

THE DIFFERENCE BETWEEN TREATY INTERPRETATION AND TREATY APPLICATION AND THE POSSIBILITY TO ACCOUNT FOR NON-WTO TREATIES DURING WTO TREATY INTERPRETATION

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I. INTRODUCTION

In principle, different treaty systems¹ do not systemically affect each other. However, under certain conditions, different treaty systems can affect each other by relying on or accounting for treaty application or treaty interpretation.²

There are a number of methods to account for a treaty in the operation of another independent treaty. These different methods have limits regarding the extent of their application and thus are worth exploring.

The World Trade Organization (WTO) treaty system is, to some extent, self-contained. WTO treaty interpreters are not always permitted to account for non-WTO treaties. Whether or not and to what extent non-WTO treaties can be taken into account so that the WTO treaty system can be enriched by and can avoid conflict with these non-WTO treaties is of great importance from a theoretical and practical perspective. Theoretically, WTO treaty interpreters accounting for non-WTO treaties could clarify the relationship between different treaty systems. Practically, WTO treaty interpreters accounting for

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1. A "treaty system" used here refers to a group of treaties established under an international regime. For instance, the various agreements under the World Trade Organization are within a treaty system.

2. For purposes of this Article, the terms "relying on" and "taking into account" refer to introducing other treaties or norms of international law through treaty interpretation or direct application. Moreover, "taking into account" other treaties includes all situations where treaty interpreters consider the language of other treaties, including relying on other treaties.

non-WTO treaties may help to harmonize the different treaty systems and reduce potential conflicts between WTO treaties and other treaties (such as environmental treaties).

This Article explores possible ways of accounting for non-WTO treaties by focusing on the method of treaty interpretation. Although commentators have debated the prudence of applying non-WTO treaties³ in the WTO system,⁴ this Article explores the various methods of accounting for non-WTO treaties and clarifies the difference between the application and interpretation of WTO treaties. This Article's focus on treaty interpretation will create a framework for WTO treaty interpreters to apply and account for non-WTO treaties.

II. VARIOUS METHODS OF TAKING NON-WTO TREATIES INTO ACCOUNT

A. *Through Incorporation*

It is common for a treaty to incorporate some provisions of another treaty or some external norms. There are a number of examples of such incorporation in the WTO treaty system. For instance, Article 3(2) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides that “[t]he 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.”⁵ Thus, the DSU incorporates the norm of customary rules of interpretation of public international law to assist with the interpretation of WTO agreements. As discussed below, the *Vienna Convention on the Law of Treaties* (VCLT) provides the customary rules for interpretation of public international law, and they are consistently applied in all WTO dispute settlement cases.⁶ This is an example of incorporating external norms into the WTO treaty system through a WTO provision.

There are examples of more explicit and direct incorporation of other

3. See generally Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001); see also Joel Trachtman, *Jurisdiction in WTO dispute settlement*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 132, 137 (Rufus Yerxa & Bruce Wilson eds., 2005).

4. See Andrew D. Mitchell & David Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function*, 31 MICH. J. INT'L L. 559, 577 (2010).

5. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter DSU].

6. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, available at untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter VCLT].

international treaties into the WTO system. For instance, Article 2(1) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) provides that “[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).”⁷ Similarly, Article 2(2) provides that “[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”⁸

Furthermore, Article 9(1) of the TRIPS Agreement provides that “[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.”⁹ Under these articles, the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits, or some provisions of them, have become an integral part of the TRIPS Agreement and can be directly applied to one another accordingly.

Another example of incorporation is found in Article 2.4 of the *Agreement on Technical Barriers to Trade* (TBT Agreement), which requires Members to follow international standards.¹⁰ Article 2.4 provides:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.¹¹

These international standards are set forth by other international organizations.

7. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 2(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Agreement].

8. *Id.* art. 2(4).

9. *Id.* art. 9(1).

10. Agreement on Technical Barriers to Trade art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [hereinafter TBT Agreement].

11. *Id.*

They are non-WTO norms. Thus, the reliance on international standards is also a type of incorporation by a WTO agreement of non-WTO norms. The *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) has a similar provision concerning the application of international standards. Article 3(3) provides in part, "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations"¹²

When incorporating a non-WTO treaty or an external norm, a WTO agreement can set forth qualifications. For instance, Article 1.1 of the TBT Agreement defines TBT measures by referring to those adopted within the United Nations system and international standardizing bodies.¹³ However, Article 1.1 still requires the context, object, and purpose of the TBT Agreement to be taken into account.¹⁴ Article 1.1 provides, "General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement."¹⁵

When a WTO agreement explicitly incorporates a non-WTO treaty into its text, the interpreters of the WTO agreement are bound by the application of the incorporated non-WTO treaty. The WTO treaty interpreters may also need to interpret the treaty through different methods provided in Articles 31 and 32 of the VCLT. Thus, when interpreting the incorporated treaty, WTO treaty interpreters might not only need to consider the context, object, purpose, and subsequent practice of the WTO agreement, but also the incorporated non-WTO treaty.

