II. THE WTO'S USE OF RELEVANT RULES OF INTERNATIONAL LAW: AN ANALYSIS OF THE *BIOTECH* CASE

A. Introduction

The relationship between trade and other areas of international law is highly contested. Some observers suggest that the enforceability of World Trade Organization (WTO) obligations should be harnessed to further other goals such as environmental protection or human rights. Others argue that imposing conditions of this kind can allow protectionist States to subvert their agreed trade commitments. Still others respond that the kind of 'self-contained regime' that is necessary to keep 'non-trade' issues outside of the WTO is antithetical to the idea of an 'international legal system'. This debate has been played out in many locations. The International Law Commission, for example, recently emphasized the systemic nature of international law, in which fragmented norms are resolvable through treaty interpretation and other rules.[1]

In *EC–Measures Affecting the Approval and Marketing of Biotech Products* a WTO Panel had to determine whether and how it could take into account sources of international law extrinsic to the WTO covered agreements.[2] The dispute was brought by the United States, Canada and Argentina about the WTO consistency of the EC's importation of genetically modified (GM) products. The policy issues arising from 'GM' (or 'biotechnology', as the complaining parties preferred to call it)[3] have been considered in many international fora, including under the auspices of multilateral environmental agreements (MEAs) like the *Cartagena Protocol on Biosafety*[4] (Biosafety Protocol) and in standard-setting bodies like the Codex Alimentarius and in international organizations like the Food and Agricultural Organization (FAO). One issue for the Panel, then, was how to take account of this international legal context in resolving the dispute. This issue was made more difficult because some of the disputing parties were not parties to the treaties that formed this international context—the EC, for example, was the only disputing party that had signed and ratified the Biosafety Protocol. Varying degrees of State consent therefore accompanied the relevant norms.

The Panel responded by distinguishing strictly between binding applicable law and non-binding 'informative' law that could be taken into account in interpreting the relevant WTO agreements.[5] In doing so, the Panel construed Article 31(1) and Article

[1] Report of the Study Group of the International Law Commission as finalized by the Chairman, M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' ILC, UN Doc, A/CN.4/L.682 and Corr.1 and Add. 1 (13 Apr 2006). The UN General Assembly took note of the conclusions of the Commission's Study Group, together with the analytical study finalized by the Chairman, on 4 December 2006: see UN Doc A/Res/61/34.

[2] Panel Report WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 Sept 2006 (*Biotech*).

[3] The *Biotech* panel used the terms 'biotech products', 'GMOs', 'GM plants', 'GM crops' or 'GM products' interchangeably: see paras 7.1–7.2. I have adopted the same approach, although 'biotech' is both a wider term and one which potentially obfuscates the issues by removing the politically charged language of 'GM' from the face of opinion.

[4] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) 39 ILM 1027. At the time of the EC's written submissions, there were 103 signatories: *Biotech* (n 2) para 4.340. The Protocol entered into force on 11 September 2003 and there are currently 141 parties: see <http://www.cbd.int/biosafety/signinglist.shtml> (last accessed 20 July 2007).

[5] *Biotech* (n 2) paras 7.92–7.94.

[*ICLQ* vol 56, October 2007 pp 907–930] doi: 10.1093/iclq/lei207

31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[6] in a novel way and, with the consent of the disputing parties, consulted other international organizations. The result was that some politically contentious international treaties and norms—including the Biosafety Protocol and the precautionary principle[7]—were left out of the report, while various rules and guidelines from standard-setting organizations such as the Codex Alimentarius were taken into account. The Panel's use of these international rules and guidelines is easy to miss for those who limit their reading of the Panel's 1,000+-page report to the 15 pages headed 'Relevance of other rules of international law to the interpretation of the WTO agreements at issue in this dispute';[8] in fact these non-WTO sources were crucial to the Panel's analysis of the applicability of the relevant WTO covered agreements.

In this note, I explain and evaluate the reasoning of the *Biotech* panel as it relates to the use of international law norms extrinsic to the WTO.[9] First, I describe the Panel's jurisdiction and its conception of the applicable law. Secondly, I turn to the Panel's interpretation of the WTO obligations according to the rules enshrined in the VCLT. In this section, I explain the controversy over the Panel's interpretation of VCLT Article 31(3)(c). The Panel found that for treaties to be relevant rules of international law applicable between 'the parties', their members must be identical to or broader than the WTO, thus attracting criticism of under-inclusiveness. Next, I assess the Panel's use of non-WTO sources as informing the 'ordinary meaning' of WTO treaty terms pursuant to VCLT Article 31(1). In taking this 'informative' law into account, the Panel did not require it to be binding between the disputing parties or the WTO members. Although some would welcome this loosening of the requirement of State consent, I claim that this method of treaty interpretation leads to 'over-inclusiveness'. To this end, I point to examples from the Panel's report where the Panel's incorporation of non-WTO sources appears indiscriminate and arbitrary. Thirdly, I consider how the Panel used its broad consultative powers to obtain information from international organizations. The Panel linked this consultation with its quest to interpret the 'ordinary meaning' of treaty terms. Again, the Panel did not inquire into the levels of membership of the disputing parties or the WTO Members in the international organizations with which it consulted. It did, however, closely involve the disputing parties in this consultative process so that their intentions remained relevant to establishing an interpretative context of the WTO treaty terms.

Underlying my critique of *Biotech*'s use of relevant rules of international law is the need for visibility of certain assumptions about the 'international system' of international law. The Panel's interpretation of VCLT Article 31(3)(c) was founded on the need to establish the consent of the constituent members of an international regime as to its relevant interpretative context. This interpretation follows classic conceptions of sovereignty and establishes State consent as the 'entrance condition' for relevant rules

[6] Vienna Convention on the Law of Treaties (1969) 8 ILM 679. There are currently 108 parties, many but not all of whom are members of the WTO. See further below n 42.

[7] That these treaties and norms are contentious for WTO Members is evidenced by the current negotiations on the relationship between existing WTO rules and multilateral environmental agreements (MEAs): see para 31(i) of the Doha Declaration, Doha Agenda Ministerial WT/MIN(01)/DEC/1, 20 Nov 2001 (2002) 41 ILM 746.

[8] ibid paras 7.49–7.96.

[9] My use of the word 'extrinsic' (and, later, 'non-WTO law' and 'non-WTO sources') is not intended to confirm the Panel's starting assumptions about sources.

of international law to be taken into account in dispute settlement. The Panel's construction of Article 31(1) was based on a different foundation, namely whether an international text could contribute to finding the 'ordinary meaning' of a treaty term without regard to whether the disputing parties or WTO members had agreed to it.[10] If such consensus gives rise to an 'entrance condition' for norms in international dispute settlement, I argue that it is important to have regard to the types of judicial and institutional tools that are currently available for establishing it.

B. The Biotech *Case*

In this section, I provide a brief overview of the case and analyse the Panel's conception of the applicable law between the disputing parties, which it found not to include sources external to the WTO covered agreements.

1. Overview

In 2003, the United States, Canada, and Argentina filed a claim at the WTO relating to their attempts to import genetically modified agricultural products into the EC.[11] The complaints covered three general categories of measures that affected the approval and marketing of biotech products:[12]

- an alleged moratorium by the EC on approvals of biotech products;
- various EC measures affecting the approval of specific biotech products such as genetically modified maize ('product-specific measures'); and
- various domestic 'safeguard measures' prohibiting the import and/or marketing of specific biotech products adopted by particular EC Member States, viz, Austria, France, Germany, Greece, Italy and Luxembourg.

The dispute was one of the most complex and wide-ranging in the WTO's 10-year history. It took three years for the Panel to resolve and the resulting report amounted to over 1000 pages. In addition to the multiple submissions of the four disputing parties, there were third-party submissions from Australia, Chile, China, New Zealand, and Norway and three sets of amicus briefs from a group of university professors and two groups of NGOs. The Panel also obtained written and oral evidence from international organizations and scientific experts.

The complaining parties based their claims on three WTO covered agreements: the Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement), the

[10] ibid para 7.94: 'the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted.'

[11] The EC legal instruments of primary relevance were those which were in force on or before the date of the establishment of the Panel on 29 August 2003, namely Directive 90/220 on the deliberate release into the environment of genetically modified organisms ([1990] OJ L117/15) (repealed 17 Oct 2002); Directive 2001/19 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220 ([2001] OJ L106/1) and Regulation 258/97 concerning novel foods and novel food ingredients ([1997] OJ L43/1): see *Biotech* (n 2) para 7.106.

