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International Civil Aviation and Sustainable Development: The Application of WTO Law

by

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Sustainable International Civil Aviation

The attached Occasional Papers have been prepared by a group of scholars associated with the Institute of Air and Space Law (IASL) at McGill University. They are the result of a collaborative effort between the IASL and the Centre for International Sustainable Development Law and are designed to be part of a book prepared by authors from both groups which will eventually be published by the Cambridge University Press under the title *Sustainable International Civil Aviation*.

As the title of the book suggests, bringing together these various scholars and papers is the central theme of the sustainable development of international aviation. In particular, the work of the International Civil Aviation Organization (ICAO), the primary United Nations body tasked with regulating the environmental aspects of international aviation, and the provisions of the Chicago Convention which lays down powers of the Organization and the fundamental rules of international air law, form the primary focus of this collection. At the next ICAO Assembly in September-October of 2016, ICAO has the ambitious mandate to finalise a global scheme to limit CO2 emissions from international aviation. As many of the articles contained in the book are of immediate relevance to the discussions due to take place at ICAO, publishing and disseminating these draft chapters will contribute to the growing interest and debates on the issue of the environmental impact of aviation. It is hoped that these papers will contribute to the work of the Assembly and that informed readers and delegates participating at the ICAO Assembly will have constructive comments to share with the authors.

Readers are invited to send their comments to the authors whose e-mail addresses are set out on the title page of each paper as well as a copy to the following address: edannals.law@mcgill.ca

The authors and the Editors of this collection of papers thank all readers for their attention and their comments.

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SUMMARY

Application of the principle of sustainable development in a World Trade Organization (WTO) dispute: Could the principle of sustainable development be invoked to justify the European Union (EU) Directive 2008/101 extending the Emissions Trading Scheme to include the aviation industry (the “Directive”) or a similar measure reintroduced after October 2016?

The issue:

- Whether a comparable measure could be challenged before the WTO?
- Whether the principle of sustainable development may successfully be invoked to justify Directive 2008/101 under WTO law?

Its importance:

- States opposed to a measure similar to the Directive might well seek to challenge it in all fora, including the WTO.
- The Directive will likely have economic repercussions on WTO Members, and may arguably have trade consequences affecting WTO obligations.
- A possible dispute before the WTO might provide guidance on the legal significance of the principle of sustainable development in WTO and international law.

The treaty law:

- Article 3.2 of the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the Marrakesh Agreement establishing the WTO Dispute Settlement Understanding:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it 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. Recommendations and rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements. [Emphasis added]

- Article XX (chapeau) and (b) of the General Agreement on Tariffs and Trade (GATT)

General Exceptions

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 contracting party of measures:

(a) ...

(b) *necessary to protect human, animal or plant life or health*; [Emphases added]

The analysis:

- The measure comparable to the withdrawn EU Directive might be challenged before the WTO for allegedly violating the national treatment clause, the most-favored nation standard, as a quantitative restriction proscribed under GATT or as a restraint on the right of entry of goods carried as cargo by aircraft.

- The principle of sustainable development has reached global acceptance and has been raised in WTO reports, yet its legal status has not been settled. The views of authors on this range from it being characterized as a soft-law, a self-standing legal principle, a substantive principle of law sitting at the intersection between international economic law, international environmental law and international social law, and an independent legal principle of reconciliation powerful enough to modify other obligations, whether customary or treaty-based.
- Other sources of Public International Law (PIL) can be considered by WTO in adjudicating a possible dispute involving the Directive under Article 3.2 of DSU. As applied in the case of Korea – Measures Affecting Government Procurement, it was stated that customary rules of international law apply to the WTO treaties. Furthermore, the reference to customary international law does not preclude the application of other PIL norms.
- In applying the principle of sustainable development in a WTO dispute, the most likely outcome is that it will be used as a means to interpret WTO covered agreements.

Options for decision-makers:

1. WTO may use the principle of sustainable development to interpret the likeness requirement for violation of national treatment and most-favored nation clause in such a manner that the production methods involved with products transported through ETS-compliant airlines and those that are not have an impact on consumers' decision, and ultimately differentiates the former from the latter.
2. WTO may use the principle of sustainable development in easing the conditions of GATT exceptions against the Directive.
3. WTO may adjudicate the potential dispute involving a measure comparable to the Directive without reference to sustainable development.

INTERNATIONAL CIVIL AVIATION AND SUSTAINABLE DEVELOPMENT: THE APPLICATION OF WTO LAW

by

Emilie Conway* and Armand de Mestral**

I. INTRODUCTION

The European Union (EU) has long been at the forefront of sustainable development initiatives. As part of its ongoing efforts to curb climate change through reduction of carbon emissions, the EU has adopted directive 2008/101/EC¹ (the Aviation Directive), which extended the EU Emission Trading System (ETS)² to include the aviation industry. Accordingly, effective as of January 1st, 2012, all airline companies – EU and non-EU airlines, without distinction – were to be subject to a greenhouse gas emission allowance trading scheme, a “cap and trade” system providing for the acquisition and surrender of allowances for emissions generated by flights coming in and out of European airports.

While the rationale behind the ETS scheme appears to have won broad support, as reflected by the international consensus on climate change issues, its extension to aviation services elicited strong reactions, both in the International Civil Aviation Organization (ICAO) and other international fora.³ In the face of such resistance, the EU has reviewed

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¹ EC, Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2008] OJ, L 8/3 [Directive 2008/101/EC].

² EC Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ, L 275/32.

³ For example, a consortium of US-based airline companies challenged the measures undertaken by the UK to implement Directive 2008/101/EC before the High Court of Justice of England and Wales, which then referred the case for a preliminary ruling by the European Union Court of Justice (EUCJ). The EUCJ's ruling, which was delivered in 2011, upheld the validity of the ETS: ECJ, *Air Transport Association of America & al. v. Secretary of State for Energy and Climate Change*, C-366/10, (2011) [ATAA]. On the political front, a group of 26 countries signed the New Delhi Declaration in September 2011 in opposition to the ETS. This Declaration provided inspiration for a working paper submitted to the ICAO: ICAO, “Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and its Impact”, C-WP/13790, 17 October 2011. Furthermore, in February 2012, a group of 23 opposing countries have adopted the *Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS*,

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its stance in order to allow for further progress in the negotiations within ICAO towards the adoption of a global market-based mechanism to regulate emissions from the aviation industry. Accordingly, in April 2013, the EU suspended the ETS requirements for the period preceding the 38th session of the ICAO Assembly, in Fall 2013.⁴ Following this session, the EU amended the ETS for the period 2013-2016, so that only emissions from flights within the EU airspace would fall under its scope of application.⁵

Depending on the results achieved at the ICAO's 39th session, to be held in Fall 2016, the EU left open the possibility of reinstating the ETS in its initial version, which would likely fuel further controversy. In this regard, opponents of the ETS raised its possible incompatibility with the EU's and EU Member States' obligations under the law of the World Trade Organization (WTO).⁶ Although a WTO dispute still remains theoretical at this point, it would likely have far-reaching implications for the trade/environment linkage. This is mainly because the ETS touches upon some of the most contentious aspects in WTO jurisprudence, namely the interface between multilateral environmental agreements (MEAs) and trade rules, process and production methods and extraterritorial application of environmental measures.

Drawing on the Aviation Directive's environmental justification, this chapter examines whether, in the event of a WTO dispute, the principle of sustainable development may successfully be invoked to justify the Directive under WTO law. In section I, it will first be discussed how the EU regime may come into conflict with WTO rules, and more particularly with provisions of the *General Agreement on Tariffs and Trade*

which was intended "as a clear manifestation of their unanimous position that the EU and its Member States must cease application of the Directive 2008/101/EC to airlines/ aircraft operators registered in third States", online: <www.ruaviation.com/docs/1/2012/2/22/50/> [*Moscow Joint Declaration*]. Finally, some States have adopted legislation forbidding their national airlines from complying with the scheme. This is namely the case of China, India and the US. For an overview of the positions against the ETS, see Lorand Bartels, "The WTO Legality of the Application of the EU's Emission Trading System to Aviation" (2012) 23:2 EJIL 429 at 435 [Bartels, "ETS"]; Rafael Leal-Arcas, *Climate Change and International Trade*, Cheltenham, Edward Elgar, 2013, at 162-170; Markus W. Gehring & Cairo A. R Robb, *Addressing the Aviation and Climate Change Challenge: A Review of Options*, ICTSD Programme on Climate Change and Energy Issue Paper No. 7, International Centre for Trade and Sustainable Development, Geneva, Switzerland, 2013, at 8, www.ictsd.org.