Concerning the form of incorporation, a relevant issue is whether including a general statement in the preamble of a treaty can be considered as an incorporation of another treaty. For example, the sustainable development statement in the first paragraph of the preamble of the *Agreement Establishing the World Trade Organization* (Establishing Agreement) could be considered to indirectly incorporate other environmental agreements so that WTO treaty interpreters are enabled to apply them. The pertinent portion of the preamble provides:

Recognizing that their relations in the field of trade and economic endeavour should be conducted . . . allowing for the optimal use of the world's resources in accordance with the

12. Agreement on the Application of Sanitary and Phytosanitary Measures art. 3(3), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

13. TBT Agreement, *supra* note 10, art. 1.1.

14. *Id.*

15. *Id.*

objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[.]¹⁶

There are a couple of reasons not to consider the statement in the preamble to be an incorporation clause. First, the preamble is not the main text of the treaty. The preamble helps treaty interpretation by providing context. As provided in Article 31(2) of the VCLT, “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”¹⁷ Since the VCLT has characterized the preamble as context for the purpose of treaty interpretation, it should not be considered an incorporation clause. Also, the statement in the Establishing Agreement does not specify which environmental agreements are incorporated. Therefore, it would be difficult for treaty interpreters to rely on such a general statement to directly apply any specific environmental agreements. Nevertheless, this statement does provide a contextual basis for accounting for environmental agreements through treaty interpretation.

Another issue concerning the status of an incorporated treaty is whether an incorporated non-WTO treaty should be viewed as the “context” of the incorporating WTO agreement, or whether the incorporated treaty becomes “text” of the incorporating WTO treaty. If the incorporating treaty becomes text, treaty interpreters need not rely on the concept of “context” to interpret it. The Panel in *Canada – Pharmaceutical Patents* took the position that an incorporated non-WTO treaty should be considered as “context” to be taken into account by the treaty interpreter:

The Panel noted that, in the framework of the TRIPS Agreement, which incorporates certain provisions of the major pre-existing international instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions, in this case Articles 27 and 28, is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties. Thus, as the Panel will have occasion

16. Marrakesh Agreement Establishing the World Trade Organization pmb., Apr. 15, 1994, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

17. VCLT, *supra* note 6, art. 31(2).

to elaborate further below, Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971) . . . is an important contextual element for the interpretation of Article 30 of the TRIPS Agreement.¹⁸

This Article disagrees with the Panel's view. A treaty interpreter is required to look at the "context" to interpret a term in the "text" of a treaty. The "context" is not the interpreted term itself; instead, the "context" is used to interpret the term. However, a treaty incorporated into a WTO agreement becomes part of the "text" of the WTO agreement. The application of the text from the incorporated non-WTO treaty is by its nature an application of the incorporating WTO agreement. It is incorrect to say that the incorporated treaty is a "contextual element." Since the incorporated treaty has become the text of the incorporating WTO agreement, the terms in the incorporated treaty may require interpretation through determining their ordinary meaning and examining the context of such terms.

B. Through Inherent or Implied Power

In addition to the direct incorporation of a non-WTO treaty by a WTO agreement enabling WTO treaty interpreters to directly apply non-WTO treaties, another complication arises regarding whether the treaty interpreters can take into account non-WTO treaties in other situations. One way to account for non-WTO treaties is to consider the application of other international norms and inherent power of treaty interpreters.¹⁹ Some commentators argue that the WTO panels and the Appellate Body

do have inherent jurisdiction but that recognition of this jurisdiction does not give them *carte-blanche* to use any international law principles to resolve WTO disputes. Inherent jurisdiction permits WTO Tribunals to apply only international law rules that satisfy three conditions. First, the application of the international law rule must be necessary for the WTO Tribunal to properly exercise its adjudicatory function. Second, the rule in question must have no substantive content of its own. Third, its application must not be inconsistent with the Covered Agreements. This third condition is particularly important: it requires careful scrutiny of the Covered Agreements in general terms and with regard to the effect of the proposed application of a principle in a

18. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.14, WT/DS114/R (Mar. 17, 2000).

19. Mitchell & Heaton, *supra* note 4, at 561.

given case.²⁰

The Appellate Body in *Mexico – Taxes on Soft Drinks* attributed a limited scope of inherent power to the treaty interpreters. Their report provides:

WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.” Further, the Appellate Body has also explained that panels have “a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.”²¹

Another way is to consider the application of other international norms to be within the scope of the implied power of a tribunal. Some argue that the power to apply other international laws might

be thought of as implied from the provisions of the Covered Agreements establishing WTO Tribunals, taken as a whole and read in the light of their objects and purposes (one of which is the establishment of judicial dispute settlement). This is effectively stating that the WTO Agreements impliedly authorize panels to do all that is necessary to fulfill their (judicial) function, which is an application of the principle of utility.²²

Reliance on the methods of inherent or implied power for the purpose of accounting for other international norms is constrained by the nature of the norms. If the applied international rule is a general rule of international law, such as one that is necessary to fulfill the judicial function of treaty interpreters, the application of non-WTO rules through reliance on these methods is less difficult. However, if it is not a general rule of international law, these methods are not very useful to the application of non-WTO rules. For instance, it is

20. *Id.*

21. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 45, WT/DS308/AB/R (Mar. 6, 2006).