[12] See ibid para 7.98.

https://doi.org/10.1093/iclq/lei207 Published online by Cambridge University Press

Agreement on Technical Barriers to Trade (the TBT Agreement) and the General Agreements on Tariffs and Trade (GATT). The SPS Agreement—which contains more onerous disciplines on import restrictions than the other two—requires countries to undertake detailed risk assessments to justify as scientifically necessary import bans or other trade measures. One of the core issues of the case was thus the Panel's interpretation of the SPS Agreement to determine its applicability to the measures in dispute vis-à-vis the other two agreements. The Panel's jurisdiction to rule on these violations was not disputed by the EC, although it did request a preliminary ruling on the breadth of the parties' claims.[13]

In its defence, the EC claimed that three rules of international environmental law were relevant to the dispute and should be used by the Panel as interpretative tools according to the customary norms of treaty interpretation.[14] First, the precautionary principle, which provides that lack of full scientific certainty should not be used as a reason to postpone or avoid measures to minimize novel and unproven risks of serious or irreversible harm, was said by the EC to be a general principle of law. Secondly, the Convention on Biological Diversity (CBD),[15] which includes inter alia a recognition of the precautionary principle in its Preamble. Of the disputing parties, the EC, Argentina and Canada were bound by the CBD, while the US had signed but not ratified it. Thirdly, the EC invoked the Biosafety Protocol, which lays down requirements for the transboundary movement of 'living modified organisms'.[16] It had been ratified by the EC but only Argentina and Canada had signed it and the US had no involvement with it except for participation in the 'Biosafety Clearing-House' information-sharing mechanism. After a request by the Panel, the EC provided a list of provisions from these MEAs that it considered to be necessary for the Panel to take into account.[17] In addition to these principles of international environmental law relied on by the EC, there was a large body of other international law invoked variously by all of the disputing parties in their submissions. This included treaties and soft law instruments that formed the legal framework of international health and safety protection such as Codex guidelines and FAO studies. I shall show in the next section that these materials were to become very relevant to the Panel's controversial task of interpreting Annex A of the SPS Agreement.[18]

The Panel released a confidential interim report to the disputing parties in May 2006 (which was apparently improperly disclosed to the public by one of them)[19] and

[13] ibid para 4.38.

[14] The WTO covered agreements are to be clarified 'in accordance with customary rules of interpretation of public international law': DSU Art 3.2.

[15] Convention on Biological Diversity (1992) 31 ILM 818. There are currently 190 parties: see <http://www.cbd.int/convention/parties/list.shtml> (last accessed 20 July 2007).

[16] See Biosafety Protocol, Art 3(g): '"Living modified organism" means any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.'

[17] *Biotech* (n 2) para 7.95, see footnote 274: 'The European Communities refers to the Preamble and Article 8(g) of the *CBD* and Articles 1, 8, 10, 11, 15, 23, 26 and Annex III of the *Biosafety* Protocol.'

[18] SPS Agreement Annex A is reproduced below, n 40.

[19] The source of the leak was not identified. Each party stated that they had no involvement with the leak and noted their concerns about it. The interim report was subsequently published on the websites of some of the NGOs that had submitted amici in the proceedings. See further *Biotech* (n 2) paras 6.183–6.196. China, as one of the third parties to the proceedings, was particularly concerned to bring this leak to the attention of the WTO membership: see Minutes of

published its final public report in September 2006. It found that the relevant legal instruments constituting the EC's approval regime at the time of the establishment of the panel were SPS Measures within the meaning of Annex A of the SPS Agreement.[20] It also found that the EC had operated a de facto moratorium on the approval of biotech products.[21] Although this de facto moratorium was not itself a SPS Measure,[22] the Panel found that it constituted 'undue delay' and thus violated certain procedural requirements of the SPS Agreement.[23] Similar findings were made with respect to the product-specific measures; 24 out of the 27 challenged approval procedures were said to have been unduly delayed.[24] In addition, the Panel found that the Member State 'safeguard measures' fell within the definition of 'SPS Measures' in Annex A of the SPS Agreement[25] and that there was a failure to conduct appropriate risk assessments before the imposition of these measures, in violation of the SPS Agreement.[26] It found, too, that having disposed of the claims under the SPS Agreement it was not required to assess the complaints under the TBT Agreement or the GATT.[27] The Panel report was adopted by the WTO Dispute Settlement Body in November 2006.[28] The EC did not appeal the decision because although it disagreed with some aspects of the findings, it considered that much of the Panel report had become theoretical because its approvals regime had been functioning normally and some 10 GM products had been authorized since the Panel's establishment. [29]

2. Applicable law

Before assessing the Panel's use of non-WTO sources as interpretative tools, it is important to note that the EC did *not* claim that the rules of international law enshrined in the precautionary principle, the CBD and the Biosafety Protocol should be directly applied

Meeting of the WTO Dispute Settlement Body of 21 November 2006, WT/DSB/M/222 (12 Jan 2007) para 74.

[20] The Panel found that the form, nature, and purpose of Directives 90/220 and 2001/18 as well as Regulation 258/97 (to the extent that that Regulation sought to prevent novel foods from being a danger to the consumer) constituted 'SPS measures' within the meaning of Annex A(1) of the SPS Agreement: see *Biotech* (n 2) paras 7.147–7.437, especially para 7.432.

[21] ibid, paras 7.438–7.1627, especially para 7.1272.

[22] ibid, para 7.1383. The complaining parties thus failed to establish that the moratorium breached Arts 5.1, 5.6 and 2.2 of the SPS Agreement.

[23] The relevant obligations were in Annex C(1)(a) and, consequently, Art 8 of the SPS Agreement: see 7.1567–7.1568. The complaining parties' claims under Arts 2.2, 2.3, 5.1, 5.5, 5.6, 7, and 10.1 and Annex B(1) and Annex C(1)(b) were rejected.

[24] See *Biotech* (n 2) paras 7.1628–7.2528. The EC was found to have failed to complete the relevant approval without undue delay and hence had breached its obligations under Annex C(1)(a), first clause, and Art 8 of the SPS Agreement: see summary, paras 7.2390–2391. For more detail see, eg, the approval procedure for Falcon oilseed rape: para 7.1813. The complaining parties' claims under 2.2, 2.3, 5.1, 5.5, 5.6, 7, Annex B(1), Annex C(1)(b), (c) and (e) of the SPS Agreement were rejected.

[25] See *Biotech* (n 2) paras 7.2545–7.2922.

[26] The relevant obligations were in Arts 5.1 and, by implication, the second and third requirements of Art 2.2 of the SPS Agreement: see generally paras 7.3008–7.3399. The Panel exercised judicial economy on Arts 2.3, 5.5 and 5.6 of the SPS Agreement.

[27] See, for the safeguard measures, *Biotech* (n 2) paras 7.3407–7.3430.

[28] Minutes of Meeting of the WTO Dispute Settlement Body of 21 November 2006, WT/DSB/M/222 (12 Jan 2007).

[29] ibid para 73.

by the Panel.[30] The issue of applicable law is not straightforward at the WTO. In one reading of the WTO's Dispute Settlement Understanding, WTO panels may apply all law applicable between the parties, including from sources outside the WTO.[31] In another view, WTO panels are restricted to applying WTO law.[32] According to the former view, if a dispute arises at the WTO between WTO members who are also parties to the Biosafety Protocol, the Biosafety Protocol can be raised as a defence.[33]

Although the complaining parties were aware of the possible relevance of this issue to the dispute,[34] the EC preferred to shape its arguments according to the Appellate Body's approach in *US–Shrimp*.[35] In that case, international environmental treaties that were not binding on the disputing parties featured heavily in the Appellate Body's report, but as aids to interpretation rather than as applicable law. According to this framing of the case, the Panel in *Biotech* did not need to address the issue of whether non-WTO law could be applied by a WTO dispute settlement body as 'applicable law between the disputing parties' in defending an alleged WTO violation. It made an oblique reference to this issue, however, when it stated: [36]

[30] See, eg, *Biotech* Annex D, D-91, para 18 with respect to the CBD and Biosafety Protocol: 'The European Communities is not inviting the panel to "apply" these instruments as such, but rather to ensure that the WTO rules are interpreted consistently with them.'

[31] See Panel Report, *Korea–Measures Affecting Government Procurement*, WT/DS/163/R (1 May 2000) para 7.96 with respect to customary international law: 'Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.' See further D Palmeter and PC Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 AJIL 398, 409; L Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) J of World Trade 499; J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge, 2003) 460 and the Report of the ILC Study Group as finalized by Koskenniemi (n 1) para 169. For the use 'applicable law' in international disputes more generally, C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279 and references therein.

[32] See, eg, G Marceau, 'Conflict of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 J of World Trade 1081, 1116 ('the applicable law before WTO adjudicating bodies is only WTO law').

[33] I make no claim about whether the Biosafety Protocol would provide a defence to WTO obligations if applied by a WTO Panel. In this regard, see S Safrin, 'Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements' (2002) 96 AJIL 606, who claims that the Protocol is compatible with the WTO regime. By contrast, if WTO and Biosafety Protocol obligations were found to conflict, these might be resolved in favour of the Protocol due to its status as *lex specialis* or, indeed, the application of another rule of recognition. For further discussion of the *lex specialis* rule, see Report of the ILC Study Group as finalized by Koskenniemi (n 1) paras 46–422.

[34] The US, for example, referred to the Panel's terms of reference under Art 7.1 of the DSU which are to examine the matter at issue 'in light of the relevant provisions … in the covered agreements cited by the parties to the dispute': *Biotech* (n 2) para 7.56. Some commentators have considered this clause to restrict the applicable law of a panel to WTO sources: see, eg, Marceau (n 27); *contra* Pauwelyn (n 26) 466–70 and references therein. Canada submitted that the only binding international law instrument relevant to the case was the International Plant Protection Convention.

