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Customary Rules of Interpretation in the Practice of WTO Dispute Settlement Bodies

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I. Introduction

The interpretative rules that are used in the adjudicative practice of the World Trade Organization (WTO) have become the object of increasing attention over the last few years. Some scholars and practitioners have voiced a need for special interpretative rules that would reflect the distinctiveness of the WTO system. Others have disagreed, noting that the instructions provided for in Articles 31 to 33 of the Vienna Convention on the Law of Treaties are sufficiently flexible to accommodate any particularities of WTO law. There is also a disagreement among scholars as to the compatibility of the interpretative methods actually used by the WTO dispute settlement bodies with the Vienna Convention on the Law of Treaties. Once again there are those who believe that both the Appellate Body (AB) and panels follow the language of the Vienna Convention, and those who argue that the approach of the WTO dispute settlement bodies is not always compatible with the standards established by Articles 31 to 33. At the

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1 cf discussion in sec 2 of this chap.
3 cf discussion in sec 2 of this chap.
same time, many of the latter critics fail to identify any specific examples of such divergences in WTO practice.\(^6\)

The application of general/specific rules of interpretation in WTO jurisprudence may be also connected with the broader problem of fragmentation and/or unity of international law. The reliance by the WTO dispute settlement bodies on specific rules, distinct from those that are applied by other international tribunals, will most probably contribute to the fragmentation of international law and play a part in creating self-contained regime, while reliance on the interpretative provisions included in the Vienna Convention on the Law of Treaties (as well as on other generally-recognised rules of interpretation that are not codified in the Convention) will have a de-fragmentation effect and lead to greater convergence among different international legal systems. This issue, although sometimes discussed in the literature,\(^7\) appears to be under-investigated.

Taking into account the above context, this chapter attempts to discuss the compatibility of WTO practice with the interpretative rules provided for in the Vienna Convention on the Law of Treaties and to identify those instances where WTO dispute settlement bodies have decided to diverge from the Convention’s provisions. Based on that, the chapter connects the issue of interpretation with the problem of fragmentation and/or unity of international law as a whole, and proposes some tentative observations with regard to WTO practice. The analysis presented here should not be seen as exhaustive, as it is based on the qualitative assessment of a limited number of cases. Nevertheless, in the opinion of the author the issues identified may reflect broader problems that exist in WTO jurisprudence.

The first section of the chapter describes the general practice of the WTO dispute settlement bodies with regard to the rules provided by the Vienna Convention on the Law of Treaties. The second and the third section concentrate on those instances where the approach of panels and the AB is not entirely compatible with the Vienna Convention. In this context, the chapter identifies two types of situations – relying on overly textual methods, and limiting the role of non-WTO rules in the process of interpretation – and illustrates each of them with relevant examples. The last part of the chapter attempts to analyse the significance of those situations for the issue of fragmentation and/or unity of international law.

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II. Customary Rules of Interpretation in the WTO Jurisprudence

WTO panels and the AB have progressively recognised the rules of the Vienna Convention on the Law of Treaties as relevant to the process of interpretation of WTO agreements. Pursuant to Article 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), dispute settlement bodies are to interpret provisions of WTO agreements in accordance with the customary rules of interpretation of public international law. According to the AB, and in line with the prevailing view in the international community, Articles 31 to 33 of the Vienna Convention on the Law of Treaties provide a codified version of such customary rules of interpretation. The mandatory language used by Article 3(2) of the DSU implies that the WTO dispute settlement bodies are under an actual legal obligation to follow those rules. However, it has also been noted in the literature that due to the status of those rules in the international legal order (being a part of international customary law), even without the explicit reference in Article 3(2) of the DSU, WTO panels and the AB would still be obliged to apply them when interpreting WTO law.

Since Articles 31 to 33 of the Vienna Convention on the Law of Treaties do not include all existing customary rules of interpretation of public international law, it was natural for the WTO dispute settlement bodies to rely on other interpretative guidelines. As noted by Lennard, ‘they have been treated

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8 There seems to be a disagreement among scholars as to the nature of arts 31 to 33 of the Vienna Convention on the Law of Treaties. Some believe that they are nothing more than a methodological device and cannot be regarded as legally binding rules; cf Jan Klabber on the Opinio Juris webpage, available at http://opiniojuris.org/tag/gardiner-treaty-interpretation-symposium (last visited 1 June 2011). Others describe them as principles, not rules, that set general guidance, eg: Van Damme (n 4) 56. At the same time, there are number of AB reports that refer to arts 31 to 33 as legally binding rules giving a rise to specific obligations; cf cases referred in (n 12). This is also the approach taken in this chap. Of course this does not mean that arts 31 to 33 establish rigid and inflexible obligations. To the contrary, the Vienna Convention on the Law of Treaties only provides general rules that leave an interpreter with a considerable margin of discretion.

9 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, Legal Instruments – Results of the Uruguay Round (15 April 1994) 33 ILM 1123, art 3(2) (‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’).

10 Van Damme (n 4) 50.


in WTO fora as emerging naturally from the expressed principles in the Vienna Convention, particularly the good faith principle. This catalogue is broad and includes, among other things, the principle of effective treaty interpretation; the principle in dubio mitius (if the meaning of the term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation); the presumption of consistency (different terms are understood as having different meanings); and the concept of evolutionary meaning (generic terms may be interpreted in an evolutionary manner). Some calls have been also made urging the development of more specific rules of interpretation which would reflect the special character of WTO obligations, and which may diverge from the principles contained in the Vienna Convention on the Law of Treaties. In particular, the Special Consultative Board to the WTO Director-General noted that ‘the customary international law rules of interpretation are, themselves, sometimes questionable when applied in the context of very detailed and intricate economic obligations of the WTO’.

