THE INTERPRETATION OF THE WTO AGREEMENT

Sebastián Mantilla Blanco

Fecha de recepción: 15 de septiembre de 2010
Fecha de aceptación: 9 de noviembre de 2010

ABSTRACT

The Vienna Convention on the Law of Treaties (1969) has been regularly used for interpreting the covered agreements of the World Trade Organization. This summary begins by presenting the reasons justifying resort to the treaty interpretation rules of the 1969 Convention in the WTO context. Thereafter, it explains how WTO adjudicating bodies have applied such rules in practice. By so doing, it seeks to provide a useful guide from students for students.

Key words: Vienna Convention on the Law of Treaties, World Trade Organization, WTO Agreement, primary means of interpretation, supplementary means of interpretation.

RESUMEN

La Convención de Viena sobre el Derecho de los Tratados (1969) ha sido utilizada recurrentemente para interpretar los acuerdos abarcados de la Organización Mundial del Comercio. Este resumen comienza por analizar las razones que justifican el uso de las reglas de interpretación previstas en la Convención en el contexto de la OMC, para explicar posteriormente la manera como dichas normas han sido aplicadas por los paneles y el Cuerpo de Apelaciones de la OMC. De esta manera, busca proveer una guía práctica de estudiantes para estudiantes.

Palabras clave: *Convención de Viena sobre el Derecho de los Tratados, Organización Mundial del Comercio, Acuerdo de la OMC, regla general de interpretación, medios de interpretación complementarios.*

INTRODUCTION

The role public international law plays in the interpretation of the WTO Agreement has been the subject of intense discussions among scholars.[1] Despite the variety of well-informed opinions, the most accurate view seems to be the one considering that the covered agreements must be interpreted in accordance with the rules provided by (general) public international law. Two reasons support this contention.

First, in spite of WTO law being a special branch of public international law, it is a part thereof.[2] As expressed by Joost Pauwleyn, *"in their treaty relations States can 'contract out' of one, more or, in theory, all rules of international law (other than those of jus cogens), but they cannot contract out of the system of international law […] The WTO treaty has contracted out parts of international law […] But contracting out some rules of international law does not mean contracting out all of them, let alone contracting out of the system of international law."*[3] For that very same reason, WTO provisions should be interpreted taking into account their character as rules of international law.

Second, in the particular field of treaty interpretation, Article 3.2 of the WTO Dispute Settlement Understanding [DSU] makes explicit reference to general international law. The provision reads as follows: *"[t]he 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."*[4]

Bearing the foregoing in mind, it is possible to conclude that the most adequate starting point for interpreting the WTO Agreement is the Vienna Convention on

1 See: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 35.

2 In this vein, it has been explained that *"[w]ith one possible exception, no academic author (or any WTO decision or document) disputes that WTO rules are part of the wider corpus of public international law […] [t]he fact that many negotiators of the WTO treaty (in numerous countries representatives of a trade ministry de-linked from that of foreign affairs) did not think of public international law when drafting the WTO treaty is not a valid legal argument. At most, it amounts to an excuse for the WTO treaty not to have dealt more explicitly with the relationship between WTO rules and other rules of international law."* Pauwelyn, Joost, *The Role of Public International Law in the WTO: How Far Can We Go?* American Journal of International Law, Vol. 95, (2001), p. 538.

3 Pauwelyn, Joost, *Conflict of Laws in Public International Law; How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, (2003), p. 37.

4 Emphasis added. Understanding on Rules and Procedures Governing the Settlement of Disputes [Annex 2 of the WTO Agreement], Art. 3.2.

the Law of Treaties [VCLT]. The reasons are twofold. First, the VCLT is the instrument which, *par excellence*, governs the interpretation of treaties concluded between States.[5] Second, as acknowledged by the Appellate Body in *US-Gasoline*, the *"customary rules of interpretation of public international law"* referred to in Article 3.2 DSU are those set forth in the VCLT.[6] Authorized scholars have come to the same conclusion.[7]

In this connection, it is worth to highlight two additional points. First, the fact that the Convention is a *treaty* does not prevent its interpretation standards from having, too, a *customary* character. As a corollary, where a country has ratified the WTO Agreement but not the VCLT, as it is the case of the United States,[8] Articles 31, 32 and 33 of the VCLT may nevertheless be applied as an expression –that is to say, a codification– of customary law.[9] In this line of argument, in *Japan-Alcohol* the Panel and Appellate Body implicitly resolved any uncertainty about the applicability of the VCLT to non-parties by stating that the Convention constitutes a codification

5 Indeed, the VCLT provides in Article 1: *"[t]he present Convention applies to treaties between States."* To the same effect, VCLT Article 2.1.a. defines the word *treaty* as an *"[i]nternational agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."* Vienna Convention on the Law of Treaties, (23 May 1969), Arts. 1 & 2.1.a.

6 In fact, after quoting VCLT Article 31, the Appellate Body explained: *"[t]he "general rule of interpretation" set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization."* United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, (29 April, 1996), p. 17.

7 In relation to this approach, Professors Matsushita, Schoenbaum and Mavroidis have explained that: *"in short the VCLT system, as described above, is the method that WTO adjudicating bodies have always used (at least in name) since the very first case submitted to them."* Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 29. To the same effect, Professors Cameron and Gray note that: *"[w]hat constitutes customary international law in the interpretation in the interpretation of treaties is generally taken to be expressed in articles 31 and 32 of the VCLT."* Cameron, James & Gray, Kevin, *Principles of International Law in the WTO Dispute Settlement Body*, International and Comparative Law Quarterly, Vol. 50, (April 2001), p. 254.

8 Cameron, James & Gray, Kevin, *Principles of International Law in the WTO Dispute Settlement Body*, International and Comparative Law Quarterly, Vol. 50, (April 2001), p. 254.

9 In words of Michael Lennard: *"[i]t therefore does not matter, for the purposes of this paper, that many WTO Members (including the United States) are not Parties to the Vienna Convention, almost inevitably for reasons other than any concerns about the treaty interpretation rules in that Convention. Identical treaty interpretation rules are almost universally regarded, including in WTO jurisprudence, as applying in customary international law anyway, and non-Vienna Convention parties, such as the United States, regularly argue their WTO and other cases based on the language of the Vienna Convention, in acknowledgment of this reality, and as a shorthand way of referring to the customary international law of treaty interpretation."* Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), pp. 18-19.

of customary international law.[10] Subsequent reports, such as the Panel report in *EC-Biotech*, confirm this approach.[11] The latter view is additionally consistent with a number of decisions issued by the International Court of Justice [ICJ].[12] Thus, the legitimacy of resorting to the VCLT for interpreting the WTO Agreement seems to be out of question.