22. Mitchell & Heaton, *supra* note 4, at 569 (citations omitted).

implausible for a treaty interpreter to ascertain that accounting for an environmental treaty in interpreting a WTO agreement is an implied or inherent power. Such a general statement allows treaty interpreters to add to or to diminish the rights and obligations of the WTO Members. This result breaches Article 3(2) of the DSU, which requires that recommendations and rulings “cannot add to or diminish the rights and obligations provided in the covered agreements.”²³

C. *Through Treaty Interpretation*

The last method of accounting for other treaties is through treaty interpretation. Since all treaties are part of international law, the interpretation of any treaty must be in accordance with the treaty interpretation principles under public international law. WTO agreements are not exempt from this general principle. The dispute settlement procedures under Article 3(2) of the DSU requires treaty interpreters “to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law.”²⁴ The principles provided in Article 31 of the VCLT are customary rules and have been uniformly applied in WTO dispute settlement cases.²⁵ Thus, the Appellate Body and the dispute settlement panels have consistently relied on the VCLT provisions to interpret WTO provisions.

III. DIFFERENCE BETWEEN TREATY INTERPRETATION AND TREATY APPLICATION

The inherent and implied powers and the incorporation of non-WTO treaties in a WTO agreement can serve as the bases for the WTO panels and Appellate Body to “apply” non-WTO treaties. Methods of treaty application are concerned with the scope of laws, that is, the applicable laws or the sources of law to be applied. Methods of treaty interpretation account for various factors including other treaties in order to correctly and properly apply the interpreted treaty.

Some argue that little difference exists between a treaty interpretation and a treaty application. For instance, they contend:

The distinction between application and interpretation is not concrete and it may in some cases be difficult to determine whether a WTO Tribunal is applying international law or

23. DSU, *supra* note 5, art. 3(2).

24. *Id.*

25. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Gasoline Appellate Body Report*]; Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 46, WT/DS50/AB/R (Dec. 19, 1997).

simply using international law to interpret a WTO provision. The answer to this question may not make a large difference from a practical perspective.²⁶

While this argument has some strength, it is not complete. From the perspective that external rules should be applied, treaty interpretation and treaty application are the same when accounting for non-WTO treaties.

In the process of a dispute settlement, treaty interpretation and treaty application can both be involved. For instance, when interpreting the WTO rules, a panel or the Appellate Body must apply the VCLT to interpret various WTO agreements in order to account for non-WTO treaties. There are three conceptual steps in this process: (1) applying the VCLT, (2) taking into account non-WTO treaties, and (3) interpreting a WTO agreement. Thus, treaty application (the application of non-WTO rules such as the VCLT) and treaty interpretation (the interpretation of WTO agreements) are interrelated.

However, treaty interpretation and treaty application are different in nature and have independent functions. "All interpretation pursues meaning within a penumbra of discursive formations."²⁷ Treaty interpretation is a process of discovering the proper meaning of treaty terms through various interpreting methods; however, treaty application is a process of identifying the source of law and applying it.²⁸ Thus, it is important to separately analyze treaty interpretation to decide whether non-WTO treaties can be taken into account.

IV. THE RELATIVELY SELF-CONTAINED WTO TREATY SYSTEM

Whether a treaty is self-contained depends on whether the treaty interpreter can apply other treaties to decide the rights and obligations of the parties involved. If a treaty is not self-contained, it would be easier to apply other treaties without relying on treaty interpretation; whereas, if a treaty is self-contained, the application of other treaties would be more difficult.

Some argue that the WTO system is not self-contained.²⁹ However, this Article takes the view that most treaties are closed systems given that interpreters are not authorized to rely on other treaties to decide the rights and obligations between the parties under the interpreted treaties. The exception is that customary international law is always applied to all treaties for the purpose

26. Mitchell & Heaton, *supra* note 4, at 570.

27. Diane A. Desierto, *Necessity and "Supplementary Means of Interpretation" for Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 828 (2010).

28. For discussions of sources of law under the WTO dispute settlement procedure, see DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 49-84 (2d ed. 2004).

29. Joost Pauwelyn, *The Application of Non-WTO Rules of International Law in WTO Dispute Settlement*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS VOLUME I* 1405, 1406 (Patrick F. J. Macrory et al. eds., 2005).

of interpretation.

In other words, the WTO system is basically self-contained from the perspective of treaty application, but the WTO system is not self-contained from the perspective of treaty interpretation. In the context of treaty interpretation, the WTO system is not self-contained because treaty interpretation is a process of determining the proper meaning of treaty terms. In order to determine the proper meaning of treaty terms, the interpreters must rely on customary rules of international law to interpret WTO agreements. The VCLT contains the customary rules of interpretation of public international law and is a source of law for the panels and the Appellate Body to interpret WTO agreements.

