Master Thesis within the Framework of Utrecht University's
Sustainable Development Programme of the Faculty of Geosciences

Sustainable Development's Golden Thread: The Principle of Integration

Integration of environmental protection within the WTO regime

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Utrecht, 18 August 2011

Table of Contents

List of Acronyms 4

1. Introduction 5
1.1. Background 5
1.2. Problem Definition, Research Question and Sub-Questions 5
1.2.1. Problem Definition 5
1.2.2. Research Question and Sub-Questions 6
1.3. Methodology 7
1.3.1. Structure 7
1.3.2. Scope 7
1.3.3. Sources 9
1.4. Relevance 10

PART I – INTEGRATION IN INTERNATIONAL LAW IN LINE WITH SUSTAINABLE DEVELOPMENT 11

2. Integration and its Role for Sustainable Development 11
2.1. Integration within the Sustainable Development Discourse 11
2.1.1. Integration, a Prerequisite for Sustainable Development 11
2.1.2. Integration and the Equitable Balancing of Pillars 12
2.2. The Two Levels of Integration 13
2.2.1. Policy Integration 13
2.2.2. Legal Integration 14
2.3. Integration as a Principle for Sustainable Development 15
2.3.1. A Leading Advocate of Sustainable Development 15
2.3.2. A Principle with a Pragmatic Application 15

3. The Legal Status of the Principle of Integration 17
3.1. Integration in Primary Sources of Law 17
3.1.1. Treaty Law 17
3.1.2. International Customary Law and General Principles 19
3.2. Integration in Secondary Sources of Law 22
3.2.1. Jurisprudence of International Courts and Tribunals 22
3.2.2. Non-Binding International Instruments 25
3.3. The Two-Fold Legality of the Principle of Integration 26
3.3.1. The Principle of Integration as an Emerging Customary Rule 26
3.3.2. The Principle of Integration as a Reasoning Rule 28

Summarizing Part I 30

PART II – INTEGRATION WITHIN THE WTO: A FOCUS ON THE RELATIONSHIP BETWEEN TRADE AND ENVIRONMENT 31

4. Normative Integration of Environmental Protection within the WTO 32
4.1. Environmental Protection, a Concern of WTO Contracting Parties 32
4.1.1. Environmental Protection, Sustainable Development and the WTO Objectives 32
4.1.2. Environmental Measures against the Core Trade Principles 34
4.2. Environmental Norms and their Position in the WTO Regime 35
4.2.1 Marginalization of Environmental Norms 35
4.2.2. Environmental Norms and their Door Into the Regime 38
4.3. Assessing Normative Integration within the 'Self-Contained' WTO Regime 40
4.3.1. A Frail Integration of Environmental Concerns 40
4.3.2. The Narrow Leeway for Environmental Norms 41

5. Judicial Integration of Environmental Protection within the WTO **42**
5.1. Environmental Concerns in the WTO Jurisprudence: a Focus on GATT Article XX 42
5.1.1. Applicability of the Environmental Exceptions under GATT Article XX 42
5.1.2. GATT Article XX and the Terms of the Chapeau 45
5.2. Environmental Norms for the Interpretation of the WTO Agreement 46
5.2.1. Applying Environmental Norms from non-WTO Treaty Provisions 47
5.2.2. Applying Environmental Norms with Contentious Primary Status 49
5.3. Environmental Protection and the Potential of Judicial Integration 51
5.3.1. Judicial Integration and Sustainable Development 51
5.3.2. The Strength of Integration in the WTO System and Beyond 52

Summarizing Part II **54**

6. Conclusion **55**
6.1. Answering the Research Sub-Questions 55
6.2. Answering the Research Question 56
6.3. Assessing the Approach and Subsequent Suggestions 58

Bibliography **59**

Annex I - Table of Main Treaties and Agreements **62**

Annex II - Table of Cases and Opinions **63**

Annex III - Table of Consulted Websites **64**

List of Acronyms

AB	Appellate Body
CBD	Convention on Biological Diversity
CTE	WTO Committee on Trade and Environment
DSS	WTO Dispute Settlement System
DSU	WTO Dispute Settlement Understanding
ECJ	European Court of Justice
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
MFN	Most Favored Nation
NT	National Treatment
SD	Sustainable Development
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WCED	World Commission on Environment and Development
WTO	World Trade Organization

1. Introduction

1.1. Background

Principle 4 of the Rio Declaration is the generally agreed-upon starting point when trying to understand 'integration' in line with sustainable development.[1] It reads: ''In order to achieve Sustainable Development, environmental protection shall constitute an *integral part* of the development process and cannot be considered in isolation from it."[2]

For some, this 'integral part' echoes nothing more than a mutable and loose notion within the wider sustainable development discourse. For others, it holds a clearer norm-creating grip requiring that development decisions do not disregard environmental considerations. Third argue that the strength of 'integration' lies instead in its pragmatic application by judges and arbitrators in mending opposing interests on a case-by-case basis.

Opinions and stances on the matter diverge greatly. One thing appears certain: more needs to be written on 'integration' as an instrument in the international legal arena. The questions of its substance and legal status in international law as well as its overall value for sustainable development remain unsettled. This thesis will attempt to shed light on these questions, but not without clearly defining its problem statement first.

1.2. Problem Definition, Research Question and Sub-Questions

1.2.1. Problem Definition

The most widespread definition of 'sustainable development' stems from the 1987 United Nations Report on *Our Common Future*.[3] It is described as "development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs".[4] Simply put, sustainable development is development that can last. The concept as such revolves around two elements: the notion of 'needs', "in particular the essential *needs* of the world's poor, to which overriding priority should be given" and, the idea of 'limitations', "imposed by the state of technology and social organization on the environment's ability to meet present and future *needs*".[5]

With mankind's needs at its core, sustainable development stands as fundamentally anthropocentric. Environmental protection is called upon but to the extent it befits the fulfillment of needs. In other words, needs may be pursued freely as long as they do not harm the environment in a way to

[1] See ILA Toronto Conference Report, 2006, p.4.
[2] *Report of the UNCED*, I (1992) UN Doc. A/CONF.151/26/Rev. Known as the Rio Declaration.
[3] Also known as *the Brundtland Report*, after the Norwegian Prime Minister Gro Harlem Brundtland who chaired the UN "World Commission on Environment and Development" (WCED) was in charge of drafting the document.
[4] WCED, 1987, p.43.
[5] *Ibid.*

jeopardize their present and future fulfillment.[6] Viewed in this light, sustainable development begs for an accommodation of needs and environmental limitations. How exactly this accommodation must come into being though, is unclear from the definition alone. 'Integration' as found in Principle 4 of the Rio Declaration appears to inform the matter.

Principle 4 requests that environmental considerations be injected into the development process[7] and not taken 'in isolation from it'. Worded like this, 'integration' clarifies the interplay between needs and limitations in line with sustainable development, certes. Whether it discloses the full picture of accommodation is a different story and is worth examining further. Specifically, it would be interesting to dive into a regime usually thought to neglect environmental limitations and explore the way it seeks to integrate - if at all, environmental protection with development needs. From there, the role of integration for sustainable development could be deduced.

A system in which economic development is usually thought to notoriously tower over efforts of environmental protection is the World Trade Organization (WTO).[8] For 'integration' to be legitimately studied under WTO law though, the concept must be shown to bear normative value in international law.[9] Accordingly, the first step would be to unravel 'integration' as a legal principle. Only then, may the principle of integration be juxtaposed onto the WTO framework and used to scrutinize the needs and environmental-limitations dynamics of the regime in line with sustainable development.

1.2.2. Research Question and Sub-Questions

The research question that corresponds to the above problem definition is:

"To what extent can the principle of integration strengthen the position of environmental protection within the WTO regime in line with sustainable development?"

For answering the main question, the following sub-questions need addressing:

Part I:

- What is 'integration' in line with sustainable development and what does it entail?
- How is the principle of integration embedded in international law in the field of sustainable development?

[6] "This 'approach [is] based on the view that environmental protection is primarily justified as a means of protecting humans rather than as an end in itself'". See Birnie and Boyle, 2009, pp. 256-257. It is also in conformity with what the 1992 Rio Declaration purports: "human beings are at the centre of concerns for sustainable development."
[7] The 'development process' is the process engaged in with the view of satisfying needs.
[8] E.g. 'Battle in Seattle' in 2000. Environmental groups have repeatedly denounced WTO activities as being inconsiderate of environmental protection. Whether this is indeed true will appear in Part II of this thesis.
[9] See ICJ, *North Sea Continental Shelf,* 1969. para. 72-74.

Part II:

- How is the principle of integration embedded within the WTO regime?
- To what extent is environmental protection taken into account in the WTO? How may the principle of integration reinforce its position?

1.3. Methodology

1.3.1. Structure

Deriving from the above questions, this thesis will build on two parts. The first will inspect the substance of integration and its status as a principle of international law. The second will discern its application and potential for environmental protection in line with sustainable development within the WTO. Given its concise scope, a few definitions and methodological notes regarding the main notions - other than integration, are in order before launching the analysis.

1.3.2. Scope

Scope of 'the principle of integration' within this thesis

Since integration is the core notion of the thesis, there is no use of flimsily defining it from the outset as it is anyways thoroughly studied later on in Chapter 2. It must only be made clear here that this thesis does not seek to address the principle of integration in international law at large. It simply attempts to shed light on the principle within the context of international law in the field of sustainable development.

'*International law in the field of sustainable development'*

To begin with, 'sustainable development' (SD) may be perceived in three forms. The first is as a concept, as it permeates *Our Common Future*. This one was discussed above. The second is as a principle. This will not be gone into detail here either as it goes beyond the purpose of this thesis[10]. The third comes in as 'international law in the field of sustainable development' and requires defining. Many scholars have attempted to explain it, some more comprehensively than others.

Cordonier Segger's definition as mentioned in a report of the International Law Association is one of the clearest. In her words, 'international law in the field of sustainable development' is a "corpus of international legal principles and treaties which address the *areas of intersection* between international economic

[10] Addressing this question in passing would not do justice to the complexity of the discussion. As one author highlights, "sustainable development is a complex and contested concept, and despite the pages of 'consensus documents' adopted by international agencies and conferences, there remain many different perspectives on what it entails and the scale of reforms required to give it force." See Meadowcroft, 2007, p. 300.

law, international environmental law and international social law aiming towards development which can last".[11]

'Environment'

International law does not agree on a definition of 'environment'[12]. Scholars point out that the term is one "that everyone understands and no one is able to define"[13] and that it has "the Alice-in-Wonderland quality of meaning what we want it to mean"[14]. There are thus not one but many possible definitions. For the sake of consistency however, since *Our Common Future* has already provided a key definition above, it may assertively provide the next: "The environment is where we all live."[15]

'*International environmental law'*

'International environmental law' seems to be "nothing more, or less, than the application of public and private international law to environmental problems''.[16] To some extent, "it is simply the application of well-established rules, principles and processes of general international law to the resolution of international environmental problems and disputes".[17] There is great dispute over the legal status of these 'environmental rules'. Entering into this polemic is unnecessary as it is not the issue at hand. All that needs to be more clearly defined is the scope of 'environmental rules and norms' within this thesis.

The research question with its "*in line with sustainable development"* points to the raison d'être of the endeavor here as geared towards achieving sustainable development. From this angle, environmental rules and norms' are the link between the objective of SD and the implementation of concrete environmental measures[18]. As such, they are inescapably tied to sustainable development. Two clarifications ought to be made on this point.

First of all, this delimitation is drawn for practical reasons only. It should by no means be interpreted as implying that all environmental norms are automatically pursuing sustainable development[19]. Secondly, environmental

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[11] Cordonier Segger et al., 2003, p. 46. "Sustainable Development in Policy and in Law". In *International Law Association Report on Sustainable Development of the 2004 Berlin Conference*. FN 28, p. 6.
[12] "The approaches to defining 'environment' do vary greatly. Early treaties tended to refer to 'flora and fauna' rather than environment. [For example], Article XX(b) and (g) of the GATT refer not to the environmental but to 'human, animal or plant life or health' and to the 'conservation of exhaustible natural resources'" See Sand,1994,p18.
[13] See Caldwell, 1980, p.170.
[14] Birnie and Boyle, 2009, p.6.
[15] WCED. Our Common Future (Oxford, 1987). xi. The Commission did not go into defining the terms.
[16] Birnie and Boyle, 2009, p.4.
[17] Birnie and Boyle, 2009, p.106.
[18] Verschuuren, 2006, p.28.
[19] "Even if almost all justifications for international environmental protection are predominantly and in some sense anthropocentric" as Birnie and Boyle mention, "not all environmental questions necessarily involve sustainable development, or vice versa. We may wish to preserve [...] the giant panda for reasons that have little or nothing to do with sustainable development; or put another way, we may wish to preserve them from sustainable *development*" – emphasis added. See Birnie and Boyle, 2009, p.4-7. But even then, to play the devil's advocate, the protection of the giant panda may be argued on the basis of a 'common-heritage' and 'common-concern-of-mankind' argument – which is essentially anthropocentric.

rules are not to be confused with norms in the field of sustainable development, even though there is arguably considerable overlap between the two[20].

In sum, when looking through the lens of sustainable development, norms of international law in this field function at the intersections *between* the international economic, social and environmental legal regimes whereas environmental rules are found *within* international environmental law as chiefly dealing with environmental issues, albeit generally for the greater goal of sustainable development.

On the WTO

A few remarks on the WTO are also noteworthy. The WTO regime does not cover all aspects of international trade nor does it enjoy universal membership. Subsequently, 'international trade law' when featured in this thesis only serves as a shortcut for 'international law under the WTO', or its predecessor, the GATT system. It does not encompass international trade law as a whole. Moreover, as the WTO operates at the global level, this thesis limits itself to the international arena.[21]

On a *final note*

After having first delimited integration and established its legal status as a principle in international law in the field of sustainable development, in the second part, the principle of integration will be subjected to the intersection of environmental law and international trade law within the WTO regime.[22] The dynamics between 'needs' and 'limitations' as embedded in 'sustainable development' will thus be looked into in this thesis as the dynamics between trade needs and trade-restricting environmental limitations within the specific framework of the WTO.

1.3.3. Sources

Being of legal nature, this research reviews the relevant primary and secondary sources of international law. Namely, it builds upon the relevant treaty law, international customary law and general principles as recognized by civilized nations. The argumentation is further developed on the basis of apposite case law, judicial opinions and scholarly articles. The list of consulted literature figures at the end of the thesis in the bibliography whereas the Annexes contain the legal instruments, cases and websites analyzed. On and all, the data extracted was subjected to a critical and in-depth analysis.

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[20] Principles of international law in the field of sustainable development may be particularly difficult to distinguish from environmental ones since they can be "old environmental principles with new focus" See Lang, 1999, p. 164.

[21] If municipal law is referred to, it is simply for pointing out state practice and/or *opinio juris*.

[22] The principle of integration as operating at the intersections of social and economic law, environmental law and social law or economic law within the international environmental regime falls outside of the scope of this thesis and will not be looked into.

International environmental law, core sustainable development texts and academic articles of lead scholars in the field of sustainable development provided the input for dissecting the normative and legal status of the principle of integration as it stands today and its trend for the future. Writings by Birnie, Boyle, Lowe, Sands and Schrijver as well as reports of the International Law Association proved particularly useful.

As for understanding the position of the environment within the WTO and the role that the principle of integration does and could further play therein, a thorough legal scan of selected WTO texts and cases[23] was performed. Commentaries of the International Law Commission were additionally consulted for a consolidated view on the position of environmental protection within the WTO regime.

1.4. Relevance

Due to its high legal technicality and specificity, this project is of most significance to the academic and policy-making circles. The work attempts to shed some light on an under-studied principle[24] within the Trade-Sustainable Development controversy.

As one academic warns, “it is difficult to enter into a discussion on principles of international law for sustainable development without a sense of [...] confusion. [...] Confusion, because perceptions of the nature, status, role and substance of principles have become increasingly unclear in the post-Rio period.”[25] For the least, as to the principle of integration and its role for sustainable development within the WTO, this thesis aims at diminishing this confusion.

[23] The Agreement is comprised of a short basic agreement of 16 articles and four annexes. Namely, Annex 1A on Trade in Goods, which includes the 1947 GATT, the SPS Agreement and TBT Agreement among others, Annex 1B in Trade in Services, Annex 1C on intellectual property rights (TRIPs), Annex 2 on the Dispute Settlement System, Annex 3 on TPRM and Annex 4 on Plurilateral Trade Agreements.

[24] “The question of integration is […] possibly the greatest challenge in the entire project of sustainable development policies. How should the various and quite different lines of standard-setting and policies in the three relevant areas (development, environment and human rights) be linked to each other, adjusted to each other and formed into the coherent whole that is required for achieving sustainable development?” See Schrijver, 2009, p.99.

