “uncertainty” by making this distinction. D. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules,” 55 ICLQ (2006) 281, 313. However, to me it seems fairly clear, in this context, what the AB has in mind: namely, that the text of the treaty leaves crucial matters to be decided in individual cases open or undetermined—for example, the closeness of fit required between a scientific risk assessment and a particular trade-restrictive domestic regulation, or the degree of certainty or precision with which a risk must be identified, in order for the risk assessment to be a basis for the regulation in question. In these respects what the treaty means on its face requires interpretation, and the aim of the interpretation is to give the text meaning in context, not to override it.

interpreted in accordance with the normal rules of interpretation would prevail. But if not, then customary norms might indeed be a legally binding constraint on the range of permissible interpretations of the treaty provisions in question.<sup>11</sup> It is thus arguable that the AB was not entirely correct that it could avoid determining whether the Precautionary Principle had the status of customary international law or a general principle of international law.

Be that as it may, what is most remarkable is the considerable role that the AB assigned to the Precautionary Principle in the ordinary interpretation of the SPS provisions in question. The AB agreed with the EC that 5.7 of SPS did not “exhaust the relevance of the Precautionary Principle” to the interpretation of the SPS Agreement. The Principle was also “reflected” according to the AB in the sixth paragraph of the Preamble of SPS and 3.3, which establish a WTO Member’s right to establish its own level of protection against risk, which may be higher than that implied or set out in international standards. By stating that these provisions “reflected” but did not exhaust the Precautionary Principle, the AB appeared to be suggesting that SPS as a whole should be interpreted so as permit precautionary strategies of regulation where these are implied or required by the level of protection a Member has set for itself in accord with the sovereign right established in paragraph 6 of the Preamble and in 3.3.

But the AB then went on to state more broadly:

a panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned. (para. 124)

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<sup>11</sup> Later a panel, in the adopted ruling in *Korea – Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R (2000), at para. 7.96, stated that ‘[c]ustomary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it.’

Here the AB seems to be suggesting that the Precautionary Principle is relevant generally to the interpretation of provisions of the SPS Agreement concerned with science and scientific evidence. The question is how the AB could give such a normative interpretative effect—a very broad one (the AB said a panel “should” and not simply “may” bear in mind precaution)—to the Precautionary Principle while leaving its legal status in international law undetermined. This question is a window onto the complex nature of international legal normativity. Tribunals whether domestic or international, are required to give meaning to a wide range of quite general legal norms; the meaning of the reasonable person, for example in domestic private law, or in WTO law the meaning of “like products” in the interpretation of non-discrimination norms. From where do judges draw the benchmarks or standards or baselines for the interpretation and application of such general norms? One answer, suggested by Joel Trachtman, is that a decision to formulate a norm in general terms is really a decision to delegate a considerable measure of decisionmaking as discretion to the judge.<sup>12</sup> But this is inadequate as one can imagine that, despite “delegation,” there are exercises of discretion that would be obviously viewed as utterly illegitimate and incompatible with the duty of the WTO adjudicator “to make an objective assessment of the matter before it,” as required by DSU Article 11.

The struggle or debate over from where to draw the benchmarks etc. in order to “make an objective assessment of the matter” in trade/environment disputes is of fundamental importance. One kind of answer is to privilege as a source of benchmarks or standards the internal ethos or culture of the “epistemic community” surrounding the treaty—here what I have called in other work the WTO insider network. Interpretation of this kind, which was largely pervasive in the GATT era, systematically privileged free trade over protection of the environment to the extent

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<sup>12</sup> Joel Trachtman, *The Domain of WTO Dispute Resolution*, supra note 2; see also Joel Trachtman, *Transcending “Trade and . . .”—an Institutional Perspective*, 96 Am. J. Intl. L. 77 (2002).

that there was any apparent tension or conflict.<sup>13</sup> In emphasizing the right of a Member to set its own level of appropriate protection as a fundamental principle of SPS the AB was acknowledging that the drafters of the Agreement did not put the values of trade liberalization above those of human health, but rather the reverse. Such a normative hierarchy has important implications for the sources of those benchmarks, standards, baselines etc. necessary to give life to general or open-textured treaty norms.

The AB referred to precaution as reflecting the widely shared practices and perspectives of “responsible, representative governments.” Since the WTO Membership consists in both states that have such governments and many that do not, why does the AB single out here “responsible, representative governments”? Because, I would hazard, it is ultimately concerned with the *perspectives of citizens*, which are taken into account by “responsible, representative governments” but not necessarily by other governments. The balance and hierarchy of values that informs adjudication of an Agreement such as SPS cannot be seen solely in light of a bargain between “states.” The protection that individuals as citizens seek from risks to their health is a fundamental consideration in the legitimacy of the interpretative choices they Appellate Body must make in applying the SPS Agreement. Thus state consent does not as such matter nor even the practices of all states in grounding the relevance of the Precautionary Principle (as would be crucial in determining the existence of custom); what matters is the practices of those governments who can be presumed to be representing the values and interests of their *people*.

This underlying logic of the Appellate Body—also reflected in its later procedural decision that it and the panels of first instance have discretion to accept *amicus curiae* briefs from

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<sup>13</sup> Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* (J.H.H. Weiler ed., 2000).

non-governmental actors—suggests an important dimension of the normativity of international law. International law, even where on a positivist account it may not be “law” at all, due to the inadequacy of *opinio juris*/state practice/state consent, or where it is at most “soft law,” can have important normative effect as the expression of transnational public opinion or public values. This communicative or expressive function of international legal material, arbitrated between international legal regimes (here environment/health and WTO) is a concrete expression of what Habermas has recently called “global domestic politics.”<sup>14</sup>

## B. Shrimp/Turtle

In *Shrimp/Turtle*<sup>15</sup>, several Asian WTO Members challenged a US legislative scheme that banned imports of shrimp from states that did not adopt shrimp-fishing technologies friendly to turtles (Turtle Excluding Devices), which were legally required in the United States. The United States did not make a defense to the claim of the complainants that the ban constituted a *prima facie* violation of Article XI of the GATT, which bans restriction and prohibitions on imports and exports, with some narrow specific exceptions. Instead, the dispute centered on whether the US could justify the ban and its application to the complainants based on the general exceptions in

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<sup>14</sup> Juergen Habermas, “Does the Constitutionalization of International Law Still Have a Hope?” in *The Divided West*. Consider Teitel, *Humanity’s Law*, 35 Cornell Int’l Law J. 355, 365: “In the global context of fragmented power, other agents[than states], namely private parties, non-governmental actors and transnational institutions, play a growing role in the production of international law.[footnote omitted]. These changes in international lawmaking processes go to the core of the existing structure and mechanisms of the international regime [footnote omitted] and affect aspects of both political and legal sovereignty. Transformation in the sites and processes of international lawmaking reflect a shift in the legitimacy and authority of international law, with ambivalent ramifications for the new international humanitarian regime’s transformation. Diversification in the sites of international norm making parallels the general economic and political expansion outward that characterizes industrialized states. As such, these changes ultimately redound to the legitimization of globalization processes. Indeed, what emerges is an apparently globalized jurisprudence.”

<sup>15</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.

Article XX of the GATT, XX(b) (the protection of animal life and health in this case) or XX(g) (the conservation of exhaustible natural resources).