The Board also added that ‘there are many different techniques that can be used for interpreting a treaty, and the Appellate Body has utilised many of the rules that are necessary’. Unfortunately, the Board neither identified those instances nor proposed any coherent and comprehensive alternatives to the rules of the Vienna Convention on the Law of Treaties. However, if one examines the WTO case law, it is difficult to find any consistent practice that would rely on such special rules of interpretation. In fact, in one of the reports, the AB explicitly refused to recognise the ‘interpretative principle directing Panels to bias towards the reduction of tariff commitments’.

It is also worth to refer here to the statement of the former member of the Appellate Body, who observed that WTO case law ‘does not reveal any mention of, or reference to, one or more rules of interpretation specific to this particular field that would come to complement or substitute for the … general rule’. Of course, as was mentioned above, both panels and the AB rely not only on Articles 31 to 33 of the Vienna Convention on the Law of Treaties but also refer to other rules, which nevertheless are to be qualified as general customary international law.

16 ibid para 164.
19 ibid.
20 Van Damme (n 4) 59 f.
21 WTO AB Report, EC – Chicken Cuts (n 11) para 189.
In the WTO context, the text of the treaty remains, in line with the Vienna Convention on the Law of Treaties, a central element of the interpretative process. The normal practice is to contextualise the text of a provision (determined initially on the basis of dictionaries) with the text, preamble and annexes of a particular WTO agreement, as well as any agreement or instrument related to the treaty. WTO case law also recognises the relevance of the good faith requirement in the process of interpretation. In practice, this is sometimes translated into the principle of effective treaty interpretation, which requires the interpreter to read different provisions in a harmonious way so as to give meaning to all of them. Nonetheless, it has been noted in the literature that the application of the good faith principle does not change the ‘result found after applying the other interpretative criteria of Article 31, ie wording, context and object and purpose of the treaty’.

Part of the contextualisation is also provided by the purpose and an object of a treaty. Both elements are normally conceptualised as referring to a treaty as a whole and not to a particular term or provision. Arguably, a purpose and an object may be sought not only in the preamble of a particular agreement, but also in the Marrakesh Agreement, which is an umbrella treaty for other WTO agreements. WTO case law, at least in theory, fully accepts the relevance of the elements enumerated in Article 31(3) of the Vienna Convention on the Law of Treaties. According to the AB, in order for subsequent practice to be relevant, there needs to be a concordant, common, and consistent sequence of acts or pronouncements, which imply the agreement of the parties on the interpretation of a treaty. This means that isolated acts do not qualify as subsequent practice. At the same time, it is not necessary that all WTO Members are engaged in a particular practice. Last but not least, the WTO dispute settlement bodies have also sometimes referred to Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In particular, the case law

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23 WTO AB Report, Japan – Alcoholic Beverages (n 11) para 12.
27 cf WTO Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (20 April 2005) WT/DS285/R, as modified by the Appellate Body Report WT/DS285/AB/R, para. 6.49 (noting ‘the requirement that a treaty be interpreted in “good faith” can be correlated with the principle of “effective treaty interpretation”, according to which all terms of a treaty must be given a meaning’). However, one may also legitimately argue that this is an application of the rules on contextual interpretation, ensuring consistency within the treaty rather than a subscription to the principle of “effective treaty interpretation”.
29 WTO AB Report, EC – Chicken Cuts (n 11) para 238.
30 WTO AB Report, Japan – Alcoholic Beverages (n 11) para 12.
31 WTO AB Report, EC – Chicken Cuts (n 11) para 257.
has clarified that rules of international law applicable to relations between the parties include the general principles of international law\textsuperscript{32} and the rules of international customary law.\textsuperscript{33}

WTO practice, again in line with the Vienna Convention on the Law of Treaties, accepts recourse to Article 32 in those cases when the application of primary rules still leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.\textsuperscript{34} Moreover, reference to supplementary means of interpretation is also made in order to confirm the results obtained on the basis of Article 31. The supplementary means include the \textit{travaux preparatoires} and the circumstances of the conclusion of WTO agreements.\textsuperscript{35} There are also instances where WTO dispute settlement bodies have relied on Article 33 of the Vienna Convention. The AB, in line with the instruction of the provision, normally tries to reconcile text of a particularly WTO agreement that differs between various authentic language versions.

Despite this explicit recognition of the rules of the Vienna Convention on the Law of Treaties in the WTO context, a closer examination of WTO jurisprudence also reveals cases where WTO dispute settlement bodies favour some elements enumerated in the Convention over others. In this contribution two such situations are identified: interpretation that is dominated by textual analysis (and which may be labelled as extended textualism), and interpretation that tends to limit the relevance of non-WTO rules. Depending on one’s understanding of Articles 31 to 33 of the Vienna Convention on the Law of Treaties, such a situation may be regarded either as a deviation from the Convention’s rules\textsuperscript{36} or merely a permissible variation in their application.\textsuperscript{37} This chapter subscribes to the first position. Although the rules of the Vienna Convention on the Law of Treaties are general and may accommodate different interpretative outcomes, the overreliance on a text of a treaty or interpretation that reduces the importance of Article 31(3)(c) can hardly be seen as compatible with the holistic approach that stands behind the Convention. The Vienna Convention on the Law of Treaties recognises a text of a treaty as a central element in the interpretative process, but it also makes clear that the interpretation is not limited to the text alone, and that other elements play an equally important role. Consequently, a text of a provision

