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"Special and Differential Treatment, Trade and Sustainable Development"

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I. Introduction

Things have not been going well in the Doha Round of WTO negotiations, launched in November 2001. Agreement appears elusive. There have been stalemates and missed deadlines. Law review articles are now being published with titles such as "Doha Round Betrayals"[1] and "The Demise of Development in the Doha Round Negotiations."[2] In the view of many, the Doha Round was intended to remedy the development deficit of the GATT Uruguay Round negotiations, which led to the establishment of the World Trade Organization in 1995. Optimism has, however, given way to frustration and disappointment.

This paper argues that the situation is not entirely bleak for the WTO law of development, at least as expressed in special and differential treatment (SDT) in favour of developing countries. The committee charged with revising the existing SDT provisions in the Doha Round has reached agreement on some clauses. More generally, SDT was reinforced when sustainable development was included in the Preamble of the newly-created WTO in the Marrakesh Agreement. As outlined below, a widely-accepted feature of sustainable development is the principle of common but differentiated responsibilities that takes into account the needs and capabilities of different countries. When SDT provisions are interpreted by WTO panels and the Appellate Body in accordance with the Vienna Convention on the Law of Treaties, existing jurisprudence on SDT obligations in favour of developing countries will be strengthened.

The paper outlines the progress of special and differential treatment in the Doha Round and discusses the concept of sustainable development. Subsequent sections then present analysis and argument concerning legal interpretation by WTO panels and the Appellate Body.

II. Special and Differential Treatment

The GATT Uruguay Round produced some disappointing results for developing countries. In that Round, new clauses providing special and differential treatment tended to be merely temporary, allowing developing countries extra time for a transition period, but not granting policy space or special treatment to address development needs on a long-term basis for so long as the need lasted. SDT became an adjustment tool rather than a development tool, and the trend was towards a "one-size-fits-all" approach.[3] The effect was heightened by the requirement that Members of the new organization had to accept all the new agreements as a single undertaking,

[1] Raj Bhala, "Doha Round Betrayals" 24 Emory Int'l L. Rev. 147 (2010). Note, for example, the heading "What Happened to Fighting Poverty?" at170.

[2] Sungjoon Cho, "The Demise of Development in the Doha Round Negotiations" 45 Tex. Int'l L. J. 573 (2009-2010).

[3] Manuela Tortora, "Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet" UNCTAD WEB/CDP/BKGD/16, January 2003 at 4, 5-7.

except for a few agreements that remained optional. Previously in GATT, each country had been able to choose whether it wished to join the various non-tariff barrier agreements that clarified and expanded on GATT provisions. Developing countries could pick only the ones they considered suitable. In the WTO, the whole single undertaking became compulsory, including new agreements on services, regulatory standards and intellectual property.[4] While developing countries made some progress on agriculture, on safeguards and on textiles and clothing, the Uruguay Round results overall were troubling.

The Doha Round began in November 2001 with the declared intent of placing the needs and interests of developing countries "at the heart of" the new Round.[5] The initial deadline for a "modalities" or framework agreement under which specific commitments would be negotiated was set at January 2005. The Ministerial conference in Cancún in September 2003 ended without agreement and the initial deadline was not met. In December 2005, at the Hong Kong Ministerial conference, Members resolved some matters and the modalities deadline was set for April (and then June) of 2006. When that date also passed without success, negotiations were suspended until February 2007. A modalities agreement was nearly reached in Geneva in July 2008, but talks broke down. At the most recent Ministerial conference, in Geneva in December 2009, Members affirmed the end of 2010 as the deadline for a modalities agreement.[6] It is widely anticipated that that deadline will also be discarded.

The Doha mandate directs a review of existing special and differential treatment provisions "with a view to strengthening them and making them more precise, effective and operational."[7] The WTO Committee on Trade and Development was instructed "to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions,"[8] "to examine . . . ways in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions"[9] and "to consider . . . how special and differential treatment may be incorporated into the architecture of WTO rules."[10] As the WTO Secretariat noted, critics argue that the existing SDT provisions "are couched in best endeavour

[4] Joseph M. Senona, "Negotiating Special and Differential Treatment form Doha to Post-Hong King: Can Poor People Still Benefit?" 42(6) J. World Trade 1041 (2008), 1043 - 1046.
[5] WTO Ministerial Declaration, Doha, WT/MIN(01)/DEC/1, adopted 14 November 2001 (Doha Declaration), para. 2.
[6] See Cho, supra note 2, 577-582, for a summary of the negotiations; WTO Ministerial Conference, Geneva, Chairman's Summary, WT/MIN(09)/18, 2 December 2009.
[7] Doha Declaration, para. 44. See also para. 50.
[8] WTO Ministerial Conference, Implementation-Related Issues and Concerns, WT/MIN(01)/17, Decision of 14 November 2001, para. 12.1(i).
[9] Ibid., para. 12.1(ii).
[10] Ibid., para. 12.1(iii).

language and merely exhort Members to take certain steps, rather than making this action mandatory and binding."[11]

The Committee on Trade and Development convened in special session to deal with its part of the Doha negotiations. The Secretariat prepared a survey of existing SDT provisions, treating them as mandatory if they used the word "shall" rather than "should," and classifying the mandatory provisions as either obligations of conduct (requiring Members to follow a certain course of conduct) or obligations of result (requiring Members to achieve a certain result).[12] Article 10.1 of the Agreement on Sanitary and Phytosanitary Measures, for example, was classified as a mandatory obligation of conduct, as it states that, in the preparation of SPS measures, Members "shall take account of" the special needs of developing country Members and least-developed country Members.[13] Similarly, Article 15 of the Agreement on the Implementation of GATT Article VI (Anti-Dumping Agreement) was a mandatory obligation of conduct, requiring that constructive remedies "shall be explored" before a Member applies anti-dumping duties that affect the essential interests of developing country Members[14] and Article IV:3 of the General Agreement on Trade in Services (GATS) was also a mandatory obligation of conduct, since it requires that "(p)articular account shall be taken" of the difficulties of least-developed countries negotiating specific commitments, in view of their development, trade and financial needs.[15] The Secretariat's approach received some criticism. In a review in May 2002, South Centre argued that a linguistic trigger such as the word "shall" was not sufficient to identify a binding obligation, since the content and beneficiaries of the obligation might still be unclear. A provision would only be fully binding in this view if a breach could trigger an action for enforcement.[16]

[11] WTO Secretariat, Developmental Aspects of the Doha Round of Negotiations, WT/COMTD/W/143/Rev.1, 22 November 2005, para. 59.

