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Mariana Clara de Andrade

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Sumário

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Path to judicial activism? The use of "relevant rules of international law" by the WTO Appellate Body*

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Mariana Clara de Andrade**

Abstract

The Appellate Body (AB) of the World Trade Organization (WTO) is currently under the concrete threat of ceasing its activities in the near future. This is the result of a series of unaddressed criticisms by some of the members of the organization, in particular the United States, regarding the alleged activist role that the AB has played. These criticisms comprise a number of issues regarding interpretative practices developed by the organ. Against this backdrop, the present paper addresses the use of "relevant rules of international law" which are external to the WTO covered agreements, in particular through Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), the provision codifying the so-called "principle of systemic integration". It studies the reports where reference to this provision was made and whether non-WTO rules have been used in an expansive or limited way with respect to the mandate of the AB. It also assesses the reception of these reports by the WTO membership in the meetings of the Dispute Settlement Body. It is concluded that, while recourse to external sources under the VCLT provision could represent a potential source of expansion of the AB applicable law in a way that could displease parts of the WTO membership, the organ has shifted from a progressive approach, which marked the beginning of its functioning, to a more narrow approach of the applicability of non-WTO sources in the more recent case law.

Keywords: World Trade Organization; Appellate Body; Judicial Activism; Systemic Integration; Vienna Convention on the Law of Treaties.

Resumo

O Órgão de Apelação (OAp) da Organização Mundial do Comércio (OMC) está atualmente sob a ameaça de cessar suas atividades em um futuro próximo. Essa situação é resultado de uma série de críticas não resolvidas por parte de membros da organização, em particular os Estados Unidos, com relação ao papel ativista que o órgão teria desempenhado. Essas críticas incluem questões relativas às práticas interpretativas desenvolvidas pelo OAp. Nesse contexto, este artigo analisa o uso de "regras pertinentes de

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** Ph.D. candidate in International Law at University of Milano-Bicocca (Italy). This article was written during a research visit at the University of Geneva. E-mail: mariana.clara@live.com

direito internacional" externas aos acordos abrangidos da OMC, em particular por meio do Artigo 31(3)(c) da Convenção de Viena Sobre o Direito dos Tratados (CVDT), o dispositivo que codifica o chamado "princípio da integração sistêmica". Este trabalho estuda os relatórios do OAp nos quais foi feita referência a esse dispositivo, bem como se normas externas à OMC foram utilizadas de maneira expansiva ou limitada com relação ao mandato do mecanismo de solução de litígios da organização. Ademais, a recepção desses relatórios pelos membros da organização durante as reuniões do Órgão de Solução de Controvérsias também é considerada. Conclui-se que, embora recurso a fontes externas à OMC por meio do Artigo 31(3)(c) possa representar uma fonte potencial de expansão do direito aplicável da OAp de modo a desagradar alguns membros da OMC, o órgão adotou, em sua jurisprudência mais recente, abordagem mais restrita com relação à aplicabilidade de normas externas à OMC do que aquela originalmente progressiva que marcou os primeiros anos de seu funcionamento.

Palavras-chave: Organização Mundial do Comércio; Órgão de Apelação; Ativismo Judicial; Integração Sistêmica; Convenção de Viena sobre o Direito dos Tratados.

1. Introduction

Several factors explain the undergoing crisis in the World Trade Organization (WTO) Appellate Body (AB), but some of them revert to a criticism, most vividly expressed by the United States, that this organ is exercising judicial overreach with respect to the functions it was originally designed to perform.[1]

The AB was a late creation of the Uruguay Round negotiations, aimed at counterbalancing the effect that the system of reversed consensus (which amounts to a quasi-automaticity of the adoption of reports) could have had. The idea was to ensure that "bad" panel reports could be reversed.[2] The mandate of panels and the Appellate Body is, however, limited: the Understanding on rules and procedures governing the settlement of disputes (DSU)[3] states that the dispute settlement system (DSS) "serves to preserve the rights and obligations of Members under the covered agreements", but the "rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Furthermore, it only has jurisdiction to assess claims which are based on WTO law.