\textsuperscript{32}WTO AB Report, \textit{US – Shrimp} (n 17) para 158.
\textsuperscript{36}\textit{cf} Ortino (n 5) 120.
\textsuperscript{37}\textit{cf} a discussion on treaty interpretation on the Opinio Juris webpage. In particular, Jan Klabbers argues that that the rules of the Vienna Convention on the Law of Treaties are so flexible that is hard to find a practice that is incompatible with arts 31 to 33, available at http://opiniojuris.org/tag/gardiner-treaty-interpretation-symposium (last visited 1 June 2011).
cannot be detached from its context, the purpose and an object of a treaty, while some other elements that are extrinsic to a treaty also need to be taken into account.\textsuperscript{38} Even Klabbers admits that the flexibility, which is embodied in the Vienna Convention on the Law of Treaties, ‘does not mean that anything goes: interpretation is not an open-ended “free-for-all”’.\textsuperscript{39}

III. Textualism

As was already mentioned above, WTO jurisprudence generally adheres to the holistic version of the rules contained in the Vienna Convention on the Law of Treaties. As explained by one of the panels:

\[\text{T}he\ \text{elements\ referred\ to\ in\ Article\ 31 –\ text,\ context\ and\ object-and-purpose\ as\ well\ as\ good\ faith –\ are\ to\ be\ viewed\ as\ one\ holistic\ rule\ of\ interpretation\ rather\ than\ a\ sequence\ of\ separate\ tests\ to\ be\ applied\ in\ a\ hierarchical\ order.}\textsuperscript{40}

The same approach was taken by the AB in \textit{EC – Chicken Cuts}. The AB particularly explained that interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention on the Law of Treaties is an exercise that should not be mechanically subdivided into rigid components.\textsuperscript{41}

Despite the general compatibility of the WTO practice with the Vienna Convention on the Law of Treaties, there are instances when, through the application of a sequential method or overreliance on dictionaries, the textual determination dominates the entire interpretative process to the exclusion of other elements enumerated in Article 31. This observation is equally true with respect to the reports of panels as well as the practice of the Appellate Body. Although there are some indications in the WTO jurisprudence that the recent case law subscribes more strictly to the holistic approach,\textsuperscript{42} instances of extended textualism may be still detected.

\textsuperscript{38} Art 31(3) of the Vienna Convention on the Law of Treaties mandates taking into account, together with the context, some other extrinsic elements such as any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and any relevant rules of international law applicable to the relationship between the parties.

\textsuperscript{39} Klabbers (n 37).


\textsuperscript{41} WTO AB Report, \textit{EC – Chicken Cuts} (n 11) para 176.

\textsuperscript{42} AH Quereshi, \textit{Interpreting WTO Agreements. Problems and Perspectives} (Cambridge, Cambridge University Press, 2006) 15 (arguing that ‘the overwhelming authority and weight in the WTO is given to the view that the
In practice, the different techniques used by the WTO dispute settlement bodies tend to promote the text of a treaty. In particular, the AB and the panels sometimes apply a sequential approach under which the context, object and purpose of a treaty are only examined when textual methods fail to elucidate the meaning of a provision, or are used as a mere confirmation of the results obtained on the basis of purely textual interpretation. The sequential approach is well captured in the US - Shrimp report, where the AB held that if

the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.\(^{43}\)

This obviously reduces the importance of the purpose and object of a treaty, as an interpreter is required to consider those elements only in order to confirm the results obtained through purely textual methods or to clarify a text which remains equivocal or inconclusive after the application of textual methods. Note also that such an approach mixes different interpretative guidelines provided by the Vienna Convention on the Law of Treaties. According to Article 31, a text needs to be interpreted in its context and in light of the object and purpose of a treaty. This requirement is not conditioned under the Convention upon the existence of specific circumstances (eg ambiguity or inconclusiveness of a text). Situations that are identified by the AB should rather lead to the application of the rules provided in Article 32, but only after the text is interpreted in its context and taking into account the purpose and object of a treaty.

The same method was used by the AB in US – Gambling when it inquired into the character of online gambling and betting services. In short, the AB had to decide whether such services were to be regarded as sporting activities rather than other recreational services. This was an important question as the US in its Schedule of Commitments did not make any concessions for sporting activities. The AB first concentrated on the text of the Schedule and found that the language was inconclusive.\(^{44}\) In the second step of its analysis, the AB examined the context and concluded that it did not clearly reveal the scope of US concessions. Only then did the AB ‘turn to the object and purpose of the GATS to obtain further guidance for our interpretation’.\(^{45}\) As noted by one scholar, the approach of the AB may be summarised as follows:

\(^{43}\) WTO AB Report, US – Shrimp (n 17) para 114.
\(^{45}\) ibid para 187.
[S]ince the ‘text’ and ‘context’ are not helpful, let us look at the ‘object and purpose’. A holistic approach to treaty interpretation would require reaching a conclusion on the ordinary meaning of the term at issue only upon the examination of all the relevant elements [taken as a whole], rather than examining each element in turn until the meaning of the term at issue is revealed.46

Another example may be found in the panel report in EC – Chicken Cuts. In particular, the panel observed that ‘the object and purpose should be considered after the treaty interpreter had determined the meaning of the words constituting the treaty obligation in question when read in their context’.47 Although the panel recognised that the treaty terms had to be interpreted in their context, the object and purpose were conceptualised as subsequent steps of the interpretative act. Again, this seems to deviate from the holistic understanding of the rules of the Vienna Convention on the Law of Treaties. As noted in the literature, while it is necessary to ‘proceed in stages (usually from “text” to “context” and then to “object and purpose”), this does not mean that the interpretative process is not one and one only’.48 In other words, it is not really possible to determine the meaning of the words without proper consideration of the purpose and the object of the treaty.