⁴ EC, Decision No. 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, [2013] OJ, L 113/1.

⁵ Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions.

⁶ *Moscow Joint Declaration*, *ibid* (attachment A to the Declaration includes in the basket of actions/measures the following point: "assessing whether the EU ETS is consistent with the WTO Agreements and taking appropriate action").

(GATT)⁷. Section II then analyses whether the principle of sustainable development may provide an effective defense against allegations of violation of WTO law.

II. THE EU EMISSIONS TRADING SYSTEM AND WTO LAW

In order to set solid groundwork for discussion, a few words are first warranted about the background and functioning of the Aviation Directive (1.1.) to understand how it could eventually be challenged by a WTO Member before a dispute panel (1.2).

A. EXTENDING THE EUROPEAN TRADING SYSTEM TO AVIATION

The EU ETS came about in the context of the international community's commitment to limit climate change, as set out under the *United Nations Framework Convention on Climate Change* (UNFCCC) and the *Kyoto Protocol*.⁸ The *Kyoto Protocol*, which entered into force in 2005, imposes upon State parties listed in its Annex 1 the obligation to reduce their greenhouse gases emissions according to given targets.⁹ Although such targets do not apply to international aviation, section 2(2) of the *Protocol* requires "[t]he Parties included in Annex I [to] pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation [...], working through the International Civil Aviation Organization [...]".¹⁰ Thus far, it has proved difficult to reach a consensus on the appropriate approach to alleviate climate impacts of international aviation under the auspices of the ICAO. The limited scope of proposed measures in the ICAO negotiations prompted the EU to develop its own strategy by expanding its Emission Trading System to cover international air transport through directive 2008/101/EC.¹¹

⁷ *General Agreement on Tariffs and Trade, Annex 1A of the Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1869 UNTS 426 (entered into force 1 January 1995) [GATT]. In this chapter, we have purposely left aside the question relating to the Aviation Directive's compatibility with the General Agreement on Trade in Services.

⁸ *United Nations Framework Convention on Climate Change*, 12 June 1992, 1771 UNTS 107, (1992) 31ILM 849 (entered into force 21 March 1994) [UNFCCC]; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, FCCC/CP/1997/L.7/Add. 1, 37 ILM 22 [Kyoto Protocol].

⁹ *Kyoto Protocol*, *ibid*, art 3.

¹⁰ *Ibid*, art 2(2).

¹¹ In the ICAO context, see ICAO, *Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection*, Assembly Res A36-22, 28 September 2007, at para 1(b)(1), available at: <www.icao.int/env/A36_> (discouraging unilateral action); ICAO, *Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection*, Assembly Res A37-19, 8 October 2010, at para 6(c), available at: <www.icao.int/icao/en/assembl/A37-Docs/a37_res_prov_en.pdf> (showing a degree of openness by recognizing that some States may choose to take more ambitious actions but reminding the need to engage in consultations and negotiations before implementing unilateral measures). Many States lodged reservations to the 2010 Resolution: <www.icao.int/icao/en/assembl/A37-

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In a nutshell, directive 2008/101/EC establishes a global ceiling for greenhouse gas emissions by fixing a limited quantity of allowances issued to aircraft operators each year. Emission quantities are to be adjusted annually according to a sliding scale.¹² Under the scheme, aircraft operators are required to monitor their yearly emissions – calculated in terms of tons of CO₂ – and surrender an equivalent number of emission allowances.¹³ Such obligations are imposed upon all aircraft operators for “flights which depart from or arrive in an aerodrome situated in the territory of a Member State”, whether they be passenger or cargo flights, intra-EU flights or flights between EU and non-EU airports.¹⁴ Part of the controversy surrounding the Aviation Directive stems from the fact that it is meant to apply not only to flights within the EU, but also to the last portion of international flights between the EU and a non-EU destination.¹⁵ Sanctions for non-compliance range from monetary penalties – 100 euros per ton of carbon dioxide emitted in excess of allowances surrendered – to outright operating bans.¹⁶

Whether or not airline companies actually comply with the scheme, the ETS will likely have economic repercussions on WTO Members, to varying degrees.¹⁷ In this regard, it can be said that the obligation to purchase emissions allowances, or the imposition of fines or plain denial of entry into the EU for refusal to respect the Directive may constitute violations of the EU’s WTO obligations. For example, the Directive could fall under the application of *GATT* disciplines for trade in goods, insofar as it imposes restrictions – albeit indirectly – on goods being transported on international flights to and from Europe. The assumption here is that the Aviation Directive compliance costs – i.e. the purchase of emission allowances – will be passed on to the importers of the goods, thus translating in increased air transportation costs, and ultimately, higher product prices.¹⁸ If the Directive comes under the purview of WTO law, the next question becomes

Docs/10_reservations_en.pdf> (on the one hand, the EU member States and states members of the European Civil Aviation Conference issued a reservation stating that the *Chicago Convention* does not require States to obtain prior consent from other States before applying market-based measures to their national airline operators; on the other hand, another group of States added a reservation stressing that unilateral measures are prohibited).

¹² Directive 2008/101/EC, *supra* note 1, art 3c(1)(2) (initially at 97% of a benchmark based on the industry’s average carbon emissions over the years 2004-2006 and at a 95% rate starting in 2013 and onwards.)

¹³ *Ibid.* art. 3(g), 14(3).

¹⁴ *Ibid.* Annex 1 (definition of “Aviation”). Annex 1 also contains a list of excluded aviation activities for example, military flights and humanitarian flights, *inter alia*.

¹⁵ Bartels, “ETS”, *supra* note 3 at 430.

¹⁶ Directive 2008/101/EC, *supra* note 1, art 16(3)(5).

¹⁷ There are various estimates as to the costs of the Directive, depending on the actors involved and the projection of the carbon market. For an overview see Bartels, “ETS”, *supra* note 3 at 432 (from his compilation, the costs assessment range between €360 and €3-4 billion. The author however emphasizes the fact that these costs do not necessarily translate into losses for the aviation industry).

¹⁸ *Ibid.*; Joshua Meltzer, “Climate Change and Trade – The EU Aviation Directive and the WTO” (2012) 15:1 JIEL 111 at 120.

whether it is likely to contravene trade rules, namely non-discrimination and national treatment.

B. APPLICATION OF WTO TREATIES TO THE AVIATION DIRECTIVE

The legal nature of the Aviation Directive has so far inspired many legal analyses by scholars.¹⁹ Rather than rehash the exercise of qualifying the ETS under WTO, we choose to focus on the most pertinent aspects for our purposes.

Commentators attempting to characterize the ETS under WTO law have usually first started by determining whether it constitutes a fiscal measure within the meaning of GATT article III:2 – which prohibits subjecting imported products to internal taxes and similar measures “in excess of those applied, directly or indirectly, to like domestic products”.²⁰ This question has attracted divergent answers. Lorand Bartels, for example, argues that the ETS does not equate to a fiscal measure. He insists on the proprietary aspect of the scheme, which in his view sets it apart from regular fiscal measures, in that airline companies obtain a “tradable property right” in exchange of purchasing emission allowances.²¹ Another reason is that, “the ‘price’ paid for an allowance is not fixed by the state in advance, but depends on free market forces” according to supply and demand.²² Joshua Meltzer, for his part, suggests that the ETS may be tantamount to an indirect tax imposed upon aircraft operators, if it is “understood as a requirement to pay E 100 per ton of CO₂ unless airlines had purchased sufficient allowances to cover their CO₂ emissions”.²³ He further adds that this obligation generates fiscal revenues for EU Member States, for them to use as they like, which tends to bring the Aviation Directive closer to taxes.²⁴

¹⁹ See for example Meltzer, *ibid*; Bartels, “ETS”, *supra* note 3; Lorand Bartels, “The Inclusion of Aviation in the EU ETS: WTO Law Considerations”, Geneva, International Centre for Trade and Sustainable Development, Trade and Sustainable Energy Series, issue paper no. 6, 2012; Warren H. Maruyama, “Climate Change and the WTO: Cap and Trade versus Carbon Tax”, 45 J World Trade (2011) 679 ; Erich Vranes, “Climate Change and the WTO: EU Emission Trading and the WTO Disciplines on Trade in Goods, Services and Investment Protection” (2009) 43 J World Trade 707.

²⁰ GATT, *supra* note 7 art III:2. The second sentence of article III:2 refers to the first paragraph of the same article, which contains the term ‘directly competitive and substitutable’.

²¹ Bartels, “ETS”, *supra* note 3 at 439.

