WTO Dispute Settlement: is there space for a development-oriented approach to WTO agreements?

Solución de controversias de la OMC: ¿hay espacio para un enfoque orientado hacia el desarrollo de los acuerdos de la OMC?

Solução de Diferenças da OMC: Há Espaço nos Acordos da OMC para um Enfoque Orientado ao Desenvolvimento?

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Abstract

A development-oriented interpretation of World Trade Organization (WTO) agreements is of utmost importance for alleviating some of the burdens of free trade for developing countries; creating a fair playing field between WTO Members having different levels of development; and promoting those aspects of development that are established in the WTO agreements and also in other norms of international law. By analysing the interpretative techniques and principles used by panels and

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the Appellate Body (AB) and also some institutional features of the WTO and the WTO dispute settlement system, this paper investigates whether there is space in WTO jurisprudence for advancing the development dimension of WTO law. It analyses those factors which favour a development-oriented approach and those representing limitations to its progress.

Keywords

WTO, Dispute Settlement, interpretation, development

Resumen

Una interpretación orientada hacia el desarrollo de los acuerdos de la Organización Mundial del Comercio (OMC) es de suma importancia para aliviar algunas de las cargas del libre comercio para los países en desarrollo; creando un campo de juego equitativo entre los miembros de la OMC que tienen diferentes niveles de desarrollo; y promoviendo aquellos aspectos del desarrollo que están establecidos en los acuerdos de la OMC y también en otras normas del derecho internacional. Mediante el análisis de las técnicas y principios interpretativos utilizados por los grupos especiales y el Órgano de Apelación (OA) y algunas características institucionales de la OMC y el mecanismo de solución de controversias de la OMC, este documento investiga si hay espacio en la jurisprudencia de la OMC para avanzar en la dimensión de desarrollo de la legislación de la OMC. Analiza aquellos factores que favorecen un enfoque orientado al desarrollo y aquellos que representan limitaciones para su progreso.

Palabras clave

Organización Mundial del Comercio (OMC), mecanismo de solución de controversias, interpretación, desarrollo

Resumo

Uma interpretação dos acordos da Organização Mundial do Comércio (OMC) orientada ao desenvolvimento é de suma importância para aliviar algumas das cargas de livre comércio para os países em desenvolvimento; para criar um campo de jogo justo entre os Membros da OMC que tenham diferentes níveis de desenvolvimento; e para a promoção daqueles aspetos do desenvolvimento que se estabeleçam nos acordos da OMC e também em outras normas do direito internacional. Mediante a análise das técnicas e princípios interpretativos utili-

zados pelos grupos especiais e o Órgão de Apelação (Appellate Body - AB) e também algumas características institucionais da OMC e o sistema de solução de diferenças da OMC, este trabalho investiga se há espaço na jurisprudência da OMC para incrementar a dimensão de desenvolvimento da normativa da OMC. Analisam-se os fatores que favorecem um enfoque orientado ao desenvolvimento e os que representam limitações ao seu progresso.

Palavras-chave

OMC, Resolução de Disputas, interpretação, desenvolvimento.

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Introduction

Nowadays, there is an extensive discourse that trade is not an end in itself and that it should foster development.[2] The uneven effects of trade liberalisation on developed and developing countries[3] and the continuing poverty and inequality pervading developing countries in the context of globalization increase the demands for distributive justice in international trade and an interpretation of WTO agreements that furthers the development objective.

2 Dani Rodrik. The globalization paradox: democracy and the future of the world economy. p. 30. Ed., W.W. Norton. (2011); Joseph E. Stiglitz. Making Globalization Work. Ed., W.W. Norton & Company. (2006); Amartya Sen, Desenvolvimento como Liberdade. p. 54-60. Ed., Companhia das Letras. (2010). Speeches from the WTO Director General emphasise the need for trade to work for development and poverty alleviation: "WTO, IMF and World Bank leaders: Trade must be an engine of growth for all". https://www.wto.org/english/news_e/news16_e/dgra_07oct16_e.htm (7 October 2016); "Azevêdo: Trade works to create jobs and lift people out of poverty". https://www.wto.org/english/news_e/spra_e/spra83_e.htm (30 September 2015); "Lamy: It's time for a new "Geneva consensus" on making trade work for development". https://www.wto.org/english/news_e/sppl_e/sppl45_e.htm (30 October 2006). The instrumental role for trade in the promotion of development is also acknowledged in the Nairobi Ministerial Declaration, WT/MIN(15)/DEC), (19 December 2015), paras. 6-8.

3 Rodrik. 2011; Stiglitz. 2006; Ha-Joon Chang, Bad Samaritans: The myth of free trade and the secret history of capitalism. Ed., Bloomsbury Publishing. (2007).

The fact that the concerns of developing countries have not been addressed in the Doha "Development" Round and continue to be an issue of disagreement in the political arena of the WTO[4] turns the attention to the WTO Dispute System as a potential forum for fostering development in WTO law, especially through the interpretation of WTO agreements.

A few renowned scholars have made proposals for furthering the objective of development in the interpretation of WTO Agreements,[5] also acknowledging that such developmental perspective has *"been neither sufficiently articulated nor coherently structured in the architecture of international trade agreements."*[6]

The idea of a development-oriented interpretation of WTO law is premised on the fact that development is one of the constitutional objectives of WTO expressed in the preamble of the Marrakesh Agreement.[7] In addition, several parts of the WTO Agreement deal with developmental issues. The GATT 1994 has a special part establishing principles, commitments and areas of collaboration for strengthening the relation between trade and development.[8] The WTO agreements have several special and differential treatment (S&DT) provisions aiming to alleviate the difficulties developing countries face in integrating into the world trade system. Moreover, the preambles of most of the covered agreements make reference to the special needs of developing countries.[9] Ministerial declarations also recognise the development dimension of WTO agreements and the need to interpret them so as to further development.[10] Last but not least, international norms and instruments stress the importance of development and the right to development, including the United Nations Declaration on the Right to Development of 1986 (UN 1986 Declaration), the International Covenant on Economic, Social and Cultural Rights (ICESC), the Millennium Development Goals (MDGs), the 2030 Agenda for Sustainable Development (2030 Agenda), among others.

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4 See paras. 30-32 of the Nairobi Ministerial Declaration.

5 Robert Howse, *Mainstreaming the Right to Development into the World Trade Organization*, en *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*. Ed., UN. (2013); Asif H Qureshi, *Interpreting WTO Agreements for the development objective*. 37 Journal of world trade, 2003. At. 847; Asif H Qureshi. Interpreting WTO Agreements. Ed.,- Cambridge University Press. (2015); Sonia E Rolland. Development at the WTO. Ed., Oxford University Press. (2012).

6 Qureshi, 181. 2015.

7 *"The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living […] to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development […] to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development […]."*

8 See Part IV to the GATT 1994, including Articles XXXVI to XXXVIII.

9 E.g. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement); Agreement on Technical Barriers to Trade (TBT Agreement); Agreement on Trade Related Investment Measures (TRIMS Agreement).

10 See 1993 Ministerial Decision on Measures in Favour of Least-Developed Countries; Doha Ministerial Declaration; and Declaration on the TRIPS Agreement and Public Health.

Under this interpretative approach, development has a *"constitutionally enshrined and systematic"*[11] place in the interpretation of WTO agreements, being truly considered in the interpretative process as a key element for providing countries with *"a share in the growth in international trade commensurate with the needs of their economic development"*, as established in the preamble of the Marrakesh Agreement.

More concretely, it involves putting into perspective the development objectives of the WTO; considering the condition of development in the interpretation and application of WTO agreements; increasing transparency in the judicial process and ensuring that the interpreters of WTO law are representative of the WTO membership as a whole; integrating into the process of interpretation of WTO agreements international law norms that promote development; developing an appropriate approach to interpretation of S&DT provisions; and factoring in interpretative methods that further the development objective.[12]

The relevance of this approach is indisputable as it ultimately aims at reducing and alleviating some of the burdens of free trade for developing countries; creating a fair playing field between WTO Members having different levels of development; and promoting those aspects of development that are established in the WTO agreements and also in other norms of international law.[13] A development-oriented approach is more preoccupied with how trade affects the enjoyment of the right to development than with classifying trade measures within the traditional protectionist vs. liberalising dichotomy. Whether the trade measure is protectionist or not is less important than how it impacts the economic, social and cultural rights of individuals.[14] Economic analysis indicates that there is no ideal pre-established mix of interventionist and liberalizing policies that ensure economic growth, development and end of poverty.[15] Therefore, a development-oriented approach represents an appropriate alternative for assessing measures affecting trade.

Considering that the theoretical framework for advancing a development-oriented approach to WTO law has been established elsewhere,[16] this paper aims

11 Asif H Qureshi. International trade for development: The WTO as a development institution? 43 Journal of World Trade, 2009. At. 175.

12 Qureshi, 186. 2015.

13 Id. at, 185.

14 *"[H]uman rights law is neutral with regard to trade liberalization or trade protectionism. Instead, a human rights approach to trade focuses on processes and outcomes – how trade affects the enjoyment of human rights – and places the promotion and protection of human rights among the objectives of trade reform"*. U.N. Office of the High Commissioner for Human Rights. *Human rights and trade*, Submission to the 5th WTO Ministerial Conference, Cancun, Mexico (10-14 September 2003), At. 3.

15 Stiglitz. 2006; Rodrik. 2011; U.N. Econ. &Soc. Concil [ECOSOC]. Commission on Human Rights. Sub-Commission on the Promotion and Protection of Human Rights, *Mainstreaming the right to development into international trade law and policy at the World Trade Organization*. UN Doc. E/CN.4/Sub.2/2004/17. (9 June 2004). At. 3.

16 See footnote 6.

at investigating how much space there is in practice for panels and the Appellate Body (AB) to promote this development objective in the interpretation of WTO agreements. By analysing WTO jurisprudence, it seeks to assess the feasibility for panels and the AB of adopting such a developmental perspective.

Panels and the AB have strongly relied on the interpretation rules of the Vienna Convention on the Law of the Treaties (VCLT) and other customary rules as an objective guide for interpretation of WTO agreements.[17] In this context, this paper assesses the relevant customary rules of interpretation as interpreted within the WTO dispute settlement system and their potential for furthering the development dimension of the WTO law or creating barriers to it.

Analysing the interpretative aspects connected with the VCLT and other customary rules of interpretation, however, is not sufficient to understand whether there is an appropriate and sufficient framework on which panels and the AB can rely to further the development-oriented approach to WTO law. Although customary rules of interpretation represent an important interpretative guide for panels and the AB in the resolution of disputes, interpretation is also affected by the institutional setup of the organisation and the respective court or tribunal where they are inserted. Each court or tribunal applies rules of interpretation in different ways according to the legal universe to which it belongs and to the role it believes it has.[18] As a result, institutional aspects of the WTO and the Dispute Settlement System which may impact the development dimension of interpretation of WTO agreements will also be addressed in this paper.