The textual approach is also visible in the extensive recourse of the WTO dispute settlement bodies to dictionaries. In this context, it was even anecdotally noted in the literature that panels and the AB had already transformed the Oxford English Dictionary into one of the covered agreements.49 This approach poses three distinct problems. First, overreliance on dictionaries sometimes leads to unsatisfactory interpretative outcomes. Second, the over-emphasis on the text can mask normative choices made by the WTO dispute settlement bodies in the process of interpretation. In such cases, textualism is only a formal tool which allows for formulation of the rationale, while the real normative decisions are either hidden or arbitrary. The examples provided below illustrate both types of problems.50 Last but not least, the over-reliance on dictionaries may also have an impact on the fragmentation/unity of international law. I will come back to this issue in the last section of the chapter.

46 Ortino (n 5) 131.
47 WTO Panel Report, EC – Chicken Cuts (n 11) para 7.92. It is also worth noting that the AB, when reviewing the panel’s report, adopted an approach which follows the instructions of the Vienna Convention on the Law of Treaties.48 Ortino (n 5) 130.
49 Quereshi (n 42) 17.
The first type of problem outlined above is well illustrated by the reasoning of the AB in EC – *Hormones*. When analysing two definitions of risk assessment that are provided by the Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement), the AB found that the first one (quarantine risk assessment) required evaluation of the likelihood of entry, establishment or spread of a pest or disease, while the second (food-borne risk assessment) spoke merely about the potential for adverse effects. The AB referred to the ordinary meaning of those terms and equated likelihood with probability, while potential was understood as a mere possibility. Świat. Consequently, the first category required a higher level of ‘probability’ than the second one (arguably a quantitative determination). Therefore, in the case of pest and disease risk assessment ‘it is not sufficient that a risk assessment conclude that there is a possibility of entry, establishment or spread of diseases’. A panel should rather look for the “‘probability” of entry, establishment or spread of diseases’. Establishing a mere possibility is obviously an easier process than determining a probability. While from a textual point of view the interpretation proposed by the AB is fully acceptable, it also results in a strange outcome. The AB, by establishing different thresholds for each risk assessment, provided importing countries with greater discretion in the case of food borne risk as compared to quarantine risks. However, since both types of risk may relate to the life and health of humans and animals, there would seem to be no compelling reasons for differentiating between these two situations. A contextual and more teleological reading would require disregarding textual differences and adopting the same threshold for both types of risk assessment. Moreover, the interpretation proposed by the AB may also be viewed as disregarding another preambular statement of the SPS Agreement, which provides that the agreement does not ‘[require] Members to change their appropriate level of protection of human, animal or plant life or health’.

Another example in the more recent case law can be found in the *Biotech* panel report. The panel, when examining the conditions of applicability of the SPS Agreement, was required to interpret various terms of the SPS Annex A. Among other things, the panel considered whether crops grown for purposes

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52 WTO AB Report, *Australia – Salmon* (n 51) para 123.
53 ibid.
54 See also the argument made by the EC in *Australia - Salmon*: WTO AB Report, *Australia - Salmon* (n 51) Third participant’s submission of the European Communities, para 7.
55 One of the goals (recital no 2 of the preamble) of the SPS Agreement is to improve human health, animal health and the phytosanitary situation in all WTO Members.
other than human or animal consumption (eg cotton or plants grown as a material for biofuels) can be regarded as ‘food’, and in consequence fall within the ambit of the SPS Agreement. The panel referred to the Oxford English Dictionary and found that ‘food’ is a substance taken into the body to maintain life and growth. This allowed the panel to classify a genetically modified crop that was grown for a different purpose, but which could be eaten by animals (including wild fauna), as ‘food’ for those animals. According to the panel, this included both genetically modified crops consumed by insects and genetically modified plants consumed by non-target animals such as insects, deer, rabbits or other wild fauna. The panel reached the same conclusion with respect to genetically modified seeds used for sowing purposes, because it found that these seeds could be spilled next to a field or on a farm and subsequently eaten by birds. As the result of such interpretation, the panel came up with a definition of ‘food’ which is completely unrelated to its understanding in the SPS field, where food is always defined in reference to human consumption. Interestingly, the panel’s understanding of various other terms included in Annex A was also different from those contained in the documents of the specialised international organisations (ie the Codex Alimentarius, the World Organization for Animal Health and the International Plant Protection Convention).

The second type of situation (over-reliance on text masking normative choices) is exemplified by the AB report in EC – Sardines. One of the issues disputed between the parties, was the meaning of the term ‘standard’ as used in the Agreement on Technical Barriers to Trade (TBT Agreement). According to the EC, only standards that were adopted by international standardization bodies by consensus could qualify as international standards. That was an important point as the standard relied on by Peru did not meet this requirement. The AB decided the issue by the application of different textual techniques and without reference to any other elements such as the context, the purpose or object of the TBT Agreement, and held that no consensus was required. The same approach was applied by the AB in the interpretation of the expression ‘as a basis for’, which appears in the context of the obligation to base national technical measures on international standards. Again the AB, employing a textual analysis, held that the expression connoted a substantive relationship between an international standard and a national measure. Note,

57 Essentially the same approach was adopted by the Biotech panel with respect to other terms that are found in Annex A of the SPS Agreement (eg: WTO Panel Report, EC – Biotech Products (n 33), paras 7.297–7.301 (with respect to the term ‘additive’), para 7.240 (‘pest’), para 7.313 (‘contaminant’)).
59 The relevant provision of the TBT Agreement provides: ‘For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus’.
60 WTO AB Report, EC – Sardines (n 58) para 227.
61 ibid para 248.
however, that in both cases the text permitted different interpretative outcomes that depended more on the normative stance held by the interpreter than on the text alone (eg, it was possible to interpret the expression ‘as a basis for’ as a procedural requirement). This in turn creates an impression that either the AB was arbitrary in its choice between competing options, or relied on some normative factors that were not disclosed in the report. As correctly noted in the literature, such an approach is problematic as it lacks an overreaching vision of the [TBT] agreement that guides the AB in this determination concerning the details ...