[25] Verschuuren, 2006, p. 2.

Part I – Integration in International Law in Line with Sustainable Development

2. Integration and its Role for Sustainable Development

First thing's first, what is 'integration' in line with sustainable development and what does it entail? As already said, Principle 4 of the Rio Declaration is usually the starting point when trying to understand integration.[26] Keeping up with this logic, Principle 4 will inaugurate the discussion here too. But it is not Principle 4 *per se*, which is of such vivid interest; instead it is its position within the Rio Declaration that instructs far more on integration in line with sustainable development.

2.1. Integration within the Sustainable Development Discourse

2.1.1. Integration, a Prerequisite for Sustainable Development

As a reminder, Principle 4 holds that "in order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it"[27].

Au pied de la lettre, Principle 4 has a rather limited one-way grasp of integration: environmental protection must be fused into the development process. It does not require environmental protection to consider development. Nor does it set out how the development process is to incorporate environmental protection.[28] Principle 4's contribution for understanding integration thus limits itself to exposing the elements of integration, namely environmental protection and development process. As to how and what extent this integration ought to occur, one must look outside of this narrow wording and into the overall setting of the Rio Declaration.

The Rio Declaration cemented a milestone for sustainable development when it was adopted at the 1992 UN Conference on Environment and Development.[29] Not only did it reaffirm the goals of the earlier 1972 Stockholm Declaration on the Human Environment, it went on to specify guidelines for achieving sustainable development. Each of its 27 provisions presents a different yet vital aspect of sustainability and as such adds up to paint a well-rounded portrait of sustainable development. What's more, since the Declaration was adopted as a 'package deal',[30] each provision must be read pragmatically against the whole

[26] Principle 4 "is the central premise for the further elaboration of integration". See ILA, 2006, p. 4.
[27] UN Rio Declaration. 1992.
[28] "Although it is possible to identify the main elements of the concept of sustainable development, it is far from certain what their specific normative implications are or indeed, how they relate to each other, or to human-rights law and international economic law. […] International law cannot be applied in a fragmented way, and sustainable development has no more claim to priority than any other element." See Birnie et al., 2009, 125.
[29] The document has received worldwide attention since its adoption.
[30] As Boyle and Freestone note, 'its 27 principles represent something of a 'package deal', negotiated by consensus, rather like the 1982 UNCLOS, and must be read as a whole. The Rio Declaration has thus been called: 'a text of uneasy

and applied in a way that it is cumulatively supportive to the overall goal of sustainable development.[31]

Principle 4 finds itself in this 'package' and is thus not a principle with an end in itself and an objective in its own right. Instead, its application is context-dependent and varies in light of the other relevant requirements for sustainable development within the case at stake. Intriguingly enough, the drafters of the Rio Declaration established Principle 4 as ballast for Principle 3[32], as the weight refraining 'the right to development' from becoming unconditional. Principle 3 is formulated similarly to Principle 4, but it puts the stress on 'development' to which it subordinates 'environmental needs'. In this light, the two principles appear as the opposite yet complementary ends of the same scales.

2.1.2. Integration and the Equitable Balancing of Pillars

The juxtaposition of Principle 4 and Principle 3 of the Rio Declaration already points to the fuller picture of integration. Indeed, integration does not seek to reconcile development with environment alone, as the wording of Principle 4 solely would convey. Instead, integration is about balancing concerns that are all vital for the achievement of sustainable development. Concretely, integration is about the equitable balancing of the three interdependent pillars of sustainable development, namely the economic, social and environmental pillars.

The origins of the three-pillar approach to sustainable development can be traced to *Our Common Future.*[33] It got more recently picked up in the 2002 Johannesburg Declaration, which asserts that states share the "collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development"[34]. This ties in with reflections and perceptions of sustainable development and integration in treaties, case law and the literature[35]. Examples therefrom are provided later on when discussing the status of integration as a principle of law.

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compromises, delicately balanced interests, and dimly discernible contradictions, held together by the interpretative vagueness of classic UN-ese". See Boyle et al., 1999, p.3.

[31] "Compared to the [Brundtland] principles the Rio Declaration is even more an exercise in progressive law-making than codification. It lacks the human rights foundation of the earlier draft, but contains a stronger focus on sustainable development, articulated more comprehensively than before in Principles 3-9. These affirm a right to development, *subject to the integration of environmental concerns* [among others]". See Boyle, 1999, 68.

[32] Principle 3 of the Rio Declaration reads: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

[33] See for instance, *Our Common Future*, Chapter 12, II, 10, "The integrated and interdependent nature of the new challenges and issues contrasts sharply with the nature of the institutions that exist today. These institutions tend to be independent, fragmented, and working to relatively narrow mandates with closed decision processes. Those responsible for managing natural resources and protecting the environment are institutionally separated from those responsible for managing the economy. The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must."

[34] Johannesburg Declaration. 2002.

[35] For example, Sands highlights that "the three subjects of [economic development, the environment and human rights] have for the most part followed independent paths, and it is only with the advent of the concept of sustainable development [...] that they will increasingly be treated in an integrated and interdependent manner." Sands, 1995, p. 53. Voigt also mentions: "Integration does not happen in a vacuum but needs to be assessed in the context of sustainable development. It is a tool for bringing together the several priorities of the modern world in order to promote the ultimate aim of sustaining human society. [...] Such a balance is only possible to the extent that ultimate limits are observed". See Voigt, 2009, p.39.

With this, the notion of integration departs from its Principle 4 phrasing and pioneers a whole new dynamic. It does not merely invoke that environmental concerns be taken into account in the development process, but asks that environmental protection be weighted against the other two pillars of sustainable development in a *consistent* and *proportionate* manner. Integration is about evenhandedly accommodating on the long run environmental protection[36] with the social and economic pillars [37] and as such addresses the interrelationships between these three spheres of life, all for the sake of sustainability.[38] How exactly it deals with these interrelationships and provides guidance for giving effect to sustainable development will be made clear in the following two sub-chapters.

2.2. The Two Levels of Integration

2.2.1. Policy Integration[39]

The first way by which integration deals with the interrelationships between the economic, social and environmental pillars of sustainable development is through the taking into account of *concerns and issues*. This type of integration operates across sectors and institutions[40], in the planning and implementing of their policies and activities[41]. In the lack of a better expression, this integration may be understood as '*policy integration'*.

Policy integration operates both between and within institutions and among the various levels of activities. It cut-crosses through the various developmental endeavors of states and international organizations and seeks to operate within the broad range of undertakings, from their concrete projects and activities, to their higher-level programmatic and executive ventures.[42]

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[36] "By constituting these essential ecological conditions as a de minimis requirement of sustainable development, the concept inhabits a non-derogable core. […] This core can be used as a point of departure and a 'principled priority' guide on how these widely divergent priorities need to be balanced. From this perspective, it becomes clear that sustainable development is about reconciling development with the environment by recognizing the limited capacity of the environment to absorb negative impacts observing the carrying capacity of ecosystems and by securing the basic functioning of ecosystems". See Voigt, 2009, p.54.

[37] "The three subjects of [economic development, the environment and human rights] have for the most part followed independent paths, and it is only with the advent of the concept of sustainable development [...] that they will increasingly be treated in an integrated and interdependent manner." See Sands, 1995, p.53.

[38] "Integration does not happen in a vacuum but needs to be assessed in the context of sustainable development. It is a tool for bringing together the several priorities of the modern world in order to promote the ultimate aim of sustaining human society. […] Such a balance is only possible to the extent that ultimate limits are observed". See Voigt, 2009, p.39.

[39] "An interpretation which makes the process of decision-making the key legal element in sustainable development, rather than the nature of the development is implicitly supported by the *Case Concerning the Gabcikovo-Nagymaros Dam*. In that decision, while not questioning whether the project was sustainable, the ICJ did require the parties in the interests of SD to ''look afresh'' at the environmental consequences and to carry out monitoring and abatement measures to contemporary standards set by international law. Such an approach enables international courts to further the objective of sustainable development in accordance with the Rio Declaration while relieving them of the impossible task of deciding what is and what is not sustainable. An argument of this kind would focus on the components of sustainable development, rather than on the concept itself" See Boyle and Freestone, 1999, p. 17.

[40] "Integration requires that the general norm of sustainability and the objective of sustainable development are the basis for and form an integrated part of policy and activities in all relevant fields, as laid down for example in Article 11 TFEU on the integration of environmental requirements. This demands a genuine application of the requirements for the pursuit of sustainable development, which is explicitly more than only a ''taking account of''". See Schrijver, 2008, p.25.

[41] "Most, if not all, everyday policies pursue the integration of something into something else." Nollkaemper, 2002, p.25.

[42] "Environmental protection and sustainable development must be an integral part of the mandates of all agencies of governments, of international organizations, and of major private-sector institutions. These must be made responsible and accountable for ensuring that their policies, programs, and budgets encourage and support activities that are

In that, policy integration strives to pervade the entire operational system of states and international institutions, both vertically and horizontally. Most likely, policy integration is what the drafters of Principle 4 had in mind.[43] It is time to turn to the second type of integration: legal integration.

2.2.2. Legal Integration

Legal integration to some extent complements policy integration.[44] It provides through its very nature a clearer basis for integration as an enforceable norm. For instance, it provides the basis for courts to counter policy decisions, which have not been sufficiently sensitive to environmental concerns.

Legal integration operates at the intersection between the three legal pillars of sustainable development. It attempts to smoothen the connections between economic, social and environmental law by accommodating their competing norms. Somewhat, legal integration may be viewed as the ointment greasing the legal mechanics between the three pillars of sustainable development to ease the machinery's rolling towards the objective. In this way, legal integration focuses on "merging all relevant legal factors into a unified [sustainable] answer"[45], and enforces policy integration by providing it with a legal basis. Legal integration takes two forms: normative and judicial integration.

Normative integration is the way by which the economic, social and environmental regimes embrace and embed the norms stemming from one another into their own functioning and fundamental texts. As the ILA comments, "normative integration focuses upon the extent to which rules have incorporated sustainable development considerations within their meaning and provisions."[46] Normative integration takes place in the law-making process and transpires in the conventional and institutional set up of regimes. *Judicial integration* on the other hand concerns itself with the way by which adjudicating bodies seek to balance diverging norms from the three pillars of sustainable development.

Judicial integration is applied in the reconciliation of competing norms and not as an instrument for fusing the latter, as normative integration does in the law-making process. With its two sides, legal integration acts thus both on an *ex ante* and *ex post* basis, and further reinforces policy integration on both these levels.

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economically and ecologically sustainable both in the short and longer terms. They must be given a mandate to pursue their traditional goals in such a way that those goals are reinforced by a steady enhancement of the environmental resource base of their own national community and of the small planet we all share." *Our Common Future*, Chap. 12, II, 17.

[43] ILA, Toronto Conference Report, 2006, p. 21.

[44] "Arguments of policy provide reasons for legislative bodies to develop the law in order to further the objective [of integration]. As such, we can assume that the integration principle as a policy has coinspired more particular legal rules. " Nollkaemper, 2002, p.25.

[45] ILA, Toronto Conference Report, 2006, p.22.

[46] ILA, Toronto Conference Report, 2006, p. 13.

2.3. Integration as a Principle for Sustainable Development

2.3.1. A Leading Advocate of Sustainable Development

As it was said in the introduction, sustainable development is about development, which can last. For development to last, it must weight out the extent of its needs with the limitations that its unrestrained pursuit could encumber on its achievement on the long run. The systemization of this dichotomy between needs and limitations has evolved into the three-pillar balancing approach.

The ideal scenario of the three-pillar approach would be to achieve a state of development within which economic, social and environmental needs and limitations altogether are in a state of equilibrium. The target of sustainable development is achieving this equilibrium so that concerns from all three spheres of life would no longer be raised. Integration, as a principle, is simply but a legal medium trying to regulate humanity's behavior on the path to this equilibrium.

Thinking back at Cordonier Segger's definition of 'international law in the field of sustainable development', norms of this field were said to work at the intersection between economic, social and environmental law. Integration as a principle might be said to fit this description. Furthermore, it seems to be the very norm bringing into existence the law on sustainable development in that it is the one requesting the interplay between the three pillars of sustainable development.

2.3.2. A Principle with a Pragmatic Application

Though Principle 4 of the Rio Declaration does set the basis for understanding integration, the notion has come to be far more than what this Principle holds. The International Law Association clearly puts it, "Principle 4, while useful shorthand for much of what integration entails, cannot in fact, reflect the totality of the uses to which integration is now put. This is especially the case when one considers the emerging non-institutional and legal aspects in which integration is said to be at work."[47]

There is indeed no uniform understanding of what integration implies as a principle. The concept of integration bears both policy and legal implications - but this is the ideal case scenario and whether it is also true for the principle still needs to be seen. What can be said about the principle of integration for now is that it is practical and flexible, and depends on the possibilities of each system for its application.[48]

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[47] ILA, Toronto Conference Report, 2006, p.4.

[48] Boyle and Freestone for instance claim that "although international law may not require development to be sustainable, it does require development decisions to be the outcome of a process which promotes sustainable development." See Boyle and Freestone, 1999, p.9.

The question which now arises is: is the principle of integration binding in international law at both the policy and legal levels? If yes, how does it impact state behavior? This next chapter will look into whether integration is a primary principle of international law and if the answer leans towards the affirmative, it will further examine its repercussions for states.

3. The Legal Status of the Principle of Integration

The question this chapter addresses is: how is the principle of integration embedded in international law in the field of sustainable development? For answering it, the chapter will first review how integration appears in the primary sources of international law in line with Article 38(1) of the Statute of the International Court of Justice (ICJ), namely in "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law [and] (c) the general principles of law recognized by civilized nations."[49] It will then observe how integration appears in secondary sources.[50] Eventually, conclusions will be drawn on its status as a legal principle.

3.1. Integration in Primary Sources of Law

3.1.1. Treaty Law

Amongst the sources just outlined, state obligations stemming from treaty law, in other words, from international conventions, are the least problematic to establish. Unlike the rest of the primary sources, treaty law is established by the conscious and deliberate acts of states through their express consent.[51] In treaty law, references to integration are made in the UN Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the Convention to Combat Desertification. Integration is also at the foundation of several international and regional conventions on the marine environment[52] and has been a recurrent instrument in European law.

Specifically, the UNFCCC speaks of 'policies and measures to protect the climate system which *should* be integrated with national development programmes'[53] and 'climate change considerations which shall, *to the extent possible*, be taken into account in relevant social, economic and environmental policies and actions'[54]. The CBD lays down that "each Contracting Party shall, in accordance with its particular conditions and capabilities, integrate, *as far as possible* and as

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[49] ICJ Statute. 1945.
[50] In line with Article 38(1)(d) of the ICJ Statute, secondary sources are "subject to the provisions of Article 59 [of the Statute], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".
[51] See Shaw, 2006, pp. 89-92.
[52] See for instance Article 6(2)(d) of the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, Article 4 of the Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, the Preamble ("the problems of ocean space are closely interrelated and need to be considered as a whole") and Articles 193-194 of UNCLOS and the OSPAR Convention.
[53] UNFCCC. Article 3(4): "The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."
[54] UNFCCC. Article 4(1): "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: (f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimize adverse effects on the economy, on public health and on the quality of the environment, of projects and measures undertaken by them to mitigate or adapt to climate change."

appropriate, the conservation and sustainable use of biological diversity into relevant sectoral and cross-sectoral plans, programmes and policies."[55]

The Convention to Combat Desertification spells out in its General Principles that "in pursuing the objective of this Convention, the Parties *shall* adopt an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought"[56] whereas Article 11 of the Treaty Establishing the European Union reads that "environmental protection requirements *must be integrated* into the definition and implementation of Union policies and activities, in particular with a view to promoting sustainable development." [57]

On and all, the same elements pop up and are connected in an analogous manner: relevant social, economic and environmental aspects are to be taken into account in policies and activities in line with sustainable development. For the most part, with *should*, *to the extent possible* and *as far as possible*, the stipulations of integration are pragmatic and sensible to the capacities of states. Most often than not thus, the principle of integration does not impose a strict obligation for states but does nevertheless present itself as strongly desirable. There are instances however in which adherence to the requirement of integration is not as flexible. Though the 1994 Convention to Combat Desertification also poses a firm integrative requirement, the prime illustration is found in European law.

Principally, the first traces of integration in European treaty law[58] can be tracked back to the 1957 Treaty of Rome establishing the European Communities. In its Preamble, the European Communities 'affirm[ed] as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples […]' and proved 'anxious to strengthen the unity of their economies and to ensure their harmonious development'[59]. The principle of integration was eventually codified in the 1986 Single European Act in Article 130r(2)[60]. It was further included in the 1993 Treaty of Maastricht[61], the 1997 Treaty of Amsterdam[62], and finally resulted in Article 11 of the Treaty on the Functioning of the European Union (TFEU).