1. WTO Dispute Settlement System and the customary rules of interpretation: a development-oriented analysis

There are several aspects in the VCLT and other customary rules which could be analysed for the purposes of treaty interpretation. Only those aspects that are

17 Pursuant to Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the WTO agreements shall be interpreted *"in accordance with customary rules of interpretation of public international law."* Several decisions from the AB confirm that the interpretation rules of the VCLT (Articles 31 to 33) have attained the status of customary rules of interpretation and therefore WTO agreements have to be interpreted accordingly. See, for instance, AB Report, *US – Gasoline* (1996), p. 17; *Japan — Alcoholic Beverages II* (1996), p. 34; *AB* Report, *US – Shrimp* (1998), para. 114; AB Report, *Korea – Dairy* (2000), para. 81.

18 Georges Abi-Saab. The AB and treaty interpretation. Ed., Brill, (2010); Miguel Poiares Maduro. *Interpreting European law: judicial adjudication in a context of constitutional pluralism*.1 Eur. J. Legal Stud. 2007; Richard H Steinberg, *Judicial lawmaking at the WTO: Discursive, constitutional, and political constraints*. American Journal of International Law. 2004; T. Ginsburg, *Political constraints on international courts*, in *The Oxford Handbook of International Adjudication,* 483-502. Ed., Oxford University Press. (2013).

most important for the purpose of interpreting WTO agreements from a development-oriented perspective will be detailed below.

1.1. The general rule of interpretation and the relationship between text, context and object and purpose

The way the interpreter reads the relationship between the interpretative tools encompassed in the VCLT general rule of interpretation (Article 31) may provide more or less space for a development oriented-approach to WTO law.

Article 31(1) of the VCLT reveals three aspects of the interpretative process – text, context and object and purpose: *"a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

Should panels and the AB decide to give primacy to a textualist approach,[19] the possibilities for a development-oriented interpretation of WTO agreements would be reduced as the development dimension of the WTO Agreement is very much placed in its object and purpose and spirit rather than translated into the text of the provisions as clear obligations.

Commentators indicate that panels and the AB have traditionally favoured a textualist approach.[20] This textual approach has been particularly strong in a time where the system was facing a process of consolidation as a rule-based system of adjudication.[21] Nowadays, as the system becomes more mature, it is possible to see some decisions giving more weight to the teleological method, in particular in cases where the textual approach would not allow the AB to fulfil important

19 Authors have distinct understandings on the weight each method of interpretation has in the operation of Article 31(1). For scholars defending textual primacy, see Alexander Orakhelashvili, The interpretation of acts and rules in public international law. p. 310. Ed., Oxford University Press. (2008). For commentators defending that no particular method prevails over the other, see Richard Gardiner. Treaty interpretation. Ed., Oxford University Press. (2015); Isabelle Van Damme, *Treaty interpretation by the WTO AB*, 21 European Journal of International Law, 2010; M. E. Villiger, *The rules on interpretation: misgivings, misunderstandings, miscarriage? the 'crucible'intended by the international law commission*, in *The Law of Treaties Beyond the Vienna Convention*, E. Cannizzaro, Ed., Oxford University Press. (2011); Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*. Available at SSRN 1938618. (2011); F. Zarbiyev, *A Genealogy of Textualism in Treaty Interpretation*, in *Interpretation in International Law*, A. Bianchi, D. Peat & M. Windsor, Ed., Oxford University Press. (2015).

20 Pauwelyn & Elsig. 2011; Zarbiyev. 2015; Abi-Saab. 2010; Orakhelashvili. 2008; John H Jackson. *The case of the world trade organization*. 84 International Affairs. 2008; Michael Lennard. *Navigating by the stars: interpreting the WTO agreements*. 5 Journal of international economic law. 2002; Claus-Dieter Ehlermann. *Experiences from the WTO AB*. 38 Tex. Int'l LJ. 2003; Peter C Maki. *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*. 9 Minn. J. Global Trade. 2000. Abi-Saab, 106. 2010. Contra: Van Damme, European Journal of International Law, 621. 2010.

21 Ehlermann, Tex. Int'l LJ, (2003).

objectives of the WTO.[22] These decisions however coexist with cases where the textual approach prevails.[23]

In any case, the AB has variously asserted that the process of interpretation, as established in the VCLT, reflects a holistic approach, where interpretative rules and methods are applied as an integrated process the elements of which are connected and mutually reinforcing,[24] giving the idea that all methods of interpretation should be equally considered, without an *a priori* hierarchical order.

As the holistic approach functions as a neutral basis compelling the interpreter to give consideration to all interpretative methods, it prevents textual primacy. In this sense, it contributes for the development dimension of interpretation of WTO law by not reducing the role of object and purpose (although not particularly favouring it).

1.2. Teleological interpretation

As stated, most of the development-supporting elements in the WTO Agreement are contained in the preamble of the Marrakesh Agreement, in the preambles of certain covered agreements, being also apprehended from the analysis of the agreements as a whole. All these factors, combined with S&DT provisions, make the development dimension of WTO law explicit. Accordingly, furthering a teleological approach is a necessary step for advancing the development objective in the interpretation of WTO agreements.[25]

Teleological interpretation is of particular relevance for law-making treaties creating an organisation[26] such as the WTO. In this case, the interpretative process should be focused on promoting the fundamental purposes laid down in their constitutive agreements.[27] The main idea is that, in these multilateral treaties,

22 AB reports on *EC – Preferences* (2004); *US – Clove Cigarettes* (2012); *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012).

23 Panel Report on *EC – Fasteners (China),* 2016, para. 7.2.

24 AB Report, *US – Continued Zeroing* (2009), para. 268. See also the AB Reports on *EC - Chicken Cuts* (2005), paras. 175–176; *China - Publications and Audiovisual Products* (2010)*,* para. 399; and *Canada — Renewable Energy / Canada — Feed-in Tariff Program* (2013), para. 5.57.

25 The need for teleological interpretation was stressed in the Declaration on the TRIPS Agreement and Public Health: *"[…] the TRIPS Agreement […] should be interpreted and implemented in a manner supportive of WTO members' right to protect public health […]"* and "*shall be read in the light of the object and purpose of the Agreement […]."*

26 In law-making agreements, the parties are bound by identical aims. They are generally signed by a higher number of parties. Not all signatories participate in the negotiation of the treaty but some accede later on. These treaties have a strong permanence feature to the extent that changes in circumstances may not substantially affect the will of the parties to remain bound by their common purposes. Their objects, therefore, resemble more those of statutes than those of contracts. Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 The American Journal of International Law (1929).

27 The idea that specific rules of interpretation – those relating to statutes (as opposed to contracts) - should apply to law-making treaties was evidenced in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, separate

the will of the parties is externalised in the process of constitution of the organisation. Achieving its purposes becomes an important feature of interpretation. In addition, the conduct and operation of the organisation may require a dynamism that is beyond what could have been originally envisaged by the parties. Consequently, the object and purpose of the agreement may provide an appropriate reference for the correct interpretation of treaty rights and obligations.

This is particularly important in a context of law of cooperation (as opposed to a law of coexistence), where States are organised as a community[28] and international organizations have a crucial role in maintaining peaceful and mutually beneficial collaboration and integration among States. Consequently, the interpretation of treaties establishing international organisations has to evolve with international law, preserving the spirit of cooperation and ensuring that institutions and rules of law shall continue to be in harmony with the new conditions of life. This is not done through interpretation that slavishly follows the text, but rather through evolutionary interpretation of the telos of the treaties establishing the international organisation.[29]

In this context, although the VCLT general rule of interpretation does not particularly favour teleological interpretation over other interpretative methods, the nature of the WTO Agreement as a law-making treaty establishing an international organization and the broad context of the international law of cooperation encourage the use of such interpretative approach.

The AB recognises the interpretative function of the object and purpose and preambles. In *US – Shrimp* (1998), it asserted that the preambular language of the WTO Agreement *"must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement*",[30] identifying the object and purpose as a qualifier of the treaty text, albeit that they cannot override the latter. Nevertheless, the interpretative role of object and purpose in WTO dispute settlement system has historically been regarded as modest.

In the same case, the AB, in assessing the meaning of the chapeau of Article XX of the GATT 1994, seemed to indicate that recourse to object and purpose would only be necessary in case of text ambiguity or in case confirmation of the correctness of the reading of the text itself was desired.[31] It also mitigated the

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opinion of Judge de Castro, I.C.J. Reports 1971, p. 181). The same idea had also been envisioned by Judge Lauterpacht in a separate opinion in *South-West Africa-Voting Procedure*, Advisory Opinion of June ?th, 1955; and also by Judge De Visscher in a dissenting opinion in *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950.

28 Declaration of Former President Bedjaoui in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports 1996, p. 261.

29 Individual opinion of M. Alvarez in *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p. 13 and 16.

30 AB Report, *US – Shrimp* (1998), para. 153.

31 AB Report, *US – Shrimp* (1998), para. 114. Panels also adopted restrictive approaches as regards recourse to object and purpose. See Panel Reports on *Canada – Pharmaceutical Patents*, 2000, p. 51; and *Canada – Aircraft*, 1999, p. 9.119.

interpretative role of the preamble of the WTO Agreement and GATT while giving prominence to the more immediate object and purpose of the individual provision of the relevant multilateral trade agreement being interpreted.[32]

In addition, it stated that *"maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement; but it is not a right or an obligation, nor is it an interpretative rule […]"*,[33] suggesting that elements mentioned in the preamble of the WTO agreements could not function as interpretative parameters to the analysis of individual provisions at the risk of arriving at a *"very broad formulation"*.

It is interesting to note, however, that although the AB attributed a limited role to teleological interpretation in analysing the introductory clauses of Article XX of GATT 1994, and seemed to mitigate the interpretative function of one of the WTO objectives stated in the preamble of the Marrakesh Agreement, it clearly paid due regard to the object and purpose relating to the protection of environment and sustainable development in assessing the meaning of "exhaustible resources" in Article XX(g) of GATT 1994.[34]

In more recent decisions, the AB and, to a lesser extent, panels are increasingly more attentive to object and purpose in the interpretation of WTO provisions.

A more solid reliance on interpretation in light of object and purpose can be found in *EC – Tariff Preferences* (2004), where the AB was called to examine whether, by virtue of footnote 3 to paragraph 2(a) of the Enabling Clause, preference-granting countries in Generalized System of Preferences (GSP) schemes were obliged to accord the same preferential treatment to *all* beneficiaries or whether they were entitled to make distinctions among them.

Noting that the need for positive efforts designed to secure developing countries a share in the growth in international trade was qualified by the expression *"commensurate with the needs of their economic development"* in the preamble of the Marrakesh Agreement, the AB concluded that this provision indicated that developing countries had "*different needs according to their levels of development and particular circumstances."*[35] Accordingly, preference-granting countries could grant *"different tariffs to products originating in different GSP beneficiaries"*, provided that *"identical treatment is available to all similarly-situated GSP beneficiaries […]."*"[36]

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32 In contrast, in *EC – Chicken Cuts,* the AB cautioned against an interpretation of the object and purpose of individual provisions which is dissociated from the broader objective and purpose of the treaty as a whole (AB Report, *EC – Chicken Cuts* 2005, para. 238-239).

33 AB Report, *US – Shrimp* (1998), para. 116.

34 *"[…] The preamble of the WTO Agreement - which informs not only the GATT 1994, but also the other covered agreements - explicitly acknowledges 'the objective of sustainable development'"* (AB Report, *US – Shrimp* (1998), para. 129).