²² *Ibid* (as highlighted in the CJEU’s ATAA ruling, *supra* note 3 – albeit in the context of the EU-US Open Skies Agreement and the Chicago Convention). *Contra* Meltzer, *supra* note 18 at 130 (in the author’s opinion, the CJEU’s finding that the ETS is not a charge or a tax has “limited relevance for the meaning of tax or charge in GATT Article III.2”. This is because the scope of GATT Article III.2 is much broader than the equivalent provisions in the EU-US Open Skies Agreement and the Chicago Convention).

²³ Meltzer, *ibid*.

²⁴ *Ibid*.

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If the Aviation Directive is indeed regulated by GATT article III:2, an assessment must follow as to whether imported and domestic products are like products pursuant to GATT article II:2.²⁵ Much has been said about what constitutes a “like product” in WTO jurisprudence.²⁶ In *Japan-Taxes on Alcoholic Beverages*, the Appellate Body identified four relevant factors to ascertain whether products will be deemed to be like: physical characteristics, end-uses, tariff classification and consumer’s tastes.²⁷ If we consider the Aviation Directive, it would seem impossible to determine, simply by looking at a product, whether it was imported via air transport. Therefore, assuming domestic products are like their imported counterparts, does the ETS apply internal taxes in excess to the latter? Meltzer answers in the affirmative, provided that the complainant party demonstrates that imported goods are subject to excess tax in a *de facto* sense, even though the Aviation Directive in principle applies to all EU and non-EU airlines without discrimination:

because the cost of complying with the Aviation Directive is directly related to CO2 emissions, which increase over distances flown, the Aviation Directive is indirectly a tax or charge on imported goods located further from the EU that is in excess of the cost of the Aviation Directive for like domestic goods.²⁸

Conversely, if the ETS is held not to be a fiscal measure under GATT article III:2, it might be characterized as an “internal measure” under GATT article III:4. This article forbids WTO Members from according foreign products less favorable treatment to that accorded to domestic products with regard to “laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.²⁹ Here again, an assessment of likeness is warranted, with the same result as set out above.³⁰ Then comes the question whether the ETS affords less favourable treatment to imported products than to like domestic products. Meltzer argues it does, given the “additional costs to be borne by imported products” associated with airfreight.³¹

²⁵ *Ibid* at 132.

²⁶ See generally Won-Mog Choi, 'Like Products' in *International Trade Law: Towards a Consistent GATT/WTO Jurisprudence*, (Oxford: Oxford University Press, 2003).

²⁷ *Japan – Taxes on Alcoholic Beverages* (1996), WTO Doc WT/DS 8, 10, 11/AB/R (Appellate Body Report) at p 21 [*Japan – Alcoholic Beverages II* (Appellate Body Report)].

²⁸ Meltzer, *supra* note **Error! Bookmark not defined.** at 134.

²⁹ GATT, *supra* note 3, art. III:4.

³⁰ It should be noted that the likeness test is not the same as under article III:4; Meltzer *supra* note 18 at 136.

³¹ Meltzer, *ibid*; Bartels, “ETS”, *supra* note 3 at 444 (the author finds that there is no violation considering that section III:4 only applies to intra-EU flights : “[t]he result is that the EU’s scheme does not appear to violate Article III:4 GATT to the extent that it applies to foreign non-imported products carried on intra-EU flights”).

Beyond the national treatment provisions described above, the ETS could also be found to violate the most favoured nation obligation (MFN) laid down in GATT article I:1, which provides that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in [...] the territories of all other contracting parties”.³² In this case, the likeness requirement would not involve a comparison between domestic and imported products, but rather between products originating from those countries that control CO₂ emissions and those that do not.

The four criteria put forward in *Japan – Taxes on Alcoholic Beverages* can provide some indications for the purposes of determining whether goods from different countries might be considered to be like.³³ As a reminder, those criteria are the following: physical characteristics, end-uses, tariff classification and consumer’s tastes. Once again, it would seem difficult to distinguish between products imported from a country that holds a good carbon report card according to ETS standards and one that does not. Although the third criterion, consumers’ perspectives, could in theory include sustainability considerations, it is far from obvious whether it would be sufficient to render two products unlike within the meaning of the MFN provisions in the current state of WTO jurisprudence. In any event, the international aspect of the EU aviation scheme – i.e. regulation of emissions for flights outside the EU – is likely to breach the MFN clause inasmuch as it accords an advantage to like products from different WTO members in the form of additional “costs on products from certain origins according to the distance they travel by air to the EU”.³⁴

The Aviation Directive could also prove problematic in light of article XI:1 GATT which proscribes quantitative restrictions, that is “prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures”.³⁵ Bartels notes that the term “other measure” has received a broad interpretation by WTO panels and is thus considered to cover “any form of limitation imposed on, or in relation to importation”.³⁶ With regard to the Aviation Directive, the limitation will likely take the form of increased transportation costs for airlines that elect to comply with the scheme, or penalties for those that refuse. ³⁷

³² GATT, *supra* note 3, art. I:1 (this section is also related to national treatment provisions, because article I:1 notably applies with respect to all matters referred to in paragraphs 2 and 4 of Article III).

³³ Meltzer, *supra* note 18 at 138.

³⁴ Bartels, “ETS”, *supra* note 3 at 445.

³⁵ GATT, *supra* note 3, art XI:1.

³⁶ Bartels, “ETS”, *supra* note 3 at 440, citing *Colombia – Ports of Entry* (2009), WTO Doc WT/DS366/R at para. 7.227.

³⁷ *Ibid.*

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It follows from the foregoing that, in the event of a dispute, the Aviation Directive might be found to breach a number of GATT provisions, namely articles III:2 and III:4 (national treatment), article I:1 (most favoured nation obligation) and XI:1 (quantitative restrictions). Those potential breaches may however be justified under the GATT article XX exceptions regime, which permits an otherwise GATT inconsistent measure to be maintained for enumerated policy reasons, in limited circumstances. Two paragraphs are of direct assistance in this case: article XX(g), which allows WTO members to adopt measures 'in relation to the conservation of exhaustible natural resources', provided that such measures are 'made effective in conjunction with restrictions on domestic production or consumption'; and article XX(b), which permits WTO members to take measures necessary for the protection of human or animal or plant life or health.³⁸ Article XX consists of a two-tier analysis whereby a Member defending a measure must prove that: (1) the measure at issue falls under one of the exceptions listed in article XX; (2) and it also satisfies the requirements of the GATT article XX chapeau.³⁹

Commentators tend to agree that the Aviation Directive will likely survive the first step of the analysis, which requires investigating whether the measure at hand entertains a degree of connection with the policy objective it seeks to achieve.⁴⁰ In the context of article XX(g), the measure must be "relating to" the conservation of exhaustible natural resources, meaning that the means must be reasonably related to the ends, and must also be "made effective in conjunction with restrictions on domestic production and consumption".⁴¹ The Aviation Directive's stated objective is to mitigate climate change through reduction of aviation emissions.⁴² One can easily draw a parallel with *US – Gasoline*, where the Appellate Body found that clean air was an exhaustible natural resource.⁴³ Bartels also remarks that the atmosphere could arguably qualify as an exhaustible natural resource.⁴⁴ Moreover, the ETS might indirectly contribute to protect living and non-living natural exhaustible resources that are vulnerable to climate change

³⁸ GATT, *supra* note 3, art XX.

³⁹ United States – Standards for Reformulated and Conventional Gasoline (1996), WTO Doc WT/DS2/AB/R at p 22 [US – Gasoline (Appellate Body Report)].

⁴⁰ Bartels, "ETS", *supra* note 3 at 450-51; Meltzer, *supra* note 18 at 140-43.

⁴¹ GATT, *supra* note 3, art XX(g).

⁴² The need for the Aviation Directive was expressed by the EU as follows: EU, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, Reducing the Climate Change Impact of Aviation, COM(2005) 459 final at p 2 ("Although aviation's share of overall greenhouse gas emissions is still modest (about 3%), the rapid growth undermines progress made in other sectors. If the growth continues as up to now, emissions from international flights from EU airports will by 2012 have increased by 150 % since 1990. This growth in the EU's international aviation emissions would offset more than a quarter of the reductions required by the Community's target under the Kyoto Protocol. In the longer run, aviation emissions will become a major contributor if current trends continue").

⁴³ Bartels, "ETS", *supra* note 3 at 449; *US – Gasoline* (Appellate Body Report), *supra* note 39 at 14-15.