Substantively, the WTO system is self-contained to a large extent because the sources of law in the form of treaty provisions are the “covered agreements” under the DSU only.³⁰ Treaty interpreters of the WTO do not apply non-WTO treaties as a source of law. Thus, Article 1(1) indicates that the DSU applies to “disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding . . .”³¹ Strictly speaking, Article 1(1) is not used purely for defining the source of law. Article 1(1) of the DSU provides that WTO panels and the Appellate Body are directed to only decide complaints under a WTO agreement.

The Appellate Body in *EC – Poultry* also indicated that an agreement not included as a “covered agreement” cannot serve as the basis to decide a dispute.

Schedule LXXX is annexed to the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the “*Marrakesh Protocol*”), and is an integral part of the GATT 1994. As such, it forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC – Oilseeds*. As such, the Oilseeds Agreement is not a “covered agreement” within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into

30. DSU, *supra* note 5, art. 1(1).

31. *Id.*

the *WTO Agreement*, the Oilseeds Agreement is not one of those legal instruments.³²

V. VARIOUS METHODS OF TREATY INTERPRETATION

Non-WTO treaties cannot be introduced into the operation of the WTO by direct application but can be introduced through treaty interpretation. Regarding Article 3(2) of the DSU, the Appellate Body in *U.S. – Gasoline* noted that “direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.”³³ If it refers to other non-WTO treaties, the requirement of not reading a WTO agreement in clinical isolation from other treaty systems must be based on treaty interpretation. Article 31 of the VCLT requires a treaty to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁴ Article 32 also requires that the circumstance of the conclusion of a treaty be considered to confirm or determine the meaning.³⁵

According to the Appellate Body, consideration of the textual contents is the starting point for treaty interpretation and should be read in their context. When the text is equivocal, the object and purpose of the treaty is considered. The Appellate Body report in *US – Shrimp* provides:

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where 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.³⁶

In the sections to follow, this Article will discuss the ordinary meaning of the textual contents, the context, the object and purpose, together with other supplementary methods, to determine whether and to what extent treaty

32. Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, ¶ 79, WT/DS69/AB/R (July 13, 1998) (citations omitted) [hereinafter *Poultry Appellate Body Report*].

33. *Gasoline* Appellate Body Report, *supra* note 25, at 17.

34. VCLT, *supra* note 6, art. 31(1).

35. *Id.* art. 32.

36. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Appellate Body Report*].

interpretation can account for a non-WTO treaty.

A. Ordinary Meaning

Article 31(1) of the VCLT provides in part that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty”³⁷ Treaty interpreters tend to rely on dictionaries to interpret treaty terms of WTO agreements.³⁸ However, a dictionary is not the only method available to interpret the ordinary meaning of a treaty term. A relevant question is whether a treaty interpreter can look at other treaties for the purpose of giving ordinary meaning to the term. The Appellate Body has suggested that they can. In its *US – Shrimp* report, the Appellate Body relied on other international instruments to decide the ordinary meaning of the term “exhaustible natural resources” in Article XX(g) of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The report provided:

From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.³⁹

Examining non-WTO treaties to determine a term’s ordinary meaning is helpful in clarifying the meaning of the WTO treaty terms and avoiding possible conflict with non-WTO treaties. The phrase “ordinary meaning” suggests that the interpreted term must be used widely and frequently. The Appellate Body’s criterion of the “frequent references” made by “modern international conventions and declarations” indicates that the interpreted term when ordinarily used has a certain extent of breadth and frequency. However, the requirement that a term be “informative” is confusing because it does not address the essence of ordinary meaning.

Similarly, in the *EC – Approval and Marketing of Biotech Products* Panel Report, with regard to relying on other treaties to decide the ordinary meaning of a treaty term, the panel provided:

The ordinary meaning of treaty terms is often determined on the basis of dictionaries. We think that, in addition to

37. VCLT, *supra* note 6, art. 31(1).

38. See Chang-fa Lo, *Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding*, 1 J. INT’L DISP. SETTLEMENT 431, 431 (2010).

39. *Shrimp* Appellate Body Report, *supra* note 36, ¶ 130 (citations omitted).

dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. . . . In the light of the foregoing, we consider that a panel may consider other relevant rules of international law when interpreting the terms of WTO agreements if it deems such rules to be informative. But a panel need not necessarily rely on other rules of international law, particularly if it considers that the ordinary meaning of the terms of WTO agreements may be ascertained by reference to other elements.⁴⁰

The *EC – Approval and Marketing of Biotech Products* panel and Appellate Body reports confirm that non-WTO rules can be introduced into the WTO system through treaty interpretation when searching for the “ordinary meaning” of a WTO term. The Appellate Body and the panel reasoned that the “frequent references” made by “modern international conventions and declarations” and other relevant rules of international law are “informative” for the purpose of interpreting WTO agreements by relying on non-WTO rules.⁴¹

B. Context

1. *The Contextual Documents Include Agreements and Other Instruments*

Article 31 of the VCLT includes the following provisions concerning the reliance on context for treaty interpretation.⁴² Article 31(1) provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.”⁴³ Article 31(2) provides:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any *agreement* relating to the treaty which

40. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.92-93, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) (citations omitted).

