
Treaty Interpretation by the WTO Appellate Body

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Abstract

This article analyses how the Appellate Body in practice expresses its interpretation of the WTO covered agreements, and discusses whether the Appellate Body's hermeneutics is different from that of other international courts and tribunals. It shows that it is impossible to discern the Appellate Body's hermeneutics from the practical exposition of how it interprets treaties. It also addresses the alleged particularity of the Appellate Body's hermeneutics. The key thread is the function of treaty interpretation in the development of the judicial function in the WTO. From the outset, the Appellate Body made the conscious choice to function as if it were a court. This exercise of the judicial function relates to the tasks and powers of the international judge and transcends the mere mandate and context of a particular court or tribunal as established in its constitutive document and other procedural rules. The Appellate Body's use of principles of interpretation has been instrumental in making acceptable its early choice to function as a court and to build its judicial identity. After 15 years of jurisprudence, the response of WTO members and the broader audience for the Appellate Body's decisions shows general acceptance of this initial, but perhaps not unavoidable, choice and the strategy to achieve this objective. In turn, this response has prompted less formalism in the Appellate Body's recent interpretations of the WTO treaties.

1 Introduction

The task of the Appellate Body is to interpret and apply the multilateral treaties collectively known as the World Trade Organization (WTO) covered agreements. How it approaches this task is as much a function of general international law on treaty interpretation as it is one of WTO law.

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An analysis of the hermeneutics of the Appellate Body assumes that we can distinguish it from an analysis of how the Appellate Body practically expresses its interpretation of the WTO covered agreements, and requires an inquiry into whether the Appellate Body's hermeneutics are different from those of other international courts and tribunals. This article deals with both questions. It shows that it is impossible to discern the Appellate Body's hermeneutics from the practical exposition of how it interprets treaties. It also addresses the alleged particularity of the Appellate Body's hermeneutics.

In addressing both themes, the key thread is the function of treaty interpretation in the development of the judicial function in the WTO. From the outset, the Appellate Body made the conscious choice to function as if it were a court, even if the finality of its decisions requires political approval by reverse consensus in the Dispute Settlement Body (DSB). Appellate Body members have chosen to assume their role as members of the international judiciary, performing the international judicial function in the same way as, but in a different context from, for example, judges of the International Court of Justice (ICJ). This function relates to the tasks and powers of the international judge and transcends the mere mandate and context of a particular court and tribunal as established in its constitutive document and other procedural rules.

The Appellate Body's use of principles of interpretation, partly codified in the Vienna Convention on the Law of Treaties (VCLT), has been instrumental in making acceptable its early choice to function as a court and to build its judicial identity. After 15 years of jurisprudence, the response of WTO members and the broader audience for the Appellate Body's decisions shows general acceptance of this initial, but perhaps not unavoidable, choice and the strategy to achieve this objective. In turn, this response has prompted less formalism in the Appellate Body's recent interpretations of the WTO treaties.

This article starts with a discussion of the meaning and effect of the language in Article 3.2 of the Dispute Settlement Understanding (DSU), requiring panels and the Appellate Body to 'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. The following section defines the law on treaty interpretation applicable in WTO dispute settlement. Next, the article describes the interpretive practices of the Appellate Body as contextual and effective. The final two sections reflect on the function of treaty interpretation in the WTO dispute settlement system, against the background of changing trends in how the Appellate Body justifies its reading of the WTO treaties, and explain that an articulated theory of interpretation is lacking.

2 The Meaning and Effect of Article 3.2 of the DSU

A Introduction

The WTO covered agreements offer guidance on how they should be interpreted. Guidance is found in the DSU, the Agreement on Implementation of Article VI of the

General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), and the Agreement Establishing the World Trade Organization (the WTO Agreement). Article 3.2 DSU states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 17.6(ii) of the Anti-Dumping Agreement restates the language of Article 3.2 DSU, but adds particular guidance on how to interpret the Anti-Dumping Agreement:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Finally, Article IX:2 of the WTO Agreement confirms that the general principle concerning the relationship between judicial interpretation and authoritative interpretation also applies to the WTO covered agreements:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.

Article 3.2 DSU and Article 17.6(ii) of the Anti-Dumping Agreement are rooted in the history of the dispute settlement system which developed in administering the General Agreement on Tariffs and Trade (GATT) 1947 and in the need to seek a balance between the great powers of the major trading partners which enabled the conclusion of the WTO Agreement. *Viewed in isolation*, Article 3.2 appears superfluous because it confirms the application of general international law, and Article 17.6(ii) may be perceived as deviating from the general principles of treaty interpretation. *Considered in context*, Article 3.2 has helped panels and the Appellate Body in asserting the judicial function in the WTO and in enforcing the relationship between the covered agreements and other treaties and general international law. Also, interpretations of Article 17.6(ii) have shown that the Appellate Body has refused to apply the principle specified therein on the ground that it is irreconcilable with the task of a judge.

B Article 3.2 DSU Confirms that General International Law on Treaty Interpretation Applies

The interpretation of the WTO covered agreements is governed by the same principles as apply to the interpretation of other treaties. These are the customary principles of treaty interpretation. Article 3.2 DSU provides that panels and the Appellate Body are 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. In part, Article 3.2 merely confirms the principle of *jura novit curia*; panels and the Appellate Body can decide themselves

how to interpret the WTO covered agreements as long as they respect the customary principles of treaty interpretation.¹

Since not all WTO members signed and ratified the VCLT, the DSU negotiators decided to refer to the customary rules on interpretation; the alternative being to mention Articles 31 to 33 VCLT.² It may be presumed that Article 3.2 refers to customary international law on treaty interpretation as it existed on and evolved after 1 January 1995, which is the date of entry into force of the covered agreements. The Appellate Body confirmed in its first reports that Articles 31 and 32 VCLT have attained the status of ‘customary rules of interpretation of public international law’.³ It later made the same point about Article 33 VCLT.⁴ Arguably, absent the explicit reference to customary principles of interpretation, panels and the Appellate Body would nevertheless apply these principles in interpreting the WTO treaty language.⁵

C The ‘inutile’ of Article 17.6(ii) of the Anti-Dumping Agreement

The first sentence of Article 17.6(ii) of the Anti-Dumping Agreement merely confirms Article 3.2 DSU.⁶ In contrast, the last sentence sets out a principle for interpreting the Anti-Dumping Agreement, according to which a panel should defer to the interpretation, relied upon by the acting member when confronted with multiple permissible

¹ On the principle of *jura novit curia* see Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)*, WT/DS246/AB/R, at para. 105.

² Some WTO members also cannot become parties to the VCLT because they are not states or are not recognized as states.

³ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)*, WT/DS2/AB/R, at 16–17; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 104; see also, e.g., Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (EC – Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, at para. 84; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, at para. 114; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea – Dairy)*, WT/DS98/AB/R, at para. 81.

⁴ Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US – Softwood Lumber IV)*, WT/DS257/AB/R, at para. 59; Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System)*, WT/DS207/AB/R, at para. 271; Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India (EC – Bed-Linen (Article 21.5 – India))*, WT/DS141/AB/RW, at para. 123, n. 153.

⁵ Compare with *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, at 1102, para. 93:

Even if there had been no reference to the ‘rules and principles of international law’, the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty. It can therefore be assumed that the reference expressly made, in this provision, to the ‘rules and principles of international law’, if it is to be meaningful, signifies something else.

⁶ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel)*, WT/DS184/AB/R, at para. 57. No conflict exists between the first sentence of Art. 17.6(ii) of the Anti-Dumping Agreement and Art. 3.2 DSU.

interpretations. Article 17.6(ii) applies solely to interpretations of the Anti-Dumping Agreement. Together with Article 11 DSU, it establishes the applicable standard of review in disputes under the Anti-Dumping Agreement.⁷ No similar language is found in the other covered agreements. The specificity lies in the assumption that judicial treaty interpretation may result in more than one permissible interpretation. As the Appellate Body said in *US – Hot-Rolled Steel*, the provision ‘presupposes that application of the rules of treaty interpretation . . . could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which . . . would both be “permissible” interpretations’.⁸ It is also different from the preliminary conclusion that the grammatical meaning of the treaty is unclear and that the interpreter needs to use other principles of interpretation.⁹ The Appellate Body has emphasized that principles of treaty interpretation in the VCLT apply generally to all treaties and do not distinguish between different subject matters of treaties.¹⁰ The second sentence of Article 17.6(ii), in effect, entails an obligation on the interpreter to examine whether a measure is based on a permissible interpretation of the Anti-Dumping Agreement after applying codified and non-codified principles of treaty interpretation.

Disputants will often propose conflicting and contradicting interpretations of identical treaty language on the basis of the same principle of interpretation.¹¹ If only one interpretation were possible, most disputes would never arise. Parties turn to a third party to settle their dispute because they hold different views on the meaning and application of the treaty text and cannot amicably resolve their differences. Thus it is necessary to distinguish such possible interpretations from a judicial interpretation of the treaty ‘which fit[s] the text, . . . ennobles [it], makes it the best it can be’.¹² In the

⁷ *Ibid.*, at para 62. US negotiators intended Art. 17.6 to establish a special standard of review similar to the standard in US law which defers to reasonable decisions of administrative authorities: H. Doc. 103–316, i. 17 Sept. 1994, Statement of Administrative Action transmitted to the US Congress with the Uruguay Round Implementing Bill, at 148; see also Greenwald, ‘WTO Dispute Settlement: An Exercise in Trade Law Legislation?’, 6 *J Int’l Econ L* (2003) 113, at 117; Cunningham and Cobb, ‘Dispute Settlement Through the Lens of “Free Flow of Trade”: A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures’, 6 *J Int’l Econ L* (2003) 155, at 161, 164. To the extent that the statement qualifies as ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty’ under Art. 31(2)(b) VCLT, it was not ‘accepted by the other parties as an instrument related to the treaty’.

⁸ Appellate Body Report, *US – Hot Rolled Steel*, *supra* note 6, at para. 59 (original emphasis); see also Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (US – Stainless Steel (Mexico))*, WT/DS344/AB/R, at para. 76; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology (US – Continued Zeroing)*, WT/DS350/AB/R, at paras 268–272.

⁹ *Anglo-Iranian Oil Co. Case (United Kingdom v Iran) (Preliminary Objection)* [1952] ICJ Rep 93, at 117.

¹⁰ Appellate Body Report, *US – Hot-Rolled Steel*, *supra* note 6, at para. 60; see also Appellate Body Report, *US – Continued Zeroing*, *supra* note 8, at para. 267.

¹¹ Klabbers finds it remarkable that this ‘awkward circumstance . . . does not seem to be regarded as an embarrassment’: Klabbers, ‘On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization’, 74 *Nordic J Int’l L* (2005) 405, at 414. On rival interpretations see Wróblewski and MacCormick, ‘On Justification and Interpretation’, 53 *ARSP-Beiheft* (1994) 255, at 261.

¹² Dworkin, ‘On Gaps in the Law’, in P. Amselek and N. MacCormick (eds), *Controversies about Law’s Ontology* (1991) 84, at 86.

WTO, the Appellate Body's findings need to offer judicial finality, and this requires that the law cannot be left indeterminate.¹³

The Appellate Body has declined to apply Article 17.6(ii) on the basis that no multiple permissible interpretations existed,¹⁴ sometimes because one interpretation was simply impermissible.¹⁵ In other cases, the issue of Article 17.6(ii) simply was avoided.¹⁶ The scepticism of the Appellate Body towards Article 17.6(ii) is understandable in the light of the principle of *jura novit curia*, as judges are presumed to know the law and its meaning. It is also visible in the Appellate Body's words that it will 'bear in mind that there could be more than one permissible interpretation of a provision of the *Anti-Dumping Agreement*'.¹⁷ The Appellate Body seeks the 'proper' or 'correct' interpretation, not any 'permissible' interpretation.

If there is ever a right answer to a legal question, there is no reason to think that questions of treaty interpretation are any different. There can be a right answer to a question of interpretation to the same extent and for essentially the same reasons as any other legal question. However, it seems implausible to say that there is *always* a right answer, given the complexities of language and context and changing circumstances, often unforeseen.¹⁸ It is just as implausible to say that there is never a right answer or that interpretation is unconstrained. A right interpretation is not the same as a possible interpretation; and a possible interpretation is not the same as the better or best answer to an interpretive problem.

D Article IX:2 of the WTO Agreement: Authentic Interpretation vs Judicial Interpretation

The interpretations of the WTO covered agreements by panels and the Appellate Body are formally authoritative for the dispute being decided, not for others. Even if the reverse consensus rule has made political control of panel and Appellate Body reports

¹³ Even if one agrees with the proposition that indeterminacy is an 'absolutely central aspect of international law's acceptability': M. Koskeniemi, *From Apology to Utopia – The Structure of the International Legal Argument* (reissued edn, 2005), Epilogue, at 591; see also H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 132; R. Gardiner, *Treaty Interpretation* (2008), at 29–33. See also Appellate Body Report, *US – Continued Zeroing*, *supra* note 8, at para. 312 (concurring opinion).

¹⁴ See, e.g., Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 4, at para. 118; Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra* note 8, at para. 136; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada (US – Softwood Lumber V)*, WT/DS264/AB/R, at para. 116. For similar conclusions see Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (US – Zeroing (EC))*, WT/DS294/AB/R, at para. 134; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews (US – Zeroing (Japan))*, WT/DS322/AB/R, at paras 188–189.

¹⁵ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC – Bed Linen)*, WT/DS141/AB/R, at para. 65.

¹⁶ See, e.g., Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States (Mexico – Corn Syrup (Article 21.5 – US))*, WT/DS132/AB/RW, at para. 133.

¹⁷ Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra* note 8, at para. 76.

¹⁸ See also Allott, 'The International Lawyer in Government Service: Ontology and Deontology', 23 *Wisconsin Int'l LJ* (2005) 13, at 18.

mostly a formality, Article IX:2 of the WTO Agreement reserves the ultimate interpretive authority to WTO members.¹⁹

Generally, authoritative interpretations are 'binding on the parties and any organ which decides on their rights and duties on a basis of delegated authority'.²⁰ In practice, WTO members have been incapable of adopting such authoritative interpretations.²¹ The responsibility for clarifying the provisions of the WTO covered agreements lies mainly, if not exclusively, with panels and the Appellate Body. Their interpretations are binding solely on the disputants and applicable to the specific subject-matter of the dispute; whereas authoritative interpretations by the Ministerial Conference and the General Council are binding on all WTO members.²² Article 3.9 DSU specifies that judicial interpretations do not prejudice the right of WTO members to exercise their competence under Article IX:2 of the WTO Agreement. Although ultimate interpretive authority lies with WTO members, panels and the Appellate Body exercise interpretive autonomy. Indeed, the (lack of) practice under Article IX:2 has meant that 'decisions [of the Appellate Body] are likely to have a kind of *de facto* finality as interpretations of law, even if they lack *de jure* finality'.²³

The Appellate Body has sometimes indicated that it would welcome an authoritative interpretation or a less formal decision of members on the meaning of a particular treaty text. Some meaning of certain treaty language is more disputed than that of other treaty language. Discussions in committees and other WTO institutional

¹⁹ On the formal character of different types of interpretation in GATT practice see Ehlermann and Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', 8 *J Int'l Econ L* (2005) 803, at 804–805.

²⁰ G. Schwarzenberger, *International Law and Order* (1971), at 119; *ibid.*, 'Myths and Realities of Treaty Interpretation – Articles 27–29 of the Vienna Draft Convention on the Law of Treaties', 22 *Current Legal Problems* (1969) 205, at 216. See also, generally, L. Voïcu, *De l'interprétation authentique des traités internationaux* (1968); Papaux, 'Article 33', in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le Droit des Traités – Commentaire article par article* (2006), II, 137.