In this context, at the center of the current crisis is the debate of whether the AB is an international court or instead its scope should similar to that of a contract arbitrator.[4] Although the two functions may overlap to some extent, advocating for the latter in detriment of the former means a more limited mandate with respect to the interpretation of WTO provisions.[5]

In its very first report, the Appellate Body stated that the "General Agreement is not to be read in clinical isolation from public international law".[6] This was made to justify recourse to the Vienna Convention on the Law of Treaties (VCLT)[7] as a reference for the interpretation of WTO Agreements, but the statement

1 For a detailed account of the context of crisis in the WTO dispute settlement, see McDOUGALL, Robert. The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance, *Journal of World Trade* v. 52, n. 6, p. 867-896, 2018.

2 See STEGER, Debra, The founding of the Appellate Body. In: MARCEAU, Gabrielle (ed*). A History of Law and Lawyers in the GATT/WTO:* The Development of the Rule of Law in the Multilateral Trading System, Cambridge: Cambridge University Press, 2015. p. 447-465.

3 *Understanding on rules and procedures governing the settlement of disputes* (DSU), Annex 2 of the WTO Agreement, available at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Access in: 05 Dec. 2018.

4 McDOUGALL, Robert. The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance, *Journal of World Trade,* v. 52, n. 6, 2018, p. 880.

5 This is the position taken by the United States. According to the United States Trade Representative (USTR), "The United States has been increasingly concerned by the tendency of WTO reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute. [...] The purpose of the dispute settlement system is not to produce reports or to 'make law,' but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the Appellate Body the power to give 'advisory opinions' as some national or international tribunals have". (USTR, 2018 Trade Policy Agenda and 2017 Annual Report - Chapter I - The President's Trade Policy Agenda, available at: https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017, accessed 05 December 2018). See, further, Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, November 21, 2018, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_.Stmt_.as-deliv.fin_.public.pdf, accessed 05 December 2018.

6 UNITED STATES — Standards for Reformulated and Conventional Gasoline, *Appellate Body Report* (29 April 1996) WTO Doc WT/DS2/AB/R, p. 17.

7 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

could be read more broadly.[8] Indeed, in US – Shrimp, by making wide reference to other sources of conventional international law in its reasoning, the AB gave a clear sign that it was willing to make reference to non-WTO law, also to shed light on the meaning of WTO terms and provisions.

Against this backdrop, this paper addresses one specific aspect which could potentially amount to judicial activism by the Appellate Body: the use of other "relevant rules of international law" and whether recourse to VCLT Article 31(3)(c) and the principle of systemic integration broaden the material jurisdiction of the WTO Appellate Body.

Recourse to non-WTO law in WTO dispute settlement can be a source of judicial overreach for two reasons. Firstly, if the line between interpretation and application of other sources of law is overstepped, the AB may be regarded as enforcing sources of law which fall outside its jurisdiction. Secondly, from a legitimacy perspective, a "too systemic" approach to the relationship between WTO law and general international law may displease its members, who may expect the WTO DSS to remain within the frame of the covered agreements.

In order to address this question, this paper is divided into three sections. The first section is aimed at briefly revisiting the jurisdictional limits of the WTO DSS, as well as explaining the content and scope of VCLT Article 31(3)(c) and the so-called principle of systemic integration, deemed to have been codified by that provision. The second section studies the relevant case law of the Appellate Body in order to assess how the organ has interpreted and recurred this provision, and to understand whether it has given a broad or narrow relevance to other sources of international law in the resolution of disputes.

Having this case law in mind, the third section considers whether the practice of the WTO AB relating to the use of Article 31(3)(c) can amount to judicial overreach.[9] In order to do so, three elements are taken into account: the overall trends of the AB practice invoking Article 31(3)(c), the implications such use has had on the line between interpretation and application of other rules of international law, and the manner in which WTO members have received AB reports as reflected in the Dispute Settlement Body (DSB) meetings.

2. The debate on jurisdiction and applicable law and the use of other "relevant rules of international law"

The controversies surrounding the use of non-WTO law in the dispute settlement of the multilateral trading system can only be grasped after understanding the mandate of the WTO adjudicators. Among other elements, this means its material jurisdiction limitations.