... As a consequence there is a risk of a tyranny of the ‘incremental steps’, whereby the cumulative effect of the often reasonable incremental decision is to substantially restrict WTO Members’ regulatory sovereignty without such an outcome ever being explicitly analyzed by the AB.

IV. The Limited Relevance of Non-WTO Rules

The Vienna Convention on the Law of Treaties recognises the relevance of other international rules in the process of treaty interpretation. Article 31(3)(c) specifically mandates an interpreter to take into account, together with the context, any relevant rules of international law applicable to the relations between the parties. How do WTO dispute settlement bodies respond to this instruction? The jurisprudence again seems to point in different and conflicting directions. On one hand, the AB has confirmed that WTO law cannot be read in clinical isolation from public international law. A similar problem may be also identified in the reasoning of the AB in EC – Hormones: WTO AB Report, EC – Hormones (n 50) para 163 (defining the expression ‘based on’ in the SPS Agreement).

Other types of extraneous normative materials have also been used by the dispute settlement bodies. Interestingly this was done without reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties. First, such materials assisted panels and the AB in ascertaining the ordinary meaning of terms. In other words, they were used not so much as source of binding law but as a kind of dictionary which reveals the internationally agreed-upon meaning of specific


64 eg: WTO AB Report, US – Shrimp (n 17) para 158.
terms. Second, the extraneous rules were also applied through reference to Article 32, as part of the historical background leading to the conclusion of WTO agreements. Third, some international treaty rules were identified as rules of customary international law. This allowed the AB to overcome the problem of the consent of all WTO Members that emerges under Article 31(3)(c).

On the other hand, there are also reports where Article 31(3)(c) was interpreted very narrowly or disregarded. The decisions in EC – Hormones and EC – Biotech Products are instructive in this regard as in both cases the external rules were effectively disregarded. The panel report in EC – Biotech Products is particularly important here. Although the panel formally recognised the relevance of Article 31(3)(c), it also adopted such an interpretation of this provision that minimises the relevance of any international treaty rules in the WTO context (at least under Article 31(3)(c) of the Vienna Convention on the Law of Treaties).

In EC – Hormones, the EC argued that the precautionary principle has become a customary rule of international law (or at least a recognised general principle of law). According to the EC, the application of the principle in the context of the SPS Agreement would have an impact on the interpretation of its specific obligations. The panel, when discussing the issue of precaution and its relevance under the SPS Agreement, did not really address the arguments of the EC and only broadly stated that the principle could not override the explicit language of the agreement (particularly Article 5(1) and 5(2)). The AB confirmed those findings. It observed, firstly, that the status of the precautionary principle as a general principle or rule of customary international law was unclear. Although the AB refrained from taking the position on that issue, it found that the status of the principle in international law was an abstract problem without consequence for the dispute. The AB also observed that ‘the precautionary principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement’. Finally, the AB added that without clear textual formulation in the SPS Agreement,

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69 WTO AB Report, EC – Hormones (n 50) para 123.
70 ibid para 124; as noted by Howse, the approach of the AB also confuses the issue of conflict between different rules of international law with the use of extraneous rules in the process of interpretation (R Howse, ‘The Use and Abuse of Other “Relevant Rules of International Law” in Treaty Interpretation: Insight from WTO Trade/Environment Litigations’ (2007) 1 IILJ Working Paper 7).
the precautionary principle does not ‘relieve a panel from the duty of applying normal (ie customary international law) principles of treaty interpretation’.\textsuperscript{71}

The same problem resurfaced ten years later in EC - Biotech Products, when the EC again argued that the precautionary principle has become a general principle of international law.\textsuperscript{72} The panel, when addressing the EC’s arguments, followed the same reasoning as the AB. First it noted that there was still disagreement on the status and the meaning of the precautionary principle in international law. The panel recognised that the principle was reflected in numerous international environmental agreements, and frequently applied in the domestic context of some WTO Members. Simultaneously however, the panel observed that the content of the principle remained unclear, and that a number of authors questioned its status.\textsuperscript{73} On that basis, without any detailed analysis, the panel concluded that ‘prudence suggests ... not [to] attempt to resolve this complex issue’ and added that there was no need to decide this issue for the purposes of the case.\textsuperscript{74}

The approach of the AB (and the Biotech panel) is confusing. On the one hand, the AB refused to assess the status of the precautionary principle under international law. Yet on the other hand, the AB instructed the panel to apply normal rules of treaty interpretation. As mentioned above, Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires taking into account, in the process of interpretation, relevant rules of international law applicable in the relations between the parties. These ‘rules’ also include the rules of customary international law (and general principles of international law). Consequently, the status of the precautionary principle in international law could hardly be seen an abstract question without relevance for the outcome of the interpretation, ie if the precautionary principle is a rule of international customary law it should be taken into account when interpreting WTO provisions. It would seem that this issue could have been handled in a better way. The AB could, for example, have taken conservative view and recognised the precautionary principle as an evolving principle of international law that had not yet attained the status of customary rule of international law. As an evolving principle, it would be irrelevant from the perspective of the Vienna Convention on the Law of Treaties (since if it is not qualified as a rule of international law it cannot fall into the ambit of Article 31(3)(c)). Such an approach would lead to the same result as reached by the AB, but at the same time it would be compatible with the prescriptions of the Vienna Convention.

