

THE INTERPRETATION OF THE WTO AGREEMENT

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ABSTRACT

The Vienna Convention on the Law of Treaties (1969) has been constantly used for construing the provisions of the World Trade Organization's covered agreements. This paper first analyzes the reasons justifying the use of the treaty-interpretation rules provided by the 1969 Convention in the WTO. Thereafter, it explains how such rules have been applied by the WTO adjudicating bodies. By so doing, it seeks to provide a useful guide 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 artículo comienza por analizar las razones que justifican el uso de las reglas de interpretación previstas en la Convención de 1969 en el contexto de la OMC, para explicar posteriormente la manera en que dichas normas han sido aplicadas por los paneles y el Cuerpo de Apelaciones de la OMC. De esta manera, busca proveer una guía práctica 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.

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INTRODUCTION

There have been extensive discussions among scholars regarding the role public international law plays in the interpretation of the World Trade Organization's [hereon "WTO"] Agreement¹. Despite the variety of well-informed opinions, the most accurate view seems to be the one considering that the covered agreements must be construed in accordance to the rules provided by general public international law. Two reasons support this contention.

First, WTO law may be a special branch of public international law, but is anyway a part thereof². As expressed by professor 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. Thus, WTO rules are to 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 [hereon "DSU"] makes explicit reference to general international law. Indeed, the said 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. Recommendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements...*"⁴.

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 [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...*". PAUWLEYN, JOOST, *The Role of Public International Law in the WTO: How Far Can We Go?* *American Journal of International Law*, (2001), p. 538.

3 PAUWLEYN, 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.

Bearing the foregoing in mind, it is possible to conclude that the most adequate starting point for taking the provisions of the WTO Agreement to mean would be the Vienna Convention on the Law of Treaties [hereon “VCLT”]; two reasons lead to such assertion. First, the VCLT is the instrument governing the interpretation of treaties concluded between States⁵. Second, in *US-Gasoline* the Appellate Body analyzed the underlined excerpts of DSU Article 3.2, finding that the *customary rules of interpretation of public international law* are those contained in the VCLT⁶. Scholarly has reached the same conclusion⁷.

In relation to the latter reason, it is worth to highlight two points. First, the fact that the Convention is a treaty does not prevent its rules of interpretation from being *customary* too, so that even where a country has ratified the WTO Agreement but not the VCLT, as it is the case of the United States⁸, the VCLT may nevertheless be applied⁹. In this line of thought, in *Japan-Alcohol* the Panel and Appellate Body

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- 5 Indeed, the VCLT provides in article 1: “...the present Convention applies to treaties between States...”. To the same effect, article 2.1.a. thereof 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, (May 23, 1969), Arts. 1 & 2.1.a.
 - 6 In fact, after quoting VCLT Article 31, the Appellate Body asserted: “[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, (April 29, 1996).
 - 7 In relation to this approach, professors MATSUSHITA, SCHOENBAUM and MAVROIDIS have asserted 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 JAMES CAMERON and Kevin Gray explain 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*. In: *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*. In: *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*. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

implicitly resolved any uncertainty about the VCLT's application to non-parties by stating that the Convention constitutes a codification of customary international law and is therefore binding on all States¹⁰; subsequent reports, such as the Panel report in *EC-Biotech*, confirm this approach¹¹. The latter view is consistent with a number of decisions issued by the International Court of Justice [hereon ICJ]¹². Thus, the legitimacy of the use of the VCLT for interpreting the WTO Agreement seems to be plain.

Second, even though the VCLT's application to the General Agreement on Tariffs and Trade [hereon "GATT"] of 1947 was not uncontroversial (as a result of the well-known debate on whether the instrument was indeed a binding treaty¹³), history shows that panels have used the VCLT for taking to mean GATT provisions. Yet, there are only few cases where GATT Panels explicitly referred to the Convention. For example, in *US- Restrictions on the Import of Sugar* (1989)¹⁴, the panel applied the VCLT without making express reference to it. Similarly, the VCLT's plain meaning and contextual understanding standards 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)¹⁵. Later on, in *EEC– Regulation on Imports of Parts and Components*, article XX(d) of the GATT 1947 was construed using the criteria provided by article 31 of the VCLT¹⁶.