35 AB Report, *EC – Tariff Preferences* (2004), para. 161.

36 AB Report, *EC – Tariff Preferences* (2004), para. 173.

Also, in *China – Raw Materials* (2012), the panel, in analysing the consistency of China's export restrictions on primary products with GATT XX(g), stated that *"a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development"*.[37]

In *US – Clove Cigarettes* (2012), the AB, relying on the object and purpose of the TBT Agreement along with context, interpreted a flexibility into Art. 2.1 of the TBT Agreement that is not readily apparent in the words of that provision.[38] In this case, Indonesia complained about a US ban on imports of cigarettes with characterizing flavours other than tobacco or menthol. The US tried to justify the restraint on the grounds that it was necessary to protect the public health and to reduce the number of individuals under 18 years of age who used tobacco products.

Being classified as a technical regulation, the measure was analysed under Article 2.1 of the TBT Agreement. This agreement, unlike GATT, does not have a general exception provision that allows that the discriminatory effects of a measure to be balanced with national policy considerations. Nevertheless, the AB concluded, in carrying out the 'no favourable treatment' test under Article 2.1 of the TBT Agreement, that de facto discriminatory measures having a *"detrimental impact on competitive opportunities for imports"* were not prohibited as long as they stemmed *"exclusively from legitimate regulatory distinctions"*.[39] This conclusion was reached after a detailed analysis of the object and purpose of the TBT Agreement, especially after the consideration that it strikes *"a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate"*[40] similar to that set out in GATT by means of Art. XX. Also, the absence of an Art XX-like exception was an element of 'context' taken into account by the AB.[41]-[42]

The type of approach of the AB in these cases reveals that it may be more open to a contextual and teleological interpretation of WTO provisions, especially in cases involving sensitive issues such as *EC – Tariff Preferences* (2004), which dealt with the needs of developing countries, and *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), which involved regulatory issues affecting Members' policy space. While so far most of the case-law

37 AB Report, *China – Raw Materials* (2012), para. 7.375.
38 This approach was followed by the panel and the AB in *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012).
39 AB Report, *US – Clove Cigarettes* (2012), para. 215.
40 AB Report on *US – Clove Cigarettes* (2012), para. 174.
41 AB Report on *US – Clove Cigarettes* (2012), paras. 99; 101, 176 and the following paragraphs.
42 The interpretation of other elements of Article 2.1 such the concept of "like product" was also characterised by a strong focus on the preamble of the TBT Agreement as well as other contextual elements such as Article III.4 of the GATT.

adopting a more contextual and teleological interpretation concerns the TBT Agreement, panels and the AB may also be challenged to maintain a consistent approach in relation to other WTO agreements.

In the cases mentioned above, the object and purpose of the treaty was resorted to specially to clarify the meaning of treaty provisions and, in particular, in *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012) and to remedy gaps, i.e. the one left by the lack of exceptions provisions in the TBT agreement. [43] However, there is still space for remedying gaps in other important agreements such as the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM agreements) and making hortatory provisions effective. This is particularly important from the perspective of a development-oriented approach. The SCM Agreement regulates instruments traditionally used for developmental purposes and, despite its lack of preamble, interpreting it in light of the development objective of the WTO Agreement as a whole is of utmost importance for providing developing countries with flexibilities for using subsidies which may be important for their social, economic and technological development.

In addition, there are several S&DT provisions of limited operational value. Realizing the development objective within the WTO involves reinforcing these important mechanisms which are destined to level the playing field between developing and developed countries. Using teleological interpretation can be one of the means to enforce these provisions, especially those bearing hortatory language or asking countries to exercise best efforts or to endeavour to accomplish a stated goal.[44] The objectives of the WTO Agreement would not be taken into consideration in interpretation if S&DT provisions were deprived of legal value and not considered legal commitments with binding and operational force.

Teleological interpretation could also be useful in the analysis of the allocation of the burden of the proof. If the WTO Agreement contemplates a development objective, the rule on the burden of proof should also establish a level playing field between developed and developing countries. For instance, in analysing Article 12.3 of the TBT Agreement, which requires WTO Members to take into account the developing countries' needs in the preparation and application of its technical regulations, standards and conformity assessment procedures, the Panels in *US – Clove Cigarettes* (2012) and *US – COOL* (2012) ultimately concluded that the burden of

43 Although in certain cases, the object and purpose has remedied gaps, it is not seen in WTO jurisprudence as an independent source of rights and obligations overriding the text of WTO provisions. See AB Report, *Japan – Alcoholic Beverages II* (1996), footnote 20; and Panel Report, *EC - Bed Linen (Article 21.5 - India)* (2003), para. 6.86.

44 A number of these best effort provisions exist in the WTO Agreement, including: Articles XXXVII:3 and XXXVI:9 of GATT 1994; Article XV:1 of GATS; Articles 10.1 and 10.4 of the SPS Agreement; Articles 10.3, 12.2, 12.5 and 12.9 of the TBT Agreement; Article 15 of the Antidumping Agreement; and Article 4.10 of the DSU. Rolland, 120, footnote 15. 2012.

proof is on the complaining party and that S&D treatment provisions do not entitle developing countries to a shift in the normal distribution of burden of proof.[45]

The panels, however, did not elaborate on the reason why the onus could not shift to the respondent (in the case, the US) in respect of Article 12.3 of the TBT Agreement. Depending on the circumstances, demonstrating the party's omission to take account of the developing countries' needs is difficult (amounting to a kind of devil's proof). Thus, it is problematic to require that the complaining party provides *prima facie* evidence in this regard. The country that is supposed to take into account the factors set forth in Article 12.3 is in a better position to show that it has actually taken the required measures, which should result in a shift of the burden of proof to the latter.

In *EC – Tariff Preferences* (2004), the AB did shift in some respects the burden of proof that normally applies to exceptions. In these case, the burden of proof generally falls on the respondent. However, the AB considered that the Enabling Clause was not a typical exception. It plays an important role in stimulating development by authorising preferential treatment for developing countries and encouraging deviation from the Most Favoured Nation (MFN) rule. This deviation, however, is stimulated only to the extent that preference-granting countries complies with its extensive requirements.[46] Given the special characteristics and the several requirements of the Enabling Clause, the AB considered that the complainant bore the initial burden of identifying *"those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of establishing the facts necessary to support such inconsistency."*[47]

Consequently, panels and the AB should, in analysing S&DT provisions, not only pay due regard to interpretation techniques that favour the concretisation of the substance of the rule, but also adopt an allocation of burden of proof that takes into account their fundamental role and specific characteristics.

In view of the above, the fact that panels and the AB are progressively relying on object and purpose to interpret sensitive issues within WTO law could indicate that they may also be more open to analyse development-oriented arguments based on teleological interpretation of WTO agreements. However, further advancement of the development dimension of interpretation of WTO agreements also requires that panels and AB have recourse to object and purpose to fill gaps in WTO law, give operational value to S&DT provisions and establish rules on

45 Panel Report, *US – Clove Cigarette* (2012), para. 7.633-7.634; and Panel Report, *US – COOL* (2012), para. 7.770.
46 AB Report, *EC – Tariff Preferences* (2004), paras. 106-113.
47 AB Report, *EC – Tariff Preferences* (2004), para. 115.

allocation of burden of proof that is consistent with the fundamental role of S&DT provisions in promoting economic growth and development.[48]

1.3. Interpretation of WTO law in light of the wider corpus of international law

Article 31.3(c) of the VCLT requires that *"any relevant rules of international law applicable in the relations between the parties"* be taken into account together with context in the interpretation of treaties, establishing the principle of systemic integration of international law.[49] While teleological interpretation of WTO agreements is important to keep the development objective in perspective, consideration of other norms of international law in the interpretation and application of WTO law can provide the interpreter with more elements to make the development dimension of WTO law more concrete.[50]

First of all, it is important to differentiate the recourse to other international norms as applicable law in WTO disputes from interpretation of WTO agreements in light of other international rules. Both the situations may have a positive outcome in terms of advancing the development objective within the WTO.[51] However, the former may not be possible by virtue of the limited jurisdiction

48 A small number of S&DT provisions have been used with any degree of frequency by developing countries. Id. at, 110. In addition, although developing country members have made reference to their developing condition in circumstances relating to S&DT provisions, they have not directly based on it Qureshi, 210. 2015. Consequently, it seems that there is also space for developing countries to raise more arguments based on S&DT provisions, provoking panels and the AB to decide on these issues.

49 U.N. General Assembly. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682. (13 April 2006). At. 2.

50 For instance, the ICESC contain several obligations providing details on several aspects of economic rights which could give the interpreter more substance to interpret and apply the WTO agreements.

51 Application of other international law norms by panels and the AB in the settling of disputes could potentially have changed the outcome of *China – Raw Materials* (2012). In this case, the Panel, in interpreting article XX(g) of GATT 1994, understood that it established a measure of evenhandiness where similar or parallel restrictions concerning the protection of exhaustible resources had to be imposed both in domestic and foreign consumers. As in the case China did nothing to restrict domestic extraction or consumption of the raw materials but imposed restrictions on foreign consumers, the Panel considered it was violating GATT. Were the ICESC considered "applicable law" in this dispute, the outcome could potentially have been different. ICESC allows for some degree of differentiation among nationals and non-nationals as regards protection of economic rights (Article 2.3). At the same time, it guarantees the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" (Article 25). Moreover, it sets forth that *"no restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent"* (Article 5.2). Considering that the ICESC allows for differentiation between nationals and non-nationals, the requirement of even-handiness established in GATT XX(g) could theoretically have been considered contrary to the ICESC. Having the citizens of one country the inherent right to enjoy and utilize fully and freely the natural wealth and resources of their own country, restrictions imposed on national consumers should not be required to be similar to those imposed on foreign consumers as, pursuant to the ICESC, they have different degrees of rights in relation to Chinese natural resources.

attributed to panels and the AB in WTO jurisprudence.[52] In practice, more integration with international law norms is more likely to happen through interpretation, considering the current case law.

Since the beginning of its operation, the AB expressed the view that *"the covered agreements are not to be read in clinical isolation from public international law"*[53] calling for a more systemic (as opposed to a self-contained) interpretation of the WTO agreements against the background of international public law. Panels and the AB have consistently argued for the harmonization of WTO law with other international obligations.

The fact that the basic interpretative technique of the AB denies the idea of the WTO as a self-contained regime shows that it is *"in principle open to interconnectedness in the interpretation of 'development'."*[54] To the extent that several international instruments are concerned in promoting development and the right to development – the 1986 UN Declaration, the ICESC, the MDGs, the 2030 Agenda, among others, the advancement of the development dimension of WTO law may be substantially impacted by the way panels and the AB interpret the relationship between WTO law and other international law norms, especially human rights instruments.

Nevertheless, two main factors prevent a deeper interconnectedness of WTO law with other international law norms.

Firstly, decisions vary substantially on the level of relevance and role attributed to international law in the interpretation of WTO agreements. While in some decisions, it is possible to see that other international law norms effectively played a role in determining the meaning of WTO law; in other decisions, the decision-making body focused on indicating that WTO law and the other international law norm coexist and can harmonise with each other, without providing a satisfactory explanation on how the non-WTO law actually impacts the interpretation of WTO law and influences the meaning of WTO provisions.