²¹ So far, the only requests for an authoritative interpretation are: General Council, *Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, Communication from the European Communities*, WT/GC/W/133, 25 Jan. 1999; General Council, *Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization, Communication from the European Communities*, WT/GC/W/143, 5 Feb. 1999. However, members can give interpretive guidance to and the Appellate Body in a 'subsequent agreement'. E.g., WTO members agreed in the Doha Ministerial Declaration that the TRIPS Agreement 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all'; Ministerial Conference, *Doha Declaration on the TRIPS Agreement and Public Health (adopted on 14 November 2001)*, WT/MIN(01)/Dec/2 (20 Nov. 2001), at para. 4.

²² Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 107; Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations' (US – FSC)*, WT/DS108/AB/R at paras 112–113, n. 217.

²³ Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', in T. Cottier and P.C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation – Experience and Lessons for the WTO*, *World Trade Forum* (2003), IV, at 11, 15.

fora can inform the Appellate Body that the meaning of a treaty text is particularly sensitive.²⁴

If the required majority can be reached, members might prefer to strengthen that majority and opt to amend the treaty language in question.²⁵ But amendment requires ratification. An authoritative interpretation requires a three-quarters majority, though there is a preference for consensus, and a simple majority of WTO members should be present.²⁶ An amendment needs the support of all WTO members or, if no consensus can be reached, a three-quarters majority.²⁷ An amendment may be adopted by a two-thirds majority but will bind only those members which approve the amendment in accordance with their constitutional processes.

The objective of authoritative interpretations is, in the Appellate Body's view, 'to clarify the meaning of existing obligations, not to modify their content'.²⁸ Authoritative interpretations cannot add to or diminish the rights and obligations of WTO members, solely an amendment or waiver can.²⁹ Rights and obligations of WTO members can be changed with their consent and amendments bind only consenting members.³⁰ The alternative conclusion renders the provisions on treaty amendment ineffective.³¹ Authoritative interpretations cannot add to or diminish the rights and obligations of WTO members, or at least no more than interpretations of panels and the Appellate Body can. The phrase 'add[ing] or diminish[ing] . . . rights and obligations' is relative; an understanding which has so far been insufficiently acknowledged.

²⁴ See, e.g., Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)*, WT/DS34/AB/R, at para. 48, referring to the similar conclusion of the Panel (Panel Report, *Turkey – Textiles*, at para. 9.148).

²⁵ See also Ehlermann and Ehring, *supra* note 19, at 806.

²⁶ Art. IX:2 of the WTO Agreement.

²⁷ Art. X of the WTO Agreement contains more detailed rules on different avenues for amendment.

²⁸ Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU/European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States, WT/DS27/AB/RW/USA (EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)), at para. 383.

²⁹ See also Gazzini, 'Can Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?', 57 *Int'l Comp LQ* (2008) 169, at 175, 179; Biermann, 'The Rising Tide of Green Unilateralism in World Trade Law', 35 *J World Trade* (2001) 421, at 426; Abbott, 'The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO', 5 *J Int'l Econ L* (2002) 469, at 492–493; Nottage and Sebastian, 'Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law', 9 *J Int'l Econ L* (2006) 989, at 1003. Contra Ehlermann and Ehring, *supra* note 19, at 808–811; J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law* (2003), at 112; Sacerdoti, 'The Dispute Settlement System of the WTO: Structure and Function in the Perspective of the First 10 Years', Bocconi University Institute of Comparative Law 'Anglo Sraffa' (I.D.C.) Legal Research Paper Series, Research Paper No. 07-03, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=981029 (arguing that an authoritative interpretation 'might even entail a modification to any existing provision').

³⁰ Art. X:3, first sentence, of the WTO Agreement says: 'Amendments to provisions . . . of the nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it'. See, e.g., General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (8 Dec. 2005).

³¹ See also Nottage and Sebastian, *supra* note 29, at 1003; Gazzini, *supra* note 29, at 175, 176.

The Appellate Body's approach to authoritative interpretations is not yet settled. In *US – FSC*, the Appellate Body refused to recognize a 1981 Council Action as an authoritative interpretation, partly because the Chairman of the GATT Council had declared that 'the adoption of these reports together with understanding *does not affect the rights and obligations of contracting parties under the General Agreement*'.³² If the 1981 Council Action was intended as an authoritative interpretation 'all contracting parties . . . would have said so in reasonably recognizable terms'.³³ The action also was not formulated in sufficiently general terms to be generally binding and applicable.³⁴ The Appellate Body thus appeared to expect that members would explain clearly that their decision was based on Article IX:2 of the WTO Agreement.

The Appellate Body has suggested that authoritative interpretations would 'in all probability, have been perceived by the contracting parties as affecting their rights and obligations, and would not, therefore, have been accompanied by such a statement'.³⁵ The observation that an authoritative interpretation should 'affect' the rights and obligations of WTO members does not imply that the Appellate Body accepts that such an interpretation can 'add or diminish' these rights and obligations. In fact, any interpretation necessarily 'affects' the rights and obligations of WTO members, and how they are applied and enforced. A declaration that a decision does not affect the rights and obligations of WTO members thus rules out that the decision is an authoritative interpretation, which always affects their rights and obligations.

If an authoritative interpretation were adopted, the Appellate Body would likely read the WTO treaty language and its authoritative interpretation as one inseparable subject of interpretation – similar to the way in which it has read treaty provisions together with *Ad Articles*. The authoritative interpretation merges with the covered agreements, which are then interpreted using the customary principles of treaty interpretation. In *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, where the Appellate Body compared waivers, authoritative interpretations, and amendments, the relationship between the treaty language and its authentic interpretation was likened to that between the treaty language and a subsequent agreement in the sense of Article 31(3)(a) VCLT – at least for purposes of treaty interpretation.³⁶

Although Article IX:2 has yet to be tested, an authoritative interpretation would appear to be the only acceptable 'necessary instrument of checks and balances *vis-à-vis* the WTO's quasi-judiciary' as an alternative to amending the treaty.³⁷ The value of authoritative interpretations in relation to judicial interpretations lies especially in the ability of the former to react against the latter. WTO members bargain in the shadow

³² Appellate Body Report, (*US – FSC*), *supra* note 22, at para. 112 (original emphasis).

³³ *Ibid.*

³⁴ *Ibid.*, at para. 109.

³⁵ *Ibid.*, at para. 112.

³⁶ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, *supra* note 28, at para. 383.

³⁷ Ehlermann and Ehring, *supra* note 19, at 812 (original emphasis).

of the GATT *acquis*,³⁸ WTO dispute settlement, and international law, while panels and the Appellate Body adjudicate in the shadow of the GATT *acquis*, ongoing trade negotiations, and international law. One Appellate Body member regrets that ‘one of the major weaknesses . . . [is] that the politics is not able to correct what the judiciary has gotten wrong’.³⁹ This does not preclude a uniform interpretation by all or a majority of members from being taken into account as subsequent practice or from representing a subsequent agreement – though this is not an authoritative interpretation in the sense of Article IX:2.

E *Jurisprudence Constante*

Overall, the Appellate Body has succeeded in producing a consistent body of interpretations of WTO law.⁴⁰ In the absence of a strict notion of *stare decisis*, the interpretations of panels and the Appellate Body are case-specific. Nevertheless, a tempered type of precedent operates in WTO dispute settlement, and many interpretations on substance and procedure have survived in subsequent DSB reports.⁴¹ At different times and in relation to various parts of the WTO covered agreements, panels and the Appellate Body have occasionally produced different, even contradictory, interpretations. WTO members can resolve the resulting interpretive uncertainty through the adoption of an authoritative interpretation of the provision in question. So far, the DSU has not provided for the ability to request a clarification or revision by the DSB, a panel, or the Appellate Body of a particular finding, recommendation, or reasoning.⁴² The Appellate Body occasionally clarifies or corrects misunderstandings about its original reasoning and recommendations in subsequent compliance proceedings,⁴³ or in subsequent appeals in other disputes.⁴⁴ In the series of zeroing

³⁸ Art. XVI: 1 of the WTO Agreement states: ‘Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947’.

³⁹ D. Terris, C.P.R. Romano, and L. Swigart, *The International Judge – An Introduction to the Men and Women Who Decide the World’s Cases* (2007), at 128, quoting an Appellate Body member.

⁴⁰ See Ruiz Fabri, ‘Le juge de l’OMC: ombres et lumières d’une figure judiciaire singulière’, 110 *RGDIP* (2006) 39, at 51. McRae notes that ‘[t]he work of the Appellate Body has become an interpretative laboratory’: McRae, ‘Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body’, in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (2006), at 360, 370.

⁴¹ J.H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (2006), at 173–177.

⁴² Compare with Art. 60 of the ICJ Statute: ‘The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.’ See also S. Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards* (2007).

⁴³ E.g., Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina (Chile – Price Band System (Article 21.5 – Argentina))*, WT/DS207/AB/RW, at paras 229–241.

⁴⁴ E.g., Appellate Body Report, *European Communities – Selected Customs Matters (EC – Customs Matters)*, WT/DS315/AB/R, at para. 200 (interpreting *EC – Bananas III* and *EC – Poultry* on the scope of Art. X:3(a) GATT 1994); Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, *supra* note 28, at para. 226 (clarifying the meaning and effect of *United States – Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act (Byrd Amendment))*), WT/DS217/AB/R,

cases, for example, the Appellate Body continuously interprets previous reports in an attempt to clarify its reasoning – and, ultimately, in an attempt to induce compliance. In *US – Stainless Steel (Mexico)*, it was quite explicit in translating this message to the disputants (and panels):

It appears to us that the United States and the Panel have not correctly understood the Appellate Body's interpretation of Article 9.3 in previous disputes.⁴⁵

Thus, it attempted to explain it again.⁴⁶ A more recent example of clarification and rationalization of past case law and interpretations of particular provisions is the Appellate Body report in *China – Audiovisual Products*.⁴⁷ In that report, the Appellate Body was relatively outspoken about interpretive issues that it did not need to address. Among the issues addressed and matters decided, the Appellate Body resolved the question whether China was entitled to invoke Article XX GATT 1994 in defence of a claim under Article 5.1 of China's Accession Protocol to the WTO, and possibly other obligations assumed by China under the Accession Protocol and the Working Party Report. It found that China was justified in doing so. In a previous dispute, the Appellate Body had avoided deciding a similar question whether Article XX GATT 1994 was available in defence of claims under the Anti-Dumping Agreement.⁴⁸ In *China – Audiovisual Products*, the Appellate Body showed itself to be more assertive and able to decide this legal question, and did so in great detail. As discussed below, the Appellate Body used the opportunity to reflect on the character of the WTO treaties, confirming known principles in international law, to clarify the relationship between the different agreements, and to summarize and rationalize its interpretations of Article XX GATT 1994, or at least parts thereof.⁴⁹

WT/DS234/AB/R, at para. 298), at para. 244, also paras 252–259 (clarifying the interpretation of the 'measure taken to comply' in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Resource by Canada to Article 21.5 of the DSU (US – Softwood Lumber IV (Article 21.5 – Canada))*), WT/DS257/AB/RW, at para. 77), at para. 464, n. 538 (clarifying its position on the notion of 'standing' before panels and the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*), WT/DS27/AB/R, at para. 135); Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts (China – Auto Parts)*, WT/DS340/AB/R, WT/DS342/AB/R, at para. 149 (clarifying its observation in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)*), WT/DS269/AB/R, WT/DS286/AB/R, at para. 197); Appellate Body Report, *US – Continued Zeroing*, at paras 230–231 (clarifying its finding on the scope of requests to consultations and to establishing a panel in *United States – Import Measures on Certain Products from the European Communities (US – Certain EC Products)*), WT/DS165/AB/R, at paras 74–77]. The Appellate Body sometimes also clarifies the meaning of panel reports. See, e.g., Appellate Body Reports, *China – Auto Parts*, at para. 140.

⁴⁵ Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra* note 8, at para. 112.

⁴⁶ *Ibid.*, at paras 112–114, also at paras 126–127.

⁴⁷ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Audiovisual Products)*, WT/DS363/AB/R.

⁴⁸ Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand/United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (US – Shrimp (Thailand)/US – Customs Bond Directive)*, WT/DS343/AB/R, WT/DS345/AB/R, at paras 304–319.

⁴⁹ Appellate Body Report, *China – Audiovisual Products*, *supra* note 47, at paras 239–242, 251–253, 301–306, 318–319.

3 General International Law on Treaty Interpretation

Treaty text is language requiring meaning to apply it to the concrete facts presented to the adjudicator. The process of coming to this meaning is interpretation. This is not peculiar to treaty texts. Indeed, 'there is a limit, inherent in the nature of language, to the guidance which general language can provide'.⁵⁰ Interpretation normally presupposes an authoritative text, something authored, whether a statute, a contract, a treaty, whatever. Such text has a certain status as law. Statements of and positions on international law not contained in such text may require interpretation to determine their status and relevance. This process of good rendering of custom shares some features with the process of good interpretation, but nevertheless differs from the latter. Interpretation precedes the application of the treaty text.⁵¹ It involves giving meaning to a text in the abstract, then making that meaning relevant and concrete, before applying the authoritative text to a measure or practice subject to review in the light of that text.

Every legal system has developed principles to guide and justify the process of the adjudicator in interpreting and applying the law.⁵² Similarly, international law has produced principles of treaty interpretation. The Commentary on the International Law Commission's Draft Articles on the law of treaties emphasized that 'statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts'.⁵³

Principles of treaty interpretation are neither rules nor principles in the classic sense of 'something . . . which underlies a rule, and explains or provides the reason for it'.⁵⁴ They underlie the interpretation of the rule, not the rule itself. They help to answer why a rule is to be given one meaning and not another. That is their creative function.⁵⁵ They are 'principles of logic and good sense' which guide the interpreter in finding and justifying the meaning of the treaty language.⁵⁶ It is hard to conceive

⁵⁰ Hart, *supra* note 13, at 126.

⁵¹ See, e.g., *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Separate Opinion Judge Shahabuddeen [1988] ICJ Rep 57, at 59; *Fisheries Jurisdiction Case (Spain v. Canada)* [1998] ICJ Rep 432, at 460.

⁵² For a historical account see Ehrlich, 'L'Interprétation des Traités', 24(IV) *Recueil des Cours* (1928) 5; D.J. Bederman, *Classical Canons: Rhetoric, Classicism and Treaty Interpretation* (2001); Gardiner, *supra* note 13, at 52–73; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), at 301–308.

⁵³ Draft Articles on the Law of Treaties with commentaries 1966, *Yrbk Int'l Law Commission* (1966), II, at 177 as part of *Report of the International Law Commission on the work of its eighteenth session (4 May–19 July 1966)*, Doc. A/6309/Rev.1, *Yrbk Int'l Law Commission* (1966), II, 172 (ILC Draft Articles (1966)), at 218, para 3 citing *Third Report of the Special Rapporteur, Sir Humphrey Waldock (16th Session of the ILC (1964))*, Doc. A/CN.4/167 and Add.1–3, *Yrbk Int'l Law Commission* (1964), II, 5, at 54, para. 5.

⁵⁴ Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92(II) *Recueil des Cours* (1957) 5, at 7; ILC Draft Articles (1966), *supra* note 53, at 218–219, paras 4–5; see also Gardiner, *supra* note 13, at 9, 37–38; and, more broadly, A.D. Mitchell, *Legal Principles in WTO Disputes* (2008), at 7–12.

⁵⁵ Koskeniemi, *supra* note 13, Epilogue, at 531.

