



European
University
Institute

ROBERT
SCHUMAN
CENTRE FOR
ADVANCED
STUDIES

WORKING PAPERS

RSCAS 2017/17
Robert Schuman Centre for Advanced Studies
Global Governance Programme-259

Promoting Coherence between PTAs and the WTO
through Systemic Integration

Pamela Apaza Lanyi and Armin Steinbach

European University Institute
Robert Schuman Centre for Advanced Studies
Global Governance Programme

**Promoting Coherence between PTAs and the WTO through
Systemic Integration**

Pamela Apaza Lanyi and Armin Steinbach

EUI Working Paper **RSCAS** 2017/17

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© Pamela Apaza Lanyi and Armin Steinbach, 2017

Printed in Italy, March 2017

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

www.eui.eu/RSCAS/Publications/

www.eui.eu

cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre is home to a large post-doctoral programme and hosts major research programmes and projects, and a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, Policy Briefs, Distinguished Lectures, Research Project Reports and Books.

Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

The Global Governance Programme at the EUI

The Global Governance Programme is one of the flagship programmes of the Robert Schuman Centre for Advanced Studies at the European University Institute (EUI). It aims to: build a community of outstanding professors and scholars, produce high quality research and, engage with the world of practice through policy dialogue. At the Global Governance Programme, established and early career scholars research, write on and discuss, within and beyond academia, issues of global governance, focussing on four broad and interdisciplinary areas: European, Transnational and Global Governance; Global Economics; Europe in the World; and Cultural Pluralism.

The Programme also aims to contribute to the fostering of present and future generations of policy and decision makers through its unique executive training programme, the Academy of Global Governance, where theory and “real world” experience meet. At the Academy, executives, policy makers, diplomats, officials, private sector professionals and academics, have the opportunity to meet, share views and debate with leading academics, top-level officials, heads of international organisations and senior executives, on topical issues relating to governance.

For more information: <http://globalgovernanceprogramme.eui.eu>

Abstract

The proliferation of preferential trade agreements (PTAs) has resulted in a heterogeneous regime of trade rules applicable among WTO Members. The interplay between PTA and WTO rules has several implications, including risks of legal tensions and incoherence between both regimes, as well as between overlapping networks of PTAs. Consequently, adjudicative bodies both under regional PTAs and global WTO dispute settlement mechanisms are increasingly confronted with taking account of alien legal sources for the purpose of interpretation. Coherence between PTA and WTO rules thus depends on the degree to which adjudication at both levels – PTA and WTO – allows integration of alien legal sources. This paper explores the role of systemic integration as a method of interpretation under public international law allowing adjudicating bodies to deal with possible tensions and promote coherence within international trade law. It traces the various approaches to systemic integration pertaining to international trade rules as employed under both WTO and PTA adjudication. While systemic integration offers a public international law tool for reducing fragmentation of substantial law, there is heterogeneity in adjudicative practice regarding the readiness to employ systemic integration for the purpose of interpretation. The article identifies possible avenues through which future dispute settlement could exploit the potential for coherence through systemic integration, as well as elements which could be taken into consideration when integrating multilateral and preferential rules. It also provides insight on how PTAs could facilitate the application of systemic integration by adjudicating bodies at both levels.

Keywords

International trade; dispute settlement; regional agreements; interpretation; coherence

I. Introduction*

The impasse in the WTO Doha negotiations has resulted in PTAs achieving trade opening relatively quickly compared to the WTO.¹ More than 500 PTAs have been concluded and several more are in the pipeline, including some mega-regionals, such as the plurilateral Trans-Pacific Partnership (TPP) Agreement,² the Transatlantic Trade and Investment Partnership (TTIP), and the Regional Comprehensive Economic Partnership (RCEP). In terms of variable geometry, PTAs have been the most popular avenue through which groups of Members sharing similar interests have pursued further trade liberalization and other objectives.³

The interplay between PTA and WTO rules has several implications, including risks of legal tensions and incoherence between both regimes, as well as between overlapping networks of PTAs. The extensive coverage of some recent PTAs, which ranges from customs matters to investment protection and environment or labor standards, exacerbates the complexities of the PTA-WTO relationship. There are undesired systemic effects of the coexistence of PTAs and global WTO rules, including a fragmentation in international trade law.⁴

There are several ways of dealing with frictions due to overlapping networks of global and regional trade rules. One is setting rules at the global level. However, negotiations to clarify and improve the multilateral rules on PTAs have remained deadlocked for several years and have dealt mainly with traditional market access issues. They seem now unsuitable to deal with the new generation of PTAs and the complex WTO-PTA relationship. While the transparency of PTAs has increased notably in recent years, there is no political control over PTAs at the multilateral level.

A more realistic avenue towards achieving coherence, particularly in the short or medium term, is through adjudication – both on the level of PTAs and WTO. Considering adjudication as an instrument for ensuring coherence highlights the relevance of legal techniques applied by adjudicating bodies to mitigate the undesired systemic effects of PTAs and to reduce fragmentation in international trade law. In this vein, this article seeks to identify the methods of interpretation under international law which may be used to deal with possible tensions and promote coherence between PTAs and WTO rules, as

* The views expressed in this paper are those of the author. They do not represent the views of the WTO or its Members, nor its Secretariat.

¹ On this widely discussed phenomenon, see, *inter alia*, Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and analysis*, 2nd ed. (Cambridge: Cambridge University Press, 2015); Simon Lester, Bryan Mercurio and Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Case studies*, 2nd ed. (Cambridge: Cambridge University Press, 2015); Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (Cambridge: Cambridge University Press, 2011); Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreements Policies for Development World Bank: A Handbook* (Washington D.C.: The World Bank, 2011); Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism, Institut Universitaire de Hautes Études Internationales, WTO* (Cambridge: Cambridge University Press, 2009); David A. Gantz, *Regional Trade Agreements: Law, Policy and Practice* (2009); Joseph H. H. Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* (Oxford: Oxford University Press, 2000).

² The TPP was signed on February 4, 2016. It has not entered into force yet.

³ For a behavioural law and economics explanation of this phenomenon, see Armin Steinbach, ‘The Trend Toward Non-consensualism in Public International Law: A (Behavioural) Law and Economics Perspective’, 27 *EJIL* 643 (2016), at 654.

⁴ Pamela Apaza Lanyi and Armin Steinbach, ‘Limiting jurisdictional fragmentation in international trade disputes’, 5 *Journal of International Dispute Settlement* 372–405 (2014); Gabrielle Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties’, 35 *Journal of World Trade* 1081 (2001), at 1108; and Lowe Vaughan, ‘Overlapping Jurisdictions in International Tribunals’, 42 *Australian Year Book of International Law* 191–204 (1999).

well as between overlapping networks of PTAs. On a number of occasions, the Dispute Settlement Body (DSB) had to deal with questions concerning the bearing of PTAs on WTO rules in the context of WTO dispute settlement. A recent example is *Peru - Agricultural Products*, where the Appellate Body examined the scope for using a PTA that had been concluded among the disputing parties for purposes of interpretation.⁵ Likewise, dispute settlement mechanisms (DSM) installed under PTAs have looked on a number of occasions into WTO provisions or case law for the purpose of interpreting provisions under PTAs.⁶

More specifically, this article examines the scope provided under the principle of systemic integration embodied in Article 31.3(c) of the Vienna Convention on the Law of Treaties (Vienna Convention), which offers a legal basis for promoting coherence of legal acts emanating from different legal orders in public international law.⁷ In particular, PTAs could be taken into account, in certain circumstances, as part of the relevant normative environment in WTO disputes among the preferential partners through, for example, WTO open-ended, generic, or evolving terms. Conversely, the WTO agreements, including WTO decisions such as the Doha Declaration, and rulings adopted by the DSB, could provide valuable guidance in PTA disputes as a means of ensuring coherence between WTO and PTA rules, as well as between overlapping networks of PTAs, while preserving the WTO *acquis*.

Against this background, this article is structured as follows: Part II explores the scope of systemic integration pertaining to the integration of PTAs into WTO law. Different approaches are examined as to how Article 31.3(c) of the Vienna Convention can be applied for that purpose. We demonstrate the scope for systemic integration by reference to "public morals" under the WTO general exceptions, which offers a concrete example of how to use PTAs in ascertaining the meaning of undefined terms or open-ended terms. Part III discusses existing and possible avenues for integrating WTO law in PTA disputes. Part IV concludes.

⁵ Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products* (Peru - Agricultural Products), WT/DS457/AB/R and Add.1, adopted July 2015; see also Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres* (Brazil - Retreaded Tyres), WT/DS332/AB/R, adopted December 2007; Appellate Body Report, *Turkey - Restrictions on Imports of Textiles and Clothing Products* (Turkey - Textiles), WT/DS34/AB/R, adopted November 2009; Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil* (Argentina - Poultry), WT/DS241/R, adopted May 2003.