Second, even though the application of the VCLT to the General Agreement on Tariffs and Trade [GATT] of 1947 was not uncontroversial (as a result, among others, of the well-known debate on whether the instrument could be characterized as a binding treaty[13]), history shows that panels actually used the VCLT – more implicitly than explicitly – when considering GATT 1947 provisions.[14] In *US- Restrictions on the Import of Sugar* (1989), the panel applied the VCLT without making express reference to it.[15] Similarly, some of the Convention's interpretative criteria were applied in *EEC –Restrictions on Imports of Desserts Apples – Complaint by Chile* (1989) and *Canada –Measures Affecting Exports of Unprocessed Herring and Salmon* (1988).[16] Later on, in *EEC –Regulation on Imports of Parts and Components*, GATT 1947 Article XX.d was construed using standards similar to those provided by Article 31 of the VCLT.[17]

For present purposes, it is in any case clear that the VCLT has a remarkable significance in the interpretation of the WTO Agreement (including GATT 1947 provisions). However, in the application of these standards, as explained by the Appellate Body in *Japan-Alcohol*, the interpreter should always bear in mind that

10 Japan-Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R & WT/DS11/R, (11 July 1996), para. 7.6; Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996), pp. 10 *et seq*.

11 See: European Communities-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R & WT/DS293/R, (29 September 2006), para. 7.65.

12 See, for example: International Court of Justice, Case Concerning Kasikili/ Sedudu Island (Botswana/Namibia), Judgment, (13 December 1999), para. 18; International Court of Justice, Oil Platforms (Islamic Republic of Iran v United States of America), Judgment on Preliminary Objections, (12 December 1996), para. 22.

13 Cameron, James & Gray, Kevin, *Principles of International Law in the WTO Dispute Settlement Body*, International and Comparative Law Quarterly, Vol. 50, (April 2001), p. 252.

14 This section provides a few examples of this practice. For these and further examples, as well as some comments on the reading of the cases, see: Cameron, James & Gray, Kevin, *Principles of International Law in the WTO Dispute Settlement Body*, International and Comparative Law Quarterly, Vol. 50, (April 2001), p. 253 (particularly at ft. 26).

15 United States-Restrictions on the Import of Sugar, L/6514-36S/331, (22 June 1989), paras. 5.2 *et seq*.

16 European Economic Community-Restrictions on the Import of Dessert Apples – Complaint by Chile, L/649-36S/93, (22 June 1989), paras. 12.12-12.18; Canada-Measures Affecting the Exports of Unprocessed Herring and Salmon, L/6268-35S/98, (22 March 1988), para. 4.3.

17 European Economic Community –Regulations on Imports of Parts and Components, L/6657-37S/132, (16 May 1990), paras. 5.15 *et seq.*

"...WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind."[18] The VCLT should hence not become a straitjacket for interpreters.[19]

This being said, in the following pages this document shortly summarizes the standards of interpretation set forth in the VCLT (1). Thereafter, it explains how WTO adjudicating bodies have applied them in practice (2).

1. THE RULES OF INTERPRETATION OF THE VCLT: AN OVERVIEW

Articles 31, 32 and 33 of the VCLT govern the interpretation of treaties. Article 31.1 provides that *"[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."*[20] The same provision states that the *context* comprises not only *"the text of the treaty, including its preamble and annexes"*,[21] but also: *"(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."*[22] In addition, the following elements shall also be taken into consideration: *"(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."*[23]

In turn, VCLT Article 32 establishes that supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion, may be used only in three scenarios, i.e.: (i) when the interpreter aims to confirm the interpretation reached pursuant to the primary interpretation criteria; (ii) if the

18 Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996), p. 32.

19 For a similar observation see: Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), pp. 23-24.

20 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.1.

21 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.2.

22 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.2.

23 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.3.

interpretation reached pursuant to such standards leaves the meaning of a particular provision *"obscure or ambiguous"*; or (iii) whenever the result of applying the primary rule of interpretation would be *"manifestly absurd or unreasonable"*.[24]

Finally, VCLT Article 33 addresses those cases where a treaty has been authenticated in more than one language. In this scenario, the text of the agreement is considered to be equally authoritative in each of its versions, unless otherwise provided by the instrument itself.[25] Moreover, the meaning of any expression used in the treaty is presumed to be the same in all languages.[26] Now, in case that: (i) there is a difference impossible to overcome with resource to the primary and supplementary means of interpretation; and (ii) it has not been agreed that a version of the treaty prevails; the interpreter shall prefer *"the meaning which best reconciles the texts, having regard to object and purpose of the treaty."*[27] Bearing the foregoing rules in mind, the next sections will show how WTO adjudicating bodies have applied these standards in practice.

2. THE USE OF THE RULES OF INTERPRETATION OF THE VCLT BY WTO ADJUDICATING BODIES

The present unit is divided in three sections, namely: (2.1) primary means of interpretation; (2.2) supplementary means of interpretation; and (2.3) conflicting but equally authentic versions of the covered agreements.

2.1 Primary means of interpretation

This section describes each of the elements of VCLT Article 31, as applied by WTO adjudicating bodies. In so doing, it aims to provide an overview of the use of primary means of interpretation within the WTO. Nonetheless, attention should be drawn to the fact that these "elements" are not autonomous from each other; rather, they should be considered (and applied) as a whole.

2.1.1 Good faith

The VCLT does not define *good faith* and attempts to define the term will probably lead to incomplete or inaccurate results. However, good faith is a meaningful concept. Romans sometimes summarized *good faith* with the maxim *pacta sunt*

24 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 32.

25 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 33.1.

26 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 33.3.

27 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 33.4.

servanda, i.e., to observe what is has been agreed upon.[28] Today it is still accepted that *"good faith is a legal principle that forms integral part of the rule pacta sunt servanda."*[29] Binding the *good faith* principle with the *pacta sunt servanda* rule is consistent with VCLT Article 26, whereby *"[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"*.[30] It is our view that two standards commonly used as *additional* to those provided by the VCLT may be deemed to constitute an expression of good faith.

First, for the parties to fulfill their commitments under international treaties, as required by the *pacta sunt servanda* rule, it is necessary to give effect to those instruments' provisions. In this vein, the *ut regis valeat quam paereat* standard (also known as the effective interpretation criterion), turns relevant. Indeed, the said rule was described by the Appellate Body in *US-Gasoline* in the following terms: *"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."*[31] Similar statements were made in *Canada-Patent Term*[32] and *Korea-Dairy*[33].

Second, where general and special rules are in conflict, applying the general rule may lead a Member to avoid compliance with the special one. Maybe conscious of this phenomenon, WTO adjudicating bodies generally follow the *lex specialis*

28 Bristow, David & Seth, Reva, *Good Faith in Negotiations - Canadian Courts are Moving Toward an Acceptance of the Duty to Negotiate in Good Faith as a Minimal Standard of Behavior*, Dispute Resolution Journal, Vol. 55, Issue 4, (2001), p. 16.