Each subsequent phrasing in European law reinforces and refines the principle in a way that it nowadays operates 'in particular with a view to promoting sustainable development'[63]. However, despite its prescriptive tone, it is unclear from Article 11 TFEU alone what obligations the principle entails for EU

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[55] CBD. Article 6(b).
[56] Convention to Combat Desertification, Article 4(a).
[57] Ex Article 6 EC/ New Article 11 TFEU. Treaty of Lisbon. The provision refers to the integration of fundamental objectives into all policy sectors of the European Union.
[58] 'European law' in this thesis means law of the European Union or its predecessor the European Community. It also refers to jurisprudence of the European Court of Justice. It does not refer to law of the Council of Europe and the European Court of Human Rights.
[59] 1957 Treaty of Rome.
[60] Single European Act: "Environmental protection measures shall be a component of the Community's other policies".
[61] See Treaty of Maastricht, Article 130r(2) EC.
[62] See the Treaty of Amsterdam Article 6 EC and Article 174.
[63] See TFEU Article 11.

Members since Article 11 refers to integration in 'Union policies and activities'. A look into the relevant jurisprudence below will try to elucidate this.

3.1.2. International Customary Law and General Principles

Customary law captures the general practice and established consent among the international community of states. The existence of a customary rule is oftentimes difficult to prove. For one, what actions qualify as *opinio juris* is frequently questionable (i.e. *opinio juris* transpires the belief that state practice takes place out of a sense of legal obligation).[64] Moreover, in the advent of a conflict between treaty and customary law, treaty norms, thought to be *lex specialis,* are likely to override customary law, which governs more general matters.

Furthermore, where treaty and customary law lack, general principles as defined in Article 38(1) of the ICJ Statute may be looked upon as directives for courts to fill gaps in the existing law and prevent *non liquet* situations, in which there is no applicable law.[65] General principles are usually said to hold a rather limited scope. Instead of being legal bases for direct application, these usually are sources of legal inspiration, used to complement treaty and customary law in the interpretation of 'open norms'. They are drawn from *opinio juris*. This section reviews whether the principle of integration may be said to be such a general principle or whether it is instead customary law.

However, due to the limited timeframe of this thesis, the traces of integration in *opinio juris* and state practice could unfortunately not be meticulously studied among the wide community of states and array of domestic courts. Instead, this section had to restrict itself to the emanations of the principle in the jurisprudence of the International Court of Justice. By virtue of Article 38(1)(d) of its Statute, ICJ jurisprudence has persuasive authority as a statement of the law. The Court's reports may thus safely be said to reflect international customary law or contain general principles. Let us see what the Court has made of integration in line with sustainable development.

Case Concerning the Gabcikovo-Nagymaros Dam

A paramount endorsement of the principle of integration by the ICJ may be found in the 1998 *Case Concerning the Gabcikovo-Nagymaros Dam*, a dispute between Slovakia and Hungary concerning the construction of a dam on the Danube. The relevant passage demands citing in full,

> "Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, *new norms and standards have been developed*, set forth in a great number of instruments during the last two decades. Such new norms *have to be taken into*

[64] See Shaw, 2006, pp. 88-92.
[65] See Shaw, 2006, p. 93.

> *consideration*, *and* such new standards *given proper weight*, not only when States contemplate new activities but also when continuing with activities begun in the past. This *need to reconcile* economic development with protection of the environment is aptly expressed in the concept of sustainable development'. For the purpose of the Present case, this means that the Parties should *look afresh* at the effects of the environment of the operation of the Gabcikovo plant."[66]

Though 'integration' is not expressed *per se*, the basic elements of the principle are dully figured. 'Environmental protection', 'development process' and 'in line with sustainable development' respectively find ground in "protection of the environment", "economic development" and "aptly expressed in the concept of sustainable development". As such, the principle of integration finds its emanation in the 'need to reconcile' and 'look afresh'. Both wordings bring different facets of integration to the table and need exploration individually.

First, the 'need to reconcile' is actually '*this* need to reconcile', in which 'this' relates to 'the new environmental norms and standards'. The Court asks that these new norms and standards be reconciled with the existing ones by 'being taken into consideration and given proper weight in economic activities'. From this standpoint, 'integration' entails a reconciliation of legal norms and standards. Concretely in the case, it calls for the conciliation of treaty rules guiding economic activities with environmental norms.

Moreover, the Court expressly highlights that the reconciliation of norms needs to occur 'when States contemplate new activities but also when continuing with activities begun in the past'. The Court thus uses the principle of integration for an evolutionary interpretation of existing provisions in light of environmental protection. This leads to the second dimension of the principle, by which the Court asks of states to reconsider their behavior and requires them to 'look afresh' at their activities in the advent of environmental principles.

'The Parties should look afresh at the effects of the environment of the operation of the Gabcikovo plant' as such encapsulates the other dimension of integration in line with sustainable development. It expands the requirement of conciliatory legal integration to the policy domain: stemming from the new environmental norms and standards, legal integration pushes environmental considerations into the policy and decision-making polity of states.

As to how states are to conduct this integration of 'need for reconciliation' and 'looking afresh', the Court abstains from providing guidance. It rules instead that,

> "It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that *takes account of the objectives of the Treaty [regulating the dam enterprise between Slovakia and Hungary]*, which must be pursued in a *joint and integrated way*, *as well as the norms of international environmental law and the principles of the law of international watercourses*."[67]

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[66] *Case Concerning the Gabcikovo-Nagymaros Dam* (1997*) ICJ Report 7.* Para. 140
[67] *Id.* Para. 141.

Finally, the dissenting opinion of Judge Weeramantry, although not officially part of the judgment, is interesting for the principle of integration. Weeramantry, then Vice-President of the ICJ, disagrees with the Court's perception of sustainable development as a concept. He instead views it as a principle 'with normative value'; value which it extracts from its 'general acceptance by the global community' and most interestingly, which it derives from 'its inescapable logical necessity'[68].

He also points that the 'right to development' and the need to protect the environment may clash, but "the law necessarily contains within itself the principle of reconciliation".[69] That principle he says is SD. SD may be the higher ideal guiding this 'reconciliation' but the principle that is directly applicable in the process is actually the principle of integration[70]; in-between 'reconciliation' and SD is 'integration'. Albeit indirectly thus, Weeramantry supports the cause of integration, which when superposed with his words, seems 'inescapable' for "humanity and planetary welfare"[71].

Pulp Mills on the River Uruguay

Another ICJ milestone for the principle of integration is the recent *Pulp Mills.* In it, the Court handles the requirement of carrying out an Environmental Impact Assessment (EIA) in the context of transboundary harm.[72] It stresses that under international law, even if it is 'accepted practice' to carry out an EIA in a situation in which there is probable risk of significant transboundary harm,[73] international customary law does not dictate the way such an EIA is to be carried out.

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[68] "The principle of sustainable development is thus part of modern international law by reason not only of its inescapable logical necessity but also by reason of its wide and general acceptance by the global community." See Dissenting Opinion, Judge Weeramantry*, Case Concerning the Gabcikovo-Nagymaros Dam*, p.95.

[69] "The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs. To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result. Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development." See Dissenting Opinion, Judge Weeramantry, *Case Concerning the Gabcikovo-Nagymaros Dam*.p. 90.

[70] Weeramantry himself shares this thought, albeit implicitly, disguised under the greater umbrella of SD: "the Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development." See Dissenting Opinion, Judge Weeramantry, *Case Concerning the Gabcikovo-Nagymaros Dam*.p. 88.

[71] "As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts, and aspirational standards. […]There are many routes of entry by which [environmental principles] can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them - embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival." See Dissenting Opinion, Judge Weeramantry, *Case Concerning the Gabcikovo-Nagymaros Dam*, p.110.

[72] *Pulp Mills* does not rule on whether EIAs are compulsory for states in deciding on a project other than a project concerned with shared natural resources with significant risk of transboundary harm.

[73] "A practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law is to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context. […] The Court notes [further] that the environmental impact assessments which are necessary to reach a decision on any plan that is

In other words, just as seen previously in *Gabcikovo-Nagymaros*, international law expects states to integrate environmental concerns and norms into their development activities and policies, specifically when their development might impact the environment of another state. The way however by which such an accommodation is to be made, if no other binding rules between the concerned states apply, is left to state discretion.[74]

From all of this, it would seem that the principle of integration has a legal value in international law for sustainable development through customary law and not as a general principle. It does not fit the definition of what constitutes a general principle: it is not a higher ideal in its own right out of which rules are drawn through analogy to avoid *non liquet* situations.[75]

It is very well a practical norm, which if anything, itself emanates from a higher 'inescapable' force - to use Judge Weeramantry's word, which is that of sustainable development. The ICJ seems to agree on this by pointing that the "balance between economic development and environmental protection [embodies the] essence of sustainable development".[76]

The principle of integration thus, in its legal dimension, brings rules together, existent and emerging, but it does not serve to create new ones as general principles would. This statement needs nuance though. Integration does not serve to create new rules but it can still, as it was seen in Chapter 2, through its policy dimension, be a principle bringing together legitimate concerns to the fore, even when no rules exist to back up these concerns.

3.2. Integration in Secondary Sources of Law

3.2.1. Jurisprudence of International Courts and Tribunals[77]

This sub-chapter will review the principle of integration as it figures in the jurisprudence of international courts and tribunals other than the ICJ. Given that ICJ case law was just reviewed in order to point to primary sources of law, it would be redundant to point to its cases again. Instead, it is more useful to

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liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party". *Pulp Mills* para. 119 and 204.

[74] "The Court observes that [...] general international law [does not] specify the scope and content of an environmental impact assessment. [...] Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project [at hand], the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment". *Pulp Mills*, p.61, para. 205.

[75] According to Shaw, in an instance in which a court realizes that there is no law covering the situation at hand, "the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules or directly from the general principles that guide the legal system, whether they be referred to as emanating from justice, equity or considerations of public policy. [...] It is for such a reason that the provision of 'the general principles as recognized by civilized nations' was inserted into article 38 as a source of law, to close the gap that might be uncovered in international law and to solve this problem which is known legally as *non liquet*." Shaw, 1997, p.78.

[76] *Pulp Mills* 2010 ICJ case, p.53, para. 177.

[77] The principle of integration can also be found in the WTO jurisprudence. However to avoid repetition, WTO jurisprudence will not be discussed here but left for Part II.

present how other international courts and tribunals have used the principle of integration for sustainable development ends.

The Iron Rhine Railway Arbitration

The Iron Rhine dispute arose between Belgium and the Netherlands concerning the reactivation of a historical railway line between Belgium and Germany, crossing the Netherlands. Among other things, the two countries conflicted when the Netherlands sought to impose a number of environmental protection measures, the costs of which it requested Belgium to bear. The 2005 *Arbitration Regarding the Iron Rhine Railway* settles the dispute. It should be noted here that the 1839 Treaty of Separation between Belgium and the Netherlands is the treaty which guides the relations between the two states and which was thus in turn the key legal basis in the dispute.[78]

In interpreting the provisions of the 1839 Treaty and discussing the applicable law between the parties, the Arbitral Tribunal notes the relevance of environmental norms, which are not as such figured in the old document. Namely, the Tribunal brings up the relevance of the principle of integration as embodied in Principle 4 of the Rio Declaration, which it perceives as an emerging principle of international law.[79] The Tribunal gives weight to the requirement of integration by quoting the ICJ *Gabcikovo-Nagymaros* case and making overt reference to the 'need to reconcile economic development with protection of the environment' and the applicability of 'new environmental norms and standards' such as the principle of integration in its interpretation of the 1839 Treaty[80]. It also highlights that neither Belgium nor the Netherlands refute the relevance of the principle of integration[81], which is the ultimate legitimization for its use by the Tribunal.

The Tribunal relies on the principle of integration to accentuate that "the reactivation of the Iron Rhine railway [based on the 1839 treaty] cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line"[82] and that "environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts"[83]. It uses the principle for an evolutionary and updated interpretation of the provisions of the old treaty in line with new environmental considerations

[78] "Belgium's plan to make renewed and significantly heavier use of the railway line, which would entail restoration, adaptation, and modernization (referred to in the award as "reactivation") of the Iron Rhine railway, is not contested as such. The two countries have however differed, *inter alia*, over the entitlement of Belgium, on the one hand, to establish the plan for the reactivation, and the entitlement of the Netherlands, on the other, to insist on conditions specified under Dutch law for such a reactivation. They also differed over the allocation of the related costs." *Iron Rhine Press Release of the Permanent Court of Arbitration*. The Hague, 24May 2005.

[79] *Iron Rhine,* para. 59.

[80] *Iron Rhine*, para. 59.

[81] *Iron Rhine*, para. 60.

[82] *Iron Rhine,* para. 223.

[83] *Id.* The Tribunal explains that "today both international and EC law require the integration of appropriate measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development [...] reflects this trend. [...] Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts [...]." para. 223.

and ends up ruling in favor of the environmental protection measures as requested by the Netherlands.

European Court of Justice

The main question on the principle of integration in European law concerns its binding force for EU Member States. As it was mentioned above, a textual analysis of Article 11 TFEU provides that the principle of integration is binding upon the European Institutions but does not say whether it also applies to Member States. The jurisprudence of the European Court of Justice (ECJ), the court of last instance for issues on European law, provides cues on this matter.

In the 1994 *Peralta* case, the ECJ pointed that the then equivalent of Article 11 was restricted to Community environmental objectives [84] and that it was incumbent upon the European Council's decision-making. Nevertheless, the ECJ made clear that Member States were not prevented from maintaining or introducing more stringent environmental measures in line with this integrative provision as long as those measures were compatible with European law.[85]

In conjunction with the principle of sincere cooperation encrusted in Article 4(3) TEU[86], it can be inferred from *Peralta*, among other cases[87], that even if Member States are not the direct addressees of Article 11 TFEU, they are nevertheless subject to the principle of integration in that they are under the obligation not to take measures incompatible with the objectives of the Union. Consequently, Member States are not to disregard the integration of environmental protection into their activities.[88]

An interesting side note is that, in *Iron Rhine*, the Arbitral Award also refers to what was then the current Article 4(3) TFEU and points that both parties to the dispute agree that the provision brings upon them an obligation to facilitate the environmental rules of European law[89]. This reinforces the argument that the principle of integration entails obligations on EU Member States, albeit indirectly.

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[84] The ECJ has long established environmental protection as one of the underlying objectives of the Community/Union. See for example, *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* (Case 240/83) [1985], para. 13.

[85] See *Criminal proceedings against Matteo Peralta,* Case C-379/92, 1994, para. 57-58: "Article 130r is confined to defining the general objectives of the Community in the matter of the environment. Responsibility for deciding what action is to be taken is conferred on the Council by Article 130s. Moreover, Article 130t states that the protective measures adopted pursuant to Article 130s are not to prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty."

[86] Article 4(3) TEU reads: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

[87] For understanding further how the ECJ has interpreted the relation between Community/Union environmental objectives and obligations of Member States, see for example, *Inter-Environnement Wallonie ASBL v Région wallonne* (Case C-129/96) and *Commission of the European Communities v French Republic* (Case C- 265/95).

[88] Similarly, in the later *Concordia Bus Case*, the ECJ ruled that "in the light [...] of the wording of [the principle of integration], [...] the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender [is not excluded]." ECJ, Case C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab, v Helsingin kaupunki, HKL-Bussiliikenne.* Para. 57.

[89] See *Iron Rhine*, paras. 138-141.

3.2.2. Non-Binding International Instruments

Soft law captures several key emanations of the principle of integration. For one, it holds in Principle 4 of the Rio Declaration[90] the chief provision when talking about integration. It also contains the earliest attempt of defining integration in Principle 13 of the 1972 Stockholm Declaration on the Human Environment. This principle outlines: "In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population."[91]

Although too early to see mentions of 'sustainable development' as the concept was crystallized on the international arena only in 1987 with *Our Common Future*, the Stockholm Declaration already attempts to connect the dots between 'environment', 'development' and 'integrated approach' in light of the 'benefit of the population' the same way the later Principle 4 does. In the Rio Declaration however, Principle 4 subjects 'integral part' to 'shall'. As such, the principle departs from its earlier Stockholm 'should' and adopts an affirmative stance in the 1990s.

Other traces of the principle in soft law include allusions to the need for an 'integrated approach' in the 1982 World Charter of Nature[92] and in *Our Common Future* Report[93], a full chapter in Agenda 21, called 'Integrating Environment & Development in Decision-Making', a reference in the Preamble[94] and Plan of Implementation of the 2002 Johannesburg Declaration[95] and most recently in a UN General Assembly Resolution from the 2005 World Summit. The said resolution promotes "the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars." [96] The International Law Association in its 2002 New Delhi Declaration also expands the room of the principle to 'principle of integration and interrelation'[97].