⁴⁴ Bartels, *ibid* at 449-50.

impacts.⁴⁵ In terms of means, the Aviation Directive is designed to capture the largest volume of CO₂ emissions by targeting both EU and non-EU airlines.⁴⁶ It has also been adopted in concert with domestic restrictions on production and consumption, as it applies to both EU and non-EU airlines and serves to complement the ETS, which already instituted such restrictions on EU domestic activities.⁴⁷

The necessity test contained in paragraph XX(b) dictates that a measure must be necessary to the protection of human, animal, or plant life or health, which means that it must be “apt to produce a material contribution to the achievement of [this] objective”.⁴⁸ For some commentators, the Aviation Directive may end up having very little impact on the patterns of carbon emission in the aviation industry, with compliance costs being passed on to consumers.⁴⁹ It is however plausible that the Aviation Directive could be considered to make a material contribution if we adopt a long-term view, as suggested by *Brazil – Measures Affecting Imports of Retreaded Tyres*, in which the Appellate Body acknowledged that: “[t]he results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change [...] – can only be evaluated with the benefit of time”.⁵⁰ In order for a measure to be necessary, there must be no reasonably alternative measures that are less trade restrictive.⁵¹ Although it seems difficult to assess at this point whether alternative measures are available, commentators are optimistic that the Aviation Directive will meet this article criteria. For Bartels, “[a]t most, it is possible to say that excluding international flights, or non-EU airlines, would not meet the EU’s objectives, as too few emissions would be captured”.⁵²

Once it is demonstrated that the measure falls within the ambit of listed exceptions, it must still meet the requirements of the GATT article XX introductory clause, which stipulates, *inter alia*, that measures should not be applied in a manner constituting “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”.⁵³ For Bartels, the Aviation Directive might create discrimination in two instances: (1) between products from WTO members situated at varying distance from the EU; (2) between products imported from countries equidistant from the EU, if it

⁴⁵ *Ibid* at 450.

⁴⁶ Meltzer, *supra* note 18 at 141.

⁴⁷ *Ibid* at 142; Bartels, “ETS”, *supra* note 3 at 450.

⁴⁸ *Brazil – Measures Affecting Imports of Retreaded Tyres*, (2007) WTO Doc WT/DS332/AB/R (Appellate Body Report) at para 150 [*Brazil – Retreaded Tyres* (Appellate Body Report)]. See also *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (2000) WT/DS161,169/AB/R at paras 161, 164 and 166 (Appellate Body Report).

⁴⁹ Meltzer, *supra* note 18 at 143; Bartels, “ETS”, *supra* note 3 at 450-51.

⁵⁰ *Brazil – Retreaded Tyres* (Appellate Body Report), *supra* note 48 at 151.

⁵¹ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (2001), WTO Doc WT/DS 135/AB/R at para 172 (Appellate Body Report) [*EC – Asbestos* (Appellate Body Report)].

⁵² Bartels, “ETS”, *supra* note 3 at 451.

⁵³ GATT, *supra* note 3, art XX (the measure must neither be a “disguised restriction on international trade”).

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is easier to transport the products from one country on a indirect flight to the EU.⁵⁴ In the second scenario, goods flown on an indirect flight would probably be subject to lower compliance costs, as only the last portion of the flight would be accounted for in the calculation of emissions. While discrimination may be rationally justified in the first case – because it is logical, from the perspective of reducing carbon emissions, that the volume of emissions, and therefore the compliance costs, be correlated to distance flown – the second case is less defensible.⁵⁵ Meltzer observes that distinguishing between direct and indirect flights may in fact yield counter-productive effects, as it provides an incentive for airlines companies to transit that may result in a higher overall volume of emissions.⁵⁶ These elements suggest that the Aviation Directive may not sustain careful examination under the GATT article XX chapeau.

Finally, it should be borne in mind that the Aviation Directive applies not only to aircrafts flying over the European airspace, but also to the last portion thereof, between EU and non-EU airports, over the airspace of third countries. This is the controversial “last leg” of the flight, which has given rise to allegations of extraterritoriality and breach of other countries’ sovereignty.⁵⁷ Such arguments are debatable, and for that matter, have been rejected by the CJEU on the grounds that the EU only conditions access to its territory on compliance with the Directive, leaving the final choice with the airline operators: “[i]t is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme”.⁵⁸ Building on this reasoning, Meltzer argues that properly understood, the concept of extraterritoriality should not negate Members’ right to condition access to their territory for events or policies that have taken place outside their jurisdiction.⁵⁹

Yet, despite these objections, the Aviation Directive may be deemed extraterritorial if we look back at the GATT decision in *Tuna – Dolphin*, wherein the panel took the view that trade-restrictive measures should be limited to the territory of the Member undertaking them.⁶⁰ Some consider that this interpretation still holds true today; despite growing acceptance of extraterritorial measures over the years, it has been left seemingly unfettered by WTO panels.⁶¹ For example, in the *US – Shrimp*, often considered as

⁵⁴ Bartels, “ETS”, *supra* note 3 at 458.

⁵⁵ *Ibid.*

⁵⁶ Meltzer, *supra* note 18 at 145.

⁵⁷ *Ibid* at 151-53.

⁵⁸ *ATAA*, *supra* note 3 at para 127.

⁵⁹ Meltzer, *supra* note 18 at 151-53.

⁶⁰ *United States – Restrictions on Importations of Tuna (Complaint by Mexico)* (1991) GATT Doc DS21/R at paras 5.25-5.29.

⁶¹ Elisa Ruozzi, “The EU Directive on Renewable Sources and WTO: Towards a Solution of the PPMs and

implicitly authorizing extraterritorial measures, the Appellate Body refused to address whether “there is an implied jurisdictional limitation in Article XX(g)”.⁶²

For Bartels, the extraterritorial dimension of the Aviation Directive does not necessarily represent an insuperable hurdle, as it would probably meet the “nexus” requirement and thus be justified under GATT article XX.⁶³ In the *US - Shrimp* decision, the Appellate Body found that sea turtles migrating to US waters had sufficient jurisdictional nexus with the US territory.⁶⁴ As Bartels rightly points out “[t]he ‘atmosphere’ that the EU seeks to protect has, if anything, an even closer ‘jurisdictional nexus’ to the EU”.⁶⁵

III. JUSTIFYING THE ETS UNDER WTO LAW

The possibility of raising sustainable development as a defense in a WTO dispute involving the Aviation Directive (2.2.) is largely contingent upon its status and relationship to trade law, which first need to be explored (2.1).

A. SUSTAINABLE DEVELOPMENT AND TRADE LAW: AN OVERVIEW

In this first section, we look briefly at the status of sustainable development under international law (2.1.1), before we analyze its degree of acceptance in WTO practice (2.1.2).

1. STATUS OF SUSTAINABLE DEVELOPMENT UNDER INTERNATIONAL LAW

Since the 1987 *Brundtland Report*, which marked its emergence in the lexicon of international environmental law, the concept of sustainable development has suffered from a lack of certainty, which still represents one of the main obstacles in its applicability.⁶⁶ Despite reaching global acceptance and being endorsed in a growing

extraterritoriality measures?”, 2012-1/5-ECLI, Instituto Universitario di Studi Europei, Working Paper Series, European and Comparative Law Issues at 7.

⁶² *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R at para 133 (Appellate Body Report) [*US – Shrimp* (Appellate Body Report)].

⁶³ Bartels, “ETS”, *supra* note 3 at 450.

⁶⁴ *US – Shrimp* (Appellate Body Report), *supra* note 62 at para 133.

⁶⁵ Bartels, “ETS”, *supra* note 3 at 450.

⁶⁶ “Our Common Future”. Report of the World Commission on Environment, UNWCED, 42d Sess., Annex, Provisional Agenda Item 83(e), UN Doc. A/42/427 (1987). Other documents prior to 1987 have paved the way to the Brundtland Report: *Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc A/Conf 48/14/Rev.1, 11 ILM 1416; *Convention on international trade in endangered species of wild fauna and flora*, 3 March 1973, 993 UNTS 243, 12 ILM 1085;

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number of national⁶⁷, regional⁶⁸ and international⁶⁹ legal instruments, from the perspective of WTO diplomats and those involved in WTO dispute settlement, controversy remains on practical and conceptual levels with regard to the concept's scope, implications and definition.⁷⁰ Pursuant to the often-cited definition put forward in the *Brundtland Report*, sustainable development is understood as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". States thus undertake 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".⁷¹ More than 25 years after it was first drafted, the wording of sustainable development continues to raise many questions. What are its operational content and meaning? How are its three pillars to be implemented? And mostly, what does a commitment to sustainable development entail in practice?⁷²

World Charter for Nature, 28 October 1982, G.A. Res 37/7, 8, U.N. Doc. A/Res/37/7.