29 DiMatteo, Larry, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability*, Syracuse Journal of International Law and Commerce, Vol. 23, (1997), p. 83. This summary has used private law scholarly writings for explaining the relationship between good faith and the *pacta sunt servanda* rule. This circumstance should not generate any inconveniences since: (i) reference was made only to the common origins of the institution; and (ii) the conclusion reached seems to be acceptable in the context of international law, bearing in mind that Article 26 of the VCLT expressly recognizes the *pacta sunt servanda* rule as related to the good faith principle.

30 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 26. See also: European Communities-Trade Description of Sardines, WT/DS231/AB/R, (26 September 2002), p. 32.

31 United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/D52/AB/R, (22 April 1996), p. 21.

32 In that case, the Panel acknowledged that *"[t]he principle of effective interpretation or 'l'effet utile' or in Latin ut res magis valeat quam pereat reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance, one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty."* Canada-Term of Patent Protection, WTO Doc. WT/DS170/R, (5 May 2000), para. 6.49, ft. 30.

33 In *Korea-Dairy* the Appellate Body expressed: *"[w]e have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties (ut res magis valeat quam pereat) which requires that a treaty interpreter […] must give meaning and effect to all the terms of the 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."* Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products, WTO Doc. WT/DS98/AB/R, (14 December 1999), para. 80.

criterion, by giving prevalence to the specific (i.e., more detailed) rule over the general one.[34] In sum, it seems that both the *ut regis valeat quam paereat* and the *lex specialis* criteria express the principle of good faith; they may further be seen as means to ensure the effectiveness of the *pacta sunt servanda* rule.

2.1.2 Ordinary meaning of the words used

This interpretation standard has been of the greatest significance within the WTO.[35] Besides, it is closely related to the use of dictionaries by WTO adjudicating bodies. Perhaps surprisingly, recourse to the Oxford English Dictionary and the Webster Dictionaries is not uncommon in the WTO.[36] However, the value of dictionaries has been questioned in the past. For example, in *Brazil-Aircraft*, the arbitrators observed that *"dictionary definitions are insufficiently specific."*[37] Similarly, in *EC-Abestos* the Appellate Body explained that dictionaries *"may leave many interpretative questions open."*[38] In the same line of thought, in *US-Gambling*, the Appellate Body expressed: *"to the extent that the Panel's reasoning simply equates the "ordinary meaning" with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach […] [In addition] the Panel failed to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word "sporting"."*[39] In *China-*

34 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), pp. 27-28; Canada-Term of Patent Protection, WTO Doc. WT/DS170/R, (5 May 2000), para. 6.50. In relation to this standard, the International Law Commission [ILC] has expressed that *"[t]here are two ways in which law takes account of the relationship of a particular rule to general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim lex specialis derogat lex generali is usually dealt with as a conflict rule. However, it need not be limited to conflict […] In both cases – that is, either as an application of or an exception to the general law – the point of the lex specialis rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general."* International Law Commission-Study Group on Fragmentation, *Fragmentation of International Law. Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes: An Outline*, available at: http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf, para. 2.1.

35 See, for example: United States-Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R, (6 August 2001), para. 8.26.

36 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 37; Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 23 (particularly at ft. 21).

37 Brazil-Exporting Financing Programme for Aircraft, WTO Doc. WT/DS26/ARB, (28 August 2000), para. 3.43.

38 European Communities-Measures Affecting Abestos and Abestos Containing Products, WTO Doc. WT/DS135/AB/R, (12 March 2001), paras. 92-93.

39 United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/AB/R, (7 April 2005), para. 166.

Publications the Appellate Body further noted that *"[d]ictionaries are important guides to, but not dispositive of, the meaning of words appearing in treaties."*[40] A similar statement was made in *EC-Chicken Cuts*.[41]

However, recent reports show that panels still rely on dictionaries for interpreting the covered agreements. For example, the report issued by the *US-Poultry* Panel in September 2010 states: *"[i]n examining the terms "arbitrary or unjustifiable", we recall the customary rules of interpretation set out in the VCLT. Article 31 of the VCLT prescribes that a treaty has to 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." The starting point for determining the ordinary meaning of the terms is, of course, the dictionary. A dictionary definition of the term "arbitrary" is "based on mere opinion or preference as opp. to the real nature of things, capricious, unpredictable, inconsistent." In turn, the term "unjustifiable" is defined as "not justifiable, indefensible", with "justifiable" meaning "[c]apable of being legally or morally justified, or shown to be just, righteous, or innocent; defensible" and "[c]apable of being maintained, defended, or made good"."*[42] We disagree with the latter approach and rather share the Appellate Body and a number of scholars' view that the ordinary meaning of a term should be neither conceived as a *"free-standing element"* nor limited to dictionary definitions; words have contextual rather than absolute meanings.[43]

2.1.3 Context

As explained beforehand, the VCLT establishes that a treaty must be interpreted taking into account its context, which includes not only the text of the instrument, but also: (i) all agreements related to the treaty and signed by the parties in connection with its conclusion; and (ii) any instrument made by one or more parties and accepted by the others as referred to the treaty.[44] At least three concerns arise in this connection.

40 China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WTO Doc. WT/DS263/AB/R, (21 December 2009), para. 348.

41 European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/AB/R & WT/DS269/AB/R, (12 September 2005), para. 175.

42 Emphasis added. United States-Certain Measures Affecting Imports of Poultry from China, WTO Doc. WT/DS292/R, (19 September 2010), para. 7.259.

43 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 38; European Communities-Measures Affecting Abestos and Abestos Containing Products, WTO Doc. WT/DS135/AB/R, (12 March 2001), paras. 92-93.

44 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.2.

First, the conditions under which it is possible to qualify an agreement (or, for example, the WTO Members' Schedules of Concessions) as an element of another agreement's context might be somewhat unclear. In *China-Autoparts*, the Appellate Body noted that *"for a particular provision, agreement or instrument to serve as relevant context in any given situation, it must not only fall within the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language."*[45] In *US-Copyright Act* the Panel indicated that, in order to be considered under the notion of *context*, an instrument should pertain to the substance of the treaty and *"clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty."*[46]

Second, the question arises as to whether, besides the context of each covered agreement, there is a context of the WTO Agreement (as a whole). In this vein, attention should be drawn to the *US –Combed Cotton Safeguards* case, where the Panel implicitly answered this inquiry affirmatively, by taking into account the context of the WTO Agreement as a whole when construing certain provisions of the Agreement on Textiles and Clothing.[47] More precisely, in *Korea-Dairy* the Appellate Body emphasized that *"a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."*[48]

Third, the problem arises as to the distinction between between *"context"*, as referred to by VCLT Article 31, and the *"supplementary means of interpretation"* listed in Article 32.[49] Scholars have observed that, while Article 31.2 of the Convention refers to agreements signed at the time of the conclusion of the treaty, so capturing the idea of a historical context, Article 32 allows the use of interpretative elements which do not correspond with the period when the treaty was made.[50]

45 China-Measures Affecting the Imports of Automobile Parts, WTO Docs. WT/DS339/AB/R, WT/DS340/AB/R & WT/DS342/AB/R, (15 December 2008), para. 151.