⁵⁶ ILC Draft Articles (1966), *supra* note 53, at 218, para. 4.

how the process of interpretation can be governed by legal rules in the ordinary sense of the term,⁵⁷ as relatively determinate directions to a given result. Discrepancies exist in how courts and tribunals explain and justify their interpretations. But even if they articulate in clear terms their interpretive practice, it is less common for adjudicators to specify the reasons for preferring certain principles of interpretation to others. An analysis of any court's interpretive practices therefore relies on a degree of pragmatism shown in its decisions. In most cases, interpretation is also a 'matter of judicial instinct'; it is an indeterminate process to arrive at a determinate meaning of a legal text,⁵⁸ reading the text in its context and taking into account circumstances surrounding it.⁵⁹

For similar reasons it is difficult to set out a clear 'trajectory' of treaty interpretation, that is, the different steps in the process. The interpretive practices of international courts and tribunals cannot easily be analysed into distinct schools of interpretation.⁶⁰ The predominant school of thought contends that the text of the document should be the focus point. The 'textual' school neither ignores nor neglects the value of negotiating history, the intention of parties, or the object and purpose of the treaty.

⁵⁷ See also V.D. Degan, *Sources of International Law* (1997), at 92; *Sixth Report on the Law of Treaties*, by Sir Humphrey Waldock, Special Rapporteur, Doc. A/CN.4/186 and Add.1–7, *Yrbk Int'l Law Commission* (1966), II, 51, at 94, para. 1; see also C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), at 29; D. Simon, *L'interprétation judiciaire des traités d'organisations internationales – morphologie des conventions et fonction juridictionnelle* (1981), at 127; Sorel, 'Article 31', in Corten and Klein, *supra* note 20, II, at 1289, 1333–1334. Klabbbers finds Arts 31 to 33 VCLT a 'curiosity' because 'normally, legal instruments do not also include the methodological tools which can or should be applied to them'. See Klabbbers, 'On Rationalism in Politics', *supra* note 11, at 407, 418; Klabbbers, 'Re-inventing the Law of Treaties: The Contribution of the EC Courts', 30 *Netherlands Yrbk Int'l L* (1999) 45, at 47. For an example of a discussion of Art. 31(1) and (3)(c) as rules rather than principles see Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech Case*', 56 *Int'l Comp LQ* (2007) 907; Orakhelashvili, *supra* note 52, at 309. On rules versus principles see R. Dworkin, *Taking Rights Seriously* (1977), at 22–26, 110–123; *ibid.*, *A Matter of Principle* (1985), at 33–71; Alexander and Kress, 'Against Legal Principles', in A. Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (1995), at 279.

⁵⁸ L. Neville Brown and T. Kennedy, *The Court of Justice of the European Communities* (5th edn, 2000), at 323; also Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92(II) *Recueil des Cours* (1957) 5, at 7; D. Simon, *L'interprétation judiciaire des traités d'organisations internationales – morphologie des conventions et fonction juridictionnelle* (1981), at 143; Gardiner, *supra* note 13, at 103.

⁵⁹ See also Abi-Saab, 'Cours général de droit international public', 207(I) *Recueil des Cours* (1987) 9, at 215. Alvarez agrees that 'language is rarely precise enough to be unambiguous': J.E. Alvarez, *International Organizations as Law-Makers* (2005), at 84; Mitchell, *supra* note 54, at 77.

⁶⁰ For a systematized discussion see Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', 28 *British Yrbk Int'l L* (1951) 1; Bos, 'Theory and Practice of Treaty Interpretation II', 27 *Netherlands Int'l L Rev* (1980) 135; Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Convention Diplomatic Conference', 18 *ICLQ* (1969) 318; E.S. Yambrusic, *Treaty Interpretation—Theory and Reality* (1986); Bachand, 'L'interprétation juridictionnelle chez les internationalistes du XXe siècle', 39(1) *Revue Belge de Droit International* (2006) 173. For an example of a purely doctrinal discussion of treaty interpretation see Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation', 54 *Netherlands Int'l L Rev* (2007) 133.

In fact, these interpretive means are viewed as *indicia* to confirm or support a textual analysis. The intent-based school, by contrast, prioritizes the intention of the parties.⁶¹ This intention may be found in the negotiating history and other sources. This school defends a more flexible method of approaching treaty texts, but with the risk of negating the words of the text. The claim that '[t]he intent of the parties . . . is the law'⁶² and the belief that interpretation 'is the search for the real intention of the contracting parties in using the language employed by them'⁶³ undoubtedly reflect the orthodox wisdom underlying treaty interpretation. However, they are more theoretical explanations than practical guidelines to finding and justifying the meaning of treaty language. Interpretation is about finding the intentions of the parties; that is undisputed. But this gives little or no answer to questions such as whose intention, what was intended, and at what time that intention matters. A third school defends the proposition that the object and purpose of the treaty should be determinative of the meaning of the treaty, and accepts that the result of such interpretation may differ from one which is more focused on the intentions of the parties.⁶⁴

While it is perhaps academically attractive, the practical value of analysing treaty interpretation by reference to these general labels is limited. No interpretive process can be captured in such general terms. The sequences in the interpretive process and its complexity are not easily grouped under labels like teleological, contextual, or intent-based. Technicalities are not entirely excluded from that process. The claim, for example, that the Appellate Body 'privileges the textual and the contextual . . . and grudgingly and sparingly analyzes the teleological'⁶⁵ is perhaps too much of an abstraction, without informing how the text, the context, and the object and purpose interact and are weighed against each other.

The rich practice of treaty interpretation on which the ILC built to draft its articles on treaty interpretation amply demonstrates the limitations of each school. The textual school's assumption that the focus must be on the text of a treaty is hardly surprising, because where else could the interpretation of an agreement in writing start? The consent of the parties is fixed in the text of the agreement, despite the intent-based school's attraction to negotiating history. The object and purpose, or the teleology, of the treaty is equally expressed in its text. Differences between these viewpoints tend to fade once a practical example of interpretation presents itself. They are not opposed to each other; instead, they compete for significance rather than relevance.

⁶¹ See H. Lauterpacht, 'Rapport à l'Institut de droit international', 1 *Annuaire de l'Institut de droit international* (1950) 336, at 377–402.

⁶² H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *British Yrbk Int'l L* (1949) 48, at 73.

⁶³ A.D. McNair, *The Law of Treaties* (2nd edn, 1961), at 366.

⁶⁴ See L. Cavaré, *Le droit international public positif* (2nd edn, 1961–1962), at 94; see also *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, Dissenting Opinion of Judge Alvarez [1951] ICJ Rep 15, at 53.

⁶⁵ Irwin and Weiler, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)', 7 *World Trade Rev* (2008) 71, at 90.

A Articles 31 to 33 VCLT

The VCLT codified the basic principles of treaty interpretation in Articles 31 to 33.⁶⁶ These provisions cover respectively the general principle of interpretation, supplementary means of interpretation, and the interpretation of treaties authenticated in two or more languages. They reflect a more comprehensive catalogue of principles without purporting to be exhaustive. The general understanding is that treaty interpretation is not simply about the application of Articles 31 to 33 VCLT.⁶⁷

Articles 31 to 33 are widely recognized as reflecting customary international law on treaty interpretation; this was also the view of the ILC.⁶⁸ These principles bind all states as customary international law. From a formal perspective, they are part of binding treaty language for the VCLT signatories. The VCLT was drafted at a time when there were few international courts and tribunals which continuously revisited the meaning of the same multilateral treaty language. Treaty interpretation was mostly a matter of *ad hoc* interpretation of bilateral treaties. Since then, the context and subject of treaty interpretation have evolved, and this has raised questions about the continued relevance of the VCLT principles.

In codifying the principle that the ‘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’ in Article 31(1), the ILC emphasized that the objective of interpretation is to arrive at a contextual meaning of the treaty language.

⁶⁶ The discussion on treaty interpretation during the Vienna Convention was mostly limited to the known debate about the role of negotiating history: see, for an overview, Sinclair, ‘Vienna Conference on the Law of Treaties’, 19 *Int’l Comp LQ* (1970) 47, at 62–65. Ultimately, the text of the final Arts 31 to 33 was adopted by unanimous vote.

⁶⁷ See ILC Draft Articles (1966), *supra* note 53, at 220, para. 10; X, ‘Part III. Law of Treaties, Draft Convention, with Comment’, prepared by Research in International Law Under the Auspices of the Faculty of the Harvard Law School, 29 *AJIL Supp* (1935) 655, at 937, Art. 19, and discussed in M.S. McDougal, H.D., Lasswell, and J.C. Miller, *The Interpretation of International Agreements and World Public Order – Principles of Content and Procedure* (1994), at 120; Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’, 8 *Virginia J Int’l L* (1968) 323; Liacouras, ‘The International Court of Justice and Development of Useful “Rules of Interpretation” in the Process of Treaty Interpretation’, 59 *ASIL Proceedings* (1965) 161, at 162. But see DSB, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement – Communication from the United States*, TN/DS/W/82 (24 Oct. 2005).

⁶⁸ E.g., *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, at 21, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* [1995] ICJ Rep 6, at 18, para. 33; *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, at 1059, para. 18; *LaGrand Case (Germany v. United States of America)* [2001] ICJ Rep 466, at 501, para. 99; *Case Concerning Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, at 645, para. 37; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objections)* [1966] II ICJ Rep 803, at 812, para. 23; *Golder v. the United Kingdom*, ECtHR (1975), Ser. A, No. 18, at para. 29; *Restrictions to the Death Penalty*, IACHR, 70 ILR (1986) 449, at 465–466; *Case C–344/04, The Queen on the application of: International Air Transport Association, European Low Fares Airline Association v. Department of Transport* [2006] ECR I–403, at para. 40; Appellate Body Report, *US – Gasoline*, *supra* note 3, at 16–17; Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 104; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), at 153; Sorel, *supra* note 57, at 1292.

Although it is often suggested that the ILC preferred the textual method, the language of Article 31(1) does not support that claim. Article 31(1) does not purport to say that interpretation should be a matter of strict grammatical or textual analysis in isolation from other considerations. Article 31(1) confirms that there can be no starting point other than the actual terms of the text. This is only a starting point. The reference to the object and purpose and the context confirms that interpretation is not well served if it does not consider other elements besides the text of the treaty.

For the ILC, the order of the interpretive elements in Article 31 was one ‘of logic’ and did not impose ‘any obligatory legal hierarchy’.⁶⁹ There is, however, a (limited) hierarchy between the general principle in Article 31 and supplementary means of interpretation in Article 32. In practice, some elements of interpretation, such as the frequent incompleteness or unavailability of preparatory work, have been given less weight for practical reasons.⁷⁰

The value of codifying these principles lies primarily in the fact that they introduce an element of accountability.⁷¹ The (limited) constraints of Articles 31 to 33 on the interpretive flexibility of the adjudicator are justified because a certain level of abstract predictability in interpretation contributes to the resolution of disputes in and outside courts and tribunals, and can possibly improve the drafting of treaties.⁷² The ILC explained that it was opportune to codify these few general principles to give full effect to other provisions of the draft Articles, to complete the principle of *pacta sunt servanda*, and to take a stance on the role of the text in treaty interpretation.⁷³ This limited codification was motivated by a concern to leave the adjudicator with a considerable degree of flexibility to approach the text of the treaty.⁷⁴ The value of Articles 31 to 33 lies in their limited ambition; the VCLT did not ‘over-codify’ principles of interpretation. It codified the principles on which there was general consensus among states, and developed the practice of treaty interpretation progressively through organizing some general principles ‘into an articulated system’.⁷⁵

⁶⁹ ILC Draft Articles (1966), *supra* note 53, at 220, para. 9; see also S. Sur, *L'interprétation en droit international public* (1974), at 205. *Contra* Horn and Howse, ‘European Communities – Customs Classification of Frozen Boneless Chicken Cuts’, 7 *World Trade Rev* (2008) 9, at 32; Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’, 102 *AJIL* (2008) 421.

⁷⁰ ILC Draft Articles (1966), *supra* note 53, at 220, para. 10. See, generally, Linderfalk, *supra* note 60, 133.

⁷¹ Stone, ‘Fictional Elements in Treaty Interpretation – A Study in the International Judicial Process’, 1 *Sydney L Rev* (1955) 344, at 345; also Wróblewski and MacCormick, *supra* note 11, at 258; Klabbbers, *supra* note 11, at 411; C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), at 18–19, 44–46.

⁷² See Yasseen, ‘L'interprétation des traités d'après la Convention de Vienne sur le droit des traités’, 151 *Recueil des Cours* (1976-III) 3, at 12. Others have expressed more reservations with respect to the ability of the codified principles of interpretation to make international dispute settlement more predictable. See, e.g., G. Schwarzenberger, *International Law and Order* (1971), at 126.

⁷³ ILC Draft Articles (1966), *supra* note 53, at 219, para. 5.

⁷⁴ Yasseen, *supra* note 72, at 13; Sur, *supra* note 69, at 71; see, more recently, Dupuy, ‘La Convention de Vienne sur le droit des traités à l'épreuve de la pratique: quel bilan trente ans après son entrée en vigueur’, [2006] *Revue Belge de Droit International* 411, at 412–413.

⁷⁵ Sur, *supra* note 69, at 71; Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)’, 62 *British Yrbk Int'l L* (1991) 1, at 17; see also N. Quoc Dinh, P. Daillier, and A. Pellet, *Droit international public* (7th edn, 2002), at 265–266.

B Other Principles of Treaty Interpretation Not Codified in the VCLT

The ILC excluded principles of interpretation from its codification exercise. Examples of non-codified principles of different orders of generality are the principle of effectiveness, the prohibition of abusive interpretations, *expressio unius est exclusio alterius*, *argumentum a contrario*, *qui dicit de uno de altero negat*, etc.⁷⁶

There was considerable criticism of the proposal to codify some principles due to concerns about how 'black letter' technical rules might affect the process of interpretation.⁷⁷ From the debate on whether to codify the principle of effectiveness, it appears that the ILC was also concerned not to take a definitive position on principles which 'might encourage attempts to extend the meaning of treaties illegitimately'.⁷⁸ This consideration applies equally, however, to the principles which the ILC did codify in Article 31 VCLT, such as the permission to refer to 'any relevant rules of international law applicable in the relation between the parties'.

As will be shown, independently of the merits of codification, the exclusion of a broad range of principles from codification has reduced the attractiveness of these non-codified principles to a certain extent. The Appellate Body was initially hesitant in formally recognizing its use of non-codified principles of treaty interpretation, but is gradually opting for a more balanced and less formal approach.

4 Key Features of the Appellate Body's Interpretive Practice: Contextualism and Effectiveness

A Contextualism

1 Introduction

The Appellate Body has not read the WTO treaty language in a purely grammatical or textual manner. The Appellate Body often immediately contextualizes dictionary definitions or the plain meaning of the text. The starting point has usually been the ordinary meaning of the terms of the treaty.⁷⁹ Where else could interpretation start? The Appellate Body's apparently excessive attention to the words of the treaty language might seem overdone,⁸⁰ but it is correct nonetheless.

⁷⁶ Other examples, dignified in Latin, include *falsa demonstratio non nocet*, *noscitur a sociis*, *copulatio verborum indicat acceptionem in eodem sensu*, *expressum facit cessare tacitum*, *affirmatio unius est exclusio alterius*, *tantum disponunt quantum loquuntur*, *contra proferentem*, *eiusdem generis*, *lex posterior derogate legi priori*, and *lex specialis derogate legi generali*. See also *Third Report of the Special Rapporteur, Sir Humphrey Waldock (16th Session of the ILC (1964))*, Doc. A/CN.4/167 and Add. 1-3, Yrbk Int'l Law Commission (1964), II, 5, at 54, para. 5; Stone, *supra* note 71, at 346.

⁷⁷ *Ibid.*, at 366; X., *supra* note 67, at 937, Art. 19.

⁷⁸ ILC Draft Articles (1966), *supra* note 53, at 219, para. 6.