⁶⁷ Organisation for Economic Co-operation and Development, *Good Practices in the National Sustainable Development Strategies of OECD Countries*, Paris, 2006, online: OECD <<http://www.oecd.org/greengrowth/36655769.pdf>>.

⁶⁸ Marie-Claire Cordonier Segger, "Sustainable Development in Regional Trade Agreements", in Lorand Bartels & Federico Ortino, eds, *Regional Trade Agreements and the WTO Legal System*, (Oxford: Oxford University Press, 2006) 331. See for example recently, in the European context: Henning Grosse Ruse-Khan, "A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond" (2010) JIEL 1; Ludwig Kramer, "Sustainable Development in EC Law", in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Where can we go From Here?* (Groningen: Europa Law Publishing, 2008) 377.

⁶⁹ *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, UN Doc. A/CONF.151/Rev. 1 (1992), 31 ILM 874 (1992); *UNEP Agenda 21: Programme of Action for Sustainable Development* (New York: UN Department of Public Information, 1992); *United Nations Convention on Biodiversity*, 5 June 1992, 1760 UNTS 79, 143; 31 ILM 818 (1992); *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 15 October 1994, 33 ILM 1328; *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 39 ILM 1027 (entered into force 11 November 2003). For a history of codification of sustainable development in international law treaties, read: Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in Bugge & Voigt, *ibid* at 87.

⁷⁰ For an overview, see inter alia Christina Voigt, *Sustainable Development as a Principle in International Law: Resolving Conflicts between WTO Law and Climate Measures*, (The Hague: Martinus Nijhoff Publishers, 2009) [Voigt, *Resolving Conflicts*]; Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (The Hague: Martinus Nijhoff Publishers, 2008); Sumudu A. Atapattu, *Emerging Principles of International Environmental Law* (Ardsey: Transnational Publishers, 2006) at 182-94; Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23:2 Eur J Int Law 377.

⁷¹ Johannesburg Declaration on Sustainable Development, 4 September 2000, UN Doc A/Conf. 199/20 at 5.

⁷² For attempts at fleshing out the content of sustainable development, see: 2002 International Law Association New Delhi Declaration on Principles of International Law Related to Sustainable Development

Equally uncertain, from the WTO perspective, is the concept's normative status under international law. Despite abundant scholarly work on this subject, the debates surrounding the legal significance of sustainable development have not yet been put to rest. As Christina Voigt remarks, there exists a wide spectrum of views on the appropriate degree of normativity that should be assigned to sustainable development.⁷³ While some scholars deny sustainable development any legal value – characterizing it, for example, as an idealistic aspiration⁷⁴, a meta-principle⁷⁵, or a source of conceptual guidance⁷⁶ – others view sustainable development as an autonomous, self-standing legal principle of international environmental law.⁷⁷ Some have gone as far as to contend that it is an emerging principle or custom of international environmental law.⁷⁸ Others argue that it should rather be construed as a principle of interpretation, or an interstitial norm, which serves to reconcile conflicting social, economic and environmental norms.⁷⁹ Finally, others have opted for a middle ground solution, which conceptualizes sustainable development both as a substantive area of law sitting at the intersection of international economic law, international environmental law and international social law, and an independent legal principle of reconciliation powerful enough to modify other obligations, whether customary or treaty-based.⁸⁰

Within this context of conflicting views, the International Law Association Committee on International Law on Sustainable Development recently observed, in its

(New Delhi: ILA, 2002), online: <<http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf>>.

⁷³ Voigt, *Resolving Conflicts*, *supra* note 70 at 161-62. For a discussion on the normativity of sustainable development, see Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23:2 EJIL 37.

⁷⁴ Voigt, *ibid*; Jonathan M. Verschuuren, "Sustainable Development and the Nature of Environmental Legal Principles" (2006) 9:1 Potchefstroom Electronic Law Journal, available at SSRN: <<http://ssrn.com/abstract=899537>>.

⁷⁵ Vaughn Lowe, "Sustainable development and Unsustainable Arguments" in Alan Boyle and David Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) at 30.

⁷⁶ Emily Barrett Lydgate, "Biofuels, Sustainability and Trade-Related Regulatory Chill" (2012) 15:1 JIEL 157 at 158.

⁷⁷ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] I.C.J. Rep. 92 at 254 (Separate Opinion of Vice-President Weeramantry).

⁷⁸ *Ibid*; Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects*, (Oxford: Oxford University Press 2005) at 45. Some authors do not see sustainable development evolving into a legal norm, be it customary or not: Lowe, *supra* note 75 at 23-24 (arguing "the concept of sustainable development is inherently incapable of having the status [...] of a rule of law addressed to States and purporting to constrain their conduct"); Alan Boyle and David Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) at 16-18.

⁷⁹ Lowe, *supra* note 75 at 19.

⁸⁰ Segger & Khalfan, *supra* note 78 at 49.

2012 report, that “there has in fact been little movement in the development of the legal foundations of sustainable development”, qualifying the discussions on the legal status of sustainable development as “sterile”.⁸¹ This latent ambiguity has earned sustainable development a timid, yet promising reception in WTO law.

B. SUSTAINABLE DEVELOPMENT AND SUBSTANTIVE WTO LAW

At the outset, it should be reminded that WTO law itself is not exempt from sustainability considerations. On the contrary, the Preamble of the 1994 *Marrakesh Agreement* relevantly states that trade liberalization

should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of 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.⁸²

This was since reiterated in the 2001 Doha Declaration and numerous other WTO documents.⁸³ Despite its non-binding nature, WTO dispute settlement system bodies have utilized the Preamble language on a few occasions since 1994.⁸⁴ For example, in the important *US – Shrimp* case, the Appellate Body used sustainable development, as cited in the *Marrakesh Agreement* Preamble, to support an evolutionary interpretation of the term “exhaustible natural resources” (article XX(g)) in order to include not only inert natural resources, but also living creatures, in this case sea turtles :

⁸¹ International Law Association, International Law on Sustainable Development, Sofia Conference (2012) 2002 Report, at p 6, online: ILA <www.ila-hq.org>.

⁸² *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154, 33 ILM 1197 (entered into force 1 January 1995).

⁸³ WTO, *Doha Ministerial Declaration*, 14 November 2001, UN Doc. WT/MIN(01)/DEC/1,7; *Marrakesh Trade and Environment Decision*, April 15, 1994, 33 ILM 1267, at 1267 (1994) (“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”); WTO Secretariat, ‘Sustainable Development’, online: WTO <<http://www.wto.org>>.

⁸⁴ For an overview of the evolution of the objective of sustainable development in the GATT and WTO jurisprudence, see Fabio Morosini, “Taking into account environmental, social and cultural concerns through the objective of sustainable development : Perspectives from the WTO jurisprudence on general exceptions” in Lilian Richieri Hanania, ed., *Cultural Diversity in International Law: The effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, London, Routledge, 2014, 54 at 55-59.

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

[...]

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. [footnotes omitted] ⁸⁵

More recently, in *Brazil - Retreated Tyres*, the Panel, in analyzing article XX(b) relating to the preservation of animal and plant life and health, reiterated the Appellate Body's observation in *US-Shrimp* to the effect "that the preamble of the Marrakesh Agreement establishing the WTO showed that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy".⁸⁶

These developments have led authors to conclude that significant progress has been made in terms of acknowledgement of sustainable development before the WTO dispute settlement bodies. For example, Christina Voigt commends "the systematic inclusion of the concept within WTO DSB jurisprudence, which indicates a significant change, not only for the dispute settlement system, but for the WTO in general. The reference to sustainable development and the inclusion of concerns entailed by other multilateral agreements, illustrate the extent to which the judicial function (at least within the WTO context) has departed from formal positivism".⁸⁷ For his part, Markus W. Ghering underscores the fact that "the objective of sustainable development has become an integral part of the world trading system", as "[l]egal arguments encompassing an integrated developmental and environmental approach have been made by the parties and accepted by the relevant dispute settlement organs".⁸⁸

However, as important as it may be, this recognition should not obscure the fact that WTO dispute settlement bodies, like most international bodies, have generally been reluctant to give sustainable development full legal effect, perhaps due to the concept's

⁸⁵ *US - Shrimp* (Appellate Body Report), *supra* note 62 at paras 129-30.

⁸⁶ *Brazil - Measures Affecting Imports of Retreaded Tyres* (2007), WTO Doc WT/DS332/R (Panel Report), at para 7.112.

⁸⁷ Voigt, *Resolving Conflicts*, *supra* note 70 at 142-43.