[12] WTO Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: A Review of Mandatory Special and Differential Treatment Provisions, WT/COMTD/W/77/Rev.1/Add.2, 21 December 2001 at 4. The Secretariat notes that the distinction between obligations of conduct and obligations of result is not always clear-cut. See also WTO Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: Mandatory and Non-Mandatory Special and Differential Provisions, WT/COMTD/W/77/Rev.1/ADD.1/Corr.1, 4 February 2002.

[13] WTO Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: A Review of Mandatory Special and Differential Treatment Provisions, WT/COMTD/W/77/Rev.1/Add.2, 21 December 2001 at 9. As well, Article 12.2 of the Agreement on Technical Barriers to Trade was classified as a mandatory obligation of conduct, as it states that Members "shall take into account" the special development, financial and trade needs of developing country Members: ibid at 12.

[14] Ibid at 15.

[15] Ibid. at 30.

[16] South Centre, Review of the Existing Special and Differential Treatment Provisions: Implementing the Doha Mandate, SC/TADP/AN/SDT/1, May 2002, paras.11, 12. The Review comments on a number of the identified provisions. It states, for example, that Article 15 of the Anti-Dumping Agreement requires serious negotiations between developed and developing countries before any duties are applied (Ibid, Annex, 39-41).

The special session of the Committee on Trade and Development made some progress with agreement in principle on some SDT proposals submitted to it. At the 2003 Ministerial in Cancún, the Committee put forward recommendations on 27 items. As that Ministerial conference ended without agreement, there was no decision to adopt any of the recommendations, which were listed in Annex C of the Draft Text for the conference.[17] On GATS Article IV.3, for example, the Committee's recommendation was that Members would be obliged to indicate how they were meeting the requirement of giving special priority to least-developed countries.[18]

In 2005, the Committee addressed measures in favour of least-developed countries.[19] This effort resulted in 5 recommendations that were adopted at the Hong Kong Ministerial in December of that year.[20] One recommendation was for duty-free and quota-free access for products of the least-developed countries. The Ministerial conference decided that developed-country Members "shall" and developing-country Members in a position to do so "should" provide this access for at least 97% of products from least-developed country Members. One of the other recommendations adopted set a new transition period for least-developed country Members that allows them to maintain measures in conflict with the Agreement on Trade-Related Investment Measures until 2013.

In March 2010, the Chair of the special session of the Committee on Trade and Development reported on the committee's work. In addition to the recommendations made to the Cancún Ministerial and the five proposals adopted by the Hong Kong Ministerial, some progress had been made on 6 further agreement-specific proposals, although they were not yet finalized. The Committee was also continuing to work on the proposal for a monitoring mechanism that would keep the implementation and effectiveness of SDT provisions under regular review.[21]

Throughout its history in the GATT, special and differential treatment was in conflict with the obligation of most-favoured-nation (MFN) treatment in Article I, under which all contracting parties are entitled to equally beneficial treatment in each others' trade arrangements. Special and

[17] Draft Cancún Ministerial Text, JOB(03)/150/Rev.2, 13 September 2003.
[18] In another Committee recommendation, concerning the Enabling Clause (which is discussed below), Members would be required to consult with developing and least-developed country Members "with a view to ensuring that their products of export interest are accorded meaningful market access."
[19] Joseph M. Senona, "Negotiating Special and Differential Treatment form Doha to Post-Hong King: Can Poor People Still Benefit?" 42(6) J. World Trade 1041 (2008), 1050-1051. For a more complete review of the Committee's deliberations, see Seung Wha Chang, "WTO for Trade and Development Post-Doha" 10 J. Int'l Econ. L. 553 (2007).
[20] Ministerial Declaration, Doha Work Programme, Hong Kong, WT/MIN(05)/DEC, adopted 18 December 2005 (Hong Kong Declaration), para. 36, Annex F. See also para. 47.
[21] Special Session of the Committee on Trade and Development, Report by the Chairman, Ambassador Thawatchai Sophastienphong (Thailand) to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise, TN/CTD/25, 22 March 2010.

differential treatment for developing countries appeared in GATT Article XVIII that granted extra flexibility and policy space for developing countries. As well, contracting parties undertook to observe the general principles of certain chapters in the Havana Charter, including chapter III on economic development and reconstruction and chapter VI on inter-governmental commodity agreements.[22] Article XXVIIIbis which provides flexibility in tariff negotiations was added during a review in the mid-1950's. In 1965, the position of special and differential treatment was reinforced, with the addition of Part IV of the GATT (Articles XXXVI, XXXVII and XXXVIII) on trade and development. In 1979, contracting parties adopted the Enabling Clause, which permits developed countries to provide certain benefits to developing countries, including preferential tariffs, in order to respond to the trade, development and financial needs of the beneficiary countries.[23] Paragraph 7 of the Enabling Clause provides for graduation, the idea that developing countries will move out of preferential status as their situations improve. As noted, this idea of transition to MFN status became a more regular aspect of the new SDT provisions added in the Uruguay Round. The tension between MFN and special and differential treatment has been a fundamental feature of both the GATT and its successor the World Trade Organization.