⁶ See, for instance, NAFTA Chapter 20 Panel Report, *Cross-Border Trucking Services* (6 February 2001); Panel Report, *US Safeguard Action taken on Broomcorn Brooms from Mexico* (16 January 1998); NAFTA Chapter 20 Arbitral Panel, *US - Agricultural Products, Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products* (2 December 1996); *Pope and Talbot Inc. v. Government of Canada, Ad hoc Investment Tribunal (UNCITRAL)* (November 2002), at http://www.biccl.org/files/3922_2002_pope_&_talbot_v_canada.pdf. See also Hsu Locknie, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links', in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 525–552; Ignacio García Bercero, 'Dispute Settlement in European Union Free Trade Agreements', in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 400–401; David A. Gantz, 'Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties', 14 *American University International Law Review* 1025 (1999).

⁷ On the use of Article 31 Vienna Convention for the purposes of integrating WTO law and other treaties, see Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol and Diet* (New York: Cambridge University Press, 2011); Pieter Jan Kuijper, 'Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO', ICTSD Issue Paper No. 10 (2010), at 6–8; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009); Marceau, above n 4, at 1108–1131. For a more general text on the principle of systemic integration, see Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International & Comparative Law Quarterly* 279–314 (2005).

II. Integrating PTAs in WTO law: Instruments under international law

International law stipulates a presumption against conflicts between treaty provisions.⁸ It is widely accepted that norms bearing on a same issue should, to the extent possible, be interpreted consistently with each other. The presumption against conflict is based on the principles of good faith and *pacta sunt servanda*.⁹ There is an assumption that, unless an intention to the contrary is clear, treaties emanating from states must be interpreted as being intended to produce effects in accordance with existing law.¹⁰ It has been stated that the presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since they can be presumed to be consistent with each other in the absence of any evidence to the contrary.¹¹ The presumption against conflict has been applied in a number of WTO disputes.¹²

A. General Rules of Interpretation

Accordingly, in the case of tension, PTAs and WTO rules shall, to the extent possible, be interpreted as giving rise to compatible obligations. Interpretation is the process of clarifying the meaning and scope of a treaty norm.¹³ The purpose of interpretation is to ascertain the meaning of a term that is, for instance, ambiguous, generic, or “open-ended.” However, the interpretation of treaties cannot “modify” the meaning of the term or go beyond what is expressed by the parties. Interpretation may not go against the meaning of the terms of the treaty rule that is being interpreted (interpretation *contra legem*);¹⁴ in other words, it cannot displace or override the applicable law.¹⁵ Article 3.2 of the DSU provides for the clarification of the provisions in the WTO covered agreements in accordance with customary rules of interpretation of public international law, which include Article 31 of the Vienna Convention. The main rules on treaty interpretation are embodied in Articles 31 and 32 of the Vienna Convention.¹⁶ The status of these rules as reflecting customary international law has been confirmed by WTO adjudicating bodies in a number of disputes.¹⁷

⁸ See Wilfred Jenks, ‘The Conflict of Law-Making Treaties’, 30 *The British Year Book of International Law* 401, 427–429 (1953). Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2009) 237–268. International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (ILC Report on Fragmentation), April 2006, UN Doc. A/CN.4/L.682, at paras 25–28.

⁹ Article 26 of the Vienna Convention.

¹⁰ Case concerning the Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, 1957 ICJ Rep. 142. See ILC Report on Fragmentation, above n 8, at para 39.

¹¹ Marceau, above n 4, at 1084. See also E. W. Vierdag, ‘The Time of Conclusion of a Multilateral Treaty: Article 30 of the Vienna Convention on the law of Treaties and Related Provisions’, 59 *BYIL* 100 (1988).

¹² For instance, see Appellate Body Report, *Canada - Certain Measures Concerning Periodicals (Canada - Periodicals)*, WT/DS31/AB/R, adopted 30 July 1997, 19 paras 219–222; Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC - Bananas III)*, WT/DS27/AB/R, adopted 25 September 1997, para 167; and Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry (Indonesia - Autos)*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998, para. 14.28.

¹³ Request for Interpretation of the Judgement of 20th November 1950, *Asylum Case*, 1950 ICJ Rep. 240 (November 27).

¹⁴ Pauwelyn, above n 8, at 237–268.

¹⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion Judge Higgins (Merits), 2003 ICJ Rep. para 49.

¹⁶ *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Merits, 1994 ICJ Rep. 21–22; and *Gabcikovo–Nagymaros Project (Hungary v. Slovakia)*, Merits, 1997 ICJ Rep. 38. See also Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline (US - Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, 16–17.

¹⁷ See, for instance, Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline (US - Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996; *Japan - Taxes on Alcoholic Beverages (Japan - Alcoholic Beverages II)*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

Article 31.1 of the Vienna Convention states that a treaty shall be interpreted “in *good faith* in accordance with the *ordinary meaning* to be given to its terms in the *context* of the treaty and in the light of its *object and purpose*” (emphasis added). This first paragraph informs the rest of Article 31 and serves as a guide to the process of treaty interpretation.¹⁸ The principle of *good faith* applies to the entire process of interpretation¹⁹ and requires the terms of a treaty to be interpreted in the context of the whole treaty, including its preamble and annexes.²⁰ The context would also include any footnotes and, arguably, side letters signed by the parties in connection with the conclusion of the treaty. The latter is relevant as the footnotes, annexes, and side letters of some PTAs include important guidance for the interpretation of PTA and WTO rules.²¹

Article 31.3 provides that, together with the context, the following shall be taken into account (emphasis added):

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice between the parties in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) *Any relevant rules of international law applicable in the relations between the parties (emphasis added).*

Article 31.3(a) and (b) refer to subsequent agreements or practices between the parties regarding the interpretation or application of a treaty. Paragraph 3(a) covers interpretative agreements made after the conclusion of a treaty. In *US- Clove Cigarettes*, the Appellate Body upheld the Panel's finding that paragraph 5.2 of the Doha Ministerial Decision on Implementation-related Issues and Concerns constitutes a subsequent agreement between the parties within the meaning of paragraph 3(a).²² The Appellate Body stated that a decision adopted by Members may qualify as a "subsequent agreement between the parties" if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of WTO law.²³ Another decision which could qualify as a subsequent agreement between the parties would be arguably the Doha Declaration on the TRIPS Agreement and Public Health²⁴.

¹⁸ As noted by the ILC, jurists differ to some extent in their basic approach to the interpretation of treaties according to the weight which they give to the text of the treaty, the intentions of the parties, and the object and purpose of the treaty. See International Law Commission, 'Draft Articles on the Law of Treaties with commentaries', 2 Yearbook of the International Law Commission 218 (1966). In *Japan - Alcoholic Beverages*, the Appellate Body stated that “the proper interpretation of the Article is, first of all, a textual interpretation”, Appellate Body Report, *Japan - Alcoholic Beverages II*, above n 16, 19.

¹⁹ This implies that, when states conclude an agreement, they take into account all their other international obligations, including general principles, customs, and treaty obligations. See Marceau, above n 4, at 1081–1131.

²⁰ Vienna Convention on the Law of Treaties (Vienna Convention), Article 31.2. See also Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984) 128.

²¹ The US PTAs, in particular, include some clauses that are relevant for determining the relationship between the PTAs and WTO Agreement in side letters and annexes.

²² The Appellate Body stated that the Doha Ministerial Decision constitutes a subsequent agreement between the parties on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012.

²³ *US-Clove Cigarettes*, Appellate Body Report, para 241-75.

²⁴ Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001. In this decision, Members affirm that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of Members' right to protect public health" and promote access to medicines.

In turn, paragraph 3(b) captures any subsequent practice between the parties concerning the interpretation of a treaty. A ‘practice’ is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual acts or pronouncements. What is required for the purpose of Article 31(3)(b) is that the subsequent practice be concordant, common, and consistent.²⁵ The judicial practice of WTO adjudicators confirms so. The Appellate Body in *US – Gambling* clarified that the test for determining the existence of ‘subsequent practice’ comprises two aspects: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision.²⁶ As regard the first element, the Appellate Body in *EC-Chicken Cuts* stated that for a particular practice to qualify as “common” and “concordant” it does not necessarily need to be exercised by *all* parties to a treaty. Yet, it would be difficult to establish a practice on the basis of acts or pronouncements of only *one* or *very few* parties.²⁷ In *EC – Computer Equipment*, in the context of using tariff classification practice as a supplementary means of interpretation, the Appellate Body stated that to establish the common intention of the parties to the treaty, the prior practice of only *one* of the parties may be relevant, but it was clearly of more limited value than the practice of all parties.²⁸ As mentioned above, the Appellate Body in *US-Gambling* stated that, in addition to determining the existence of a common, consistent discernible pattern of acts or pronouncements, one must demonstrate that such acts or pronouncements “imply agreement on the interpretation of the relevant provision”.²⁹ The issue of whether PTAs could be used as evidence of “subsequent practice” in connection with the interpretation of WTO rules has been suggested by some commentators in relation to the use of certain PTA provisions and “templates” with standard PTA provisions.³⁰

While sub-paragraphs (a) and (b) relate to events taking place after a treaty's conclusion, (c) does not contain any such time indication, which seems to suggest that the latter covers both rules of international law at the time of conclusion of the treaty and at the time the interpretation is being made.³¹ Also, the scope of Article 31.3(c) is broader, as it refers to any *relevant* rules of international law applicable to the relations between the parties. Article 31.3(c) constitutes an expression of the “principle of systemic integration”, which seeks to ensure that international obligations are interpreted

²⁵ Malgosia Fitzmaurice and Panos Merkouris, ‘Canons of Treaty Interpretation’, in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff, 2010) 153-238, at 223.