For instance, in *US – Shrimp* (1998) the AB, considering *"modern international conventions and declarations"* on environment protection, actually clarified the meaning of GATT XX(g) by concluding that the term 'exhaustible natural resources' comprise both living and non-living (e.g. mineral) resources. In *China – Raw Materials* (2012), in contrast, in interpreting the same WTO provision, in particular, the expression "*made effective in conjunction with restrictions on domestic production or consumption"*, vis-à-vis the principle of sovereignty, the

52 So far, the jurisprudence of the WTO has not accepted that non-WTO norms can be part of the applicable law in WTO disputes, except where these norms reflect customary international law from which the WTO treaty agreements have not contracted out. See AB Report, *Mexico – Taxes on Soft Drinks* (2006), paras. 56 and 78; AB Report*, Peru – Agricultural Products* (2015), para. 5.97; Panel Report, *Korea - Procurement* (2000), para. 7.96.

53 AB Report, *US – Gasoline* (1996), para. 43.

54 U.N. Office of the High Commissioner for Human Rights, 8. 2003.

Panel gives the impression of giving consideration to the latter in the interpretation of WTO agreements, but it ultimately does not play a substantial role. In stating that China's sovereignty over its natural resources has to conform with WTO parameters as a result of the country's accession to the WTO Agreement,[55] the Panel's approach to Article XX(g) does not actually explain how the principle of sovereignty could clarify the scope of these parameters, especially in the particular case of a resource-endowed and developing country.

Secondly, a narrow reading of certain elements of Article 31.3(c) limits its scope and the possibility of consideration of other international law norms in the process of interpretation of WTO Agreements.[56] In particular, this provision raises questions on (i) which rules should be considered; (ii) what rules are 'relevant'; and (iii) which are the parties to be considered, for the purposes of this provision. In addition, (iv) this provision does not clarify *"whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises."*[57] The interpretation of panels and the AB in respect of these issues poses limitations on how Article 31.3(c) can be used as a tool assisting in the promotion of a development-supporting interpretation of WTO agreements.

(i) Which rules?

In general, there is some understanding among legal scholars that the relevant rules of international law include at least international conventions, international custom, and general principles of law.[58]

Important instruments recognizing the right to development, however, do not reflect these traditional sources of international law. For instance, there is no doctrinal consensus on the status of the right to development[59] and the 1986 UN Declaration. In addition, instruments such as the MDGs and the 2030 Agenda are commonly classified as soft law. This poses challenges for the role of Article 31(3)

55 Report of the Panel, *China – Raw Materials* (2012), para. 7.405.

56 References to international law norms in the interpretation of WTO agreements can be made without reference to Article 31.3(c) of the VCLT. However, they are limited to those situations where international rules can assist in clarifying the ordinary meaning of words of the treaties being interpreted or where they are considered supplementary means of interpretation (e.g. they are part of the historical background of the relevant WTO agreement). Joost Pauwelyn. Conflict of norms in public international law: how WTO law relates to other rules of international law. Ed., Cambridge University Press. 2003.

57 McLachlan, The International and Comparative Law Quarterly, 290-291 (2005).

58 Gardiner. 2015; Orakhelashvili. 2008; Qureshi. 2015.

59 Denise Prévost. Balancing Trade and Health in the SPS Agreement: The Development Dimension. p. 21. Ed., Wolf Legal Publishers. (2009); Isabella D Bunn. The right to development and international economic law: legal and moral dimensions. Ed., Bloomsbury Publishing. (2012). Nevertheless, several components of this 'umbrella' right have been given legal effect in various human rights instruments, that could be interpretative tools.

c of the VCLT in furthering a development-oriented approach to WTO law based on these soft law instruments.[60]

Panels and AB do not seem willing to accept non-traditional sources of law in the interpretation of WTO agreements.[61] The fact that the ICESC – which reflects one of the most relevant treaties recognizing fundamental rights for the realization of the right to development - is a traditional source of law[62] keeps the relevance of this instrument as a tool for promoting a development-oriented approach in WTO law. Nevertheless, a deeper consideration of the development dimension of WTO law requires that panels and the AB expand the interpretation of WTO agreements vis-à-vis non-traditional sources of international law. This would be in line with the legal development in the jurisprudence of other international courts, where the role of soft law in treaty interpretation is increasing.[63]

(ii) Which rules are relevant?

According to the case law of the AB, international law rules will be relevant, for the purposes of treaty interpretation, to the extent that they *"concern the same subject matter as the treaty terms being interpreted."*[64]

This interpretation ("same subject matter") may be considered too restrictive and therefore prejudicial for the advancement of a development-oriented approach to WTO law. For instance, legal instruments relating to the right to development, economic, social and cultural rights may not concern the exact same subject matter as WTO agreements, but they may still be useful in clarifying certain of their provisions, as trade and development are intrinsically related matters.

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60 Potentially, soft law instruments could be used as supplementary means of interpretation. However, supplementary means of interpretation are of limited applicability as they shall be resorted to only if the conditions set forth in Article 32 of the VCLT are met.

61 The Panel in *EC – Approval and Marketing of Biotech Products* (2006), para 7.67, considered as 'rules', for the purpose of Article 31(3)(c), only those conventional elements of hard law: (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognised general principles of law. The AB in *US – Anti-Dumping and Countervailing Duties (China)* (2011), paras. 307 and 308, equated 'rules of international law' to those sources defined in Article 38 of the ICJ Statute. In *US – Shrimp* (1998), para. 130, the AB, when interpreting the term 'natural resources' in Article XX(g) of the GATT, made reference to the Agenda 21, which is soft law. In this case, this legal instrument functioned as evidence of the common understanding of the parties as to the meaning of a term. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 The International and Comparative Law Quarterly 279(2005).

62 The ICESC is a treaty but could potentially be considered customary law.

63 The jurisprudence of the European Court of Human Rights shows several cases where sources of law which have not been signed or ratified; which are not conventional means of interpretation; and which are intrinsically non-binding instruments of the Council of Europe Bodies have been used for interpretative purposes. Gardiner, 307-310. 2015.

64 AB Reports on *US – Antidumping and Countervailing Duties (China)* (2011), para. 308; *EC and certain member States — Large Civil Aircraft* (2011), para. 846-855; *Peru – Agricultural Products* (2015), paras. 5.102-5.103.

The text of Article 31(3)(c) does not fix a narrow criterion according to which rules must concern the same subject matter. In fact, the provision does not establish any criteria apart from the "relevance" of the rule, which is more naturally linked to its ability to clarify another rule and not necessarily to the fact that they concern the same subject matter.[65] Any rule of international law capable of clarifying a treaty term should fall within that provision.[66] In addition, the definition of "same subject matter" is imprecise, considering the various intersections between different areas (e.g. trade and environment, trade and investment).

Therefore, it is too restrictive to require that international rules concern the same subject matter of the treaty being interpreted. It should suffice that they relate to the treaty being interpreted and are able to clarify its provisions. This more reasonable approach enables that development-related instruments be taken into account in the interpretation of WTO agreements even when they do not touch on the specific subject matters of WTO agreements (e.g. subsidies, trade-related investments, etc.).

(iii) Which parties?

The reference in Article 31(3)(c) to international law rules 'applicable between the parties' does not clarify whether these rules shall apply only to the parties to the dispute or whether it should be applicable to *all* the parties to the treaty under interpretation.

Where the relevant rules of international law are customary law or general principles of international law, this discussion is not relevant to the extent that they will be binding to each and every State. This issue is particularly relevant when it comes to resorting to treaties other than the one being interpreted, because, in this case, not all parties to the dispute or to the treaty being interpreted may be bound by the treaty being resorted to.

This discussion has direct implications on the development-oriented interpretation of WTO law. It is difficult to find treaties involving development rights (e.g. human rights treaties) whose parties correspond to the whole WTO membership. For instance, the parties to the ICESC are not the same as the WTO Members. Just to cite one example, although the US signed the ICESC, it has never ratified it. In this sense, there is doubt whether the ICESC could be raised in WTO disputes as a tool assisting in the interpretation of WTO law.

Four solutions for this question is found in international law doctrine:

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65 The French version of the provision refers to *"toute règle pertinente de droit international applicable dans les relations entre les parties."* "Pertinente" is the quality of relating to the thing that is being thought about or discussed; or the quality of being appropriate.

66 Qureshi, 47. 2015.

1. Recognizing that the international rules referred to must be binding on all parties to the treaty being interpreted.
2. Allowing that the relevant rules of international law be binding only on the parties to the dispute.[67]
3. Requiring that the treaty being referred to reflects customary international law.[68]
4. Requiring that the non-WTO rule be "*at least implicitly accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means."*[69]

In *EC – Approval and Marketing of Biotech Products* (2006), the Panel, based on the idea that "party" in Article 2.1(g) of the VCLT means those States which have consented to be bound by the treaty, opted for the most restrictive solution, i.e., requiring that the relevant rules of international law be applicable in the relations between *all* the parties to the treaty under interpretation, that is, all WTO Members. According to the Panel, this approach *"ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules."*[70]

That drew criticism from legal scholars who stressed that, although the WTO jurisprudence signalled that its law should not be read 'in clinical isolation' from public international law, this narrow reading of Article 31(3)(c) VCLT effectively guaranteed such clinical Isolation.[71] The International Law Commission (ILC) noted that interpreting article 31 (3) (c) so that the treaty to be taken account of must be one to which all parties to the WTO treaty are parties almost nulifies the role of other treaties in assisting the interpretation of WTO law.[72]

Although in that case the Panel stressed that 'parties' for the purposes of Article 31(3)(c) would mean all parties to the agreement being interpreted, it also highlighted that, because the relevant rules were not even binding on the parties to the

67 This solution, however, could entail potential conflicting interpretations. Id. at. and McLachlan, The International and Comparative Law Quarterly, 314-315 (2005).

68 Although this solution may be correct in technical terms, *"(i) it could preclude reference to treaties which have very wide acceptance in the international community […] but which are nevertheless not universally ratified and which are not accepted in all aspects as stating customary international law […]; (ii) it could also preclude references to treaties which represent the most important elaboration of the content of international law on a specialist subject matter, on the basis that they have not been ratified by all parties to the treaty under interpretation"*. McLachlan, The International and Comparative Law Quarterly, 314 (2005).

69 Pauwelyn, 261. 2003.

70 Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.70.

71 J. Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in *The Law of Treaties Beyond the Vienna Convention* 205, E. Cannizzaro, Ed., Oxford University Press. (2011).