41. *Shrimp* Appellate Body Report, *supra* note 36, ¶ 130.

42. VCLT, *supra* note 6, art. 31.

43. *Id.* art. 31(1).

was made between all the parties in connection with the conclusion of the treaty; (b) any *instrument* which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.⁴⁴

In terms of the non-WTO rules being considered as the “context” of the WTO agreement, it should be noted that in addition to an agreement, other “instruments,” including unilateral ones, can also be considered as the context of a treaty to be interpreted. The International Law Commission provides:

The principle on which [Article 31(2)] is based is that a unilateral document cannot be regarded as forming part of the “context” . . . *unless not only was it made in connexion with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties.* . . . What is proposed in [Article 31(2)] is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.⁴⁵

2. *The Contextual Document Must be Relevant*

Article 31(2) of the VCLT provides in part:

The context for the purpose of the interpretation of a treaty shall comprise . . . (a) any agreement *relating to* the treaty which was made between all the parties *in connection with* the conclusion of the treaty; (b) any *instrument* which was made by one or more parties *in connection with* the conclusion of the treaty and accepted by the other parties as an instrument *related to* the treaty.⁴⁶

Thus, the main criteria for interpreting WTO agreements, is the “relationship” between the WTO agreements and non-WTO agreements or instruments. In

44. *Id.* art. 31(2) (emphasis added).

45. *Report of the Commission to the General Assembly*, U.N. Doc., at 221, A/6309/Rev.1, (1966), reprinted in [1967] 2 Y.B. Int'l L. Comm'n 172, U.N. Doc. A/CN.4/SER.A/1966/Add.1., available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1966_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf) (emphasis added).

46. VCLT, *supra* note 6, art. 31(2) (emphasis added).

other words, the two must be “relating to,” “in connection with,” or “related to” each other.⁴⁷

Neither the Appellate Body nor any dispute settlement panels have provided a direct interpretation of the terms “relating to,” “in connection with,” or “related to” as used in the VCLT. However, the term “relating to” is also used in GATT Article XX(g) and the Appellate Body has previously interpreted this term.⁴⁸ In *US – Gasoline*, the Appellate Body indicated that although the parties of the dispute agree that the term “relating to” used in Article XX(g) of the GATT 1994 is an equivalent of “primarily aimed at,” the “phrase ‘primarily aimed at’ is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g).”⁴⁹

The term “relating to” does not mean that the relationship should be as close if one is the primary aim of the other. One commentator suggested that, in order to be related to the treaty and thus a part of the “context,” an instrument “must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty.”⁵⁰ Phrased differently, as long as there is a substantive relationship between the two, it meets the requirement of “relating to,” “in connection with,” and “related to.”

3. *Broad Consensus Is a Useful Indication of Relevance*

The Appellate Body in *EC – Chicken Cuts* confirmed that the Harmonized System (HS) constituted relevant “context” to interpret a Member’s schedule of concessions, and that the “broad consensus” among WTO Members to rely on such non-WTO rules helped confirm the needed relations.

The Harmonized System is not, formally, part of the *WTO Agreement*, as it has not been incorporated, in whole or in part, into that Agreement. Nevertheless, the concept of “context”, under Article 31, is not limited to the treaty text—namely, the *WTO Agreement*—but may also extend to “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”, within the meaning of Article 31(2)(a) of the *Vienna Convention*, and to “any instrument which was made by one or more parties in connection with the conclusion of the treaty

47. *Id.*

48. General Agreement on Tariffs and Trade art. XX(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

49. *Gasoline* Appellate Body Report, *supra* note 25, at 18-19.

50. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 129 (2d ed. 1984) (citation omitted).

and accepted by the other parties as an instrument related to the treaty”, within the meaning of Article 31(2)(b) of the *Vienna Convention*. Moreover, should the criteria in Article 31(3)(c) be fulfilled, the Harmonized System may qualify as a “relevant rule[] of international law applicable in the relations between the parties”.⁵¹

The Appellate Body’s report further provides:

[P]rior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an “agreement” between WTO Members “relating to” the *WTO Agreement* that was “made in connection with the conclusion of” that Agreement, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is “context” under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members’ Schedules.⁵²

The Panel Report on *EC – Tariff Treatment of Certain Information Technology Products* also confirms that the HS can be used as context for interpreting WTO agreements because of its “close link” with the WTO agreements. This “close link” is shown by the relevant WTO agreements referring to the HS for the purpose of defining product coverage:

In establishing that the HS provided relevant “context” for the interpretation of a Member’s schedule, the Appellate Body took into consideration a number of factors. While noting that

51. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 195, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005) [hereinafter *Chicken Cuts* Appellate Body Report].