²⁶ *US-Gambling*, Appellate Body Report, para. 192-3.

²⁷ Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts (EC-Chicken Cuts)*, adopted on 27 September 2005, para. 259.

²⁸ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment (EC-Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 93.

²⁹ United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, *US-Gambling*, Appellate Body Report, DS285, adopted on 20 April 2005, para. 192-3. The Panel in *EU-IT Products*, when considering the classification practice of the EU and other Members, stated that it would be for a party asserting the existence of a common and concordant practice among WTO Members to provide sufficient evidence – which clearly is something beyond a handful of classification exercises in one Member- to establish such a “consistent, common and concordant” classification practice. 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 (para. 7.565).

³⁰ See, for instance, Mitchell A. and Voon T., *Preferential Trade Agreements and Public International Law*, in: Simon Lester and Bryan Mercurio (eds.), *Bilateral and Regional trade agreements*, p.81–113; and, Voon, Tania, *Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements*, *International & Comparative Law Quarterly*, 2010, Vol. 59, No. 3, pp. 625–667; Locknie Hsu, ‘Applicability of WTO Law in Regional Trade Agreements: Identifying the links’, in Lorand Bartel and Federico Ortino (eds), *Regional Trade Agreements and the WTO legal system*, (Oxford: Oxford University Press, 2006), 525-552.

³¹ Don W. Greig, *Intertemporality and the Law of Treaties* (London: British Institute of International & Comparative Law, 2001) 46.

by their normative environment;³² that is, not only in their own context, but in the wider context of international law.³³ Article 31.3(c) has been interpreted to serve, *inter alia*, to resolving conflicting obligations arising under different treaties.³⁴ It has been stated that Article 31.3(c) is a concrete expression of the presumption against conflict and harmonization, since good faith requires states to regard their treaty rights and obligations as an integrated whole.³⁵

B. Article 31.3(c) of the Vienna Convention

Under Article 31.3(c), two conditions have to be met. First, the rule must be “relevant” and must also be “applicable in the relations between the parties”. The “relevance” of the international rule for purposes of Article 31.3(c) shall be assessed in relation to the treaty term or provision that is subject to interpretation. As Judge Higgins stated, Article 31.3(c) could not envisage incorporating the entire substance of international law on a topic not mentioned in a particular clause.³⁶ Thus, a rule would be “relevant” if it concerns the subject matter of the provision at issue.³⁷ In *EC and certain member States – Large Civil Aircraft*, the Appellate Body defined the term “relevant” similarly.³⁸

Second, the rule has to be “applicable in the relations between the parties”. There is disagreement concerning its scope *ratione personae*; that is, whether the term “parties” alludes to *all* the parties to the treaty or could cover only a sub-set of parties. There is no doubt that Article 31.3(c) comprises norms of general international law applicable to all states, such as customary international law and the general principles of international law.³⁹ For instance, the Appellate Body has stated that certain provisions of the ILC Draft Articles on State Responsibility (ILC Articles) constitute “customary rules of international law” (CIL). Insofar as the ILC Articles reflect CIL, they would be “applicable in the relations between the parties”⁴⁰ leading the Appellate Body to apply a “provision-by-provision” approach to consider whether the ILC Articles concerned constitute CIL mainly based on decisions by international courts and prior statements made by the respondent recognizing the ILC Article as CIL.⁴¹ The latter would suggest that, while it is not necessary for a party to show that it has persistently objected to the CIL during its formation, it is still required to show that such party has acknowledged the CIL character of a provision before using it for the interpretation of WTO provisions.

The WTO adjudicators have resorted to the ILC Articles to interpret WTO rules. In *US–Anti-dumping and Countervailing Duties (China)*, for example, the Appellate Body took into account certain provisions of the ILC Articles to interpret WTO rules pursuant to Article 31.3(c) of the Vienna

³² ILC Report on Fragmentation, above n 8, at para 423.

³³ Sinclair, above n 19, 139.

³⁴ Richard K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press 2008) 260.

³⁵ See Kuijper, above n 7, at 6–8.

³⁶ See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion Judge Higgins (Merits), 2003 ICJ Rep. para 49.

³⁷ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009) 433.

³⁸ Appellate Body Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft (EC and Certain Member States - Large Civil Aircraft)*, WT/DS316/AB/R, adopted June 1, 2011, para 846.

³⁹ See ILC Report on Fragmentation, above n 8, at paras 424–428.

⁴⁰ Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (US – Continued Suspension)*, WT/DS320/AB/R, adopted 14 November 2008, para.382.

⁴¹ Appellate Body Report, *US-Line Pipe*, para. 259. See also Graham Cook, *Digest of World Trade Organization jurisprudence on public international law concepts and principles*, Cambridge University Press, 2015, p. 363.

Convention.⁴² While considering Article 5 of the ILC Articles, it concluded that since the outcome of its analysis did not turn on such provision, it was not necessary "to resolve definitely the question of to what extent Article 5 of the ILC Articles reflects customary international law".⁴³ More recently, in *Peru – Agricultural Products*, the Appellate Body was requested to take into consideration Articles 20 and 45 of the ILC Articles for the interpretation of the WTO agreements. The Appellate Body ultimately concluded that the PTA provision and the ILC Articles were not "relevant" to the interpretation of the WTO provisions at issue.⁴⁴ The approach used in that dispute would constitute an indirect way of integrating PTAs as their rules would be considered through the ILC Articles, which would be used for the interpretation of WTO rules. This avenue will be explored below by reference to *indirect* integration of PTAs. By contrast, the issue here is whether other international treaties can be used for purposes of interpretation and, if so, whether they have to be binding on *all* the parties to the treaty that is being interpreted, or only on some of them. The question of whether PTAs can be considered for interpreting WTO rules is directly linked to these questions (*direct* integration of PTAs).

As mentioned above, Article 3.2 of the DSU provides for the clarification of the provisions in the WTO covered agreements in accordance with customary rules of interpretation of public international law, which include Article 31 of the Vienna Convention. The use of external treaties was first addressed in a GATT dispute, *US–Tuna*, where the Panel rejected the use of certain environmental Conventions (such as CITES⁴⁵) and other bilateral and plurilateral agreements for purposes of interpretation.⁴⁶ In the WTO context, the Panel in *EC–Biotech Products* interpreted that Article 31.3(c) refers to *all parties to the treaty* that is being interpreted; that is, to all WTO Members.⁴⁷ The narrow interpretation in *EC–Biotech* would imply that only international rules that are binding on all the Members can be used to interpret WTO rules, which automatically excludes PTAs from being used for WTO interpretation.

Against this background, one can identify three main possible interpretations under Article 31.3(c).⁴⁸ It may cover any rules of international law binding on: (i) *all the parties* to the treaty under interpretation; that is, all WTO Members (narrow approach); (ii) a sub-set of WTO Members, including both parties to the dispute (*inter-partes* approach); or, (iii) a sub-set of Members, where both parties to the dispute are not parties to the treaty used for interpretation (broad approach). Under the narrow approach, it would simply not be possible to use PTAs to interpret the WTO Agreement. The *inter-partes* approach would admit the use of PTAs in WTO disputes among the preferential parties only. The broad approach would allow for the use of PTAs in disputes among a PTA partner and a WTO Member (non-PTA party). While the Appellate Body referred to this issue in *Peru-Agricultural Products*, it stated that it was not addressing the meaning of the term "*parties*" in Article 31.3(c).⁴⁹

⁴² The Appellate Body held that, even when the WTO has its own rules on the matter (which constitute *lex specialis*), those Articles could be used for purposes of interpretation. Appellate Body Report, *US - Anti-Dumping and Countervailing Duties (China)*, DS379/R/AB, adopted March 2011, paras. 311- 313.

⁴³ *US- Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, para. 311.

⁴⁴ *Peru – Agricultural Products*, Appellate Body Report, para.5.118.

⁴⁵ Convention on international trade in endangered species of wild fauna and flora, adopted on 3 March 1973, and entered in force on 1 July 1975 CITES.

⁴⁶ GATT Panel Report, *United States- Prohibition of Imports of Tuna and Tuna Products from Canada*, BISD295/91, adopted February 1989, para 4.19.

⁴⁷ Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, (EC - Approval and Marketing of Biotech Products), WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted September 2006, para 7.70.

⁴⁸ Benn McGrady uses a similar approach, referring to these three possible interpretations as the "restrictive approach" (all parties), "divergent" (rules applicable only to the parties to the dispute), and "broad approach" (rules applicable only to one of the parties to the dispute), respectively. McGrady, above n 7, at 45–79.

⁴⁹ See Appellate Body Report, *Peru - Agricultural Products*, above n 5, para 5.104–5.105.