The difference between the applicable law (understood as the sources of law that can be used in the WTO DSS)[10] available to the WTO adjudicators and parties and its actual jurisdiction (understood as the sources which can actually be enforced) has been widely reviewed by scholarship.[11] Furthermore, Article 3.2 of the

8 James Bacchus, original AB member who drafted the US – Gasoline report, recollects: "In the report resulting from the very first appeal to the Appellate Body, US – Gasoline, we thought it appropriate, while musing on the meaning of Article 3.2 of the DSU, to state that this particular provision in the WTO treaty reflects 'a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law'" (BACCHUS, James. Not in clinical isolation. In: MARCEAU, Gabrielle (ed.). *A History of Law and Lawyers in the GATT/WTO:* The Development of the Rule of Law in the Multilateral Trading System, Cambridge: Cambridge University Press, 2015. p. 508).

9 Judicial *activism* and *overreach* are employed interchangeably in this work.

10 Marceau observes that part of the controversy on the limits of applicable law is semantic. Her definition of "applicable law" is the "law for which a breach can lead to actual remedies", while the conception of the ILC Study Group "includes all legal rules that are necessary to provide an effective answer to legal issues raised, and it would include procedural-type obligations (like the burden of proof)" (MARCEAU, Gabrielle. Fragmentation in International Law: The Relationship between WTO Law and General International Law - A Few Comments from a WTO Perspective. *Finnish Yearbook of International Law*, v. 7, 2006, p. 6). This article aligns with a broader sense of applicable law – thus, closer to the ILC Study Group's: applicable law here is to be understood as the sources of law that can be used by the DS panels and AB to settle a dispute and interpret the law that they have actually hold jurisdiction to enforce.

11 See, *inter alia*, BARTELS, Lorand. Applicable Law in WTO Dispute Settlement Proceedings. *Journal of World Trade*, v. 35, n. 3, p. 499–519, 2001; MARCEAU, Gabrielle, Conflicts of Norms and Conflicts of Jurisdictions the Relationship between the WTO Agreement and MEAs and other Treaties. *Journal of World Trade*, v. 35, n. 6, p. 1081–1131, 2001; PAUWELYN, Joost. *Conflict of Norms in Public International Law:* How WTO Law Relates to other Rules of International Law. Cambridge: Cambridge University Press, 2003; PALMETER, David; MAVROIDIS, Petros C. The WTO Legal System: Sources of Law. *The American Journal of International Law,* v. 92,

DSU provides guidance on this matter. It states:

> 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**. Recommendations and rulings of the DSB **cannot add to or diminish the rights and obligations provided in the covered agreements**.[12]

It seems well settled that the WTO DSS has jurisdiction only over matters involving the WTO covered agreements,[13] while its applicable law can range further according to the view one takes as to the material limits of the DSS. The crucial difference would be that panels and Appellate Body reports are not authorized to enforce obligations deriving from external sources. Still, the distinction between using such sources as applicable law (for purposes of "clarifying the existing provisions") and actually enforcing them (thereby "adding to or diminishing the rights and obligations" of WTO members) is not clear-cut.

The position submitted by the present work sides with Marceau's approach to the problem. She contends that

> in most cases the proper interpretation of the relevant WTO provisions will be such as to avoid conflicts with the other international obligations of the WTO Members. [...] In case of irreconcilable conflicts, WTO adjudicating bodies are prohibited, through the dispute settlement mechanism and while making recommendations to the Dispute Settlement Body (DSB), from adding to or diminishing the rights and obligations of WTO.[14]

She advocates an interpretation of the WTO rules which is consistent with public international law, but which at the same time does not promote the enforcement of external obligations to the detriment of WTO law. The only way these sources can be used would be through WTO provisions.[15] One example of this possibility would be the use of the general exceptions of Article XX when justified by external treaties and obligations. Another example would be the use of Conventions that grant waivers in accordance with Article IX of the WTO Agreement. Marceau thus acknowledges the importance of Articles 3.2 of the DSU and 31 of the VCLT, which, "in certain cases requires panels and the Appellate Body to use or to take into account various other treaties, custom and general principles of law when interpreting WTO obligations".[16]

Article 3.2 is "commonly understood as an invocation of the Vienna Convention".[17] Based on this provision, panels and the AB have justified recourse to the rules on interpretation provided by the VCLT.[18] In particular, Article 31(3)(c) of the Vienna Convention has been recognized as customary law.[19] As such, it can be employed in the WTO dispute settlement mechanism for the interpretation of the covered agreements due to the explicit wording of the DSU stating that "[t]he dispute settlement system of the WTO […] serves to […] clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".

p. 398-413, 1998.