[35] Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, adopted 6 Nov 1998, DSR 1998: VII, 2755.

[36] *Biotech* (n 2) para 7.72.

> it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.

This cited paragraph can be read in two ways. It appears in the context of the Panel's ruling on treaty interpretation under VCLT Article 31(3)(c),[37] and may be read as obiter dicta that opens up the possibility that all parties to a dispute can agree that a Panel ought to take certain non-WTO sources into account. Alternatively, it may be read as eliding the issues of applicable law and interpretation.[38] In this second reading, the Panel is contesting whether sources of non-WTO law might be considered as applicable law in a dispute at the WTO. The implications of this position are important for future WTO cases involving conflicting norms but also for the current dispute. Although uncontroversial with respect to the Biosafety Protocol, given that the EC was the only disputing party bound by it, it becomes more problematic when one considers the international legal obligations under the CBD, to which three of the disputing parties were parties, and the precautionary principle, which as a general principle of law would have applied to all the disputing parties.

The cited paragraph also calls into question the Panel's approach of merging the complaints into one proceeding. As each set of parties had different legal obligations, it would have been better to separate their legal claims and defences. Although this could have led to different outcomes for the different disputing parties (where, for example, the EC's obligations to the US might have been found to be different from its obligations to Canada, if Canada and the EC's applicable rights and obligations under the CBD were taken into account), this could have been the right result given the different substantive obligations assumed by them.[39]

C. Taking Account of Relevant Rules through Treaty Interpretation

As noted above, the complaining parties based their claims on three WTO covered agreements: the SPS Agreement, the TBT Agreement and the GATT. Annex A of the SPS Agreement provides a long and detailed definition of the types of government

[37] The Panel had already given its interpretation of 'the parties' in VCLT Art 31(3)(c), paras 7.68–7.70: see further my Part C below.

[38] The issues of applicable law and interpretation are interrelated but distinct: see Report of the ILC Study Group as finalized by Koskenniemi (n 1) para 423. For recent judicial consideration of the relationship between applicable law and interpretation, see *Case Concerning Oil Platforms (Iran v United States of America)* (2003) 42 ILM 1334. In this case, the jurisdiction of the ICJ was limited by the clause of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. The question was how far the Court could rely on customary norms in interpreting the terms of that treaty, a clause of which allowed the parties to use measures 'necessary to protect its security interests'. The Court used VCLT Art 31(3)(c) to interpret the phrase in accordance with the law on the use of force by reference to the provisions of the UN Charter and customary international law: see p 1352. Judge Higgins disagreed with the approach of the majority: see esp pp 1386–7 ('[The Court] has rather invoked the concept of treaty interpretation to displace the applicable law').

[39] Note also the possible relevance of VCLT Art 30 or Art 41. These conflict rules were considered by the ILC in the context of its work on fragmentation: see further Report of the ILC Study Group as finalized by Koskenniemi (n 1) paras 251–66; 295–319.

measures that fall within the disciplines of the SPS Agreement.[40] The meaning of Annex A was therefore central in determining the applicability of the more onerous disciplines of the SPS Agreement vis-à-vis the TBT Agreement and the GATT. Terms like 'pests', 'diseases' and 'toxins' were hotly contested in the parties' submissions as to whether the EC approval regime and the safeguard measures to protect against risks posed by biotechnology were 'SPS measures'. The meaning of other WTO treaty terms such as 'likeness' (ie whether GM and non-GM were 'like products'), 'risk assessment' (whether the EC procedures satisfied the relevant risk assessment requirements) and 'undue delay' (in assessing the time taken by the EC to approve biotech products) were also contested by the parties.

To determine whether relevant rules of international law could assist in the interpretation of these treaty terms, the Panel had to follow customary norms of treaty interpretation,[41] which are codified, at least in part, by the VCLT.[42] The Panel separated its task of treaty interpretation into two stages. The first stage, isolated early in the report and delivered in the 15 pages mentioned above,[43] related to the use of Article 31(1) and 31(3)(c) of the VCLT in determining whether the CBD, Biosafety Protocol and precautionary principle were relevant to this dispute. The second stage was the Panel's substantive interpretation of Annex A of the SPS Agreement, which it undertook using a wide variety of interpretative techniques and extrinsic sources of international law, ostensibly in ascertaining the 'ordinary meaning' of treaty terms according to VCLT Article 31(1). In my view, the Panel separated its reasoning in this way because of sensitivities relating to the WTO's treatment of international environmental law, an issue of enduring political disagreement.[44]

1. VCLT Article 31(3)(c) and 'the parties'

VCLT Article 31(3)(c) allows a treaty-interpreter to take into account 'relevant rules of international law applicable in the relations between the parties'. The Panel agreed that 'rules of international law' could encompass treaties, customary international law and, drawing on *US–Shrimp,* general principles of law. As such, it agreed that a treaty like the Biosafety Protocol would qualify as a rule of international law. So too the precau-

[40] Annex A:1 of the SPS Agreement reads: '1. *Sanitary or phytosanitary measure*—Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests'.

[41] DSU Art 3.2 (n 14).

[42] The Appellate Body has considered VCLT Arts 31 and 32 to have each attained the status of rules of customary or general international law: see, respectively, *United States–Standards for Reformulated and Conventional Gasoline (US Gasoline),* WT/DS2/AB/R (20 May 1996) 15–16; *Japan–Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 Oct 1996) 9.

[43] See n 8.

[44] The relationship between MEAs and the WTO are subject in the proviso that the negotiations will not affect WTO Members who are not parties to the relevant MEAs: see Doha Declaration (n 7).

tionary principle, if established as a general principle of law. The sticking point was, however, the need for such rules to be 'applicable in the relations between the parties'. The Panel ruled that 'the parties' meant all the parties to the WTO, rather than 'the disputing parties' or 'one or more parties'.[45] It found:

> This understanding of the term 'the parties' leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members.[46]

The Panel then pointed to the evidence that the CBD and Biosafety Protocol did *not* have the same coverage of members as the WTO covered agreements; in particular, the fact that the US had not ratified either.[47] Moreover, after reviewing recent cases and commentary on the precautionary principle, including the Appellate Body's refusal to take a position on its status as a principle of general or customary international law in the 1998 *EC–Hormones* decision,[48] the Panel declined to rule on whether the precautionary principle could constitute a relevant rule of international law according to Article 31(3)(c). The Panel thus disposed of the need to take into account any relevant rules of international law according to VCLT Article 31(3)(c).

The terms of the VCLT lend compelling support to the Panel's finding that relevant rules must be applicable to *all* the parties to the treaty being interpreted. VCLT Article 2, for example, defines 'party' as 'a state which has consented to be bound by the treaty and for which the treaty is in force'. In addition, the VCLT is intended to be applied generally as well as to disputes.[49] Moreover, if one considers the WTO covered agreements to represent a 'package deal' which is not subject to reservation, it would follow that the treaties cannot mean different things for different parties. As such, 'consent' of the entire WTO membership is a necessary 'entrance condition' for treaties that are to be relevant as interpretative tools. However, the Panel's approach to Article 31(3)(c) departed from the bulk of the submissions to it. The complaining parties had proceeded on the basis that 'the parties' meant 'the disputing parties',[50] although Canada later amended its approach.[51] The only third party to make a submission on this matter also focused on the disputing parties.[52] This understanding of 'the parties' as parties 'to the dispute' has also been advanced by several commentators.[53]

One of the main reasons to prefer a reading of Article 31(3)(c) as referring to 'the disputing parties' is because the alternative interpretation renders it ineffective.[54] The

[45] *Biotech* (n 2) para 7.68.

[46] ibid.

[47] *ibid,* paras 7.74–7.75.

[48] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 Feb 1998, DSR 1998:I, 135.

[49] McLachlan (n 31) para 16. This point was made by the Panel, which noted that Article 31 did not purport to lay down rules of interpretation 'which are applicable solely in the context of international (quasi-)judicial proceedings'. The Panel contrasted this with VCLT Article 66, which deals with procedures for judicial settlement, arbitration and conciliation and makes reference to 'the parties to a dispute': see *Biotech* (n 2) para 7.68, footnote 241.

[50] Second Written Submission of the United States at *Biotech* (n 2) para 4.543; Second Written Submission of Canada at *Biotech* (n 2) para 4.600; Second Written Submission of Argentina at *Biotech* (n 2) para 4.688.

[51] *Biotech* (n 2) para 7.60.

[52] Third Party Oral Statement of Australia, ibid para 5.12.

[53] Palmeter and Mavroidis (n 31) 411. This is also implicit in Marceau (n 32) 1087.

