

V. The influence of the international customary rule of interpretation on the object and purpose provisions

In adjudicating a dispute, both panel members and the Appellate Body are bound in terms of Article 3.2 to pursue the clarification of the WTO agreements in light of the ‘*customary rules of interpretation of public international law*’. Accordingly, WTO adjudicators are required to abide by certain basic rules of interpretations. The Vienna Convention on the Law of Treaties is considered the best collection of the customary rules of interpretation.¹⁷² The golden rule, Article 31(1) of the Vienna Convention, requires adjudicators to give the disputed text its ‘ordinary meaning’. In determining the ordinary meaning the terms must be interpreted within ‘their context *and* in the light of its object and purpose’ (emphasis added). This therefore means that the ordinary meaning of a treaty’s provisions is not limited to the meaning of the words but instead a more comprehensive meaning has to be given, a meaning that complies with and gives effect to the object and purpose of the treaty.¹⁷³ A treaty provision cannot be interpreted on face value only. Its meaning derives from the treaty as a whole, preamble and annexes included.¹⁷⁴ The ordinary meaning cannot be isolated from the objects and principles of the treaty as it is often these provisions that reflect the common intention of the parties.

The objectives and principles laid down in the TRIPS Agreement, the preamble as well as Articles 7 and 8, are not merely an aid for determining a meaning of a vague term or provision; they are instead a mandatory consideration factor that must be considered when determining the ordinary meaning of the TRIPS Agreement. Developing Member States expressed their concern that the DSB was failing in this regard, thus effectively enforcing a treaty that no longer represented the common intention of the parties. In addition there was growing concern that the role of the object and purpose provisions in examining the TRIPS Agreement was being progressively sidelined. It was hoped that the express referral of certain Member States prior to the Doha Ministerial Conference to the interpretational provisions of international treaty law would serve to counter the apparent arbitrariness certain DSB

172 WTO *Japan – Alcoholic Beverages II* p. 11, WTO *United States – Gasoline* Report of the Appellate Body p. 16-17; WTO *United States – Section 211* (Appellate Body ruling) p. 77. See also WTO Submission by Brazil and others to the TRIPS Council ‘TRIPS and Public Health’ (29.6.2001) IP/C/W/296 p. 5, *Ehlermann and Lockhart*, 7 JIEL 3 (2004) p. 497.

173 Art 31(1) of the Vienna Convention is a compulsive provision. It states a ‘treaty *shall* be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (emphasis added).

174 A WTO panel concluded that ‘the elements referred to in Art 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’. WTO *United States – Sections 301-310 of the Trade Act of 1974* Report of the Panel (22.12.1999) WT/DS152/R p. 305.

panels exhibited.¹⁷⁵ This reminder to the DSU of their duties had a double rationale: firstly to remind TRIPS adjudicators that the interpretation of the TRIPS Agreement has rules and secondly to ensure that the adjudicators do not lose sight of the scope and purpose of the TRIPS Agreement whilst applying the agreement. By reigning in the TRIPS adjudicators, developing Member States believe that they will retain a margin of flexibility that would otherwise have been limited by conservative interpretational methods. The reminder of the application of international rules of treaty interpretation ensures that the objectives and principles, set out in the preamble and Articles 7 and 8, retain their importance of guiding the interpretation of the agreement and ensuring that its implementation is carried out in a manner ‘conducive to social and economic welfare, and to a balance of rights and obligations’.¹⁷⁶

In terms of Article 31(4) of the Vienna Convention, Member States may, *ex post facto*, give a particular meaning to a TRIPS provision by way of a subsequent agreement. Article IX.2 of the WTO Agreement however provides for a formal process for the Member States to secure a common interpretation of a treaty provision. It would appear that the WTO Agreement excludes the application of Article 31(4) of the Vienna Convention as the WTO Agreement states that the Ministerial Conference and the General Council shall have ‘exclusive authority to adopt interpretations’. Although the customary rules of interpretation create a theoretical possibility for an interpretation without fully complying with the process, the Article IX.2 process is likely to be the sole process for providing interpretations as it does not require complete consensus.