12 *Understanding on rules and procedures governing the settlement of disputes*, available at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Access in: 19 October 2018), emphasis added.

13 These are the WTO Agreement, the Multilateral Trade Agreements of Annexes 1A, 1B, 1C and 2, and Plurilateral Trade Agreements in Annex 4.

14 MARCEAU, Gabrielle. Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties. *Journal of World Trade,* v. 35, n. 6, 2001, p. 1083.

15 She advances: "The use of outside law (non-WTO) will depend on the terms of the WTO provisions at issue. Numerous references to outside rules and standards can be found in the WTO agreements. ln some cases, the WTO provision should be interpreted as requiring the outside obligation to be enforced within the WTO system; in others, the outside provision will merely provide interpretive material that must be used by WTO adjudicating bodies when enforcing another WTO obligation" (MARCEAU, Gabrielle Zoe. A call for coherence in international law: praises for the prohibition against 'Clinical Isolation' in WTO dispute settlement. *Journal of World Trade*, v. 33, n. 5, 1999, p. 112, footnotes suppressed).

16 MARCEAU, Gabrielle. Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties. *Journal of World Trade***,** v. 35, n.6, 2001, p. 1103.

17 LINDROOS, Anja; MEHLING, Michael. Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO. *European Journal of International Law*, v. 16, n. 5, p. 865, 2006.

18 Isabelle Van Damme explains that "It may be presumed that Article 3.2 refers to customary international law on treaty interpretation as it existed on and evolved after 1 January 1995, which is the date of entry into force of the covered agreements. The Appellate Body confirmed in its first reports that Articles 31 and 32 VCLT have attained the status of 'customary rules of interpretation of public international law'" (VAN DAMME, Isabelle. *Treaty Interpretation by the WTO Appellate Body,* The European Journal of International Law, v. 21, n. 3, 2010, p. 608, footnotes omitted).

19 MERKOURIS, Panos. *Article 31(3)(c) and the Principle of Systemic Integration*: Normative Shadows in Plato's Cave. Brill Nijhoff: 2015. p. 4.

Article 31(3)(c) of the VCLT forms part of its general rule of interpretation, which provides:

> 1. 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.
>
> 2. 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 was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. 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.[20]

At first reading, the meaning of "context" present in Article 31(1) can be misleading. One may think that the "context" that should inform the interpretation of a treaty is its factual context. Article 31(2) of the VCLT, together with the commentaries of the International Law Commission (ILC), suggests otherwise. In particular, Article 31(2) states that "The context for the purpose of the interpretation of a treaty shall comprise, *in addition to* the text, including its preamble and annexes […]". The use of the words "in addition to" implies that the context is the text, the preamble and annexes.[21]

The wording of this provision may evoke the question of whether the use of "any relevant rules of international law applicable in the relations between the parties" should be taken into account simultaneously with the consideration of the context, or if instead the division of Article 31 into paragraphs indicates some kind of order in the interpretative process.

This question has been recently addressed by the ILC on the occasion of the adoption of the Draft Conclusions on Subsequent agreements and subsequent practice in relation to the interpretation of treaties.[22] Paragraph 5 of its Conclusion 2 states that "[t]he interpretation of a treaty consists of a *single combined operation*, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32".[23] While not necessarily definitive, this paragraph is nonetheless authoritative in shedding light on the interpretative process.

Article 31(3)(c) directs a process in which "obligations are interpreted by reference to their normative environment (system)".[24] In other words, by determining that "any relevant rules of international law applicable between the parties" shall be taken into account "together with the context" of a provision, the drafters of the VCLT codified the idea that treaties must be interpreted taking into consideration other rules of international law.[25]

20 *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, emphasis added.

21 This is to be then complemented by "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". There does not seem to be, however, any agreement or instrument that falls within the definitions of paragraphs (a) and (b) which are relevant for analysis under the present study.