The Enabling Clause was the subject of WTO dispute settlement in a claim brought by India against the European Community. Part of the EC's system for preferential tariffs granted extra preferences for certain countries affected by the illegal drugs trade. India argued that the Enabling Clause did not permit the EC to discriminate in this way among the beneficiaries of its preferential tariffs. The Appellate Body noted that the Enabling Clause authorizes preferences that are generalized, non-reciprocal and non-discriminatory. Action taken under the Clause is to "respond positively to the development, financial and trade needs of developing countries,"[24] which are specific for each country and which can change over time.[25] In this context, the Appellate Body reasoned that a measure would only meet the requirement of being non-discriminatory if it granted identical treatment to all similarly-situated beneficiaries.[26] Since the EC's Drugs Arrangement did not explain the qualifying criteria or procedures for any countries wanting this extra preference, the Appellate Body ruled in favour of India, as the EC had failed to demonstrate that it was offering identical treatment to all similarly-situated beneficiaries.[27]

[22] GATT Article XXIX. See Havana Charter for an International Trade Organization, UN Doc. E/Conf.2/78, 24 March 1948 (not in force).
[23] GATT Contracting Parties, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, Doc. L/4903, BISD 26S/203.
[24] Ibid., para. 3(c).
[25] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC–Preferences)*, WT/DS246/AB/R, adopted 20 April 2004, paras. 157-165.
[26] Ibid., para. 154.
[27] Ibid., paras. 180-189. See further Maureen Irish, "GSP Tariffs and Conditionality: A Comment on *EC-Preferences*" 41(4) J. World Trade 683 (2007).

There are many challenges for special and differential treatment in the WTO apart from the up-dating of existing provisions. Since the conclusion of the Uruguay Round, regional agreements have proliferated, covering large segments of international trade. In order to enter into such a regional agreement with a developed country, developing countries may accept obligations beyond those in the WTO Uruguay Round agreements, without receiving special and differential treatment in return. Debates continue over the design of SDT and the effectiveness of provisions that are merely time-limited transition periods. It is argued that SDT must be more nuanced if it is to "ensure the proportionality of trade agreements, commensurate with the levels of development of developing countries and their capacity to manage the burdens of the adjustment process."[28] To be a tool of development, SDT would reflect economic and social criteria relevant to the needs of each country.[29] It should also be accompanied by positive measures such as technical assistance and capacity-building as appropriate, operating coherently with programmes of the World Bank and other institutions.[30]

One part of the continuing debate involves the concern over perceived lack of enforceability of existing SDT provisions.[31] After a brief overview of sustainable development, this paper argues that recognition of sustainable development as an objective for the WTO affects the interpretation of these provisions. Teleological interpretation in accordance with the Vienna Convention on the Law of Treaties will revive and strengthen positive GATT/WTO jurisprudence on special and differential treatment.

III. Sustainable Development

The first paragraph of the preamble of the Marrakesh Agreement Establishing the World Trade Organization adopts the objective of sustainable development:

[28] Faizel Ismail, "Mainstreaming Development in the World Trade Organization" 39(1) J. World Trade 11 (2005) at 13.

[29] Murray Gibbs, A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations, UNCTAD/ITCD/TSB/10, 2000, 67; South Centre, Is Development Back in the Doha Round? Policy Brief no.18, November 2009, 5-6. The design of a suitable mechanism for assessment of those needs is problematic. For example, the Decision on Measures in Favour of Least-Developed Countries (Uruguay Round Ministerial Decision, LT/UR/D-1/3, 15 April 1994) as amended at the Hong Kong Ministerial provides that any least-developed Member not in a position to comply with its WTO obligations "shall bring the matter to the attention of the General Council for examination and appropriate action" (Hong Kong Declaration, Annex F, item 88). Criticizing this amendment, Seung Wha Chang states that it involves political decision-making and amounts to a veto by any importing country that is negatively affected (Seung Wha Chang, "WTO for Trade and Development Post-Doha" 10 J. Int'l Econ. L. 553 (2007) at 563).

[30] Manuela Tortora, "Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet" UNCTAD WEB/CDP/BKGD/16, January 2003, 12-13, 19.

[31] Gustavo Olivares, "The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs" 35(3) J. World Trade 545 (2001).

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

The addition of the sustainable development objective is a significant change from the first paragraph in the preamble of GATT:

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

The preamble for the new World Trade Organization adds the idea of environmental sustainability and the goal of responding to the "needs and concerns" of countries "at different levels of economic development." This commitment to sustainable development is reaffirmed in paragraph 6 of the Doha Ministerial Declaration in November 2001, which refers to the World Summit on Sustainable Development scheduled for Johannesburg in September 2002.

Sustainable development was adopted as the goal of a "new and equitable global partnership" in the Rio Declaration on Environment and Development in 1992.[32] The Declaration links economic development and environmental protection. Principle 3 affirms that the right to development must be fulfilled to "meet developmental and environmental needs of present and future generations." Principle 4 recognizes that protection of the environment constitutes "an integral part of the development process." The Rio Declaration builds on the Stockholm Declaration of 1972[33] and the Report of the World Commission on Environment and Development of 1987.[34]

[32] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/Conf.151/26, Annex I, Preamble.

[33] Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, A/Conf.48/14, at 3, especially Principles 8, 9, 10, 11, 12, 20.

[34] World Commission on Environment and Development (Gro Harlem Brundtland, Chair), *Our Common Future*, United Nations and Oxford University Press, 1987: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (p.43)

The Johannesburg Summit in 2002 reaffirmed the commitment to sustainable development,[35] identified as the integration of the three pillars of economic development, social development and environmental protection. One of the Summit documents is the New Delhi Declaration of the International Law Association (2002) listing and describing seven principles widely considered to be part of sustainable development:

1. The duty of States to ensure sustainable use of natural resources
2. The principle of equity and the eradication of poverty
3. The principle of common but differentiated responsibilities
4. The principle of the precautionary approach to human health, natural resources and ecosystems
5. The principle of public participation and access to information and justice
6. The principle of good governance
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives[36]

The principle of common but differentiated responsibilities refers to both the special needs and situations of developing countries and the differing contributions that states have made to creating environmental problems.[37] It is based on Principle 7 of the Rio Declaration of 1992. It is also contained in Article 3(1) of the United Nations Framework Convention on Climate Change, opened for signature at the 1992 Rio Conference on Environment and Development: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[38]

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[35] Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, A/CONF.199/20, Johannesburg Declaration on Sustainable Development (Annex to Resolution 1); Plan of Implementation of the World Summit on Sustainable Development (Annex to Resolution 2). The Plan of Implementation refers to the WTO Doha Ministerial Conference and the needs and interests of developing countries "at the heart of" the WTO work programme (para. 48).