The panel of first instance attempted a reconceptualization of the approach of the GATT *Tuna/Dolphin* panels, which was that Article XX exceptions simply cannot be used to justify trade action concerned with other WTO Members' environmental policies and practices except as they have effects on the environment of the *regulating* country through importation of the *product* being restricted. The panel in *Shrimp/Turtle*, perhaps sensitive to the critique that the *Tuna/Dolphin* rulings had weak or non-existent textual foundations, achieved the same result through reliance on the language in the chapeau of Article XX, which conditions the Article XX exception on the measure not being applied to so as to constitute arbitrary or unjustifiable discrimination between countries where similar conditions prevail. The panel concluded that trade measures directed at other Members' environmental policies were inconsistent with the principle of non-discrimination that was foundational to the multilateral trading order. Finding various errors of law in the panel's approach to Article XX the Appellate Body reversed a number of its findings. The AB then completed the analysis and found that the US legislative scheme could be justified under Article XX(g) as "in relation" to the conservation of exhaustible natural resources but that several features of the application of the statute to the complainants by US authorities violated the requirements of the chapeau, entailing as they did elements of "unjustifiable" and/or "arbitrary" discrimination.

In *Shrimp/Turtle* the AB made use of international law for a number of purposes, without, however, invoking Vienna Convention Article 31 (3)c explicitly.

First of all, the Appellate Body used international law to answer what it described as the "threshold question" of whether sea turtles, if endangered with extinction, are to be considered

an “exhaustible natural resource.” The complainants had argued, referring to the drafting history of Article XX that the framers of the 1947 GATT had understood “exhaustible natural resources” exclusively to mean non-living resources (such as fossil fuels) and not to include species individual members of which were capable of biological reproduction.

The AB first used international law to reject the original intent approach to the meaning of “exhaustible natural resources.” Citing the ICJ advisory opinion in the *Namibia* case, the AB considered that it was a rule or canon of treaty interpretation in international law that terms of a treaty may be inherently evolutionary, requiring interpretation in light of changes in the law. The AB then found that the expression “exhaustible natural resources” was such a term, based upon the explicit recognition of the objective sustainable development in the Preamble of the WTO Agreement (para. 131, AB Report). As the AB noted, the WTO Agreement is a framework or umbrella agreement that informs the interpretation of both the GATT and the other treaties in the WTO system.

The reference to “sustainable development” thus allowed the AB to define the meaning of “exhaustible natural resources” in XX(g) of the GATT by reference to contemporary international environmental law. The AB noted: “It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources” (para. 130).

The AB in referring to these various conventions and declarations did not invoke Article 31(3)(c) of the Vienna Convention. In citing the ICJ *Namibia* advisory opinion, however, the AB quoted the following passage: “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>16</sup> This principle of interpretation, which regards the entire universe of current international legal

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<sup>16</sup> *U.S.-Shrimp*, fn. 109.



norms as applicable to the interpretation of treaties, seems broader than 31(3)(c), thus suggesting that 31(3)(c) is really simply an explicit, specific illustration of the broader principle.

Unlike the case with its discussion of the Precautionary Principle as an interpretative aid in *Hormones*, the AB was explicitly attentive to the issue of state consent with respect to the various international environmental instruments it invoked to establish that natural resources include living resources. These included: The United Nations Convention on the Law of the Sea (UNCLOS); the Rio Biodiversity Convention; the Resolution on Assistance to Developing Countries adopted in connection with the Convention on the Preservation of Migratory Species of Wild Animals; and Agenda 21 of the United Nations Conference on Environment and Development.<sup>17</sup> In the case of most of these instruments, the AB stated in the footnote citation the extent to which the parties to the dispute (not however the Membership of the WTO as a whole) adhered to each.

With respect to UNCLOS, it noted, for instance:

India, Malaysia and Pakistan have ratified the UNCLOS. Thailand has signed, but not ratified the Convention, and the United States has not signed the Convention. In the oral hearing, the United States stated: "... we have not ratified this Convention although, with respect to fisheries law, for the most part we do believe that UNCLOS reflects international customary law."<sup>18</sup>

From this, it is clear that the AB implicitly sees some degree of consent among the parties to the dispute as important in giving weight to an international instrument in interpretation of WTO law but this degree of consent can fall short of all the parties to the dispute being bound formally by the instrument in question. It turns out that except for Thailand and the United States, all of the other parties to the dispute (Malaysia, India, and Pakistan) were formally bound—i.e. had signed and ratified at least **one** of the instruments cited by the AB. In the case

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<sup>17</sup> Id. at para. 130.

<sup>18</sup> Fn. 110 of AB Report

of the United States, it considered it was bound by the relevant norms in one of the instruments (UNCLOS) as a matter of customary law. In the case of Thailand, it had signed but not ratified two of the instruments.

The AB's point seems to be here to show that among the disputants there was broad acceptance among them of the norm in question, overlapping between the various instruments to which there were differing degrees of formal state consent among different disputants. What was at stake was not determining whether a rule was applicable between the parties in the sense of "binding" in positive law, but whether the norm, as among these parties to this dispute, could be applied as a legitimate *community* norm or standard. Take a counterfactual: suppose that the developed country defendant, the United States, was a party to every instrument the AB cited, but that all of the developing country complainants had not even participated in its negotiation or given later approval of some sort to it. In such an instance, it would be very troubling if the AB were to give weight to the norm in question as a community norm in the dispute.

One view of what the AB was doing in citing international environmental instruments is that it was simply using them as it might use the dictionary in some other case to properly define the "ordinary meaning" of the words in a treaty provision. It wasn't giving any normative effect to the instruments in question, but simply using them as a kind of glossary, recognizing that "exhaustible natural resources" has a specialized meaning in environmental policy and science. In that case, the relevant provision would be 31.4 of the VCLT, which provides: "A special meaning shall be given to a term if it is established that the parties so intended." If one wishes to understand in positivistic terms the way in which the AB used international environmental instruments to decide the meaning of "exhaustible natural resources," then 31.4 is probably the best recourse: the AB could be viewed as invoking the reference to "sustainable development" in

the preamble of the WTO Agreement precisely to show that the parties intended that a special meaning—one consonant with the evolving law of sustainable development—be given to terms related to the protection of the environment.

But the AB did not itself invoke 31.4 in explaining its methodology. And this is, I believe, because it did not consider what it was doing simply in positivistic terms, i.e. interpreting the “ordinary meaning” of a text using a set of fixed rules for interpretation and the *acquis* of a particular regime, the multilateral trade regime. The AB gives us a clue in this regard by its statement in passing that two previous adopted GATT panels had found fish to be an “exhaustible natural resource” within the meaning of XX(g) (para. 131). The AB further referred in a footnote to its view that in fact the negotiating history did not support the conclusion that the framers had excluded living species from the meaning of exhaustible natural resources (fn. 114).

In other words, the AB could have reached its legal conclusion that “exhaustible natural resources” include living resources by recourse to conventionally authoritative sources within the trading regime. Numerous panel reports and Appellate Body reports treat previous adopted GATT rulings as if they were binding authorities (although they have a lesser status formally, as the AB clarified in the *Japan-Alcohol* case). Similarly, in the GATT tradition, enormous weight was given to negotiating history and the case of the complainants that living resources were excluded seemed to depend almost entirely on a reading of that history that the AB said was not persuasive.