1. Narrow approach: Article 31.3(c) covers all the parties to the treaty under interpretation

Two main arguments support the narrow interpretation of Article 31.3(c). The first argument is a textual one and is based mainly on the “context” of Article 31 of the Vienna Convention and on the use of the term “parties” in other Articles of the Convention. That was also the main approach used by the Panel in *EC–Biotech*.⁵⁰ The second argument relates to the “consent” and requires the external rule to reflect the “common intention” of all the parties to the treaty under interpretation. The Panel in *EC–Biotech* relied on the use of the term “parties” in Article 31.3(c) as well as on Article 2.1(g), which defines the meaning of “party” for purposes of the Vienna Convention.⁵¹ This led the Panel to conclude that the rules to be taken into account are those that are applicable in the relations between “all the parties to the treaty which is being interpreted” (that is, all WTO Members).⁵² However, such interpretation is not compelling, as the *lack of qualifications* in Article 31.3(c) could also be interpreted in the inverse way, that is, as allowing consideration of treaties between a sub-set of the Membership (less than all Members), and could also refer to the parties to the dispute.⁵³ As to the second argument, it has been argued that only treaties reflecting the “common intention of all WTO Members”, either by agreement or tolerance, shall be taken into account to interpret WTO rules.⁵⁴ This argument is mainly based on the principle *pacta tertiis nec nocent nec prosunt*, which states that a treaty does not create either obligations or rights for a third state without its consent.⁵⁵

As pointed out by the ILC Study Group on Fragmentation and some commentators,⁵⁶ the narrow approach followed by the Panel in *EC–Biotech* suffers from a number of problems. First, it would reduce the number of potential treaties that could be used for the interpretation of WTO provisions.⁵⁷ Second, and most importantly, it could lead to inconsistencies and incoherencies between systems of laws.⁵⁸ The requirement for a treaty to be binding on all WTO Members would unnecessarily limit the scope of Article 31.3(c) to a few international treaties of global nature, thereby rendering such provision nearly ineffective. It would also imply the introduction of a *two-tier* system of international treaty law: only universal treaties would enjoy the effect of being considered for the purpose of interpretation of other treaties, while non-universal treaties would not have this effect. This divergence in effect, however, weighs against the notion of equality by introducing a hierarchy among international treaties. Furthermore, it would create a paradox whereby the WTO would become more isolated from international law as the WTO Membership grows, since fewer international agreements would match its membership.⁵⁹ This situation would go against the principle of systemic integration.

⁵⁰ Panel Report, *EC - Approval and Marketing of Biotech Products*, above n 47, para 7.68–7.10.

⁵¹ Article 2.1(g) of the Vienna Convention defines the meaning of the term “party” as “a State which has consented to be bound by the treaty and for which the treaty is in force”.

⁵² Panel Report, *EC - Approval and Marketing of Biotech Products*, above n 47, para 7.68.

⁵³ David Palmeter and Petros C. Mavroidis, ‘The WTO Legal System: Sources of Law’, 92 *AJIL* 398 (1998). Article 31.3 (a) and (b) make no reference to all the parties, although these sub-paragraphs link any subsequent agreement/practice to the treaty under interpretation.

⁵⁴ Pauwelyn, above n 8, at 258.

⁵⁵ Article 34 of the Vienna Convention.

⁵⁶ See, for instance, Gabrielle Marceau, ‘WTO Dispute Settlement System and Human Rights’, 13 *EJIL* 753 (2002), at 754–814; Robert Howse and Ruti G. Teitel, ‘Beyond the Divide: the International Covenant on Economic, Social and Political Rights and the World Trade Organization’, in Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham: Edward Elgar, 2009) 39, at 44; Joe McMahon and Margaret Young, ‘The WTO’s use of Relevant Rules of International Law: An Analysis of the Biotech Case’, 56 *International and Comparative Law Quarterly* 907 (2007), at 907; Andrew Lang, *World Trade Law After Neoliberalism: Re-imagining the Global Economic Order* (Oxford: Oxford University Press, 2011) 152–153.

⁵⁷ See also McLachlan, above n 7, at 279–314; and ILC Report on Fragmentation, above n 8, at para 471.

⁵⁸ Marceau, above n 56, at 780–783. See also ILC Report on Fragmentation, above n 8, at para 471.

⁵⁹ It has also been stated that since the WTO allows non-sovereign members under certain conditions to become WTO Members, it would be impossible for the WTO to have an identical membership to any treaty. Marceau, above n 56, at

There is no doubt that the object of an interpretative exercise, as confirmed by the Appellate Body in *Peru - Agricultural products*, is the treaty as a whole. As stated by the Appellate Body in that case, 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).⁶⁰ The latter does not mean that only treaties binding on all the Members shall be considered, as there may be treaties which, while not binding on all Members, could serve to elucidate the meaning of WTO terms or concepts. It is one thing to say that interpretation cannot *create* either rights or obligations" to the Members (add to or diminish the rights and obligations under the covered agreements); it is another thing to say that a given interpretation "cannot *affect*" the Members. Some commentators have pointed out that, in fact, any interpretation necessarily "affects" the rights and obligations of WTO Members; but this should be read to mean as referring to those Members that are "parties to the dispute". In *EC- Chicken Cuts*, the Appellate Body stated that "the ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case". As stated by the Appellate Body in *Peru-Agricultural products*, "(w)hile an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intention of the parties to the treaty being interpreted."⁶¹ While the objective of treaty interpretation is to elucidate "the common intention of the parties" (arguably some bilateral and particularly plurilateral agreements may serve this purpose); it does not mean that each and every interpretation developed within the context of a particular dispute will necessarily in practice *affect* other Members, as it may in practice apply only to the parties to the dispute.

As mentioned earlier, there are certain limits to treaty interpretation. Particularly, interpretation cannot "modify" the meaning of the term or go against the meaning of the terms of the treaty rule that is being interpreted (interpretation *contra legem*). In *Peru - Agricultural products*, the Appellate Body noted that Peru had not yet ratified the FTA, and therefore it was not clear whether it can be considered as a "party" to the PTA in the sense of Article 31.3(c). It also noted that even under the PTA itself, there is ambiguity as to whether the PTA allows Peru to maintain a WTO-inconsistent measure.⁶² The Appellate Body arrived to this conclusion after having looked at a number of PTA provisions including those touching upon the relationship between WTO and PTA rules.⁶³ While the presumption against conflict would require interpreting PTA and WTO rules as giving rise to compatible obligations; it was not possible to conclude, from reading the PTA, that the parties had agreed on something different from what they had already did in the WTO. Besides, the Appellate Body noted that Peru had argued before the Panel that by virtue of the PTA both countries had "modified" reciprocally their rights and obligations. Therefore, in view of the Appellate Body, the arguments put forward were beyond the scope of an interpretative exercise.⁶⁴ The Appellate Body further noted that, if the argument was indeed "modification", then the appropriate avenue for assessing whether the parties can modify their WTO obligations would be the regional exception.

There is no reason to assume that any external treaty used for the interpretation of WTO rules will necessarily affect the rights or obligations of other Members that are non-parties to the treaty. Therefore, nothing excludes *a priori* any possibility of taking into account external international rules that, although not binding on *all* Members, may be relevant for the interpretation of WTO rules. The narrow approach seems to be the weakest amongst the three possible interpretations, both from a technical point of view, as it finds no support in the context of the Vienna Convention, and from the

(Contd.) _____

781. According to Article XII of the Marrakesh Agreement establishing the WTO, customs unions possessing full autonomy of their commercial external relations may become Members of the WTO.

⁶⁰ Appellate Body Report, *Peru - Agricultural Products*, above n 5, para 5.95.

⁶¹ *Ibid.*, para 5.95.

⁶² *Ibid.*, para 5.108 and 5.109.

⁶³ *Ibid.*, paras. 5.86 and 5.109.

⁶⁴ *Ibid.* para. 5.96.

point of view of systemic integration. The narrow approach would exclude any possibility of considering PTAs that may be relevant for the interpretation of WTO obligations, thereby reducing the potential of using the principle of systemic integration for promoting coherence between both regimes.

2. Inter-partes approach: Article 31.3(c) covers treaties among a sub-set of Members, including both parties to the dispute

As stated by the ILC, the use of “relevant rules” within the meaning of Article 31.3(c) is particularly relevant where parties to the treaty under interpretation are also parties to the international treaty taken into account for purposes of interpretation.⁶⁵ The rationale would be to view states as identical to themselves when acting in other institutional and normative contexts.⁶⁶

On some occasions, WTO adjudicating bodies have considered bilateral agreements amongst the parties, even if not formally under Article 31.3(c). The issue is whether treaties among a small sub-set of Members, such as PTAs, could be used under certain circumstances when interpreting the WTO Agreements, without affecting the rights and obligations of other Members. Some commentators have argued that only those treaties that were accepted widely enough should be taken into account.⁶⁷ Others have stated that international rules found in regional treaties, such as NAFTA or the EU Treaties, can be of direct interest and guidance for the interpretation of WTO provisions, to the extent that such provisions may be evidence of specific international relevance.⁶⁸ In *US–FSC (Article 21.5-EC)*, the Appellate Body looked at several regional agreements for the interpretation of “foreign-source income” under the SCM Agreement.⁶⁹ In *EC–Poultry*, the Panel used a bilateral agreement (Oilseed Agreement) between the parties to the dispute (Brazil and the EC) for the interpretation of the EU schedule of commitments on goods, which are part of the GATT.⁷⁰ The Panel looked at the Oilseed Agreement to the extent relevant for determining the EC’s obligations under the WTO Agreement *vis-à-vis* the complainant (Brazil) only;⁷¹ that is, not in relation to other Members.