⁷⁹ Ehlermann, 'Reflections on the Appellate Body of the WTO', 6 *J Int'l Econ L* (2003) 695, at 699.

⁸⁰ *Abi-Saab, The Appellate Body and Treaty Interpretation*, in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (2006) 453, at 461. The Appellate Body is also said to have adopted an approach of 'semantic textualism', see Zang, 'Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate', 33 *Syracuse J Int'l L and Commerce* (2006) 393, at 413–438; also Irwin and Weiler, *supra* note 65, at 95.

Prior to the consideration of context as a formal matter under Article 31(2) VCLT, the ordinary meaning of the text is already ‘contextualized’ on the basis of Article 31(1). In this sense, indeed, the term ‘assumes what has to be proved’.⁸¹ This practice reflects how contextual interpretation may extend beyond the confines of the definition of context in the VCLT.

The Appellate Body follows the ILC’s assumption that the text is presumed to reflect the intent of the parties, and expresses the purpose of the words used by WTO members.⁸² In *US – Gasoline*, the Appellate Body assumed that the text of Article XX GATT 1994 reflected the intent of reasonable WTO members, remarking that:

it does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.⁸³

In *Japan – Alcoholic Beverages II*, the Appellate Body assumed that the margin of appreciation in interpretation would be influenced by the purpose of the treaty provision. The appreciation of a broader or narrower interpretation of ‘like products’ could not result in ‘one precise and absolute definition’; it was influenced by ‘the various characteristics of products in individual cases’.⁸⁴ The Appellate Body found that the concept and meaning of ‘likeness’ is a ‘relative one that evokes the image of an accordion . . . which stretches and squeezes in different places as different provisions of the WTO Agreement are applied’.⁸⁵ In the case of Article III:2, first sentence, of GATT 1994 ‘the accordion of “likeness” is meant to be narrowly squeezed’.⁸⁶ The Appellate Body imparted to WTO members the detailed level of analysis it would follow in interpreting the WTO covered agreements and also warned them of the high level of scrutiny it (and panels) would apply, especially in the case of open-textured terms.

2 Dictionaries and context

When interpreting the ordinary meaning of the treaty, dictionary definitions have often been a useful starting point and occasionally conclusive. Generally, the Appellate Body has not used dictionaries in isolation from the broader context of the treaty language, the context of the dispute, the different uses of particular words or phrases, and the other interpretive elements mentioned in the VCLT. The general thread has been to use the contextualized ordinary meaning as the keystone upon which the interpretation is built. Occasions on which the Appellate Body considered only the (non-)contextualized ordinary meaning are

⁸¹ Koskenniemi, *supra* note 13, at 333–334; *contra* Orakhelashvili, *supra* note 52, at 321.

⁸² Appellate Body Report, *US – Gasoline*, *supra* note 3, at 18.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at 114; see also Appellate Body Report, *Canada – Certain Measures Concerning Periodicals (Canada – Periodicals)*, WT/DS31/AB/R, at 466–467.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* The meaning of ‘likeness’ in Art. III:2, first sentence GATT 1994 could also inform the understanding of ‘likeness’ in other articles of the WTO covered agreements.

rare.⁸⁷ As a matter of course, the Appellate Body accepts the limits of dictionary definitions.⁸⁸

The first step is to find 'a' and not necessarily 'the' meaning of the text. The Appellate Body can rely on either common knowledge about the meaning of a particular term or phrase, or dictionaries. Dictionary definitions often confirm the common sense meaning of a term. The Appellate Body usually starts with consulting one or more dictionaries, and then simultaneously contextualizes the dictionary definition – adapting it to the treaty language and its context.⁸⁹

In select cases, the Appellate Body found that the plain or dictionary meaning was satisfactory without the need to contextualize that meaning. It has rarely ended its interpretation with the dictionary or plain meaning of the treaty language.⁹⁰ Even then, the Appellate Body may have relied on contextual elements but not acknowledged this in its report, though this suggestion is speculative. At other times, the Appellate Body immediately considers the ordinary meaning in light of the object and purpose.⁹¹

In most cases, the Appellate Body has relied on general dictionaries, which are not necessarily exhaustive with respect to the various (continuously evolving) definitions of terms in various areas of law, business, economics, or society. Occasionally, specialized and technical dictionaries have been used.⁹² The claim that the *Shorter Oxford Dictionary* has become one of the WTO covered agreements⁹³ is a statement mostly

⁸⁷ E.g., Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU (Brazil – Aircraft (Article 21.5 – Canada))*, WT/DS46/AB/RW, at para. 45; Appellate Body Report, *EC – Bed Linen*, *supra* note 15, at paras 51–57; Appellate Body Report, *EC – Tariff Preferences*, *supra* note 1, at para. 90; Appellate Body Report, *Korea – Dairy*, *supra* note 3, at paras 77–89; Appellate Body Report, *US – Hot-Rolled Steel*, *supra* note 6, at para. 99; Appellate Body Report, *EC – Customs Matters*, *supra* note 44, at paras 224–227.

⁸⁸ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, *supra* note 44, at para. 248; Appellate Body Report, *US – Softwood Lumber IV*, *supra* note 4, at para. 59; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)*, WT/DS70/AB/R, at paras 153–154; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US – Wheat Gluten)*, WT/DS166/AB/R, at para. 67; see also Appellate Body Report, *US – Continued Zeroing*, *supra* note 8, at para. 268, stating the truism that 'a word or term may have more than one meaning or shade of meaning but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it'.

⁸⁹ The Appellate Body has emphasized that dictionaries are only 'a useful starting point': Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States (India – Additional Import Duties)*, WT/DS360/AB/R, at para. 167, n. 324; Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 175; Appellate Body Report, *US – Softwood Lumber IV*, *supra* note 4, at para. 59. See also Gardiner, *supra* note 13, at 169.

⁹⁰ See, e.g., Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, *supra* note 87, at para. 45.

⁹¹ See, e.g., Appellate Body Report, *EC – Tariff Preferences*, *supra* note 1, at para. 90.

⁹² Panel Report, *Mexico – Measures Affecting Telecommunications Services (Mexico – Telecoms)*, WT/DS204/R, at paras 7.81–7.83.

⁹³ Mavroidis, 'Looking for Mr and Mrs Right: Ten Years of the Appellate Body at the WTO', in Sacerdoti, Yanovich, and Bohanes (eds), *supra* note 40, at 348, 358; Mavroidis, *supra* note 69; see also Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Restraints', 98 *AJIL* (2004) 247, at 261. On how the *Oxford English Dictionary* is drafted and compiled see Tomkins, 'Who left the Wags out?', *FT Magazine* (3/4 Mar. 2007), at 16–21.

about isolated parts of DSB reports. Charges of excessive reliance on dictionaries may not accurately depict the Appellate Body's jurisprudence.⁹⁴ The fact that the Appellate Body consults dictionaries is not problematic; it is a common technique.⁹⁵ Dictionaries represent an objective standard to counteract impressions of arbitrariness. What is remarkable is the extent to which the Appellate Body openly acknowledges their usefulness, at least until recently. A critique of *US – Gambling* noted that 'the trend in WTO jurisprudence to minimize the hermeneutic relevance of dictionary definitions is . . . a welcome development'.⁹⁶ However, this was hardly a new development.⁹⁷ More recently, the Appellate Body has mediated the constraints of dictionary definitions with other means of interpretation and through the application of a broad understanding of context.

The limited function of dictionaries became clear in the Appellate Body's interpretation of 'like' in Article III:4 GATT 1994 in *EC – Asbestos*.⁹⁸ Throughout the covered agreements, the Appellate Body observed that 'like products' had to 'be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears'.⁹⁹ This was also the rationale for its explanation in the earlier case of *Japan – Alcoholic Beverages II* of how 'likeness' is a relative concept which stretches like an accordion.¹⁰⁰ The Appellate Body emphasized that the meaning of 'like products' in other provisions would constitute relevant context but 'need not be identical, in all respects, to those other meanings'.¹⁰¹ It consulted dictionaries to define 'like products' and took into account the French and Spanish versions of the treaty language,¹⁰² finding that these 'dictionary meanings leave many interpretive questions open'.¹⁰³ Consequently, the Appellate Body examined the context and the object and purpose of 'like products' in Article III:4.

Even the contextualized dictionary meaning is often only a starting point and, at a minimum, the Appellate Body considers this meaning in the light of the (formal) context and the object and purpose of the treaty. A useful example is its interpretation

⁹⁴ See, e.g., Horn and Weiler, 'European Communities – Trade Description of Sardines: Textualism and its Discontent', in H. Horn and P.C. Mavroidis (eds), *The WTO Case Law of 2002* (2005) at 248, 252; Davey, 'The WTO Dispute Settlement System: The First Ten Years', 8 *J Int'l Econ L* (2005) 17, at 22, n. 22.

⁹⁵ See, e.g., N. MacCormick, *Rhetoric and the Rule of Law – A Theory of Legal Reasoning* (2005), at 126; Gardiner, *supra* note 13, at 166–169.

⁹⁶ Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling*: A Critique', 9 *J Int'l Econ L* (2006) 117, at 123.

⁹⁷ Appellate Body Report, *US – FSC*, *supra* note 22, at para. 129 (citing Appellate Body Report, *Canada – Aircraft*, *supra* note 88, at para. 153).

⁹⁸ Although GATT panels, WTO panels, and the Appellate Body had previously interpreted 'like products', *EC – Asbestos*, *infra* note 99, presented the first opportunity to interpret 'like products' in Art. III:4 GATT 1994.

⁹⁹ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, at para. 88.

¹⁰⁰ See Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 114.

¹⁰¹ Appellate Body Report, *EC – Asbestos*, *supra* note 99, at para. 89.

¹⁰² *Ibid.*, at para. 91.

¹⁰³ *Ibid.*, at paras 91–92 (citing Appellate Body Report, *Canada – Aircraft*, *supra* note 88, at para. 153).

of the term ‘harmony’ in Article 9.3 DSU, when addressing the European Communities’ (EC’s) appeal against the refusal of the Panel to harmonize the timetables in *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*. The Appellate Body consulted the *Shorter Oxford English Dictionary* to define this term in the light of the object and purpose and the context of Article 9.3. The term ‘harmony’ was defined as ‘the combination or adaptation of parts, so as to form a “consistent and orderly whole”’.¹⁰⁴ This definition was then immediately contextualized for the purposes of Article 9.3 to conclude that the use of the term ‘harmonized’ meant that the provision ‘confers to panels a judgment of degree and practicality’.¹⁰⁵ As a result, Article 9.3 did not impose a strict obligation and confirmed the power of panels ‘to organize the steps of the proceedings in a way that will ensure that they form a consistent and orderly whole’.¹⁰⁶ This interpretation was also supported by the use of the phrase ‘to the greatest extent possible’, introducing the main clause of the sentence, and Articles 12.1 and 12.2 DSU, which give panels a margin of discretion in drafting panel working procedures and informed the applicable standard of review in examining a panel’s compliance with its obligations under Article 9.3 DSU.¹⁰⁷ The Appellate Body then continued to contextualize the ordinary meaning of ‘harmonized’ in the light of the particularity of Article 21.5 DSU implementation proceedings and their shortened timeframe (compared with ordinary panel proceedings).¹⁰⁸

The Appellate Body has emphasized that ‘dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized’.¹⁰⁹ In *US – Gambling*, the Appellate Body condemned the Panel’s overly mechanical approach of equating the ordinary meaning with the dictionary meaning and criticized the Panel for not properly examining the variances in definitions of ‘sporting’.¹¹⁰ Although *US – Gambling* could be interpreted as a departure from textualism,¹¹¹ it may be more accurately described as a useful clarification that the ordinary meaning comprises dictionary definitions and their possible uses. The Panel’s extensive use of dictionaries may have signalled to the Appellate Body that its understanding and application of Article 31(1) VCLT had been misunderstood.

¹⁰⁴ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, *supra* note 28, at para. 192.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, at paras 193–194.

¹⁰⁸ *Ibid.*, at para. 195.

¹⁰⁹ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, at para. 164. Compare with *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria) (Preliminary Objections)*, Joint Dissenting Opinion Judges Lauterpacht, Wellington Koo, and Spender [1959] ICJ Rep 156, at 183 and discussed in Fitzmaurice, ‘Hersch Lauterpacht – The Scholar as Judge. Part III’, 39 *British Yrbk Int’l L* (1963) 133, at 150.

¹¹⁰ Appellate Body Report, *US – Gambling*, *supra* note 109, at para. 166.

¹¹¹ Ortino, *supra* note 96, at 123.

In *EC – Chicken Cuts*, the Appellate Body found that the ‘factual context’ is part of the ordinary meaning.¹¹² The Appellate Body examined the ordinary meaning of ‘salted’ in the EC schedule, including its factual context, before turning to the context, the object and purpose, the circumstances of the conclusion of the treaty, and subsequent practice.¹¹³ The introduction of ‘factual context’ under Article 31(1) VCLT confirmed the practice of searching for the contextualized plain or dictionary meaning. The Appellate Body merely articulated its interpretive mode in a more detailed manner and applicable to all WTO covered agreements, including schedules.¹¹⁴

The concept and value of factual context in interpreting the WTO covered agreements may find its origin in McNair’s distinction between the absolute and relative meaning of terms. McNair found that ‘while a term may be “plain” *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used’.¹¹⁵ Determining the relative meaning of the treaty language implied finding ‘their intention as expressed in the words used by them in the light of the surrounding circumstances’.¹¹⁶ In relying on McNair’s position on the ‘relative’ meaning of treaty language, the Appellate Body preferred to cite McNair’s treatise than his earlier individual opinion in *Anglo – Iranian Oil Co. Case*, which dealt with the interpretation of a unilateral declaration but addressed the same point.

The Appellate Body in *EC – Chicken Cuts* reiterated that dictionaries were not always dispositive in finding the ordinary meaning and, as a result, ‘the ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case’.¹¹⁷ It further explained that the ordinary meaning ‘must be seen in the light of the intention of the parties as expressed in the words used by them against the light of the surrounding circumstances’.¹¹⁸ Thus, the Appellate Body approved the Panel’s consideration of ‘products covered by the concession’ and ‘flavour, texture, and other physical products’. These elements could have been qualified as ‘context’ under Article 31(2) VCLT, but this would not have changed the outcome because ‘interpretation pursuant to the customary rules codified in Article 31 . . . is ultimately a holistic exercise that should not be mechanically sub-divided into rigid

¹¹² Prior to *EC – Chicken Cuts*, the Appellate Body had already relied on ‘factual context’, though not qualified as such. See Appellate Body Report, *US – Wheat Gluten*, *supra* note 88, at paras 105–106 (original emphasis); also Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US – Line Pipe)*, WT/DS202/AB/R, at paras 97–110.

¹¹³ Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 148.

¹¹⁴ E.g., the Appellate Body in *EC – Asbestos*, *supra* note 99, could have found guidance in the ‘factual context’ of ‘like’ to answer some of these interpretive questions.

¹¹⁵ McNair, *supra* note 63, at 366 (original emphasis); also X., *supra* note 67, 655, at 946.

¹¹⁶ *Ibid.*, at 365 (original emphasis), and cited by the Appellate Body in *EC – Chicken Cuts*, *supra* note 44, at para. 175; compare with *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (Preliminary Objection)*, Individual Opinion of Judge McNair [1952] ICJ Rep 116, at 118.

¹¹⁷ Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 175.

¹¹⁸ *Ibid.*

components'.¹¹⁹ The Appellate Body considered the ordinary meaning and its factual context before looking at the other context and the object and purpose. The Appellate Body in *EC – Chicken Cuts* again offered clarification in the light of reactions against some of its previous reports.