72 U.N. General Assembly. International Law Commission. *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law.* 227-228. Doc. A/CN.4/L.682 13 April 2006.

dispute, it did not need to take a position on whether in such a situation it would be entitled to take the relevant rules of international law into account.[73] Consequently, it left open the possibility of resolving the case using solution (2) above.[74]

In *EC and certain member States – Large Civil Aircraft* (2011), the AB did not take a conclusive approach on the meaning of 'parties' for the purposes of Article 31(3)(c) of the VCLT, but it suggested that application of Article 31.3(c) required a reasonable equation between, on one side, the principle of systemic integration, and, on the other side, the rights and obligations assumed by WTO Members which may not be part to the other international instruments.[75]

More recently, in *Peru – Agricultural Products* (2015), the AB allegedly suggested that recourse to Article 31.3(c) may presuppose that all parties to the WTO are bound by the rules of international law.[76] In explicating (i) that interpretation is a process that requires an homogeneous understanding by all the parties to the treaty reflecting their common intentions; and (ii) that it is not possible to conduct a partial interpretation of a treaty based on the understanding of only some parties, the AB has given an indication that it may consider the term "parties" as all the parties to a treaty, for the purposes of Article 31(3)(c):

> "[…] Article 31(1) of the Vienna Convention states that '[a] treaty shall be interpreted' such that the object of the interpretative exercise is the treaty as a whole, not the treaty as it may apply between some of its parties. We thus understand that, with multilateral treaties such as the WTO covered agreements, the "general rule of interpretation" in Article 31 of the Vienna Convention is aimed at establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted."[77]

Another possible interpretation is that the AB requires that the interpretation in light of relevant rules of international rules be consistent with the common intentions of the parties. This is in line with AB ruling on *EC and certain member States – Large Civil Aircraft* (2011) where it stated that interpretation of "the parties" in

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73 Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para. 7.72.

74 Peter Van den Bossche & Werner Zdouc. The Law and Policy of the World Trade Organization - Text, Cases and Materials. pp. 190-191. Ed., Cambridge University Press 3rd ed. (2013).

75 AB Report, *EC and certain member States – Large Civil Aircraft* (2011), para. 845.

76 Because the AB did not find that the international norms resorted to by Peru were "relevant" for the purposes of Article 31.3(c), it argued that it did not need to address the meaning of the term 'parties' in this provision. However, from the reading of the AB report, it is possible to make some inferences as to its understanding of this term.

77 AB Report, *Peru – Agricultural Products* (2015), para. 5.95.

Article 31(3)(c) should be oriented by the fact that the purpose of treaty interpretation is to establish the common intention of the parties to the treaty.[78] From this perspective, resorting to the object and purpose of the treaty interpretation to identify those disciplines outside the treaty that may be relevant for the parties to the agreement could be an intermediate solution to the problem of defining the relevant rules of international law applicable in the relations between the parties. In this case, being the object and purpose of a treaty an expression of the parties' common intentions, it could serve as a parameter to indicate which international rules may be relevant for the purpose of Article 31.3(c).

As indicated above, the preamble of the WTO treaty makes reference to several objectives (e.g. sustainable development; environment, economic development, etc.) which may be indicative of the Members' common intentions to take them into account in the interpretation of WTO disciplines. Therefore, international agreements pursuing these objectives could be seen as 'relevant rules of international law applicable in the relations between the parties'. This approach would favor a development-oriented interpretation of WTO law as development is among the objectives of WTO law and resorting to other international instruments relating to this subject matter could assist panels and the AB in the clarification of WTO obligations.

(iv) Temporality

Article 31(3)(c) of the Vienna Convention does not make it clear whether, in the interpretation of a treaty, account must be taken of relevant rules of international law that (i) existed at the time of conclusion of the treaty being interpreted or (ii) emerged later on and exist at the time of interpretation.

The first proposition of the ILC special rapporteur Sir Humphrey Waldock was to take into account, for interpretation purposes, only those rules existing at the time of the conclusion of the treaty. However, the ILC realized that this formula would not address intertemporal problems and would not reflect the evolution of international law.[79] Consequently, by not setting forth any specific rule on temporality, the VCLT rules of interpretation left open the possibility of interpreting treaty provisions in light of the relevant rules of international law existing at the time of the conclusion of the treaty or at the time interpretation issues are raised.

The AB has been consistent in applying an evolutionary interpretation of treaty terms, especially in view of the indefinite duration of the agreement and the

78 AB Report, *EC and certain member States – Large Civil Aircraft* (2011), para. 845.
79 Mustafa Kamil Yasseen. L'interprétation des traités d'après la Convention de Vienne sur le droit des traités. Ed., Martinus Nijhoff. (1976).

need to keep WTO law in line with the development of international law and the values of the international community.

In *US – Shrimp* (1998), in interpreting the term "exhaustible natural resources" under GATT XX(g), the AB noted that whose words were *"crafted more than 50 years ago"* and *"must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."*[80] Moreover, this construction is reinforced by the fact that *"the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy"* (para. 129) and that *"modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources."*[81] Given the "evolutionary", rather than "static" definition of the term, the AB considered that it comprised both living and non-living (e.g. mineral) resources.

Likewise, in analysing the scope of China's commitment under its GATS Schedule, in particular, the entry *"sound recording distribution services"*, the AB, in *China – Publications and Audiovisual Products* (2010), considered that the WTO Agreement is a treaty of indefinite duration and that generic terms may be interpreted differently over time, contrasting China's arguments that its commitments should be interpreted based on the meaning of those terms at the time the former were made.[82]

Evolutionary interpretation is very important for a development-oriented interpretation of WTO Agreements. Several instruments are constantly emerging in connection with development and sustainable development (e.g. MDGs, 2030 Agenda, Framework Convention on Climate Change, Paris Agreement, among others). The fact that the AB has been consistently adopting an evolutionary approach to WTO law may also open space for a development-supporting interpretation of WTO agreements.

1.4. Principle of effectiveness

The principle of effectiveness[83] – which is recognised by the AB as *"one of the corollaries of the "general rule of interpretation" in the Vienna Convention"*[84] –

80 AB Report, *US – Shrimp* (1998), para. 129.
81 AB Report, *US – Shrimp* (1998), para. 130.
82 AB Report, *China – Publications and Audiovisual Products* (2010), paras. 396-397. Panels, in contrast, seem more hesitant in applying evolutionary interpretation. See Panel Reports on *EC – IT Products* (2010), para. 7.600 and footnote 806; *EC – Chicken Cuts (Brazil)* (2005), para. 7.99.
83 For an extensive analysis of the functions of the principle of effectiveness in the jurisprudence of the AB, see Isabelle Van Damme. Treaty interpretation by the WTO AB. Ed., Oxford University Press. (2009).
84 AB Report, *US - Gasoline* (1996), p. 23.

plays an important role in advancing the development dimension of the WTO law, especially in cases where the explicit intentions of the parties are not clearly articulated in the WTO provisions and the principle, as a mandate for interpreting the treaty as a whole and with a view on the purpose which the treaty is considered to fulfil,[85] enables the interpreter to fill in gaps or read WTO obligations consistently with the development objective of the WTO.

An international treaty – including the WTO Agreement – inevitably *"bears the imprint of many hands"* and its text is *"sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructed ambiguity."*[86] Where the common intentions of the parties are not clearly stated or not at all present to the minds of the parties when they negotiated, the principle of effectiveness requires that the judge acts *"on the implied intention of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue."*[87]

The WTO Agreement contains several obligations relating to trade and development (Article XXXVI of GATT) which are characterised by their vague nature, in addition to S&DT provisions lacking operational value. The interpretative practice of the AB of reading the treaty as a whole and harmoniously[88] could contribute to the enforcement of such obligations. In this situation, the principle of effectiveness may complement and reinforce teleological interpretation, refining it irrespective of whether the objectives and values of the treaty are explicitly articulated in its text.

For instance, in relation to provisions where Members are supposed to take into account the special needs of developing countries, the WTO jurisprudence has generally attributed a very low level of responsibility to the party that is supposed to give special regard to the situation of the former. This could be reversed by effective interpretation.

In *US — Steel Plate* (2002), the Panel assessed the extent of Member's obligation under Article 15 of the Antidumping Agreement, under which special regard must be given to developing countries when considering the application

85 Hersch Lauterpacht. *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. YB Int'l L., 73 (1949).

86 AB Report, *US – Continued Zeroing* (2009), para. 306.

87 Lauterpacht, Brit. YB Int'l L., 80 (1949).

88 In *US – Gasoline*, the AB asserted that, under the principle of effectiveness "*interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility*" (AB Report, *US – Gasoline*, 1996, p. 23). See also AB Report, *Japan – Alcoholic Beverages II*, 1996, p.12. In *Argentina – Footwear* (EC), the AB considered that provisions relating to different WTO covered agreements and relating to the same matter should "*a fortiori be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction." Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously"* (AB, *Argentina – Footwear* (EC), 2000, para. 81) See also AB Report, *Korea – Dairy*, 2000, para. 81.

of antidumping measures. The Panel considered that there are no specific legal requirements for specific action in the first sentence of Article 15 and that, therefore, *"Members cannot be expected to comply with an obligation whose parameters are entirely undefined."*[89] In *EC — Tube or Pipe Fittings* (2003), the Panel similarly stated that Article 15 *"clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action."*[90] Likewise, the Panel in *EC — Bed Linen* (2001) stated that *"[…] Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. […] It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."*[91]

In interpreting Article 10.1 of the SPS Agreement, which urges WTO Members to consider the special needs of developing countries in the preparation and application of sanitary and phytosanitary measures, the Panel in *EC – Approval and Marketing of Biotech Products* (2006), by adopting a very literal approach, considered that the dictionary definition of 'take account of' was the same as *"consider along with other factors before reaching a decision"*. Consequently, it considered that *"Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead [sic], or may lead, to a decrease, or a slower increase, in developing country exports."*[92]

Likewise, in analysing the term *'take account of'* in Article 12.3 of the TBT Agreement, the panels in *US – Clove Cigarette* (2012) and *US – COOL* (2012) both considered that Article 12.3 did not require a specific action or result from the country implementing the measure. In *US – Clove Cigarette* (2012), the panel stated that *"this provision does not, in our view, 'prescribe a specific result to be achieved'. Rather, we read Article 12.3 as an obligation to 'take account of" the special needs of developing countries'."*[93] Likewise, the Panel in *US – COOL* (2012), based on dictionary definition of the term, took the view that *"'to take account of' and 'to take into account' mean to consider, but not necessarily to act in line with the specific need, view or position under consideration."*[94] In addition, it found that *"Article 12.3 of the TBT Agreement does not amount to a requirement for WTO Members to*

89 Panel Report, *US - Steel Plate* (2002), para. 7.110.
90 Panel Report, *EC - Tube or Pipe Fittings* (2003), para. 7.68.
91 Panel Report, *EC - Bed Linen* (2001), para. 6.233.
92 Panel Report, *EC – Approval and Marketing of Biotech Products* (2006), para. 7.1620-7.1621.
93 Panel Report, *US – Clove Cigarette* (2012), para. 7.617.
94 Panel Report, *US – COOL* (2012), para. 7.776.

conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision."[95]

Imposing no concrete requirement to show that active and meaningful consideration has occurred may frustrate the objective of the respective provisions and go against an effective and teleological interpretation thereof. Without imposing a more substantive obligation, equating 'take account of' to accord consideration to certain factors may result in the relevant country being very receptive to developing countries' concerns during the decision-making process, holding consultations with them, etc. but ultimately doing nothing that actually reflects the special needs of developing countries in its regulations (which is inconsistent with the development objective of the WTO Agreement). While 'take account of' may not be a requirement for WTO Members to conform their actions to the special needs of developing country, they should at least be obliged to justify on objective and reasonable grounds the lack of incorporation of the concerns of developing countries in their regulations.