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[90] UN Rio Declaration. 1992. "'In order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

[91] UN Stockholm Declaration, 1972.

[92] The 1982 World Charter of Nature speaks of 'planning and implementing social and economic development activities taking due account of the fact that the conservation of nature is an integral part of those activities'. 1982. Principle 7.

[93] See Brundtland Report, 1987, pp.62-65.

[94] In Johannesburg, states "assume[d] a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels." Preamble of the Johannesburg Declaration, provision 5. See Report of the World Summit on Sustainable Development, Johannesburg, 2002, UN doc. A/CONF.199/20.

[95] See Johannesburg Plan of Implementation, provision 139(b) of chapter XI 'Institutional Framework of Sustainable Development': "139. Measures to strengthen institutional arrangements on sustainable development, at all levels, should be taken within the framework of Agenda 21, build on developments since the United Nations Conference on Environment and Development and lead to the achievement of, inter alia, the following objectives: (a) Strengthening commitments to sustainable development;(b) Integration of the economic, social and environmental dimensions of sustainable development in a balanced manner;"

[96] UN doc. A/RES/60/1, 24 October 2005, para. 48.

[97] "The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind. " Principle 7.1. ILA. 2002. New Delhi Declaration.

Another manifestation of integration, which is of relevance here, is Principle 12 of the Rio Declaration. This principle outlines that: "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation."[98] Even if Principle 4 more vaguely refers to 'development process', whereas Principle 12 concretely mentions the international economic system, within the scope of this thesis, the two principles very much appear as the two sides of the same coin.

3.3. The Two-Fold Legality of the Principle of Integration

3.3.1. The Principle of Integration as an Emerging Customary Rule

In discussing the requirements for establishing a conventional norm as a customary rule of law[99], the ICJ reminds that "it would in the first place be necessary that the provision concerned should, at all events potentially, be of fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[100] Only afterwards does the Court point to the necessity of establishing *opinio juris* and 'extensive and virtually uniform' state practice in regards the norm at stake[101]. In light of the three elements, let us see whether the principle of integration could constitute such a customary rule.

First thing would be to assert whether the principle of integration bears a norm-creating character, which sets a clear requirement for state behavior. As it has transpired from the above, the straightforward and authoritative stipulations of the principle of integration that directly address the international community of states as a whole[102] are found in soft law. Most evidently, the principle of integration finds norm-creating value in Principle 4 of the Rio Declaration. The principle of integration as appearing therein lays down a blueprint states are expected to abide by.[103] For instance, without explicitly referring to it, the ICJ paraphrases the wording of Principle 4 to require that the 'Parties look afresh' at the effects that their economic activity poses on the environment.

The Rio Declaration, of which Principle 4 is part, possesses near-universal adherence. The principle of integration also features in widely ratified conventions as the CBD and UNFCCC. As such, the requirement of a 'very

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[98] Rio Declaration,1992.
[99] Article 38(1) of the ICJ Stature defines "international custom, as evidence of a general practice accepted as law."
[100] ICJ, *North Sea Continental Shelf,* 1969. para. 72.
[101] "[...] Before a conventional rule can be considered to have become general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. [...] Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." ICJ, *North Sea Continental Shelf,* 1969. para. 73-74.
[102] As opposed to regional institutions as was shown to be the case of Article 11 TFEU for instance.
[103] As Bothe puts it, "as resolutions [and declarations] give rise to expectations, they trigger a certain pressure for compliance that is often effective on the long run." Bothe, 1980, p.392.

widespread and representative participation' necessary for establishing *opinio juris* seems to be fulfilled.

On a related note, even if the Rio document is not binding in nature, nothing precludes its provisions from growing into hard law[104] or from conversely, codifying established custom[105]. As one author comments, soft law instruments hold "an element of good faith commitment, an expectation that [states will adhere to their provisions] if possible, and in many cases, a desire to influence the development of state practice"[106]. Principle 2[107] of the Rio Declaration for instance, a restatement of Principle 21 of the Stockholm Declaration, which codifies a generally accepted norm, offers a bright example in that.

Finally turning to the principle of integration's endorsement by states, it is difficult to establish 'a virtually uniform' state practice. Obviously, there is a general acknowledgment that the integration of environmental concerns and norms into development activities is required.[108] Numerous provisions and cases point to that. There is however no clear-cut duty in international law as to precisely how states are to take account of the principle and implement it in their domestic plethora. If anything, as *Pulp Mills* illustrates, it is for states to decide how to carry out their integration prerequisite. Uniform state practice could thus be rather hard to pin down at this point in time.

Consequently, even if it may be difficult to proclaim the principle of integration a full-fledged rule of custom just yet, it can be safely said to constitute an emerging primary rule nonetheless; an emerging rule, which requires of states to conciliate to the extent possible the environmental, social and economic dimensions of their activities, in policy and law alike, particularly when those activities impact other states. As an emerging rule, the principle of integration could also be said to impact the rationale behind international institutions. This discussion put aside, the principle of integration possesses also a second legal implication: decision-makers, adjudicators included, have used it as a guiding rule in their reasoning process.

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[104] To have effect on customary international law, Birnie and Boyle explain that "a lawmaking [...] declaration need not necessarily proclaim rights or principles as law, but [...] the wording must be 'of fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'" (Birnie et al.: 2009; 31) as reflected in the 1969 ICJ *North Sea Continental Shelf Case.* ICJ Reports (1969) 3, para. 72. Similarly, in the words of Weil, "even if [declarations] do not attain full normative stature, they nevertheless constitute 'embryonic norms' of 'nascent legal force', or 'quasi-legal rules'." 1983, p. 416.

[105] "Multilateral declarations by states may also have effects on customary international law. Whether they provide evidence of existing law, or of the *opinio juris* necessary for new law, or of the practice of states, will depend on various factors which must be assessed in each case." Birnie et al., 2009, 31.

[106] Birnie et al., 2009, p34.

[107] Principle 2 deals with national sovereignty over natural resources and the duty to prevent transboundary harm.

[108] "[T]he third recital in the preamble to the Habitats Directive expressly states that the directive, the aim of which is to 'promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements', makes 'a contribution to the general objective of *sustainable development*'." Leger went on that "*The concept 'sustainable development' does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies* pursued by the Community (...). On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled." Opinion of Advocate General F. Léger in Case C-371/98. *R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping Ltd.*

3.3.2. The Principle of Integration as a Reasoning Rule

Decision-making reasoning tools do not impose obligations directly on states like primary rules do.[109] They instead seek to reconcile clashing interests (i.e. policy integration) but most importantly, they may accommodate primary rules when these overlap at the intersection of legal systems and threaten to conflict with one another (i.e. legal integration both in the normative and judicial aspects). In this way, legal reasoning tools have the potential to balance, weight out and bend primary rules, exercising a kind of 'interstitial normativity' upon them. They can redirect primary rules and adjust existing state rights and obligations in the advent of new social goals and considerations, in both the law-making and judicial processes.

From the law-making or normative point of view, the mere fact that the Rio Declaration and all its competing principles are intended as a whole exhumes the very quintessence of integration. There just could not be a more fascinating specimen of this law-making integration aspect. The principle of integration – in its balancing-of-pillars shape, not the dull Principle 4 - seems to guide the very logic behind one of sustainable development's perkiest pearls, the Rio Declaration.

From the judicial perspective, the principle of integration does appear to be of use in the decision-making of ICJ judges and adjudicators of other international tribunals. In *Gabcikovo* and *Iron Rhine*, for instance, the principle of integration clearly pushes and modifies the boundaries of existing primary rules against emerging environmental norms in line with sustainable development[110]. Concretely, the principle adds an environmental tint to the reading of the treaty provisions guiding the respective dam and railway projects.

According to Vaughan Lowe, who wrote an authoritative article revolving around the idea of such reasoning tools, these rules, 'modifying rules' as he calls them, are applied on a case-by-case basis by decision-makers when the latter choose to do so[111]. Adjudicators for instance strive for consistency over time but they are seemingly under no obligation to apply these rules in guiding their work. This is where the principle of integration differs from other reasoning rules.

In the *Gabcikovo* and *Pulp Mills* cases, the ICJ did not optionally apply the principle of integration. In fact, the Court makes it explicit that "such new norms *have to be taken into consideration*, and such new standards *given proper*

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[109] "Norms may function primarily as rules for decision, of concern to judicial tribunals, rather than as rules of conduct." Lowe, 1999, p.33.

[110] "Development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved. It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development." See Dissenting Opinion, Judge Weeramantry, Case Concerning the Gabcikovo-Nagymaros Dam.p. 92.

[111] See Lowe, 1999, see p.31-37.

weight"[112]. The 'have to' points to an obligation to apply the principle of integration for the greater objective of sustainable development.

The principle of integration is thus of a peculiar legal nature. It has elements of both a primary and a reasoning rule and yet, it is neither in full-fledged form. Instead it draws its strength and is reinforced from a combination of both. Eventually, it might, for instance, through the fine-tuning of adjudicators in their decision-making, assert itself over time as an undisputed primary rule of law. For now, it remains a flexible norm (but still a norm!) applicable to decision-makers just as to states, which mixes policy and legal elements for the greater pursuit of sustainable development.[113]

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[112] *Case Concerning the Gabcikovo-Nagymaros Dam* (1997*) ICJ Report 7.* Para. 140

[113] "The Principle of Integration itself lacks independent positive normative substance, relying instead upon the substantive concepts of environmental protection, the development process and sustainable development, and so, the Principle of Integration appears to be more in the nature of a rule of implementation, a second-order rule aimed at implementing the overarching objective of sustainable development and its subsidiary rules." ILA Toronto Conference Report, Annex II, 2006, p.31.

Summarizing Part I

In conclusion, the principle of integration operates within a four-dimensional space, in line with its two-fold legality and two-level operational field. In other words, the principle of integration can function as:

1) An emerging *primary rule* seeking to accommodate diverging *interests and concerns*;
2) An emerging *primary rule* seeking to accommodate competing *legal norms*;
3) A *reasoning rule* for guiding the decision-making process (in particular the judicial decision-making) and seeking to balance diverging *interests* and/or;
4) A *reasoning rule* for guiding the decision-making process (again, also the judicial process) and seeking to balance and reconcile competing *norms*.

It must be made clear that regardless of the level at which it operates, or the way by which it is applied, the principle of integration has but one goal: achieving sustainable development. In line with it, it sets out to "resolve apparent conflicts between the […] economic, social and environmental [pillars of sustainable development] whether through existing institutions, norms or policies or new ones."[114]

It must also be clearly stated that the extent by which integration occurs in international law, and whether it occurs at all, varies greatly from one setting to the next, whether across legal regimes, international institutions or in state relations. In each separate instance, the extent of integration is tied to the contextual understanding of sustainable development and the priorities set for achieving it. As an example, in a third-world country, environmental protection may be neglected in the prioritization of economic and social development – and arguably rightfully so.

As a last point before moving on with the preliminary comments of Part II, it must also be clearly stated that when applied, not all dimensions of the principle of integration are necessarily at play or of equal strength. For instance the integration of conflicting legal norms by an adjudicative body may be disregarded but competing interests may be accommodated nevertheless. As for the dimensions, which are applied within a given context, their dynamics most certainly overlap and usually serve to reinforce one another.

Having said this, Part II will now illustrate how the principle of integration supports the sustainable cause in a concrete scenario, that of the World Trade Organization.

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[114] ILA New Delhi Declaration.

Part II – Integration within the WTO: A Focus on the Relationship between Trade and Environment

A few preliminary remarks are needed. The questions put out in the introduction to guide this second part were: how is the principle of integration embedded in the WTO regime? To what extent is environmental protection taken into account in the WTO and how can the principle of integration further strengthen its position? These were legitimate for the purpose of the introduction but in light of the findings of Part I, they need reconsideration.

First of all, the principle of integration in Part I was established as a balancer between the three pillars of sustainable development, the economic, social and environmental. The research question does not require digging into all facets of the principle, as it focuses only on two of the three pillars: the economic and environmental. And with that, it restricts the economic pillar to the trade regime.

Moreover, the main question calls for the exploration of only one side of the relation between those two pillars, namely the integration of environmental protection into trade endeavors. There is thus no need to look at the way by which the principle of integration is embedded in the WTO regime. Instead, what is needed is to look at the integration of environmental protection in the trade regime.

Furthermore, as just seen, the principle of integration operates at two levels: the policy, through the integration of concerns, and the legal, through the integration of norms. And legal integration is further ramified in normative and judicial integration. Since there is overlap between the two levels in that legal integration also encompasses and reinforces policy integration, there is also only a need to look into the legal integration of environmental protection in the WTO regime.

To simplify matters even more, Part II will be divided in line with the two aspects of legal integration, namely normative and judicial integration. Subsequently, the two revised sub-questions for Chapters 4 and 5 respectively are:

- How is environmental protection integrated in the WTO 'constitutional' set up[115]?
- How is environmental protection integrated in the WTO adjudication process?[116]

[115] By 'constitutional set up' is meant the WTO founding Agreement: the Marrakesh Agreement. See Annex I for reference.
[116] The study of the principle of integration as a decision-making reasoning tool is narrowed to the operation of the WTO Dispute Settlement Body for practical reasons. It is not to mean that the principle of integration is not discernable in the decision-making of other WTO bodies.

4. Normative Integration of Environmental Protection within the WTO

How is environmental protection integrated in the WTO set up? *Normative integration* was earlier said to be the way by which the economic, social and environmental regimes embrace and embed each other's considerations and norms in line with sustainable development. Within the context of this thesis, normative integration in line with sustainable development thus requires to look at the way by which the WTO 'constitutional' set up takes into account environmental protection – both in terms of environmental concerns and rules. Let us see whether the WTO at all subscribes to sustainable development and if yes, how it abides by its requirement of environmental integration.

4.1. Environmental Protection, a Concern of WTO Contracting Parties

4.1.1. Environmental Protection, Sustainable Development and the WTO Objectives

The World Trade Organization is an intergovernmental institution[117] used by its Contracting Parties as a platform for trade liberalization purposes. It began its work in 1995 as a result of the Uruguay Round of Multilateral Trade Negotiations that took place under the framework of the GATT of 1947 – the multilateral trading regime preceding the WTO. The Uruguay Round talks addressed among other things the way by which the GATT would be transformed into a full-grown organization. The Agreement Establishing the WTO was signed during one of the last meetings of the Uruguay Round, in Marrakesh in April 1994, and sets out the institutional framework of the Organization.[118] Most importantly, the WTO Agreement comprises among others, the GATT Agreement, the Sanitary and Phytosanitary (SPS) Agreement and the WTO Dispute Settlement Understanding (DSU).

The core objective of the WTO regime as encrusted in the Agreement is trade liberalization. The system pursues this goal by seeking to reduce trade and market access barriers, such as tariffs, quotas and customs, on one hand, and minimize domestic regulations like subsidies or technical barriers to trade, which affect the competition on the internal marketplace of its states and in turn bear negative consequences on international trade, on the other. To ensure that these two subsidiary goals are achieved, the WTO upholds three core obligations: the prohibition of quantitative restrictions on imports or exports[119], the Most-Favored Nation (MFN) principle and the National Treatment (NT) principle.[120] The latter two principles are of interest here.

[117] It is thus owned and governed by governments of states and it has no discretion other than the one vested to it by its Members. It currently has 151 Members.
[118] See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14; 33 I.L.M. 1143.
[119] Article XI GATT.
[120] The MFN is captured in Article 1 GATT whereas Article 3 GATT outlines the NT principle.

The essence of the MFN and NT principles is non-discrimination. MFN prohibits WTO members from discriminating against similar goods and services on the basis of their country of origin. It regulates the entry of goods and services into the territory of a given WTO member. NT on the other hand, regulates the treatment of goods and services domestically, once they have accessed the national customs territory. NT stipulates that WTO members are to apply the same treatment to their domestic products as to the foreign similar ones.

In parallel with the trade liberalization objective and its three core obligations, WTO members are free and even encouraged to pursue other objectives, out of which, sustainable development, tied with environmental protection. The Preamble of the Marrakesh Agreement clearly states that WTO members are encouraged to conduct their economic endeavors,

> "with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*."[121]

As it appears from the Preamble of the Organization's founding document, environmental protection in line with sustainable development is indeed a legitimate goal WTO members may pursue but it is an objective contracting parties to the Agreement are to pursue flexibly in line with their 'respective needs and concerns at different levels of economic development'. In line with that, sustainable development is not a goal of the WTO itself; it may only serve to 'give color, texture and shading to the rights and obligations of Members under the Agreement'.[122]

In other words, the integration of environmental protection in the trade relations between WTO members is strongly desirable but it is not compulsory. The pursuit of environmental protection is a right each WTO Member enjoys but it is not an obligation conferred upon it by virtue of it becoming a party to the Agreement. Moreover this right of pursuing environmental protection may induce negative consequences on trade liberalization. For instance, a ban on the import of a certain product on environmental grounds will damper its trade flows.