[54] The principle of effective interpretation was considered by the ILC to be implicit in the

Panel's conception that treaties must be applicable to all WTO Members requires parallels in treaty membership that are mostly unrealistic, especially when the treaty under interpretation extends to non-State actors, as does the WTO.[55] In addition, express inter se modification of WTO obligations by only some of the parties is permitted under the VCLT.[56] On this basis, some argue that recourse to such inter se agreements in the interpretation of the relevant WTO agreement should not be excluded by a restrictive reading of Article 31(3)(c).[57] Moreover, for those concerned about the 'systemic integration' of international law, the requirement that relevant rules of international law need to be 'applicable in relations between WTO Members' in order to qualify under Article 31(3)(c) will result in the 'isolation' of multilateral agreements as 'islands' and be contrary to the intent of treaty-makers.[58]

It was on this basis that the ILC Study Group, commenting on the interim report in *Biotech,* was so critical of the case.[59] The Study Group preferred an approach that emphasized the treaty membership of the disputing parties.[60] The risks of divergent interpretations would be mitigated, according to the Study Group, in two ways. First, the treaty-interpreter would differentiate between 'synallagmatic'[61] treaties that created merely reciprocal obligations between treaty pairs and treaties that were more 'interdependent' or 'collective', which created obligations owed *erga omnes partes*. For the former type, divergence in treaty interpretation for sets of disputing parties would be unproblematic. For the latter type, however, the coherence of the treaty would need to be protected by restricting the use of other treaties in interpreting its terms.[62] Secondly, the Study Group considered that a treaty-interpreter should take into account the extent to which another relevant treaty could be said to have been 'implicitly' accepted or tolerated by other parties, notwithstanding non-identical membership.[63] The final conclusions of the ILC Study Group reflected this second qualification.[64] The ILC

doctrine of interpretation of good faith in accordance with the ordinary meaning of the text, and was therefore not given separate expression in the VCLT: see [1996] Ybk of the International Law Commission Vol II, p 219, para 6. For further references to the Appellate Body's application of the principle, see *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products,* WT/DS98/AB/R, p 24.

[55] The 'parties to the WTO Agreement' include customs territories, which are simply unable to be parties to treaties like the CBD, thus rendering Art 31(3)(c) inutile if it can only be applied to treaties of identical membership. Of course, interpreting the VCLT in the light of the (different) parties to the WTO might be taking an evolutionary approach to interpretation too far.

[56] VCLT Art 41. See also VCLT Art 30 and 59.

[57] L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction' (2002) 36 J of World Trade 353, 360–1. Bartels considers that, unlike the EC, the WTO system is founded on regulatory diversity and does not call for the uniform interpretation of WTO rules: ibid.

[58] Report of the ILC Study Group as finalized by Koskenniemi (n 1) para 471.

[59] ibid para 450: 'The panel buys what it calls the "consistency" of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole.'

[60] ibid para 472: 'A better solution [for the use of treaties under VCLT Article 31(3)(c)] is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty.'

[61] ibid.

[62] See Pauwelyn (n 31) 440–86; and Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature' (2003) 14 EJIL 907; and, more recently, C Carmody, 'WTO Obligations as Collective' (2006) 17 EJIL 419.

[63] The Study Group considered the Appellate Body Report in *US–Shrimp* to be demonstrative of this approach.

[64] The Study Group's conclusions were published in a separate document from the Report: see Conclusions of the Work of the Study Group, A/CN.4/L.702 (18 July 2006).

Conclusion (21) suggests that the probative value of a treaty increases according to the degree to which it has been affirmed by States. [65]

Article 31(3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of *particular relevance* where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

On one reading at least, ILC Conclusion (21) appears to endorse a spectrum of 'international consensus' that departs from basing VCLT Article 31(3)(c) on binary questions of consent and non-consent. If conceived to mean that total unanimity of the WTO membership is not required for an extrinsic treaty to be agreed as relevant interpretative context, ILC Conclusion (21) accords, to some degree, with certain institutional provisions in the WTO covered agreements. For example, revisions of the WTO Agreement allow three-quarters of the total WTO membership to adopt binding interpretations.[66] The spectrum of consensus is also implicit in some cases. For example, the European Court of Justice looked to a non-binding international treaty in construing the EC treaty in an early waste treatment case.[67]

ILC Conclusion (21) may be read, instead, as emphasizing the need for 'implicit' agreement of treaty terms. A similar approach was followed by an arbitrator in the OSPAR arbitration between Ireland and the UK.[68] Gavan Griffith QC, in dissent, drew on the Aarhus Convention,[69] which was not binding between the disputing parties, in interpreting the relevant obligations of the parties under the OSPAR Convention.[70] Griffith based his approach on the value of the Aarhus Convention as evidence of the OSPAR parties' intentions, made manifest by the fact that the disputing parties were at least signatories to the Aarhus Convention.[71]

This emphasis on implicit agreement as a necessary ingredient to the use of non-WTO sources under Article 31(3)(c) is also supported by other parts of the general rule on interpretation. VCLT Article 31(3)(b) recognizes the use by treaty interpreters of the subsequent practice of treaty parties as an interpretative tool.[72] Some authors have

[65] ibid 15, para (21).

[66] Interpretations of the WTO Agreement can be adopted by the Ministerial Conference and the General Council: Marakkesh Agreement Establishing the WTO, Art IX(2. See also the fact that international standards can become binding on WTO members even if they are not agreed by consensus: this is dealt with below, n 153, and surrounding text.

[67] Case C–2/90 *Commission v Belgium* (9 July 1992) para 35. The Court took account of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal. The Convention was not in force at the time of the judgment and the Community was only a signatory.

[68] Permanent Court of Arbitration: Dispute Concerning Access to Information under Art 9 of the OSPAR Convention: *Ireland v United Kingdom*—Final Award (2 July 2003) (2003) 42 ILM 1118.

[69] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998) (1999) 38 ILM 517.

[70] Convention for the Protection of the Marine Environment of the North-East Atlantic (22 Sept 1992) (1992) 32 ILM 1069.

[71] Griffith drew on rules of interpretation independent of the VCLT: see *Ireland v United Kingdom—Final Award* (2 July 2003) (2003) 42 ILM 1118, 1163.

[72] VCLT Art 31(3)(b) provides that subsequent practice may be taken into account in interpreting a treaty if the practice has established 'the agreement of the parties regarding its interpretation'.

suggested that such subsequent practice may be probative even if it is only evidenced by individual parties.[73] For the Appellate Body, the 'implied' agreement of all of the WTO Members is necessary to establish subsequent practice, even if the practice has not been engaged in by all parties.[74]

The *Biotech* Panel did not entertain notions of "consensus spectrums" or "implicit agreement" in its reading of VCLT Article 31(3)(c),[75] as set out above. However, perhaps in recognition of the tension between the apparent doctrinal correctness of its interpretation of "the parties" and its restrictive effects, and also because it was still to reconcile the Appellate Body's decision in *US–Shrimp*, the Panel went on to consider an alternative aspect of the VCLT rule of interpretation, namely Article 31(1).

2. VCLT Article 31(1) and 'Ordinary Meaning'

In considering an alternative basis to Article 31(3)(c) for the consideration of non-WTO law in interpreting the covered agreements, the Panel turned to VCLT Article 31(1).[76] The Panel considered that Article 31(1) allowed for the use of rules of international law that were not binding on the parties where those rules provided evidence of the 'ordinary meaning' of the treaty terms and were thus 'informative'.[77] Extending the well-known reliance by WTO panels on language dictionaries in finding the 'ordinary meaning' of terms,[78] the Panel thus incorporated international law instruments as sources of linguistic guidance. The Panel considered that this approach would not 'mandate' a consideration of relevant rules of international law, as compared with Article 31(3)(c).[79] However, if a rule of international law could 'shed light on the meaning and scope of a treaty term to be interpreted', a Panel may have regard to it.[80] The Panel found its approach to be consistent with the Appellate Body's use of relevant rules of international law that were not binding on all parties in *US–Shrimp* and declared: 'the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted'.[81] The Panel stated that it had given careful

[73] Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford, 2003) 605.

[74] Appellate Body Report, *European Communities–Customs Classification of Frozen Boneless Chicken Cuts,* WT/DS269/AB/R, WT/DS286/AB/R (27 Sept 2005) para 273.

[75] The *Biotech* Panel considered this construction of Art 31(3)(b) to be supportive of its interpretation of Art 31(3)(c): see *Biotech* (n 2) para 7.68, note 243.

[76] VCLT Art 31(1) provides: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[77] *Biotech* (n 2) para 7.92.

[78] The use by WTO dispute settlement bodies of dictionaries has been criticized as an overtextual approach: see H Horn and JHH Weiler, 'European Communities—Trade Description of Sardines: Textualism and its Discontent' in H Horn and PC Mavroidis (eds) *The WTO Case Law of 2002* (CUP, Cambridge, 2003) 248. The Appellate Body has nodded towards the limitations of dictionaries: see, eg, *Canada—Measures Affecting Export of Civilian Aircraft*, WT/DS70/AB/R para 153: 'Clearly, however, dictionary meanings leave many interpretative questions open.'

[79] ibid, cf para 7.69.

[80] ibid, para 7.95.