\textsuperscript{71} WTO AB Report, EC – Hormones (n 50) para 124.
\textsuperscript{72} WTO Panel Report, EC – Biotech Products (n 33) para 4.523 (as noted by the panel, the EC used a somewhat imprecise expression, since the theory and practice of international law refer to rules of international customary law and general principles of law recognised by nations).
\textsuperscript{73} ibid para 7.88.
\textsuperscript{74} ibid para 7.89.
The other example of the limited role of non-WTO rules may be found again in *EC – Biotech Products*. The panel analysed the relevance of the rules of the Convention on Biological Diversity and the Cartagena Protocol on Biosafety (Cartagena Protocol) in the context of WTO law. Following a position expounded in some circles in the literature, the panel adopted a very narrow interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties and found that the expression ‘applicable in the relations between the parties’ required that the treaty (eg the Cartagena Protocol), in order to be relevant for the purpose of the SPS Agreement, had to be applicable to all WTO Members. The panel based its finding on three arguments. First, it used the textual argument and found that the Vienna Convention used the expression ‘parties’ in reference to the parties of a treaty and not to a dispute. Second, the panel emphasised that its approach was motivated by the desire to ‘ensure ... or enhance ... the consistency of the rules of international law applicable to these States’. However, this consistency was understood as concerning only WTO law. Third, it referred to the consent argument and stressed that the parties could not be bound by rules which they did not expressly accept.

This position was, however, mitigated as the panel noted a few lines later that its interpretation did not exclude the possibility of considering the rules of another treaty applicable to all the parties to a particular dispute, if all parties to the dispute agreed that a WTO agreement should be interpreted in the light of these other rules of international law. The structure of the panel’s reasoning seems to be logically flawed. Its earlier requirement that all WTO Members have to be parties to a treaty logically excludes the possibility of accepting such a treaty as relevant even if it binds all parties to the dispute and those parties express their desire to use such rules in the interpretation of WTO provisions. Note also that this second finding is incompatible with two considerations that motivated the panel to reject a broad interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (ie, textual basis in the Convention and consistency in application of WTO law).

In this context, it is also worth noting that overall the arguments put forward by the panel are not entirely persuasive. As noted in the literature, the text of the Vienna Convention on the Law of Treaties is ambiguous and may equally support the conclusion that the expression ‘parties’ used in Article 31(3)(c) refers to parties to a dispute. McGrady, in particular, notes that the expression ‘parties’ is used in the

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75 eg: M Lennard (n 14) 36.
76 Panel Report, *EC – Biotech Products* (n 33) para 7.70.
77 ibid para 7.68.
78 ibid para 7.70.
79 ibid para 7.71; also cf art 34 of the Vienna Convention on the Law of Treaties.
80 ibid para 7.72.
81 Note that the panel did not take into account any case law from other tribunals regarding the interpretation of art 31(3)(c) of the Vienna Convention on the Law of Treaties.
82 Howse (n 70) 24.
Vienna Convention on the Law of Treaties at least in three different ways: as parties to a dispute, all parties to a treaty, and some subset of parties. There are also twelve instances where reference to ‘all parties’ is made. If the notion of ‘parties’ as used in Article 31(3)(c) by definition encompassed all the parties, then the expression ‘all parties’ would become superfluous. This leads to the conclusion, contrary to the panel’s finding, that the text of Article 31(3)(c) actually does not unequivocally determine the meaning of the term. Secondly, as has been convincingly argued by Pauwelyn, WTO agreements mainly consist of bilateral (or reciprocal) rather than collective obligations. The object of WTO law (trade, which remains bilateral business), its origin (concessions negotiated on the bilateral basis), objective (trade liberalisation, which is not a genuine collective interest), and the enforcement procedure (bilateral enforcement, including bilateral suspensions) all indicate that WTO obligations are predominantly of a bilateral nature. The SPS Agreement is no exception. Although the SPS Agreement ‘set out minimum standards that WTO Members must meet, irrespectively of their actual or potential trade impact in (bilateral) relations with other WTO Members’, this does not change the bilateral character of its obligations. Breach of the SPS Agreement affects one or more WTO Members, and not the collective obligations owed to all WTO Members. As summarised by Pauwelyn, ‘the mere fact that they are regulatory in nature – and thus substantially the same bundles for all WTO Members – does not suddenly transform them into constitutional–type norms in the interest of some global common’. Consequently, if one subscribes to the view of WTO rules (including SPS rules) as bilateral obligations, divergence in their interpretation, depending on the parties to the dispute, does not necessarily create the problems that the panel was concerned with. Countries, as actors in international relations, may take up different obligations arising from different treaties and conventions. To separate one set of bilateral rights and obligations and disregard others (vis-à-vis another country) constitutes interference with the sovereign decisions of the States that agreed to be bound by a number of different international rules. This observation is also connected with the third argument used by the panel (ie the requirement of consent). Again, it seems that the panel did not sufficiently analyse its argument. EC - Biotech Products was technically only a single

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86 Pauwelyn (n 84) 938.
87 ibid 939 f; McGrady also notes that art 31(3)(c) lays down general interpretative rules as well as rules for resolution of disputes, consequently the phrase ‘the parties to a dispute’ would not be appropriate in the context of this provision: McGrady (n 83) 598.
88 cf ILC Fragmentation Report (n 7), para 472 (‘although this creates a possibility of eventually divergent interpretations that would simply reflect the need to respect (inherently divergent) party’s will’).
dispute between four parties while legally there were three disputes (EC v Canada, EC v US, and EC v Argentina) merged into a single proceeding. The DSU makes clear that a single panel examining different complaints organises its examination and presents its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed, had separate panels examined the complaints, are in no way impaired.\(^{89}\) Thus, the panel should have rather addressed the question of consent in relation between the EC and each of the complainants. Although none of the complainants was a party to the Cartagena Protocol, both Canada and Argentina were parties to the Convention on Biological Diversity. Moreover, if WTO obligations are conceptualised as bilateral, the problem of consent only becomes relevant with regard to the parties to a specific dispute.