52. *Id.* ¶ 199; see also Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 89, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998) (“We are puzzled by the fact that the Panel, in its effort to interpret the terms of [the EC Schedule], did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the Harmonized System. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System*’s nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature.”).

the HS was not formally part of the WTO Agreement and was not incorporated, in whole or in part, into that Agreement, the Appellate Body observed that the vast majority of WTO Members are also contracting parties to the HS and identified what it considered was a “close link” between the HS and the WTO Agreement. Specifically, the Appellate Body observed that a number of WTO agreements resulting from the Uruguay Round, including the Agreement on Rules of Origin (in Article 9), the Agreement on Subsidies and Countervailing Measures (in Article 27), and the Agreement on Textiles and Clothing (in Article 2 and the Annex thereto), refer to the HS for purposes of defining product coverage within the agreement or the products subject to particular provisions.⁵³

The Panel Report on the same case further indicates that the Information Technology Agreement (ITA) is an instrument that may be used to provide context for WTO treaty interpretation because the ITA was proposed, drafted, and agreed to by a subset of WTO Members and other states or separate custom territories in the process of acceding to the WTO.⁵⁴ In this regard, the Panel Report lowers the “broad consensus” threshold. As long as there is a subset of WTO Members engaged in the process of negotiating and concluding the ITA and such Members modified their tariff schedules accordingly, the relationship threshold is met. The relevant paragraphs provide:

Setting aside for the moment whether the ITA is a treaty or not, Article 31(2) recognizes that both “agreements” and “instruments” may qualify as context as long as they meet certain conditions. The Vienna Convention refers to the concepts of “agreement” and “instrument” within the definition of “treaty” above. The statement by the International Law Commission above implies that a qualifying “instrument” may even be a unilateral “document” so long as it complies with the additional requirements in Article 31(2)(b) that it was “made in connection with the conclusion of the treaty”, and “its relation to the treaty was accepted in the same manner by the other parties”. In light of this, it is useful to consider whether the ITA is concerned with the substance of the treaty, clarifies concepts in the *WTO Agreement*, or otherwise limits its field of application, and the extent to which it was drawn

53. Panel Report, *European Communities—Tariff Treatment of Certain Information Technology Products*, ¶ 7.440, WT/DS375/R, WT/DS376/R, WT/DS377/R (Aug. 16, 2010) (citation omitted).

54. *Id.* ¶ 7.445.

up on the occasion of the conclusion of the treaty. . . . At a minimum, the ITA qualifies as an “instrument” for the purposes of Article 31(2)(b). The ITA was proposed, drafted and agreed to by a subset of WTO Members and states or separate customs territories in the process of acceding to the WTO. ITA participants in turn modified their WTO Schedules, which themselves form part of the WTO Agreement, following the conclusion and signing of the ITA. In this sense, the parties recognized the ITA as an “instrument” as we understand that term.⁵⁵

The Panel concluded that the ITA may serve as context within the meaning of Article 31(2)(b) of the VCLT.⁵⁶

4. *Sufficient Linkage*

The criteria given by the Appellate Body and the *EC – Technology* panel for meeting the relationship requirement, as quoted above, include showing: a broad consensus among the parties to use a non-WTO agreement as the basis for a WTO agreement; the vast majority of the parties are also parties to the non-WTO agreement; a number of WTO agreements refer to the non-WTO agreement for purposes of defining the agreements’ coverage; and a subset of WTO Members engaged in the process of negotiating and concluding the agreement and they amended their tariff schedules accordingly.⁵⁷ The terms “relating to,” “in connection with,” and “related to” as used in Article 31(2) are not very strict criteria to meet. These terms only require some connection or relationship between the non-WTO agreement or instrument and the interpreted WTO agreement.

The *EC – Technology* panel and Appellate Body reports confirm that the HS is “context” as a result of the broad consensus among the parties to use the HS as the basis for their WTO Schedules. The HS is “context” because the vast majority of WTO Members are also contracting parties to the HS, and the Members identified a “close link” between the HS and the WTO Agreement. The ITA is “context” because it was made by a subset of WTO Members in connection with the conclusion of the treaty and accepted by WTO Members as an instrument related to the treaty. The WTO Members have proved a certain amount of connection or relationship between the HS and the WTO tariff schedules (the connection being the broad consensus to use the HS), between the HS and the WTO Agreement (the connection being the close link) and between the ITA and the WTO Agreement concerning the tariff schedule (the

55. *Id.* ¶¶ 7.376-77 (citations omitted).

56. *Id.* ¶ 7.383.

57. *Id.* ¶¶ 7.376-81.

connection being that the ITA was proposed, drafted and agreed to by some WTO Members and the participants of the ITA in turn modified their WTO Schedules). In addition to these specific situations establishing needed connections or relations, the needed connection or relation may also be established as long as certain linkage exists for the purpose of accounting for a non-WTO treaty to interpret a WTO agreement.

C. Subsequent Agreement or Practice and Relevant Rules

Article 31(3) of the VCLT provides:

There shall be taken into account, together with the context:
(a) any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any *subsequent practice* 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*.⁵⁸

Thus, the three named situations are subsequent agreement, subsequent practice, and relevant rules of international law.

Subsequent agreement must concern “the interpretation of the treaty or the application of its provisions.”⁵⁹ It is rare for a non-WTO treaty concluded between WTO Members to provide an interpretation of a WTO agreement or the application of its provisions. Thus, the first situation is not very relevant to the discussion in this Article.