[36] Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations, A/Conf.199/8, Annex, ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development.

[37] Ibid., para. 3.3.

[38] *United Nations Framework Convention on Climate Change*, adopted 9 May 1992, open for signature at Rio de Janeiro 4 June 1992, in force 21 March 1994, 31 I.L.M. 849 (1992). See also: *Convention on Biological Diversity*, opened for signature at Rio de Janeiro 5 June 1992, in force 29 December 1993, 31 I.L.M. 822 (1992), permitting each Party to undertake programmes for the conservation of biological diversity "in accordance with its particular conditions and capabilities." (Article 6); Yoshiro Matsui, "The Principle of 'Common but Differentiated Responsibilities'" in Nico Shrijver and Friedl Weiss (eds.), *International Law and Sustainable Development Principles and Practice* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 73.

Sustainable development has been adopted in many international environmental and trade treaties including the Kyoto Protocol to the Framework Convention on Climate Change,[39] the 1994 International Tropical Timber Agreement,[40] the Energy Charter Treaty,[41] and the North American Free Trade Agreement,[42] in addition to the Marrakesh Agreement Establishing the World Trade Organization.[43]

In *Gabčíkovo- Nagymaros*, the International Court of Justice referred to sustainable development in a discussion of "new norms" of international law that states have to take into account. In the dispute, Hungary argued unsuccessfully that it had a right to terminate a treaty dealing with the shared resources of the Danube River, in order to respond to new requirements of international law. Finding both Hungary and Czechoslovakia (now Slovakia) in breach of the treaty, the Court decided that both countries had to "look afresh" at the operation of the power plant in question in a good faith effort pursuant to the treaty, taking the new norm into consideration.[44]

The International Court of Justice also mentions the objective of sustainable development in its judgment in *Pulp Mills on the River Uruguay*, a dispute between Argentina and Uruguay. In discussing the interests of riparian states, the Court refers to sustainable development as, in essence, the balance between economic development and environmental protection.[45] In the decision, the Court ruled that Uruguay had breached procedural obligations to inform, notify and consult contained in an agreement over use of the boundary water, although the Court did not order dismantling of a pulp mill constructed on the Uruguayan side of the river.[46] The Court stated that general international law now requires an environmental impact assessment prior to implementation of an activity presenting a risk to a shared transboundary resource, and imposes an obligation of continual monitoring of operations once the activity is in place.[47] On the

[39] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, in force 16 February 2005, 37 ILM 22 (1998), Article 2(1).
[40] *International Tropical Timber Agreement*, 26 January 1994, in force 1 January 1997, 33 ILM 1014 (1994), Preamble. See *International Tropical Timber Agreement, 2006*, 27 January 2006, TD/TIMBER.3/12 (not yet in force), Preamble.
[41] *Energy Charter Treaty*, 17 December 1994, in force 16 April 1998, 34 ILM 360 (1995), Article 19(1).
[42] *North American Free Trade Agreement,* 17 December 1992, in force 1 January 1994, 32 ILM 289 and 32 ILM 605 (1993), Preamble.
[43] For a full list and discussion of relevant treaties, see Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Leiden/Boston: Martinus Nihoff Publishers, 2008), pp.102 - 141 (full text of the lecture published in Hague Academy of International Law, *Recueil des cours*, Vol. 329 (2007), 217).
[44] International Court of Justice, *Case Concerning the Gabčíkovo- Nagymaros Project (Hungary v. Slovakia)*, I.C.J. Reports 1997, p.7, para. 140. In a separate opinion, Judge Weeramantry describes sustainable development as not merely a concept, but "a principle with normative value" (ibid at 88).
[45] International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, para. 177. The Court had referred to sustainable development in its provisional order in the dispute: ibid. paras. 75, 76.
[46] Ibid., paras. 158, 275.
[47] Ibid., paras. 204, 205.

evidence, Argentina had not demonstrated a failure by Uruguay to meet a treaty obligation of co-ordinating measures to avoid changes in the ecological balance of the river, but the Court was clear that the provision was an obligation of conduct imposing a duty of due diligence.[48] Both parties remained subject to an ongoing duty to co-operate under the agreement.

As the International Court of Justice has confirmed, sustainable development now has some effect as a norm in international law,[49] although there is ambiguity over its content. The concept of sustainable development may be best considered to consist of several elements that could be recognized as customary international law or general principles of law, as in the International Law Association Declaration of 2002.[50] One of the pivotal features is the notion of equity that responds to the needs of developing countries.[51] The principle of common but differentiated responsibilities of developed and developing countries is one of the elements that, through treaty practice, may reflect an emerging norm.[52] The overall concept of sustainable development is quite general and unlikely to dictate precise outcomes. At the moment, it is probably more procedural than substantive.[53] So far, in the decisions of the International Court of Justice, sustainable development has had to do with the process of decision-making, reinforcing obligations of conduct to consult and co-operate with due diligence and in good faith.

[48] Ibid., para. 186.

[49] Philippe Sands, *Principles of International Environmental Law*, 2d ed., Cambridge University Press, 2003, 254.

[50] Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Leiden/Boston: Martinus Nihoff Publishers, 2008), pp.162 - 172 (full text of the lecture published in Hague Academy of International Law, *Recueil des cours*, Vol. 329 (2007), 217).

[51] Duncan French, *International Law and Policy of Sustainable Development*, Manchester University Press, Juris Publishing, 2005, 66-67 (cf. p.69: [T]he principle of common but differentiated responsibilities is not simply a mechanism for encouraging developing States to sign and ratify multilateral environmental agreements … . Differentiated responsibilities permit the international community to act as a true society … .")

[52]Philippe Sands, *Principles of International Environmental Law*, 2d ed., Cambridge University Press, 2003, 148. See Philippe Sands, "Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law" in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 39 at 42, n.12.