In this context, one should also examine an additional argument that is sometimes advanced in the literature and which seems to support the panel’s position. Some scholars are concerned that a broad reading of Article 31(3)(c) of the Vienna Convention on the Law of Treaties will result in great uncertainty as to the nature of WTO rights and obligations and will reduce the precedential character of AB rulings. Although this is an important objection, its relevance should not be overstated. The WTO case law shows only small number of instances where the need to take extraneous treaty rules into account was argued by the parties.\(^{90}\) This, in turn, indicates that the risk of reducing the precedential nature of AB decisions may be limited.\(^{91}\) This risk is further minimised by the current WTO practice of regarding particular provisions of an extraneous treaty as a rule of customary international law, or considering such a treaty as a form of dictionary (instead of applying Article 31(3)(c) of the Vienna Convention on the Law of Treaties). Under such approach, a particular rule is applicable to all WTO Members and does not negatively impact the consistency of WTO jurisprudence.

V. Treaty Interpretation and the Unity/Fragmentation of International Law – Some Observations

In general, the dispute settlement bodies follow the instructions of Article 31 to 33 of the Vienna Convention on the Law of Treaties. The customary rules that are embodied in these articles constitute a point of reference for both panels and the AB in their interpretation of WTO provisions. The same is true for other non-codified customary rules of interpretation (eg the principle of effectiveness or in dubio

\(^{89}\) DSU, art 9(2).
\(^{90}\) Of course, it may be argued that litigation strategies of parties result from the approach of dispute settlement bodies. However, as the current approach of the case law is not consistent, one should not expect any consistency in these litigation strategies.
\(^{91}\) Lennard (n 14) 38.
mitius). It is also difficult to find in WTO jurisprudence, any consistent interpretative approach that would be characteristic only for the trade legal system.

Such an approach has a clear de-fragmentation effect. First of all, it acknowledges the applicability of other rules of international law in the WTO context. As explained by the WTO Director-General Pascal Lamy, the reliance of WTO dispute settlement bodies on rules of the Vienna Convention on the Law of Treaties constitutes ‘a clear confirmation that the WTO wants to see itself as being as fully integrated into the international legal order as possible’.\footnote{P Lamy, ‘The Place of the WTO and its Law in the International Legal Order’ (2006) 17(5) Eur. J. Int’l L. 969, 979.} WTO law, despite its particularities, is therefore seen as an integral part of the broader system of international law, rather than a type of self-contained regime. Second, one may also expect that the use of the same methodological devices by different international tribunals (including panels and the AB) will lead to a greater convergence in their interpretative results, or at least it will create a common ground for a judicial dialogue between various international entities. This also may be seen as an element that contributes to the unity of international law.

At the same time, this chapter has identified a number of instances where the WTO dispute settlement bodies appear to deviate from the holistic approach that is promoted by the Vienna Convention on the Law of Treaties. The extensive reliance on text, combined with an interpretative approach that limits the relevance of non-WTO rules of international law in the process of interpretation, arguably contribute to the fragmentation of international law. Indeed, it has been noted in the literature that the AB textualism results in the emergence of ‘a wide gap between the jurisprudence of the World Court [the International Court of Justice] and that of the World Trade Court [the AB]. The former is no less skilled or sophisticated in its hermeneutics – without, however, a reductionist textualism’.\footnote{Horn and Weiler (n 62) 253.}

The fragmentation effect is particularly visible when technical terms that have acquired an internationally agreed-upon meaning are interpreted by WTO dispute settlement bodies solely on the basis of dictionaries. As was discussed in the section three of this chapter, the Biotech panel defined a number of technical terms using only the Oxford English Dictionary. As a consequence, it came up with meanings that did not correspond to their understanding in the SPS field. However, one needs to realise that the SPS Agreement (as well as some other WTO agreements) is a legal instrument that regulates highly technical issues and the meaning of some of its terms cannot be simply established on the basis of dictionaries. Such terms have their own specific sense, which can be determined only within a particular technical or scientific discipline. In this context, the documents produced by specialised international agencies such as the Food and Agriculture Organization or the World Health Organization, may constitute
a useful reference point.\textsuperscript{94} Technically speaking, these documents may be regarded as a kind of glossary which reveals the meaning ascribed to specific technical terms by the international community.\textsuperscript{95} Such an approach would clearly contribute to the unity of international law by integrating different legal instruments (including soft law) into one system (here the WTO).

In this context, it should be also noted that this kind of approach is not alien to the WTO dispute settlement bodies, which sometimes use extraneous normative (or quasi-normative) materials in order to identify the ‘ordinary meaning’ of words used in WTO law.\textsuperscript{96} For example the AB in US – Shrimp, when defining the expression ‘exhaustible natural resource’, referred to a number of different legal instruments, including the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and Agenda 21 of the United Nations Conference on Environment and Development.\textsuperscript{97} The same approach was used to determine whether the US importation ban could be regarded as relating to the conservation of natural resources. Again the AB looked at other international instruments in order to establish the consensus of the international community (ie whether turtles could be regarded as an endangered species).\textsuperscript{98} In this way, the AB was able to integrate different legal instruments, without departing from the instructions of the Vienna Convention on the Law of Treaties.