[81] ibid, para 7.92. The Panel continued in a footnote: 'Equally, in a case where all disputing parties are parties to a convention, this fact would not necessarily render reliance on that convention appropriate.' This is presumably a further example of the Panel's reticence to frame the problem in terms of applicable law, discussed above (n 36) and surrounding text.

consideration to various provisions of the CBD and the Biosafety Protocol on this basis. It concluded that it did not find it 'necessary or appropriate to rely on these particular provisions in interpreting the WTO agreements at issue in this dispute'.[82]

Materials that *did* assist the Panel in interpreting certain terms of Annex A of the SPS Agreement, in accordance with VCLT Article 31(1), were said to be reference materials provided to it by several international organizations, namely Codex, FAO, the IPPC Secretariat, WHO, OIE, the CBD Secretariat and UNEP.[83] These materials included conventions, standards and guidelines of these international organizations, in addition to glossaries and reference works.[84] The Panel had consulted with these international organizations during the course of the dispute.[85] It was this body of materials that informed the Panel in its far-reaching interpretation of Annex A of the SPS Agreement, which formed the bulk of its reasoning on the applicability of the SPS Agreement to this dispute.

The Panel's approach to VCLT Article 31(1) is logically attractive given that 'ordinary meaning' is not a matter of consent, but rather of intersubjectivity. Meaning in language is not dependent on the consent of participants, but rather develops according to social practices within a community. Given the implied reliance on the concept of an international community, the Panel's approach may seem appealing to those who call for the systemic integration of international norms.[86] It negates the need to establish the consent of treaty parties when taking into account other treaties that, notwithstanding dissimilar treaty membership from the treaty being interpreted, are representative of 'ordinary meaning'. Of relevance is not whether WTO members have ratified the relevant rule, but whether it is 'informative' by dint of its representativeness of ordinary meaning within the international community, or, at least, to the treaty-interpreter. The following section will examine this notion of 'informative' rules and analyse the Panel's use of them. But first it is important to ascertain the doctrinal basis for the Panel's approach.

(a) Doctrinal support for the use of extrinsic materials to interpret a treaty term in accordance with its 'ordinary meaning'

The Panel claimed doctrinal support for its use of VCLT Article 31(1) from *US–Shrimp*, in which the Appellate Body used relevant rules of international law for a number of interpretative purposes, without ascertaining whether such rules were binding on the disputing parties or, indeed, the WTO membership as a whole. In determining, for example, whether the term 'exhaustible natural resources' in Article XX (g) GATT 1994 included endangered turtles, the Appellate Body considered that the text was not determinative and sought the aid of interpretative tools.

The Panel's pigeon-holing of the Appellate Body's reasoning to VCLT Article 31(1) is questionable. In *US–Shrimp,* the Appellate Body did not refer directly to

[82] ibid, para 7.95.
[83] ibid, para 7.96.
[84] ibid.
[85] See Part D below.
[86] McLachlan (n 31) para 17: 'reference 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 terms used. This may be done pursuant to the overall requirement of Article 31(1) to consider the object and purpose of the treaty.' But see Report of the ILC Study Group as finalized by Koskenniemi (n 1) para 450: 'taking "other treaties" into account as evidence of "ordinary meaning" appears a rather contrived way of preventing the "clinical isolation" as emphasized by the Appellate Body.'

particular paragraph numbers of the VCLT in its interpretation of 'exhaustible natural resources'.[87] This is consistent with the status of VCLT Article 31 as a general rule (rather than rules),[88] or, alternatively, due to the location of the Appellate Body's approach to treaty interpretation in the wider corpus of interpretative norms found in customary international law.[89] If one does wish to fit the Appellate Body's nuanced approach to treaty interpretation into specific paragraph numbers of the VCLT, however, its interpretation of 'exhaustible natural resources' could be said to fall within VCLT Article 31(1),[90] Article 31(2),[91] Article 31(3)(b)[92] and/or Article 32.[93] In addition, Article 31(3)(c) might be said to have been relevant in allowing for the use of treaties that reflect the "common intentions" of WTO members.[94] Thus, the Panel's claim that Article 31(1) is the only relevant avenue for the use as interpretative tools of treaties that are not binding on all WTO members is subject to doubt.

A reading of the terms of VCLT Article 31(1) also casts doubt on the Panel's view that VCLT Article 31(1) allows recourse to relevant rules of international law to determine 'ordinary meaning'. 'Ordinary meaning' is a seductively simple phrase, suggesting a natural meaning and masking the fact that a different understanding of the meaning of terms is likely to be the root of the conflict.[95] This limitation is recognized by the VCLT. Article 31(1) acknowledges that a tready's terms cannot be ascertained in the abstract by requiring that the ordinary meaning of terms be interpreted 'in their context'. The key question is therefore to ascertain which contextual boundaries are

[87] The Appellate Body did refer to VCLT Arts 31(3)(c) and 32 in its interpretation of the *chapeau* of GATT Art XX, for which it sought 'additional interpretative guidance, as appropriate, from the general principles of international law': see paras 157–8.

[88] See A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge, 2000) 186–7.

[89] See, eg, its interpretation that the 'generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"' [footnotes omitted]: *US–Shrimp* (n 35) para 130.

[90] Consistently with VCLT Art 31(1), the Appellate Body considered the term 'exhaustible natural resources' according to its ordinary meaning, and found that 'exhaustible' did not ordinarily exclude 'renewable': ibid para 128. Moreover, the good faith and object and purpose test of Art 31 is particularly relevant to the Appellate Body's reliance at para 131 on the principle of effectiveness: see further Yearbook of the ILC (n 54).

[91] eg it found the relevant context in the preambular reference in the WTO Agreement to the principle of 'sustainable development'. This necessitated 'exhaustible natural resources' to be read according to contemporary concerns: *US–Shrimp* (n 35), para 129.

[92] See, eg, the Appellate Body's consideration of the subsequent practice of the international community in entering various international agreements, including UNCLOS, CBD and Agenda 21 (without considering whether these were signed by parties): ibid para 130. In addition, the two adopted GATT reports cited by the Panel in support of its approach might be said to constitute subsequent practice according to VCLT Art 31(3)(b): ibid para 131.

[93] eg it would be manifest that an interpretation of 'natural resources' that failed to update it according to contemporary ecological concerns would be unreasonable or absurd. Also falling within Art 32 might be the use made by the Appellate Body of the drafting history of the GATT, which it footnoted as failing to demonstrate that the framers intended to exclude 'living' natural resources from the scope of Art XX(g): ibid footnote 114.

[94] See, eg, Pauwelyn (n 31) 260; Bartels (n 57) 354.

[95] H Lauterpacht, *The Development of International Law by the International Court* (Frederick A Prager, New York, 1958) 52–60, reproducing in substantial terms his 'A Note on the Doctrine of "Plain Meaning"' (1950), which he submitted to the Institute of International Law: (1950) 42 Annuear 377–90. Indeed, the contextual and contestable nature of meaning has been a preoccupation of many disciplines of academic thought. Most notably, the idea behind deconstruction, as found for example in the works of Derrida, is that words or terms always and necessarily defer to other different terms in a conceivably endless process.

imposed by the system itself. In the VCLT, the allowable context is narrowly defined by Article 31(2) as the body of textual material generated during the conclusion of the treaty.[96] According to the rest of the VCLT's rule of interpretation, the only other relevant extrinsic materials are those developed subsequently by the parties evidencing their common intentions, (including with respect to a 'special meaning' to be given to a term),[97] and supplementary means where interpretation under Article 31 leaves the meaning 'ambiguous or obscure' or leads to a result 'which is manifestly absurd or unreasonable'.[98] Thus other extrinsic materials, such as informative international law materials and even, perhaps, dictionaries, are not considered to be relevant to establishing 'ordinary meaning'. These contextual boundaries were ignored by the Panel, which instead sought guidance from 'informative' texts to bring to an end its search for 'ordinary meaning'.

In my view, the Panel would have been more convincing if it had relied on the purposive element of VCLT Article 31(1) rather than its reference to 'ordinary meaning'. Treaties that are not binding on all WTO Members may still be relevant, for example, to inform a treaty-interpreter about the object and purpose of a treaty.[99] The object and purpose of a treaty regulating the apple trade will be more easily found to exclude the orange trade if a substantial predecessor treaty exists for the trade in oranges, even if membership of the two treaties is not identical. On this reading, the fact that the CBD parties, most of whom are WTO members, were negotiating a Protocol on Biosafety at the time of the SPS Agreement could be rebuttable evidence that the object and purpose of the SPS Agreement was to exclude rules and disciplines on SPS measures aimed at biotech products.[100] The principles of 'sustainable development' and 'mutual supportiveness' that have been endorsed by WTO members would also be relevant to this purposive inquiry.[101]

[96] Although it may seem odd to turn to supplementary means to interpret the phrase 'ordinary meaning', I note that this reading is confirmed by reference to the ILC Commentary on the VCLT. The ILC did not appear to anticipate that the 'ordinary meaning' would necessitate the reference to any extrinsic texts beyond those texts that established the 'context' of the treaty in Art 31(2): see Yearbook of the ILC (n 54) 221, para 12.

[97] VCLT Art 31(3); Art 31(4).

[98] ibid Art 32.

[99] In advocating the use of Art 31(1) as part of a process of systemic integration, McLachlan points to both its purposive aspects as well as the 'ordinary meaning': McLachlan (n 31) para 17: 'In many cases, this kind of purposive enquiry [of Art 31(1) and 31(4)] will provide a better explanation for decisions referring to other treaties within the WTO DSU than Article 31(3)(c) itself. The open-textured language of exclusions in the Covered Agreements themselves calls for a programmatic interpretation which may properly take account of other material sources of international law. In doing so, the tribunal is using other treaties not so much as sources of binding law, but as a rather elaborate law dictionary.' McLachlan advances this argument as a qualification to his restrictive interpretation of the term 'the parties' in Art 31(3)(c), an interpretation that was also adopted by the Panel. His other qualification relates to the applicable law between the disputing parties, as described above at n 31 and surrounding text.