This raises the question of why the AB felt it necessary at all to go outside the *acquis* of the GATT/WTO system. In my view, the most plausible explanation was that the AB was making a “statement” in the trade/environment debate: the community norms against which trade/environment disputes are decided cannot simply be those that pertain to the trade regime

but must include in the relevant meaning of “international community” environmental interests and constituencies. Environmentalists—not just as represented by governments but through NGOs as well—were influential in the making, for example, of the Rio Convention on Biodiversity that the AB cited along with other instruments. The AB acted so as to enfranchise environmental constituencies in the WTO; and it is significant that in the very same case, the AB spontaneously accepted an unsolicited amicus curiae brief from an environmental NGO as well as clarifying that panels could accept such briefs. Moreover, part of the power of the AB’s statement comes by virtue of its presentation of the meaning of “exhaustible natural resources” in international environmental law and policy as the primary basis for the interpretation, with the considerations internal to the trade regime—adopted GATT reports and the negotiating history—of secondary or subordinate importance, merely confirming an interpretation that relies essentially on environmentalism.

Having used international environmental instruments to determine that living species could be “exhaustible natural resources” within the meaning of XX(g), the Appellate Body went on to use international environmental law as evidence that the particular species of sea turtles protected by the US measure were in fact endangered and therefore that the measure in question was “*in relation* to the conservation of exhaustible natural resources” (emphasis added). Thus, the AB noted that the CITES Convention listed the species as endangered as evidence of consensus in the international community that this was so.

The use of international law in *Shrimp/Turtle* that has caused most confusion or misunderstanding (largely cleared up by the AB itself in its ruling on implementation by the US of the original AB report) is the invocation by the Appellate Body of a regional environmental instrument, the Inter-American Convention for the Protection and Conservation of Sea Turtles as

well as the Rio Biodiversity Convention and several other instruments, in connection with its finding that the US had engaged in unjustifiable discrimination in failing to attempt to negotiate an agreement with the complainant countries and had thus not met a condition of the chapeau of Article XX. The Appellate Body cited the Rio Biodiversity Convention and Agenda 21, *inter alia*, as evidence of an international environmental law norm that cooperative or negotiated solutions to global environmental problems are to be preferred over unilateral ones.<sup>19</sup> The Appellate Body noted that while the US State Department had attempted to negotiate an agreement with Western Hemisphere countries and indeed had succeeded in concluding the Inter-American Convention for the Protection and Conservation of Sea Turtles, no comparable negotiations had been undertaken with the complainants. This failure to enter into good faith negotiations constituted unjustifiable discrimination against the complainants.

In commentary on this aspect of the ruling, scholars and practitioners widely understood the AB as drawing from international environmental law a duty to negotiate before taking unilateral measures pursuant to Article XX of the GATT. Further, it was assumed that in invoking the Inter-American Convention, the AB was establishing some kind of benchmark for the sort of Agreement that would discharge the duty to negotiate. However, this is a misunderstanding of the normative effect that the AB was giving to both the Inter-American Convention and to the other international environmental instruments cited in connection with the norm of cooperation to solve global environmental problems.

In order for the “arbitrary or unjustifiable discrimination” condition of the chapeau to be violated, not only must there be discrimination in the application of a measure, it must also be of

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<sup>19</sup> The provision of the Rio Convention cited by the AB is Principle 12, which reads “Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*”(emphasis added)

an *arbitrary or unjustifiable* kind. The *discrimination* in application here depended on the fact that the statutory scheme, the “measure,” called for negotiation with all affected countries, whereas in applying the statute the State Department had engaged in serious negotiations with some of those countries, but not the complainants. The norm of cooperation in the solution of global environmental problems was invoked by the AB to show that the discrimination was *arbitrary or unjustifiable* under the chapeau and not as an autonomous source of law creating a duty to negotiate not supported by the text of Article XX. Thus, if the US statutory scheme had not entailed negotiation at all, i.e. with any country, there would have been no *discrimination* stemming from the mere fact of the failure to negotiate with the complainants and no violation of the condition in the chapeau.<sup>20</sup> The AB emphasized:

...[N]egotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that "arbitrary or unjustifiable discrimination" will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries. (Para 122; emphasis added)

The Appellate Body also made it clear that there was no obligation to actually have concluded or put in place an agreement as a condition of taking unilateral trade measures under Article XX (g) and that the international environmental law that it had invoked in its original ruling did not imply such a limit on unilateral actions:

Requiring that a multilateral agreement be *concluded* by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country

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<sup>20</sup> Here however it should be remembered that the chapeau concerns how a “measure” is “applied”. The “measure” here is the US statute, which on its face was not discriminatory in that it called for negotiations with *all* affected nations. What if the statute didn't say anything at all about negotiating but simply banned imports of turtle-unfriendly shrimp, and the State Department *without* any statutory mandate sought to negotiate agreements with particular countries that would facilitate them making their shrimp turtle-friendly and therefore admissible to the US, but left out other WTO Members. In such an instance, the negotiating conduct of the State Department while possibly not viewed as an “application” of the “measure,” i.e. the statute (since the statute says nothing about negotiation) might be considered as a separate or autonomous “measure” conceivably raising issues under Article I of the GATT, the MFN provision.

party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable. (Para. 123)

### **C. The Descent into Positivism and Formalism: the EC-Biotech panel ruling**

In the *EC-Biotech* case, the United States, Argentina and Canada challenged restrictive measures on GMOs of both the EC and some of its individual member states; these measures were based on a regulatory framework and policy decisions that existed through the 1990s until the recent putting into place of a new EC wide GMOs regulation, including labeling and traceability requirements. Three kinds of measures were at issue: first of all, the so-called moratorium, a political decision of EC Members not to provide any more regulatory approvals for GMOs until a new, more rigorous regulatory approach could be agreed upon and put in place; secondly, individual delays or suspensions in the approval process for GMOs originating from the complainant states, which they argued were attributable to the “moratorium” ; thirdly, member state actions in banning GMOs that were acceptable under the EC regulatory scheme in effect at the time, based on the right under that scheme to take “safeguards” at the member state level even if the product was acceptable to the EC regulator.

The complainants alleged numerous violations of the WTO SPS Agreement, TBT (Technical Barriers to Trade) Agreement and GATT (Article III:4, the National Treatment requirement). Most relevant to both the disposition of the case by the panel in its report and to the use and abuse of international law by the panel are the following legal claims:

First of all, the Complainants argued that the individual delays and suspensions of approvals violated a procedural provision of the SPS Agreement requiring that regulatory decisions be made “without undue delay.”

Secondly, two of the Complainants, Argentina and Canada, argued that various features of EC regulations and policies violated the National Treatment obligation in the GATT (Article III:4) because they provided “less favourable treatment” to imported GMO products than to domestic non-GMO products. The underlying premise of this argument was that the GMO products in question were “like” their non-GMO analogues within the meaning of “like” in Article III:4 and therefore imports of the GMO products were entitled to be treated no less favourably.