22 General Assembly, Subsequent agreements and subsequent practice in relation to the interpretation of treaties - Text of the draft conclusions adopted by the Drafting Committee on second reading, UN Doc A/CN.4/L.907, 11 May 2018.

23 United Nations, Report of the International Law Commission - Seventieth session (30 April–1 June and 2 July–10 August 2018), UN Doc A/73/10, p. 13, emphasis added.

24 General Assembly, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law - Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, p. 208, para 413.

25 See DÖRR, Oliver. Article 31. General rule of interpretation. In: DÖRR, Oliver; SCHMALENBACH, Kirsten (ed.). *Vienna Convention on the Law of Treaties:* A Commentary. Springer, 2018. p. 602-603. There is some disagreement as to what sources of law can be considered "rules of international law" for the purposes of Article 31(3)(c), in particular whether or not it includes general principles. This work supports the view that "rules" comprises treaties, customary law and general principles (See MERKOURIS, Panos. *Article 31(3)(c) and the Principle of Systemic Integration*: Normative Shadows in Plato's Cave. Brill Nijhoff: 2015, p. 19 and DÖRR, Oliver. Article 31. General rule of interpretation. In: DÖRR, Oliver; SCHMALENBACH, Kirsten (ed.). *Vienna Convention on the Law of Treaties*: A Commentary. Springer, 2018, p. 605). Moreover, in *US — Anti-Dumping and Countervailing Duties (China)*, the AB, in assessing the relevance of the ILC Draft Articles on State Responsibility, stated that while are not binding as written rules, but "insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties" (United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Appellate Body Report (11 March 2011) WT/DS379/AB/R, para 308). For a diverging view, see McLACHLAN, Camp-

The use of Article 31(3)(c) by international adjudicators can provide a tool against the fragmentation of international law.[26] McLachlan describes it as a "master key" to "all of the rooms" of international law, permitting the treaty interpreter to look "outside of the four corners of a particular treaty to its place in the broader framework of international law […]".[27] According to the author, as well as to the ILC Study Group on Fragmentation of International Law's final report,[28] Article 31(3)(c) and its codified principle of systemic integration provide an essential toolkit to reducing international fragmentation.[29]

On the other hand, the use of external sources of law in the context of WTO dispute settlement can conflict with the limitations on its mandate. In this vein, the question remains as to what extent the WTO DSS has recurred to this provision to refer to non-WTO sources of law to guide its interpretative process, and to what extent this use has impacted its material jurisdiction.

3. The use of Article 31(3)(c) by the WTO AB: case studies

This section analyzes how the Appellate Body has applied Article 31(3)(c) and the principle of systemic integration in its case law. Four cases have been selected,[30] and will be addressed in chronological order: US – Shrimp (AB report circulated in 1998), US — Anti-Dumping and Countervailing Duties (China) (March 2011), EC and certain member States — Large Civil Aircraft (May 2011) and Peru – Agricultural Products (2015).

These cases are representative of the AB's rulings from a temporal perspective, comprising a selection from an early report (1998) until a more recent one (2015). While some are more thorough than others regarding considerations to Article 31(3)(c) and the principle of systemic integration, their combined assessment will provide a general overview of the subject here discussed.

3.1. US – Shrimp

The *US – Shrimp* report is marked by broad recourse to external sources of international law by the AB. In order to shed light on the meaning of "exhaustible natural resources" in GATT Article XX(g), the AB referenced a number of other international agreements. However, in doing so it made no reference to Article 31(3)(c), but rather through the "ordinary meaning" of the terms in accordance with Article 31(1) of the VCLT.

The AB did refer to Article 31(3)(c), but in a different context: to invoke the principle of good faith as a general principle of international law reflected under the *chapeau* of Article XX. The AB stated that the *cha-*

bell. The Principle of Systemic Integration and Article, v. 31, n. 3, (c) of the Vienna Convention. *The International and Comparative Law Quarterly*, v. 54, n. 2, p. 290, 2005. VILLIGER, Mark E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden: Martinus Nijhoff Publishers, 2009. p. 433.