[100] This evidence would be rebutted by the 'savings clause' in the Biosafety Protocol, which states that WTO rights are not to be affected: see further Safrin (n 33).

[101] On the goal of 'sustainable development', which is recognized in the Preamble to the *Marrakesh Agreement Establishing the WTO*, see *US–Shrimp*. Recent literature emphasizes the integrative nature of this principle: see MC Cordonier Segger and CG Weeramantry (eds), *Sustainable Development: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff, The Hague, 2004), which I reviewed in (2007) 56 ICLQ 209. On 'mutual supportiveness' see below n 150 and surrounding text.

In summary, I have questioned the basis of the Panel's use of VCLT Article 31(1) on the grounds of the text itself and by reference to the jurisprudence on which it relied. The Panel found additional support for its use of non-WTO sources under VCLT Article 31(1), however, from its consultations with international organizations. These consultations were conducted with the close involvement of the disputing parties. As such, the mode of the Panel's investigation into the 'ordinary meaning' of treaty terms depended heavily on the disputing parties. Paradoxically, given the flurry over the meaning of 'the parties', the consent of the 'disputing parties', rather than consent of the 'WTO members', thus continued to influence the Panel's task of treaty interpretation. I will examine this issue more fully in the next Part.[102] First, however, it is necessary to demonstrate the practical problems inherent in the Panel's conception of Article 31(1).

(b) The Panel's use of extrinsic materials to interpret a treaty term in accordance with its 'ordinary meaning'

As noted above,[103] the Panel applied its conception of VCLT Article 31(1) to the interpretation of certain terms in Annex A to the SPS Agreement. The meaning of these terms would come to determine the applicability to the SPS Agreement—rather than the TBT Agreement or the GATT—to the challenged measures of the EC and its Member States and the nature of the required risk assessment. The Panel gave an expansive interpretation to Annex A measures.[104] I have selected seven examples of the Panel's use of non-WTO sources in its interpretation of Annex A terms to demonstrate the dangers of an over-inclusive use of extrinsic materials.[105]

The SPS Agreement applies, amongst other things, to certain government measures aimed at protecting human, animal or plant life or health from the spread of 'pests'.[106] The EC argued that measures aimed at reducing risks from biotech products did not relate to the spread of pests. To this end, the EC submitted that the definition of 'pests' in the International Plant Protection Convention (IPPC)[107] was a relevant context for the purposes of interpreting the term 'pest'.[108] The IPPC defines pests as '[a]ny species, strain or biotype of plant, animal or pathogenic agent *injurious* to plant or plant products'. The Panel found this definition to be informative but not dispositive of the meaning of 'pests'.[109] It instead drew on the dictionary definition of 'pests' as 'troublesome or annoying'. As such, 'pests' in the SPS Agreement did not have to be 'injurious' but could be anything with troublesome or annoying characteristics.[110] On this

[102] See below n 146 and surrounding text.

[103] See above n 83 and surrounding text.

[104] J Peel, 'A GMO by Any Other Name … Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement' (2006) 17 EJIL 1. But note that Canada considered the result of the Panel to be an overly narrow interpretation of Annex A: see DSB Meeting 21 Nov 2006 (WT/DSB/M222) para 66.

[105] A more comprehensive examination of the Panel's interpretation of Annex A terms can be found in Peel, ibid.

[106] SPS Agreement, Annex A (a), (c), (d).

[107] Revisions to the IPPC were approved at the FAO in 1997 to reflect the role of the IPPC in relation to the Uruguay Round Agreements of the WTO, particularly the SPS Agreement. The new revised text entered into force on 2 October 2005. See further <https://www.ippc.int/IPP/En/default.jsp> (accessed 20 July 2007).

[108] *Biotech* (n 2) para 7.187.

[109] ibid para 7.241.

[110] ibid.

basis, GM plants were considered 'pests' within the meaning of Annex A in situations where they did not cause injury but, for example, grew where they were undesired.[111] This interpretation was to have profound effects for the wide applicability of the SPS Agreement to the EC Member-State safeguard measures on biotech products.[112]

A second example of the Panel's reasoning is drawn from its interpretation of the term 'diseases', which featured in Annex A with respect to animals or plants. The EC cited the definition of the World Organization for Animal Health (OIE) that disease is 'the clinical and/or pathological manifestation of infection'. This definition supported its argument that its biotech approval regime did not address the risks identified in Annex A because GMOs were not diseases or disease-carrying organisms. As one of the standard-setting institutions recognized by the SPS Agreement, I consider that the OIE was well chosen as representative of the international health and safety context for animals and plants. However, the Panel instead turned to the dictionary definition of disease as a 'disorder' and drew also on the World Health Organization (an organization aimed at human rather than animal health). On the basis of this wide reading of 'disease', the Panel concluded that an approval regime that sought to avoid adverse effects that might arise from the deliberate release of GMOs into the environment constituted a measure applied to protect animal or plant life or health from risks arising from disease.[113]

Further examples of the Panel's reasoning can be identified from the Panel's interpretation of Annex A(1)(b) of the SPS Agreement, which covers measures applied 'to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs'.[114] The third example of the seven listed here relates to the Panel's reasoning as to whether the challenged measures related to 'foods, beverages or feedstuffs'. The EC submitted that GM seeds used in agriculture were not covered by this provision.[115] The Panel referred to the dictionary definition of 'food' as nutrition for humans or animals (without considering the object and purpose of the SPS Agreement with respect to food safety) and considered that, for example, if the pollen from a GM crop was consumed by an insect or if a GM plant was consumed by deer, this would be considered as 'food'.[116] On the basis of this finding, the Panel found that several of the Member-State safeguard measures fell within Annex A(1)(b).[117]

The fourth example relates to the Panel's determination that the EC's measures on biotech products amounted to protection from 'additives'. Codex defines an additive as a substance that is added to 'food', rather than a substance which is added to plants and which may find its way into food. The EC submitted that this definition was determi-

[111] ibid para 7.242. Other situations included 'situations of unintentional gene flow or transfer from a GMO plant ("out-crossing") leading to cross-breeds between GM plants and other plants … which have undesired introduced traits"' and 'situations where pesticide-producing … GM plants increase the potential for the development of pesticide-resistance in target organisms, notably insects'.

[112] See ibid paras 7.2677–7,2678 (Austria); para 7.2726 (France); paras 7.2787–2788; 7.2791 (Germany); para 7.2906 (Luxembourg); and paras 7.2828, 7.2833 (Greece).

[113] *Biotech* (n 2) paras 7.277–7.278.

[114] Above n 40.

[115] *Biotech* (n 2) para 7.288.

[116] ibid paras 7.291–7.292.

[117] ibid paras 7.2630, 7.2676 (Austria), para 7.2786 (Germany); para 7.2837 (Greece).

native that the GM products relevant to the dispute were not 'additives'.[118] The Panel noted that the incorporation of Codex standards by the harmonization provisions of the SPS Agreement did not mean that Codex definitions were necessary to take into account in ascertaining the meaning of Annex A terms.[119] It drew instead on the dictionary definition of an additive as 'a substance added to another so as to give it special qualities'[120] and concluded that genes intentionally added to GM plants (where the plants are to be eaten) can be considered as additives.[121]

Fifthly, the Panel adopted similar reasoning when it found that the term 'contaminants' covered broader situations than envisaged by the relevant Codex definition. The Panel extended the term to 'proteins unintentionally produced in GM plants which are eaten or used in the production of food or feedstuffs'.[122] Sixthly, the Panel drew on the dictionary definition of 'toxin' in addition to definitions from the Codex and the FAO[123] as support for its proposition that toxins did not necessarily have to be added *unintentionally* to foods; the fact that a GM plant (earlier defined as 'food') might intentionally produce a toxin to ward off insects did not remove it from the definition of toxin in Annex A(1)(b). As a final example,[124] the Panel considered that this definition of 'toxin' was also relevant to the EC's targeting of the risk that GM products might give rise to allergic reactions. In assessing whether this aspect of the EC approval regime constituted an SPS measure, the Panel noted that there is no reference to 'allergens' as one of the grounds of risk in Annex A(1)(b). It noted that the drafters of the SPS were aware of food allergenicity concerns,[125] but considered that the absence of the term 'allergens' did not 'reflect a deliberate choice to exempt food allergenicity risks from the scope of the SPS Agreement'.[126] Instead, the Panel found that the drafters had considered food allergens to fall within 'toxins'.[127] For this interpretation, the Panel relied on the dictionary and a definition of allergen as 'an antigen that provokes an immune response'" from the FAO Glossary of Biotechnology for Food and Agriculture.[128] The Panel considered that food allergens were akin to poisonous substances in the harm they could cause to humans; as such, they could fall within Annex A(1) as 'toxins'.[129] For allergic reactions caused by exposure to GM unrelated to food consumption, the Panel drew on its earlier interpretation of the IPPC and dictionary definition of 'pest' and found that 'to the extent that a GM plant produces allergenic effects other than as food, it would be a plant which causes harm to the health of humans and, as such, would qualify as a "pest"'.[130]