How then may WTO Members enforce their right of adopting environmental measures in a way that it is compatible with the Agreement, even when they might go contra the greater objective of trade liberalization? This is what will be reviewed now.

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[121] Preamble of the WTO Agreement. First Paragraph.

[122] "The specific language of the preamble to the *WTO Agreement* […] gives color, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular." *US-Shrimp*, 1996, para. 153.

4.1.2. Environmental Measures against the Core Trade Principles

As just stated, the WTO is not an environmental organization. Its primary objective is trade liberalization and not environmental protection. Still, its contracting parties are entitled to pursue environmental goals and in that, adopt environmental measures. Environmental measures not imposing trade restrictions on similar products are easily compatible with the regime's liberalization objective, since they do not impinge on the core trade rules of non-discrimination, namely the MFN and NT principles. Most environmental measures however do lead to trade restrictions on similar products. Put differently, most environmental measures discriminate among similar products on the basis of the environmental qualities such products do or do not possess.

To understand how discrimination occurs, let's dwell on to this idea of 'similar products' or in WTO terminology, 'like products'. GATT/WTO case law has set out four criteria for identifying 'like products', namely: the physical properties of the products, the extent by which the products serve the same end-use, the extent consumers consider the products as alternatives for the same function and finally, the international classification of the products for tariff purposes.[123] This list of attributing 'likeness' is relative and applicable on a case-by-case basis. In the words of the Appellate Body (AB) – the WTO's highest judicial instance,

> "The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretched and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which the provision may apply."[124]

Moreover, it would also seem that the list is not optimal at this stage. For one, it concerns itself with the end-use of products and not their production processes. In that, it does not for instance take into account the environmental impact of products. Could two seemingly identical products be differentiated on the basis of their carbon footprint for example, hence established as not 'like', environmental protection would stand a far greater chance in international trade: no issue of discrimination would arise which would complicate the implementation of the environmental measure.

As intriguing as this question of likeness is, and this idea of adding a fifth environmental criterion to the 'likeness' test, it will not be addressed further in this thesis as it falls outside of its scope. The focus here is not to propose amendments to the existent system but instead to show how, through the principle of integration, environmental protection may be further strengthened in the existing set up of the WTO regime. The 'likeness' discussion was simply necessary to show the complications of pursuing environmental protection for states members of the WTO regime.

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[123] See Japan-Alcoholic Beverages, (1987) and EC-Asbestos (2000) at p.32-39.
[124] See AB Report in *Japan-Alcoholic Beverages* (1996), H.1.a., 21-22.

So, parenthesis closed, currently, most environmental measures are trade restricting in the sense that they infringe the non-discrimination principles. The regime however allows for such environmental measures under a series of provisions of the Agreement. Article XX of the GATT is arguably the most significant provision in that regard. Being an exception clause, Article XX comes into play only once a measure is found to be inconsistent with the core trade principles. Its relevant passage reads:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: […]
>
> *(b)* necessary to protect human, animal or plant life or health; […]
>
> *(g)* relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; […]".[125]

The legality of a trade-restrictive measure depends thus on whether it is justifiable under the exceptions granted by the Agreement. It is Chapter 5, which addresses the integration of environmental protection in the WTO adjudication process that the use of Article XX GATT for the justification of a trade-restricting environmental measure will be turned to in greater detail.

4.2. Environmental Norms and their Position in the WTO Regime

4.2.1 Marginalization of Environmental Norms

As it was just seen, the WTO Agreement takes environmental concerns into account in its provisions. However, the WTO Agreement is not equally as generous to environmental norms. When it comes to environmental rules, these are not integrated within the Agreement *per* se; they are merely found in the reflection of its environmental provisions. For instance, the principle of prevention may be read in-between the lines of Articles XX (b) and (g) of GATT.[126] But this by no way also signifies that environmental norms such as the prevention principle are part of the Agreement[127] and that they stipulate rules States bear as a result of becoming WTO members: environmental rules do not constitute *ipso facto* rights and obligations extracted from the WTO rulebook.[128]

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[125] GATT Article XX.

[126] Other agreements that contain environmental-relevant provisions are the GATS, the Agreeemnt on Techincal Barriers to Trade (TBT), the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Aspects of Intellectual Property. See WTO website: http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm#scm.

[127] The WTO Agreement is the Agreement Establishing the WTO and its annexes. The 'WTO agreements' are understood in this thesis as all agreements binding upon WTO Members.

[128] For instance, in *EC-Hormones*, the Appellate Body notes, "the precautionary principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement."

It follows that environmental rules may not be relied upon for justifying a trade-restricting environmental measure separately from the provisions of the Agreement. Put differently, environmental rules may very well trigger the adoption of a trade-restrictive environmental measure, but under the regime, the measure needs to be justified through one of the Agreement's environmental provisions. A fictional example would help illustrate this point.

An environmental rule stemming from a Multilateral Environmental Agreement (MEA) may lead State A to adopt an environmental measure, which restricts the trade of a certain good, and negatively impacts State B. B which deems A's measure to be inconstant with the trade obligations under the WTO Agreement to which both states are parties decides to bring the case before the Dispute Settlement Body (DSB). In order to justify the consistency of its measure under the regime, A would have to justify its measure under the provisions of the WTO Agreement, as for instance the environmental exceptions of the GATT. The MEA rule cannot serve as the legal basis for the trade-restrictive measure; only provisions of the WTO Agreement can.[129]

As a matter of fact, in line with the terms of the WTO Agreement, contracting parties are only bound by the rules they have expressly consented to - and those rules are the ones of the Agreement. The WTO Dispute Settlement Understanding (DSU) makes that clear when it purports that the WTO Dispute Settlement System's (DSS) purpose is "to preserve the rights and obligations of [the WTO members] and clarify the existing provisions of the [WTO] agreements" and not "to add or diminish the rights and obligations provided in the covered agreements".[130] A core concern of the WTO regime is safeguarding this equilibrium between the rights and obligations of its contracting parties. And as this equilibrium is the start for understanding the WTO from a lawyer's slant, it deserves closer attention.[131]

As seen above in Part I, for a norm to be binding upon a state, the given state must either have expressly agreed to limit its sovereignty with respect to that norm or that the norm imposes an obligation upon that state by virtue of its status as customary law or general principle. When the norm has been shown to fall within either one of the case scenarios, it then constitutes an obligation upon the bound state. Under the WTO Agreement, contracting parties are bound by their trade obligations towards the other parties and need to compensate those other parties if they infringe these trade obligations. Through these non-

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[129] The MEA rule can nevertheless serve to back up the legitimacy of the policy goal guiding the trade-restricting measure.

[130] Dispute Settlement Understanding, Art. 3(2). Article 3(2) of the WTO Dispute Settlement Understanding reads: "The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements *in accordance with customary rules of interpretation of public international law*."

[131] As the Report of the Expert Group Meeting on Identification of Principle of International Law for Sustainable Development noted, "[s]ustainable development will be enhanced if competing legal rules strive as a first step towards compatibility and as a second step towards mutual support [...] Interrelationship as a principle contributing to the achievement of sustainable development depends on the respect of each legal domain for the scope and content of adjacent bodies of law." Prepared by the Division for Sustainable Development for the fourth session of Commission on Sustainable Development, 1996, New York. Para. 13. In ILA Report, Toronto Conference on Sustainable Development, 2006, p.22.

derogable obligations, the WTO provides appealing predictability and stability to its Members.

The environmental provisions of the Agreement do not constitute obligations of the regime; they are rights, which grant exceptions to the obligations. Though the Preamble of the WTO Agreement acknowledges environmental protection, there is no obligation upon WTO Members to protect the environment.[132] The pursuit of environmental protection is only a right – and a conditional one with that.[133]

As it will be seen through the WTO adjudication process, the environment rights of the exception provisions are even subjected in their exercise to the core obligations of non-discrimination.[134] In striking the equilibrium between rights and obligations of WTO Members, environmental norms are thus not part of the equation on their own right. Yet, according to the principle of integration, which requires the balancing on an *equal* footing of sustainable development pillars, they should be.

Lastly, the Committee on Trade and Environment (CTE) was mandated in 1994 to clarify the way by which trade and environment are to interact within the WTO. Specifically, the CTE was mandated to explore and attempt to reconcile the relationship between environmental rules stemming from Multilateral Environmental Agreements, which have the potential to clash with WTO rules and to which WTO members have accepted to be bound by, albeit outside of the framework of the WTO regime.

The mandate of the CTE clearly sets out: "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other"[135]. A decade and a half later, the CTE has still to issue a report clarifying this question. In the meantime, the CTE's mandate was reaffirmed in the 2001 WTO Doha Ministerial Conference.[136]

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[132] This is in line with the ICJ Jurisprudence: "the International Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain." *ICJ Reports- United States Nationals in Morocco case*, pp. 196 and 199. In ILC Drafting Commentary. YILC. Vol. II. 1966. VCLT Report. Para. 16, p. 221.

[133] In *Brazil-Tyres*, the Appellate Body points that the chapeau of Article XX serves to ensure that "the WTO members' right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, not as a means to circumvent one member's obligations towards other WTO members". See *Brazil-Tyres*.

[134] In *US Wool Shirts and Blouses,* the Appellate Body asserts that Article XX contains "limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves". See *US-Wool Shirts and Blouses*, Appellate Body Report, *in DSR 1997*, volume 1, Geneva, 2000, p. 335.

[135] Decision on Trade ad Environment. (1994) Uruguay Round GATT Document. Marrakesh.

[136] At the Doha Ministerial Conference, agreement was reached to commence negotiations on certain aspects of the WTO/MEA relationship. Members have agreed to clarify the relationship between WTO rules and MEAs, with respect to those MEAs, which contain "specific trade obligations" (STOs). Specifically, Paragraph 31 (i) of the Doha Development Agenda calls for negotiations on the relationship between existing WTO rules and STOs set out in MEAs. However, the outcome of these negotiations must be limited to the applicability of WTO rules to conflicts between WTO Members who are parties to an MEA. In other words, Members have not agreed to negotiate a solution to conflicts involving MEA parties and non-parties.

4.2.2. Environmental Norms and their Door Into the Regime

Even if environmental rules do not correspond to 'rights and obligations provided in the covered agreements' i.e. they are not integrated *within* the WTO constitutional set up, and may not serve as the legal basis for justifying environmental measures which restrict trade, they may nonetheless serve a different purpose in the WTO, namely in the works of the DSS. Article 3(2) of the DSU[137] provides that in the clarification of provisions of the WTO Agreement, the DSB[138] ought to act "in accordance with customary rules of interpretation of public international law"[139].

Among the customary rules of interpretation allowed for under Article 3(2) of the DSU is Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[140], which the DSB has endorsed time and again in its work.[141] Article 31 of the VCLT requires of interpreters to interpret treaty provisions in *good faith*[142] by taking into account of (1) the ordinary meaning of their provisions' words as well as (2) the context, (3) object and purpose of the treaties they are inscribed in. All three criteria are essential for a *good faith* treaty interpretation and none of the criteria is to be overlooked in the interpretation process.[143]

Accordingly, for interpreting the provisions of the WTO Agreement in *good faith*, one of the elements the DSB needs to establish is the actual meaning of the words of the provisions at hand i.e. their *ordinary meaning*. In doing so, the DSB may not 'add or diminish the rights and obligations' of the Agreement. Since environmental rules are not found in the Agreement, they may not be inserted in the interpretation process based only on the 'ordinary meaning' requisite. A second element interpreters are obliged to consider in line with Article 31 of the VCLT is the *context* of the treaty provision being interpreted.

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[137] The DSU is the agreement codifying the rules of the WTO's DSS.

[138] Panels constitute the first instance dispute settlement resort in the WTO. Appeals are handled by the Appellate Body, which is the WTO's highest judicial instance.

[139] Dispute Settlement Understanding, Art. 3(2).

[140] Article 31, entitled, 'General Rule of Interpretation', reads: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

[141] See *inter alia*, WTO decisions of *US-Gasoline*, 1996, p.17, *Japan-Alcoholic Beverages II, US-Shrimp, India-Patents, EC-Hormones*. It is just worth mentioning that the VCLT is but one of the instruments of customary law of interpretation allowed for in the DSS.

[142] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *VCLT* Article 26.

[143] See *Yearbook of the International Law Commission*, 'Draft Articles of the VCLT with Commentaries'. 1966, Vol. II, pp.218-222. Article 31 "is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule." The International Law Commission further "considered that [Article 31], when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article." *YILC,* 1966, p.220.

When interpreting an environmental provision of the GATT for instance, this contextual element would require taking into account of *inter alia* the Preamble of the WTO Agreement and "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty"[144]. The 1994 Decision on Trade and Environment, which sets the mandate of the CTE, and was signed during the "meeting on the occasion of signing the Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations at Marrakesh"[145], qualifies as such an agreement and must be considered in the interpretation process.

Finally, the '*object and purpose'* aspect of interpretation desires to assure that the treaty's aims are given proper effect in light of any relevant subsequent developments in international law[146]. Now this is the interesting part for environmental rules in the interpretation of the WTO Agreement. Concretely, it is the provision (3)(c) of Article 31 of the VCLT that is of particularly interesting. Together with its chapeau, this provision reads: "There shall be taken into account, together with the context, […] any relevant rules of international law applicable in the relations between the parties."[147]

In its broadest sense, a rule of international law is deemed 'relevant' if it applies to the state of affairs in relation to which the treaty at hand is being interpreted. Put differently, in order to fulfill its *good faith* requirement, the interpreter must take into account all rules of international law, which govern and are applicable to the subject matter at hand. In so doing, the interpreter must 'appreciate the juridical fact in the light of the law contemporary to it'. [148]

The *context* of WTO environmental provisions points to the 'objective of sustainable development' in the Preamble of the Agreement and further to the consideration that "there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other"[149] in the 1994 Decision on Trade and Environment establishing the CTE. Their *ordinary meaning* provides for the right to pursue environmental protection whereas their *object and purpose* encompasses 'relevant rules of international law'.

Moreover, let us be reminded that the context, ordinary meaning and object and purpose aspects *must altogether* be taken into account for a *good faith* interpretation as required by Article 31 of the VCLT. Through basic analogy,

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[144] VCLT Article 31(b)(1).
[145] Decision on Trade ad Environment. (1994) Uruguay Round GATT Document. Marrakesh.
[146] In its Advisory Opinion in the *Namibia Case*, the ICJ stated that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southeast Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports, 16 ff, at 31. See also ICJ *Aegean Sea Case,* para.32-33; Oil Platforms Case, 2003, para. 40-41. See also for a comment, Birnie and Boyle, p.19-20.
[147] VCLT 31(3)(c).
[148] ILC. *YILC.* Vol. II. 1966. *VCLT Report.* Para. 16, p. 222.
[149] Decision on Trade ad Environment. (1994) *Uruguay Round GATT Document.* Marrakesh.

environmental rules, which are in line with the *contextual* 'objective of sustainable development', are very *relevant* for the interpretation of the *ordinary meaning* of the WTO's environmental provisions and *must*[150] be applied in the interpretation of the WTO Agreement – granted they are also 'rules *applicable* between the parties'. Environmental norms may find as such a place in the multilateral trading regime – only not from *within* its immediate confines but as *outside* rules of the broader fabric of international law. Chapter 5 below goes into the practical side of this through the review of two relevant WTO cases.

4.3. Assessing Normative Integration within the 'Self-Contained' WTO Regime

4.3.1. A Frail Integration of Environmental Concerns

The principle of integration supposes at best an equal balancing of all three pillars of sustainable development. And at its weakest, it imposes a requirement to take the environment into account in the development process. Environmental protection concerns are integrated within the WTO Agreement. The Preamble of the Agreement establishing the WTO refers to 'the objective of sustainable development' and the 'protection and preservation of the environment' [151] and the Doha Ministerial Conference asserts that "WTO members are convinced that an open, equitable and non-discriminatory multilateral trading system has a key contribution to make to national and international efforts to better protect and conserve environmental resources and promote sustainable development."[152]

Under the regime however, environmental measures are permissible to the extent that they fall under the WTO Agreement's provisions.[153] In this light, the WTO regime appears to be 'self-contained'. The objective of sustainable development seems challenged by this subordinate position granted to environmental protection. The WTO needs to invest greater efforts in understanding the prerogatives of environmental protection in line with sustainable development - especially when thinking of the slowness of the CTE towards clarifying the relationship between trade and environment. The fact remains though that the integration of environmental concerns into the WTO founding documents is a reality, which transpires the principle of integration's normative entrenchment *within* the regime's set up.