Moreover, general exceptions in the WTO agreements also contain an open-textured language (e.g. definition of public morals in Arts. XX(a) of GATT 1994, XIV(a) of the General Agreement Trade in Services (GATS), and XXIII.2 of the Agreement on Government Procurement (GPA); public order in Art. XIV(a) of GATS and 27.2 of the TRIPS Agreement; human life in Arts. XX(b) of GATT 1994; XIV(b) of GATS, XXIII.2 of the GPA and 27.2 of the TRIPS Agreement). Under the principle of effectiveness, the interpreter could potentially expand the scope of such provisions, including developmental concerns as appropriate exceptions to trade rules.

As mentioned, in *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), despite the absence in the TBT Agreement of a general exception like Article XX of GATT 1994 allowing that the discriminatory effects of a measure be balanced with national policy considerations, the AB considered that it was possible to make this kind assessment under Art. 2.1 of the agreement. This represents a strong focus on effective and teleological interpretation that could be replicated in similar situations requiring a balance between trade and non-trade concerns.

1.5. Interpretation of exceptions

Exceptions in the WTO Agreement encapsulate non-trade values of the WTO Agreement and as such bridge the general rules to this other dimension of the WTO Agreement relating to development, environment, public health, etc. They therefore allow for integration of WTO objectives and connect the WTO

95 Panel Report, *US – COOL* (2012), para. 7.781.

Agreement with the rest of the international order and its agenda on trade and non-trade concerns. In this sense, they are relevant for facilitating the development dimension of WTO law.

The VCLT rules of interpretation do not contain special norms for interpreting exceptions. However, there is a legal maxim that exceptions shall be interpreted restrictively, meaning that in case of a contest between a general rule and an exception, any doubt may be resolved in favour of the former. Nevertheless, it is not clear whether this canon is of mandatory or discretionary application in international law.[96]

The practice in the GATT and some early panels[97] in the WTO have adopted this legal maxim in the interpretation of exceptions. However, the AB has departed from the presumption of restrictive interpretation of exceptions.[98]

In *EC – Hormones* (1998) the AB has asserted that *"normal rules of treaty interpretation"* apply to exceptions and no *a priori* methodology should be inferred.[99] The importance of exceptions as rules which should be analysed as any other treaty provision and under normal rules of interpretation seems to derive from the fact that *"WTO objectives may well be pursued through measures taken under provisions characterized as exceptions"*.[100] In this sense, adopting a narrow interpretation of exceptions would undermine the rights of the party relying on the exception and, consequently, cause an imbalance in the system of rights and obligations under the WTO treaty.

Even though there is now a discourse that exceptions should be interpreted under normal rules of treaty interpretation and indeed there are cases where the AB analysed exceptions with an open mind such as in *EC – Tariff Preferences* (2004), where teleological interpretation played an important role, there are also cases in which the AB adopted a very textualist approach which prevented a more expansive reading of exceptions, undermining the realization of important objectives of the WTO.

For instance, in *China – Raw Materials* (2012), the issue of whether Article XX of GATT 1994 could be used to justify export duties that are found to be inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol

96 Qureshi, 170. 2015.

97 GATT Panel Report, *EEC - Bananas I* (1993), para. 339; GATT Panel Report*, Canada – Ice Cream and Yoghurt* (1989), para. 59; GATT Panel Report, *US – Tuna (Mexico)* (1991), para. 5.22; GATT Panel Report*,* GATT Panel Report*, US – Sugar Waiver* (1990), para. 5.9; GATT Panel Report*, US – Canadian Pork* (1991), para. 4.4; GATT Panel Report*, US – Customs User Fee* (1987), para. 84; Panel Reports on *US - Shrimp* (1998), para. 7.46; *US – Underwear* (1997), para. 7.21; and *US — Section 110(5) Copyright Act*, 2000, para. 6.97.

98 Qureshi, 152. 2015.

99 AB Report, *EC – Hormones* (1998) para.104. See also Panel Report, *US – Steel Safeguards* (2003), para. 10.13.

100 AB Report, *EC -Tariff Preferences* (2004), para. 94

was raised. Because the text of the latter provision expressly refers to Article VIII of the GATT 1994, but does not contain any textual reference to other provisions of the GATT 1994, including Article XX, the AB considered it as evidence that Article XX could not be used as a defence by China in this case.[101] In addition, it argued that the absence of a reference to the GATT 1994 in Paragraph 11.3 in contrast with the references to this agreement in Paragraphs 11.1 and 11.2 of China's Accession Protocol further supported the interpretation that China may not have recourse to Article XX.[102]

Although in *China – Publications and Audiovisual Products* (2010) the AB interpreted the language of Paragraph 5.1 of China's Accession Protocol as including a reference to Article XX, especially in view of *"China's right to regulate trade in a manner consistent with the WTO Agreement"*, the same conclusion was not reached in relation to *China – Raw Materials* (2012). The AB found that because *"such language is not found in Paragraph 11.3 of China's Accession Protocol"*, Article XX could not be used to justify export duties that are inconsistent with Paragraph 11.3.[103]

Additionally, the AB found that neither of the objectives in the preamble of the WTO Agreement nor the balance struck between trade and non-trade concerns contained therein *"provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol."*[104]

This textual approach in *China – Raw Materials* (2012) in analysing whether exceptions are applicable to the dispute is in sharp contrast to the teleological interpretation applied by the AB in *US – Clove Cigarettes* (2012), *US – Tuna II (Mexico)* (2012) and *US – COOL* (2012), which read in flexibilities which were not apparent from the text of the TBT Agreement. In *China - Raw Materials* (2012), despite the fact that there was no specific textual reference to GATT 1994 in Paragraph 11.3 of China's Accession Protocol, the Accession Protocol is considered an 'integral part' of the WTO Agreement and the introductory language of Paragraph 5.1 establishes a general right to regulate trade that should be considered in relation to all obligations contained in the Accession's Protocol. These factors were controversially discarded by the AB as relevant elements supporting the existence of a right to regulate trade by China to be balanced against its export duties.

Consequently, the interpretation followed by the AB in *China – Raw Materials* (2012) overrestricted the applicability of the right to regulate trade which has an utmost importance for realizing non-trade concerns. The right to regulate trade

101 AB Report, *China – Raw Materials* (2012), para. 303.
102 AB Report, *China – Raw Materials* (2012), para. 293.
103 AB Report, *China – Raw Materials*, para (2012), 304.
104 AB Report, *China – Raw Materials* (2012), para. 306.

and therefore to resort to Article XX as a defence for export duties should not be interpreted as having been excluded from China's Accession Protocol and the WTO Agreement, at the risk of being considered "somewhat like the pact with the devil".[105] Its elimination ultimately resulted in a severe mitigation of China's policy space for addressing non-trade concerns in case of export duties, not to mention the lack of equitable treatment among WTO Members which arguably can rely on Article XX of GATT as a justification for their export duties.

In view of the above, although the AB is progressively leaving aside the notion that exceptions shall be interpreted restrictively, a textual reading of WTO law still prevents an expansive reading of exceptions into WTO agreements. Not only a truly holistic interpretation of clearly expressed exceptions is necessary but also teleological interpretation of WTO law is necessary for opening up the possibility of exceptions. This may contribute to the development-oriented approach to WTO agreements to the extent that exception may ingrain the development objective.

2. Institutional setup, interpretation and the development objective

As mentioned in the Introduction, the customary rules of interpretation are not the only factor playing a role in the interpretative process. Interpretation choices are also to some extent a function of the environment where judges are located.[106]

If one understands interpretation as part of a communicative process, it is easier to comprehend that it is dependent not only on the speaker but also on the audience.[107] The meaning of what the speaker says will be invariably moulded by how the audience understands it. In other words, the meaning of what the parties to a treaty have communicated through the text will be interpreted by a judge who will also play a role in the attribution of sense to the treaty text. The judge is surrounded by an institutional setup and carries personal and community values. All these elements will influence the process of interpretation.

Certain institutional aspects of the WTO could potentially discourage a development-oriented approach to WTO law. The first one is the idea of a *'Member-driven'* institution. This gives the impression that the WTO and its organs is

105 Qureshi, 142. 2015.

106 Abi-Saab. 2010; Maduro, Eur. J. Legal Stud., (2007); Steinberg, American Journal of International Law, (2004); Ginsburg, (2013).

107 *"Communication is a comprehensive process in which communicators and audiences are both involved. […] participants usually play two supplementary roles, one that of the initiator of the messages, the other that of the recipient. (...) A sign is most readily classified according to the group whose members are expected to understand it".* Harold D. Lasswell, James C. Miller & Myres S. McDougal. The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure. p. xii-xiii. Ed., Martinus Nijhoff Publishers. (1994).

deferent to the interests of Members and the latter have extensive control over the whole WTO structure. Secondly, the rule according to which panels and the AB *"cannot add to or diminish the rights and obligations provided in the covered agreements"* (Articles 3.2 and 19.2 of the DSU) could indicate that Members would push for restrictive interpretations of WTO law. In this context, a development-supporting interpretation could face resistance from powerful developed Members, even though emerging economies also have an influential role in WTO operations, especially by means of the G-5.[108]

In practice, however, the reverse consensus rule,[109] gives panels and the AB great autonomy in making their decisions[110] to the point that they can be regarded as progressive developers of WTO law, which is beneficial to a development-oriented approach. In addition, the WTO case law on Articles 3.2 and 19.2 of the DSU does not indicate that panels and AB are supposed to restrict their judicial role to being the 'mouth of the law' without any function in progressively giving forward movement to the development of law.[111]

A serious issue, however, is the increasing political interference of the US in the process of reappointment of AB Members in an attempt to exert control over their preferences and decisions. The US blocking of the reappointment of Ms. Jennifer Hillman, in 2011, and Mr. Seung Wha Chang, in 2016 generates concerns as to the integrity, impartiality and independence of the AB.[112] From a development perspective, this casts doubts on whether AB Members would be able to adopt development-oriented interpretations in view of potential threats from major powers from the developed world.

Another important issue regards the representativeness of WTO staff and, in particular, that involved in the interpretation of WTO agreements. Article 17.3 of the DSU requires that the AB be "*broadly representative of the membership in the WTO."* Indeed, the composition of the AB since its inception shows that the WTO

108 Brazil, China, India, Mexico and South Africa.

109 According to the reverse consensus rule, reports from panels and the AB will be adopted by the Dispute Settlement Body (DSB), unless it decides by consensus not to adopt them. See Articles 16.4 and 17.14 of the DSU.

110 Gregory Shaffer & Joel P Trachtman. *Interpretation and Institutional Choice at the WTO*. 1 Oñati Socio-Legal Series, 2011.

111 AB Reports on *US – Wool Shirts and Blouses* (1997), para. 57-58; *Chile – Alcoholic Beverages* (2000), p. 79; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* (2007), footnote 370; *Mexico – Taxes on Soft Drinks* (2006), para. 53; *India – Patent* (1998), para. 46; *US – Carbon Steel* (2002), para. 91.