More recently, in *China – Auto Parts*, the Appellate Body emphasized again the broad definition of context in Article 31(2) VCLT and summarized the content of that provision.¹²⁰ This was hardly a clarification of the VCLT or its own interpretive techniques. As explained in this article, it has applied a broader notion of contextualism. But the Appellate Body added that context, as defined in Article 31(2) must be relevant, meaning that:

context is *relevant* for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue. Thus, for a particular provision, agreement or instrument to serve as *relevant* context in any given situation, it must not only fall within the scope of 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.¹²¹

The relevance requirement seemingly narrows the category of interpretive means listed in Article 31(2), but ultimately underlies every principle of interpretation which allows the taking into account of instruments extraneous to the exact phrase or term under interpretation. The relevance requirement helps to explain the distinction between the interpretation of Articles 31 to 33 VCLT and their application to a particular treaty text or term. In *China – Auto Parts*, this meant that the Harmonized System (HS) might be 'apt to shed light on the meaning of terms used in [members'] Schedules' but is not necessarily or automatically 'context relevant to the interpretative question faced by the Panel'.¹²² This application of the relevance requirement is confusing because the distinction made has nothing to do with the requirement. It is one thing to distinguish between the HS as context for schedules and the HS as context for the other covered agreements which do not explicitly refer to it. It is another to determine whether the HS is relevant context for interpreting a particular schedule tariff line or term and phrase in, for example, Article II:1(b) GATT 1994. The Appellate Body's cited paragraph in *China – Auto Parts* conflates both distinctions.

3 Cross-referencing and context

Cross-referencing is a common interpretive technique, especially in WTO dispute settlement. It ensures that the treaty language is interpreted in the light of its object and

¹¹⁹ *Ibid.*, at para 176; also Appellate Body Report, *US – Continued Zeroing*, *supra* note 8, at paras 268, 273, 282. A subsequent panel has, in turn, misunderstood the Appellate Body's clarification of contextualism. The Panel in *EC – Customs Matters* found that 'the Appellate Body's approval of the use of "factual context" under Article 31 of the *Vienna Convention* indicates that it may alternatively/additionally be taken into consideration under Article 32 of the *Vienna Convention*'. The Panel confounded the Appellate Body's approach towards Arts 31 and 32 VCLT in *EC – Chicken Cuts*. Panel Report, *European Communities – Selected Customs Matters (EC – Customs Matters)*, WT/DS315/R, at para. 7.130, n. 267.

¹²⁰ Appellate Body Reports, *China – Auto Parts*, *supra* note 44, at para. 151.

¹²¹ *Ibid.* (original emphasis).

¹²² *Ibid.*

purpose.¹²³ The technique of cross-referencing is an application of Fitzmaurice's principle of integration:

Treaties are to be interpreted as a whole and particular parts, chapters or sections also as a whole¹²⁴ . . . and with reference to their declared or apparent objects, purposes, and principles.¹²⁵

The use of cross-referencing is not solely a means of contextualizing the treaty language. It also serves to maintain consistency and coherence. Cross-referencing allows for the 'synchronizing' of the meaning of different treaty provisions and guarantees mutually consistent interpretations.¹²⁶ Another portrayal of cross-referencing is 'horizontal cross-fertilization [of jurisprudence]', that is, a treaty provision is interpreted taking account of other provisions in the same treaty and other covered agreements, as previously interpreted by panels and the Appellate Body.¹²⁷ In interpreting in this way, the Appellate Body can remedy careless drafting by negotiators, though this has to be contrasted with genuine cases of interpreting silence.¹²⁸ The Appellate Body often compares and contrasts similar or different language in various treaties or

¹²³ See Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements', 5 *J Int'l Econ L* (2002) 17, at 25; see also Cameron and Gray, 'Principles of International Law in the WTO Dispute Settlement Body', 50 *Int'l Comp LQ* (2001) 248, at 255; *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Dissenting Opinion Judge Anzilotti, PCIJ (1932) Ser. A/B, No. 50, 383.

¹²⁴ Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', 33 *British Yrbk Int'l L* (1957) 203, at 211. See also, e.g., *International Status of South-West Africa*, Dissenting Opinion of Judge de Visscher [1950] ICJ Rep 186, at 187; *Case Concerning Right of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] ICJ Rep 176, at 209; *Ambatielos Case (Greece v. United Kingdom) (Merits: Obligation to Arbitrate)*, Joint Dissenting Opinion of Judges McNair, Basdevant, Klaestad, and Read [1953] ICJ Rep 25, at 30.

¹²⁵ Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', 28 *British Yrbk Int'l L* (1951) 1, at 9. See, generally, S. Pufendorf, *De Jure Naturae and Gentium Libri Octo* (1686 edn, trans. C. H. Oldfather and W. A. Oldfather, 1934), ii, at 797, 803; E. de Vattel, *The Law of Nations, or, Principles of Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (4th edn, 1811), at 255–256. McNair also found that the first step was to decide on 'the unity that must be construed "as a whole"' and depending on 'circumstances it may be a complete treaty or a self-contained part of it or even a single article'. But he refuted 'pedantic insistence' on interpreting the treaty as a whole in all circumstances: McNair, *supra* note 63, at 474–175.

¹²⁶ The term 'synchronize' is borrowed from Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (1992), at 283, 290. On 'mutually consistent' interpretations of the WTO covered agreements see Appellate Body Report, *US – Wheat Gluten*, *supra* note 88, at paras 72–79; see also Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand (US – Lamb)*, WT/DS177/AB/R, WT/DS178/AB/R, at paras 162–181; Appellate Body Report, *US – Line Pipe*, *supra* note 112, at paras 209–211. Compare with *Case Concerning the Auditing of Account between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides*, PCA Award Series (2008) 107, at para. 91.

¹²⁷ Marceau, 'Balance and Coherence by the WTO Appellate Body: Who could Do Better?', in Sacerdoti, Yanovich, and Bohanes (eds), *supra* note 80, at 326, 334.

¹²⁸ On the interpretation of silence see further I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), ch. 4.

different provisions in the same treaty. The need to use the technique of cross-referencing in WTO dispute settlement has been explained as:

[The] effort to ensure horizontal coherence is vital in a treaty such as the WTO, where provisions of the GATT 1947 were combined with new, more specific provisions, and where there was never an authentic attempt by the treaty negotiators to tie together disparate provisions of the treaty in a consistent, articulate, legal fashion, other than by reliance on an ambiguous rule about conflicts.¹²⁹

The Appellate Body has relied on similarities and differences in treaty language, other than the term or phrase under interpretation, either to construe the meaning of the treaty or to confirm its interpretation. In the latter case, cross-referencing to other treaty language is supplementary in the sense of Article 32 VCLT. The Appellate Body's general assumption is that one part of the treaty, and especially the preambular language, can 'add colour, texture and shading to . . . interpretation of the agreements annexed to the *WTO Agreement*'.¹³⁰

Treaty provisions may refer explicitly to other parts of the treaty but this is not necessarily the case. The Appellate Body often assumes as a matter of logic an implied reference to another treaty provision or a term therein, which then becomes part of the context.¹³¹ Treaty provisions may function as a point of reference from which to contrast or compare other different, similar, or identical treaty language. Cross-referencing is a technique enabling one to determine the ordinary meaning of the treaty language by analogy or *in contrario*, but such interpretations are also possible without cross-referencing.

The structure of a treaty provision often consists of an introductory paragraph or a sub-paragraph as an overarching provision, which 'inform[s] all the other obligations' or 'informs the more detailed obligations' set out in that provision.¹³² Generally, the object and purpose and the structure of other treaty provisions and the

¹²⁹ Marceau, *supra* note 127, at 340.

¹³⁰ Appellate Body Report, *US – Shrimp*, *supra* note 3, at para 153.

¹³¹ E.g., Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 111–112; Appellate Body Report, *US – Zeroing (EC)*, *supra* note 14, at paras 192–193; Appellate Body Report, *US – Wheat Gluten*, *supra* note 88, at paras 51–56; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products (US – Steel Safeguards)*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, at paras 346–361 (referring to Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))*, WT/DS121/AB/R, at para. 94); Appellate Body Report, *Japan – Measures Affecting the Importation of Apples (Japan – Apples)*, WT/DS245/AB/R, at paras 179, 184; Appellate Body Report, *Argentina – Footwear (EC)*, *supra* this note, at paras 111–114; Appellate Body Report, *Canada/United States – Continued Suspension of Obligations in the EC – Hormones Dispute (Canada/US – Continued Suspension Hormones Dispute)*, WT/DS321/AB/R, WT/DS320/AB/R, at paras 372, 375, also at 384 (agreeing with Panel Report, *United States – Section 301–310 of the Trade Act of 1974 (US – Section 301 Trade Act)*, WT/DS152/R, at paras 7.44–7.45).

¹³² E.g., Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand – H-Beams)*, WT/DS122/AB/R, at paras 90, 106–108; Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice (Mexico – Anti-Dumping Measures on Rice)*, WT/DS295/AB/R, at paras 125, 202; Appellate Body Report, *India – Additional Import Duties*, *supra* note 89, at para. 153.

entire treaty are considered together. The object and purpose of the treaty can inform what treaty language to compare and suggest that similar treaty language be interpreted similarly or differently. The Appellate Body generally seeks to ensure congruity of the overall treaty language with the object and purpose of the treaty, and aims to respect the ‘architecture’ of the agreements and their provisions.¹³³ Ultimately, it is often the principle of effectiveness that informs the interpretive weight of other different, similar, or identical treaty language.

When the Appellate Body relies on cross-referencing merely to confirm its interpretation, it often cites a series of provisions with perhaps a brief overview. The Appellate Body uses words like ‘confirm’, ‘confirmation’, ‘support’, etc. to describe this function of cross-referencing.¹³⁴ For example, in *Thailand – H-Beams*, the Appellate Body’s analysis of the context in support of its interpretation of ‘positive evidence’ in Article 3.1 of the Anti-Dumping Agreement did not extend beyond an overview of a series of Anti-Dumping Agreement provisions.¹³⁵ Generally, the Appellate Body relies more on other treaty language in support of or to confirm its interpretation than to correct or modify the contextualized ordinary meaning.¹³⁶ The technique of cross-referencing has also been applied, without mention of Articles 31 and 32 VCLT, with the objective of using other instruments of international law as interpretive background.¹³⁷

The text of the treaty may include references or the Appellate Body itself will decide which treaty language offers contextual justification. For example, after examining the text of paragraphs (a) and (b) of Article XVII:1 GATT 1994, the Appellate Body in *Canada – Wheat* looked at context to support its understanding of the relationship between the two paragraphs. It was relevant that both paragraphs were continuously cross-referenced together in other paragraphs of Article XVII:1 and the first sentence of its *Ad Note*.¹³⁸ The Appellate Body accepted that the first but not the second part of paragraph 3 of Article XVII:3 was relevant. The second part had a particular objective and pointed to the inherent limitation to Article XVII:1; this paragraph could

¹³³ See Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea (Japan – DRAMS (Korea))*, WT/DS336/AB/R, at para. 264.

¹³⁴ See, e.g., Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, *supra* note 132, at para. 346; Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (US – Countervailing Measures on Certain EC Products)*, WT/DS212/AB/R, at para. 113; Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998 (US – Section 211 Appropriations Act)*, WT/DS176/AB/R, at para. 159; Appellate Body Report, *US – Line Pipe*, *supra* note 112, at paras 253–256; Appellate Body Report, *Canada – Aircraft*, *supra* note 88, at para. 155; Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US – Lead and Bismuth II)*, WT/DS318/AB/R, at paras 56, 58.

¹³⁵ Appellate Body Report, *Thailand – H-Beams*, *supra* note 132, at paras 108–111; see also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, *supra* note 4, at paras 109–110.

¹³⁶ See, e.g., Appellate Body Report, *US – Section 211 Appropriations Act*, *supra* note 134, at para. 163.

¹³⁷ Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Cotton Yarn)*, WT/DS192/AB/R, at paras 119–121.

¹³⁸ Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain (Canada – Wheat)*, WT/DS276/AB/R, at para. 93.

not 'serve as the sole legal basis for eliminating *all* potential obstacles to trade relating to STEs'.¹³⁹

4 Object and purpose

The 'object and purpose of the treaty' is an evolving concept which has the same meaning but different functions throughout the VCLT.¹⁴⁰ The concept becomes concrete in relation to a particular treaty but cannot be defined exhaustively. The 'object and purpose' is a singular concept, even if strictly speaking the 'object' is about *what* the treaty covers and the 'purpose' is about *why* the treaty covers an issue. Finding the 'object and purpose' is a matter of 'extracting the "essence", the overall "mission" of the treaty'.¹⁴¹ The title, preamble, specific provisions, overall framework, and negotiating history of the treaty are only some of the elements shaping the impression of the 'object and purpose'.

Article 31(1) VCLT envisages the object and purpose of the treaty as a whole, not only of the particular provisions under interpretation.¹⁴² Equally, the object and purpose of other treaty provision(s) may become part of the contextualization of the treaty language. The Appellate Body has found that the 'object and purpose' is instrumental in confirming and justifying interpretations but cannot form 'an independent basis for interpretation'.¹⁴³ This hesitance has been explained by Ehlermann on the ground that 'it is risky to ascertain the object and purpose that the parties pursued if the object and purpose is not expressed in the treaty itself', especially since 'each party may have very different objects and purposes in mind'.¹⁴⁴ The paradox lies in the fact that interpretation in the light of the object and purpose often requires an initial interpretation of the treaty to find its object and purpose.¹⁴⁵ The Appellate Body has recognized that 'most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes', adding that '[t]his is certainly true of the *WTO Agreement*'.¹⁴⁶ This reading of Article 31(1) is preferred to ideas about text and the object and purpose of a provision or a treaty as clinically isolated. Rightly, the Appellate Body has recognized that defining the teleology of the treaty and its provisions is not a matter of technicalities.

¹³⁹ *Ibid.*, at para. 97.

¹⁴⁰ Arts 18(a), 58(1)(b)(ii), 41(1)(b)(ii), 60(3)(b), 31(1), and 33(4) VCLT.

¹⁴¹ *Tenth report on reservations to treaties by Special Rapporteur Pellet – Addendum*, Doc. A/CN.4/558/Add.1, at para. 77, see also 89, 91, proposing draft guideline 3.1.6. See also Buffard and Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?', 3 *Austrian Rev Int'l and European L* (1998) 311, especially at 333; Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', VIII *Finnish Yrbk Int'l L* (1997) 138.

¹⁴² Sinclair, *supra* note 67, at 130.

¹⁴³ Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 106, n. 20.

¹⁴⁴ Ehlermann, *supra* note 79, at 699.

¹⁴⁵ See US argument in Appellate Body Report, *US – Zeroing (EC)*, *supra* note 14, at para. 40 (the US also rejected the idea that a treaty provision can have an object and purpose; only treaties can). Contrast with Report of the ILC Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Finalized by Martti Koskenniemi and Draft conclusions of the work of the Study Group*, Doc. A/CN.4/L.682 and Add.1 and Corr.1, 2 May 2006 (and taken note of by the UNGA Sixth Committee, Doc. A/61/454, para III.4) (ILC Fragmentation Report), at para. 35.

¹⁴⁶ Appellate Body Report, *US – Shrimp*, *supra* note 3, at para. 17.