26 See, for instance, the relevance of the use of this provision in reconciling multilateral environmental agreements and WTO obligations: MOROSINI, Fabio Costa; NIENCHESKI, Luisa Zuardi. A relação entre os tratados multilaterais ambientais e os acordos da OMC: é possível conciliar o conflito?, *Brazilian Journal of International Law*, v. 12, n. 2, 2014, p. 156-158.

27 McLACHLAN, Campbell. The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention. *The International and Comparative Law Quarterly*, v. 54, n. 2, 2005, p. 281.

28 General Assembly, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law - Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006.

29 Chin Leng Lim notes that "This is how the systemic integration clause is viewed today. It was not always so. In fact, the systemic integration clause was not previously viewed to have been concerned with systemic integration at all. Rather, it was viewed as an expression of the doctrine of inter- temporal law such that the words in a treaty might usefully be taken to have been used in the sense they bore under the rules of international law in existence at the time the treaty was made, but without ignoring the fact that it may be equally useful to have regard to the current state of the law" (LIM, Chin Leng. Trade Law and the Vienna Treaty Convention's Systemic Integration Clause. In: CHAISSE, Julien; LIN, Tsai-yu (eds.), *International Economic Law and Governance Essays in Honour of Mitsuo Matsushita*, Oxford: Oxford University Press, 2016. p. 98).

30 The reports on which this research focused were select through the following method: first, the database used was the WTO website and searching for relevant Appellate Body reports ("type of document") which referred to "relevant rules" and/or "systemic integration" ("full text search") (These terms were typed into the "find dispute text" section). Following this procedure, 14 Appellate Body reports were identified (as of 16 October 2018). However, not all of these reports refer to "relevant rules of international law" as such for purposes of interpretation. Moreover, in some of these reports, reference to "relevant rules" might be only superficial. The second step was thus to pinpoint the cases in which Article 31(3)(c) was effectively employed and substantive findings this provision were drawn. This paper disregards Appellate Body reports under DSU Article 21.5 procedures.

peau was "in fact, but one expression of good faith".[31] The VCLT provision was mentioned in a footnote to justify the fact that the AB's task was "to interpret the language of the *chapeau,* seeking additional interpretative guidance, as appropriate, from the general principles of international law".[32]

This was the first time the AB referred to Article 31(3)(c),[33] and it is a very limited reference to the provision. For instance, there is no clarification on why the principle of good faith would be a "relevant rule of international law" for the purposes of that dispute. There is a mere assertion that general principles of international law can provide guidance and that this is justified by Article 31(3)(c).

Moreover, it is interesting to observe how reference to this provision came up when invoking a general principle which was in fact derived from the very text of Article XX (it is *an expression* of the *chapeau*). Conversely, the AB did not mention the VCLT provision or the principle of systemic integration when invoking other sources of international law (which also provided "additional interpretative guidance") to interpret the meaning of "exhaustible natural resources".

3.2. US — Anti-Dumping and Countervailing Duties (China)

In *US — Anti-Dumping and Countervailing Duties (China)*, the meaning of the term "public body" in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) was under dispute.[34] The question was whether state-owned and controlled entities should be characterized as public bodies for the purposes of Article 1.1(a)(1) of the SCM Agreement. China invoked the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR), in particular Articles 4, 5 and 8 (which lay out the rules on attribution of conduct to States), as relevant rules that should be taken into account for the interpretation of the provision in the sense of VCLT Article 31(3)(c).

The Panel in the dispute had considered that, while the DASR could be taken into consideration for interpretative purposes, panels and Appellate Body had accepted them as providing "conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements".[35] The Panel dismissed the DASR as "relevant rules of international law" as invoked by China claiming that the WTO Agreement should be interpreted "on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context […]", that the DASR are not binding and that the WTO rules are *lex specialis* vis-à-vis the general rules of international law on State responsibility.[36]

The AB ascertained the meaning of "public body" following the steps of the general rule of interpretation in Article 31 of the VCLT. After analyzing the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and motivated by China's arguments, it considered the DASR.