46 United States-Copyright Act, WTO Doc. WT/DS160/R, (27 July 2000), para. 6.46. Also discussed in this connection by Michael Lennard. See: Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), pp. 25-26.

47 United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc. WT/DS192/R, (31 May 2001), para. 7.46. Also discussed in this connection by Michael Lennard. See: Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), pp. 24-25.

48 Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products, WTO Doc. WT/DS98/AB/R, (14 December 1999), para. 81.

49 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 34.

50 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 36.

The latter definition of the scope of Article 31.2 is determinative for ascertaining the legal value of certain documents. Let us consider an indicative example: in *EC-Poultry* the Panel analyzed *"as a preliminary question"* the relevance of a bilateral *Oilseeds Agreement* (Brazil-European Community).[51] The Members of the Panel finally took the instrument into account, *"to the extent relevant"* for that particular case.[52] The Appellate Body, while acknowledging that the *Oilseeds Agreement* had been negotiated *"within the framework of article XXVIII of the GATT"*,[53] held that *"the Oilseeds Agreement may serve as a supplementary means of interpretation of Schedule LXXX pursuant to Article 32 of the Vienna Convention."*[54] Please note that a treaty that could have been used as a principal interpretation criterion was deemed to have a merely supplementary value. The idea underlying such consideration seems to be that the *Oilseeds Agreement* fell outside the scope of article 31.2 of the VCLT because its conclusion was subsequent to GATT 1947.

Nevertheless, establishing the distinction between *"context"* and *"supplementary means of interpretation"* on the basis of this *"time element"* is not without controversy.[55] For instance, in *US- Copyright Act* the Panel might have gone too far by holding that *"[u]ncontested interpretations given at a conference', e.g., by a chairman of a drafting committee, may constitute an 'agreement' forming part of the context."*[56] It seems that the Panel confused the context with the preparatory work. As expressed by Michael Lennard (commenting on the case), such statements *"precede the settling of the text, rather than being an agreement on that settled text"* and should hence be pondered under VCLT Article 32.[57]

2.1.4 Object and purpose

The VCLT requires that a treaty be interpreted according to the ordinary meaning of the words it uses, bearing in mind its context and in light of its object and

51 European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/R, (12 March 1998), para. 196.

52 European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/R, (12 March 1998), para. 202.

53 European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/AB/R, (13 July 1998), para. 83.

54 European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/AB/R, (13 July 1998), para. 83.

55 On this notion of the "time element" see: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 36.

56 United States-Copyright Act, WTO Doc. WT/DS160/R, (27 July 2000), para. 6.45.

57 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 25.

purpose.[58] At least three concerns arise in relation to this standard. First, it seems unclear whether the *"object and purpose"* is to be treated as a separate interpretation criterion. This inquiry was answered in the negative by the Appellate Body in *Japan-Alcohol*, where it held that *"[t]he treaty's ''object and purpose" is to be referred to in determining the meaning of the ''terms of the treaty" and not as an independent basis for interpretation"*.[59] However, a different approach was followed by the same body in *US-Shrimp*, where it implied that there could be a hierarchy between the reading in context of the instrument's wording and recourse to its object and purpose (as different *"steps"*), which would in turn suggest that they are separate interpretation standards.[60] The conclusion reached in *Japan-Alcohol* seems to be the better view.

Second, it may be doubtful whether a treaty has a single purpose. In *EC-Chicken Cuts*, the Appellate Body noted that *"[i]t is well accepted that the use of the singular word "its" preceding the term "object and purpose" in Article 31(1) of the Vienna Convention indicates that the term refers to the treaty as a whole; had the term "object and purpose" been preceded by the word "their", the use of the plural would have indicated a reference to particular "treaty terms". Thus, the term "its object and purpose" makes it clear that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety […] To the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component."*[61]

This premise has not been uncontested. For instance, the United States advanced the opposite argument in *US-Shrimp*.[62] Moreover, WTO adjudicating bodies have sometimes referred to multiple *"objects and purposes"*,[63] and – at least implicitly – distinguished between the object and purpose of the WTO Agreement and the

58 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.1.

59 Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996), p. 20.

60 United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, (12 October 1998), para. 114. For a similar reading of the case see: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), pp. 31-32.

61 European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/AB/R & WT/DS269/AB/R, (12 September 2005), para. 238.

62 United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, (12 October 1998), para. 17.

63 See, for example, the panel report in *EC-Chicken Cuts*: European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/R, (30 May 2005), para. 7.328 (referring to the *"objects and purposes of the WTO Agreement·"*).

object of purpose of some particular provisions.[64] When discussing the approach followed in *US- Shrimp,* some scholars have concluded that interpreters should not focus on the whole of the WTO Agreement, but on the specific treaty provisions at stake; commenting on these views, Michael Lennard – perhaps anticipating the Appellate Body report in *EC-Chicken Cuts* – expressed in 2002 that *"[a]n analysis of the text of a provision in its context may reveal an 'object and purpose' of the provision, and (through it) of the wider agreement."*[65] This approach is agreeable.

Finally (third), the question arises as to how to find the object and purpose of a treaty. In relation to this point, it seems clear that these elements are usually expressed in the treaties' preambles.[66]

2.1.5 Other interpretative elements

At this point we shall address two additional primary interpretative elements expressly mentioned in the VCLT, namely, subsequent practices and subsequent agreements of the parties.

2.1.5.1 Subsequent practices of the parties

As explained above, this element refers to any practice among the contracting parties revealing an agreement as to the meaning of the treaty. Three questions arise in this connection. First, it could be unclear whether the practice must have been followed by all WTO members, or may be spread among only a part of them. While some authorities have followed the first approach,[67] the Panel report in *EC-Chicken Cuts* convincingly adopted a more flexible view.[68] In words of the Panel: *"it is reasonable to rely upon EC classification practice alone in determining*

64 Some indicative examples are discussed at: European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/AB/R & WT/DS269/AB/R, (12 September 2005), para. 237, ft. 445.

65 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 28.

66 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 33. See also: Agreement Establishing the World Trade Organization, Preamble.

67 Indeed, according to some scholars, *"WTO case law […] seems to have adopted the view that only unanimous practice by all WTO members could qualify as subsequent practice. This approach, of course, amounts to introducing a very restrictive filter, in the sense that little, if any practice is unanimous and thus eligible for consideration as subsequent practice in accordance with Art 31.3 VCLT."* Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 53.