⁸⁸ Markus Gehring, "Sustainable Development in World Trade Law - a Short History" in Bugge & Voigt, *supra* note 68, X at X.

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perceived indeterminacy.⁸⁹ For instance, in the famous *US – Shrimp* and *US – Shrimp, Recourse to Article 21.5* cases, the WTO Panel referred to sustainable development as an “objective”⁹⁰ or a “concept”⁹¹, rather than a legally binding principle. Indeed, the use of sustainable development before WTO dispute settlement bodies has so far been limited to that of an interpretative tool. Accordingly, in *US – Shrimp*, the Appellate Body declared that the objective of sustainable development must “add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement”.⁹² In a follow-up to the same dispute, the Panel held that the notion of sustainable development should inform its interpretation of GATT’s article XX introductory clause, as it reflects the “object and purpose” of the WTO Agreement.⁹³

Notwithstanding the fact that many WTO decisions have highlighted the importance and relevance of sustainable development, none have so far dismissed a claim on sustainability grounds.⁹⁴ This suggests that the status of sustainable development in the WTO remains somewhat contradictory: “despite its conceptual centrality and wide acceptance in principle, it is very controversial when applied through trade-restrictive regulation”.⁹⁵ The concept’s breadth and vagueness also pose very concrete challenges in the WTO context. As Emily Barrett Lydgate points out, it might be quite difficult to justify comprehensive and far-reaching regulations such as the ETS, “solely based on its contribution to the abstract concept of sustainability”.⁹⁶ In and of itself, sustainable development appears to provide insufficient grounds to implement trade-restrictive measures because it is difficult to discern what it prescribes, allows, or prohibits and whether, in short, it contains any executable normative obligation. Lydgate adds that sustainability is a “process-oriented concept”, which seeks to promote sustainable processes and production methods that are not always visible in the physical characteristics of the end product (non product-related process and production methods

⁸⁹ See Abdul G. Koroma, “Law of Sustainable Development in the Jurisprudence of the International Court of Justice” in Jonas Ebbesson & al., eds, *International Law and Changing Perceptions of Security, Liber Amicorum Said Mahmoudi*, Leiden, Brill, 2014, 189 at 201; Marie-Claire Cordonier Segger, “The Role of International Forums in the Advancement of Sustainable Development” (2009-2010) 10 *Sustainable Dev L & Pol’y* 4 at 18; Nico Schrijver, “The Evolution of sustainable development in international law: inception, meaning and status” (2007) 329 *Recueil des cours* 217 at 317-325; Philippe Sands, “International Courts and the Application of the Concept of ‘Sustainable Development’” (1999) 3 *Max Planck Y.B.U.N.L.* 389.

⁹⁰ *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (2001), WTO Doc. WT/DS58/RW at para 5.54 (Panel Report) [*US – Shrimp, Recourse to Article 21.5* (Panel Report)].

⁹¹ *Ibid* at footnote 202; see also *US – Shrimp* (Appellate Body Report), *supra* note 85 at footnote 107.

⁹² *US – Shrimp* (Appellate Body Report), *ibid.* at 153.

⁹³ *US – Shrimp, Recourse to Article 21.5* (Panel Report), *supra* note 90 at para 5.54.

⁹⁴ Marie-Ève Rancourt, “Promoting Sustainable Biofuels Under the WTO Legal Regime” (2009) 5 *McGill Int’l J Sust Dev L & Pol’y* 73 at 82.

⁹⁵ Lydgate, *supra* note 76 at 170.

⁹⁶ *Ibid.*

(PPM)).⁹⁷ It is sufficient to note that the WTO Members and WTO dispute settlement bodies have historically been hostile to the establishment of regulatory distinctions based on non product-related PPMs.⁹⁸ But perhaps more fundamentally, the applicability of sustainable development is further complicated by the interaction between WTO law and multilateral environmental agreements and public international law (PIL) in general.

C. SUSTAINABLE DEVELOPMENT AS A JUSTIFICATION FOR NON-CONFORMING ETS MEASURES

As we shall see, the role of public international law in WTO dispute settlement (2.2.1) greatly shapes and constrains the ways in which sustainable development may be raised to defend the Aviation Directive (2.2.2).

1. THE ROLE OF PUBLIC INTERNATIONAL LAW IN WTO DISPUTE SETTLEMENT

It is now trite to say that WTO law “should not be read in clinical isolation from public international law”.⁹⁹ But working out the exact terms and conditions that should govern the WTO/PIL relationship is no easy feat. While it is beyond the scope of this contribution to reconstruct the debates on this matter, it is worth recalling the main doctrinal trends involved. In an effort to elucidate the role of non-WTO norms in dispute settlement, scholars have traditionally drawn a distinction between treaty interpretation and treaty application.¹⁰⁰ Simply put, this means that we can either resort to non-WTO rules to *interpret* WTO rights and obligations, or use them as *applicable law*.

⁹⁷ *Ibid* at 171.

⁹⁸ On the PPM debate see in general Steve Charnovitz, “The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality” (2002) 27 Yale J Int’l L 59; Robert Read, “Like Products, Health and Environmental Exceptions: The Interpretation of PPMs in Recent WTO Trade Dispute Cases” (2004) 5 The Estey Centre Journal of International Law and Trade Policy 123; Sanford E. Gaines, “Process and Production Methods: How to produce sound Policy for environmental PPM-based trade measures?” (2002) 27 Colum J Env’tl L 383; Robert Howse & Donald Reagan, “The Product/Process Distinction – An Illusory Basis for Disciplining Unilateralism in Trade Policy” (2000) 11 EJIL 24.

⁹⁹ *US – Gasoline* (Appellate Body Report), *supra* note 43 at p 17. On the issue as to whether WTO law is a self-contained regime: John H. Jackson, “Fragmentation or Unification Among International Institutions: The World Trade Organization” (1999) 31 NYU J Int’l L & Pol 823; Donald M. McRae, “The WTO in International Law: Tradition Continued or New Frontier?” (2000) 3 JIEL 27; Bruno Simma & Dirk Pulkowski, “Of Planets and the Universe: Self-contained Regimes in International Law” (2006) 17:3 EJIL 483.

¹⁰⁰ Gabrielle Marceau, “A Call for Coherence in International Law: Praises for the Prohibition against ‘Clinical Isolation’ in WTO Dispute Settlement” (1999) 33:5 J World Trade 87 at 113 [Marceau, “Praises for the Prohibition”]; Chang-fa Lo, “The Difference between Treaty Interpretation and Treaty Application and the Possibility to Account for non-WTO Treaties during WTO Treaty Interpretation” (2012) 22 Ind Int’l & Comp L Rev 1. *Contra*: Andrew D. Mitchell & David Heaton, “The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function” (2010) 31 Mich J Int’l

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The WTO *Dispute Settlement Understanding* (DSU) does not contain a provision explicitly stating the applicable law before WTO dispute panels.¹⁰¹ Articles 3.2, 7.1 and 11 DSU are however used to provide some guidance in this area. Let us start with section 7.1 DSU, which defines the mandate of the dispute settlement bodies in the following terms:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s). [emphasis added]

Some commentators have suggested that this provision limits both the WTO's substantive jurisdiction and applicable law to the covered agreements, thus excluding the application of non-WTO rules.¹⁰² They have drawn the same inference from article 11 DSU, which describes the panel functions as "[making] an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" [emphasis added]. Other scholars vigorously oppose the proposition that the applicable law should be delimited by the covered agreement.¹⁰³ In his seminal 2001 article¹⁰⁴, Joost Pauwelyn argues that the multiple references to covered agreements in the DSU do not serve to circumscribe applicable law, but rather strictly concern the WTO's jurisdiction.¹⁰⁵

L 559 (arguing that the distinction between treaty application and treaty interpretation is in practice very thin).

¹⁰¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) [DSU].

¹⁰² Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 EJIL 753 at 767; Joel P. Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40 Harv Int'l LJ 333 at 342.

¹⁰³ David Palmeter & Petros C. Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92 Am J Int'l L 398 at 399. See also Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings" (2001) 35 J World Trade 499 at 505 [Bartels, "Applicable law"] ("Nowhere do these paragraphs say that the law applicable in Panel proceedings is limited to that contained in the covered agreements. According to Article 7.1, Panels are to examine the matter referred to the DSB by the complainant *in the light of* the relevant provisions in the relevant covered agreement. The phrase "in the light of" does not limit the sources of law that might be relevant in examining the "matter"."); Erich Vranes, "Jurisdiction and Applicable Law in WTO Proceedings" (2005) 48 German Yearbook of International Law 265.