Thirdly, with respect to the member state “safeguards,” the Complainants argued, *inter alia*, that they violated provisions of SPS that required that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence (2.2) and that such measures, to the extent that they were more protective than provided by international standards, be based on a risk assessment (5.1). The measures in question were in respect of products for which risk assessments had been done and on the basis of those risk assessments the EC regulator had found that the products in question were adequately safe to be approved in the EC. Thus, the Complainants argued it is obvious that the member state bans are not appropriately based on science.

In its pleadings, the EC invoked the Cartagena Biosafety Protocol<sup>21</sup>, to which both Canada and Argentina are signatories<sup>22</sup> but not the United States, and the Precautionary Principle more generally in responding to the above legal arguments of the Complainants.

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<sup>21</sup> The Cartagena Biosafety Protocol is a multilateral agreement that deals with international trade in Living Modified Organisms (LMOs). These include GMOs but some of the obligations apply only to GMOs other than those intended for direct use as food or feed or for processing into food or feed. The Protocol is based on the Rio Biodiversity Convention to which the US is also not a party and its non-participation in the Rio Convention is an obstacle to the US adhering to the Cartagena Protocol. However, the US actively participated in the negotiations and as part of the “Miami Group” of (pro-GMO) countries, which also included Canada, shaped considerably the final outcome. On the negotiation of the Protocol and its provisions, see generally, C. Bail, R. Falkner and H. Marquard, eds., *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development?* (London: RIIA/Earthscan, 2002).



With respect to “undue delay,” an expression never before given meaning in WTO case law, the EC pointed to the provisions of the Protocol that dealt with acceptable time frames for regulatory decisions. It noted that although the general time frame specified for decisions in the Protocol was 270 days, there was also a right under Article 8 to request additional information and accordingly extend the time frame for decisionmaking.<sup>23</sup> Also, the EC noted Article 12(1) of the Protocol affirmed the right to review and change decisions on imports at any time in light of new scientific information on potential adverse effects on biodiversity, taking to account also risks to human health. In its defense against the claim of “undue delay” the EC in its pleadings went on to argue that in each individual case delays could be explained precisely by factors such as the need for additional information or to reconsider or suspend the application in light of new scientific information or in order to consider the implications of that information.

The EC also invoked the Cartagena Protocol as evidence that GMOs were not “like” their non-GMO analogues and therefore that the claim of a GATT National Treatment violation, based upon imported GMOs being treated worse than the non-GMO analogues, must fail<sup>24</sup> (it should be emphasized that the EC measures did not treat imported GMOs less favorably than domestic GMOs thus the only discrimination being alleged by Argentina and Canada was that between GMOs and non-GMO analogues).

Finally, with respect to the member state “safeguards,” the EC argued that even though risk assessments had led the EC regulator to the conclusion that the products in question were adequately safe, other scientists had raised legitimate questions about the adequacy of the assessments as evaluations of all relevant risks, the quality of the science used in light of new

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<sup>22</sup> Neither has, however, ratified the Protocol so far.

<sup>23</sup> *European Communities-Measures Affecting the Approval and Marketing of Biotech Products-First Written Submission by the European Communities*, para. 106-108.

<sup>24</sup> *Id.* at para. 90 and para. 535.

scientific knowledge, and the methodologies in some instances. Based upon a precautionary approach to regulation it was not unreasonable according to the EC for member states to provisionally ban the products in question in such circumstances in order to obtain a more adequate scientific judgment on their safety. Here the EC relied not only on 5.7 of SPS but in the alternative, i.e. if the panel found that 5.7 did not apply, the EC argued that the requirement that measures be based on scientific principles and sufficient scientific evidence (SPS 2.2) and on a risk assessment 5.1 should be interpreted in a precautionary manner such that where a risk assessment is considered inadequate or not based on state of the art scientific knowledge it is reasonable for a WTO Member to act with caution and ban or restrict the product until more adequate science can be applied to the question. Here, in addition to the Precautionary Principle generally, a number of the provisions of the Biosafety Protocol (including the version of the Precautionary Principle incorporated in the Protocol) mentioned in the EC pleadings were clearly relevant, including the right to revise a regulatory decision at any time in light of new scientific knowledge or information (12(1)). As well, the EC noted in its pleadings a provision of Annex III of the Protocol, providing detailed guidelines on risk assessment, which stipulates that “[I]ack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk.” This would appear to offer powerful support for the EC’s position that member states need not act on the assumption that a product is safe because determined to be adequately safe on the basis of a risk assessment scientific adequacy and comprehensiveness of which had been credibly challenged.

The panel responded to the EC by refusing to consider the Biosafety Protocol as well as the Precautionary Principle in general.

With respect to the Biosafety Protocol, the panel interpreted the words “applicable in relations between the parties” in 31(3)(c) of the Vienna Convention as requiring that a rule of international law be binding between all the parties of the treaty being interpreted in order to be taken into account in the interpretation of that treaty.<sup>25</sup> The panel relied principally on three considerations in coming to this conclusion. The first was that generally in the VCLT the expression “parties” is used to refer to parties to a treaty not to a dispute and that the definition of “party” in 2.1(g) of the VCLT is “a State which has consented to be bound by the treaty and for which the treaty is in force.” The second was the notion that “[r]equiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.” (para. 7.70) Third, the panel observed “it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.”(para. 7.71)

Clearly, the textual argument of the panel concerning the meaning of “party” is not dispositive. There is no question that the “parties” referred to in 31(3)(c) have to be parties to the treaty being interpreted, whether or not the reference here is to *all* parties of the treaty or only to *those of the parties to the treaty who are in the dispute*. There is simply no inconsistency between the definition of “party” in VCLT 2.1 (g) and this latter reading of 31(3)(c). Moreover, in its textual analysis, the panel failed to consider the language “applicable in relations between.” If 31(3)(c) referred to the concept of the treaty having to be binding and in force for all the parties why was this standard terminology, appearing as the panel itself notes, in the definitional

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<sup>25</sup> *EC-Biotech*, paras. 7.67-7.71.

parts of the VCLT not used here but rather the expression “applicable in relations between” which seems less to do with legal force but rather the appropriateness of the norm to the matters in dispute.<sup>26</sup>

The second consideration, the possibility that by using a legal norm not applicable between all the parties to the treaty the treaty interpreter would create a result that would lead to inconsistent interpretation, since in another case the interpretation might require applying different norms because the parties to the dispute were different, is clearly an important one. Here it should be emphasized, however, that 31(3)(c) only requires that other “relevant rules of international law” be taken into account and it supposes that such rules will merely be one element in a complex interpretative process.<sup>27</sup> The consideration the panel raises would merit case-by-case consideration but not exclusion of all norms not binding on all parties. Where there is sufficient overlap between the collectivity of states adhering to various instruments that reflect a particular norm and the Membership of the WTO for instance the danger of conflicting interpretations in different disputes to which different WTO Members are parties would be minimal, even if no one single instrument bound every Member of the WTO. In other instances, for example where a norm has very different formulations in different regional or plurilateral agreements, the possibility of conflicting or divergent interpretations of WTO law depending on

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<sup>26</sup> This seems to be the reading of some of the judges of the International Court of Justice, as will be discussed in the next section of the paper.