In *EC and certain member States - Large Civil Aircraft*, the Appellate Body referred to “other rules of international law” under Article 31.3(c). In this dispute, the EU asked the Panel to consider a bilateral agreement concluded with the US for the interpretation of “benefit” under Article 1.1(b) of the SCM Agreement. Although the bilateral agreement was ultimately not considered because it was deemed not “relevant”, the Appellate Body did refer to Article 31.3(c) and the principle of “systemic integration” as embodied therein. While reaffirming that the purpose of treaty interpretation is “to establish the common intention of the parties to the treaty”, the Appellate Body recognized that in a multilateral context, such as the WTO, when recourse is taken to non-WTO rules for the purpose of interpreting WTO provisions, a delicate balance must be struck between “taking due account of an individual WTO Member’s international obligations and, ensuring a consistent and harmonious approach to the interpretation of WTO law among WTO Members”.⁷² This suggests that it might be possible, under certain circumstances, to consider non-WTO law, including bilateral treaties, to clarify an individual Member’s obligations under the WTO Agreement. However, it also emphasized a

⁶⁵ ILC Report on Fragmentation, above n 8, at para 15.

⁶⁶ *Ibid.*, at para 447.

⁶⁷ Robert Howse, ‘The Use and Abuse of other Relevant Rules of International Law in Treaty Interpretation: Insights from WTO Trade/Environment Litigation’, *International Law and Justice Working Papers 2007/1* (2007), at 43.

⁶⁸ Marceau, above n 56, at 782.

⁶⁹ Appellate Body Report, *United States - Tax Treatment for Foreign Sales Corporations (US - FSC, Article 21.5- EC)*, WT/DS108AB/RW, adopted February 2006, para. 144.

⁷⁰ Panel Report, *European Communities - Measures Affecting the Importation of Certain Poultry Products (EC - Poultry)*, WT/DS69/R, adopted March 1998, para 80–84.

⁷¹ Panel Report, *EC - Poultry*, above n 70, para 83.

⁷² Appellate Body Report, *EC and Certain Member States - Large Civil Aircraft*, above n 38, para 845.

remaining concern regarding the use of such treaties when interpreting WTO rules; that is, the need to ensure a consistent interpretation of WTO rules.

An argument in favor of considering treaties binding on a sub-set of parties may be that WTO rulings have binding effects only on the disputing parties, not all WTO Members (that is, they do not amount to *stare decisis*).⁷³ This may suffice for considering PTAs in disputes among the preferential parties, where relevant for the purposes of interpreting WTO rules.⁷⁴ Still, some may argue that even when such rulings are binding only on the disputing parties, they have a value in terms of precedent.⁷⁵ While interpretation from prior panels and the Appellate Body do not constitute definitive interpretations of the Agreements, they create legitimate expectations among WTO Members and traders and should therefore be taken into account in disputes on similar facts or claims.⁷⁶

The existence of a PTA provision, relevant for the interpretation of WTO terms in a dispute among the preferential parties, may constitute a legitimate reason for considering other interpretations without compromising the predictability of WTO rulings. The PTA provision would be taken into account for purposes of interpretation in the light of the particular circumstances of the dispute. As noted by the ILC, the consideration of other rules would simply reflect the need to respect (inherently divergent) party will, as elucidated by reference to those other treaties. Thus, a case could be made in favor of considering PTA provisions that shed light on WTO terms or provisions in a specific dispute among preferential parties, without affecting other Members' rights or obligations under the WTO Agreement.

In those cases, WTO adjudicating bodies may still need to look at PTA provisions to examine the scope provided for systemic integration. Many PTAs include clauses stating that the parties confirm their rights and obligations under the WTO Agreements, while some also state that in case of inconsistency between the PTA and WTO rules, the PTA shall prevail. As mentioned earlier, in *Peru - Agricultural Products*, the Appellate Body observed that the abovementioned PTA provisions were ambiguous and could not necessarily be read as allowing a party to maintain a WTO –inconsistent measure.⁷⁷ The latter should be considered by PTA parties when crafting clauses with the aim of promoting coherence between both regimes. If the aim of the parties is to agree on something different, they should explicitly state so in the PTA. In addition, the PTA parties could explicitly provide for the application of the principle of systemic integration amongst them as a means of promoting coherence between their international trade obligations or, alternatively, provide that in case of possible inconsistency this should be resolved under the PTA.⁷⁸

⁷³ See Appellate Body Report, *Japan - Alcoholic Beverages II*, above n 7, para 6.10. Among others, in this dispute, the Appellate Body held that a “decision” adopted by a panel report is not a “decision” within the meaning of Article 1(b) (iv) of the GATT 1994.

⁷⁴ Another argument in favour of taking into consideration PTAs for the interpretation of WTO provisions under Article 31.3(c) derives from the explicit authorization set forth in the WTO Agreement for *inter se* modifications aimed at furthering liberalizing trade pursuant to Articles XXIV of the GATT (customs unions and free trade areas) and V of the GATS (economic integration agreements).

⁷⁵ Such interpretations are commonly used by panels and the Appellate Body in subsequent cases. Thus, the use of rules that are only binding on the parties to the dispute could eventually have certain influence in subsequent interpretations.

⁷⁶ On the status of prior panels and Appellate Body reports, see Palmeter and Mavroidis, above n 53, at 400–407. See also Appellate Body Report, *Japan - Alcoholic Beverages II*, above n 7, para 6.10–6.18.

⁷⁷ Appellate Body Report, above n 5, para. 5.109. See also footnotes 295, 296 and 297.

⁷⁸ The TPP seems to have adopted this approach. Article 1.2 of the TPP (Relationship to other Agreements) provides that:
"1 Recognizing the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms,
a) in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to each other; and

Assuming that international rules under Article 31.3(c) also cover PTAs, the next question would be under what circumstances a PTA provision could be taken into account in a WTO dispute among the preferential parties. PTAs incorporate by reference several WTO provisions or borrow WTO terms (including some open-ended terms), while clarifying those terms or provisions. In addition, PTAs include clauses on the interplay between regional and multilateral rules. Thus, PTA provisions could serve different purposes when interpreting the WTO Agreements; for instance, to define the scope of certain WTO terms or provisions,⁷⁹ or to clarify the relationship between certain PTA and WTO rules.

3. Ascertaining the meaning of undefined terms or open-ended terms: The example of "public morals" under the WTO general exceptions

A number of PTAs include a provision on general exceptions which incorporates by reference Article XX of the GATT and/or Article XIV GATS into the agreement, making it an integral part of the PTA.⁸⁰ Instead, other PTAs include a clause modelled on the WTO exceptions.⁸¹ Certain PTAs provide within the general exceptions that "measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health" in accordance with the chapter on social aspects.⁸² The cross-reference refers to the PTA labor and environmental chapters,⁸³ in which the parties reaffirm their commitments to internationally recognized core labor standards as defined by the relevant ILO Conventions, including "the elimination of the worst forms of child labour". The parties also agree "that labour standards should not be used for protectionist trade purposes", and "not to encourage trade or foreign direct investment (...) by lowering the level of protection provided by domestic social and labour legislation".⁸⁴

It is argued that the PTA general exceptions clause can be relevant for purposes of defining the scope and meaning of "public morals" in the WTO general exceptions. To that end, it may be useful to distinguish among the different types of labor provisions found in some PTAs, particularly some North-South PTAs, including the TPP. Labor provisions are normally found in separate chapters which set forth standards of protection based on the main international treaties. WTO Members have different views about the link between trade and labor standards in trade agreements. At the 1996 WTO Singapore Ministerial Conference, Members renewed their commitment to recognize core labour standards, while rejecting the use of such standards as "protectionist tools".⁸⁵ With a few

(Contd.) _____

b) in relation to existing international agreements to which that Party and at least one other Party are party, its existing rights and obligations with respect to such other Party or Parties, as the case may be

2.If a Party believes that a provision of this Agreement is inconsistent with a provision of another agreement to which it and at least one other Party are party, upon request, the relevant Parties to the other agreement shall consult with a view to reaching a mutually satisfactory solution. This paragraph is without prejudice to a Party's rights and obligations under Chapter 28 (Dispute Settlement)." The agreement provides that the Parties agree that the fact that an agreement provides more favourable treatment does not mean that there is an inconsistency within the meaning of paragraph 2.

⁷⁹ See also Isabelle Van Damme, 'Role of Regional International Law in WTO Agreements', in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2007) 553–575.

⁸⁰ See, for instance, Article 29.1 of TPP. Other examples include Article 23.1.1 of US - Chile and US - Korea and Article 22.1.1 of US - Peru. See also Article 2.15 of EU - Korea and Article 158 of EU - CA.

⁸¹ See, for example, Article 22 of EU - Mexico, Article 91 of EU - Chile and Articles 158:3 of EU - CA and 106.2 of EU - Colombia, Peru.

⁸² See Article 224.1 of the EU - Cariforum. The general exceptions clause applies to trade in goods and trade in services.

⁸³ This chapter is in Part II of the PTA titled "trade and trade-related matters".

⁸⁴ See Articles 191.4 and 193 of the EPA.