68 On this divide see also: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 53.

whether or not there is "subsequent practice" that "establishes the agreement" of WTO Members within the meaning of Article 31(3)(b) of the Vienna Convention regarding the interpretation of the concession contained in heading 02.10 of the EC Schedule."[69] Importantly, in the same case the Appellate Body went on to say that *"not each and every party must have engaged in a particular practice for it to qualify as a "common" and "concordant" practice. Nevertheless, practice by some, but not all parties is obviously not of the same order as practice by only one, or very few parties."*[70]

On the other side of the spectrum, the International Law Commission's commentary to VCLT Article 31(3)(b) indicates that *"[t]he text provisionally adopted in 1964 spoke of a practice which "establishes the understanding of all the parties". By omitting the word "all" the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."*[71] Notwithstanding the foregoing, it is our view that the approach adopted in *EC-Chicken Cuts* is reasonable; it would be utterly excessive to require a practice to be followed by the whole membership of the WTO in order to qualify as common practice.

Second, it has been discussed whether reports issued by WTO adjudicating bodies may constitute a subsequent practice. In *Japan-Alcohol* the Panel answered this inquiry affirmatively.[72] However, in the same case, the Appellate Body expressly adopted the opposite view, explaining that *"[t]he essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant […] We do not believe that the contracting parties, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994 […] For these reasons, we do not agree with the Panel's conclusion in paragraph 6.10 of the Panel Report that "panel reports adopted by the GATT*

69 European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/R, (30 May 2005), para. 7.289.

70 European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/AB/R & WT/DS269/AB/R, (12 September 2005), para. 259.

71 See: Rauschning, Dietrich, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires*, (1978), p. 254.

72 Japan-Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R & WT/DS11/R, (11 July 1996), para. 6.10.

contracting parties and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" as the phrase "subsequent practice" is used in Article 31 of the Vienna Convention."[73] Against this backdrop, it can only be said that the value of Panel reports as expressions of *"subsequent practice"* remains doubtful.

Third the question arises as to the features practice must have in order to be considered as *"relevant practice"* for the interpretation of a treaty. In this regard, as emphasized in *US-Gambling* and *Japan-Alcohol*, the threshold issue seems to be whether the practice truly indicates an agreement of the parties on the interpretation of the instrument.[74] The latter requirement is of paramount importance. For example, it seems to be the reason underlying the Panel's finding in *Brazil-Coconut* that the Tokyo Round Subsidies and Countervailing Measures [SCM] Code were not a subsequent practice on GATT 1947, so that *"only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994."*[75]

2.1.5.2 Subsequent agreement of the parties

This criterion refers to any subsequent agreement concluded by the parties to an international treaty indicating their common understanding on how the instrument is to be interpreted or applied.[76] The question arises as to which treaties may be labeled as *"subsequent agreements"* under Article 31.3 of the VCLT. Authorized scholars have observed that *"...[c]ase law so far has refused to accord the status of subsequent agreement (in the Art 31.3 VCLT-sense of the term) to inter se agreements (that is, agreements between a part of the WTO membership). The only agreements that can qualify as subsequent agreement are, in this line of thinking, only those to which the WTO itself (that is, all of the WTO membership) is a party."*[77] Scholars following the latter approach have cited instruments concluded by the WTO with other international organizations as examples of such subsequent agreements.[78] We disagree with this view for two reasons.

---

73 Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996), pp. 13-14.

74 United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/AB/R, (7 April 2005), para. 192; Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996), pp. 12-13.

75 Brazil-Measures Affecting Desiccated Coconut, WT/DS22/R, (20 March 1997), para. 259. Michael Lennard discusses this case in more detail. See: Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 33.

76 International Law Commission, *Commentary on the draft Vienna Convention*, Yearbook of the International Law Commission, Vol. II, (1966), p. 221.

77 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 53.

78 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 53.

First, as explained by Michael Lennard, *"the Appellate Body would, no doubt, be very cautious in finding that a relevant 'subsequent agreement' had been reached other than through formal WTO procedures for developing an agreed interpretation."*[79] Moreover, according to the same scholar, an agreement concluded by all parties to a multilateral treaty and aimed to have such effect, is not only unusual but could formally constitute amendment to the instrument.[80] In turn, the WTO Agreement is a multilateral treaty which explicitly sets forth special requirements for an amendment: the proposal must be submitted to the Ministerial Conference, which may only *by consensus* decide to submit it to the member States.[81]

Second, a treaty concluded by all the WTO membership will be hard to find. Agreements concluded between the WTO and other international organizations are not accurate examples of the *"subsequent agreements"* mentioned by the VCLT. In fact: (i) the Vienna Convention is only applicable to treaties *among States*, and clearly excludes from its scope of application treaties with or between other subjects of international law;[82] and (ii) Article 31.1 of the VCLT refers to instruments between the *parties* to the treaty which interpretation is at issue, and neither the WTO nor other international organizations are parties to the WTO Agreement.

Thus, a more liberal approach seems appropriate: if the complaining party and the respondent State have concluded an agreement, whereby they directly interpreted or determined how to apply a provision of the WTO Agreement, such instrument could be deemed to fall within the scope of VCLT Article 31.3 and be used accordingly. This view seems to be consistent with the opinions expressed by both the Panel and the Appellate Body in *EC-Chicken Cuts* in relation to subsequent practices, and would hence accomplish a similar treatment for these two elements of VCLT Art. 31.3 (*"subsequent practices"* and *"subsequent agreements"*).

2.1.5.3 Relevant rules of international law

The VCLT provides that a treaty must be interpreted in accordance with *"relevant rules of international law."*[83] The use of this standard within the WTO is clearly justified; as expressed by Gabrielle Marceau, *"the WTO should ensure that its interpretation and application of WTO rules are consistent with public international*

79 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 30.

80 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 30.

81 Agreement Establishing the World Trade Organization, Art. 10.

82 Vienna Convention on the Law of Treaties, (23 May 1969), Arts. 1, 2.1.a. & 3.

83 Vienna Convention on the Law of Treaties, (23 May 1969), Art. 31.3.c.

law".[84] Despite the fact that this criterion has been subject of some debate in WTO dispute settlement practice (e.g., in *EC-Bananas*[85] and *Korea-Procurement*[86]), scholars have observed that it has not been *"closely tested"* by WTO adjudicating bodies yet.[87]

For example, in *Brazil-Aircraft*, the arbitrators avoided labeling certain means of interpretation under this category; in fact, they merely stated: *"...[w]e note that Canada objects to us using the Draft Articles in this interpretation process. Canada argues that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31.3(c) of the Vienna Convention. As already mentioned, we use the Draft Articles as an indication of the agreed meaning of certain terms in general international law."*[88] Other reports however seem to go deeper into this interpretative criterion. A representative example would be *EC-Biotech*.[89] The underlying problem seems to be that the *"relevant rules of international law"* is a concept hard to specify. Therefore, the threshold issue would be identifying which *"rules of international law"* are actually relevant for the interpretation of the WTO Agreement. Four guidelines could be helpful in this regard.