<sup>27</sup> This seems not to be well-understood by Pauwelyn, who argues that rules in treaties to which not all WTO Members are parties cannot be taken into account in interpretation since according to the WTO Agreement, “authoritative interpretation” of WTO treaties requires agreement of at least  $\frac{3}{4}$  of the WTO Membership. Authoritative interpretation is different from interpretation in dispute settlement; interpretation in dispute settlement legally binds only the parties to the dispute, whereas an authoritative interpretation, adopted by the Ministerial Council pursuant to Article IX of the WTO Agreement, is binding on the entire WTO Membership. Thus, when its significance is considered in relation to dispute settlement, “authoritative interpretation” actually supports the opposite reading of “parties” in 31(3)(c) to that of Pauwelyn: namely, that the concern about parties being *bound* to norms they never consented to through WTO interpretation, is really in the case of dispute settlement, a concern as to whether the parties to the dispute have accepted those other norms, since the interpretation in question, as a matter of WTO law, binds only *them*. J. Pauwelyn, *Conflict of Norms in Public International Law How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), 258-262.

who are the parties to a given dispute may be a real risk, and applying the norm in WTO interpretation could exacerbate the fragmentation of trade law already occurring due to the proliferation of regional trading arrangements.

As for the third consideration, it should be noted that, as interpreted by panels and the Appellate Body, both the SPS and TBT Agreement give considerable legal force to so-called “international standards”—norms created by bodies that are often largely private in nature, where the intention is to create voluntary standards, where not all WTO Members are participants, and where the decisionmaking may deviate from consensus.<sup>28</sup>

In dealing with the Precautionary Principle, the panel simply asserted that despite developments in international law since the AB *Hormones* ruling it remained unclear whether the Precautionary Principle was a rule of customary international law. The panel then suggested that as with the Appellate Body in *Hormones*, it did not need to decide the question in order to dispose of the legal claims before it. (para. 7.89)

Of course, as we saw in *Hormones*, the AB did not find it necessary to decide whether the Precautionary Principle was a general principle or custom, because the AB felt that it could have weight in the interpretation of SPS without being either. This raises the issue of how the panel in *EC-Biotech* was able to avoid the obvious fact that the AB jurisprudence had made extensive use of international law, including international environmental law, without invoking in particular 31(3)(c). The highly restrictive reading of 31(3)(c) by the panel would seem in tension with the AB practice, informed apparently by the notion that there is a broader basis in canons of treaty

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<sup>28</sup> See Appellate Body Report, *European Communities – Trade Description of Sardines (Sardines)*, WT/DS231/AB/R, adopted 23 October 2002, where the obligation in 2.4 of the TBT Agreement to use “international standards” as a basis for domestic mandatory regulations was held to include standards that were made by international standards bodies deviating from consensus decisionmaking. In any case, the TBT Agreement requires only that such bodies be open to the relevant standardization entities of all WTO Members and does not require that all Members participate in the bodies in question for their standards to have legal force pursuant to 2.4.

interpretation for the use of international law of which 31(3)(c) is simply one particular non-exhaustive elaboration.

The panel's answer comes in the attempt to squeeze this broader use of international law into the notion that a treaty interpreter can use international law like a dictionary, as a source of "ordinary meaning." (para. 7.92) Why then did the panel simply not proceed to treat the international legal materials invoked by the EC in this way?

First of all, the panel suggests that the EC never explained the relevance of these sources to the interpretation of the WTO treaty provisions in dispute. This statement either reflects incompetence or disingenuousness, for as discussed above, the relevance on several matters is very evident from the initial pleadings of the EC. Secondly, and in some tension with the rather incredible statement just mentioned, the panel stated: "We have carefully considered the provisions referred to by the European Communities. Ultimately, however, we did not find it necessary or appropriate to rely on those particular provisions in interpreting the WTO agreement at issue in this dispute." (para. 7.95) This is the sum total of explanation given by the panel in rejecting the provisions of the Biosafety Protocol, a detailed code on risk assessment and regulatory control of GMOs accepted by 188 states, as of any relevance to resolving the dispute!

Of course, a "right" interpretation of the WTO law at issue in the dispute might have produced the same reading of the WTO text even if appropriate weight **were** given to the international legal sources in question. But since the EC had invoked those sources, the panel was arguably under a duty to explain why this was the case, i.e. either that the norms led to the same interpretation as would otherwise be correct (i.e. they were not "necessary") or why it was not "appropriate" to give them weight.

Here it is useful to make the contrast with the Appellate Body in *Shrimp/Turtle* in its analysis of the meaning of “exhaustible natural resources”; in that case, as we observed, the AB gave pride of place to international environmental law in its interpretative exercise even though the interpretation it offered could have been grounded primarily or indeed entirely upon GATT precedent and its reading of the negotiating history. Conversely, in *EC-Biotech*, even assuming there were other persuasive considerations to support its interpretation, the panel could have at least engaged with the norms of the Biosafety Protocol, explaining the consistency of its interpretation with them or why in particular cases they were not appropriate to use in understanding provisions of the WTO Agreements. The difference in approach may in fact come down to the Appellate Body’s interest in enfranchising environmental interests and constituencies in WTO dispute settlement, and the panel’s concern (reflecting the insider perspective of the WTO bureaucracy, the Secretariat, which has a large influence in the drafting of panel decisions) to enfranchise those interests and constituencies as little as possible.

#### **D. Mexico-Soft Drinks**

Taken on its own *EC-Biotech* could be seen as a reflection of the panel’s failure to understand the approach of the Appellate Body to the use of non-WTO international law in interpreting the covered agreements. The EC did not appeal the Biotech Panel ruling so the Appellate Body had no opportunity to comment on it. The AB ruling in Mexico-Soft Drinks, however, raises the possibility that the AB itself has moved towards a more constrained role for non-WTO international law in WTO litigation. In Mexico-Soft Drinks, the AB had to adjudicate Mexico’s defense that its measure was “necessary” to secure compliance with laws and

regulations, within the meaning of GATT XX(d). The essence of Mexico's argument was that the US had violated the NAFTA in its application of anti-dumping law to Mexico and had obstructed the dispute settlement process available to Mexico under NAFTA to enforce its rights. While rejecting Mexico's invocation of Article XX(d) on other grounds (namely, that the phrase "laws and regulations" in XX(d) does not extend to international legal norms that have not been made effective in a Member's municipal law), among the findings of the AB was that the WTO dispute settlement organs lack jurisdiction to make determinations with respect to compliance with international legal norms outside the covered agreements, in this instance, the NAFTA (para. 56). The AB appeared to be saying that it could not entertain Mexico's defense because doing so would require it to determine rights and obligations under non-WTO law. This seems to get the legal question backward. *If* Mexico's interpretation of Art. XX(d) is correct, then the AB has jurisdiction to make a determination as to whether the US has violated the NAFTA to the extent that this is necessary in order to apply XX(d) properly interpreted. It is obvious that the AB would not have jurisdiction to make a determination under the NAFTA except to the extent it is interpreting and applying WTO law, but this does not in itself preclude application of WTO law in that way. There is no reason, conversely, to reject Mexico's interpretation of XX(d) on the assumption that WTO provisions should be read as not intended to involve determinations under other legal orders. Plainly, this was contemplated by Members when they incorporated large parts of the great intellectual property conventions into TRIPs, or for instance, when they made compliance with OECD export credit rules relevant to the determination of whether a subsidy is prohibited under the SCM Agreement. It is difficult to square the approach of the AB in Mexico-Soft Drinks with its remarks in EC-Bananas, where the AB had no doubt that to the extent required to interpret and apply the Lome Waiver, the panel and the AB could determine