Relevant rules of international law must be “relevant” and “applicable” to the relationship between the parties. However, these requirements are not very strict, and they should not be over utilized. For instance, if all environmental agreements are considered relevant to the WTO mentioning anything about the environment or sustainable development, it would be too broad and would result in adding to or diminishing the rights and obligations of WTO Members. Thus, when the word “relevant” is interpreted, the interpreter should account for the degree of relevancy between the non-WTO treaty and the relevant WTO agreement. If the relevancy is remote, a WTO treaty interpreter should not take the environmental agreement into account.

Additional cases confirm reliance on subsequent practice to assist treaty interpretation. Commentators and WTO interpreters have elaborated on some of the criteria. Subsequent practice must not be a

58. VCLT, *supra* note 6, art. 31(3) (emphasis added).

59. *Id.*

single or sporadic practice. It must become a pattern of practice adopted by WTO Members.

Ian Sinclair notes:

It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice – that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention.⁶⁰

The Appellate Body Report, *Japan – Alcoholic Beverages II*, explains that “subsequent practice” within the meaning of Article 31(3)(b) entails a “‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.”⁶¹

The Appellate Body’s Report in *US – Gambling* explains that there are two elements for the purpose of establishing “subsequent practice”: “(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.”⁶²

In reference to the criteria for subsequent practice, the Appellate Body in its Report on *EC – Chicken* provided:

We share the Panel’s view that not each and every party must have engaged in a particular practice for it to qualify as a “common” and “concordant” practice. Nevertheless, practice by some, but *not all* parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a “concordant, common and discernible pattern” on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement*.⁶³

Thus, the subsequent practice must be a “concordant, common and consistent sequence of acts or pronouncements sufficient to establish a

60. SINCLAIR, *supra* note 50, at 138.

61. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

62. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 192, WT/DS285/AB/R (Apr. 7, 2005).

63. *Chicken Cuts* Appellate Body Report, *supra* note 51, ¶ 259.

discernible pattern” and the acts or pronouncements must imply the agreement of the parties on the interpretation of the treaty term. However, it does not require each and every party to engage in the practice.⁶⁴

Under these criteria, a non-WTO agreement can theoretically be a subsequent practice for the purpose of interpreting a WTO agreement. However, it is a rare situation where there is an agreement concluded outside the WTO system where WTO members participate and practice concordantly subsequent to the agreement to indicate the meaning or intention of the WTO agreement.

D. Object and Purpose

Article 31(1) of the VCLT requires treaty interpreters to assign ordinary meaning to the terms of the treaty in their context and in the light of their “object and purpose.”⁶⁵ Normally, treaty interpreters must account for the object and purpose of the whole agreement. For instance, the Appellate Body in *Argentina – Textiles and Apparel* provided:

In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members “treatment no less favourable than that provided for” in its Schedule. It is evident to us that the application of customs duties *in excess of* those provided for in a Member’s Schedule, inconsistent with the first sentence of Article II:1(b), constitutes “less favourable” treatment under the provisions of Article II:1(a).⁶⁶

Article 31 requires that ordinary meaning be given to the terms of the treaty when considering the treaty’s object and purpose.⁶⁷ Therefore, a treaty interpreter must determine the object and purpose of the interpreted treaty. WTO interpreters have little room to account for non-WTO treaties when identifying the “object and purpose” of a WTO agreement.

64. *Id.* ¶ 26.

65. VCLT, *supra* note 6, art. 31(1).

66. Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 47, WT/DS56/AB/R (Mar. 27, 1998).

67. VCLT, *supra* note 6, art. 31(1).

E. Circumstances of Conclusion

Article 32 of the VCLT provides supplementary means of interpretation.⁶⁸ It provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and *the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.⁶⁹

WTO jurisprudence confirms that non-WTO documents, including a WTO Member's legislation and its court judgments, can be considered the circumstances of conclusion of a WTO agreement. Thus non-WTO documents may be taken into account by treaty interpreters when interpreting a WTO agreement.

The Panel Report on *EC – Chicken* clearly indicates that EC regulations can be “circumstances of conclusion” for the purpose of treaty interpretation of WTO agreements. The Report provides that “the mere fact that an act, such as EC Regulation No. 535/94, is unilateral, does not mean that that act is automatically disqualified from consideration under Article 32 of the *Vienna Convention*.”⁷⁰ The Panel reasoned that:

[S]ince EC Regulation No. 535/94 was published prior to the conclusion of the EC Schedule, the WTO Membership may be considered to have had constructive knowledge of that Regulation at the time the EC Schedule was concluded for the purposes of Article 32 of the *Vienna Convention*. In this regard, we disagree with the European Communities that Members should have specifically raised EC Regulation No. 535/94 during the verification period in order for it to form part of the “circumstances of conclusion”.⁷¹

The Panel concluded “that EC Regulation No. 535/94 is relevant to the conclusion of the EC Schedule and, therefore, qualifies as ‘circumstances of conclusion’ of the EC Schedule within the meaning of Article 32 of the *Vienna*

68. *Id.* art. 32.

69. *Id.* (emphasis added).