First, it may be accepted that *jus cogens*,[90] *"is by its very nature relevant for the interpretation of any international regime."*[91] Second, the rules must be applicable in the relations between the *parties*. This leads to the question as to the meaning of the term *"parties"*. Despite the fact that the WTO Agreement uses the expression *members* rather than *parties*, this question should be assessed on the basis of VCLT Article 2.1.g. Indeed, a *member* is a *party* in international law to the WTO Agreement, as it may be deduced from the instrument itself, which opening

84 Marceau, Gabrielle, *A Call for Coherence in International Law: Praises for the Prohibition against Clinical Isolation in WTO Dispute Settlement*, Journal of World Trade, Vol. 33, (1999), pp. 109, ff.

85 European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, (9 September 1997), paras. 8 (argument by St. Lucia) & 16 (argument by the EC).

86 Korea-Measures Affecting Government Procurement, WTO Doc. WT/DS163/R, (1 May 2000), para. 7.96.

87 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 35.

88 Brazil-Exporting Financing Programme for Aircraft, WTO Doc. WT/DS26/ARB, (28 August 2000), para. 3.44, ft. 48.

89 European Communities-Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R & WT/DS293/R, (29 September 2006), para. 7.67.

90 The VCLT provides a definition of *ius cogens*. See: Vienna Convention on the Law of Treaties, (23 May 1969), Art. 53.

91 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 34.

sentence reads: *"the Parties to this Agreement"*.[92] In turn, under the VCLT, the word *"parties"* refers to the *"parties to the treaty"* rather than to the *"parties to a particular dispute under that treaty"*.[93] Third, the relevance of non-mandatory rules must be assessed on a case-by-case basis, bearing in mind that their applicability to a specific relationship shall established in light of the *"objectively ascertained intention"* of the contracting parties.[94] Fourth, the source of a rule should not affect its use under VCLT Article 31.3.c. In this vein, in *EC-Biotech* the Panel noted that the phrase *"rules of international law"*, as used in the VCLT, is broad enough to cover all general sources of international law, encompassing both treaties and customary rules.[95]

2.2 Supplementary means of interpretation

Supplementary means of interpretation have been commonly used in WTO dispute settlement practice.[96] However, the mere fact that these sources are labeled as *supplementary* already implies a legal qualification thereof.[97] Particularly, the criteria provided in VCLT Article 32 have a limited legal value: while referring to the criteria listed in Article 31 is compulsory, interpreters are not bound to have recourse to Article 32.[98] Nonetheless, as the Appellate Body recognized in *Japan –Alcohol*,

92 Agreement Establishing the World Trade Organization. Despite some discrepancies, this point seems to be a commonplace in scholarly writings. See, for example: Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 37.

93 See: Pauwelyn, Joost, *The Role of Public International Law in the WTO: How Far Can We Go?* American Journal of International Law, Vol. 95, (2001), p. 575. This conclusion is consistent with the Panel's considerations in *EC-Biotech*. See: European Communities –Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R & WT/DS293/R, (29 September 2006), para. 7.68.

94 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 41.

95 In this vein, it held that the Cartagena Biosafety Protocol, a non-WTO instrument, *"would qualify as a "rule of international law" within the meaning of Article 31(3)(c)"*; in addition, it further declared that *"we would agree that if the precautionary principle is a general principle of international law, it could be considered a "rule of international law" within the meaning of Article 31(3)(c)."* European Communities –Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R & WT/DS293/R, (29 September 2006), paras. 7.67-7.68. To the same effect, Joost Pauwelyn has stated that *"[t]he non-WTO rules referred to in Article 31(3)(c) may derive from any source of international law, that is, treaty provisions, customary international law, or general principles of law."* Pauwelyn, Joost, *The Role of Public International Law in the WTO: How Far Can We Go?* American Journal of International Law, Vol. 95, (2001), p. 575.

96 Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Docs. WT/DS161/ R & WT/DS169/R, (10 January 2001), para. 539.

97 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 32.

98 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 34.

VCLT Article 32 also constitutes a codification of customary international law.[99] This being said, it is worth to underscore that the list of supplementary interpretative elements included in Article 32 is not exhaustive. For present purposes, we shall only address the ones expressly mentioned in the Convention, namely: (i) preparatory work; and (ii) circumstances of the conclusion of the treaty.

2.2.1 Preparatory work

WTO adjudicating bodies may resort to the *travaux préparatoires* for interpreting a covered agreement. Scholars have however identified several reasons for avoiding them, namely: (i) not all the WTO members took part in the negotiations; (ii) the negotiation history sometimes does not lead to any *"concrete outcome"*; and (iii) a provision's meaning may have changed with the passage of time.[100] The strongest of these reasons is the first one. Indeed, as recognized by the Appellate Body in *US-Cotton Safeguards*, a party that has exercised due diligence cannot be held liable for what it *"could not have known"* when entering into the treaty.[101] Scholarly writings have also analyzed this point in detail.[102] Conversely, it may be argued in favor of the use of preparatory work that it expresses *"the will of the principals (founding fathers) and thus circumscribe[s] the mandate of the agents (Panels and Appellate Body)."*[103]

Due to the fact that strong reasons support both opinions, WTO adjudicating bodies seem to enjoy broad discretion in deciding whether or not to use the documents in question, depending on the needs posed by each particular case. Scholars have identified a tendency to use them as a means to: (i) confirm the result of the primary interpretation; (i) establish the meaning of obscure provisions; and (iii) directly determine the meaning of a provision (in lieu of the primary means).[104] In the following paragraphs we shall consider each of these three uses.

First, the use of preparatory work for confirming the result reached under VCLT Article 31 is not uncommon within the WTO. For example, in *Canada-*

99 Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996), p. 97.

100 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 39.

101 United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc. WT/DS192/AB/R, (8 October 2001), para. 79.

102 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 49.

103 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 39.

104 On these three uses of preparatory work see: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), pp. 39 & 50.

Periodicals the Appellate Body referred to the *travaux préparatoires* in order to support a textual interpretation of GATT Article III(8)(b).[105] Other relevant cases would be the interpretation of Article 30 of the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS] proposed by the Panel in *Canada- Pharmaceutical Patents*[106], as well as the *US-Upland Cotton* Appellate Body report.[107] However, by far, the case that has been most often discussed in relation to this point is *US-Shrimp*. In its report, the Appellate Body considered the negotiating history of the International Trade Organization [ITO] and the Havana Charter.[108] Some scholars have critically analyzed the report, observing that the Appellate Body did not take into consideration that the documents at issue were not easily accessible to the general public.[109] In sum, although it is a fact that the preparatory work has been used for confirming the conclusion reached pursuant to VLCT Article 31, its use has not been undisputed.