what was “required” under the Lome Convention (paras. 167-168). It is true that one may distinguish instances where the non-WTO law is explicitly or implicitly referred to in a WTO instrument from those where it is not. However, *if* Mexico was correct in the view that “laws or regulations” in XX(d) included international law, then XX(d) itself would contain an explicit reference to non-WTO international law. Of course, the AB rejected that view, holding instead that only to the extent incorporated or implemented in domestic law did international law fall within XX(d). So perhaps all the AB was saying in *Mexico-Soft Drinks* was that it had no jurisdiction to make a determination of rights and obligations under non-WTO legal instruments *apart from the case* where there is some reference, implicit or explicit, to non-WTO law in the relevant WTO instruments. This would make some sense of the AB’s holding, since it would flow from the AB’s reading of XX(d) rather than being some spurious invented constraint on the use of non-WTO law—flowing from the notion of the WTO as a “self-contained regime” for example (a view long rejected by the AB). In the case of *Shrimp/Turtle*, the reference to “sustainable development” was sufficient for the AB to bring into its interpretation the international law of biodiversity. In *Bananas*, it was enough that there was a reference to the requirements of the Lome Convention in the relevant WTO instrument, the Lome Waiver. Similarly, in *Turkey-Textiles*, Article XXIV of the GATT, as interpreted by the AB, requires that the WTO dispute settlement organs examine what is required for the existence of a customs union or free trade area, which implies determinations concerning the rights and obligations under the instrument establishing the customs union or free trade area.

The facts in *Mexico-Softdrinks* raised the issue of possible determinations based on similar or identical legal texts in more than one forum (in this case NAFTA as well as the WTO) and also the issue of these two fora making a decision in essentially the same dispute. These

choice of forum issues were not addressed head on by the Appellate Body; rather the AB instead finessed or conflated them with the question of whether, in the course of interpreting a provision of a WTO treaty (in this case, GATT Article XX(d)) it could make findings, en passant, as it were, about a WTO Member's compliance with a non-WTO legal norm.

As a matter of general international law the remarks of the International Court of Justice in the recently decided case of *Bosnia-Herzegovina v. Serbia* suggest that there is no intrinsic restraint on the possibility of the rights and obligations under a single international instrument being the subject of determination in more than one forum, provided each forum has a jurisdictional basis for adjudicating. In that case, among Serbia's arguments on jurisdiction was that since *state* responsibility for genocide could only occur through *attribution* to the state of the acts of individuals that are *criminal* under the law of genocide, the ICJ could not adjudicate Bosnia-Herzegovina's claim except to the extent that there were prior criminal convictions in respect of the acts alleged. The ICJ held: "The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed." (para. 181) If one were to apply this reasoning to the situation in Mexico-Soft Drinks, it would imply that the WTO dispute settlement organs, fulfilling a different role than that of a NAFTA panel, could nevertheless make a determination without the necessity of a prior ruling in NAFTA. Of course, were WTO dispute settlement organs to make a ruling prior to that of a NAFTA panel then the question of *res judicata* would arise. Perhaps this is the AB's concern, namely that it does not view a WTO adjudicator as having the jurisdiction to make a determination of rights and obligations under NAFTA that is binding on them as NAFTA parties. However, and again the remarks of the ICJ

in *Bosnia-Herzegovina v. Serbia* are apposite, it would be up to the NAFTA tribunal itself to determine what weight to give in a NAFTA dispute to any prior determinations of the WTO dispute settlement organs.

### **III. Treaty Interpretation and International Law: Perspectives from the International Court of Justice (ICJ) and the International Law Commission (ILC)**

In this section of the paper, I examine the use of international law in the WTO disputes discussed above in light of recent discussions concerning treaty interpretation by the International Court of Justice and the International Law Commission.

#### **A. The *Oil Platforms* case**

In *Oil Platforms*<sup>29</sup>, the ICJ had occasion to opine on the role of other rules of international law in the interpretation of a treaty. Both the opinion of the Court as well as several of the separate opinions of the judges (Simma, Higgins, and Buergenthal) are of interest in this regard. In *Oil Platforms*, Iran brought a claim against the United States in respect of an attack by US naval forces on its oil platforms. The context of these attacks was the Iran-Iraq war, where US activities in the Gulf created considerable tensions with Iran.

The ICJ determined that it had jurisdiction to adjudicate the claim, but solely based on provisions of a 1955 commercial treaty between the United States and Iran<sup>30</sup>, which provided for settlement of disputes under the treaty by the ICJ. The substance of Iran's claim then depended upon Article X (1) of the Treaty, which reads "'Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.'" Iran argued that

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<sup>29</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, merits, November 6, 2003.

<sup>30</sup> *Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran* (1955).

attacks on commercial activity such as oil platforms in the Persian Gulf constituted an interference with “freedom of commerce and navigation” in violation of Article X (1). However, Article XX (1)(d) of the treaty contained a national security exception, which reads: “The present Treaty shall not preclude the application of measures: ... (d) necessary to fulfill the objective of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.” The United States maintained that its measures were justified under this provision; the US also brought a counterclaim in respect of Iranian attacks on and mining of ships flying the US flag.

Eventually, the Court would reject both the claim and the counterclaim, finding that none of the acts complained of actually interfered with commerce between the United States and Iran, which was largely non-existent at the time due to tensions between the two countries. But prior to examining Article X (1) the ICJ considered the defense of the United States under XX(1)(d) of the treaty.<sup>31</sup> It is in this context that the Court examined the issue of whether the general international law on the use of force, including the concepts of proportionality and necessity, was relevant to the interpretation of XX(1)(d).

Unlike the panel in *EC-Biotech* but very much like the Appellate Body in *Hormones*, *Shrimp/Turtle*, and *GSP*, the Court did not view the consideration of other relevant norms of international law as exclusively dependent on Article 31(3)(c) of the VCLT. Thus, the Court began by considering not 31(3) c but the reasonable expectations of the parties: in placing a national security exception in a commercial treaty, did they contemplate that the ambit of such an

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<sup>31</sup> An interesting facet of this ruling (albeit not directly related to the subject of this paper) is that unlike the practice of the WTO Appellate Body the ICJ considered the exceptions provision first before determining whether there was a violation of any positive obligation of the treaty. Had the ICJ considered Article X(1) first, it might out of judicial economy have never gotten to XXI(2)(d). Perhaps the way the Court proceeded may be explained by the desire of some of the judges to use the case as an opportunity to make a statement on the law on the use of force (most notably, Simma-who however would indicate his dissatisfaction in his separate opinion that the opinion of the Court was not a fuller and stronger statement on the law of force).

exception would be affected and circumscribed by the international law on the law of force? Here the Court referred to a similar provision of a commercial treaty that it considered in the *Nicaragua* case; and noted that it had cited the proceedings of the United States Foreign Relations Committee “tending to show that such had been the intentions of the Parties.” Secondly, much in the way that the Appellate Body in *Shrimp/Turtle* invoked the Preamble of the WTO Agreement and its reference to sustainable development in order to justify considering international legal instruments related to biodiversity, the Court in *Oil Platforms* referred to Article I of the Iran-US commercial treaty, which declares that “There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.” The Court considered that an interpretation of XX(1)d of the treaty that did not limit forcible actions to those consistent with the norms of international law would be inconsistent with the object and purpose expressed in Article I.