¹⁰⁴ Joost Pauwelyn, "The Role of Public International Law in the WTO: How far can we go?" (2001) 95 Am J Int'l L 535 [Pauwelyn, "How far can we go?"]; from the same author: Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected islands" (2003-2004) 25 Mich J Int'l L 903 [Pauwelyn, "Bridging Fragmentation"].

¹⁰⁵ Pauwelyn, "How far can we go?", *ibid* at 560 (in his opinion, "the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements").

Therefore, they do not bar the application of *other* rules of public international law in deciding on WTO claims.¹⁰⁶

Article 3:2 *DSU* is also regularly cited for the purposes of determining applicable law. This provision describes the role of the dispute settlement system as “preserv[ing] the rights and obligations of Members under the covered agreements, and [...] clarify[ing] the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”. Two conclusions have been drawn from this article. First, WTO panels may apply international customary law in the context of dispute settlements.¹⁰⁷ Second, this reference to customary law does not necessarily preclude the application of other PIL norms.¹⁰⁸ Commentators rely upon the case *Korea – Measures Affecting Government Procurement*, in which the Panel declared that there is “no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply”.¹⁰⁹

There is, however one important caveat to the above, which also derives from article 3.2: “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”.¹¹⁰ According to Pauwelyn, it follows that a WTO member could in practice invoke rules of international law as a defense, subject to the condition that the opposing party is also legally bound by the same rules. This is because, in accordance with article 3.2 *DSU* “[t]he complaining party cannot see its WTO rights diminished on the basis of a rule of international law by which it is not bound”.¹¹¹ As attractive as it may be on paper, the approach delineated above does not yet seem to constitute *lex lata*. In fact, dispute settlement bodies have generally declined to rule on a dispute based on treaties not explicitly included in the covered agreements.¹¹²

¹⁰⁶ *Ibid* at 561.

¹⁰⁷ *Korea – Measures Affecting Government Procurement* (2000), WTO Doc WT/DS163/R at para 7.96 (Panel Report) [*Korea – Procurement*] (“Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO”).

¹⁰⁸ Bartels, “Applicable law”, *supra* note 103 at 506.

¹⁰⁹ *Ibid*; *Korea – Procurement*, *supra* note 107 at footnote 753.

¹¹⁰ *DSU*, *supra* note 101, art 19.2

¹¹¹ Pauwelyn, “How far can we go?”, *supra* note 104 at 566.

¹¹² Bartels, “Applicable law”, *supra* note 103 at 509 (noting, after reviewing the practice of dispute bodies that there “then, is an inconsistency in the treatment of “outside” law considered *prima facie* to be applicable, but which, if applied, would conflict with the covered agreements. In some cases, the rules of the Vienna Convention on the Law of Treaties are used to exclude this law, while in others it is claimed that the law does not apply because it is not contained in a covered agreement. And in other cases again, the covered agreements are simply assumed to “override” the other law”).

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Public international law may also assist dispute settlement bodies in the interpretation of WTO disciplines. Over the years, the Appellate Body interpreted 3.2 DSU as incorporating article 31 of the *Vienna Convention on the Law of Treaties*, which calls for a treaty to be interpreted in light of its context, object and purpose.¹¹³ Together with the treaty “context”, interpreters should take into account, *inter alia*, “any relevant rules of international law applicable in the relations between the parties”. [emphasis added]¹¹⁴ There have been some disagreements about the proper scope of this provision: must “outside WTO rules” bind all WTO Members¹¹⁵ in order to be used as interpretative tools, just the parties to the dispute, or only one party¹¹⁶? The case law on this issue is ambiguous. For instance, in *US – Shrimp*, the Appellate Body did not hesitate to resort to multilateral environmental agreements – notably the *United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora*, the *Convention on the Conservation of Migratory Species of Wild Animals* and the *Convention on Biological Diversity* – to impart meaning to the term “exhaustible natural resources” (GATT article XX(g)), even though these agreements were not binding upon all parties to the dispute.¹¹⁷ In *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, the Panel nevertheless rejected the argument of the EU to the effect that the *Convention on Biological Diversity* and the *Cartagena Protocol on Biosafety* – by which the United States were not bound – should be used to interpret the parties’ obligations.¹¹⁸ Aside from being “a relevant rule applicable between the parties”, sustainable development may also be contemplated as the “object and purpose” of a treaty, which is probably the most appropriate solution in the present case.

2. SUSTAINABLE DEVELOPMENT AS DEFENSE: BETWEEN INTERPRETATION AND APPLICATION

If we now turn to sustainable development, the foregoing developments direct us to two possible points of entry into WTO law. First, following Pauwelyn’s prospective approach, one could consider sustainable development to be applicable law within the

¹¹³ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*Vienna Convention*]; *US – Gasoline* (Appellate Body Report), *supra* note 43 at p 17; *Japan – Alcoholic Beverages II* (Appellate Body Report), *supra* note 27 at p 10; *European Communities – Customs Classification of Certain Computer Equipment* (1998), WTO Doc. WT/DS62, 67, 68/AB/R at para 86 (Appellate Body Report); *US – Shrimp* (Appellate Body Report), *supra* note 85 at para 114 and note 82.

¹¹⁴ *Vienna Convention*, *supra* note 113 art 31(1)(c).

¹¹⁵ Pauwelyn, “Bridging Fragmentation”, *supra* note 104 at 910 (affirming that the relevant rules that may assist a panel in the process of treaty interpretation should be limited to “non-WTO rules reflecting the common intentions of all WTO Members”).

¹¹⁶ Marceau, “Praises for the Prohibition”, *supra* note 100 at 124.

¹¹⁷ *US – Shrimp* (Appellate Body Report), *supra* note 85 at footnote 111.

¹¹⁸ *European Communities – Measures affecting the approval and marketing of biotech products*, (2006) WTO Doc WT/DS291, 92, 93/R at paras 7.74-7.75 [*EC – Approval and Marketing of Biotech Products*].

meaning of section 3.2 of the *Dispute Settlement Understanding*.¹¹⁹ Defining the legal nature of sustainable development here becomes crucially important. If we qualify sustainable development as a customary norm, it may well become applicable law in a dispute involving the Aviation Directive. In light of the above, it is however safe to say that sustainable development is not “ripe” for such a qualification yet. Furthermore, a WTO panel might be reluctant to characterize sustainable development a new source of customary law. It should indeed be borne in mind that in the *European Communities – Measures Concerning Meat and Meat Products* case, the Appellate Body displayed extreme caution in refusing to decide whether the precautionary principle had reached the status of customary international law.¹²⁰

Alternatively, if we conceive sustainable development as an obligation imposed by a Multilateral Environmental Agreements (MEAs), and thus embodied in a legal instrument, it may be invoked as a defense, with the important limitation that such legal instrument must bind both parties to the dispute.¹²¹ This poses a few challenges in the context of the Aviation Directive. First, it is questionable whether the Aviation Directive can be considered as a measure implementing an MEA. Although the *UNFCCC* and the *Kyoto Protocol* both make multiple references to sustainable development¹²², it is open to argue, given this concept’s breadth and complexity, that it did not specifically require the EU to adopt the Aviation Directive. Marie-Ève Rancourt notes that “State Parties under the *UNFCCC* and the *Kyoto Protocol* have absolute discretion as to how they fulfil their obligations [...]”.¹²³ Consequently, these conventions cannot be invoked to justify the modalities and necessity if a disputed measure.¹²⁴ The language of article 2(2) of the *Kyoto Protocol* – which invites States to work towards aviation emissions reduction within the ICAO framework – appears to be of little assistance in this case. Its vagueness was underscored in the CJEU’s *ATAA* ruling in the following terms:

¹¹⁹ *DSU*, *supra* note 101, art 3.2.

¹²⁰ *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, (1998) WTO Doc WT/DS26/AB/R at para 123 (concluding that it was “unnecessary, and probably imprudent, for [it] in this appeal to take a position on this important, but abstract, question”).

¹²¹ Pauwelyn, “How far can we go?”, *supra* note 104 at 566.

¹²² For example, the objective of the *UNFCCC*, as laid out in its section is to 2, is to stabilize greenhouse gas concentrations “within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner.” Perhaps more evidently, section 3(4) of the Convention states that State parties have a right to and a duty to promote sustainable development. In a similar fashion, the *Kyoto Protocol* identifies the promotion of sustainable development as one of the key obligations incumbent upon State parties.

¹²³ Rancourt, *supra* note 94 at 81.