[53] Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999), 19 at 31-37; Henning Grosse Ruse-Khan, "A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond" 13(1) J. Int'l Econ. L. 139 (2010) at 156; Alan Boyle and David Freestone, "Introduction" in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999), 1 at 17: "A more plausible argument is that although international law may not require development to be sustainable, it does require development decisions to be the outcome of a process which promotes sustainable development."

IV. Interpretation

a. Teleological interpretation

Teleological interpretation forms part of the primary rule for treaty interpretation. Article 31(1) of the Vienna Convention on the Law of Treaties requires that interpretation be in accordance with the ordinary meaning of the words in their context and in light of the object and purpose of the treaty. As the Preamble of the Marrakesh Agreement states, an objective of the new World Trade Organization is "sustainable development," to be pursued by Members "in a manner consistent with their respective needs and concerns at different levels of economic development."

In the *Shrimp-Turtle* decision in 1998, the Appellate Body referred to the inclusion of sustainable development in the Preamble and confirmed that the Preamble applies not just to the provisions of GATT 1994, but to all the WTO covered agreements.[54] In the decision, the sustainable development objective supported the inclusion of the conservation of sea turtles within Article XX(g). The Appellate Body referred again to the objective of sustainable development in its analysis of the introductory paragraph of Article XX, stating that the Preamble added "colour, texture and shading" to interpretation of the WTO agreements.[55]

Differential treatment for the benefit of developing countries is a widely accepted feature of the concept of sustainable development and this was also the case in April 1994 when the Marrakesh Agreement was signed. The principle of common but differentiated responsibilities was affirmed in the United Nations Framework Convention on Climate Change, opened for signature on 4 June 1992 at the Rio Conference.[56] There are now 194 parties to the Climate Change Convention, including 193 countries and 1 regional economic integration organization. All of the 153 Members of the WTO are party to the Climate Change Convention.[57] The Article 21.5 WTO panel in *Shrimp-Turtle* referred to common but differentiated responsibilities and Principle 7 of

[54] Appellate Body Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 129. See ibid. para. 131.
[55] Ibid. para. 153.
[56] *United Nations Framework Convention on Climate Change*, adopted 9 May 1992, open for signature at Rio de Janeiro 4 June 1992, in force 21 March 1994, 31 I.L.M. 849 (1992), Article 3(1).
[57] See Members and Observers, WTO website (http://www.wto.org), Annex I and Non-Annex I Parties, UNFCC website (http://unfccc.int/parties_and_observers), both websites accessed 20 September 2010. There is one possible exception. The WTO lists Chinese Taipei as a party, while the United Nations Framework Convention on Climate Change follows U.N. practice on the recognition of Taiwan.

the Rio Declaration when it urged Malaysia and the United States to cooperate and reach an agreement in the dispute, consistent with WTO objectives including sustainable development.[58]

The sustainable development objective, including the element of beneficial treatment for developing countries, must be taken into account in the interpretation of provisions of special and differential treatment in the WTO Agreements. It might be suggested that sustainable development only operates as a goal or purpose when the matter at issue deals with the relationship between trade and the environment. The International Court of Justice, after all, stated in *Pulp Mills on the River Uruguay* that the essence of sustainable development is the balance between economic development and environmental protection.[59] There is no reason to conclude, however, that the essence is synonymous with the totality and that all aspects must be present in order for sustainable development to influence interpretation. It would be very odd to maintain that the WTO is interested in promoting environmental protection only if the matter in question involves developing countries, and not when an issue arises between developed countries. The concept of sustainable development is wide, as is the Preamble mention of the needs and concerns of countries at different levels of economic development. Both development and environmental protection are goals, separately and together. The Preamble includes the objective of economic development that will support teleological interpretation of many WTO provisions promoting development,[60] even if the question is not an environmental one.

Taking the sustainable development objective into account should result in strengthening rights of developing countries in WTO provisions, with special emphasis on making procedural rights effective. This approach to interpretation will confirm some GATT and WTO jurisprudence, and should indicate that certain other decisions are less reliable guides for the future.

The 1980 GATT panel report on *EC – Refunds on Exports of Sugar*[61] would likely be confirmed. In the dispute, Brazil argued that duty refunds on exports were subsidies in breach of GATT Article XVI and were also contrary to Articles XXXVI and XXXVIII in Part IV of GATT. The panel found the EC had contravened Article XVI:1. The European Communities argued that the Part IV provisions in Articles XXXVI and XXXVIII were only principles and objectives and were too imprecise and vague to establish enforceable obligations. The panel rejected that view and decided that, on the evidence, the effect of the subsidies in 1978 and 1979 was to undermine efforts by Brazil and other countries to establish a commodity agreement for the world sugar

[58] Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, adopted with Appellate Body Report, WT/DS58/AB/RW, 21 November 2001, paras. 7.2, 7.1 (panel). See ibid. paras. 6.1, 6.2.

[59] International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, para. 177.

[60] See Asif H. Qureshi, "Interpreting World Trade Organization Agreements for the Development Objective" (2003) 37(5) J. World Trade 847.

[61] GATT Panel Report, *European Communities – Refunds on Exports of Sugar*, L/5011, adopted 10 November 1980, BISD 27S/69.

market. The EC, thus, had breached its duty in Article XXXVIII to collaborate jointly with other parties to promote improved market conditions for the export of primary products from developing countries. The panel's finding is in line with the emphasis on procedural duties such as consultation and cooperation that would be supported by an interpretation based on sustainable development.