Only after raising these two justifications for considering international law norms on the use of force did the Court refer to 31(3)(c) of the VCLT. According to the Court: “Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account ‘any relevant rules of international law applicable in the relations between the parties.’”<sup>32</sup> In beginning this sentence with the expression “Moreover” the majority of Court made it abundantly clear that it could bring in any norms of international law appropriate to interpreting the words of the treaty in light of object, purpose and context even if 31(3)(c) did not exist.

Unlike the panel in *EC-Biotech*, the ICJ did not appear to view 31(3)(c), as *restrictive* of those rules of international law it could consider in interpreting the treaty. Thus, there is no indication that the majority of the Court viewed the words “applicable in the relations between

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<sup>32</sup> *Case Concerning Oil Platforms*, para. 41.

the parties” to mean that it could only consider rules of international law *binding* on the United States and Iran in their relations. Of course, since much of the law in question was drawn from the United Nations Charter perhaps the majority of the Court felt no need to interpret the expression “applicable in the relations between the parties.” However, with respect to custom, had it viewed the language in question as restricting the consideration of rules to those binding on the US and Iran, it would have had to make an inquiry into whether with respect to any of those rules one of these countries was a persistent objector and the relevance of such objection to whether the customary rule was binding on the US; it would also have had to consider whether any customary obligation had been limited by treaty including the treaty being interpreted. But the majority of the Court did not embark on such an inquiry; it simply imported wholesale the entire corpus of norms related to the use of force. As Judge Higgins would note and go on to criticize in her separate opinion, the majority of the Court “reads this provision [31(3)(c)] as incorporating the totality of the substantive international law...on the use of force.”<sup>33</sup>

When, in passing, the majority of the Court uses from 31(3)(c) the notion of applicability or application it refers to rules “applicable to the question” (paragraph 42). This suggests a fundamentally different reading of the expression “applicable in the relations between the parties” than the *EC-Biotech* panel’s understanding of this phrase as meaning that the rules should be binding on all the parties to the treaty being interpreted. By contrast, the majority of the Court seems to view the issue as whether the rules are applicability to the *dispute and in the relations of the parties* before it, while apparently viewing the word “relevant” in 31(3)(c) as referring to relevance to the specific treaty provision it is being called on to interpret.

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<sup>33</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, merits, November 6, 2003, separate opinion of Judge Higgins, para. 46.

Judge Simma in his separate opinion regretted that the Court did not go further than using the law on the use of force to interpret XX(1)d of the US-Iran treaty; according to Simma, “The text to the Judgment should have included an unambiguous statement to the effect that the United States military operations against the oil platforms, since they were not conducted in justified self-defense against an armed attack by Iran, must be considered breaches of the prohibition on the use of military force enshrined in the United Nations Charter and in customary international law.”<sup>34</sup> Simma considered that such a conclusion could be drawn from the application of rules in the UN Charter and in customary law that clearly bound the United States.<sup>35</sup> By using the rules only for interpretative purposes, the majority of the Court, by contrast, could feel comfortable bringing in the entire universe of norms related to the use of force, without specifically focusing on those clearly binding on the United States, whether by agreement, custom or even as *ius cogens*. Simma is in fact critical of the majority for not singling out or privileging the UN Charter rules on the use of force.

In any case, Simma, like the majority, seems to understand “applicable” to mean “applicable in the case” and parties in the dispute (para. 8). Further, Simma understands and approves of the majority interpreting 31(3)(c) to include not only “treaty law applicable between the parties” but any “rules of general international law “surrounding” the treaty.” (Para. 9).

Moreover, where the rules in question are peremptory norms (*ius cogens*) according to Simma

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<sup>34</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, merits, November 6, 2003 (separate opinion of Judge Simma), para. 7.

<sup>35</sup> It is important to note that Simma places some emphasis on the nature of the International Court of Justice as a tribunal: “After all, the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations.”(paragraph 7.) There is thus no necessary tension between his view of the ICJ’s place in applying legal rules outside the scope of the treaty it is interpreting and the reluctance of the WTO Appellate Body—a more specialized tribunal—to make interpretations that imply a determination of whether a WTO Member has violated some non-WTO rule of international law (see *Mexico-Soft Drinks*, Report of the Appellate Body). In that case, however, it is arguable that the Appellate Body was mistaken that it was strictly necessary to determine whether other rules of international law were violated in order to use those other rules to *interpret* the WTO treaty provision in question.

there is a “legally insurmountable limit to permissible treaty interpretation.” I take this to mean that in the case of *ius cogens* a treaty interpreter may not craft a reading of a treaty inconsistent with the norms in question,<sup>36</sup> whereas in other instances the interpreter is simply required to consider the international law rules in question along with the text, object and purpose, as well as other contextual factors in crafting the best possible interpretation of the treaty provisions in question.

Judge Higgins’ objection to the broad range of international legal materials brought into the interpretation of the treaty by the majority of the Court is that the majority has not circumscribed the range of legal materials to the “context,” whereas the VCLT suggests that the consideration of such rules is subordinate to the “context.” Here, Higgins views that context as one of a commercial agreement. She further objects that the majority of the Court, instead of confining its use of the norms on the use of force to interpreting the exact words of the treaty, essentially displaced the application of the text of XX(1)d with a determination of whether the acts the US was seeking to justify were legal under the law of force. (para. 48) But Higgins also stresses that she does not object to bringing in “general international law” where required to give meaning to specific terms in the treaty such as the word “necessary’ in XX(1)d..

Judge Buergenthal in his separate opinion suggests that reliance on the Vienna Convention on the Law Treaties cannot overcome the Court’s lack of jurisdiction to consider the international law on the use of force in the dispute at issue.<sup>37</sup> He would appear to suggest that even the use of international law rules for purposes of interpretation would require some kind of explicit jurisdiction of the tribunal to apply or interpret those rules. This is a very odd position,

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<sup>36</sup> And indeed Article 103 of the UN Charter precludes the application of any treaty norm that is in conflict with a UN Member’s obligations under the UN Charter; Article 103 is not limited to provisions of the Charter that have the status of *ius cogens*.