The Appellate Body appears to suggest that the ordinary meaning of the text in its context needs to be consistent with the object and purpose of all other contextual elements; or, at least, not seriously subvert their object and purpose.¹⁴⁷ For example, the Appellate Body in *US – Gasoline* found that the context of Article XX(g) GATT 1994 included the other provisions of the GATT 1994, in particular Articles I, III, and XI. Conversely, this meant that the context of Articles I, III, and XI also included Article XX – this relationship was revisited and clarified in *EC – Asbestos*.¹⁴⁸ As a result, the interpretation of ‘relating to the conservation of exhaustible natural resources’ could not be so broad ‘as seriously to subvert the purpose and object of Article III:4’; this logic equally applied to the reading of Article III:4 in the light of the object and purpose of Article XX(g).¹⁴⁹

The relationship between the object and purpose of the entire treaty and individual provisions was explored in some detail in *EC – Chicken Cuts*. The Appellate Body criticized the Panel for having incorrectly differentiated between the object and purpose of the WTO agreements and their individual provisions. It found that the object and purpose of individual treaty provisions is subsidiary to the object and purpose of the entire treaty and can be taken into account when helpful in identifying the object and purpose of the entire treaty. Therefore, it was not ‘necessary to divorce a treaty’s object and purpose from the object and purpose of specific treaty provisions, or *vice versa*’.¹⁵⁰ If there is a discernible object and purpose of an individual 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’.¹⁵¹ The object and purpose of individual treaty provisions thus needs to be in harmony with the object and purpose of the entire treaty.¹⁵² The Appellate Body cautioned also against a narrow interpretation which is too focused on the ‘purported’ object and purpose of an individual treaty provision, including a tariff heading. It agreed with the Panel that ‘one Member’s unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis’ for interpreting a tariff heading because the VCLT commands the interpreter to identify the common intentions of the parties to the treaty.¹⁵³ Especially in the case of schedules and their

¹⁴⁷ In its following decision, the Appellate Body relied on ICJ jurisprudence to find that ‘interpretation must be based above all upon the text of the treaty’ and the meaning of the text must be considered in the light of the object and purpose of the treaty and its context: Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 105, also at 109. Other examples include: Appellate Body Report, *EC – Asbestos*, *supra* note 99, at paras 97–99; Appellate Body Report, *United States – Tax Treatment for ‘Foreign Sales Corporations’ – Recourse to Article 21.5 of the DSU by the European Communities (US – FSC (Article 21.5 – EC))*, WT/DS108/AB/RW, at paras 204–206; Appellate Body Reports, *China – Auto Parts*, *supra* note 44, at para. 161.

¹⁴⁸ Appellate Body Report, *US – Gasoline*, *supra* note 3, at 16; compare with Appellate Body Report, *EC – Asbestos*, *supra* note 99, at para. 115.

¹⁴⁹ *Ibid.*

¹⁵⁰ Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 238 (original emphasis). See also, e.g., Appellate Body Report, *US – Stainless Steel (Mexico)*, *supra* note 8, at para. 98.

¹⁵¹ *Ibid.* (recalling Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (Argentina – Textiles and Apparel)*, WT/DS56/AB/R, at para. 47).

¹⁵² See also, e.g., Appellate Body Report, *EC – Tariff Preferences*, *supra* note 1, at paras 155–156, 159–165.

¹⁵³ Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 239.

detailed tariff headings, the Appellate Body appeared to advocate a broader interpretation of the object and purpose.¹⁵⁴ This is another example of the tension between the individual intent of the committing member and the common intentions of WTO members in interpreting schedules. The Appellate Body agreed with the Panel that the ‘security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade’ is an object and purpose of the WTO Agreement as well as of the GATT 1994.¹⁵⁵ But this could not justify the application of an ‘interpretative principle directing Panels to bias towards the reduction of tariff commitments’, as the EC had claimed.¹⁵⁶ In *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, the Appellate Body added that ‘concessions made by WTO members should be interpreted so as to promote the general objective of expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements’ and that ‘“the objective of promoting security and predictability in international trade” is furthered “through the exchange of concessions”’.¹⁵⁷

The context of the treaty language and its object and purpose are important factors in choosing a broader or narrower interpretation. In *US – Shrimp*, the Appellate Body found that in the light of the broad authority attributed to panels and the object and purpose of their mandate in Article 11 DSU, the term ‘seek’ in Article 13 DSU should not be interpreted ‘in too literal a manner’.¹⁵⁸ This formed the basis for finding that Article 13 does not preclude the authority of panels to accept unrequested information from non-governmental sources or so-called *amicus curiae* briefs.¹⁵⁹ By contrast, the purpose of the third sentence of Article 2.4 of the Anti-Dumping Agreement led the Appellate Body in *US – Zeroing (EC)* to apply an *a contrario* interpretation, that is, ‘that allowances should not be made for differences that do not affect price comparability’.¹⁶⁰ This *a contrario* interpretation appeared to trump the grammar, special meanings, and dictionary meanings of the language in the third sentence of Article 2.4. The influence of the object and purpose in choosing a narrower or broader

¹⁵⁴ See also Van Damme, ‘The Interpretation of Schedules of Commitments’, 41 *J World Trade* (2007) 1.

¹⁵⁵ Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 243.

¹⁵⁶ *Ibid.*

¹⁵⁷ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, *supra* note 28, at para. 433 (citing Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador (EC – Bananas III (Article 21.5 – Ecuador II))*, WT/DS27/RW2/ECU, at paras 7.433–7.434).

¹⁵⁸ Appellate Body Report, *US – Shrimp*, *supra* note 3, at para. 107.

¹⁵⁹ *Ibid.*, at paras 108–110. See also Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/AB/R, at paras 157–167; Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 12; Appellate Body Report, *US – Lead and Bismuth II*, *supra* note 134, at paras 36–42; Appellate Body Report, *EC – Asbestos*, *supra* note 99, at paras 53–57; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, *supra* note 134, at para. 76; Appellate Body Report, *US – Steel Safeguards*, *supra* note 131, at para. 68; Appellate Body Report, *US – Softwood Lumber IV*, *supra* note 4, at para. 9.

¹⁶⁰ Appellate Body Report, *US – Zeroing (EC)*, *supra* note 14, at para. 156. Compare e.g., with a more restrictive use of the *a contrario* technique in Case 9/56, *Meroni* [1958] ECR 133, at 140; Case 8/55, *Fédéchar* [1954–56] ECR 245, at 299.

interpretation was also visible in *US – Softwood Lumber IV (Article 21.5 – Canada)*. In interpreting the scope of jurisdiction of an Article 21.5 implementation panel, the Appellate Body emphasized the objective of Article 21.5 DSU in seeking ‘to promote the prompt resolution of disputes’.¹⁶¹ This objective would seem to favour a broader jurisdiction. However, the Appellate Body contrasted this objective with the ‘competing consideration’ that the DSU provided for shorter time-limits and limited claims to be submitted in Article 21.5 proceedings compared with original panel proceedings.¹⁶² These procedural provisions appeared to contradict a broad interpretation of the jurisdiction of an Article 21.5 panel. The Appellate Body added another consideration, namely that the limitations of Article 21.5 proceedings could not be interpreted so as to ‘allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another’.¹⁶³ The Appellate Body approached these ‘competing considerations’ not as in conflict, but as a balance to be sought and to be taken into account in interpreting Article 21.5 DSU.¹⁶⁴

In conclusion, the use of the object and purpose of the treaty never exclusively determines the treaty’s meaning. The function of any means of interpretation is relative to that of others. The above discussion of how and when the Appellate Body has looked at the object and purpose of the treaty or provisions thereof does not warrant labelling its interpretive practices as ‘teleological’. The role of the object and purpose is one of degrees and variances, and cannot be generalized.

5 Conclusions

The interpretation of treaty language in the light of its context and object and purpose is part of a broader appreciation of contextualism in treaty interpretation, which obviously embraces Article 31(2) VCLT. In fact, the negotiating history of the VCLT shows that the ILC did not intend to define context exhaustively. Nuances in the definition of context are possible.¹⁶⁵ Even if the VCLT drafters realized that context has a broader meaning and impact in treaty interpretation, the language in Article 31(2) mirrors the ultimate consensus that could be reached. Also, at the time of the VCLT negotiations there was little practice of international courts and tribunals that continuously revisit the same treaties. This might point to a certain disjuncture between the principles in Articles 31 to 33 VCLT and the interpretive practice of international courts and tribunals, without calling into question the text of the VCLT.

The principle in Article 31(1) VCLT that a treaty be interpreted in good faith and in accordance with its contextualized ordinary meaning and in the light of its object and purpose does not explain how this is done. This section has explained the techniques used by the Appellate Body to arrive at this contextualized meaning. The Appellate

¹⁶¹ Appellate Body, *US – Softwood Lumber IV (Article 21.5 – Canada)*, *supra* note 44, at para. 72.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, at para. 71.

¹⁶⁴ *Ibid.*, at para. 72.

¹⁶⁵ See McNair, *supra* note 63, at 365 (original emphasis); also Morgenthau, ‘Positivism, Functionalism, and International Law’, 34 *AJIL* (1940) 260, at 269 and 271.

Body's application of Article 31(1)–(2) may appear technical at times. The Appellate Body has used Articles 31 to 33 to strengthen its decision to act as a court and exercise the judicial function in the WTO. This explains the degree of formalism in its application of Article 31. The Appellate Body appears increasingly torn between its formal attachment to Articles 31 to 33 VCLT and the recognition that the VCLT ultimately offers only a few basic principles. Incrementally, the Appellate Body explains its interpretations with less reference to the VCLT.¹⁶⁶ The Appellate Body's notion of contextualism represents this tension well. It also shows how contextualism occasionally pushes the edges of voluntarism in the VCLT. But this does not mean that context is always conclusive; it is something to be taken into account. The Appellate Body's recent reports signal a more flexible approach; it simply no longer resorts to the VCLT to justify every step in its reasoning process. This mild trend does not mean that the Appellate Body has changed how it interprets treaties, at least not generally. It only suggests a shift in how it explains its interpretations. This gradual change from formalism to informality in the Appellate Body's interpretive techniques is yet to be fully recognized and embraced by parties in their submissions and panels in their reports.¹⁶⁷ Every step in the process is no longer explained in function of Articles 31 to 33 VCLT, and this is for the better.

B Effectiveness

The principle of effectiveness can perform different functions. Effectiveness can be an independent ground on which the interpreter relies to construe the meaning of the treaty language, but it may equally perform a mere confirming or corrective function. It is often relied upon as a benchmark for reviewing a particular interpretation. In this context, the function of the principle is negative.¹⁶⁸ When consulting dictionary definitions, the Appellate Body has also applied the principle of effectiveness. It has looked at the effectiveness of the treaty language in terms of the treaty's application and enforcement. Equally, it has considered the functioning of the WTO as an institution under the heading of effectiveness. How the Appellate Body applies the principle may depend, to some extent, on whether the treaty language concerns substantive rights and obligations of WTO members or rather procedural or operational provisions.

In *US – Gasoline*, the Appellate Body explained that '[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'.¹⁶⁹ In *US – Offset Act (Byrd Amendment)*, it stressed that the principle of effectiveness was an 'internationally recognized interpretative

¹⁶⁶ See, e.g., Appellate Body Report, *Japan – DRAMS (Korea)*, *supra* note 133, at paras 207–209, 237–242; Appellate Body Reports, *US – Shrimp from Thailand/US – Customs Bond Directive*, *supra* note 48, at para. 226.

¹⁶⁷ See, e.g., Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities (Mexico – Olive Oil)*, WT/DS341/R, at paras 7.22–7.28.

¹⁶⁸ Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)', 62 *British Yrbk Int'l L* (1991) 1, at 47.

¹⁶⁹ Appellate Body Report, *US – Gasoline*, *supra* note 3, at 21.

principle'.¹⁷⁰ In *US – Gambling*, the Panel sought justification for using the principle of effective interpretation. It is unclear why, because the principle is part of customary international law on treaty interpretation. The Panel recognized that Article 31(3)(c) VCLT could apply, but ultimately justified its effective interpretation under the good faith principle in Article 31(1).¹⁷¹ The Panel's reasoning was in line with the Appellate Body's explanation in *US – Gasoline* that the good faith obligation in Article 31(1) 'underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable'.¹⁷²

The functions of the principle of effectiveness in interpreting the WTO covered agreements are still not sufficiently appreciated.¹⁷³ For example, the use of the principle has been contrasted with the 'principal hermeneutic approach' of the Appellate Body.¹⁷⁴ To the extent that the function of the principle in the Appellate Body's jurisprudence has been recognized, the discussion is often not devoid of a certain distrust or scepticism towards it.¹⁷⁵

The Appellate Body systematically interprets the same corpus of treaties within an institutional structure. This reality necessarily influences the weight given to the object and purpose of the treaty, its institutional context, and the wider and deeper system of WTO law.¹⁷⁶ Effectiveness is a relative concept. What the Appellate Body finds an effective interpretation is in part determined by its institutional, judicial, and political context and function and by the object and purpose of the treaties it is asked to apply. Its relative character of the principle also helps to explain why it ultimately

¹⁷⁰ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, *supra* note 44, at para. 271; see also Appellate Body Report, *US – Gasoline*, *supra* note 3, at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 106, 111; Appellate Body Report, *Korea – Dairy*, *supra* note 3, at para 80; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada – Dairy)*, WT/DS103.113/AB/R, at para 133; Appellate Body Report, *Argentina – Footwear (EC)*, *supra* note 131, at para 81; Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre (US – Underwear)*, WT/DS24/AB/R, at 24; Appellate Body Report, *US – Section 211 Appropriations Act*, *supra* note 134, at paras 161, 338; Appellate Body Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WT/DS267/AB/R, at para 549; Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 214. An effective interpretation of the treaty language guarantees that the text is not rendered useless, redundant, or even irrational. See also Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US – Carbon Steel)*, WT/DS213/R, at para. 8.29, see also paras 8.43 and 10.10 ('would yield irrational results').

¹⁷¹ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, at para. 6.49, n. 605.

¹⁷² Appellate Body Report, *US – Gasoline*, *supra* note 3, at 21.

¹⁷³ Compare, e.g., Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction – The Relationship between the WTO Agreement and MEAs and other Treaties', 35 *J World Trade* (2001) 1081, at 1089, n. 22 with Marceau, *supra* note 127, at 330.

¹⁷⁴ Trachtman, 'The Jurisdiction of the World Trade Organization', 98 *ASIL Proceedings* (2004) 139, at 140.

¹⁷⁵ See, e.g., McRae, 'The Legal Ordering of International Trade: from GATT to the WTO', in R. MacDonald and D. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005), at 543, 564.

¹⁷⁶ 'Deeper' denotes how the WTO legal system is not only reflected in the written word of the WTO covered agreements, but equally in the silences of those agreements and the practice and law resulting from the WTO institutional bodies. 'Wider' refers to the relationship between the WTO covered agreements and general international law and other treaty law.

was not codified in the VCLT: it was difficult, if not impossible, to define the concept in writing.¹⁷⁷ The preoccupation of the Appellate Body with giving effect to the rights and obligations of WTO members, and by extension the values and objectives underlying the WTO legal system, has been translated in different types of application of the principle.¹⁷⁸

The principle of effectiveness accompanies the application of all other principles of interpretation and functions as the ultimate justification for the eventual meaning of the treaty. Sometimes, both functions are at play. For example, the Appellate Body in *US – Zeroing (EC)* relied on the principle to justify the *a contrario* interpretation of the third sentence of Article 2.4 of the Anti-Dumping Agreement. In the Appellate Body's view, 'if allowances could be made for differences not affecting price comparability, the purpose of the requirement of the third sentence of Article 2.4 would be undermined'.¹⁷⁹ *A contrario*, 'allowances should not be made for differences that do not affect price comparability'.¹⁸⁰

The principle of effectiveness can also be instrumental in justifying an evolutionary interpretation of the treaty. The principles of effectiveness and evolutionary interpretation are usually regarded as reflecting distinct methods of interpreting treaties, but they can equally mutually support their application. The principle of effective interpretation can mean also that 'the treaty must remain effective rather than ineffective',¹⁸¹ thus the treaty language may need to be actualized to ensure its continued effect.¹⁸²

The principle of effectiveness helps to guarantee the necessary degree of continuity in the development of an international organization, such as the WTO, and the interpretation of a complex network of treaties, such as the WTO covered agreements. Treaty interpretation by a juridical body should be intellectually coherent.¹⁸³ The principle is a reminder to supervise the aggregate result of the interpretation of individual treaty provisions and its implications for the future development of the treaty regime.