The 1989 GATT panel in *EEC – Restrictions on Imports of Dessert Apples*[62] was not convinced that the EEC had acted in conformity with its obligation in GATT Article XXXVII:3(c) to explore all possibilities of constructive remedies before imposing measures against apples from Chile. The panel did not express a conclusion on the matter, as Article XXXVII:3(c) applies only to measures otherwise permitted in the GATT and the panel found that the EEC measures breached GATT Articles XI and XIII.[63] The sustainable development objective would likely support the panel's approach to the procedural burden of Article XXXVII:3(c). In its decision, the panel noted that:

> the EEC had held consultations with affected suppliers and had amended its regulations, but these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV.[64]

Given this appreciation of the evidence, the panel stated that it "could not find that the EEC had made appropriate efforts to avoid taking"[65] the measures in question. In the result, the 1989 panel did not proceed to analyze the rest of Article XXXVII:3(c) which limits the duty of exploring other constructive remedies to situations where the measures "would affect essential interests" of the developing country. Chile had presented argument concerning the importance of fresh fruit exports to its economy.[66]

The approach of the 1989 panel was stronger and more attuned to procedural burdens than the views of a GATT panel in 1980 on a dispute between the same parties over restrictions on the same products.[67] In the 1980 dispute, Chile made similar arguments about breaches of GATT obligations, including Articles XXXVI and XXXVII. The panel found a breach of Article XIII but no breach of Article XXXVII because it "could not determine that the EEC had not made

[62] GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples*, L/6491, adopted 22 June 1989, BISD 36S/93.
[63] Chile had also cited Article XXXVII:1(b), in which developed countries are, to the fullest extent possible, to refrain from introducing import barriers on products of particular export interest to developing countries. This duty is not limited to measures that are otherwise permitted in the GATT. The panel, however, did not pursue analysis of Article XXXVII:1(b).
[64] Ibid., para. 12.32.
[65] Ibid. See also paras. 3.29, 3.30 concerning the adequacy of notice.
[66] Ibid., paras. 8.2 – 8.4.
[67] GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, L/5047, adopted 10 November 1980, BISD 27S/98.

serious efforts to avoid taking protective measures against Chile."[68] The EEC had argued that it had tried to reach agreement through negotiation.[69] Perhaps the panel meant to make a positive finding that the EEC had fulfilled its duty of making serious efforts, but the phrasing of the finding does not indicate awareness of the procedural burden resting on the EEC. An interpretation in light of the objective of sustainable development would call for a different approach to assessment of the negotiations.[70] In this context, a party owing a duty should have the burden to demonstrate that it has met the duty. If it fails to do so, it should be found in breach, just as the WTO panel in *EC-Preferences* found against the EC for failure to demonstrate that the Community's preferential trade arrangements offered non-discriminatory treatment to similarly-situated beneficiaries. Given the objective of sustainable development, ambivalent evidence is insufficient to show fulfillment of the duty.

The WTO panel in *EC – Bed Linen* adopted an approach compatible with sustainable development when it interpreted Article 15 of the Anti-Dumping Agreement:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

The complaint was brought by India against anti-dumping duties imposed by the EC. The panel considered that a reduced duty or the acceptance of price undertakings could be constructive remedies within the Article. Although an alternative might not be found in a given dispute, the panel was of the view that the exploration of possibilities "must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome," given the object and purpose of Article 15.[71] The developed country Member cannot simply reject the possibility "out of hand."[72] The EC was in breach of its duty, since "[p]ure passivity is not sufficient . . . to 'explore' possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned."[73]

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[68] Ibid., para. 4.23.
[69] Ibid., paras.3.25 – 3.28, paras. 3.36 – 3.27.
[70] See further Gustavo Olivares, "The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs" 35(3) J. World Trade 545 (2001).
[71] Report of the Panel, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted with Appellate Body Report, WT/DS141/AB/R, 12 March 2001, para. 6.233 (panel).
[72] Ibid., para. 6.238.
[73] Ibid. The panel's reasoning from *EC – Bed Linen* was applied in *EC – Tube or Pipe Fittings*, where the panel determined that the EC and Brazil had discussed the issue of a price undertaking, and the EC had met its duty under Article 15: Report of the Panel, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings form Brazi*, WT/DS219/R, adopted with Appellate Body Report, WT/DS219/AB/R, 18 August 2003.

The WTO panel in *US – Steel Plate* was less forceful in analyzing the duty on the importing developed country under Article 15. In *US – Steel Plate*, US authorities met with India's representatives and told them it was unlikely India's proposal of a suspension agreement (i.e. price undertaking) would be accepted. No written reasons were provided. The panel nevertheless found that the United States had met its Article 15 obligation.[74] While the decision acknowledges a duty on the importing developed country Member, and any assessment will be fact-specific, it could be stronger. The panel accepted US authorities' failure to consider a lesser duty, referring to Article 9.1 of the Anti-Dumping Agreement which encourages but does not require the reduction of duties below the margin of dumping to a level that would still be adequate to remedy the injury. Unfortunately, the panel also noted as a justification that US domestic law does not provide for reductions below the margin of dumping.[75] If domestic legislation were such that it precluded all possibility of constructive remedies, then a Member would be in breach of its Article 15 obligations.

The sustainable development objective should enhance the effectiveness of existing WTO provisions for special and differential treatment in favour of developing countries, with an emphasis on the process of decision-making. The WTO Secretariat was correct to classify many current SDT provisions as mandatory obligations of conduct and of result in its report in 2001.[76] For obligations of conduct such as in GATT Articles XXXVII and XXXVIII and Article 15 of the Anti-Dumping Agreement, it is appropriate to expect that a duty to consult or a duty to negotiate will be enforceable by a WTO panel or the Appellate Body. It is appropriate that Members will have a burden to demonstrate that they have explored alternate remedies before imposing measures on products of a developing country, or that they have taken account of the interests of developing countries and least-developed countries.[77]

Teleological interpretation in accordance with the objective of sustainable development does not add new obligations or rules, but sheds light on the meaning of WTO law, as interpreted following the primary rule of treaty interpretation in Article 31(1) of the Vienna Convention on

[74] Report of the Panel, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, adopted 29 July 2002, para. 7.110. The panel refers to a GATT decision on an earlier anti-dumping provision substantially similar to Article15. In *EEC – Imports of Cotton Yarn from Brazil*, Brazil had offered voluntary export restrictions, but they were rejected because the EEC was not satisfied that they would eliminate the injury from the dumping. The GATT panel determined that the EEC had met its duty to consider the possibility of constructive remedies: GATT Panel Report, *European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil,* ADP/137, adopted by the Committee on Anti-Dumping Practices 30 October 1995, BISD 42S/17, para. 590.

[75] Report of the Panel, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, adopted 29 July 2002, para. 7.116.