In any case, for the purposes of this study, it has been laid bare that the VCLT has a remarkable importance in the interpretation of the WTO Agreement, as well as that it may be relevant even for construing GATT 1947 provisions. However, in

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

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), § 7.65.

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

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

14 United States - Restrictions on the Import of Sugar, L/6514 -36S/331, (June 9, 1989).

15 European Economic Community - Restrictions on the Import of Dessert Apples –Complaint by Chile, L/6491- 36S/93, (June 22, 1989); Canada - Measures Affecting the Exports of Unprocessed Herring and Salmon; L/6268-35S/98, (March 22, 1988); Cameron, James & Gray, Kevin, *Principles of International Law in the WTO Dispute Settlement Body*. In: *International and Comparative Law Quarterly*, vol. 50, (April 2001), p. 253, ft. 26.

16 European Economic Community - Regulations on Imports of Parts and Components, L/6657-37S/132, (22 March 1990), §§ 3.75, ff.

the application of these standards, as explained by the Appellate Body in *Japan-Alcohol*, the interpreter must bear in mind that “...*WTO rules are reliable, comprehensible and enforceable. 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. In that way, we will achieve the ‘security and predictability’ sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system...*”¹⁷. Thus, although the VCLT is to be complied, it should not become a strait-jacket for interpreters.

This being said, in the following pages this paper shortly summarizes the standards of interpretation provided for by the VCLT (1) and thereafter explains how they have been applied by the WTO adjudicating bodies (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 establishes that a treaty shall be construed in good faith, according to the ordinary meaning of the terms it uses, in their context and in light of the instrument’s object and purpose¹⁸. The same provision states that the *context* comprises: (i) the text of the treaty, including its preamble and annexes; (ii) any agreements related to the treaty made by all the parties in connection with its conclusion; and (iii) instruments made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as related to it¹⁹. In addition, when taking inter-State agreements to mean, regard should be taken of the following elements: (i) any subsequent practice related to the application of the treaty expressing the parties’ agreement on its interpretation; (ii) any subsequent agreement between the parties concerning the interpretation of the treaty or the application of its provisions; and (iii) all relevant rules of international law applicable in the relations between the parties²⁰.

On the other hand, 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

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

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

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

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

wishes to confirm the construction reached pursuant to the primary criteria; (ii) if the interpretation reached pursuant to such standards leaves a provision's meaning obscure or ambiguous; or (iii) whenever the result of applying the primary interpretation criteria is manifestly absurd or unreasonable²¹.

In turn, VCLT Article 33 addresses those cases where a treaty has been authenticated in more than one language. In this vein, the agreement's text is considered as equally authoritative in each version, unless otherwise provided by the instrument itself²². Moreover, the meaning of any expression of the instrument is presumed to be the same in all of its languages²³. Now, if: (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 meaning which best reconciles the texts, taking into account their object and purpose, will be preferred²⁴. Bearing the foregoing rules in mind, we will proceed to analyze how these standards have been applied by the WTO adjudicating bodies.

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

This chapter will be divided in three parts, i.e.: (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:

At this point we will provide a separate analysis of the WTO adjudicating bodies' understanding of each of the elements mentioned by VCLT Article 31, so summarizing how the primary means of treaty interpretation are being applied within the WTO. Nonetheless, attention should be drawn to the fact that the elements in question are not autonomous to each other, so that they are to be applied together.

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, it is not a vacuous but rather a

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

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

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

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

meaningful concept. Indeed, it should be noted that Romans summarized *good faith* with the maxim *pacta sunt servanda*, i.e., to observe what has been agreed upon²⁵ and today it is still accepted that “...*good faith is a legal principle that forms integral part of the rule pacta sunt servanda...*”²⁶. Binding the *good faith* principle with the *pacta sunt servanda* rule is consistent with article 26 of the VCLT, which reads: “...[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith...”²⁷. Now, it is our view that two standards commonly used as additional to those provided by the VCLT may well be deemed to be concrete expressions of the good faith element and applied as such.

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* as follows: “...*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...*”²⁸. Similar statements were made in *Canada- Patent Term*²⁹ and *Korea-Dairy*³⁰.

25 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. In: *Dispute Resolution Journal*, (vol. 55, No. 4, 2001), p. 16.