<sup>37</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, merits, November 6, 2003 (separate opinion of Judge Buergenthal).



since given the customary international law status of the provisions of the Vienna Convention in question it might be assumed or expected by the parties to a treaty that in giving a particular tribunal jurisdiction to interpret the treaty they are also giving it jurisdiction to consider the sources of interpretation under customary international law. Nevertheless, in the case of the WTO, the drafters decided to provide an explicit mandate to the dispute settlement organs to use the “customary rules of interpretation of public international law.”<sup>38</sup> (DSU 3.2)

## **B. The Report of the Study Group of the International Law Commission on Fragmentation**

The Report of the Study Group tends to favor the broad approach to the use of international law in treaty interpretation exemplified by the practice of the WTO Appellate Body, inasmuch as the study Group considers 31(3)(c) not to be exhaustive or restrictive of the uses of international law in interpretation but rather as reflective of the broader principle of “systemic integration”: “All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.” (Paragraphs 414 and 424)

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<sup>38</sup> Joel Trachtman appears to take a similar position concerning the jurisdiction of WTO dispute settlement organs, *despite* DSU 3.2. See J. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard International Law Journal* 333 (1999) and J. Trachtman, *Book Review: Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. By Joost Pauwelyn, 98 *AM. J. OF INT’L L.* 855 (2004). The underlying confusion here may be between jurisdiction to apply the rules in question as autonomous sources of law and the permissibility of applying them to interpret rules that are clearly within the tribunal’s competence as established by treaty and/or compromis. This confusion is explained in detail in Mavroidis, Howse and Bermann, *supra* n.3.

It is not surprising, then, that the Study Group is critical of the narrow approach taken by the panel in *EC-Biotech*. Concerning the panel's restrictive reading of "applicable in relations between the parties," the Study Group observes: "Bearing in mind the unlikelihood of a precise congruence in the membership of most important multilateral conventions, it would become unlikely [based on the panel's interpretation that 31(3)(c) requires that every party to a treaty be bound by another instrument in order for that instrument to be taken into account in interpretation] any use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law.<sup>39</sup> In practice, the result would be the isolation of multilateral agreements as "islands" permitting no references *inter se* in their application.... This of course would be contrary to the legislative ethos behind most of multilateral treaty-making, and presumably, with the intent of most treaty makers." (para. 471). To the problem of possibly inconsistent interpretations raised by the panel, the Study Group proposes a case-by-case solution along the lines that I have suggested above, namely to take into account the extent to which the norm in question can be considered because it is found in widely enough accepted instruments as reflecting the common intentions or understanding of the relevant community. (para. 472)

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<sup>39</sup> This point is also made by C. McLachlan, "The principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention," 54 ICLQ (2005), 279, 314.

## IV Conclusion

By and large, the trend in Appellate Body jurisprudence in trade/environment disputes as well as broader trends in international legal policy (the study group report for example) are at odds with the attempt by the EC biotech panel and Judge Buergenthal in oil platforms to cabin the use of international law in treaty interpretation to situations where all parties to the treaty have consented to be bound by the norm and/or its interpretative use. Indeed, the EC biotech panel unwittingly admits that the effort is futile, since however restrictive one's reading of 31(3)(c) of the VCLT, international law can still have normative effects on parties to a treaty without their consent, through the treaty interpreter using that law, which can include soft law, to puzzle out the ordinary meaning of the word of the treaty (international law as "glossary"). If this is so all the restrictive approach does is to give some formalistic cover to a treaty interpreter who for whatever reasons, which may be good or bad, legitimate or illegitimate, wants to avoid an explicit engagement with a particular set of international law rules. Fragmentation combined with the inherent nature of international law and the interpretive process lead to legal normativity being made effective through cross-regime interpretive exercises. Environmentalists should recognize the opportunities here as well as the risks that international environmental law will be abused in other regimes. Weak norms and soft law in this area appear less polyannish when one considers that, through interpretation, they can have important normative effects on international economic relations. Isolationist strategies of attempting to resist the normative impact of international law by withholding participation and/or consent appear risky or perhaps even to some extent futile. All of this reinforces the need to consider what principles and values should guide interpreters in giving weight to international law in the interpretive process. State

consent is no longer the sine qua non of legitimacy in all situations. As has been discussed in this paper some decisions concerning international law may raise legitimacy issues that relate to a range of widely held values in the international community, and state consent is not necessarily an adequate or essential proxy for those values. Along these lines, and summarizing some of the suggestions offered in the paper, I would offer for consideration some of the following possible guidelines:

-an international norm from one regime that is being applied in interpretation in another regime should be appropriately cross-contextual. An example of inappropriate cross-contextuality already suggested in my discussion of the Hormones rulings would be the use of the principle of precaution to interpret the norms of self-defense in the UN Charter to permit preemptive use of force. This is inappropriate, in part, because the context in which the precautionary principle emerged was such that no discussion or reflection on the values and interests relating to the use of force occurred.

-the values of democracy and self-determination require that a treaty interpreter be attentive, in cases where there is not formal state consent to be bound, to the risk of giving normative effects to an international law rule that the people of a particular state party to the dispute have had no opportunity to shape or influence, either through a representative government and/or the participation of NGOs in law-creation processes and which there is reason to believe is in tension with widely held values in that society

-but at the same time, such considerations may be outweighed to the extent that the norms to be applied in interpretation reflect recognized universal *values* (human rights and humanitarian principles for example) that are expressed in custom or ius cogens (even if the specific *norm* itself does not have the status of custom or ius cogens)

-the publicness of the process by which the norm was generated should be taken into consideration. As Kingsbury explains:

Law – especially public law -- has in many national societies a distinct normative quality of publicness, which refers to the claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups. I argue that this quality is increasingly part of the concept of international law, and that this quality is having a transformative effect on the sources of international law, reducing the significance of voluntarism, bilaterality and opposability, and increasing the significance of generality, solidarity, and the integration of international law into a conception of world public order.

An aspiration to meet requirements of publicness in making law – that is, an aspiration for law to stand in the name of the whole society and to speak to that whole society – is increasingly a requirement of jurisgenerative capacity in international law, although practice is far from uniform. Almost every intergovernmental institution currently faces demands to increase the openness of its decision processes: the Basel Committee of central bankers now publishes drafts of its proposals to receive comments from interested private sector groups before adoption, NAFTA arbitral tribunals now accept amicus briefs from third parties, and so on. This political commitment to publicity as an element going to the legitimacy of governance is often expressed as a requirement that legal rules and decisions be made publicly accessible if they are to qualify as law. This claim has not completely dominated the field, but it has had the effect of raising doubts about the

law-quality of much secret or unpublicized state practice which a century ago would probably have satisfied the sources test for international law pedigree. Many inter-state agreements and understandings on security matters and intelligence are kept secret, but much of this practice – e.g. the silent transfers of suspects without extradition processes, or promises to share intelligence information – is not generally analyzed as making international law or generating international legal obligation, in the way that other state practice is thought to do. The IMF keeps not only the deliberations of its own Board secret, but also many pieces of ‘advice’ to, and understandings with, borrowing countries. It seems to accept that doing this means these materials can not easily be jurisgenerative.<sup>40</sup>

-as already noted in the paper, consistent with the idea of “integration,” a treaty interpreter should attempt to avoid situations where the use of international law gives rise to divergent interpretations depending on which parties to the treaty are parties to a particular dispute. This would occur where there is a lack of commonality or overlap between the international legal commitments of different parties to the treaty being interpreted such that the norm in question is not very widely accepted among the parties to the treaty, or different parties

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<sup>40</sup> B. Kingsbury, “Who Should Make International Law?” Princeton Conference, Feb. 17-18, 2006, p. 4-5

actually have commitments to norms that vary on the matter in question (for example, through adherence to different regional agreements).

This is just a beginning in thinking through what emerges as the real issue: not whether international law can be brought into treaty interpretation in a broad fashion but how to do it legitimately, one case at a time.