¹²⁴ *Ibid.*

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Article 2(2) of the Kyoto Protocol, mentioned by the referring court, provides that the parties thereto are to pursue limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels, working through the ICAO. Thus, that provision, as regards its content, cannot in any event be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity of Directive 2008/101.¹²⁵

Moreover, relying upon article 2(2) may be a slippery slope, as it paradoxically highlights the Aviation Directive's alleged unilateral and extraterritorial nature.

Second, it remains uncertain, if the Aviation Directive were to be challenged before the WTO, whether all the parties to the dispute would be bound by the *Kyoto Protocol*. The European Union being a party to the *Kyoto Protocol*, this treaty's provisions "form an integral part of [its] legal order".¹²⁶ Conversely, the United States, which may be a potential party to a WTO dispute, has signed but not ratified the *Protocol*. It should be noted that both the EU and the United States are parties to the *UNFCCC*. However, contrary to the *Kyoto Protocol*, which provides for binding and mandatory emissions reduction commitments, the *UNFCCC* is more aspirational in nature, as it solely enjoins States to limit their emissions, without obliging them to do so.¹²⁷ These difficulties, coupled with the WTO's unfavourable jurisprudence, render the direct application of sustainable development highly implausible.

More realistically, sustainable development may be used as a means to interpret the WTO covered agreements in a manner that is more compatible with the Aviation Directive.¹²⁸ As a preliminary matter, we must rule out the application of sustainable development as "relevant rules of international law applicable in the relations between the parties", pursuant to article 31(1)(c) of the *Vienna Convention*. Recent WTO case law indeed suggests that all parties to the dispute must be bound by "outside" WTO rules used in interpreting WTO obligations.¹²⁹ As previously discussed, this requirement may not be met in a dispute involving the Aviation Directive. Contrary to section 31(1)(c) of the *Vienna Convention*, relying upon sustainable development as the "object and purpose" of WTO Agreements does not require all parties to have ratified MEAs under which trade-

¹²⁵ *ATAA*, *supra* note 3 at para 73.

¹²⁶ *Ibid* at para 54.

¹²⁷ The ICAO 2004 and 2007 resolutions, by which the Members reiterated their desire to address the aviation sector's impact on global warming, may at best be characterized as soft-law.

¹²⁸ On this point see Morosini, *supra* note 84 at 59-61 (albeit for the purpose of integrating culture into the WTO jurisprudence); Jeffrey Lagomarsino, "WTO Dispute Settlement and Sustainable Development: Legitimacy Through Holistic Treaty Interpretation" (2010-2011) 28 Pace Envtl L Rev 545; Gabriele Gagliani, "The interpretation of general exceptions in international trade and investment law: is a sustainable development interpretive approach possible?" (2014-2015) 43 Denv J Int'l L & Pol'y 559.

¹²⁹ *EC – Approval and Marketing of Biotech Products*, *supra* note 118 at paras 7.74-7.75.

restrictive measures are adopted. The “object and purpose” of WTO covered agreement applies in virtually all disputes, since all WTO Members share a common commitment to sustainable development through the Marrakesh Agreement Preamble.¹³⁰

There are several advantages to using sustainable development as an interpretation aid. First, it bypasses the problems of indeterminacy: in this context, sustainable development “[...] does not purport to bind states in the form of a specific obligation entailing an executable substantive order, [nor] does [it] need to prescribe any specific integrated outcome” [...]; “[h]ere, regardless of the identified ambiguity, the concept can still perform a general steering role towards integrative decision-making processes”.¹³¹ Second, it may help instill greater flexibility in trade rules, by supporting a broad and teleological interpretation of WTO provisions.¹³² How may sustainable development add “colour, texture and shading” in the case at hand?

One example is the open-ended “likeness requirement” at the heart of WTO non-discrimination provisions (articles I:1, III:2, III:4 GATT) – which the Aviation Directive is, considering the foregoing, likely to breach. Conceivably, the likeness test could take a different turn if interpreted in light of sustainable development. As Rancourt notes, it could for instance integrate new social and environmental considerations, and in particular non-product related process and production methods, insofar as they have an impact on consumers’ tastes and preferences.¹³³ In *EC – Asbestos*, the Appellate Body found that the health risks associated with a product were relevant to a likeness assessment, in that they influence consumer’s behavior.¹³⁴ By extension, could the depletion of exhaustible resources and health risks associated with aviation emissions become pertinent to determine whether products flown on ETS-compliant airlines are “like” other products imported without regard to carbon emissions? It might seem far-fetched, but the logic is the same: if production methods indeed have an impact on consumers’ decisions, then the products may not necessarily be “like” and differential treatment may be justifiable.¹³⁵ Proving the existence of a widespread consumer concerns over climate change issues would, of course, require strong evidence, but it is not unfeasible. More generally, sustainable development may help answer the three following questions: what characteristics should be taken into account in assessing likeness?; to what extent must products share similar characteristics in order to be

¹³⁰ Miguel A. Elizalde de Carranza, “MEAs with trade measures and the WTO: Aiming towards sustainable development? (2007-2008) 15 *Buff Envtl LJ* 43 at pp 87-88.

¹³¹ Ruse-Khan, *supra* note 68 at 35.

¹³² Carranza, *supra* note 130 at 89.

¹³³ Rancourt, *supra* note 94 at 93-94.

¹³⁴ *EC – Asbestos* (Appellate Body Report), *supra* note 51 at para 121; Rancourt, *ibid*.

¹³⁵ Rancourt, *ibid* at 94.

considered to be like?; and finally, from whose perspective should likeness be evaluated?¹³⁶

In addition, sustainable development could help ease the conditions of the GATT exceptions regime to ensure that non-protectionist or non-discriminatory measures furthering MEA objectives are not unduly dismantled. This would sometimes mean giving the Defendant Member the benefit of the doubt, and may eventually lead, as Marceau suggests, to a presumption that MEA-motivated trade restrictions meet the requirement of GATT article XX, in certain circumstances.¹³⁷ In the case of the Directive, two examples easily come to mind: the first one relates to the “necessity test” contained in article XX(b), and the second to the requirements of the article XX chapeau.

First, sustainable development could help support the view that the Aviation Directive’s contribution to the objective of combating climate change should be analyzed in a long-term perspective, in line with the Appellate Body’s findings in *Brazil – Retreated Tyres*. Not only is the Aviation Directive in itself insufficient to prevent climate change, but its effects are unlikely to be obvious in the near future. However, this should not preclude a WTO body from finding that the measure was necessary.¹³⁸ Likewise, sustainable development could encourage WTO panels to adopt a more holistic view of the contribution of the measure to the objective it seeks to achieve. In the case of the Aviation Directive, for example, one should not only examine its results in terms reduction of carbon emissions, but also the positive impact it may have in inciting other countries to adopt similar measures and changing behaviour in the aviation sector.¹³⁹ Second, concerning the controversial “last leg” of the flights that the Aviation Directive intends to regulate, sustainable development could help offer a justification for the fact that it is being applied in a “discriminatory and arbitrary manner”. On a practical level, one possible explanation why the Directive only applies to the last portion of international flights is that, as Bartels points out, the “EU cannot obtain data relevant to flights without a terminal point in the EU”.¹⁴⁰ This is largely due to administrative constraints, which could eventually amount to a valid justification in a sustainable development perspective. As Bartels notes, there is, in fact, some “room for justifying discrimination under the Chapeau on the basis of genuine administrative constraints”.¹⁴¹ In *Brazil – Retreated Tyres*, the Appellate Body acknowledged the fact that climate change measures might not immediately bring visible results. We see no reason why it should not also acknowledge the difficulties inherent with designing a scheme that is both balanced and effective in

¹³⁶ These questions were identified by Gary P. Sampson, *The WTO and Sustainable Development*, (Tokyo: United Nations University Press, 2005) at 82.

¹³⁷ Carranza, *supra* note 130 at 88-89; Marceau, “Praises for the Prohibition”, *supra* note 100 at 131.

¹³⁸ Meltzer, *supra* note 18 at 142-43.

¹³⁹ *Ibid.*

¹⁴⁰ Bartels, “ETS”, *supra* note 3 at 459.

¹⁴¹ *Ibid* at 456.

preventing climate change. As for the risk of increasing aviation emissions due to the incentive to transit, an approach inspired by sustainable development may help look beyond individual cases where the Directive may have such negative effects, and instead consider general changes in emissions patterns and behaviour modification in the aviation sector.

Although perhaps inconclusive, the solutions proposed above certainly open up new avenues for creating a legal framework favorable to a sustainability-inspired measure.

Draft for comments

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