26 DiMATTEO, LARRY. An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability. In: *Syracuse Journal of International Law and Commerce*, (n° 23, 1997), p. 83. At this point it is worth to mention that, although we have used private-law scholarly to explain the relationship good faith with the *pacta sunt servanda* rule, it ought to be noted that: (i) reference was made 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 connected with the good faith principle.

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

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

29 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, (October 12, 2000), §6.49.

30 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, (December 14, 1999), §80.

Second, where general and special rules are in conflict, applying the general rule may lead a Member to easily avoid the fulfillment of the special one. Conscious of this phenomenon, the WTO adjudicating bodies have adopted the *lex specialis* criterion, whereby recourse to the covered agreement regulating a particular issue in more detail than another is preferred³¹. It seems that both the *ut regis valeat quam paereat* and the *lex specialis* criteria express the good faith principle and are helpful for the *pacta sunt servanda* rule to be effective.

2.1.2. Ordinary meaning of the words used:

This interpretation standard has been extensively used within the WTO³² and is closely-related to the use of dictionaries by the WTO adjudicating bodies. In fact, recourse to the Oxford English Dictionary and the Webster Dictionaries is surprisingly not uncommon within the WTO³³. However, the value of dictionaries has been questioned. For example, in *Brazil-Aircraft*, the arbitrators acknowledged that dictionary definitions were not sufficiently-specific³⁴. Similarly, in *EC-Abestos*, the Appellate Body explained that dictionaries may leave many interpretative questions open³⁵. 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

31 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, (May 5, 2000), §6.50. In relation to this standard, the International Law Commission 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, §2.1.

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

33 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*. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

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

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

mechanical an approach. Secondly, 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”...³⁶.

However, recent reports show that panels still rely on dictionaries for taking to mean covered agreements’ provisions. For example, the report issued by the *US-Poultry* panel on 29 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”... ”³⁷. 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 not be conceived as a free-standing element, nor limited to dictionary definitions: words have contextual rather than absolute meanings³⁸.

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 instrument’s text, 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 treaty³⁹. At least three concerns appear in relation to this primary interpretation element.

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

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

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

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

First, the question arises as to whether, besides the context of each covered agreement, there is a context of the WTO Agreement in its entirety. 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 Clothing⁴⁰.

Second, the conditions under which it is possible to use a covered agreement as part of another's context seem to be unclear. In this vein, the Panel report in *US - Copyright Act* indicates that the instrument is required to be related to the substance of the treaty, clarify certain concepts used therein or limit its field of application; in addition, it must have been drawn up on the occasion of the treaty's conclusion⁴¹.

Third, the problem arises as to the substantive boundary between *context*, as referred to by VCLT Article 31, and the supplementary means of interpretation listed in Article 32⁴². Scholarly has found 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 leaves the door open to interpretative elements which do not chronologically overlap with the date when the treaty was made⁴³.

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*⁴⁴ Brazil argued that a bilateral *Oilseeds agreement* with the European Community was relevant for the resolution of the dispute. The Panel decided take the instrument into account, "...to the extent relevant to the determination of the EC's obligations under the WTO agreements vis-à-vis Brazil..."⁴⁵. Afterwards, the Appellate Body recognized that the *Oilseeds Agreement* had been negotiated within the framework of article XXVIII of the GATT and provided the basis for the tariff-quota at issue in that dispute. In light of the foregoing, it was held that "...the *Oilseeds Agreement* may serve as a supplementary means of interpretation..."⁴⁶. Please

40 United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc. WT/DS192/R, (May 31, 2001), §7.46.

41 United States - Copyright Act, WTO Doc. WT/DS160/R, (July 27, 2000), §6.46.

42 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 34.

43 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 36.

44 European Communities - Measures Affecting the Importation of Certain Poultry Products, WTO Docs. WT/DS69/R (March 12, 1998) & WT/DS69/AB/R (July 13, 1998).

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

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

note that a treaty which could have been used as a principal interpretation criterion was deemed to have a 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 the GATT 1947.

Nevertheless, the latter approach is not undisputed. For instance, in *US-Copyright Act* the Panel went 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’...”⁴⁷. It is our view that the latter assertion confuses the context with the preparatory work. As expressed by professor MICHAEL LENNARD, such statements precede the settling of the text, so that they actually are not an agreement on the settled text and should be considered under VCLT Article 32⁴⁸.