An articulation of this function is the established understanding that the treaty needs to be interpreted as a whole.¹⁸⁴ The Appellate Body has emphasized that the principle entails 'the task of the interpreter to give meaning to all the terms of the treaty'.¹⁸⁵ This task is the underlying rationale for the Appellate Body's broad reliance

¹⁷⁷ It has been suggested that caution is advised when concluding that a certain interpretation would 'disregard the *effet utile*' of a covered agreement: see, e.g., Pauwelyn, *supra* note 29, at 402.

¹⁷⁸ On the limitations of the principle, see generally H. Lauterpacht, *The Development of International Law by the International Court* (rev'd edn, 1958), at 229.

¹⁷⁹ Appellate Body Report, *US – Zeroing (EC)*, *supra* note 14, at para. 156.

¹⁸⁰ *Ibid.*

¹⁸¹ Lauterpacht, *supra* note 178, at 228; see, e.g., Arbitral Award, *Eureko B.V. v. Republic of Poland*, 12 ICSID Rep 335, at para. 248.

¹⁸² See, e.g., Panel Report, *Mexico – Telecoms*, *supra* note 92, at para. 7.2.

¹⁸³ See Ruiz Fabri, *supra* note 40, at 53.

¹⁸⁴ See *Fisheries Jurisdiction Case (Spain v. Canada) (Jurisdiction)* [1998] ICJ Rep 432, at 453; *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Dissenting Opinion Judge Anzilotti, PCIJ (1932) Ser. A/B, No. 50, at 383.

¹⁸⁵ Appellate Body Report, *EC – Chicken Cuts*, *supra* note 44, at para. 214; also Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 106; Appellate Body Report, *Argentina – Footwear (EC)*, *supra* note 131, at para. 81; Appellate Body Report, *US – Gasoline*, *supra* note 3, at 21.

on the technique of cross-referencing.¹⁸⁶ The Appellate Body assumes that the treaty language must always have an effect, whatever that effect may be. While the treaty or any part of it cannot be given nil effect, it may be possible that ‘a particular sentence or clause [is] reduced to mere surplussage’.¹⁸⁷ The harmonious interpretation of the WTO covered agreements means that ‘a treaty interpreter read[s] all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously’.¹⁸⁸ This implies that the WTO covered agreements ‘must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction’.¹⁸⁹ Indeed, effective interpretation justifies the use of the technique of cross-referencing, especially when the treaty language itself does not contain any references to other parts of the treaty, its provisions, or other connected and relevant treaties.¹⁹⁰

The function of the principle of effectiveness in the Appellate Body’s interpretation of the WTO covered agreements illustrates why the ILC ultimately and wisely decided not to codify the principle. The principle is rarely the sole guidance and explanation for a particular interpretation. In most cases, it accompanies the application of other principles of interpretation and functions as a touchstone to review the possible meanings of the treaty language. The principle can also be a vehicle to emphasize certain values in the treaty. This is common when an adjudicator continuously revisits the same treaty language. Even then, the principle has its limitations and the observation that ‘inferring limitations on powers from the principle of effective interpretation which is used to induce those very powers is a technique which can be taken only so far’¹⁹¹ applies to the interpretation of the WTO treaty language as much as it does to other treaties establishing an international organization. So far, the Appellate Body

¹⁸⁶ Appellate Body Report, *Chile – Price Band System*, *supra* note 4, at para. 217.

¹⁸⁷ Thirlway, *supra* note 75, at 46; see also *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Separate Opinion of Judge Lauterpacht [1955] ICJ Rep 90, at 104–105.

¹⁸⁸ Appellate Body Report, *Argentina – Footwear (EC)*, *supra* note 131, at para. 81 (original emphasis); see also Appellate Body Report, *Korea – Dairy*, *supra* note 3, at para. 81; Appellate Body Report, *US – Gasoline*, *supra* note 3, at 21–23; Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at 111; Appellate Body Report, *US – Upland Cotton*, *supra* note 170, at paras 547–549; Appellate Body Report, *US – Continued Zeroing*, *supra* note 8, at para. 268, adding at para. 273 that Arts 31 to 33 VCLT ‘cannot contemplate interpretations with mutually contradictory results’.

¹⁸⁹ Appellate Body Report, *Argentina – Footwear (EC)*, *supra* note 131, at para. 81 (original emphasis); see also Appellate Body Report, *EC – Asbestos*, *supra* note 99, at paras 95–97 (citing Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra* note 3, at paras 112–113).

¹⁹⁰ The harmonious interpretation of the WTO covered agreements with other treaties may not be identical to the perception of the relationship between the different WTO covered agreements. The WTO covered agreements were negotiated at the same time, by the same negotiators, between the same members and in the same (institutional) context. The relationship between, e.g., the GATT 1994 and a multilateral environmental agreement will often lack the characteristics of internal logic and consistency, if it can be assumed that the WTO covered agreements themselves reflect these features. Nevertheless, the principle of effectiveness can function as a force of comity between sub-systems of international law and international courts and tribunals.

¹⁹¹ Crawford, ‘Multilateral Rights and Obligations in International Law’, 319 *Recueil des Cours* (2006) 325, at 380.

has not used the principle of effectiveness as an instrument for achieving certain political objectives through dispute settlement. But the principle is a vehicle for making context and the object and purpose of the treaty meaningful, even without justifying this process on the basis of Article 31 VCLT. If the principle has often been neglected in the past, often more in doctrine than in practice, the growth of treaties has forced a reappraisal of its functions.

5. The Function of Treaty Interpretation in the WTO

A General Functions of Principles of Treaty Interpretation

The ILC ultimately codified only the basic principles of interpretation on which agreement could be found. The ILC always made it clear that the effect of its codification was not to impair interpreters' freedom to assess a range of considerations in reaching a conclusion on the meaning of a treaty. It was also aware of the impossibility of an exhaustive codification of the law on treaty interpretation. As a result, it only codified certain key principles and organized them in a particular order. The belief was that Articles 31 to 33 VCLT would be applied together with principles, such as the principle of effectiveness, left uncoded.

With varying degrees of success, international courts and tribunals have responded well to these principles, using them as guidance and justification, as tools to build credibility and to exercise and assert their judicial function, as instruments to achieve accountability, as techniques to order and structure their reasoning process, and, as aids to making their decisions acceptable and comprehensible.

Principles of treaty interpretation guide the adjudicator in the interpretation process.¹⁹² International courts and tribunals generally have not adopted a free interpretation;¹⁹³ principles of treaty interpretation are not about mere rationalization of the process to determine the meaning of the treaty. And, the process of interpretation cannot be so flexible that there is no process at all. Some principles do not contain necessarily tools to establish the meaning of the treaty language, but rather function as guidance for the interpreter in giving weight to other elements of treaty interpretation, such as context or the object and purpose. In that sense, they influence how the interpreter weighs and balances means of interpretation. This is the case with the principle of effectiveness, according to which the interpreter should not deprive the treaty of due effect.¹⁹⁴

¹⁹² McNair defended the 'gradual devaluation' of 'rules' of treaty interpretation: McNair, *supra* note 63, at 366. On the guidance and justification functions see Schwarzenberger, 'Myths and Realities of Treaty Interpretation – Articles 27–29 of the Vienna Draft Convention on the Law of Treaties', 22 *Current Legal Problems* (1969) 205, at 217.

¹⁹³ See, e.g., F. Gény, *Méthode d'interprétation et sources en droit privé positif: Essai critique* (2nd edn, 1919).

¹⁹⁴ Schwarzenberger describes this as the function of 'disguise'. He also distinguishes the function of 'self-deception': if the interpreter is 'unaware of the actual rules' on treaty interpretation: Schwarzenberger, *supra* note 192, at 217.

Principles of treaty interpretation also help to justify the meaning given to the treaty.¹⁹⁵ They help to provide what is reasonably necessary to make a decision comprehensible. They are useful because ‘it is elegant – and it inspires confidence – to give the garb of an established rule of interpretation to a conclusion reached as to the meaning of a statute, of a contract, or of a treaty’.¹⁹⁶ Put differently, principles of interpretation also serve to legitimize the judicial function of courts and the effect of their decisions.¹⁹⁷ Equally, they can function as a benchmark against which to review the interpretation reached; the interpretation will be valid to the extent that no other principle contradicts that meaning.¹⁹⁸ In this sense, principles of interpretation help ‘to objectivise and constrain the subjective preferences of judges’.¹⁹⁹ But a single principle of interpretation may also ‘objectivise’ the opposite conclusion on the meaning of the treaty language.²⁰⁰ This raises the question of the extent to which conclusions on the meaning of the treaty language should be justified.

If principles of treaty interpretation are principles of logic and order, they require some explanation. Disputants should be able to understand how and why the adjudicator came to a particular interpretation.²⁰¹ The quality of judicial reasoning builds the accountability of the judicial decision maker. But principles of interpretation should not be explained by the adjudicator to the extent that disputants are given the impression that these principles are formulas allowing one to predict the answer to a future question of interpretation. Justification is partly a matter of judicial marketing; it is not just reasoning on paper. The extent to which the reasoning process is expressly explained in a judgment varies widely depending on the particular international court, tribunal, or other body, and on the dispute at issue. Practically, it may be impossible to translate the interpretive process into concrete legal language.

B The Function of Treaty Interpretation in WTO Dispute Settlement

In WTO dispute settlement, the first function of treaty interpretation is clarification of a complex network of WTO covered agreements, enabling panels and the Appellate Body to resolve disputes between WTO members about the interpretation and application of those agreements. The Appellate Body has trodden carefully in fulfilling this task. It has interpreted the WTO covered agreements openly, applying a remarkable

¹⁹⁵ Lauterpacht, *supra* note 62, at 53. Proposed standards of justification include universality, correctness, and wrongfulness. See also Schwarzenberger, *supra* note 192, at 217; Wróblewski and MacCormick, *supra* note 11, at 256–257.

¹⁹⁶ Lauterpacht, *supra* note 62, at 48, 53; see also Beckett, ‘Observations des membres de la Commission sur le rapport de M. Lauterpacht – 1. Comments by Sir Eric Beckett’, 43(I) *Annuaire de l’Institut de Droit International* (1950) 435, at 436; Fitzmaurice, *supra* note 109, at 136.

¹⁹⁷ See Poiars Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’, 1 *European J Legal Studies* (2007) 1.

¹⁹⁸ See *LaGrand Case (Germany v. United States of America)* [2001] ICJ Rep 466, at para. 109.

¹⁹⁹ Poiars Maduro, *supra* note 197, at 1.

²⁰⁰ See Koskenniemi, *supra* note 13, at 341–345.

²⁰¹ Wróblewski and MacCormick, *supra* note 11, at 255; see also Thirlway, ‘The Drafting of ICJ Decisions: Some Personal Recollections and Observations’, 5 *Chinese J Int’l L* (2006) 15, at 20–21; Stone, *supra* note 71, at 364; D.P. O’Connell, *International Law* (2nd edn, 1970), at 252.

level of formalism in justifying its conclusions on the meaning of the agreements. This formalism, at times perhaps excessive, helped to make the institution of the Appellate Body and its jurisdiction acceptable to WTO members. On a more substantive level, this formalism also helped realize, to some degree, the promise of the WTO covered agreements as a single integral treaty system. When asked or seeking to clarify the relationship between that treaty system with other treaties and general international law, the Appellate Body has been less expressive in its explanations of this relationship.

The Appellate Body has struggled, nevertheless, with the functions of guidance and justification of principles of interpretation, to the point where one Appellate Body member questioned whether 'if the reasoning is there, is it not better to shed the camouflage?'.²⁰² Another former Appellate Body Chairman contemplates that 'security and predictability would be better served by broad statements of principle that allow WTO Members to orient their activities in the future'.²⁰³ Both statements share a concern about excessive formalism in interpreting treaties and drafting reports. WTO Director-General Lamy, on the other hand, interprets this attachment to the VCLT 'as a clear confirmation that the WTO wants to see itself as being as fully integrated into the international legal order as possible'.²⁰⁴ This may well be the case, but there are limits to the instrumentalism of Articles 31 to 33. The jurisdiction of and the applicable law in WTO dispute settlement prevent the type of integration which Director-General Lamy describes.

Formalism in interpretation by the Appellate Body is visible from its early use of the principles of treaty interpretation codified in Articles 31 to 33 VCLT. Initially, the Appellate Body used Articles 31 to 33 in explaining every step of its reasoning, though other principles of treaty interpretation were also used, but less openly. By adopting this strategy, the Appellate Body succeeded in making its early decisions transparent and understandable – even if sometimes at the cost of finding its own authoritative voice. As claims and arguments became more complex and were made under various agreements, it became increasingly difficult to maintain that strategy. At times, excessive formalism showed the limitations of the principles codified in Articles 31 to 33, causing the Appellate Body to find a more balanced approach in explaining how it arrived at its conclusion about the meaning of the treaty. The Appellate Body initially created an expectation that it would explain and justify every step in its reasoning by reference to, preferably, Articles 31 to 33. This expectation has not entirely disappeared. It seems as if the conclusion that the meaning is evident, as it often is, became intolerable. Indeed, the Appellate Body has sometimes struggled between its attachment to the straitjacket of the VCLT and its attraction to using other customary principles of treaty interpretation.

Treaty interpretation by the WTO Appellate Body, and, in fact, by any court or tribunal, can never be reduced to a mere synthetic application of Articles 31 to 33 VCLT.

²⁰² Abi-Saab, *supra* note 80, at 462.

²⁰³ Ehlermann, 'Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as a Member of the Appellate Body of the World Trade Organization', 36 *J World Trade* (2002) 605, at 638.

²⁰⁴ Lamy, 'The Place of the WTO and its Law in the International Legal Order', 17 *EJIL* (2006) 969, at 979.

The Appellate Body's initial excessive reliance on these provisions was sometimes misunderstood as a signal that it would only accept interpretive arguments based on the VCLT. Other principles and methods of approaching a text were often neglected or too easily dismissed. In making only such arguments, WTO members effectively pushed the Appellate Body to further formalism in its use of Articles 31 to 33 and immoderate informalism in applying principles that are not codified.

Incrementally and gradually, the Appellate Body now explains its interpretations with less reference to the VCLT. Not every step in the process is now explained as a function of Articles 31 to 33 VCLT. In part, this is the result of the acceptance of the judicial function of the Appellate Body in the WTO. This mild trend does not mean that the Appellate Body has changed how it interprets treaties, at least not generally. It mostly suggests a shift in how the Appellate Body explains its interpretations.

Undoubtedly, the Appellate Body has made mistakes, but this is no reason to question customary international law or dismiss the text of Articles 31 to 33 VCLT. Judicial reliability does not preclude judicial fallibility. Mistakes can be corrected; perhaps treaties can less easily be corrected, or in practice not at all.

The Appellate Body is increasingly confident in exercising its judicial function. This is a development which can only be gradual and ultimately limited, especially in the context of a not-fully-developed institutional framework like that of the WTO. In part, this development may be instigated by the imperfections of the WTO as an international organization and its crippled legislative process. The assertion and exercise of inherent powers are illustrative of this maturing, but they equally self-enforce the Appellate Body's early decision to function as a court or tribunal. As said, that decision was not inevitable, but perhaps its consequences were. In part, the evolution of procedural law in the WTO is the result of a dialectic relationship between consent-based powers and inherent powers. The consent of parties forces the Appellate Body to source procedural powers from outside the DSU and on an *ad hoc* basis, and to look at the practice of other courts and tribunals. Occasionally, this has forced the Appellate Body to take a position on the scope of its powers, forming the basis for developing procedural principles that apply generally and not merely on an *ad hoc* basis.