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[150] "An adjudicatory body is not entitled to exercise discretion. It must 'take account' of the customary norm [that is relevant and applicable in line with Article 31(3)(c) of the VCLT]." See Sands, 1999, p. 58.

[151] Marrakesh Ministerial Declaration. Agreement Establishing the World Trade Organization. 1994. 9.

[152] See WTO website: http://www.wto.org/english/tratop_e/envir_e/envir_req_e.htm .

[153] "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements." See AB, *US-Gasoline*.

4.3.2. The Narrow Leeway for Environmental Norms

Environmental norms are not integrated in the WTO Agreement[154] but they do find refuge within the regime via the DSB in the interpretation process of the Agreement – especially as the DSB is under the obligation of applying the relevant environmental rules in its judicial reasoning process in accordance with Article 31(3)(c) of the VCLT.[155] In this light, just as for the trade-restricting environmental measures, environmental norms are secondary to the primary rules of trade law – only this time, in a complementary instead of antagonistic way.[156] This undermines the idea of equal balancing of pillars in line with sustainable development once again.

As Judge Weeramantry reminds in his dissenting opinion in the *Gabcikovo-Nagymaros* case,

> "When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole."[157]

Indeed, a 'call for thought upon this matter' is sorely needed within the WTO if one considers only its institutional integration of environmental protection. It is time to ponder how the WTO Dispute Settlement Body has responded to this 'call for thought upon this matter'. One would think that the integration of rules from outside of the WTO Agreement is unlikely to happen within the multilateral trade regime as it would undermine the underlying principle of state sovereignty and would destabilize the equilibrium between the rights and obligations of WTO members under the Agreement. Appellate Body practice – the practice of the WTO's highest judicial instance - points otherwise[158] and will be looked at now, starting with the judicial integration of environmental concerns.

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[154] Environmental principles "cannot override or amend the express terms of a treaty, their importance derives principally from the influence they may exert on the interpretation, application, and development of treaties in accordance with Article 31(3) of the 1969 VCLT". Birnie and Boyle, 2009, p.28. Moreover, in the 2000 *Korea-Measures Affecting Government Procurement*, the Panel noted that "the relationship of the WTO Agreements to customary international law is broader than [the reference in article 3.2 [re: customary rules of interpretation]. Customary international law applies generally to the economic relations between WTO Members. 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 that 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." Para. 7.96.

[155] "Even as it is clear that the competence of WTO bodies is limited to consideration of claims under the covered agreements (and not, for example, under environmental or human rights treaties), when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties)." ILC. 2006. Para. 170.

[156] In the sense of Article 31(3)(c), "a customary norm is to be interpreted into a conventional norm, not applied instead of it. [...] The treaty being interpreted retains a primary role. The customary norm has a secondary role, in the sense that there can be no question of the customary norm displacing the treaty norm, either partly, or wholly." Sands, 1999, p. 58.

[157] See Weeramantry, *Dissenting Opinion Gabcikovo-Nagymaros*, p. 118.

[158] For the complete discussion, see the ILC Report of 2006. A/CN.4/L.682. paras. 443-450. As one author points separately, "The Appellate Body has also accepted that the WTO agreements should be accepted in a way that protects the domestic power to regulate (sovereignty) where such discretion exists (Hormones) and that the interpretation of specific terms in the WTO agreements can change over time (evolutionary interpretation i.e. Shrimp)." Qureshi, p. 285.

5. Judicial Integration of Environmental Protection within the WTO

Chapter 4 has made apparent the subordinate position of environmental protection within the WTO Agreement. Since normative and judicial integration are the two faces of legal integration, there is no reason to believe that the judicial integration of environmental protection within the WTO is any different than the normative one. Still, perhaps it is. Chapter 5 will look into that by aiming to show the position of environmental protection within the WTO adjudication process, again by first studying the integration of environmental concerns and then that of environmental norms through the interpretation of the Agreement. The question addressed here is: how is environmental protection integrated in the WTO adjudication process?

5.1. Environmental Concerns in the WTO Jurisprudence: a Focus on GATT Article XX

The WTO Doha Ministerial Declaration was clear about it: "under WTO rules, no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate".[159] As the below will show though, such environmental measures are permissible provided they are indispensable for achieving the set out environmental goal. Furthermore, they may not be applied in an arbitrary and discriminatory manner and must not constitute a disguised restriction on trade. Let's take a closer look at how the WTO DSS has been applying Article XX GATT, respectively through the justification of trade-restricting measures under provisions (g) and (b).[160]

5.1.1. Applicability of the Environmental Exceptions under GATT Article XX

GATT *Article XX (g)*[161]

Perhaps the most renowned case in WTO jurisprudence linked to environmental protection, which involves the application of Article XX GATT[162] is the 1998 *Shrimp-Turtle case*, also known as *US-Shrimp*. The dispute arose between the United States and South-Eastern Asian countries, when the US, in an attempt to reduce the incidental killing of sea turtles during shrimp harvesting, imposed an trade-restricting ban based on shrimp harvesting methods. In order to access the

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[159] See Ministerial Declaration [Doha Declaration], Concluded 14 Nov. 2001, WT/MIN(01)/DEC/1; 41 I.L.M. 746 (2002) para.6.

[160] WTO Members may also use technical environmental standards or sanitary and phytosanitary measures when pursuing their environmental objectives. They may, for instance, impose labeling requirements on certain products. As for restrictions on products, these technical and sanitary measures ought to be applied in a manner, which is non-discriminatory from the core trade rules of national treatment and most favored nation principle. What's more, the WTO encourages its members to apply international standards where they exist.

[161] Although not coherent alphabetically speaking, Article XX (g) is examined first since it arguably holds the most famous application of an environmental exception measure in *US-Shrimp*.

[162] Under GATT '47, six environment-related panel proceedings were carried out under Article XX: *US – Canadian Tuna, Canada – Salmon and Herring, Thailand – Cigarettes, US – Tuna (Mexico), US – Tuna (EEC)* and *US –Automobiles*). Three out of the six reports did not get adopted: *US – Tuna (Mexico), US – Tuna (EEC)* and *US – Automobiles*. Under GATT '94, four environmental disputes have led to the adoption of panel and Appellate Body reports: *US – Gasoline, US – Shrimp, EC – Asbestos* and *Brazil-Tyres*.

US market, the US required of importers to demonstrate the use of Turtle Extracting Devices (TEDs) or similar harvesting 'turtle-friendly' equipment in their shrimp-harvesting process. After it was established that the US measure was inconsistent with the MFN rule of Article I GATT, the DSS (the Panel and later the Appellate Body (AB)) looked into the legality of the US measure based on the exception provided by Article XX (g).

The argumentation here may go directly to the AB's findings, skipping the Panel's. There are two reasons for this: first, although the AB's reports are only binding upon the parties to the case, and do not constitute an authoritative interpretation of the WTO Agreement, they nevertheless have the final say over panels, and second, in this specific turtle case, the AB undermines the Panel's findings by reversing its logic. Now let's scrutinize how the AB proceeds with examining the US measure against Article XX (g) GATT. In its deliberation, the AB applies the two-tier test, which it had previously concocted in the 1996 *US-Gasoline* case.

The first step of this two-tier test consists of asserting the *applicability* of the trade-restricting measure at hand for achieving its set environmental goal. This requirement is what will be reviewed in this section; the second requirement is left for below. Coming back to the applicability element, the requirement within the context of Article XX (g) requires a dexterous analysis of the provision's wording, namely of *'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'*.

In *US-Shrimp*, the first element for the AB to establish was whether sea turtles were 'exhaustible natural resources' in the sense of the provision. The AB, by relying on the objective of sustainable development as appearing in the Preamble of the Agreement, 'pertinently' noted that, "modern international conventions and declarations make frequent references to natural resources as embracing both living and nonliving resources".[163] Subsequently, it interpreted 'exhaustible natural resources' as both 'exhaustible living and non-living natural resources', also encompassing endangered sea turtles.

In the wake of the now recognized objective of sustainable development – which was not originally intended by the GATT drafters in 1947[164], the AB expands the scope of the GATT provision beyond its initial 'non-living' understanding. It thus allows for the integration of an environmental concern in line with SD. Also interesting is that, the AB explicitly points to the 'objective of sustainable development' as recognized by WTO members through its insertion in the Preamble of the Agreement and specifies that the concept 'informs not only the GATT 1994 but also the other covered agreements'. It further notes that the

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[163] US-Shrimp para. 131.

[164] See *US-Shrimp* paras. 129-133. In its reasoning, the AB made a distinction between GATT 1947 and GATT 1994. Although the texts of the agreements are identical, their contexts are not. It follows that with the objective of sustainable development as codified in the Preamble of the WTO Agreement, the meaning of 'exhaustible natural resources' was to be updated in line with the new preoccupations of the international community.

"concept has been generally agreed as integrating economic and social development and environmental protection".[165]

By analogy, in *US-Shrimp*, the AB seems to suggest that integration is as recognized by WTO members as the objective of SD itself. Even more interestingly, the AB surpasses the dichotomous 'environment into development process' perception of integration and refers to the more complex three-pillar approach. What needs to be noted here though is that this reference to integration does not appear in the main text of the AB Report but instead is featured in a footnote when discussion SD. Nevertheless, by its mention alone, this three-pillar understanding of SD by none other than the AB provides a cornerstone for judicial integration in the WTO.

The second important element for the discussion here, which the AB needed to establish in *US-Shrimp*, was whether the measure at hand was 'related to the conservation of sea turtles', which it determined as being equivalent to 'primary aimed at'.[166] There is no need to see how it concretely assessed the US measure. What is worth pointing out instead is that, as one scholar highlights, "the AB went a step beyond integrating environmental protection into WTO law, and undertook an assessment of the degree of integration of environmental protection in the US domestic legislation under review. [...]. The national legislation would be deemed inappropriate if it did not reach an adequate degree of integration of environmental protection."[167]

Paraphrasing this last thought, it means that the AB undertook to apply the principle of integration in its judicial reasoning process for assessing itself whether the environmental measure at hand (i.e. imposing the use of TEDs so as to reduce the incidental killing of sea turtles, which would in turn contribute to their conservation) was 'primary aimed at' achieving the environmental policy goal of protecting sea turtles the US were striving for. It seems that Article XX is in itself a rule dictating the integration of environmental protection within the WTO, in this sense guiding the interpretation of the 'open norm' of GATT Article XX (g) as a general principle would. And luckily for sea turtles, the US measure was deemed worthy of the GATT exception. Had it not, it would have been unjustifiable within the WTO regime.

All of this sends mixed messages on the position of environmental concerns in the WTO regime. The application of the necessity test in *US-Shrimp* points equally to the legitimacy and even, to the objective of WTO members to integrate environmental measures in trade affairs in line with sustainable development while simultaneously showing the difficulty for them of doing so by the sinuous environmental leeway allowed for instance under Article XX (g) GATT. Environmental goals of WTO Members seem even further complicated by a second test – which will be turned to right after a word is said on the application of the necessity test in line with the other environmental exception of Article XX.

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[165] See *US-Shrimp,* para. 129 and FN 107.
[166] See *US-Shrimp*, para. 135-142.
[167] See Broude, 2006, ILA Toronto Report, Annex II.

GATT *Article XX (b)*

The above indicated how an exception is justifiable under Article XX (g) and not Article XX (b). The process is not very different and arguably, even simpler. The wording of provision XX (b) explicitly points to the element of 'necessity'. In determining whether a measure is "necessary" to protect human, animal or plant life or health, the AB balances a series of factors, among which, for example, are the contribution of the measure to the environmental policy objective and the importance of the common concerns the measure seeks to address.

The applicability test is applied until here in a similar fashion as for Article XX (g). The application of (b) just adds one more element to the applicability test: when it is established that the measure is indeed necessary for the policy goal, it must be further looked at whether there is no other less trade-restrictive alternative possible, which would contribute to reaching the same policy goal in a more trade-amicable manner.[168] If such a less restrictive measure is shown to exist, then the measure at hand must be substituted with the new finding. If there is none, then the measure has passed the applicability requirements and is ready for the second phase of the two-tiered test: the chapeau of Article XX.

5.1.2. GATT Article XX and the Terms of the Chapeau

When a trade-restricting measure is allowed under one of the exceptions of GATT Article XX, its application must be weighted against the requirements of the introductory paragraph of the article, most commonly known in WTO jargon as the chapeau of Article XX GATT. The chapeau ensures that the trade-restricting measure found permissible under provision (b) or (g) of Article XX, is also applied "in a manner which would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and that it does not pose a disguised restriction on trade".[169]

There are three standards contained in the chapeau: arbitrary discrimination between countries where the same conditions prevail, unjustifiable discrimination between countries where the same conditions prevail, and a disguised restriction on international trade. The three elements blended

[168] See further *EC-Asbestos* or *Brazil-Retreated Tyres*. In *EC-Asbestos*, the Appellate Body found, as a result of a process of weighing and balancing a series of factors, that there was no reasonably available alternative to a trade prohibition. This was clearly designed to achieve the level of health protection chosen by France and the value pursued by the measure was found to be "both vital and important in the highest degree". The AB made the point that the more vital or important the common interests or values pursued, the easier it was to accept as necessary measures designed to achieve those ends. In *Brazil-Tyres*, for instance, the AB found that the import ban on retreaded tyres was "apt to produce a material contribution to the achievement of its objective", i.e. the reduction in waste tyre volumes. The AB also found that the proposed alternatives, which were mostly remedial in nature (i.e. waste management and disposal), were not real alternatives to the import ban for preventing the accumulation of tyres.

[169] The Preambles of both the SPS and TBT contain the similar umbrella formulation that 'no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between Members where the same conditions prevail or a disguised restriction on international trade'. This formulation is almost identical when reading Article XX(b) of GATT and Article XIV(b) GATS, and their respective chapeaus. Not surprisingly, the SPS stresses that it "elaborates rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)". See the Preamble to the Agreement on the Application of Sanitary and Phytosanitary Measures.

together appear to be nothing more than the mirrors of the MNF and NT principles. In other words, the chapeau is there to ensure that the trade-restricting measure, even if it goes contra the greater goal of trade liberalization in itself, is for the least applied in a manner consistent with the core non-discrimination disciplines of the WTO regime. This is the conditionality test introduced by the chapeau of Article XX; it requires a *good faith* application of the exception clauses in line with the object and purpose of the Agreement.

Although any AB report reviewing the requirements of the chapeau would have done the trick, as for instance *US-Gasoline, EC-Asbestos* or *Brazil-Tyres*, let's return to *US-Shrimp* in the name of consistency. In it, the AB rejected the US environmental measure on the basis that it was applied in a discriminatory fashion. Indeed, the US measure required of shrimp importers to comply by the strictly imposed TEDs standards. It did not leave enough flexibility for importers to achieve the same policy goal with other measures, which would arguably have been equally as effective for the well-being of sea turtles. Again, to underline: it is on the application of the measure that the environmental cause lost its case the first time around, not because of its environmental goal *per se*. In fact, once the US redressed the discriminatory element of its measure, the AB approved of it.

As now the position of environmental protection has been shed light on within the WTO, let us discuss to what extent the WTO DSS integrates environmental norms in the interpretation of the Agreement.

5.2. Environmental Norms for the Interpretation of the WTO Agreement

It was outlined above: the WTO Agreement provides for the integration of environmental norms into the WTO adjudication process through the window of Article 3(2) of the DSU. Integrated through there, environmental rules ought to serve the interpretative process of the WTO Agreement. The only prerequisite for them to be taken into account is that they be assessed as 'relevant rules of international law applicable in the relations between the parties'[170] in line with Article 31(3)(c) of the VCLT. This raises a question of 'relevance' and again, of 'applicability'.

'Relevance' refers to the subject matter of the case at stake. It suffices that an environmental norm relates to an environmental issue raised in the DSS for that rule to be deemed relevant in the given case.[171] The 'applicability' element of

[170] See International Law Commission Report. 2006. A/CN.4/L.682. "One sometimes hears the claim that this might not even be permissible in view of the express prohibition in the DSU according to which the "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (DSU 3:2 *in fine*). Such a view would, however, presume that the covered agreements are "clinically isolated" precisely in the way the AB has denied. " para. 447, p. 226.