2.1.4. Object and purpose:

In the VCLT requires a treaty to be interpreted according to the ordinary meaning of the words it uses, bearing in mind its context and in light of its object and purpose. Three concerns arise in relation to this standard. First, it seems unclear whether this standard 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...”⁴⁹. However, a different approach seems to have been followed by the same body in *US-Shrimp*, where it analyzed if there is a hierarchy between the reading in context of the instrument’s wording and recourse to its object and purpose, which in turn would imply that they are different standards⁵⁰. We agree with the conclusion reached in *Japan-Alcohol*.

Second, it may be doubtful whether a treaty has a single purpose. The *US-Shrimp* case is once again enlightening in this regard. Indeed, the Appellate Body held that “...[t]he Panel had failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO

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

48 LENNARD, MICHAEL, Navigating by the Stars: Interpreting the WTO Agreements. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

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

50 United States - Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, (October 12, 1998), §114.

*Agreement...*⁵¹. Based on the latter approach, the WTO adjudicating bodies have drawn a distinction between the object and purpose of particular provisions and those of the treaty as a whole⁵². When discussing the approach followed in *US-Shrimp*, some scholars have concluded that any construal should consider the singular provision being interpreted, rather than the whole WTO Agreement; nonetheless, others have expressed the view 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...”⁵³. We agree with the latter approach.

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’ preambles⁵⁴.

2.1.5. Other interpretative elements:

At this point we will address two additional primary interpretative elements expressly mentioned by the VCLT, i.e., subsequent practices and agreements of the parties.

2.1.5.1. Subsequent practices of the parties:

This element refers to any practice among the parties to a treaty expressing an agreement of those States as to the instrument’s meaning. It gives rise to at least three questions. First, it remains unclear whether the practice must have been followed by all WTO members, or may be spread among only a part of them. Indeed, although some authorities have followed the first approach⁵⁵, the Panel report in *EC-Chicken Cuts* adopted a more flexible view. In that case, the European Community was the only importer classifying salted chicken cuts. Due to this circumstance, it was held

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

52 European Communities - Measures Affecting Meat and Meat Products, WT/DS26/AB/R & WT/DS48/AB/R, (February 13, 1998), §117.

53 LENNARD, MICHAEL, *Navigating by the Stars: Interpreting the WTO Agreements*. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

54 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 33. For an example of a preamble expressing a treaty’s object and purpose, see: Agreement Establishing the World Trade Organization, Preamble.

55 Indeed, according to certain 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.

that "... it is reasonable to rely upon EC classification practice alone in determining 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. Among other reasons for this approach, we note that the European Communities is apparently the only importing WTO Member with any practice of classifying the products at issue..."⁵⁶.

The latter understanding finds further support in the International Law Commission's commentary to VCLT Article 31(3)(b), which reads as follows: "...[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"⁵⁷. It is our view that the approach described above is reasonable: it would be excessive to require the practice to be followed by the whole membership of the WTO.

Second, the question arises as to the features a practice must have for being relevant in the interpretation of a treaty. In this regard, the core issue seems to be whether the practice is likely to indicate an agreement of the parties on the interpretation of the instrument under consideration. The latter requirement is not without 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 the GATT 1947, so that "...only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994..."⁵⁸.

Third, it has been discussed whether WTO adjudicating bodies' reports may constitute a subsequent practice. In this regard, in *Japan- Alcohol* the Panel answered this inquiry affirmatively⁵⁹. However, in the same case, the Appellate

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

57 See: RAUSCHNING, DIETRICH, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires*, (1978), p. 254.

58 Brazil - Measures Affecting Desiccated Coconut, WT/DS22/R, (March 20, 1997), §259.

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

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 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...”⁶⁰. Thus, the value of Panel reports as expressions of a subsequent practice remains doubtful.

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 applied⁶¹. The question arises as to which treaties may be labeled as *subsequent agreements* under Article 31.3 of the VCLT. Authorized scholarly has stated 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...”⁶². Scholars following the latter approach have cited instruments concluded by the WTO with other international organizations as examples of such subsequent agreements⁶³. We disagree with this view for two reasons.