70. Panel Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts: Complaint by Brazil*, ¶ 7.360, WT/DS269/R (May 30, 2005).

71. *Id.* ¶ 7.361 (citation omitted).

Convention.”⁷² The same Panel Report also confirms that EC judgments can be “circumstance of conclusion” for a WTO agreement, providing:

Regarding the question of whether or not court judgements can be considered as “circumstances of conclusion” under Article 32 of the *Vienna Convention*, the Panel recalls that, in *EC – Computer Equipment*, the Appellate Body explicitly stated that the importing Member’s classification practice during the Uruguay Round and that Member’s “legislation” that was applicable at that time should have been taken into consideration under Article 32. As has been noted by the parties in this case, the issue arises as to whether the Appellate Body’s list is exhaustive or, rather, is merely linked to the particular facts of that case, implying that other unlisted items may also qualify. The Appellate Body’s report tends to indicate that the latter interpretation is the valid one – that is, the Appellate Body was merely making a pronouncement on the basis of the facts that were available to it in that case rather than seeking to provide an exhaustive list of items qualifying as “circumstances of conclusion” in all cases. This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the *Vienna Convention*. Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32 of the *Vienna Convention*.⁷³

The *EC – Chicken* Appellate Body Report confirms that those documents, which are neither bilateral nor multilateral, can still be “circumstances of conclusion” for the purpose of treaty interpretation:

Although we do not disagree with the general proposition by Yasseen, we do not agree with the European Communities that a “direct link” to the treaty text and “direct influence” on the common intentions must be shown for an event, act, or instrument to qualify as a “circumstance of the conclusion” of a treaty under Article 32 of the *Vienna Convention*. An “event, act or instrument” may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause

72. *Id.* ¶ 7.364.

73. *Id.* ¶ 7.391 (citation omitted).

and effect; it may also qualify as a “circumstance of the conclusion” when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision. . . . Thus, not only “multilateral” sources, but also “unilateral” acts, instruments, or statements of individual negotiating parties may be useful in ascertaining “the reality of the situation which the parties wished to regulate by means of the treaty” and, ultimately, for discerning the common intentions of the parties. . . . We agree with the Panel that “relevance”, as opposed to “direct influence” or “[genuine] “link”, is the “more appropriate criterion” to judge the extent to which a particular event, act, or other instrument should be relied upon or taken into account when interpreting a treaty provision in the light of the “circumstances of its conclusion”.⁷⁴

When a unilateral legislation or a judgment of a court qualifies as the “circumstance of conclusion” within the meaning of Article 32 of the VCLT, it is not difficult to ascertain that a bilateral or multilateral non-WTO treaty can also qualify as the “circumstance of conclusion.” Thus, in *EC – Poultry*, the Appellate Body found that a bilateral agreement between two WTO Members could serve as “supplementary means” of interpretation for a provision of a covered agreement.

[T]he Oilseeds Agreement may serve as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat.⁷⁵

A non-WTO treaty can be accounted for as part of the “circumstances of conclusion” of a WTO agreement. The criteria for accounting for a non-WTO treaty include whether the non-WTO treaty helps to discern the common intentions of the WTO Members at the time of the conclusion, or whether “relevance,” as opposed to “direct influence” or “genuine link,” can be found between the non-WTO treaty and a WTO agreement.

The criteria are not very strict. However, in practice the application of such a treaty interpretation method is still limited. Under this interpretation method, treaty interpreters are expected to look at the circumstances surrounding the conclusion of a WTO agreement. The non-WTO treaties eligible for consideration would be limited to those existing at the time of the

74. *Chicken Cuts* Appellate Body Report, *supra* note 51, ¶¶ 289-90.

75. *Poultry* Appellate Body Report, *supra* note 32, ¶ 83.

conclusion of the interpreted WTO agreement. If a non-WTO treaty develops after the conclusion of a WTO agreement, it is not relevant to the conclusion of the WTO agreement in question and thus would not be able to meet the requirement of “circumstance of conclusion” of the WTO agreement. Therefore, it is a rare situation where a non-WTO treaty exists prior to the relevant WTO agreement and still helps to discern the common intentions of the WTO Members.

VI. CONCLUSION

This Article argues for the importance of distinguishing treaty interpretation from treaty application, for the basic reason that they have their respective functions and are subject to different rules. Different methods are available for treaty interpreters. Some of the treaty interpretation methods do not enable interpreters to look at non-WTO treaties. For instance, there is little room for WTO treaty interpreters to account for non-WTO treaties when identifying the “object and purpose” of a WTO agreement. Also, it is a rare situation where a non-WTO agreement can be practiced concordantly subsequent to the WTO agreement indicating the meaning or intention of the WTO agreement. Additionally, the non-WTO treaties eligible for consideration as part of the circumstances of conclusion are very limited.

However, there are other methods that can serve as a basis for treaty interpreters to account for non-WTO treaties. For instance, “frequent references” made by “modern international conventions and declarations” help decide the ordinary meaning of a WTO term. The extent of connections or relationships between the non-WTO agreement or instrument and the interpreted WTO agreement helps to decide the context of the WTO agreement.