[171] Moreover, when drafting the VCLT, the ILC took special care to provide Article 31(3)(c) with an inter-temporal status. The article allows for an evolutionary consideration of what may constitute the 'relevant and applicable rules' at the time of interpretation. The initial text of the would-be Article 31(3)(c) reads: "in the light of the general rules of international law in force at the time of its conclusion". After objections from several states on the basis that it did not allow for an evolutionary interpretation of the treaty text, the Commission adopted the new meaning, now Article 31(3)(c). The ILC "considered that, in any event, the relevance of rules of international law for interpretation of treaties in any given case was dependent on the intentions of the parties and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties." Drafting Commentary. *YILC.* Vol. II. 1966. *VCLT Report*. Para. 16, p. 222.

Article 31(3)(c) on the other hand, is more complicated. Once an environmental rule is labeled relevant, the requirement brought up by Article 31(3)(c) would demand of the DSB to assess its applicability to the case by inevitably looking into its legal status.[172] Let us see now how the DSB has cooped with this interpretation requirement for both relevant environmental norms relied upon from non-WTO treaty provisions and alleged to stem from international customary law.

5.2.1. Applying Environmental Norms from non-WTO Treaty Provisions

The first instance in which a relevant environmental norm would call for the DSB to assess its applicability is in the case of a rule stemming from a treaty provision other than the WTO's. To date, the clearest address of the matter is found in the Panel report of the 2006 *EC-Biotech*. The case which opposed Canada, the US and Argentina to the EC, concerned itself with an EC restriction on the import of certain biotech products on human health grounds. The case has only been reviewed at the panel level.

The relevant excerpt of the *EC-Biotech* Panel Report does not review the applicability of a concrete environmental rule. Instead, it involves a general discussion on the applicability of any rule in line with Article 31(3)(c) of the VCLT – environmental included. From the discussion, conclusions may be drawn on the applicability of a non-WTO environmental treaty rule. Concretely, the most interesting passage of the Report establishes that 'rules' in the sense of Article 31(3)(c) are those rules "applicable in the relations between *all* parties of the treaty being interpreted"[173].

For the interpretation of the WTO Agreement, this translates the "relevant rules applicable between the parties to the treaty being interpreted" as applicable to all the WTO membership.[174] Through analogy, the Panel's logic would suggest

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[172] And this may prove to be a tedious task, which the DSB might wish to opt out from. As one scholar explains, "in the absence of judicial authority and conflicting interpretations under state practice it is frequently difficult to establish the parameters or the precise international legal status of each general principle or rules. *The legal consequences of each* in relation to a particular activity or incident must be considered *on the facts and circumstances* of each case and take account of several factors, including: its sources; textual content; its language; the particular activity at issue; its environmental and other consequences; the circumstances in which it occurs. Some general principles or rules may reflect customary law, others may reflect emerging legal obligations, and yet others might have an even less developed legal status. In each case however, the principle or rule is supported by consistent reference and significant practice through repetitive use or reference in an international legal context''. Sands, 1994, p. 183.

[173] See *EC-Biotech.* p.334. paras. 7.70. The Panel further notes that, “"party" means "a State which has consented to be bound by the treaty and for which the treaty is in force". It may be inferred from these elements that the rules of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force. 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." p.333. para. 7.68.

[174] Birnie and Boyle point out: "Whether another treaty is regarded as an agreement on interpretation, or as a guide to the interpretation of inherently evolutionary provisions, or simply as evidence of a common understanding of comparable provisions, the level of participation cannot be ignored. Some authors read Article 31(3)(c) as referring only to rules applicable between the parties to a treaty dispute, rather than all the parties to a treaty. Apart from being inconsistent with the ICL commentary to Article 31(3), this interpretation leaves unanswered the question how the article should be applied in other contexts […] and risks a serious Balkanization of global treaties implemented by regional agreements. […] A treaty cannot realistically be regarded as an agreement on interpretation or as a "relevant rule applicable in the relations between the parties" unless it has the consensus support of all the parties, r there is no objection." Birnie and Boyle, p. 21.

that the applicable rules are only those codifying international customary law, general principles or the rules of treaties to which all WTO members are also parties. When thinking that virtually all States are WTO Members[175], to rely on an environmental principle on the basis of a non-WTO treaty is thus made very difficult [176] - unless the given provision is proved to codify international custom.

The Panel in the *EC-Biotech* case provides thus for a very minimal[177] and careful take on the integration of environmental norms, stemming from rules of treaties other than the WTO's. Understandably, but also unfoundedly, the Panel has avoided falling into what it saw as a trap for the clarification of the MEA-WTO controversy. For one, the Appellate Body in *US-Shrimp* made extensive reference to provisions of international environmental instruments for its interpretation of 'exhaustible natural resources' of Article XX (g) of the GATT[178] without fearing of entering such a trap.

Moreover, among the instruments the AB pointed to were binding treaties like UNCLOS and the CBD but also soft law instruments such as Agenda 21. True, the AB did not expressly refer to Article 31(3)(c) of the VCLT[179]. But it did nevertheless base its reasoning on the need to establish the 'ordinary meaning' of 'exhaustible natural resources' in line with what it called 'the principle of effectiveness in treaty interpretation', which it had previously considered in its landmark *US-Gasoline* report as "one of the corollaries of the 'general rule of interpretation of interpretation' in the Vienna Convention"[180].

In other words, the AB in *US-Shrimp* did implicitly rely on Article 31 of the VCLT, and in particular on Article 31(3)(c), for invoking provisions of international environmental instruments binding and non-binding alike. To skeptics who would argue otherwise, and would point to Article 31(1) of the VCLT - the provision dealing with the ordinary meaning of treaty provisions - as the only basis for the AB's interpretation, Article 31(1) calls for a treaty interpretation "in

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[175]The WTO counts 151 of the world's states as its contracting parties.

[176] See Meltzer, J. (2004). 'Interpreting the WTO Agreements – A Commentary on Pauwelyn's Approach'. *Michigan Journal of International Law*.Vol. 25: 917-927. "Should the Vienna Convention Article 31(3)(c) be understood as referring to only those rules of international law that are legally binding on all WTO members, this would effectively preclude the Appellate Body from taking into account most rules of public international law when interpreting the WTO." p. 919.

[177] International Law Commission Report, 2006. A/CN.4/L.682 "Those rules must be both relevant and "applicable in the relations between the parties". The sub-paragraph does not specify whether, in determining relevance and applicability one must have regard to all parties to the treaty in question, or merely to those in dispute." Para. 426 (c), p. 215.

[178] See *United States - Import Prohibition of Certain Shrimp and Shrimp Prod*ucts (12 October 1998) WT/DS58/AB/R, DSR 1998:VII, paras. 126-134. The AB referred to provisions of UNCLOS (to which the US, party to the WTO dispute but not a contracting party to UNCLOS), the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on Biological Diversity and even the soft law Agenda 21. "Our task here", it said in relying on article 31(3)(c), "is to interpret the language of the chapeau, seeking interpretative guidance, as appropriate, from the general principles of international law". para. 158. The fact that it took into account Agenda 21 – which is not a treaty, could serve the contrary view that the AB was not implicitly acting on the basis of Article 31(3)(c) as this article mentions 'rules', *ipso facto* excluding soft law provisions, unless those are 'generally recognized' or have gained customary status. Some authors argue, in line with the Panel in EC-Biotech, that this reference to other treaties of international law was simply used by the AB as evidence of a common understanding of similar provisions within the context of general international law, within which the WTO permeates. See Birnie and Boyle, p.20-21.

[179] See ILC, para. 445: "It may be argued that these agreements, such as UNCLOS, CDB and Agenda 21, have been used only as a "supplementary means of interpretation" and not by virtue of article 31(3)(c). Such recourse has often been rationalized as providing evidence of the intent of the parties or of the "ordinary meaning" of the treaty words." The EC-Biotech Panel seems to go in that direction.

[180] See *US-Gasoline*. "One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Part. IV, p.23.

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"[181]. As said earlier, all provisions of Article 31, 31(3)(c) included, are to serve the interpretation process. None is to be overlooked. Article 31(1) is itself a reminder of that.

The Panel approach in *EC-Biotech* seems indeed quite narrow when contrasted with the Appellate Body's *US-Shrimp*. It is no wonder that the International Law Commission (ILC) has reprimanded the WTO in this instance for not practicing what it preaches. Apart from alluding to *US-Shrimp*, the ILC also coldly referred to the AB's famous recognition in *US-Gasoline* that "the General Agreement is not to be read in clinical isolation from public international law"[182].[183] This leads to the second peculiar case scenario in applying Article 31(3)(c) of the VLCT; that in which the DSB navigates its way out from applying an environmental rule when its legal status is prone to debate.

5.2.2. Applying Environmental Norms with Contentious Primary Status

If an environmental norm has undisputed customary status or is considered a "generally accepted international rule or standard" [184], the DSB should not see any hindrances for its application in the interpretation process of the WTO Agreement and should proceed with applying it. This instance is rather straightforward. The complication arises when an environmental norm is considered relevant but its legal status is uncertain, as was the case in *EC-Hormones* in regards the precautionary principle.[185]

EC-Hormones arose when the US and Canada opposed an EC import ban on meat and meat products derived from cattle previously injected with hormones for growth purposes. Among other things, the EC justified its ban on the basis of the Sanitary and Phytosanitary Agreement (SPS) and the precautionary principle. In discussing the applicability of the precautionary principle in the interpretation of the SPS provisions, the AB ruled that, "it [is] *unnecessary*, and probably imprudent, for the it [...] to take a position on this important, but abstract, question [that it the legal status of the precautionary principle]. The

[181] See VCLT. Article 31(3)(1).
[182] *US-Gasoline*, 1996, 35.
[183] In *EC-Biotech*, "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. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, 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." ILC. 2006. Report on Fragmentation. Para. 450. For a further discussion, see Birnie and Boyle, pp. 19-20. See also ICJ *Oil Platforms*: A treaty is "not intended to operate independently of general international law."
[184] "That international tribunals have, until recently, rarely made any specific use of article 31 (3) (c) is not to say that they would not have referred to law external to the treaty to be applied. By their very nature, customary law and general principles of law (and general principles of international law) exist as lex generalis in relation to any particular agreements. They are fully applicable and often applied alongside particular treaties." ILC Report of 2006. A/CN.4/L.682. para. 462.
[185] See *EC-Hormones* and *EC-Biotech*, in particular the latter in the discussion revolving around the precautionary principle. "We have stated earlier that, in our view, the relevant rules of international law to be taken into account include general principles of law". Para. 7.76. *EC-Biotech*.

precautionary principle, at least outside of the field of international environmental law, still awaits authoritative formulation."[186] With that, the AB clearly opted out from applying the principle to the case.

The AB gave two justifications for finding it 'unnecessary' to look into the legal status of the precautionary principle. One is linked to it being a second instance body and ruling only on points of law.[187] With the Panel not having reached conclusions on the legal status of the principle[188], the AB considered itself under no obligation to do so itself. The second is linked to the fact that the precautionary principle is not directly laid down in the SPS provisions.

Eventually, by stressing inter alia that "the precautionary principle [is] not written down […] as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement"[189], the AB felt that it had relieved itself from the applicability of the precautionary principle to the case and subsequently from the need to review its legal status. With all due respect to the AB's authority, its legal reasoning in this case is defective and needs criticizing.

According to Article 31(3)(c) of the VCLT – which the AB conveniently abstained from mentioning in the case, and the principle of integration itself, the AB should have considered the legal status of the precautionary principle. This was not optional.[190] It should have considered it not because the principle would have been directly applicable for justifying the trade-restrictive EC measure on the basis of its *relevance* for the interpretation of the SPS Agreement.[191] The case's outcome could have been different had the precautionary principle been applied in a way 'to give color, texture and shading' to the WTO provisions.[192]

Yet, to the AB's defense, this *EC-Hormones* dates back to 1998. This is the year of the ICJ's *Gabcikovo-Nagymaros* – arguably the first milestone for sustainable development in international jurisprudence. The principle of integration was far from its current status as a judicial reasoning tool. The AB could not have been expected to take such a dramatic leap and apply it in its reasoning prior to the ICJ itself. But it should have brought up the VCLT Article 31(3)(c) nevertheless.

To actually even give some credit to the AB, it does not refute the precautionary principle in its reasoning because it expressly deems it irrelevant, if anything, it

[186] See *EC-Hormones*. Para. 123.
[187] DSU Article 17(6). "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."
[188] "the Panel did not make any definitive finding with regard to the status of the precautionary principle in international law". *EC-Hormones*, para. 123.
[189] *EC-Hormones*. The AB further stresses that "the precautionary principle does not, by itself, and without clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement." Para.124.
[190] See EC-Biotech. Para. 7.69. p. 334. The Panel notes: "It is important to note that Article 31(3)(c) [of the VCLT] mandates a treaty interpreter to take into account other rules of international law ("[t]here shall be taken into account"); it does not merely give a treaty interpreter the option of doing so."
[191] Sands agrees with this reasoning when he says that "it is only after the existence, relevance and applicability of a customary norm has been recognized by an adjudicatory body that its precise impact upon the interpretation of a treaty falls to be determined in application of Article 31(3)(c)." See Sands, 1999, p.58.
[192] See *US-Shrimp*. Para. 153.

does remind of its relevance by simply referring to it[193]. It undermines it because of a legal mishap on its part. The AB was thus willing to apply the principle but misguided itself on its applicability.[194] This would not have happened had the principle of integration been applied. But again, it could not have been expected to back then. The AB's willingness in this case does mark a step in the right direction. What's more, the DSS has partly redressed this casualty since. As it has been seen in the 2006 *EC-Biotech*, the Panel did for the least bring up Article 31(3)(c) in its deliberation process.

5.3. Environmental Protection and the Potential of Judicial Integration

As it was done in Chapter 4, the last part of Chapter 5 here is an assessment; only now, it is an assessment on the judicial integration of environmental protection in the WTO. Let us see where the strength of judicial integration lies so as to finally have the full picture mapped out and conclude how it could strengthen the position of environmental protection within the WTO regime.

5.3.1. Judicial Integration and Sustainable Development

A point is best understood through a concrete example: how does *US-Shrimp* transpire the principle of integration in line with sustainable development? The principle appears in three ways in the case. All three pop up in the application of the terms of the chapeau of Article XX GATT.

The first most obvious emanation of the principle of integration is simply the chapeau's conditionality requirement: environmental protection is integrated within the WTO to the extent it is consistent with the regime's highest rules. The second appearance of the principle of integration as embedded in the reasoning of the AB plays in favor of the integration of economic development concerns into environmental measures - ironically enough. This needs further elucidation.

In applying the terms of the chapeau, the AB refutes the US measure because it is not flexible enough: the US measures does not allow the possibility for less costly shrimp-harvesting means, which could still be as effective for reducing the incidental killing of sea turtles.[195] The US measure is thus overturned because it does not sufficiently integrate economic concerns. And just like that, the AB turns the tables around, and applies the principle of integration in favor of the economic pillar. Or in the eyes of a realist, simply in favor of sustainable development as after all, it all comes down to the balancing of pillars.

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[193] As a matter of fact, the AB in *EC-Hormones* goes on to acknowledge that, "it appears [...] important, nevertheless, to note some aspects of the relationship of the precautionary principle to the SPS Agreement." EC-Hormones. Para. 123.

[194] "The precautionary principle indeed finds reflection in Article 5.7 of the SPS Agreement. We agree [...] that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle." Moreover, "a panel charged with determining whether 'sufficient scientific evidence' exists to warrant the maintenance of by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible damage to human health are concerned." *EC-Hormones.* Para. 124.

[195] See the discussion on *US-Shrimp* by Broude in the ILA Toronto Report, 2006, Annex II.

There is also a third reason why *US-Shrimp* is interesting for integration: the AB underlines the importance of multilateral co-operation among WTO members for facilitating the preservation of global environmental resources. The AB expressly points to "the need for concerted and cooperative international efforts on the part of many countries" for "the protection and conservation of highly migratory species of sea turtles"[196], as opposed to unilateral environmental measures. In its argumentation, the AB relies on Principle 12 of the Rio Declaration and Agenda 21 – both soft law instruments imaging the principle of integration.

In *US-Shrimp*, the AB manages thus to turn around the classical conception of integration in the WTO's favor by applying the rules at its disposal *from the WTO Agreement* i.e. non-discrimination principles. The AB further acknowledges the role of the CTE in clearing the relationship between trade and environment but also points that 'any specific recommendations of the CTE on the matter are pending', [197] and thus takes upon itself this task to the extent it is applicable in its adjudication process.

Regardless of the way integration has been used by the DSS though, the important is that the principle is embedded within the WTO structure. It serves as such as guidance for the 'open' environmental provisions of the Agreement. As long as it is there, it may very well be applied in another way in the future. The pending question would be to find the path by which it would allow WTO members to enjoy more freely their right of pursuing environmental protection.