First, as explained by MICHAEL LENNARD, the Appellate Body would be very cautious in considering that a subsequent agreement between all Members has

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

61 International Law Commission, *Commentary on the draft Vienna Convention*, Yearbook of the International Law Commission, vol. II, (1966), §221.

62 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 53.

63 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 53.

been reached other than through formal WTO procedures for developing an agreed interpretation⁶⁴. 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 would generally be formally an amendment to the instrument⁶⁵. In turn, the WTO Agreement is a multilateral treaty which explicitly sets forth special requirements for any amendment: the proposal must be submitted to the Ministerial Conference, which may only *by consensus* decide to submit it to the member States⁶⁶. Well, it seems too restrictive to consider that a subsequent agreement must take the form of an amendment to the WTO Agreement.

Second, a treaty concluded by all the membership of the WTO will be hard to find and the agreements between the WTO and other international organizations are not accurate examples of the *subsequent agreements* mentioned by the VCLT, since: (i) the Convention applies only to treaties between States and expressly excludes from its scope of application those concluded with or between other subjects of international law⁶⁷; 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 should be deemed to fall within the scope of article 31.3 of the VCLT and be used accordingly. This view seems to be consistent with the view expressed in the *EC-Chicken Cuts* Panel report in relation to subsequent practices, so providing a similar treatment to both elements.

2.1.5.3. Relevant rules of international law:

The VCLT provides that a treaty must be interpreted in accordance to the relevant rules of international law. This criterion should be used within the WTO bearing in mind that “...*the WTO should ensure that its interpretation and application of WTO rules are consistent with public international law...*”⁶⁸. Despite the fact

64 LENNARD, MICHAEL, *Navigating by the Stars: Interpreting the WTO Agreements*. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

65 LENNARD, MICHAEL, *Navigating by the Stars: Interpreting the WTO Agreements*. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

66 Agreement Establishing the World Trade Organization, art. 10.

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

68 MARCEAU, GABRIELLE, *A Call for Coherence in International Law: Praises for the Prohibition against Clinical Isolation in WTO Dispute Settlement*, *Journal of World Trade*, (1999), pp. 109, ff.

that this criterion has been used in the WTO dispute settlement practice in cases such as *EC-Bananas*⁶⁹ or *Korea-Procurement*⁷⁰, it has not been closely tested by the WTO adjudicating bodies yet⁷¹. For example, in *Brazil-Aircraft*, the arbitrators avoided labeling certain means of interpretation under this category; in fact, they 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..."⁷².

The underlying problem seems to be that the *relevant rules of international law* is a concept hard to concrete. Therefore, the question in a nutshell would be identifying those rules in the context of the WTO. Four guidelines are likely to enlighten this point.

First, it may be accepted that *jus cogens*⁷³, "...is by its very nature relevant for the interpretation of any international regime..."⁷⁴. Second, the rules must be applicable in the relations between the parties. The threshold issue here would be the meaning of the term *parties*. Well, it seems that such word is to be understood in accordance to VCLT Article 2(1)(g), despite the fact that the WTO Agreement uses the expression *members* rather than *parties*. Indeed, a *member* is a *party* in international law to the WTO Agreement, as it may be deduced from the instrument itself, which opening sentence reads: "...the Parties to this Agreement..."⁷⁵. Thus, following the VCLT, the word *parties* refers to the parties to the treaty rather than to the parties to the dispute⁷⁶. Third, the relevance of non-mandatory rules must be

69 European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, (September 9, 1997), §16.

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

71 LENNARD, MICHAEL, Navigating by the Stars: Interpreting the WTO Agreements. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

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

73 The definition of *jus cogens* is provided in the VCLT. See: Vienna Convention on the Law of Treaties, (May 23, 1969), Art. 53.

74 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 34.

75 Agreement Establishing the World Trade Organization.

76 See: PAUWELYN, JOOST, The Role of Public International Law in the WTO: How Far Can We Go? *American Journal of International Law*, (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), § 7.68.

assessed on a case-by-case basis, bearing in mind that their applicability to a specific relationship depends on the objectively-ascertained intention of the parties⁷⁷. Fourth, the source of a rule will not affect its application in this context. Indeed, in *EC-Biotech* the Panel noted that the term *rules of international law*, as used in VCLT Article 31(2)(c), is broad enough to cover all general sources of international law, encompassing both treaties and customary law rules⁷⁸.