⁸⁵ They also identified the International Labour Organization (ILO) as the competent body to set and deal with labour standards.

exceptions,⁸⁶ the WTO Agreements do not include trade-related labor provisions. While WTO rules do not set standards of environmental or labor protection, they interact with those policies in several ways. Depending on how labor clauses are inserted in PTAs (e.g., setting standards of protection or as *exceptions*), they may interrelate with WTO rules in different ways.⁸⁷ While those other PTA provisions may be of some relevance, as in the case at hand given the cross-reference made in the PTA, we refer exclusively to the labor clause found in the PTA general exceptions for purposes of interpreting Article XX of GATT or Article XIV of GATS.

As to the interpretation of the WTO general exceptions, a first issue would be whether measures aimed at combating child labor or eliminating the worst forms of child labor fall within the range of policies designed to protect public morals under Articles XX (a) of GATT and/or XIV (a) of GATS. There are two central questions about the meaning of "public morals": *what* morals are covered and *whose* morals are covered.⁸⁸ The latter touches upon the issue of "territoriality"; that is, whether there is an implied jurisdictional limitation in Article XX (a). The PTA clause could be relevant for purposes of interpreting the meaning of "public morals" and answering these questions.

Regarding the first question (*what* morals), in *US - Gambling*, the Panel held that open-ended terms such as "public morals" can vary from Member to Member, as they are influenced by each Member's prevailing social, cultural, ethical, and religious values.⁸⁹ As stated by the Panel, Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories "according to their own systems and scales of values". Subsequently, in this dispute, the Panel examined some dictionary definitions and supplementary means of interpretation to delimit the scope of the term public morals.⁹⁰ As to the second question (*whose* morals), in *EC—Seals products*, the Panel considered that the question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires an assessment of two issues: (i) whether the concern in question indeed exists in that society; and (ii) whether such concern falls within the scope of "public morals" (standards of right or wrong) as defined and applied by a regulating Member "in its territory, according to its own systems and scales of values".⁹¹ On appeal, the Appellate Body referred to this issue, but decided not to examine the question further given that the participants did not address it in their appellate submissions.

As stated by the Appellate Body in *Peru - Agricultural Products*, if the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered "together with the context".⁹² A preferential partner applying trade restrictive measures aimed at protecting child

⁸⁶ Article XX sub-paragraph e) allows Members to adopt trade-restrictive measures relating to prison labour, subject to the requirements of that provision. The preamble to the GATT refers to sustainable development.

⁸⁷ For instance, for the interpretation of Article 2.2 of the WTO TBT Agreement, to the extent the measure is deemed covered under such agreement.

⁸⁸ Steve Charnovitz, 'The Moral Exception in Trade Policy', 38 Va. J. Int'l L. 689 (1997-1998).

⁸⁹ Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US - Gambling), WT/DS285/AB/R, adopted 20 April 2005, para 6.461; see also Panel Report, China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R.

⁹⁰ Appellate Body Report, US - Gambling, above n 89, para 6.462–6.474. In this dispute, the Panel turned first to dictionary definitions in order to delimit the scope of the term "public morals", and then referred to various examples of "supplementary means" of interpretation, some of which involved a moral exception being offered for gambling activities, including: international law *decisions*; examples of WTO Members relying on "public morals" grounds; historical examples from past trade negotiations; and *judicial rulings* in other jurisdictions.

⁹¹ This analysis was carried out in the context of Article 2.2 of the TBT Agreement. Appellate Body Report, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products - AB-2014-1 - AB-2014-2 (EC - Seals products), WT/DS400/AB/R, WT/DS401/AB/R, para 7.379–7.384.

⁹² Appellate Body Report, Peru - Agricultural Products, above n 5, para 5.94.

labor could request a WTO panel to take into account the PTA provision in a dispute against the preferential party for purposes of clarifying the term “public morals” based on Article 31.3(c) of the Vienna Convention as part of "other elements" considered together with the context. The fact that the PTA makes explicit reference to child labor within the scope of policies covered by the "moral exception" could be given a special weight within this interpretative exercise. The reference to other PTA chapters referring to the elimination of the worst forms of child labor and certain ILO Conventions may provide additional guidance for purposes of defining the scope of the exception in this specific case. The party resorting to the PTA provision as a means of interpretation will need to comply with the other requirements under the general exceptions, notably the "necessity test" and the chapeau. Regarding the chapeau, as stated by the Appellate Body, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination involves an analysis that relates primarily to the cause or the rationale of the discrimination.⁹³ In other words, it may not be possible to justify differential treatment accorded to different Members if the reasons for such treatment are not connected to the main objective of the measure. The PTA provision would be taken into account as an interpretative tool for purposes of clarifying the meaning of the term "public morals" under the WTO general exceptions in order to determine the rights and obligations of the parties in the dispute under the WTO covered agreements.

4. Broad approach: Article 31.3(c) covers treaties among a sub-set of Members which are not binding on both disputing parties

Some may argue that the reference to “any relevant rules applicable in the relations between the parties” could also be read to mean any relevant rules of international law applicable to the dispute and in the relations between the parties to the treaty under interpretation.⁹⁴ This approach could take into account rules of international law that, while not applicable to both disputing parties, are relevant to clarify the obligations of one of the parties to the dispute. WTO adjudicating bodies have considered, on certain occasions, international rules that were not binding on both parties to the dispute. In *US–Shrimp*, the Appellate Body took into account various international treaties that were not binding on both parties to the dispute for purposes of interpreting Article XX (g) of GATT.⁹⁵ Also, in *US–FSC*, the Appellate Body took into consideration a number of regional agreements that were not binding on the disputing parties for the interpretation of “foreign-source income” under the SCM Agreement.⁹⁶ As mentioned earlier, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body seemed to allude to the possibility of taking into account under certain circumstances "individual WTO Member's international obligations", while stating the importance of ensuring a consistent and harmonious approach to the interpretation of WTO law.

It may be argued that, under certain circumstances, PTAs could also be taken into account, for the interpretation of terms also found in the WTO Agreements, even if those agreements are not binding on both disputing parties. A Member may argue, for instance, that a certain provision found in a

⁹³ Appellate Body Report, *Brazil - Retreaded Tyres*, above n 5, para 225.

⁹⁴ See McGrady, above n 7, at 49.

⁹⁵ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products (US - Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, para 130. It has been argued that, while not requiring both parties to be bound by the non-WTO treaties, it was considered whether the Members that were parties to the dispute (and third parties) were bound by one or more of those treaties. Thus, while there was no consent, WTO adjudicating bodies looked at the general level of support from the Members and the international community in general. See Howse, above n 67, at 43. Other examples of disputes where WTO bodies have taken into consideration other treaties, although not under Article 31(3)(c), include: Appellate Body Report, *Titel (Korea - Various Measures on Beef)*, WT/etc, adopted on XX month year, para 539; Appellate Body Report, *United States - Tax Treatment for “Foreign Sales Corporations” - Recourse to Article 21.5 of the DSU by the European Communities (US - FSC (Article 21.5 - EC))*, WT/DS108/AB/RW, adopted 29 January 2002, para 144; and Appellate Body Report, *EC - Bananas III*, above n 12, para 167.

⁹⁶ Appellate Body Report, *US - FSC (Article 21.5–EC)*, above n 69, paras 141-145.

number of PTAs concluded between WTO Members, which is relevant for the clarification of a WTO term, can be used in support of a given general interpretation. Circumstances such as the number of PTAs containing the same or similar provisions, the number of parties (e.g., bilateral vs. plurilateral) and the composition of the agreements (e.g., PTAs among countries representing different regions and legal traditions) can play a role in deciding whether to take into account the PTAs for purposes of interpreting WTO provisions or terms.⁹⁷ Ultimately, the "weight" given to the PTA would depend on different factors such as the provision at issue, its context, and the circumstances of the particular dispute.

5. Indirect integration of PTAs

Another possible avenue for integrating PTAs would be through the general rules of international law (*indirect* integration of PTAs).⁹⁸ Under the indirect integration approach, PTAs would be considered through the general rules of international law, which would be used for the interpretation of WTO rules. While under the approach outlined above, PTAs would be taken into account "as relevant rules of international law applicable in the relations between the parties" (direct integration)⁹⁹; under indirect integration, PTAs would be considered as a factual matter or as factual evidence. The latter approach was used in *Peru – Agricultural Products*, where the Appellate Body was requested to take into consideration Articles 20 and 45 of the ILC Articles for the interpretation of the WTO agreements. In this dispute, Peru argued based on Article 20 of the ILC Articles that Guatemala's approval and ratification of their PTA amounted to a "consent" precluding the wrongfulness of maintaining the measure at issue.¹⁰⁰ The Appellate Body ultimately concluded that the PTA at issue and the ILC Articles were not "relevant" as they did not concern the same subject-matter as the WTO provisions that were being under interpretation, or as bearing specifically upon the interpretation of those provisions.¹⁰¹ In this regard, the Appellate Body noted that "in the absence of clarity as to whether the PTA rules allow Peru to depart from its WTO obligations, it did not see how the ILC Articles that address consent to wrongful acts and consent to a waiver can be relevant to the interpretation" of the WTO rules at issue.¹⁰² This could mean *contrario sensu* that should the PTA provisions had clearly stated that Peru was allowed to depart from its WTO obligations, the ILC Articles would have been deemed "relevant"; that is, bearing upon the interpretation of the WTO provisions. Some scholars have argued that the Appellate Body's reasoning in *Peru – Agricultural Products* implies that one may utilize Article 20 not only as a rule to "interpret" WTO law, but also as a self-standing defense under general international law from which to justify WTO breaches on a bilateral basis.¹⁰³ For this defence to be applicable, it will be necessary to show that Article 20 of the

⁹⁷ This issue could also be linked to the possible use of PTAs as "subsequent practice" referred to above in relation to Article 31.3(b) of the Vienna Convention.