112 Manfred Elsig & Mark A Pollack. Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO AB. European Journal of International Relations. Vol 20, Issue 2, September 2012. At. 391-415. See also Letter from Former AB Members criticising the US veto to the reappointment of Mr. Seung Wha Chang. http://worldtradelaw.typepad.com/files/abletter.pdf (31 May 2016).

Membership seeks a balance among Members from developing and developed countries, representing different regions (Table 1).

Table 1: Members of the Appellate Body, term and nationality

	Generation 1		Generation 2		Generation 3			
	Term	**Name/ Country**	**Term**	**Name/Country**	**Term**	**Name/ Country**	**Term**	**Name/ Country**
US Representative	1995 - 2003	James Bacchus	2003 - 2007	Merit E. Janow	2007 - 2011	Jennifer Hillman	2011 - 2019	Thomas R. Graham
EU Representative	1995 - 2001	Claus-Dieter Ehlermann (Germany)	2001 - 2009	Giorgio Sacerdoti (Italy)	2009 - 2017	Peter Van den Bossche (Belgium)	-	-
Asian Representative (developed country)	1995 - 2000	Mitsuo Matsushita (Japan)	2000 - 2007	Yasuhei Taniguchi (Japan)	2008 - 2012	Shotaro Oshima (Japan)	2012 - 2016	Seung Wha Chang (Korea)
							2016 - 2020	Hyun Chong Kim (Korea)
Oceania Representative	1995 - 2000	Christopher Beeby (New Zealand)	2001 - 2006	John S. Lockhart (Australia)	None	None	-	-
Latin America Representative	1995 - 2001	Julio Lacarte-Muró (Uruguay)	2001 - 2009	Luiz Olavo Baptista (Brazil)	2009 - 2017	Ricardo Ramírez Hernández (México)	-	-
African Representative	1995 - 2000	Said El-Naggar (Egypt)	2000 - 2008	Georges Michel Abi-Saab (Egypt)	2006 - 2013	David Unterhalter (South Arica)	2014 - 2016	Shree Baboo Chekitan Servansing (Mauritius)
Asian Representative (developing country)	1995 - 2001	Florentino Feliciano (Philippines)	2000 - 2008	Arumugamangalam Venkatachalam Ganesan (India)	2007 - 2011	Llia R. Bautista (Philippines)	2011 - 2019	Ujal Singh Bhatia (India)
					2008 - 2016	Yuejiao Zhang (China)	2016 - 2020	Hong Zhao (China)

Source: WTO website. Elaboration: Author.

This is important from a development perspective because Members from different countries and regions have different backgrounds and ideologies which may influence their legal reasoning. For instance, it is not new that developed countries have traditionally preached a liberal ideology as a formula to be followed by other countries (not necessarily themselves) while developing countries have more immediate development concerns.[113] In this sense, although AB Members are not representatives of their country, the values of the communities to which they belong may to some extent influence their decisions.

However, it does not suffice that the AB be broadly representative of the WTO membership. Legal advisers from the Legal Affairs Division and from the AB

113 This can be illustrated by the consequences of the New International Economic Order (NIEO) in WTO law. For details, see Rolland, 45-46. 2012.

Secretariat may not take the final decision on interpretation of WTO agreements, but in their supportive role their perspectives may influence the interpretative process. In this context, they should also be broadly representative of the WTO as a whole.[114] There is no available information on their nationalities, but statistics on WTO staff on regular budget (Table 2) indicate that 75% of WTO staff come from developed countries and only 25%, from developing countries. If this figure is a proxy for the situation of legal advisors, there may be an imbalance of values within the WTO which may adversely impact a development-oriented approach.

Figure 2: WTO staff on regular budget by nationality, as of 31 December 2014

	Region	Numbers of countries	Staff number	% Staff number	Average staff number per country
Developed countries	North America	2	52	8,20 %	26
	Europe	25	401	35,25 %	16,04
	Asia	2	8	1,26 %	4
	Oceania	2	14	2,21 %	7
	Total developed countries	31	475	74,92 %	15,32
Developing countries	Latin America	18	73	11,51 %	4,06
	Asia	9	49	7,73 %	5,44
	Africa	20	37	5,84 %	1,85
	Total developing countries	47	159	25,08 %	3,38
	TOTAL	**78**	**634**	**100,00 %**	**8,13**

Source: WTO website <https://www.wto.org/english/thewto_E/secre_e/intro_e.htm>, visited on 17 Jan 2017

Fourthly, because development is a complex and multifaceted subject, it requires a deep cooperation of international institutions to find solutions for problems affecting development. This requires more active participation of development-oriented institutions (e.g. United Nations Conference on Trade and Development_- UNCTAD, United Nations Development Program - UNDP, among others) in WTO disputes through submission of amicus curiae briefs. However, clearer rules on these briefs by international organizations are needed.[115]

Finally, in order to factor in a development-oriented approach to WTO law it is naturally necessary that the disputing parties raise arguments of this nature. It is essential to provoke panels and the AB to decide on issues which potentially enable this type of interpretation. However, developing countries – which are the

114 Qureshi, 217. 2015.

115 Under current WTO case law, panels and the AB have the authority to accept *amicus curiae* briefs from international organisations. However, there are no clear rules establishing substantive or procedural requirements defining the circumstances under which panels and the AB will actually accept these briefs. See Peter Van den Bossche & Werner Zdouc. 263-267. 2013.

most interested parties in advancing this kind of argument – lack *"'in-house' legal expertise to participate in the most effective manner in WTO dispute settlement."*[116] This is where technical assistance within the WTO and also the Advisory Centre on WTO Law (ACWL)[117] can assist in the promotion of a development-friendly interpretation of WTO agreement.

It makes a difference whether technical assistance is focused on *"'training' officials to implement the 'law' in its maximally trade-liberalizing version or interpretation"* or on *"interpretations and legal strategies that would maximize the flexibilities and limiting dimensions of trade-liberalizing obligations"*,[118] where necessary to secure development objectives. It also matters whether it reflects an epistemic community which still considers trade liberalization as the ultimate goal of the WTO, rather than a diverse perspective which regards improving standards of living and development as the telos of the institution.[119] The Biennial Technical Assistance and Training Plan for 2016-2017 is inconclusive in this matter. It suggests some trade-liberalising perspective[120] and does not mention any development-oriented perspective for the training sessions.

3. Conclusion

Furthering a development-oriented interpretation of WTO agreements is essential for alleviating some of the burdens of free trade for developing countries, levelling the playing field between WTO Members at different levels of development; and effectively placing social, economic and human development at the core of the WTO system.

Panels and the AB make use of interpretative tools that contribute to advancing the development dimension of WTO law. The VCLT rules of interpretation and the holistic approach proposed by the AB repeal a purely textualist interpretation of WTO agreements, opening space for a more contextualized approach. In addition, their use of teleological, systemic and effective interpretation show that they are willing to progressively develop WTO law.

Moreover, the fact that the AB consistently has recourse to evolutionary interpretation[121] shows that it pays due regard to the cooperative and dynamic nature of the WTO Agreement and the need to keep it in line with the development of

116 Peter Van den Bossche & Werner Zdouc. 300. 2013.
117 ACWL is an international organization established in 2001 to provide developing countries with free legal advice and training on WTO law and to provide support in WTO dispute settlement proceedings at discounted rates.
118 Howse, Mainstreaming the right to development into international trade law and policy at the World Trade Organization 11. 2004.
119 Id. at.
120 See page 6, paragraph 8, of the Plan.
121 *US – Shrimp (1998)* and *China – Publications and Audiovisual Products* (2010).

international law and the values of the international community. This is particularly important for a development-oriented interpretation of the WTO agreements as development is a contemporary concern of present society which is reflected in several international instruments. Furthermore, interpretations such as that carried out by the AB in *EC – Tariff Preferences* (2004) also demonstrate that it is aware of the vital role of development in the WTO system.

Therefore, the interpretative techniques used by panels and especially the AB demonstrate that they have the tools to create more possibilities for furthering the development dimension of WTO agreements. In addition, from the institutional perspective, the fact that panels and the AB enjoy great autonomy in making their decisions as a result of the reverse consensus rule also enables them to make development-oriented interpretations which otherwise would be opposed by some WTO Members.

Nevertheless, there are also some drawbacks which must be overcome so that development can be effectively regarded to be a constitutionally enshrined principle in interpretation of WTO agreements.

First, decisions from panels and the AB vary greatly. For instance, while the latter have made recourse to evolutionary interpretation in key cases, panels are more hesitant.[122] In addition, more open-minded interpretations applied in one case are not necessarily replicated in others.[123] Also, it is possible to see that the same interpretation technique is used to different degrees in the same decision.[124] This makes it more difficult to promote a consistent development-oriented approach in WTO jurisprudence.

Moreover, despite recourse to teleological and effective interpretation has been made in several cases, there is still space for panels and the AB to use them more effectively in cases involving S&DT provisions. It is necessary to provide substance and operational value to those open-textured and hortatory obligations and to analyse the burden of proof in a way that enables a fair allocation considering the condition of development of WTO Members. There is also opportunity for expanding the scope of general exceptions.

Besides, although the AB has said early on that the WTO agreements *"are not to be read in clinical isolation from public international law"*[125], in practice, there are cases where the panel uses the language of Article 31(3)(c) of the VCLT as if

122 See footnote 82.

123 For instance, the strong reliance of the AB in teleological interpretation to read into flexibilities that were not apparent in one WTO agreement which is seen in *US – COOL* (2012) was not used in *China – Raw Materials* (2012), where the panel had to verify whether GATT exceptions were available for China to justify export duties under China's accession protocol.

124 See the level of reliance of the AB in teleological interpretation in analysing, on one hand, the introductory clause of Article XX of GATT 1994 and, on the other hand, the meaning of 'exhaustible resources' in Article XX(g) of GATT 1994 in *US – Shrimp* (1998).

125 AB Report, *US – Gasoline* (1996), para. 43.

making a systemic interpretation of WTO provisions, but in fact the international norm does not seem to affect its interpretation of WTO obligations.[126]

Also, the restrictive reading of the type of international rule which can be factored into the process of interpretation also discourages the process of furthering the development objective in the interpretation of WTO law. So far, WTO jurisprudence has considered as 'rules', for the purpose of Article 31(3)(c), only those conventional elements of hard law.[127] This prevents panels and the AB from further considering the role of several soft law instruments concerning development and the right to development in the interpretation of WTO law.

Likewise, the limited interpretation of the word "relevant" in Article 31.3(c) is prejudicial for the development dimension of WTO law. The AB has considered that in order to be relevant for the purposes of interpretation, the international rule has to concern the *'same subject matter'* of the treaty terms being interpreted.[128] From this perspective, it would not be surprising if panels and the AB did not consider that international norms such as the UN 1986 Declaration and the ICESC for the purposes of Article 31.3(c), because they do not specifically concern trade matters. Consequently, their role could be limited to factual evidence of the importance of the value of development in WTO law, but they would not more substantially impact the meaning of WTO provisions.