Second, preparatory work may be used for interpreting provisions that do not convey a clear meaning after primary means of interpretation have been applied. This use of the *travaux préparatoires* has found expression in several Appellate Body reports. Typical examples would be *Canada-Dairy* and *US-Gambling*.[110] Now, as noted by the Appellate Body in *China-Publications*, the weight given to preparatory work at these instances may deeply differ from cases where the *travaux préparatoires* are merely used to confirm an interpretation.[111] One way or another, it should also be borne in mind that, as shown by the Panel report in *India-Quantitative restrictions*, preparatory work is rarely unequivocal and is hence unlikely to definitively solve an interpretative issue.[112]

105 Canada-Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/AB/R, (30 June 1997), p. 34.

106 Canada- Patent Protection of Pharmaceutical Products, WTO Doc. WT/DS114/R, (17 March 2000), paras. 7.45-7.47.

107 United States-Subsidies on Upland Cotton, WTO Doc. WT/DS267/AB/R, (3 March 2005), para. 623.

108 United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, (12 October 1998), para. 157.

109 Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002), p. 51.

110 Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WTO Doc. WT/DS103/AB/R, (13 October 1999), paras. 138-139; United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/AB/R, (7 April 2005), paras. 196-197. On these cases see also: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 51.

111 China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WTO Doc. WT/DS263/AB/R, (21 December 2009), para. 403.

112 India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WTO Doc. WTDS90/R, (6 April 1990), paras. 5.110-5.111.

Third, there are a few cases where WTO adjudicating bodies have omitted the hierarchy established by the VCLT by directly relying on the *travaux préparatoires* for ascertaining the meaning of some specific clause. This phenomenon is likely to occur particularly in connection with GATT articles.[113] However, the said use has appeared also in cases pertaining to other instruments. Scholars mention in this connection, among others, the reports issued in *Canada Canada-Pharmaceutical Patents* and *Korea-Procurement*.[114] In *Canada-Pharmaceutical Patents*, TRIPS Article 30 was construed upon the basis of the preparatory work before exhausting the primary criteria set forth in the VCLT.[115] Similarly, in *Korea-Procurement*, the Panel did not try to define the scope of the commitments of Korea relying on article 31 of the VCLT, but proceeded directly to the records of the negotiations.[116] In any case, such use of the preparatory work contravenes the VCLT and, thus, *"is a good example of what panels should not do."*[117]

2.2.2 Circumstances of the conclusion of the treaty

The second example of supplementary means of interpretation referred to in VCLT Article 32 would be the set of circumstances surrounding the conclusion of the treaty. There are three *main* (but not *sole*) elements which may be classified under this heading. First, as expressly recognized in *EC-Computer Equipment*, such *"circumstance"* could be a consistent practice followed by a WTO member or group of members.[118] Second, according to the Panel report in *EC-Chicken Cuts*, decisions issued by national courts at the time when a treaty was signed may be catalogued under the same label.[119] The Appellate Body shared this view.[120] Third, as explained by the Appellate Body in *EC- Computer Equipment*, this element of

113 Kuijper, Pieter Jan, *The Law of the GATT as a Special Field of International Law; Ignorance, Further Refinement or Self-Contained System of International Law,* Netherlands Yearbook of International Law, Vol. 25, (1994), p. 229.

114 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 52.

115 Canada- Patent Protection of Pharmaceutical Products, WTO Doc. WT/DS114/R, (17 March 2000), para. 7.29.

116 Korea-Measures Affecting Government Procurement, WTO Doc. WT/DS163/R, (1 May 2000), para. 7.74.

117 Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 52.

118 European Communities-Customs Classification of Certain Computer Equipment, WTO Docs. WT/DS62, 67 & 68/AB/R, (5 June 1998), para. 92. On the consistency requirement see also para. 95.

119 European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/R, (30 May 2005), paras. 7.391-7.392.

120 European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/AB/R & WT/DS269/AB/R, (12 September 2005), para. 309.

Article 32 *"permits, in appropriate circumstances, the examination of the historical background against which the treaty was negotiated."*[121]

2.3 Conflicting but equally authentic versions of the covered agreements

The last rule of interpretation provided by the VCLT (Article 33) refers to the special case of treaties authenticated in different languages. This standard has been often applied by WTO adjudicating bodies. Let us consider some indicative examples. In *EC-Abestos* the Appellate Body used the French and Spanish versions of a treaty to confirm the ordinary meaning of the English word *like*.[122] Another example may be found in *Chile-Price Band System*, where the same body encouraged the harmonization of the different authenticated versions of a treaty.[123] Similarly, in *EC-Bed Linen*, the conclusion reached by analyzing the present-tense construction of a provision was confirmed by recourse to the French version of the instrument.[124] In *US-Softwood Lumber IV*, the Appellate Body used the Spanish and French versions of the Agreement on Subsidies and Countervailing Measures [SCM] to support its conclusion that *"the ordinary meaning of the term "goods" in the English version of Article 1.1(a)(1)(iii) of the SCM Agreement should not be read so as to exclude tangible items of property, like trees, that are severable from land"*.[125] Finally, in the *EC-Tariff Preferences* case, the consistent wording of the Spanish and French versions of a treaty prevailed over its English text.[126] Thus, it seems clear that VCLT Article 33 may also be of actual practical importance for ascertaining the meaning of WTO provisions in some particular cases.

FINAL REMARKS

This introductory outline has shown that WTO adjudicating bodies have often relied on the VCLT for interpreting the WTO Agreement. Case law indicates that

121 European Communities-Customs Classification of Certain Computer Equipment, WTO Docs. WT/DS62, 67 & 68/AB/R, (5 June 1998), para. 86.

122 European Communities-Measures Affecting Abestos and Abestos Containing Products, WTO Doc. WT/DS135/AB/R, (12 March 2001), paras. 90-91.

123 Chile-Price Band and Safeguard Measures Relating to Certain Agricultural Products, WTO Doc. WT/DS207/AB/R, (23 September 2002), para. 271.

124 European Communities-Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU, WTO Doc. WT/DS141/RW/AB/R, (8 April 2003), para. 123 (including ft. 153).

125 United States-Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada, WTO Doc. WT/DS257/AB/R, (19 January 2004), para. 59.

126 European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, WTO Doc. WT/DS246/AB/R, (7 April 2004), para. 147. On this reading of the case, see: Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 29.

both panels and the Appellate Body usually recognize the hierarchy established by the Convention (i.e., the distinction between primary and supplementary means of interpretation), albeit they do not always adjust to it. Relying on the VCLT is appropriate, bearing in mind that: (i) WTO law is part of the broader corpus of public international law, so that WTO rules should be construed as international law rules; (ii) the WTO Agreement falls within the VCLT definition of *treaty*; and (iii) VCLT Articles 31, 32 and 33 are applicable among all WTO members, either as treaty clauses or as customary rules of international law (in the sense of DSU Article 3.2).