[76] WTO Secretariat, Implementation of Special and Differential Treatment provisions in WTO Agreements and Decisions: A Review of Mandatory Special and Differential Treatment Provisions, 21 December 2001, WT/COMTD/W/77/Rev.1/Add.2.

[77] See also Article 10.1 of the Agreement on Sanitary and Phytosanitary Measures; Article 12.2 of the Agreement on Technical Barriers to Trade; and Article IV:3 of the General Agreement on Trade in Services.

the Law of Treaties. The Dispute Settlement Understanding, in Article 12.11, confirms that special and differential treatment is to be made effective in WTO panel decisions. If one of the parties to a dispute is a developing country Member, the panel must "explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment ... which have been raised by the developing country Member in the course of the dispute settlement procedures."[78] In *US – Offset Act*, a WTO panel ruled that Article 12.11gave it jurisdiction to hear argument from India and Indonesia based on Article 15 of the Anti-Dumping Agreement, even though they had not raised this claim in their requests for establishment of the panel. The terms of reference would not normally include the complaint, but the panel ruled that it was a relevant matter raised in the proceedings, and thus covered by Article 12.11.[79]

b. Other public international law

Sustainable development could influence the decisions of WTO panels and the Appellate Body in ways other than through teleological interpretation. Pursuant to Article 3(2) of the Dispute Settlement Understanding (DSU), WTO agreements are to be interpreted in accordance with the customary rules of interpretation in public international law. Article 31(3)(c) of the Vienna Convention on the Law of Treaties states that interpretation is to take account of "any relevant rules of international law applicable in the relations between the parties." This reference to public international law outside the WTO agreements could cover other treaties, international custom and general principles of law.[80] Non-WTO law relating to sustainable development could apply in contexts beyond the interpretation of the existing SDT provisions.

Julia O'Brien has argued that the recognition of common but differentiated responsibilities for developing countries in Article 3(1) of the U.N. Framework Convention on Climate Change could affect WTO disputes over trade measures relating to climate change.[81] If governments decide to place duties on imports to reflect the amount of greenhouse gases produced during their manufacture, O'Brien argues that the duties should not depend on the amount of gases that would have been produced if the goods had been manufactured in the country of import, but

[78] Dispute Settlement Understanding, Article 12.11. See: Report of the Panel, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted with Appellate Body Report, WT/DS90/AB/R, 22 September 1999, para. 5.157 (panel); Report of the Panel, *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/R, adopted with Appellate Body Report, WT/DS308/AB/R, 24 March 2006, para. 8.3 (panel).

[79] Report of the Panel, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted with Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R, 27 January 2003, para. 7.87 (panel). See discussion in Andrew D. Mitchell, *Legal Principles in WTO Disputes*, Cambridge University Press, 2008, at 256 - 259.

[80] Statute of the International Court of Justice, Article 38(1).

[81] Julia O'Brien, "The Equity of Levelling the Playing Field in the Climate Change Context" 43(5) J. World Trade 1093 (2009).

must be lower for goods from developing countries in accordance with the recognition of differentiated responsibility. In this argument, the national treatment rule in GATT Article III would be modified by Article 3(1) of the Climate Change Convention.[82] Article III requires that imports receive treatment that is no less favourable than the treatment given to domestic products. Article 3(1) of the Climate Change Convention would add that the treatment must be assessed in accordance with the expected responsibility of the actual country of production.

The Climate Change Convention may be one of the very few treaties unambiguously available for use in this manner under Article 31(3)(c), since all the Members of the WTO are also party to the Convention. The WTO panel in *EC-Biotech Products* considered that Article 31(3)(c) applies to the use of outside treaties only if all WTO Members are party to both.[83] Some have criticized this view as too restrictive,[84] and unlikely to encourage coherence in the application of international obligations. As well, the panel's interpretation of Article 31(3)(c) is difficult to reconcile with Article 41 of the same Vienna Convention, dealing with modification of multilateral treaties between some but not all of the parties. Article 41 states that such bilateral modification is possible if not prohibited by the multilateral treaty and if the modification is not "incompatible with the effective execution . . . of the treaty as a whole." Assume two states have entered into a modification that meets the requirements of Article 41. If the panel's interpretation of Article 31(3)(c) prevails, would the original multilateral treaty have to be interpreted without reference to the modification? Could a state wanting to escape its obligations under the modification simply choose to ignore them? Article 31(3)(c) deals with approaches to treaty interpretation but cannot be the only method for determining relationships among treaties.

Non-WTO public international law that is a customary rule or a general principle of law does not present the same difficulty for use in interpretation pursuant to Article 31(3)(c), as all WTO Members will be affected by international custom and general principles. General principles can fill gaps left by other rules. They can also have supplementary effect, as in the case of principles calling for due process or good faith implementation of treaty provisions. General principles of

[82] Article XX would similarly be modified to reflect differentiated responsibility of developing countries, should it be argued as justification for a breach of Article III.

[83] WTO Panel Report, *European Communities – Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.70. In *EC-Biotech Products*, the other treaties at issue were the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, whose membership did not include all WTO Members or even all Members party to the dispute.

[84] Benn McGrady, "Fragmentation of International Law or 'Systemic Integration' of Treaty Regimes: *EC-Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties" 42(4) J. World Trade 589 (2008). An approach that would consider only the parties to the particular dispute does not fit easily with the rest of Article 31 or with the definition of "party" in the Convention: "a State which has consented to be bound by the treaty and for which the treaty is in force." See also Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" 54 Int'l & Comp. L. Q. 279 (2005) at 315: "[R]eference may properly be made to other treaties, even if they are not in force between the litigating parties, as evidence of the common understanding of the parties as to the meaning of the term used. . . . In doing so, the tribunal is using other treaties not so much as sources of binding law, but as a rather elaborate law dictionary."

law can assist in the interpretation of WTO provisions.[85] Sustainable development or elements of sustainable development could potentially influence dispute settlement if accepted as international custom or general principles of law.