⁹⁸ The Appellate Body stated in *EU-Anti-Dumping and Countervailing Duties (China)*, that the reference to rules of international law in Article 31.3(c) corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice, which include customary rules of international law and general principles of law. *US-Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, para. 309.

⁹⁹ In *Peru – Agricultural Products*, the Appellate Body acknowledged that the characterization of PTA provisions for the purpose of determining whether a Member has complied with its obligations involves legal characterizations that fall within the scope of appellate review (para. 5.86)

¹⁰⁰ Peru also argued that Guatemala's ratification of the FTA amounted to a "waiver" in the sense of Article 45(a) of the ILC Articles. We will not refer to this argument in this paper as this argument is a "procedural one" (related to Guatemala's rights to start procedures) and not a substantive one. For an analysis of the possible use of Article 45(a) as a "procedural defence" in WTO proceedings, see: Pamela Apaza Lanyi and Armin Steinbach, above n 4, at 372–405.

¹⁰¹ Appellate Body Report, above n 5, para. 5.103.

¹⁰² Appellate Body Report, above n 5, footnote 296.

¹⁰³ Pauwelyn, Joost, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence* (February 10, 2016). Available at SSRN: <https://ssrn.com/abstract=2731144>, p.24.

ILC Articles amounts to CIL. As mentioned earlier, the Appellate Body has applied a provision-by-provision approach to determine whether the ILC Articles constitute customary rules. More importantly, relying on Article 20 would require consent to be clearly established¹⁰⁴ by looking into the PTA at issue. This raises again the issue of avoiding ambiguities in PTAs, which turns out to be particularly critical when it comes to establishing consent. While WTO adjudicating bodies have applied international law principles and CIL to resolve “procedural issues”, they have not used them to resolve the “substance” of a dispute.¹⁰⁵ For some commentators, the difficulty of applying customary rules of international law in reaching a conclusion that a WTO provision has been superseded by another international treaty is that panels risk reaching a conclusion that adds or diminishes the rights or obligations of WTO Members.¹⁰⁶ The ILC report on the ILC Articles states that the circumstances precluding wrongfulness do not annul or terminate the obligation, which is still binding upon the parties; therefore, in principle, the successful invocation of such circumstances as defence would not affect or “supersede” WTO obligations.¹⁰⁷ According to the ILC report, when consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.¹⁰⁸ In principle, any other Member that considers itself affected by the measure may start procedures on its own merit to request that the Member concerned bring the measure into conformity with the WTO Agreements.

III. Integrating WTO law in PTA disputes

Coherence can also be achieved in the opposite direction, that is, when WTO law can inform the interpretation of PTAs. In fact, the proliferation of PTAs implies fragmentation of the global trade-related dispute settlement regime.¹⁰⁹ In the context of FTAs, most DSMs provide for *ad hoc* panels (not standing bodies, such as the WTO Appellate Body) composed for each dispute. FTAs typically contain deeper obligations and provide their own DSMs (modelled on the DSU), which increases the likelihood of having more regional disputes in the future. PTAs often incorporate by reference a number of WTO provisions. For example, most US PTAs and the latest EU PTAs incorporate, by reference, the national treatment principle for trade in goods (Article III of the GATT, sometimes including its interpretative notes¹¹⁰), as well as the general exceptions (Article XX of the GATT and/or Article XIV of GATS¹¹¹), or even in some cases a whole WTO Agreements¹¹² (e.g. the TBT Agreement¹¹³). In addition, PTAs commonly borrow definitions or concepts from the WTO Agreements, such as the concept of “likeness” or the “necessity test”. The level of activity and

¹⁰⁴ *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Yearbook of the International Law Commission, 2001, vol. II, Part Two, annexed to UN Doc. A/RES/56/83 of 12 December 2001, at 73.

¹⁰⁵ In *Korea – Procurement*, the Panel concluded that “(c)ustomary international law applies generally to the economic relations between WTO Members” to the extent the WTO treaty does not “contract out” from it. Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000.

¹⁰⁶ Marceau, above n 4, p. 1102-1104 (arguing that this would be inconsistent Article 3.2 of the DSU).

¹⁰⁷ *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, above n 104, p. 70-74.

¹⁰⁸ This refers to the principle *pacta tertiss nec noce nec prosunt* found in Article 34 of the Vienna Convention according to which a treaty does not create either obligations or rights for a third state without its consent. The defence would only be effective vis-à-vis the party who gave its consent, without affecting other Members.

¹⁰⁹ Apaza Lanyi and Steinbach, above n 4, at 372–405.

¹¹⁰ See, for example, Article 3.2.1 of US - Chile, Article 2.2.1 of US - Peru, Article 2.8 of EU - Korea and Article 85 of EU-CA. Article II of the GATT, including its interpretative notes, are incorporated into and made part of the Agreement *mutatis mutandis*.

¹¹¹ See for example Article 21.1 of US- CAFTA-DR, 23.1 of US-Korea (KORUS). See also Article 29.1 of TPP.

¹¹² See for example Article 126 of EU-Central America and 4.1 of EU-Korea.

¹¹³ See latest EU PTAs.

maturity varies greatly among PTA DSMs depending, for instance, on the level of integration or type of agreement (CU or FTA).

In that context, an issue that arises is to what extent *ad hoc* PTA adjudicating bodies shall take into account WTO law, including WTO decisions adopted by the Membership, and WTO case law as adopted by the DSB, when interpreting PTAs. At the regional level, particularly in the case of FTAs, there is generally no standing judicial body or mechanism of appeal (similar to the WTO Appellate Body). Thus, PTAs rely exclusively on *ad hoc* panels chosen from a roster of individuals for each dispute. WTO interpretations, as adopted by the DSB, can provide valuable guidance for the clarification of PTA provisions, as well as predictability for the PTA parties and economic operators. What is noteworthy is that some PTAs require adjudicating bodies to consider jurisprudence developed by the DSB. For example, the EU–Korea and EU–Central America PTAs expressly state that, when interpreting provisions that are *identical* to WTO provisions, PTA panels shall adopt an interpretation “which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body”.¹¹⁴ The TPP includes a similar provision.¹¹⁵ Other PTAs grant regional panels wider powers to consider WTO case law, notably the CETA imposes an obligation on CETA panels to take into account relevant WTO jurisprudence without conditioning such obligation on particular circumstances.¹¹⁶ The requirement for PTA panels to be consistent with WTO interpretations results from the recognition of the expertise of WTO adjudicating bodies and the importance of keeping coherence with the body of jurisprudence developed at the multilateral level. That being said, the clause may result narrow in certain cases where the PTA rule is not identical, but still clearly based on WTO rules or terms.

A first issue is the legal basis under which WTO case law could be used in PTA disputes. It has been stated that WTO case law itself, in the form of panel and Appellate Body reports adopted by the DSB, does not necessarily constitute rules of international law within the meaning of Article 31.3(c) of the Vienna Convention.¹¹⁷ While Article 31.3(c) covers *all* sources of international law, which could also include relevant judicial decisions from international bodies, judicial decisions constitute “subsidiary means for the determination of rules of law” according to Article 38 of the ICJ Statute.¹¹⁸ Unless the PTA establishes otherwise, WTO interpretations could still be taken into account as “subsidiary means of interpretation”. Some PTAs refer to the general rules of interpretation contained in the Vienna Convention, while others make no reference to any international rules of interpretation. For example, NAFTA provides that the Parties shall interpret and apply the provisions of the Agreement in the light of its objectives and “in accordance with applicable rules of international law”.¹¹⁹ This has been understood to include Articles 31 and 32 of the Vienna Convention.¹²⁰ Most post-NAFTA US PTAs do not include an explicit reference to the general rules of interpretation. As mentioned earlier, the general rules of interpretation embodied in the Vienna Convention have been recognized as general rules of customary international law, which means they are binding on all states,

¹¹⁴ See Article 14.16 of EU - Korea and Article 322 of EU – Central America.

¹¹⁵ See Article 28.12.3 of TPP.

¹¹⁶ See Article 29.17 of CETA. It provides that “The arbitration panel shall take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body.

¹¹⁷ Andrew Mitchell and Tania Voon, ‘PTAs and public international law’, in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, 2nd ed. (Cambridge: Cambridge University Press, 2015) 114, at 118. The main argument is that, pursuant to Article 2.3 of the DSU, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered WTO Agreements.

¹¹⁸ According to Article 38(d) of the Statute of the ICJ, judicial decisions constitute subsidiary means for the determination of rules of law.

¹¹⁹ Article 102(2) of NAFTA.