The VCLT provides primary and supplementary means of interpretation, as well as rules for overcoming conflicts between an instrument's different authentic versions. When approaching the convention, students should always bear three basic premises in mind. First, with regard to the primary standards, relying on a single interpretative element (excluding the consideration of the others) is generally inappropriate. For example, the use of the definitions provided by dictionaries without taking into account the context is questionable, if to say the least. Second, the supplementary means of interpretation cannot be applied as substitutes of the primary interpretation standards. Third, consistency between the various versions of a treaty should always be sought.

BIBLIOGRAPHY

Treaties

Agreement Establishing the World Trade Organization.

Understanding on Rules and Procedures Governing the Settlement of Disputes [Annex 2 of the WTO Agreement].

Vienna Convention on the Law of Treaties, (23 May 1969).

Decisions of the International Court of Justice

International Court of Justice, Case Concerning Kasikili/ Sedudu Island (Botswana/Namibia), Judgment, (13 December 1999).

International Court of Justice, Oil Platforms (Islamic Republic of Iran v United States of America), Judgment on Preliminary Objections, (12 December 1996).

WTO and GATT 1947 Cases

Brazil-Exporting Financing Programme for Aircraft, WTO Doc. WT/DS26/ARB, (28 August 2000).

Brazil-Measures Affecting Desiccated Coconut, WT/DS22/R, (20 March 1997).

Canada- Patent Protection of Pharmaceutical Products, WTO Doc. WT/DS114/R, (17 March 2000).

Canada-Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/AB/R, (30 June 1997).

Canada-Measures Affecting the Exports of Unprocessed Herring and Salmon, L/6268-35S/98, (22 March 1988).

Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WTO Doc. WT/DS103/AB/R, (13 October 1999).

Canada-Term of Patent Protection, WTO Doc. WT/DS170/R, (5 May 2000).

Chile-Price Band and Safeguard Measures Relating to Certain Agricultural Products, WTO Doc. WT/DS207/AB/R, (23 September 2002).

China-Measures Affecting the Imports of Automobile Parts, WTO Docs. WT/DS339/AB/R, WT/DS340/AB/R & WT/DS342/AB/R, (15 December 2008).

China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WTO Doc. WT/DS263/AB/R, (21 December 2009).

European Communities –Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R & WT/DS293/R, (29 September 2006).

European Communities-Anti Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU, WTO Doc. WT/DS141/RW/AB/R, (8 April 2003).

European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, WTO Doc. WT/DS246/AB/R, (7 April 2004).

European Communities-Customs Classification of Certain Computer Equipment, WTO Docs. WT/DS62, 67 & 68/AB/R, (5 June 1998).

European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/R, (30 May 2005).

European Communities-Customs Classification of Frozen Boneless Chicken Cuts, WTO Doc. WT/DS269/AB/R & WT/DS269/AB/R, (12 September 2005).

European Communities-Measures Affecting Abestos and Abestos Containing Products, WTO Doc. WT/DS135/AB/R, (12 March 2001).

European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/R, (12 March 1998).

European Communities-Measures Affecting the Importation of Certain Poultry Products, WTO Doc. WT/DS69/AB/R, (13 July 1998).

European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, (9 September 1997).

European Communities-Trade Description of Sardines, WT/DS231/AB/R, (26 September 2002).

European Economic Community-Regulations on Imports of Parts and Components, L/6657-37S/132, (16 May 1990).

European Economic Community-Restrictions on the Import of Dessert Apples – Complaint by Chile, L/649-36S/93, (22 June 1989).

India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WTO Doc. WTDS90/R, (6 April 1990).

Japan-Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R & WT/DS11/AB/R, (4 October 1996).

Japan-Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R & WT/DS11/R, (11 July 1996).

Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products, WTO Doc. WT/DS98/ AB/R, (14 December 1999).

Korea-Measures Affecting Government Procurement, WTO Doc. WT/DS163/R, (1 May 2000).

Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Docs. WT/DS161/ R & WT/DS169/R, (10 January 2001).

United States-Certain Measures Affecting Imports of Poultry from China, WTO Doc. WT/DS292/R, (19 September 2010).

United States-Copyright Act, WTO Doc. WT/DS160/R, (27 July 2000).

United States-Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada, WTO Doc. WT/DS257/AB/R, (19 January 2004).

United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/ AB/R, (12 October 1998).

United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/AB/R, (7 April 2005).

United States-Restrictions on the Import of Sugar, L/6514-36S/331, (22 June 1989).

United States-Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R, (6 August 2001).

United States-Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/D52/AB/R, (22 April 1996).

United States-Subsidies on Upland Cotton, WTO Doc. WT/DS267/AB/R, (3 March 2005).

United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc. WT/DS192/R, (31 May 2001).

Scholarly writings

Bristow, David & Seth, Reva, *Good Faith in Negotiations - Canadian Courts are Moving Toward an Acceptance of the Duty to Negotiate in Good Faith as a Minimal Standard of Behavior*, Dispute Resolution Journal, Vol. 55, Issue 4, (2001).

Cameron, James & Gray, Kevin, *Principles of International Law in the WTO Dispute Settlement Body*, International and Comparative Law Quarterly, Vol. 50, (April 2001).

DiMatteo, Larry, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability*, Syracuse Journal of International Law and Commerce, Vol. 23, (1997).

Kuijper, Pieter Jan, *The Law of the GATT as a Special Field of International Law; Ignorance, Further Refinement or Self-Contained System of International Law,* Netherlands Yearbook of International Law, Vol. 25, (1994).

Lennard, Michael, *Navigating by the Stars: Interpreting the WTO Agreements*, Journal of International Economic Law, Vol. 5, Issue 1, Oxford, (March 2002).

Marceau, Gabrielle, *A Call for Coherence in International Law: Praises for the Prohibition against Clinical Isolation in WTO Dispute Settlement*, Journal of World Trade, Vol. 33, (1999).

Matsushita, Mitsuo; Schoenbaum, Thomas & Mavroidis, Petros, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006).

Pauwelyn, Joost, *Conflict of Laws in Public International Law; How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, (2003).

Pauwelyn, Joost, *The Role of Public International Law in the WTO: How Far Can We Go?* American Journal of International Law, Vol. 95, (2001).

Rauschning, Dietrich, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires*, (1978).

Others

International Law Commission- Study Group on Fragmentation, *Fragmentation of International Law. Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes: An Outline*, available at: http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf

A preliminary draft of this article had been unintentionally included in the print and electronic editions of this volume. The electronic edition has been corrected at the author's request.