The use of customary international laws in the interpretation of the TRIPS Agreement is not limited to the Vienna Convention. The Vienna Convention does not constitute a complete codification or closed list of customary rules of interpretation of international law.¹⁷⁷ The Convention itself acknowledges this and recognises that its role is amplified by the progressive development of international customary law.¹⁷⁸ Thus, any international custom which is generally practiced by states and accepted as law will apply to the interpretation of the TRIPS Agreement.¹⁷⁹ Customs are dynamic and develop as international relations develop. Trade rules between states are developing and multiplying at a significant rate. The potential exists that certain rules common to bilateral and multilateral treaties will acquire international

175 For example the Appellate Body took the following approach: ‘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’. WTO *United States – Shrimps* p. 42.

176 TRIPS Agreement Art 7.

177 Brownlie, *Principles of Public International Law* (6th edn OUP Oxford 2003) p. 580.

178 Vienna Convention Preamble.

179 Statute of the International Court of Justice 59 Stat. 1031 Art 38(1)(b).

law status. So to may general principles of law acquire an authoritative value.¹⁸⁰ Although not expressly referred to in the ICJ Statute, there is general acceptance that decisions of international bodies may potentially be a source of international law. Thus it would seem that decisions of the WTO and its Councils could potentially aid the understanding and implementation of the text of the TRIPS Agreement. The standards used to determine the existence of customary law is: ‘actual practice and *opinio juris* of States’.¹⁸¹ The ICJ went further and stated that ‘multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them’.¹⁸²

Thus, a reference to public international law reinforces the obligation adjudicators of the TRIPS Agreement have to grant due consideration for the objectives and purposes of the agreement and ensures that any subsequent agreement reached on the meaning of a TRIPS provision will have the effect of ensuring that the provision retains the meaning given to it by its signatories, whether by virtue of the original intention or by virtue of an direct or indirect meaning given *ex post facto* and by consent.

Finally, the added attention given to customary rules of interpretation of public international law by Member States benefits the role of the DSB which struggles to ensure a balance between respecting the discretions of the Member States and ensuring the ‘security and predictability’ of the TRIPS agreement.¹⁸³ The inclusion of references to customary public international law reaffirm that Member States desire a TRIPS Agreement that acknowledges, as a core principle, that the treaty need be interpreted and implemented in accordance with its objectives and principles.¹⁸⁴ The conclusion of a Ministerial Declaration on the application of provisions in the TRIPS agreement also, in terms of the Vienna Convention on the Law of Treaties, further assists the DSB as it guides the adjudicators to the intention of the Member States, towards a ‘clarified’ intention

VI. The role of ‘flexibility’ in the object and purposes of the TRIPS Agreement

Flexibility plays two roles with respect to the object and purpose of the TRIPS Agreement. Internally, the terminology and phraseology used in the preamble and Articles 7 and 8 permits numerous and often conflicting conclusions as to the intention of the parties.¹⁸⁵ Externally, when an interpreter seeks to determine the scope of

180 Statute of the International Court of Justice 59 Stat. 1031 Art 38(1)(c).

181 Continental Shelf Case (Libyan Arab Jamahiriya/Malta) [1985] ICJ Rep 13 p. 29.

182 Continental Shelf Case (Libyan Arab Jamahiriya/Malta) [1985] ICJ Rep 13 p. 29.

183 DSU Art 3.

184 Ehlermann and Lockhart, 7 JIEL 3 (2004) p. 478.

185 Flexibilities found in the TRIPS Agreement are to be distinguished from the application of the *in dubio mitius* principle. The *in dubio pro mitius* principle refers to instances where there is a burden to prove a desired interpretation and not to clauses that permit more than one interpretation. It is however noteworthy that the Appellate Body has applied the *dubio pro mi-*