The occasional over-reliance by the WTO dispute settlement bodies on the text of a treaty (to the exclusion of other elements) should not come as a surprise. The WTO, as a relatively young international organisation, is particularly vulnerable to the accusation of overstepping its mandate. The establishment and maintenance of authority (of the AB as an international adjudicating body in trade matters and WTO law as system of reference for such controversies) seem to be more important in the early years of a particular organisation than later. If one adds to this that a considerable number of disputes which emerge in the WTO context relate to highly sensitive issues, the caution expressed by the panels and the AB is even more understandable. This is particularly true with respect to cases which involve regulatory issues pertaining to public health (eg EC – Hormones) or public morals (eg US – Gambling), matters that are at the core of sovereign prerogatives of each national State. An additional difficulty is added by the fact that

\begin{footnotesize}
\begin{enumerate}
  \item cf Howse (n 70) 15. Although it may look as if the Biotech panel followed such approach, the ultimate outcome of its analysis indicates that the meaning of the terms used in Annex A(1) of the SPS Agreement was determined solely on the basis of dictionaries.
  \item AB Report, US – Shrimp (n 17) para 130.
  \item ibid para 132 (referring to the Convention on International Trade in Endangered Species of Wild Fauna and Flora).
\end{enumerate}
\end{footnotesize}
the WTO system remains to great extent a type of unfinished contract. Specific provisions are formulated in general language, while the system as such has numerous gaps that have to be filled in by the WTO dispute settlement bodies. Employment of strictly textual methods may be seen as a way which helps to defend against charges of having exceeded their authority to act, particularly if a dispute is highly politicised. At the same time, the interpretative results obtained through such a method seem to be more easily acceptable by WTO Members as compared to other methods. As expressly admitted by the former member of the AB, ‘the heavy reliance on the “ordinary meaning to be given to the terms of the treaty” has protected the Appellate Body from criticism that its reports have added to or diminished the rights and obligations provided in the covered agreements’.99

In other words, deciding disputes at a technical level, with text playing the central (or even exclusive) role in the interpretative process, allows, at least on its face, to depoliticise the controversy. Such an approach denies the relevance of policy considerations in the dispute settlement process, since it assumes that a particular issue is decided on the basis of a neutral text and does not require the dispute settlement bodies to make difficult normative decisions. The logical consequence of strict textualism is to deny any policy-making role to dispute settlement bodies. In consequence, textualism acts as a shield against the governments of WTO Members. A similar observation is made by Van Damme, who notes the AB’s ‘excessive use of dictionaries ... was probably instigated by the need to assert its judicial function against the backdrop of a not fully-developed institutional model and under-developed procedural rules in the DSU’.100 One may also expect that once the WTO becomes more mature, its dispute settlement system will depart more and more from strict textualism, openly accepting the existence of a political dimension to its decisions, and becoming more receptive to other rules of international law. There is indeed some evidence of movement in this direction. As has been noted by one scholar, ‘since the very beginning of its mandate, the Appellate Body has been very adamant in strengthening its legitimacy underpinnings (eg, by adopting the very narrow textualist approach to treaty interpretation from which it is now trying to emancipate).’101 This is also reflected in the more recent practice of the AB, where the reference to dictionaries, although present, is not as frequent as previously. The practice of the panels still seems to fall behind, but also here changes are visible.102

As far as the second type of situation (ie, interpretation that limits the relevance of other rules of international law) is concerned, the answer is not straightforward. While the refusal of the AB and the panel to assess the status of the precautionary principle within WTO law clearly does not contribute to

99 Ehlermann (n 13) 617.
100 Van Damme, in a discussion on treaty interpretation on the Opinio Juris webpage (n 37).
101 Ortino (n 5) 129.
unity of international law, the narrow interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties has a more ambiguous character. On the one hand, it has a fragmentation effect as it transforms WTO law into a quasi self-contained regime by limiting the possibility of taking into account, at least under subparagraph (c) of Article 31(3) of the Vienna Convention, other international treaties. This effect has recently provoked a bitter comment from the International Law Commission, which observed that such an approach is ‘contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers’. On the other hand, a broad reading of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (interpreting ‘parties’ as the parties to the dispute), would enhance the substantive unity for some of parties (ie parties to the dispute) while undermining the unity of a particular system (ie the WTO) by emphasising the ‘existence of bilateral relationships within the multilateral context’. This problem, however, disappears under a middle ground approach, which concentrates on a common intention of the parties (ie, common understanding among the parties of a particular treaty as to the meaning of a specific term), without requiring all of them to be parties to a specific non-WTO agreement. This would guarantee the consistency of WTO law and maintain the precedential nature of AB decisions. At the same time, such an approach would also contribute to the unity of international law as it would allow for broader consideration in the interpretive process of extrinsic legal materials. Interestingly, the middle ground position seems to correspond closely with the approach of the AB in *US – Shrimp*, where extrinsic legal materials were used as an aid in determination of the ‘ordinary’ meaning of terms used in WTO law.

Despite the above observations, the analysis of WTO practice shows a clear tendency on the part of the dispute settlement bodies to interpret WTO provisions in accordance with the methods established by the Vienna Convention on the Law of Treaties. Deviations from its model are not frequent and appear to be less visible in the more recent case law. Future WTO jurisprudence will show whether this is a permanent trend.

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103 cf ILC Fragmentation Report (n 7) para 472.
104 McGrady (n 83) 598.
105 ibid 592; Howse (n 70) 35; however, it may be argued that such a reading of art 31(3)(c) is incompatible with the textual basis and also raises the problem of a party’s consent. This drawback may be somehow overcome by examining the extent to which that other treaty was implicitly accepted or at least tolerated by other parties.