In sum, the WTO dispute settlement system is unusually strong but not necessarily unique. The Appellate Body comes to interpretation from within its function in the WTO institution as a juridical body. In reading the same intractable treaty text, the Appellate Body has probably developed one of the most intense interpretive practices in the history of international dispute settlement. Naturally, this has involved making choices.

An analysis of treaty interpretation by a particular court or tribunal needs to take into account that some issues of interpretation may be wonderfully irresolvable in theory. There may be more than one right answer to a question of interpretation, but a judge is equally concerned with providing a definitive legal answer. For better or worse, the Appellate Body accepts that for every legal question there is a legal answer, and this answer lies in the text of the WTO covered agreements, and possibly other rules of international law. The Appellate Body needs to find an interpretation of that treaty language which accommodates the balances of power between and the

interests of the 153 WTO members, while also preserving its own integrity and that of the WTO. Ultimately, tensions between these two objectives will arise and reconciliation will not always be possible. The conclusion shows how the meta-questions relating to treaty interpretation remain mostly unaltered, also when studied in the context of the WTO.

6 The Lack of an Articulated Theory of Interpretation

The suggestion that the principles of treaty interpretation be rethought is not new. In part, the codification exercise of the ILC involved an exercise in re-evaluating and articulating in a particular system existing beliefs about how to interpret, often stand-alone, bilateral and some multilateral treaties. Nevertheless, the ILC engaged in this task on the assumption that any codified principles of treaty interpretation would apply generally to all types of treaty text, independently of who interprets and for whom the text is interpreted. In other words, the ILC did not connect the principles of treaty interpretation in the VCLT to the subject matter of the treaty, the character of the institution interpreting the text, and the audience for whom the text is interpreted. It intended to articulate a set of principles applying generally in different contexts, and with possibly different outcomes. In doing so, the ILC 'objectivized' the matter of interpretation. Some courts and tribunals have not considered this choice to be an obstacle to using the steps set out in the VCLT to further a particular project. Other courts and tribunals have found it more difficult to use principles of interpretation so boldly. In an almost cyclical movement, the instrumental value of the principles of treaty interpretation is questioned again today. The Appellate Body is likely to fall within the latter category of courts and tribunals, at least for the moment, for reasons relating to *what* it interprets, *who* interprets, and *for whom* it interprets.

Compared to that of other courts and tribunals, the function of the Appellate Body was not neatly defined at its inception. The DSU created a dispute settlement system without making a conscious decision to refer third party resolution of disputes between WTO members to a judicial body. In many respects, establishing a body responsible for reviewing panels' decisions and reasoning on issues of law was an ambitious experiment, but without the expression of a clear sense of purpose or direction of this new institution. The chorus of 'security and predictability' and 'not adding or diminishing the rights and obligations' in Article 3.2 DSU is often used to describe the unique mandate of panels and the Appellate Body. However, it is difficult to imagine that a judicial dispute settlement system would not be entrusted with the tasks of preserving the integrity and respecting the text of the treaty it is mandated to uphold and apply to the resolution of disputes. In other words, the uniqueness of Article 3.2 DSU should not be overestimated. The thrust of the provision is unquestioned, also in other contexts of international dispute settlement.

The question of who interprets must therefore be explained by other means. The Appellate Body is a permanent body of seven part-time members, supported by a separate Appellate Body Secretariat. The members are appointed through a relatively

rigorous process, forcing candidates to demonstrate a clear and sufficiently detailed understanding of the rules and principles which they may be asked to interpret and apply in their future position. The Appellate Body Secretariat is separate from the rest of the WTO Secretariat, meaning that Secretariat staff are not directly involved in political discussions about (changes to) the current treaty rules. They can witness the discussions without having any direct participation in them. In the DSU, WTO members signalled that they wanted some separation of powers between the judicial and political branches of the institution. But WTO members did not go as far as to make that separation absolute and they continue to reserve political control over the dispute settlement system, even if only through reverse consensus. They also did not balance any power at which the dispute settlement system may aspire against secondary law-making powers for the institution.

In principle, the Appellate Body interprets a single treaty. In practice, it interprets a network of treaties that do not necessarily apply equally to all members of the organization within which it functions. The Appellate Body's sensitivity to upholding the principle that these treaties form an integral whole has been visible in its decisions, through an increasing reliance on the principle of effectiveness as a means to connect these varying treaties, sometimes without a clear textual basis for links. In so doing, it has not functionally differentiated between any of the WTO covered agreements. None of the treaties has been labelled as constitutional, administrative, contractual, or legislative, and arguably this is a correct approach because only rights and obligations in individual provisions warrant such a label. The more important observation is that the Appellate Body has not attempted to categorize different types of obligations according to this known typology.

An international court or tribunal with exclusive and specific jurisdiction to apply and interpret one or more treaties has a particular task to ensure that the treaty has effect, and is of continued relevance for the (distant) future. Of course, it cannot modify the terms of the treaty text, chosen by the drafters. But neither are those terms often sufficient to guarantee the treaty's continuing effect and relevance. Treaty language is necessarily incomplete, in terms of scope but also with respect to the amount of detail about how treaty commitments should be applied. In certain treaty systems, institutional and political bodies are entrusted with the task of completing the treaty, sometimes by means of some type of secondary law-making. That task may also be shared with one or more judicial bodies, responsible for judicial review of institutional decision-making and application and interpretation of the treaty commitments by the original treaty drafters, and members of the organization. In performing that task, those bodies – whether judicial or political – have an interest in, foremost, conserving the *status quo* and ensuring that the treaty language is not rendered ineffective, inutile. Although that approach may appear conservationist, it still entails considerable scope for regulating how treaty commitments should be respected. In other words, a conservationist approach is not synonymous with conservatism.

In choosing to conserve the *status quo*, concentered in the treaty text, judicial bodies also seek to protect their own jurisdiction and continued appeal as a third party available to resolve disputes about the treaty's interpretation and application. After all,

that treaty establishes their jurisdiction. In also serving this institutional interest, judicial bodies cannot simply consider the treaty text as it stands at the time of a given decision; at least some perspective on the near or distant future of the (institutional) context in which they function and of the treaty which establishes their jurisdiction seems sensible.

The use of the principle of effectiveness in interpreting multilateral treaties in particular, also establishing some institutional structure, is therefore neither surprising nor worrying. The principle of effectiveness allows for the adaptation of a treaty system to changing circumstances surrounding the treaty, leaving it within the discretion of the interpreter to define those circumstances within a particular chosen timeframe. In other words, the principle of effective interpretation takes you only so far in analysing how a given court or tribunal interprets treaties. Certain interests underlie the choice to rely, as such, on the principle. But those are interests which are not specifically directed to how to apply the principle. In applying the principle, a court or tribunal forms a view of the function of a particular treaty provision, of a treaty, and possibly of an institution. Broad, and perhaps bold, views may be articulated as such in a given decision, or they may find a particular application in light of the facts at issue in a dispute.

The Appellate Body used the principle of effectiveness already in its earliest decisions, though it sometimes attempted to disguise that use. The ways in which the Appellate Body has used the principle are various, but often without a clear expression of the effect(s) the Appellate Body attempts to protect or establish through treaty interpretation. Perhaps this is a result of the fact that the Appellate Body is often asked to interpret relatively technical, detailed provisions relating to trade remedies and to resolve questions about the relationship between trade remedy agreements and other WTO covered agreements. In other disputes, though, the Appellate Body has needed to clarify the regulating power of members wishing to act and protect societal concerns, such as public health, public morals, animal and plant health, etc. Ultimately, those disputes have been few and the choices made by the Appellate Body have been much discussed and debated, but in the bigger scheme were perhaps often very limited to the facts at issue.

This is not to say that the Appellate Body was wrong in choosing to define the interpretive questions before it narrowly. After all, the creation of the Appellate Body was mostly an experiment, and the institution has needed to build its acceptability, credibility, and legitimacy – through treaty interpretation. However, this fact does help to explain why it remains difficult to discern the Appellate Body's broader view on the future of the WTO as an organization, the future scope and effect of the WTO covered agreements, and its own place in that future.

Ultimately, it is perhaps not entirely inaccurate to claim that the Appellate Body has yet to be tested by the more difficult interpretive questions. The WTO covered agreements establish an overwhelming set of commitments for WTO members, and sometimes impose some additional obligations that do not apply to the entire membership. Panels and the Appellate Body have interpreted few of these obligations. Some commitments may appear problematic, but ultimately the interpretation of, for example,

the general exception clause in Article XX GATT 1994 has not necessarily forced the Appellate Body to make bold decisions about this provision's (regulatory) potential. Other provisions, like Article 2 of the Anti-Dumping Agreement have been heavily litigated to force the Appellate Body to take a position on whether the practice of zeroing is permitted in determining the margin of dumping. As an interpretive matter, however, the decision to permit or prohibit zeroing is relatively straightforward, notwithstanding the burdensome political history and context of that decision. The point is that the available jurisprudence has demonstrated that the Appellate Body has used the principle of effectiveness to protect the *status quo*, but nothing more. It has not used the principle to foster regulatory objectives with the intention of transforming treaty commitments into something more than an agreement in writing, into clearer regulatory instruments. In most cases, it resolves an interpretive question in light of the specific facts at issue, without signalling how other facts may or may not fit with that interpretation.

As such, this approach is perfectly reconcilable with the task entrusted to the Appellate Body and sits comfortably with the Appellate Body's jurisdiction and place within the underdeveloped institutional framework of the WTO. It is also understandable in light of the lack of corrective law-making processes.

The Appellate Body has taken great care, at least in the first decennium of its existence, to explain its interpretations of the WTO covered agreements by reference to the VCLT. In so doing, it has attempted to perform its mandate strictly in conformity with the DSU, also respecting the mantra of a member-driven organization. Increasingly, however, the separateness of the institution of the Appellate Body and its function within the organization force it to adopt a different approach, and depart from that type of strict formalism.

The most visible expression of this development is the Appellate Body's report in *China – Audiovisual Products*. In that report, the Appellate Body assertively corrected WTO members' treaty-drafting of China's Accession Protocol, in deciding that China could invoke Article XX GATT 1994 in defence of a claim under a not particularly well-drafted Article 5.1 of China's Accession Protocol to the WTO. In doing so, the Appellate Body attempted to re-enforce the idea of equality in WTO membership, and attempted to reduce the notion of China's WTO-plus obligations to acceptable terms. The Appellate Body confirmed the general principle that it is the sovereign right of states to regulate trade, which is restricted only to the extent that states accept limitations on that right by acceding to the WTO:

With respect to trade, the WTO Agreement and its Annexes instead operate, among other things, to discipline the exercise of each member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed together.²⁰⁵

Through this prism, which reflects a foundational principle of international law, the Appellate Body interpreted the treaty language in Article 5.1 of China's Accession Protocol. It reasoned from principle, and did not construe the meaning of the WTO agreements on the basis of some rigid structure of interpretive steps. The tone adopted

²⁰⁵ Appellate Body Report, *China – Audiovisual Products*, *supra* note 47, at para. 222.

in its reasoning is authoritative, and seemingly sounds liberating. In another part of the same report, the Appellate Body also needed to review whether the Panel had properly interpreted the entry for 'Sound Recording Distribution Services' in China's GATS Schedule.²⁰⁶ On appeal, the Appellate Body was asked whether the Panel had correctly applied the principles of treaty interpretation codified in the VCLT. In performing this task, the Appellate Body did not adopt novel approaches to how those principles should be applied. The Panel had interpreted China's GATS Schedule in the formalistic manner, which previously also defined the Appellate Body's approach. The report nicely reflects the different trends in how interpretations of the WTO treaty language have been explained in the past 15 years of jurisprudence. On the one hand, the report confirms the informalism adopted in recent Appellate Body reports, and shows how that informal approach has empowered the Appellate Body to voice more articulated views on the balance of powers between WTO members, and the depth and scope of their regulatory freedom. On the other hand, the report also shows that panels have yet to adopt a similar approach, for reasons pertaining to their particular constellation, the arguments made before them, and the unavoidable time required for the Appellate Body to instigate the judicial techniques employed by panels.

7 Conclusion

The WTO dispute settlement system is unusually strong but not necessarily unique. The Appellate Body comes to interpretation from within its chosen function in the WTO institution as a judicial body. The uniqueness of the WTO dispute settlement system needs to be emphasized but not overestimated. The system was created by a treaty to apply and interpret a treaty. For the purpose of this study, three characteristics need to be borne in mind. First, the political control exercised by the DSB over panel and Appellate Body reports may not be able to block the adoption of reports because of the reverse consensus rule. Nevertheless, it matters in terms of the context in which panels and the Appellate Body operate and justify their interpretations. Secondly, Article 3.2 DSU may seem self-evident but the provision emphasizes that WTO members expect that they will be able to understand panel and Appellate Body reports in the light of the customary principles of treaty interpretation. Thirdly, the lack of an explicit clause on the applicable law is of conceptual and institutional importance. Interpreted narrowly, Article 3.2 DSU is silent about nothing. It simply does not deal with the question of the applicable law. There is no single test to answer the question of how much other international law, apart from the WTO covered agreements, is part of the applicable law. It is a matter to be decided by WTO members and, in the absence of such a decision, it is a test to be designed by panels and the Appellate Body. The covered agreements are obviously part of the applicable law in WTO dispute settlement. But the WTO covered agreements are incomplete, and sometimes it becomes necessary to apply other international law.

²⁰⁶ *Ibid.*, Part VII.

With the creation of the WTO, interest in the field of international trade law increased and has now exploded. In analysing the field as part of international law the emphasis is often put on the uniqueness of the agreements, the institution, and the dispute settlement system. This uniqueness is then used to test the continued application of customary international law and general principles of international law. It has also caused many to consider how the WTO covered agreements interact with other treaties. The ILC studied these themes, and arrived at the comforting conclusion that the law of treaties, as codified in the VCLT, continued to offer a relevant set of tools to deal with most contemporary problems of treaty conflict and treaty interpretation. That conclusion was not necessarily surprising because the law of treaties was, in large part, based on state practice in dealing with matters of treaty practice and treaty interaction. While those problems have gained in complexity and affect more states these days, the underlying meta-questions have mostly remained unchanged.

The WTO's place in international law and the Appellate Body's place in the international judiciary should, in principle, be undisputed. A treaty created the WTO, and its dispute settlement system offers a means of third party resolution of disputes between WTO members over the application and interpretation of the WTO covered agreements. Moreover, the organization and the agreements build on 50 years of intense treaty practice. Nevertheless, the GATT 1947 and the other pre-1995 agreements were administered, negotiated, and interpreted by a narrow group of diplomats, civil service staff, and selected trade lawyers. This small group applied the law of treaties with relatively little need for consideration of how the law of treaties had been applied by other courts and tribunals or much familiarity with other processes of law-making in international law. Conversely, international lawyers generally neglected to study and learn from treaty-making and interpretation in the context of the GATT 1947.

The success of the WTO dispute settlement system is undisputed. Its success can be measured in different ways and by different audiences of its decisions. For many, the mere fact that the system has functioned effectively, and in a manner as closely resembling the judicial function as the text of the DSU allows, in resolving disputes between various WTO members is a sufficient reason to reach this conclusion. For others, success of the WTO dispute settlement lies in its ability to balance great powers and reinforce the binding force of the WTO covered agreements. Yet others see WTO dispute settlement as a useful laboratory to test whether the promise of international law as a single legal system continues to exist. The WTO dispute settlement system probably serves all of these functions, but this does not make it unique. Other international courts and tribunals often (can) perform similar functions.