In addition, the fact that WTO jurisprudence has suggested that the word 'parties' in Article 31.3(c) of the VCLT may comprise all the parties to the agreement being interpreted[129] may also limit the resort to important development-related norms. For instance, the parties to the ICESC do not correspond to the WTO membership, which could limit systemic interpretation of WTO law vis-à-vis this international instrument, unless it is considered customary law.[130]

Finally, from the institutional perspective, a development-oriented approach can face resistance should the US continue to interfere in the process of reappointment of AB Members. The autonomy enjoyed by the AB as a result of the reverse consensus is threatened while there is no change in the mandate of members from a four-year term with possibility of reappointment to a single eight-year term. Additionally, a development-oriented approach may not find a receptive institutional framework while the overwhelming majority of WTO staff involved in the process of interpretation of WTO law allegedly comes from developed countries

126 Panel Report on *China – Raw Materials* (2012).
127 *EC – Approval and Marketing of Biotech Products* (2006) and *US – Anti-Dumping and Countervailing Duties (China)* (2011).
128 *US – Antidumping and Countervailing Duties (China)* (2011); *EC and certain member States — Large Civil Aircraft (2011);* and *Peru – Agricultural Products* (2015).
129 *Peru – Agricultural Products* (2015).
130 Note though that the discipline of ICESC is still developing as customary law. Fons Coomans. *Application of the International Covenant on Economic, Social and Cultural rights in the framework of International Organisations*. Max Planck Yearbook of United Nations Law Online, Volume 11, Issue 1, 2007. At. 359 – 390.

and is not broadly representative of the WTO membership. Also, the insufficient interaction of the dispute settlement system with development institutions may delay the progress of the development dimension of the WTO agreements. Lastly, a development approach also requires that disputing parties be aware of the flexibilities in the WTO agreement that could be raised for this purposes. Without provoking panels and the AB, they will not effectively advance a development-oriented interpretation. It is necessary that the technical assistance provided within the WTO and the ACWL go beyond trainings on formal aspects of WTO law and include special sessions on legal strategies to place development at the core of the interpretation of WTO agreements.

Bibliography

Agreement on Government Procurement, 1869 U.N.T.S. 508 (Text available at 1915 U.N.T.S. 103).

Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120.

Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493.

Agreement on Trade Related Investment Measures, 1868 U.N.T.S. 186.

Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299.

'Azevêdo: Trade works to create jobs and lift people out of poverty', WTO News Item. https://www.wto.org/english/news_e/spra_e/spra83_e.htm (30 September 2015).

Bunn, Isabella D. The right to development and international economic law: legal and moral dimensions. Ed., Bloomsbury Publishing. (2012).

Chang, Ha-Joon. Bad Samaritans: The myth of free trade and the secret history of capitalism. Ed., Bloomsbury Publishing. (2007).

Coomans, Fons. *Application of the International Covenant on Economic, Social and Cultural rights in the framework of International Organisations*. Max Planck Yearbook of United Nations Law Online, Volume 11, Issue 1, 2007. At. 359 – 390.

Ehlermann, Claus-Dieter. *Experiences from the WTO AB*. 38 Tex. Int'l LJ. 2003.

Elsig, Manfred; Pollack, Mark A. Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO AB. European Journal of International Relations. Vol 20, Issue 2, September 2012. At. 391-415.

Gardiner, Richard. Treaty interpretation. Ed., Oxford University Press. (2015).

General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187.

General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183.

Georges Abi-Saab. The AB and treaty interpretation. Ed., Brill, (2010).

Ginsburg T., *Political constraints on international courts*, in *The Oxford Handbook of International Adjudication,* 483-502. Ed., Oxford University Press. (2013).

Howse, Robert. *Mainstreaming the Right to Development into the World Trade Organization*, en *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*. Ed., UN. (2013).

Jackson, John H. *The case of the world trade organization*. 84 International Affairs. 2008.

Klabbers, J. *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in *The Law of Treaties Beyond the Vienna Convention* 205, E. Cannizzaro, Ed., Oxford University Press. (2011).

'Lamy: It's time for a new "Geneva consensus" on making trade work for development', WTO News Item. https://www.wto.org/english/news_e/sppl_e/sppl45_e.htm (30 October 2006).

Lasswell, Harold D.; Miller, James C.; McDougal, Myres S. The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure. Ed., Martinus Nijhoff Publishers. (1994).

Lauterpacht, Hersch. *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. YB Int'l L., 73. 1949.

Lennard, Michael. *Navigating by the stars: interpreting the WTO agreements*. 5 Journal of international economic law. 2002.

Letter from Former AB Members expressing their concern on the US veto to the reappointment of Mr. Seung Wha Chang. http://worldtradelaw.typepad.com/files/abletter.pdf (31 May 2016).

Maduro, Miguel Poiares. *Interpreting European law: judicial adjudication in a context of constitutional pluralism*.1 Eur. J. Legal Stud. 2007.

Maki, Peter C. *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*. 9 Minn. J. Global Trade. 2000.

Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

McLachlan,Campbell. *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 The International and Comparative Law Quarterly 279(2005).

Orakhelashvili, Alexander. The interpretation of acts and rules in public international law. Ed., Oxford University Press. (2008).

Pauwelyn, Joost. Conflict of norms in public international law: how WTO law relates to other rules of international law. Ed., Cambridge University Press. 2003.

Pauwelyn, Joost; Elsig, Manfred. *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*. Available at SSRN 1938618. (2011).

Prévost, Denise. Balancing Trade and Health in the SPS Agreement: The Development Dimension. Ed., Wolf Legal Publishers. (2009).

Qureshi, Asif H. International trade for development: The WTO as a development institution? 43 Journal of World Trade, 2009.

Qureshi, Asif H. *Interpreting WTO Agreements for the development objective*. 37 Journal of world trade, 2003.

Qureshi, Asif H. Interpreting WTO Agreements. Ed.,Cambridge University Press. (2015).

Rodrik. Dani. The globalization paradox: democracy and the future of the world economy. Ed., W.W. Norton. (2011).

Sen, Amartya. Desenvolvimento como Liberdade. Ed., Companhia das Letras. (2010)

Shaffer, Gregory; Trachtman, Joel P. *Interpretation and Institutional Choice at the WTO*. 1 Oñati Socio-Legal Series, 2011.

Sonia E. Development at the WTO. Ed., Oxford University Press. (2012).

Steinberg, Richard H. *Judicial lawmaking at the WTO: Discursive, constitutional, and political constraints*. American Journal of International Law. 2004.

Stiglitz, Joseph E. Making Globalization Work. Ed., W.W. Norton & Company. (2006).

U.N. Econ. &Soc. Concil [ECOSOC]. Commission on Human Rights. Sub-Commission on the Promotion and Protection of Human Rights, *Mainstreaming the right to development into international trade law and policy at the World Trade Organization*. UN Doc. E/CN.4/Sub.2/2004/17. (9 June 2004).

U.N. General Assembly, United Nations Millennium Declaration, Resolution Adopted by the General Assembly, A/RES/55/2. (18 September 2000).

U.N. General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, A/RES/41/128. (4 December 1986).

U.N. General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, (16 December 1966).

U.N. General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (21 October 2015).

U.N. General Assembly. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682. (13 April 2006).

U.N. General Assembly. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682. (13 April 2006).

U.N. Office of the High Commissioner for Human Rights. *Human rights and trade*, Submission to the 5th WTO Ministerial Conference, Cancun, Mexico (10-14 September 2003).

Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401.

Van Damme, Isabelle. *Treaty interpretation by the WTO AB*, 21 European Journal of International Law, 2010.

Van Damme, Isabelle. Treaty interpretation by the WTO AB. Ed., Oxford University Press. (2009).

Van den Bossche, Peter; Zdouc, Werner. The Law and Policy of the World Trade Organization - Text, Cases and Materials. Ed., Cambridge University Press 3rd ed. (2013).

Villiger, M. E. *The rules on interpretation: misgivings, misunderstandings, miscarriage? the 'crucible'intended by the international law commission*, in *The Law of Treaties Beyond the Vienna Convention*, E. Cannizzaro, Ed., Oxford University Press. (2011).

Wright, Quincy. *The Interpretation of Multilateral Treaties*, 23 The American Journal of International Law (1929).

WTO, IMF and World Bank leaders: Trade must be an engine of growth for all, WTO News Item. https://www.wto.org/english/news_e/news16_e/dgra_07oct16_e.htm (7 October 2016).

WTO. Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2), (14 November 2001).

WTO. Ministerial Decision on Measures in Favour of Least-Developed Countries (1993).

WTO. Ministerial Declaration, WT/MIN(01)/DEC/1) (14 November 2001).

Yasseen, Mustafa Kamil. L'interprétation des traités d'après la Convention de Vienne sur le droit des traités. Ed., Martinus Nijhoff. (1976).

Zarbiyev, F., *A Genealogy of Textualism in Treaty Interpretation*, in *Interpretation in International Law*, A. Bianchi, D. Peat & M. Windsor, Ed., Oxford University Press. (2015).

ICJ cases

I.C.J., *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion: I.C.J. Reports 1948, p. 57.

I.C.J., *International status of South-West Africa*, Advisory Opinion: I.C. J. Reports 1950, p. 128.

I.C.J., *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66.

I.C.J., *South-West Africa-Voting Procedure*, Advisory Opinion of June ?th, 1955: I.C.J. Reports 1955, p. 67.

I.C.J., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

Table of GATT panels

Short title	Full case title and citation
Canada – Ice Cream and Yoghurt	GATT Panel Report, Canada – Import Restrictions on Ice Cream and Yoghurt, L/6568, adopted 5 December 1989, BISD 36S/68
EEC - Bananas I	GATT Panel Report, EEC – Member States' Import Regimes for Bananas, DS32/R, 3 June 1993, unadopted
US – Canadian Pork	GATT Panel Report, United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, DS7/R, adopted 11 July 1991, BISD 38S/30
US – Customs User Fee	GATT Panel Report, United States – Customs User Fee, L/6264, adopted 2 February 1988, BISD 35S/245

Short title	Full case title and citation
US – Sugar Waiver	GATT Panel Report, United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions, L/6631, adopted 7 November 1990, BISD 37S/228
US – Tuna (Mexico)	GATT Panel Report, United States – Restrictions on Imports of Tuna, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155

Table of WTO cases

Short title	Full case title and citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by AB Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Pharmaceutical Patents	Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, DSR 2000:V, p. 2289
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Chile – Alcoholic Beverages	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, p. 281
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by AB Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501

Short title	Full case title and citation
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by AB Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Bed Linen (Article 21.5 – India)	Panel 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*, WT/DS141/RW, adopted 24 April 2003, as modified by AB Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
EC – Chicken Cuts	Panel Reports, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R *(Brazil)* / WT/DS286/R *(Thailand)*, adopted 27 September 2005, as modified by AB Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, p. 9295 / DSR 2005:XX, p. 9721
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by AB Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by AB Report WT/DS246/AB/R, DSR 2004:III, p. 1009
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by AB Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9

Short title	Full case title and citation
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by AB Report WT/DS406/AB/R, DSR 2012: XI, p. 5865
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by AB Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3

Short title	Full case title and citation
US – Section 110(5) Copyright Act	Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, p. 3769
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by AB Report WT/DS58/AB/R, DSR 1998:VII, p. 2821
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
US – Steel Safeguards	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by AB Report 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, DSR 2003:VIII, p. 3273
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by AB Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by AB Report WT/DS24/AB/R, DSR 1997:I, p. 31
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323