In this dispute, the AB developed a more detailed analysis on the applicability of non-WTO rules invoked under Article 31(3)(c) to WTO dispute settlement. It stated that the provision "contains three elements. First, it refers to 'rules of international law'; second, the rules must be 'relevant'; and third, such rules must be 'applicable in the relations between the parties'".[37] "Rules of international law", for the AB, "corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice and thus includes customary rules of international law as well as

31 UNITED STATES — Import Prohibition of Certain Shrimp and Shrimp Products, *Appellate Body report* (12 October 1998) WT/DS58/AB/R p. 61, para 158.

32 UNITED STATES — Import Prohibition of Certain Shrimp and Shrimp Products, *Appellate Body report* (12 October 1998) WT/DS58/AB/R, p. 61-62, para 158 and footnote 157.

33 Previously, the AB had referred to this provision in Brazil - Measures Affecting Desiccated Coconut (WT/DS22/AB/R, p. 8), but only when referring to Brazil's argument regarding the relevance of Article 28 of the VCLT. The AB did not make further considerations on the matter.

34 The provision states: "1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), […]".

35 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Panel Report* (22 October 2010) WT/DS379/R p. 47, para 8.87.

36 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Panel Report* (22 October 2010) WT/DS379/R p. 48, para 8.87.

37 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 119, para 307.

general principles of law". [38]

Thus, the AB hinted it would proceed to assessing whether the DASR provisions invoked by China corresponded to "rules of international" – i.e., customary international law or general principles of law.[39] However, before even addressing the issue, the AB reasoned that its interpretation of "public body" (based on the general rule in VCLT Article 31(1)) "coincide[d] with the essence of Article 5 [of the DASR]".[40] In other words, the AB claimed that Article 5 of the ILC DASR lent support to its own foregoing analysis.[41] The AB thus circumvented the question of whether the ILC DASR constitute general principles of law or customary law by stating that they "lent support" to its conclusions.

After that, the AB went on to criticize the Panel for its statements that the ILC provided mere "conceptual guidance" to WTO provisions and thus they did not constitute rules of international law in the sense of that provision. The AB reversed this finding and considered that if ILC Articles have been used to contrast or confirm the meaning of WTO Agreement provisions, "this evinces that these ILC Articles have been 'taken into account' in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases".[42]

If the AB is clearly stating that these Articles have been considered in WTO case law through Article 31(3)(c), it means that it incidentally considers they have attained the status of customary law or general principle. After all, the AB had argued earlier that, to be taken into account as a "rule of international law", they would have to correspond to one of these sources. However, the organ did not explain to what extent the DASR Articles reflected customary law or general principles.

Finally, in considering the Panel's finding that the ILC DASR could not supersede WTO Agreement provisions because these constitute lex specialis vis-à-vis international law, the AB concluded that there is a distinction between taking these Draft Articles into account for purposes of interpretation of the SCM Agreement and applying the Draft Articles. It stressed that the provisions being applied were those in the SCM Agreement.[43]

3.3. EC and certain member States — Large Civil Aircraft

In *EC and certain member States — Large Civil Aircraft* (hereinafter, *Large Civil Aircraft)*, the United States had brought a dispute to the DSS with regard to certain European Union (EU) measures that allegedly constituted subsidies to the Airbus companies for the development of civil aircraft. In its defense, the EU invoked the "Agreement between the European Economic Community and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft" (1992 Agreement) as a relevant rule of international law, within the meaning of VCLT Article 31(3)(c). The EU invoked this provision and referred to it as the "principle of 'systemic integration' of all international agreements applicable in the parties' relations […]".[44]

There are two elements worth noting in the *Large Civil Aircraft* AB report. The first one relates to the "*relevant* rule of international law" criterion. The AB ultimately did not take the 1992 Agreement into consideration because it was deemed not "relevant" within the meaning of Article 31(3)(c). The AB considered that "[a] rule is 'relevant' if it concerns the subject matter of the provision at issue" and, since the 1992 Agreement did not specifically relate to the term "benefit" in Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures, it could not be considered "relevant".

The second element is the position the AB took regarding the meaning of the term "applicable in the relations between the parties" in Article 31(3)(c). In the EC

38 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 119, para 308.

39 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 118, para 304 ff.

40 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 120, para 310.

41 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 120, para 311.

42 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 121, para 340.