2.2. Supplementary means of interpretation:

Supplementary means of interpretation are commonly used in the WTO practice⁷⁹. However, the mere fact that these sources are labeled as *supplementary* implies already a legal qualification thereof⁸⁰. Particularly, the criteria provided by article 32 of the VCLT have a limited legal value: recourse to them is optional, while referring to those listed in VCLT Article 31 is mandatory⁸¹. Nonetheless, this does not deprive article 32 of the VCLT from being a rule of customary international law, as recognized by the Appellate Body in *Japan –Alcohol*⁸². This being said, it is worth to mention that the list of supplementary interpretative elements of VCLT Article 32 is not exhaustive. However, we will address only to the ones expressly mentioned by the Convention, i.e.: (i) The preparatory work; and (ii) The circumstances of the conclusion of the treaty.

2.2.1. Preparatory work:

The WTO adjudicating bodies are not bound to use the *travaux préparatoires* for construing the covered agreements. What is more, there are certain reasons for

77 LENNARD, MICHAEL, Navigating by the Stars: Interpreting the WTO Agreements. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

78 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 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), §§ 7.67-7.68. To the same effect, professor 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*, (2001), p. 575.

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

80 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 32.

81 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 34.

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

avoiding their use, i.e.: (i) not all the WTO members participated in the negotiations; (ii) the negotiation history sometimes does not point to a concrete outcome; and (iii) a provision's meaning may have changed with time⁸³. The strongest of the foregoing 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 at the time when it entered into the treaty⁸⁴. This point has also been analyzed by scholarly⁸⁵. Conversely, it may be argued in favor of the use preparatory work that it expresses the will of the principals (founding fathers), so circumscribing the work of the agents (Panels and Appellate Body)⁸⁶.

Due to the fact that strong reasons support both opinions, the 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 case. In turn, scholarly has identified a tendency to use them as a supplementary means of interpretation to confirm the result of the primary interpretation, take obscure provisions to mean and even as a sort of primary means of interpretation⁸⁷. In the following paragraphs we will consider each of the three uses mentioned above

First, the use of preparatory work for confirming the result reached under VCLT Article 31 is not uncommon within the WTO. For example, in *Canadian Periodicals* the Appellate Body referred to the *travaux préparatoires* in order to support a textual interpretation of Article III(8)(b) of the GATT 1994⁸⁸. Other relevant cases would be the interpretation of Article 30 of the Agreement on Trade-Related Aspects of Intellectual Property Rights [hereon "TRIPS"] proposed by the Panel in *Canada-Pharmaceutical Patents*⁸⁹, as well as the *US-Upland Cotton* Appellate Body report⁹⁰. However, by far, the case which has been mostly discussed in relation to this point is *US-Shrimp*. In its report, the Appellate Body relied on the negotiating history of the International Trade Organization (ITO) and the Havana Charter⁹¹.

83 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 39.

84 United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc. WT/DS192/R, (May 31, 2001), §79.

85 LENNARD, MICHAEL, Navigating by the Stars: Interpreting the WTO Agreements. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

86 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 39.

87 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), pp. 39 & 50.

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

89 Canada - Patent Protection of Pharmaceutical Products, WTO Doc. WT/DS114/R, (March 17, 2000), §§7.46-7.47.

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

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

Scholarly has critically analyzed the report and has observed that the Appellate Body did not take into account that the documents at issue were not easily accessible to general public⁹². In sum, although it is a fact that the preparatory work has been used for confirming the conclusion reached pursuant to VLCT Article 31, the convenience of such use remains unclear.

Second, as shown by the Panel report in *India-Quantitative restrictions*, even though the use of the preparatory work for construing provisions which remain unclear after the application of the primary means of interpretation has been recognized as legitimate, it is rarely successfully alleged⁹³. However, it has in fact been used by WTO adjudicating bodies; examples are provided, besides the abovementioned case, by the Appellate Body reports in *Canada-Dairy*⁹⁴ and *US-Gambling*⁹⁵.