This all leads one to wonder how the environment may obtain a more prominent position in the WTO, in accordance with its Members' self-acknowledged 'objective of sustainable development' through this principle of integration discernable between the lines. The WTO needs to 'look afresh' at its stand on environmental protection. And the legal face of the principle of integration may provide a sound path for this re-conceptualizing.

5.3.2. The Strength of Integration in the WTO System and Beyond

In line with sustainable development, the principle of integration requires the proportionate accommodation of three spheres of life i.e. environmental, social and economic. In reality, this accommodation is not as far-reaching. As the case study of the WTO regime has shown, development needs might take precedence over concerns on the state of the environment. The principle of integration might be the leeway for fixing this, namely in its capacity as a reasoning tool.

Mindful of the argument of 'modifying rules', by the power vested in the judiciary, the principle of integration guides the shaping of the law. It has the power to mold and guide the interpretation of other norms and rules of international legal regimes. Over time, it may serve to overturn the stiffness of

[196] *US-Shrimp*, para. 168.
[197] In explaining the mandate of the CTE, the Report acknowledges Principle 3, 4, 12 of the Rio Declaration and Agenda 21. See *US-Shrimp*, 1998, para. 154-155 and FN 147.

so-called 'primary rules' such as the WTO Agreement provisions and may allow for the equality of standing of environmental concerns in trade law and the full-fledged weighting of environmental norms against trade rules.

Moreover, even if not enforceable as an obligation upon states at the moment, the principle of integration nevertheless raises an international norm states are expected to abide by in line with the objective of sustainable development. When the norm is not complied with and the case happens to be brought to the attention of a court, it is swiftly redressed by the very same principle, only in its capacity as a reasoning tool. This has been seen in *Gabcikovo-Nagymaros* for instance and even in the WTO DSS in the *US-Shrimp* case[198]. Eventually, the circle closes upon itself and returns to its starting point, reinforcing the emergence of the principle as a primary rule.

Most importantly though, the principle of integration, in its reasoning tool capacity, expands beyond the legal arena. It is a norm flooding decision-making at large in that it provides a holistic perception on human activities. Its potential spans thus beyond the legal arena; it dictates the way of life itself in line with the objective of sustainable development. It is in line with this reasoning that the drafters of the WTO Agreement acknowledged the importance of sustainable development in the Preamble; they gave their blessing to WTO Members to pursue environmental protection and adopt environmental measures, even trade-restrictive ones.

Coming from a regime with near-universal membership (151 state members), this adds an additional coat to the legitimacy of the objective of sustainable development and the pursuit of environmental protection. Ironically enough thus, the principle of integration's most valuable contribution to environmental protection goes beyond international law[199]: the principle of integration may push any relevant environmental interest onto the WTO decision-making table, or within the polity of any regime as a matter of fact, with or without the help of a rule of environmental law[200].

In sum, to borrow the wise words of Schrijver, a well-respected legal scholar, in particular on legal matters related to sustainable development, "international law [and the principle of integration] ha[ve] a role to play, both as a value system consolidating an integrated approach to environment and development and as a concrete regulatory framework [and utensil] for co-operation between and action by all relevant actors".[201]

[198] When the AB overturned the US measure implicitly due to the fact that it was not economically integrative enough.
[199] "[...] integration of environmental interests that in themselves are not contained in legal principles or norms. In this respect, integration goes beyond the normative structure of existing international law." Nollkaemper, 2002, p.28.
[200] 2006 ILA Toronto Conference Report quotes Cordonier Segger and Khalfan, "there is a second meaning to integration, one that seems closer to what is intended in the 1992 Rio Declaration, which looks to integration between economic, social law and policy and environmental law and policy. This type of integration is not simply a trend or a 'coming together', on the international level, but rather, a need to undertake development in a way that fully takes into account, and combines its social, economic and environmental aspects." p. 106 in Cordonier Segger and FN 12 in ILA Report.
[201] See Schrijver, 2008, p.235.

Summarizing Part II

Based on the four dimensions outlined in the summary of Part I, this recap reviews at a glance how the principle of integration currently operates within the WTO regime. Respectively:

1) As a policy integration rule embedded within the WTO framework and addressing WTO Members, the principle of integration allows and even encourages WTO Members to pursue their environmental objectives in line with sustainable development under certain conditions: WTO Members need first to strive that their environmental measures do not restrict trade and in the contrary case that these are trade-restrictive, Members need to ensure that the measures comply with the environmental exceptions provided by the WTO Agreement;

2) As a legal integration rule embedded within the WTO framework, the principle of integration summons the accommodation of competing trade rules with environmental norms within the mandate of the CTE but does not allow for the direct reliance of environmental rules by WTO Members for justifying trade-restricting environmental measures under the regime;

3) As a policy integration tool for the WTO decision-making processes, namely used by the DSB, the principle of integration is not used as a balancer requiring of the DSB to weight out environmental concerns against trade priorities. Instead, integration is used to control the legality of a trade-restricting environmental measure in line with the provisions and rules of the WTO Agreement and lastly;

4) As a legal integration tool for the WTO decision-making processes, in particular as used by the DSB, the principle of integration does not seek to balance and reconcile competing environmental and trade norms. Instead, it requires at the very minimum the incorporation of environmental principles in the interpretation process of the environmental provisions of the WTO Agreement.

It is important to remind that integration is not explicitly presented as a principle espoused by the WTO regime, whether in the Agreements, adopted institutional documents or DSB reports. Still that does not prevent it from being rooted within the multilateral trading system and its development process nonetheless. The first obvious example that comes to mind is the existence of the CTE. As it has been shown, the principle of integration is both at the very basis of its creation as it is entrenched in its mandate.

6. Conclusion

6.1. Answering the Research Sub-Questions

Now that both Part I and II have been summarized, it will be easy to provide a to-the-point answer to all sub-questions. These are taken one by one:

Part I:

- What is 'integration' in line with sustainable development and what does it entail?

Integration was shown to be both a concept and a principle of international law in the field of sustainable development. Integration seeks to accommodate the three pillars of sustainable development, namely the economic, social and environmental pillars, both from a policy and legal point of view. In other words, integration seeks to accommodate both clashing concerns and competing norms for reaching the higher objective of sustainable development.

- How is the principle of integration embedded in international law in the field of sustainable development?

The principle of integration has a two-fold legality in international law in the field of sustainable development. On one hand, it is an emerging customary rule that requires of states to conciliate to the extent possible the environmental, social and economic dimensions of their activities, in policy and law alike. On the other, it constitutes a reasoning rule requiring of courts and other decision-making body to take into account and adjust concerns and norms arising from the three pillars of sustainable development, of relevance to their case at hand.

Part II:

- How is environmental protection integrated in the WTO constitutional set up?

In line with sustainable development, the WTO constitutional set up allows WTO Members to pursue environmental protection goals in parallel to their trade liberalization objective under the regime. Environmental protection is thus a right of WTO Members and not an obligation stemming from the WTO Agreement. What's more, in implementing their environmental rights through the adoption of environmental measures, WTO Members need to ensure that these are consistent with the Agreement. Environmental measures need to be consistent in that they either simply do not impinge upon trade, and thus upon the trade obligations under the regime, or if they do, then they must be adopted in a way justifiable under the exceptions of the Agreement. Either way, environmental measures are subservient to the WTO Agreement.

- How is environmental protection integrated in the WTO adjudication process?

The secondary position of environmental protection within the WTO framework is exemplified through the work of the WTO Dispute Settlement Body in their interpretation and application of the Agreement. The WTO jurisprudence makes it clear that environmental protection does not form 'an integral part' of the WTO institution, as the very minimal Principle 4 would have liked to see. Instead, it only arises when the stakes are at odds for the trade liberalization process.

Moreover, in the limited instances where environmental protection does come up as a concern, it is pedestalled by the core non-discrimination WTO disciplines. Environmental protection is not a goal of the WTO regime - as opposed to a goal of its Members, as a quick glance at the Preamble of the Agreement could tempt to misleadingly conclude. It is allowed to thrive – but in compatibility with the provisions of the WTO Agreement.

6.2. Answering the Research Question

Finally turning to the research question of this thesis:

"To what extent can the principle of integration strengthen the position of environmental protection within the WTO regime in line with sustainable development?"

The WTO regime may strive to remain an isolated island within the broader international legal fabric. Alas for it, with the reference to sustainable development and environmental protection within the Preamble of its Agreement, its Members with their myriad of interests, are inevitably bound to pull it out of its comfort zone towards the dreaded environmental pillar of sustainable development.

It must be made clear that the principle of integration operates within the broader international legal system. WTO law happens to be affected by the need for environmental integration in line with sustainable development because it is part of this larger international law system, and not because it grows the principle from inside its own walls. Accordingly, the WTO regime is to be unavoidably affected by the two legal sides of the principle in international law.

The question that now arises is how may the principle of integration, through both its sides, strengthen the position of environmental protection within the WTO regime. From its side as an emerging customary rule of international law, not much may be done under the institutional status quo – unless the WTO Agreement is amended. However from the side of integration as a reasoning tool, environmental protection has a chance of a brighter future. Let us explain.

The principle of integration as an emerging customary rule addresses the WTO Members in their capacity as sovereign States of the international community. It

does not address the WTO institution *tel quel*. As such, it is the WTO Members that are bound to balance the three pillars of sustainable development, and namely integrate environmental protection in their development undertakings. Under the current status quo, this is not an obligation of the WTO.

Accordingly, it is unreasonable to expect the principle of integration as an emerging customary rule to do anything for the position of environmental protection within the WTO institution in the immediate turn, within the current setting. Even if the CTE ends up issuing its highly anticipated trade-environment report, it cannot be expected to revolutionize the WTO system in favor of environmental protection. The WTO has a firm trade mandate.

The WTO is 'not an environmental institution', as it itself claims. It only plays a role of trade auditor in the environmental protection effort of its Members: the WTO is there to ensure that in pursuing their environmental protection right and in the subsequent adoption of environmental measures, its Members do so in line with their obligations under the WTO Agreement.

The principle of integration as a reasoning tool however may be expected to gradually loosen the inflexibility allowed for environmental protection under the regime. For one, the principle of integration as reasoning rule directly addresses the WTO institutional bodies. In particular, since the CTE has not been very active, it has been picked up by the WTO Dispute Settlement Body, which has undertaken to deal with environmental principles in its work.

Through it, most importantly, the DSB has affirmed the legitimacy of environmental protection in line with sustainable development. In *US-Shrimp*, it did sustain a very environmental-considerate position. In noting what it did not decide, the AB declared:

> "We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do."[202]

Eventually, over time, through an integrative reasoning in line with SD, the AB could take this environmental legitimacy a step further and embrace it as applicable to the WTO's own trade framework. The DSB has already been noted to embrace an integrative approach in the interpretation of the WTO environmental provisions; an approach even breaking away from the more enclosed 'environment-into-development' conception of integration and diving into the three-pillar balancing requirement instead.[203]

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[202] See *US-Shrimp*, 1999, para. 185.

[203] As pointed out in the application of the chapeau in *US-Shrimp*, the AB has even inversed the principle of integration from its usual requirement of 'environment-into-development' towards an effort to balance pillars.

Conversely, through the principle of integration, the DSB has the potential to shift this right of WTO Members to adopt environmental measures into a more pressing matter in line with the goals of the regime itself. It is thus in this, its side as a tool guiding the interpretation of the WTO Agreement, that the principle of integration has the potential to strengthen the position of environmental protection within the WTO regime, under the regime as it currently stands. It is in that which resides part of the principle of integration's golden thread for sustainable development.

6.3. Assessing the Approach and Subsequent Suggestions

The above has looked into the WTO regime, as it exists today and has attempted to suggest insights into the potential of the principle of integration for environmental protection within the current operational framework. It has not sought to look into the inconsistencies of the WTO Agreement and propose amendments. Due to technical time and scope limitations, this master thesis has thus implicitly started from the premise that the Agreement is not to be amended.

However this is a flawed reasoning, which critics may rightfully attack. Perhaps the very fact that the principle of integration is emerging in international customary law could enhance the pressure on WTO Members and make it easier to amend the WTO Agreement in a way to directly reinforce the position of environmental protection within the regime in a just a couple of years. The practicability of this for the goal of sustainable development and its actual feasibility within the WTO should definitely be looked at in a follow up study.

Moreover, for the sake of being able to go more in-depth, this thesis has deliberately restricted itself in another way. It has solely looked into the integration of the environmental pillar of sustainable development into the WTO regime. As it was shown in Part I, integration is far more than just the basic stipulation of Principle 4 of the Rio Declaration. It is about reciprocal interaction of concerns and norms between three pillars, not two.

It would be interesting for instance for a follow up study to take a look at the other side of the trade-environment coin – from the standpoint of international environmental law that is, and compare the role of the principle of integration in that field of law with its role within the WTO regime. This would undoubtedly lead to a better understanding of the principle itself but most importantly, through comparison, it would enhance the understanding of its potential for sustainable development.

Another research could examine the integration of the social pillar of sustainable development into the WTO regime. In that however, a eureka moment might be expected to lack: the exceptions which allow for the adoption of trade-restricting social measures are most likely to point to a very similar pattern as the one for environmental protection. It is still worth asserting in the name of research.

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Annex I - Table of Main Treaties and Agreements

Year	Treaty / Agreement
1945	Statute of the International Court of Justice United Nations, *Statute of the International Court of Justice* 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215. Open for signature 26 Jun. 1945. Entry into force, 24 Oct. 1945. As of August 2011, 192 Parties.
1947	General Agreement on Tariffs and Trade 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700. Entry into force, 1 Jan. 1948. Now incorporated in GATT 1994 of the WTO Agreement.
1957	Treaty of Rome *Treaty establishing the European Economic Community* until 1993, then *Treaty establishing the European Community* until 2009. Now TFEU. Open for signature 25 Mar. 1957. Entry into force: 1 Jan. 1958.
1969	Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679; 63 AJIL 875. Open for signatures May 1969. Entry into force: 27 Jan. 1980. August 2011: 126 Signatories, 111 Parties.
1972	Stockholm Declaration of the UN Conference on the Human Environment UN Doc. A/CONF.48/14/Rev.1, Chapter I, Stockholm, June 1972
1973	Convention on International Trade in Endangered Species of Wild Fauna and Flora 27 UST 1087; TIAS 8249; 993 UNTS 243. Signed 3 Mar. 1973. Entry into force 1 Jul. 1975.
1982	World Charter for Nature UN Doc A/RES 37/7. Adopted 28 Oct. 1982.
1986	Single European Act Luxembourg and The Hague. Signed 28 Feb. 1986. Entry into force 1 Jul. OJ L 169 of 29 Jun. 1987.
1992	UN Convention on Biological Diversity UN Doc. 1760 U.N.T.S. 79, 143; 31 I.L.M. 818. Adopted 5 June 1992. Entry into force 29 Dec. 1993.
	UN Framework Convention on Climate Change UN Doc. 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849. Signed 9 May 1992. Entry into force 21 Mar. 1994.
	Rio Declaration of the UN Conference on the Environment and Development UN Doc. A/CONF.151/26 (Vol. I), Chapter I, Annex I, Rio de Janeiro, June 1992
	Treaty on European Union TEU, Maastricht Treaty, Signed Feb. 7, 1992, Entry into force 1 Nov. 1993. O.J. (C191) 1; 31 I.L.M. 253.
1994	Convention to Combat Desertification in Countries Experiencing Serious Drought UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, UN Doc. A/Res, 47/188. Signed 14 Oct. 1994, Entry into force 26 Dec. 1996.
1995	Marrakesh Agreement Establishing the World Trade Organization 1867 U.N.T.S. 154; 33 I.L.M. 1144. Signed 15 Apr. 1994. Entry into force 1 Jan. 1995. 151 Parties.
1997	Treaty of Amsterdam Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Signed Oct. 2 1997, Entry into force 1 May 1999. O.J. (C340) 1; 37 I.L.M. 56.
2002	Johannesburg Declaration on Sustainable Development UN Doc. A/CONF.199/20, Chapter 1, Resolution 1, Johannesburg, September 2002.
2007	Treaty on the Functioning of the European Union In Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. C 306. Consolidated Version. Signed 17 Dec. 2007. Entry into force 9 May 2008. OJ C 115/47

Annex II - Table of Cases and Opinions

International Court of Justice

North Sea Continental Shelf cases (Germany vs. the Netherlands and Germany vs. Denmark) (1969) *ICJ Reports 3.*

Case Concerning the Gabcikovo-Nagymaros Dam Project (Slovakia vs. Hungary) (1997*) ICJ Reports 7.*

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Case Concerning Pulp Mills on the River Uruguay (Argentiva vs. Uruguay) (2010) *ICJ Reports 135.*

WTO

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Other

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Annex III - Table of Consulted Websites

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