There is debate over the extent to which WTO panels and the Appellate Body have jurisdiction to consider non-WTO law pursuant to the Dispute Settlement Understanding. Andrew Mitchell notes the usual terms of reference for WTO panels in Article 7 and a panel's duty to assess "applicability of and conformity with the relevant covered agreements," as set out in Article 11. He concludes that non-WTO law applies only if it is reflected in WTO agreements, and not independently.[86] Joost Pauwelyn, on the other hand, argues that WTO panels and the Appellate Body exist within the public international legal order and all of public international law is potentially applicable, unless WTO Members have contracted out of it. Under the Dispute Settlement Understanding, complaints must be based on WTO agreements, but Pauwelyn maintains that the rest of public international law may be raised by responding Members in their defence.[87] He notes that Article 11 gives panels power to make "such other findings as will assist" the Dispute Settlement Body and concludes that other treaties, custom and general principles may all be part of the applicable law, with independent effect.[88]

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[85] Andrew D. Mitchell, *Legal Principles in WTO Disputes*, Cambridge University Press, 2008.

[86] Ibid. at 95-96. Independent use of principles relating to inherent jurisdiction of judicial tribunals would, however, be permitted, in his view: *ibid.* at 97 - 103. See Andrew D. Mitchell, "The Legal Basis for Using Principles in WTO Disputes" 10(4) J. Int'l Econ. L. 795 (2007) at 827 - 833. See further Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R, adopted 24 March 2006, para. 56.

[87] Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" 95 Am. J. Int'l L. 535 (2001); Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003); Joost Pauwelyn, "How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law: Questions of Jurisdiction and Merits" 37(6) J. World Trade 997 (2003).

[88] See also the usual terms of reference for panels in DSU Article 7: ". . . and to make such findings as will assist the DSB." Lorand Bartels starts from the same point as Pauwelyn, but considers that Articles 3.2 and 19.2 of the DSU contain some limits on the use of non-WTO law. Those Articles provide that WTO panels, the Appellate Body and the Dispute Settlement Body (DSB) "cannot add to or diminish the rights and obligations . . . in the covered agreements." Bartels agrees that non-WTO law can be used for interpretation and for filling gaps, but concludes that panels do not have jurisdiction to give an outside rule priority over a WTO provision in case of a conflict (Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings" 35(3) J. World Trade 499 (2001)). The Appellate Body in *Chile –Alcoholic Beverages* considered Articles 3.2 and 19.2, holding that a correct interpretation and application of WTO provisions would not add to or diminish rights and obligations (Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para.79). The dispute dealt with the interpretation of GATT Article III. The Appellate Body's view of Articles 3.2 and 19.2 is not in itself controversial, but it does not address the possibility of non-WTO law applying and taking priority. For Pauwelyn's discussion of possible findings and recommendations in that situation, see Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands" 25 Mich. J. Int'l L. 903 (2003-2004). It could be argued that Articles 3.2 and 19.2 merely confirm that decisions do not have binding effect beyond the particular dispute, but the Appellate Body in *Chile – Alcoholic Beverages* treated the provisions as having a meaning for the dispute in question, and not simply rejecting a *stare decisis* effect in regard to future disputes.

In a given context, it may not be easy to decide whether an outside source is being used for interpretation or for independent effect. In the climate change example suggested by O'Brien, does Article 3(1) of the Climate Change Convention merely assist with interpretation of GATT Article III? Does it add an independent effect? Does it conflict with GATT Article III? Authority is unfavourable so far on the independent use of general principles in WTO disputes. The WTO panel in *EC-Biotech Products*[89] and the Appellate Body in *EC-Beef Hormones*[90] both indicated a willingness to take general principles of law into account, although they were not persuaded that the precautionary approach was established as a general principle of international law, as had been argued in the two disputes. In *EC-Beef Hormones*, the Appellate Body noted that the precautionary principle was reflected in several WTO provisions, and stated that the principle "by itself, and without a clear textual directive to that effect" would not override WTO law. Pauwelyn agrees with the result in the decision, given uncertainty over the legal status of the precautionary principle in international law and its relationship to the provisions at issue. He criticizes the Appellate Body, however, for failing to consider that the principle might operate with independent effect as a defence available beyond the text, if it were legally established.[91]

WTO panels and the Appellate Body are obliged to interpret in favour of development, whatever the meaning of Article 31(3)(c) and whatever the conclusion on the applicability of non-WTO law. In support of this obligation, it is not necessary that special and differential treatment be recognized in public international law as a general principle of law or an international custom. Teleological interpretation pursuant to the primary rule in Article 31(1) of the Vienna Convention does not depend on such recognition. A goal – such as, for example, expanding trade in goods and services – does not need to qualify as a general principle or custom in order to operate as a purpose of the WTO agreements. The Preamble adopts sustainable development as an objective of the World Trade Organization, in favour of protecting the environment and enhancing Members' means of doing so "in a manner consistent with their needs and concerns at different levels of economic development." WTO provisions that contain special and differential treatment for the benefit of developing countries must be interpreted so as to have effect, in light of the stated object and purpose.

[89] WTO Panel Report, *European Communities – Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.86.
[90] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 123 - 124.
[91] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) at 481 - 82.

V. Conclusion

The addition of sustainable development as an objective for the World Trade Organization must be taken seriously in the legal interpretation of WTO agreements. Provisions of special and differential treatment in favour of developing countries are strengthened by the acknowledgement of common but differentiated responsibility as an element of sustainable development. The current jurisprudence of the International Court of Justice on sustainable development emphasizes the effectiveness of procedural obligations such as duties to negotiate, consult and co-operate. Proper interpretation of existing SDT provisions will reinforce such duties as obligations of conduct that can be enforced through WTO dispute settlement. Teleological interpretation will help to meet the Doha mandate of strengthening those existing provisions and making them more "effective and operational."[92]

Differences remain, of course, over whether SDT provisions should be temporary transition periods or more reliable tools of development available for as long as the needs last. In the ongoing negotiations, the current provisions on special and differential treatment should not be under-estimated. Viewed in accordance with a traditional, well-established, teleological approach to legal interpretation, the existing treaty obligations have significant legal force.

[92] Doha Declaration, para.44.