Third, there are few cases where WTO adjudicating bodies have omitted the hierarchy established by the VCLT by directly relying on the *travaux préparatoires* for taking to mean the provisions of an international agreement. This phenomenon is likely to occur particularly regarding GATT articles⁹⁶. However, the said use has appeared also in cases concerning other instruments. For example, in *Canada-Pharmaceutical Patents*, TRIPS Article 30 was construed by using the preparatory work before exhausting the primary criteria provided by the VCLT⁹⁷. 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 moved on directly to the history of the negotiation for overcoming an ambiguity⁹⁸. In any case, such use of the preparatory work contravenes the VCLT and, thus, "...is a good example of what panels should not do..."⁹⁹.

92 LENNARD, MICHAEL, Navigating by the Stars: Interpreting the WTO Agreements. In: *Journal of International Economic Law*, vol. 5, Issue 1, Oxford, (March, 2002).

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

94 Emphasis added. Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WTO Doc. WT/DS103/AB/R, (October 13, 1999), §§138-139.

95 Emphasis added. United States - Measures affecting the cross-border supply of gambling and betting services, WTO Doc. WT/DS285/AB/R, (April 7, 2005), §§196-197.

96 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.

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

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

99 MATSUSHITA, MITSUO; SCHOENBAUM, THOMAS & MAVROIDIS, PETROS, *The World Trade Organization: Law, Practice and Policy*, Oxford University Press, (2006), p. 52.

2.2.2. Circumstances of the conclusion of the treaty:

The second example of supplementary means of interpretation, as provided by 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 that heading. First, as it was expressly recognized in *EC-Computer Equipment*, a consistent practice followed by a WTO-member or group of members is likely to constitute such a *circumstance*¹⁰⁰. Second, decisions issued by national courts at the time when a treaty was signed, in accordance to the Panel report in *EC-Chicken Cuts*, may be catalogued under the same label¹⁰¹. Third, the element under consideration, as explained by the Appellate Body in *EC- Computer Equipment*, “...permits, in appropriate circumstances, the examination of the historical background against which the treaty was negotiated...”¹⁰².

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 the treaties which have been authenticated in different languages. This standard has been extensively applied by the 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*¹⁰³. Another example may be found in *Chile-Price Band System*, where the same body encouraged the harmonization of the different authenticated versions of a treaty¹⁰⁴. Similarly, in *EC-Ben Linen* the conclusion reached by analyzing the present-tense construction of a provision was confirmed by recourse to the French version of the instrument¹⁰⁵. On the other hand, in *US-Softwood Lumber IV*, the Appellate Body used the Spanish and French versions of the Agreement on Subsidies and Countervailing Measures [hereon “SCM”] to support

100 European Communities - Customs Classification of Certain Computer Equipment, WTO Docs. WT/DS62, 67 & 68/AB/R, (June 5, 1998), §92. With regard to the consistency requirement, see §95.

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

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

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

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

105 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, (April 8, 2003), §123 & ft. 153.

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 ...”¹⁰⁶. Finally, we find particularly interesting the *EC-Tariff Preferences* case, where the consistent wording of the Spanish and French versions of a treaty prevailed over its English text¹⁰⁷. Thus, VCLT Article 33 is also relevant for taking WTO provisions to mean.

CONCLUSION

This study has shown that the VCLT has been extensively used by the WTO adjudicating bodies for construing WTO provisions. Case law indicates that the hierarchy established by the Convention is usually recognized and should be respected both by panels and the Appellate Body. It is our view that 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; and (ii) the WTO Agreement falls within the VCLT definition of *treaty* and Articles 31 to 33 thereof are applicable among all WTO members, either as a treaty or as the customary rules of international law to which DSU Article 3.2 refers.

The VCLT provides primary and supplementary means of interpretation, as well as rules for overcoming conflicts between an instrument’s different authentic versions. In this vein, three basic rules should always be borne in mind. First, with regard to the primary standards, attention should be drawn to the fact that relying on a single interpretative element is inappropriate. For example, the use of the definitions provided by dictionaries without taking into account the context of the terms used by the treaty is highly-questionable. Second, the supplementary means of interpretation cannot be applied as substitutes of the primary interpretation standards. Finally, third, consistency between the various versions of a treaty should always be sought. The foregoing conclusions show that the VCLT sets forth a binding methodology for interpreters of WTO provisions and must be applied accordingly.

106United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada, WTO Doc. WT/DS257/AB/R, (January 19, 2004), §59.

107European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WTO Doc. WT/DS246/AB/R, (April 7, 2004), §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.

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