These seven examples demonstrate that an approach that draws on extrinsic materials to inform an 'ordinary meaning' of a term may lead to de-contextualized and arbitrary reasoning. The Panel failed to meet the challenge of moving beyond the abstract meanings of the terms in Annex A towards a disciplined and reasoned use of other

[118] ibid para 7.295.
[119] ibid para 7.300.
[120] ibid para 7.297.
[121] ibid para 7.301.
[122] ibid paras 7.305–7.316
[123] ibid para 7.321.
[124] There are many other examples of the Panel's interpretation of Annex A terms: see, eg, ibid paras 7.147–7.437.
[125] ibid para 7.333.
[126] ibid.
[127] ibid. See also para 7.337.
[128] ibid para 7.334.
[129] This reasoning was applied to the Austria safeguard measure on B-176: ibid paras 7.2643, 7.2783.
[130] ibid para 7.350.

https://doi.org/10.1093/iclq/lei207 Published online by Cambridge University Press

'informative' materials.[131] For example, it is controversial that a WHO definition of 'disease' was more relevant than the OIE to defining risks of animal or plant diseases. In addition, a common dictionary definition of 'pests' should be subordinated to an IPPC standard for plant safety, given the relationship between the IPPC and the SPS Agreement. Moreover, the Panel's controversial interpretation of the drafters' intent with respect to the absence of the term 'allergens' from Annex A should have instead followed the VCLT rules of interpretation, particularly with respect to supplementary materials, instead of relying on a quest for 'ordinary meaning' by reference to dictionary definitions. The seven examples offered above demonstrate the difficulties and dangers of finding an 'ordinary meaning' within a diverse international context.

As explained above, the Panel's interpretation of VCLT Article 31(3)(c) confirmed that 'consent' was an entrance condition for the use by a dispute settlement body of international law as interpretative tools. Its use of VCLT Article 31(1), on the other hand, removed the need to establish the consent of the WTO membership for non-WTO sources to be used in interpreting WTO terms. In my view, the Panel substituted the entrance condition of 'consent' for 'relevance' so that extrinsic materials could be taken into account if they were informative of the 'ordinary meaning' of WTO treaty terms. This concept of relevance has great promise for improved decision-making, as it does in many areas of domestic law.[132] Yet the practical examples of the Panel's interpretation of Annex A of the SPS Agreement identified above are not convincing. But these examples demonstrate a need to reconsider 'entrance conditions' in WTO disputes to provide necessary guidance and restraint for the interpretation of WTO terms by reference to non-WTO sources. Ideas for such entrance conditions may be provoked by an examination of some of the WTO's institutional provisions for consultation and coexistence with international organizations, which is the subject of the next Part.

D. Taking Account of Relevant Rules through Consultation

As already noted, the Panel obtained much of the extrinsic material that was to become relevant to its interpretation of Annex A terms through consultations with international organizations.[133] In fact, the Panel obtained information from a range of individuals and bodies, which fell broadly into three groups: international organizations, scientific and technical experts and those interested parties who filed *amicus* briefs.[134] The empowering provisions for these consultations were cited as Article 13.1 DSU, Article 11.2 SPS Agreement, Articles 14.2 and 14.3 TBT Agreement, and, in the case of the *amici,* the Panel's broad discretion.[135]

[131] For an account of that challenge, see Second Written Submissions of the EC, ibid para 4.748: 'it is clear that the "common and ordinary" meaning approach advocated, in some instances, by the complaining parties, to the exclusion of the international definitions, would not be sufficient. The common language definitions of SPS terms are often so vague and broad as to deprive of any meaning the categories and distinctions set out in Annex A.1. For instance, the definition proposed by the United States of the term "toxin" ("any substance which, when introduced into or absorbed by a living organism, destroys life or injuries health") is capable of encompassing anything, from a chemical residue to a lead bullet.'

[132] Special regard may be had to principles familiar to many administrative lawyers, such as the judicial reviewability of failures by decision-makers to take relevant considerations into account.

[133] *Biotech* (n 2) para 7.96, above n 83 and surrounding text.

[134] As described above, three unsolicited briefs were submitted to the Panel; one was from a group of university professors and the other two were from coalitions of NGOs.

[135] *Biotech* (n 2) para 7.11, citing *US–Shrimp.*

Of relevance here is how these consultations related to the Panel's use of non-WTO sources. To begin with, although the Panel accepted the *amicus* briefs on the record, it did not find it necessary to take them into account.[136] The consultations with scientific and technical experts were more influential in bringing non-WTO sources of law to the Panel's attention. The EC had argued that these experts should be consulted on the meaning of certain terms in the SPS Agreement. The complaining parties opposed this request on the basis that the terms were to be assessed by applying the rules of treaty interpretation.[137] The Panel appeared to uphold the complaining parties' opposition and limited its requests to the experts to three categories of scientific and technical information surrounding the products at issue in the dispute.[138] The Panel expected the experts, however, to draw on rules and guidelines of international organizations in providing their advice.[139] The Panel's representation of the experts' evidence was then overseen by the disputing parties.[140]

It was through its consultations with international organizations that the Panel delved most deeply into sources of non-WTO law. The Panel first consulted these organizations on the selection of scientific experts.[141] Next, the Panel asked them to provide reference documents and other materials to 'assist the Panel in ascertaining the meaning of certain terms and concepts'.[142] Two aspects of these consultations are worthy of note. First, notwithstanding the articulation of its general power to consult, the Panel emphasized that its use of the relevant international rules and guidelines was empowered by the need to ascertain the 'ordinary meaning' of Annex A terms.[143] As such, VCLT Article 31(1) acted as a 'gatekeeper' to the information obtained through consultation. Secondly, the Panel was careful to stress that in conducting these consultations, it had taken into account the views of the disputing parties.[144] While this approach is reasonable in an adversarial procedure, there was arguably no need to consult the disputing parties in this way given the Panel's wide powers to seek information. Instead, this partial deference to the disputing parties demonstrates the influence of the disputing parties in the conduct of the consultations and, consequently, their influence in the interpretation of treaty terms according to VCLT Art 31(1). Viewed in this way, the disputing parties may be said to have shaped the interpretative context of the WTO treaty terms, notwithstanding the rejection by the Panel of that idea in its conception of VCLT Article 31(3)(c).[145] The Panel's quest for 'consistency' in treaty

[136] ibid para 7.11.
[137] ibid para 7.19.
[138] ibid para 7.18.
[139] eg the Panel asked the experts to comment on how the relevant scientific documentation relied on by the EC Member States in establishing their safeguard measures compared with documentation of several international organizations: see ibid Annex H-170. The Panel referred to IPSM, FAO/WHO Codex principles and Annex III of Biosafety Protocol. Canada disputed that Annex III could be construed as an 'international standard' in these terms: ibid Annex I-2 para 119.
[140] See, eg, the disagreement between the parties at the interim review stage over the representation of expert opinion on antibiotic resistant marker genes: ibid paras 6.36–6.41.
[141] ibid para 7.18.
[142] ibid para 7.31; see also para 7.96.
[143] ibid para 7.96.
[144] ibid para 7.31: 'it should be noted that the Parties were consulted both on the international organizations from which information would be sought and on the list of terms on which information would be sought.'
[145] See above n 45 and surrounding text.

interpretation, which underlay its approach to the 'relevant rules applicable between the parties',[146] is therefore impeded, at least to some degree, by the will of the disputing parties.[147]

It is useful to contrast the Panel's consultation with international organizations with the WTO's broader institutional relationships. For example, the concept of 'mutual supportiveness' has been incorporated in a number of WTO instruments such as the Decision on Trade and Environment[148] and the Doha Declaration.[149] Accordingly, members have agreed to negotiate and formulate policy with this concept in mind. If the Panel's consultations had been driven by this concept rather than its restrictive notions of treaty interpretation, it arguably would have been able to take into account a much wider scope of non-WTO sources, including the Biosafety Protocol and the CBD.[150] In addition to the explicit concept of 'mutual supportiveness' the WTO's interdependence with other institutions is apparent in many of its rules. For example, the SPS and TBT Agreements depend on international bodies like Codex to harmonize non-tariff barriers (through standards)[151] and to provide scientific and technical definitions[152] and advice.[153] This institutional role of providing a 'multilateral scientific consensus' extends, in certain circumstances, to a recognition of minority scientific opinion.[154] The generation by these institutions of important scientific and technical understandings sits uneasily with the Panel's conception that they merely inform the 'ordinary meaning' of treaty terms. Yet while the Panel was aware of the broader status

[146] See above n 59 and surrounding text.

[147] The disputing parties' influence on treaty interpretation will of course also result from the content and quality of their submissions to a panel.

[148] Ministerial Decision on Trade and Environment, 14 Apr 1994, Marrakesh Agreement Establishing the WTO (available at <http://www.wto.org>).

[149] Above n 7, para 6: 'We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive ... We welcome the WTO's continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations.'