¹²⁰ See NAFTA Chapter 20 Panel Report, *Tariffs applied by Canada to certain U.S. origin agricultural products (Canada - Agricultural Products)*, 2 December 1996, paras 118–119; and NAFTA Chapter 11 Arbitration Tribunal, *S.D. Myers, Inc. v. Canada (Myers v. Canada)*, 2002, para 200.

including PTA partners. Thus, even in those cases where the PTAs do not explicitly refer to the international rules of interpretation contained in the Vienna Convention, such rules shall be taken into account when interpreting the PTAs. The reference to “any rules of international law applicable in the relations between the parties” in Article 31.3(c) would include the WTO Agreement.

On some occasions, NAFTA panels have referred to WTO law and case law in support of their decisions. For instance, in *Broomcorn–Brooms*, a NAFTA panel relied on the interpretations of certain terms used in the WTO Agreement on Safeguards (“domestic industry” and “like or directly competitive products”) to interpret NAFTA provisions.¹²¹ In *Cross-Border Trucking Services*, a NAFTA panel acknowledged the importance of WTO jurisprudence developed under Article XX of GATT when interpreting the term “necessary”.¹²² It is also interesting to note that WTO case law has been referred to not only by panels under the NAFTA State-to-State dispute settlement mechanism and the Binational panels on anti-dumping and countervailing measures, but also by arbitrators under the NAFTA Investor-State mechanism.¹²³ Some have argued, however, that WTO law and case law in investment disputes has been sometimes considered without taking into account the particular PTA context and the different nature of the interests at stake in investment disputes (investors' vs. state's).¹²⁴ At the same time, the fragmentation of investment rules and rulings has been flagged as a problem by several commentators and states. In any case, the use of WTO law and case law for the interpretation of PTA provisions should be considered taking into account the particular context of the PTA, the provisions under interpretation, and the matter at issue. The preferential forum could considerably gain by taking into consideration WTO case law, as adopted by the DSB, where relevant for the interpretation of PTA provisions.

Where PTAs use WTO rules or similar rules as a basis, it would be necessary to look at or consider the corresponding WTO rules. It has been stated that, even in those cases where preferential provisions are largely independent from WTO obligations (such as WTO plus provisions), WTO law may have an influence since many of the underlying legal concepts are imported from the WTO, for example when interpreting the meaning of a preferential market access concession for goods or services or terms contained in the government procurement section or chapter.¹²⁵ In *Canada-Agricultural Products*, a NAFTA panel took into consideration GATT provisions that were incorporated into the treaty, but amended after the conclusion of the WTO Agreement.¹²⁶ The NAFTA panel recognized the amended GATT provision on the basis of a NAFTA clause providing that the parties retain their rights and obligations under GATT 1947. The Panel concluded that the reference at issue was not simply to the GATT as it existed when the NAFTA provision came into effect (old GATT 1947), but to the GATT regime as it had evolved into the WTO. Some PTAs have provisions similar to the one included in the NAFTA concerning the modification of WTO provisions incorporated by reference into PTAs.

Likewise, PTA adjudicating bodies shall take into consideration WTO decisions adopted by the Membership. The range of WTO decisions adopted for the application or clarification of WTO

¹²¹ NAFTA Chapter 20 Panel Report, U.S. Safeguard Action taken on Broomcorn Brooms from Mexico (Broomcorn Brooms), (January 1998), Final Report paras 64–67.

¹²² NAFTA Chapter 20 Panel Report, *Cross-Border Trucking Services*, February 2001, Final Report para 260.

¹²³ In *SD Myers v. Canada*, the arbitral panel considered WTO law for the purpose of interpreting the term “like circumstances” in the context of the national treatment obligation due to investors under the PTA investment chapter.

¹²⁴ NAFTA Chapter 20 Panel Report (investor–state), *Methanex Corporation v. United States of America*, August 2005, Part IV, Chapter B paras 29–37. The Panel in *SD Myers v. Canada* was criticized for using WTO case law on “like products” for the interpretation of the term “like circumstances”. See also Mitchell and Voon, above n 117, at 119.

¹²⁵ García Bercero, above n 6, at 400–401. According to this commentator, it cannot be excluded that in interpreting the meaning of market access concessions or of a term in the government procurement section, a bilateral arbitration panel may consider WTO law or jurisprudence.

¹²⁶ NAFTA Panel Report, *Canada - Agricultural Products*, above n 120, para 134.

provisions may be wide (for example, some constitute binding decisions, while others non-binding guidelines) and they can be used as valuable tools of interpretation when clarifying PTA provisions, depending on the case. As mentioned above, a number of PTAs refer to the Doha Declaration on the TRIPS Agreement and Public Health and recognize its importance.¹²⁷ Even in those cases where PTAs make no explicit reference to such Declaration, it shall be taken into account where relevant for the interpretation of the preferential parties' rights and obligations as contained in the PTA. The same reasoning would apply regarding other decisions aimed at implementing WTO rules. In *US– Clove Cigarettes*, the Appellate Body concluded that a paragraph of the Doha Ministerial Decision (paragraph 5.2 on the interpretation of the term “reasonable interval” in Article 2.12 of the TBT Agreement) can be considered to be a “subsequent agreement”, within the meaning of Article 31 (3) (a) of the Vienna Convention – any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.¹²⁸ The relevance and weight given to the WTO decisions for purposes of interpretation would depend on the specific provisions at issue, their context, and the particular aspects of the dispute. Thus, a case could be made in favor of requesting PTA panels to take into account decisions adopted by the Members regarding the application, interpretation, or clarification of WTO rules, where relevant, for purposes of interpreting PTA provisions as a means of promoting coherence between the two regimes.

IV. Conclusions

The proliferation of PTAs leads to an increasing fragmentation of both substantial and procedural governance of trade, putting at risk the coherent application of global trade rules. The need for a coherent application of trade rules emanating from different legal orders requires employment of the legal techniques available under public international law. Systemic integration of both PTA- and WTO-based rules poses a two-sided challenge: How to integrate PTA rules into the application of WTO rules, and vice-versa?

The principle of systemic integration embodied in Article 31.3(c) of the Vienna Convention can play a key role in promoting coherence in disputes involving the preferential parties. GATT/WTO panels have already resorted to bilateral agreements to the extent that this has been relevant to determine the obligations of disputing parties. PTA rules may be further relevant to define the scope of certain terms (e.g., open-ended terms) contained in the WTO Agreement and for determining the relationship between preferential and multilateral rules. The issue of how, when, and to what extent PTAs should be taken into account has to be decided on a case-by-case basis, depending on the context and particular circumstances of each dispute. In this regard, the following elements could be taken into consideration when systemically integrating multilateral and preferential rules: (i) the “relevance” of the PTA provision at issue; that is, whether it concerns the same subject matter as the WTO provision under interpretation, or as bearing upon the interpretation of the WTO provision at issue; (ii) whether the PTA provision serves to establish the common intention of the parties; and, (iii) the extent to which the PTA clearly defines the relationship between multilateral and preferential rules. The possibility of different interpretations will have to be weighed against the gains derived from considering WTO rules within their normative environment and promoting coherence between PTAs and the WTO. As the Appellate Body noted in *EC and Certain Member States - Large Civil Aircraft*, it is necessary to strike a balance between “taking due account of an individual Member's international obligations” and ensuring a “harmonious interpretation of WTO law”.¹²⁹ The use of PTAs as a means of interpretation of WTO law may become more manifest as more WTO Members

¹²⁷ See, for instance, Article 197 of EU - Peru, Colombia.

¹²⁸ Appellate Body Report, United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes), WT/DS406/AB/R, adopted 24 April 2012, para 260–267.

¹²⁹ Appellate Body Report, EC and Certain Member States - Large Civil Aircraft, above n 38, para 845.

from different regions, legal traditions, and at different levels of development conclude plurilateral PTAs.

In parallel, PTA panels shall consider WTO law when interpreting PTA provisions, including the decisions adopted by the WTO Members on the application and interpretation of the WTO agreements. In many cases, it will be necessary to consider WTO rules, as PTAs generally use WTO rules as a basis to add new commitments. WTO judicial interpretations, as adopted by the DSB, could also provide valuable guidance to PTA panels as well as in offering adaptability to the evolving global trading environment. This would make it possible to build on well-established case law and the experience of WTO panels and the Appellate Body on the interpretation of rules and terms which are also contained in PTAs. In addition, the inclusion of clear and specific PTA provisions ruling on the relationship between multilateral and preferential rules should be considered in order to provide precise guidance to adjudicators and smooth the application of systemic integration at both levels.

The readiness of WTO panels to integrate PTA rules may also strengthen the trajectory of international trade law. A narrow understanding requiring all WTO Members to be bound by the rules may isolate WTO adjudication in the long run. It would also establish a two-tier system within international trade law which is at odds with public international law and would ignore the potential value of PTAs to clarify WTO rules. Relying on the principle of systemic integration in Article 31.3(c) of the Vienna Convention on the Law of Treaties would provide a legal basis for considering PTA rules in WTO disputes, thereby enhancing the predictability of the global trading environment.

Author contacts:

Pamela Apaza Lanyi

WTO, Geneva

Email: pamela.apaza@wto.org

Armin Steinbach

Robert Schuman Center for Advanced Studies, EUI

Via Boccaccio 121

50133 Firenze

Italy

Email: steinbach@coll.mpg.de