[150] For criticism that the Panel in *Biotech* failed to incorporate the concept of mutual supportiveness, see N Bernasconi-Osterwalder, 'Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in EC-Biotech' Background Note to presentation at the British Institute of International and Comparative Law Annual WTO Conference, May 2007, available on the website of the Center for International Environmental Law (<http://www.ciel.org>).

[151] See SPS Agreement Art 3.1 and TBT Agreement Art 2.4. See further *EC–Trade Description of Sardines* (WT/DS231/AB/R), especially paras 171–316.

[152] TBT Art 1.1 provides that '[g]eneral terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.'

[153] In the dispute settlement context, see especially SPS Agreement Art 11.2. But this also operates outside of dispute settlement: see SPS Agreement Art 5.1 ('[Members risk assessment techniques to take] into account risk assessment techniques developed by the relevant international organizations'); Art 5.7 (provisional measures to be based inter alia on available pertinent information from relevant international organizations); Art 6.1 (in adapting SPS measures to regional conditions, Members shall take into account 'appropriate criteria or guidelines which may be developed by the relevant international organizations'); Art 9.1 (Members to facilitate technical assistance inter alia through appropriate international organizations).

[154] (n 48) para 194. See further DA Motaal, 'The "Multilateral Scientific Consensus" and the World Trade Organization' (2004) 38 J of World Trade 855.

of international organizations in the SPS and TBT Agreement, it considered that Annex A of the SPS Agreement did not incorporate such coexistence.[155]

The status of international organizations in the SPS and TBT Agreement leads to a further important point. Relevant standard-setting bodies are identified in the SPS Agreement as the Codex, the IPPC and the OIE, although further international bodies can be identified through the SPS Committee provided they are open for membership to all WTO Members.[156] The TBT Agreement goes further and endorses standards developed by international bodies that are open to the relevant bodies of all WTO members.[157] There is no need for consensus in the development of the standards for them to be relevant.[158] However, the standard-setting bodies are encouraged to operate with open, impartial and transparent procedures.[159] Moreover, international bodies may apply for observer status to the relevant committees.[160] Accessibility for the WTO membership, rather than parallel membership, is therefore the main theme of the WTO's institutional coexistence with other international organizations under this framework. As such, there is a much stronger presence of the notion of 'systemic integration' in the institutional structure envisaged by the WTO covered agreements than in the *Biotech* panel's interpretative tools.[161]

E. Conclusion

The dispute over trade in certain GM products arose within a diffuse institutional and normative context. This context involved the WTO covered agreements, multilateral environmental agreements such as the CBD and Biosafety Protocol, international standards of bodies such as IPPC and Codex and the alleged general principle of precaution. Once filed at the WTO, the question for the Panel was how much regard it could have to these bodies of law, many of which were not binding on the disputing parties or the WTO members as a whole. This note has examined the way the Panel utilized these non-WTO sources by assessing the applicable law and interpretative tools identified by the Panel and its institutional mechanisms for consultation, particularly with international organizations.

In summary, the Panel restricted the use of non-WTO law by:

[155] *Biotech* (n 2) para 7.300.

[156] SPS Agreement Annex A.3.

[157] TBT Agreement Annex 1:4.

[158] *Sardines* (n 138) para 225.

[159] Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Arts 2, 5 and Annex 3 of the Agreement. These principles are found in Section IX of the Decisions and Recommendations adopted by the Committee since 1 January 1995, G/TBT/1/Rev. 8, 23 May 2002 ('In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives.')

[160] There has been a long-standing request by the CBD and the Biosafety Protocol for observer status to the SPS Committee, which has been delayed on political grounds: see further J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP, Oxford, 2007) 63.

[161] I note that the ILC Study Group's mandate did not extend to a consideration of institutional issues relevant to the fragmentation and diversification of international law: see Report of the ILC Study Group as finalized by Koskenniemi (n 1) para 13.

- merging the complaints of the complaining parties. This limited the applicable law to law binding on all four disputing parties, in the sense that the CBD, which was binding on three of the disputing parties, was not applicable;[162]
- construing 'the parties' in VCLT Article 31(3)(c) as 'the parties to the treaty' rather than 'the disputing parties'. As a result, the Panel could not take account of 'relevant rules of law applicable in the relations between the parties' in its interpretation of the relevant WTO agreements unless they had identical membership to the WTO; and
- closely involving the disputing parties in its consultations with international organizations and scientific experts, notwithstanding its broad ability to seek information under the DSU.

On other hand, the Panel expanded its ability to take into account non-WTO law by:

- drawing on non-WTO sources if they were informative of the 'ordinary meaning' of WTO treaty terms according to VCLT Article 31(1).

The first set of strategic and doctrinal decisions identified above engenders the criticism that the Panel was overly restrictive in its use of non-WTO sources. On this basis, the Panel's later construction of VCLT Article 31(1) as allowing for the incorporation of a wide body of non-WTO law will be welcomed. Treaties were found to be relevant if they could be considered as demonstrative of the 'ordinary' meaning of certain WTO terms, regardless of the degree to which the WTO members were bound by them. Yet I have demonstrated that, quite apart from the questionable doctrinal foundations of this reading of VCLT Article 31(1), its application can lead to highly abstract notions that are de-contextualized from disputes. The Panel's attempt to 'unmask' the terms of Annex A of the SPS Agreement in a depoliticized, 'natural' investigation that picked and chose between dictionaries and rules of international law was fraught.

Of the many implications of my analysis, two may be identified here. First, if the consent of the disputing parties or the WTO members is *not* required for a treaty to be taken into account under the norm of treaty interpretation in VCLT Article 31(1), it is important to shed visibility on its substitute. For the Panel, this substitute was the 'informative' nature of a relevant rule of international law. Implicit in this approach is the notion of an 'international system' or 'international community' providing the context for an assessment of the rule's relevance. Questions must be asked about any biases that result from this conception of the international community. For example, in *Biotech* this 'international community' was a scientific and technical community that had been active in developing rules and guidelines. Yet absence of rule-making by parts of this scientific community may be attributed to an absence of scientific inquiry (due to diverted research funding, epistemic weaknesses, etc) rather than an absence of collective concern. Silence in the international system may be 'informative' for many reasons. Moreover, given that all the disputing parties argued at various points that there was 'consensus' for the interpretation that they were advancing, there is a need for the Panel to assess (and even rank) 'degrees' of consensus in ways other than simply pronouncing on what seems the most 'informative'.

[162] I recall that the panel declined to comment on whether law binding on all the disputing parties would be necessarily applied by it: see above n 36 and surrounding text.

https://doi.org/10.1093/iclq/lei207 Published online by Cambridge University Press

This criticism points more generally to the second major implication of my analysis: the need to think critically and creatively about the types of 'entrance conditions' for norms in international dispute settlement. For example, institutional relationships already exist between the WTO and other international organizations. In this note I have pointed to some of the ways that standard-setting bodies are incorporated into the WTO framework if they accord accessibility to all WTO members. Such accessibility might be a factor in determining whether a WTO panel should take account of the work of that organization.[163] The breadth of an organization's support, and its balance of its membership between developing and developed countries,[164] might be other factors.[165] Procedures for transparency and cooperation between secretariats, and openness to non-State actors such as NGOs, might be further factors that reinforce the 'relevance' of the norms developed under the auspices of international organizations. These ideas call into question the current judicial tools of interpretation and consultation. For example, to allow for such radical 'entrance conditions' for international norms in treaty interpretation, panels may need to consult with other international institutions in a proactive way that does not rely on the disputing parties.[166] Moreover, the VCLT itself could be interpreted in an evolutionary fashion to incorporate a spectrum of 'international consensus' as opposed to binary questions of consent and non-consent. Recognizing the increased involvement of international organizations and non-State actors in law-making adds a further shade to this spectrum and allows institutional questions of openness and accessibility to be raised at the interpretative stage. As such, the *process* by which a treaty comes into being may be assessed to determine its probative value in interpreting other treaty obligations. These ideas would have benefited the *Biotech* panel and will be increasingly useful to the fragmented international legal order.

MARGARET A YOUNG*

[163] For a comparison with the European Communities' coexistence with standard-setting bodies, see J Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 EJIL 307.

[164] For a similar idea in relation to treaty interpretation, see AH Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (CUP, Cambridge, 2006) 114–59, 120 ('The development dimension as an objective needs to be factored in at the time of drafting the WTO Agreements, institutionalised in the very process of interpreting the WTO Agreements, engineered into actual interpretations of the WTO Agreements and facilitated through the introduction of development-friendly material into the judicial process').

[165] For additional considerations such as the concepts of subsidiary and flexibility, see Scott (n 163) 346.

[166] For an assessment of an enhanced judicial role in participation, information-sharing and principled decision-making, see J Scott and SP Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2007) 13 Columbia J of Eur L, available at SSRN <http://ssrn.com/abstract=982281>)(last accessed 7 June 2007).

* Research Fellow, Pembroke College, University of Cambridge. I am grateful to Professor Joanne Scott, Professor James Crawford, Dr Lorand Bartels, Dr Andrew Lang and Stephen Humphreys for discussions and comments on an earlier draft. Responsibility for errors and omissions remains with me.