43 UNITED STATES - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, *Appellate Body Report* (11 March 2011) WT/DS379/AB/R, p. 122, para 316.

44 EUROPEAN COMMUNITIES — Measures Affecting Trade in Large Civil Aircraft, *Appellate Body Report* (18 May 2011) WT/DS316/AB/R, p. 39, para 81.

– Biotech panel report, which was circulated in 2006 and was not appealed, the panelists had concluded that "the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between [all] the WTO Members".[45] This finding was largely criticized by the scholarship,[46] and directly challenged by the European Union in Large Civil Aircraft.[47]

Before discarding the relevance of the 1992 Agreement to the dispute, the AB drew considerations on the meaning of the principle of systemic integration, and stated that

> in the words of the ILC, seeks to ensure that 'international obligations are interpreted by reference to their normative environment' in a manner that gives 'coherence and meaningfulness' to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.[48]

Albeit subtly, this extract, in highlighting the need to take into account "an individual WTO Member's international obligations", represents an implicit overruling – or at least a more nuanced approach – of the *EC – Biotech* panel finding on the matter.[49]

It is telling that the ILC report on fragmentation quoted in this extract by the AB had severely criticized the interpretation of the same term of the provision in the *EC – Biotech* panel report. In other words, the AB cited the works of an institution of general international law *par excellence* which criticized a previous WTO panel report in order to ground its considerations on the provision. One could assume that the AB drew these considerations precisely in order to send the message that it was overruling the *EC – Biotech* panel report.

This is especially so considering that in fact the agreement invoked under Article 31(3)(c) was dismissed for not being "relevant", an assessment that typically comes before the meaning of "applicable in the relation between the parties". The AB could, thus, have abstained from making any findings relating to this criterion, but instead it chose to make the above quoted statements.

3.4. Peru – Agricultural Products

A similar approach to that in *Large Civil Aircraft* was taken in the more recent *Peru – Agricultural Products* report, in which Peru invoked as part of its defense arguments Articles 20 and 45 of the ILC DASR (respectively, provisions on Consent and Loss of the Right to invoke responsibility to the violation of an international obligation).

The point of contention was the fact that, in Peru's view, the Free Trade Agreement concluded between the disputants modified relevant WTO obligations between themselves. Peru argued that the DASR provisions on consent and loss of right to invoke responsibility were relevant to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT, object of the dispute, in the terms of Article 31(3)(c) of the VCLT.[50]

45 EUROPEAN COMMUNITIES — Measures Affecting the Approval and Marketing of Biotech Products, *Panel report* (29 September 2006) WT/DS291/R; WT/DS292/R; WT/DS293/R, p. 333, para 7.68.

46 Most notably, by the Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law (13 April 2006) ILC, 58th session, Geneva, 1 May-9 June and 3 July-11 August 2006, UN Doc A/CN.4/L.682 227, para 459 and 237, para 471. See, *inter alia*, HOWSE, Robert; HORN, Henrik, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, *World Trade Review*, v. 8, n. 1, 49, 2009; McGRADY, Benn, Fragmentation of International Law or 'Systemic Integration' of Treaty Regimes: EC - Biotech Products and the Proper Interpretation of Article 31(3)(C) of the Vienna Convention on the Law of Treaties, *Journal of World Trade,* v. 42, n. 4, pp. 589-618, 2008.

47 EUROPEAN COMMUNITIES — Measures Affecting Trade in Large Civil Aircraft, *Appellate Body Report* (18 May 2011) WT/DS316/AB/R, p. 39, para 82.

48 EUROPEAN COMMUNITIES — Measures Affecting Trade in Large Civil Aircraft, *Appellate Body Report* (18 May 2011) WT/DS316/AB/R, p. 363, para 845, footnotes suppressed.

49 Diane Desierto contends that the Appellate Body "[…] simply took a 'balancing position' […]", but did not "further elaborate or develop the practical implementation of this test, nor show the manner by which 'due account was to be taken of the non-WTO rules, nor elucidate a methodology for achieving harmonization in the interpretation of WTO law in relation to non-WTO rules" (DESIERTO, Diane. *Public Policy in International Economic Law*: the ICESCR in trade, finance and investment. Oxford: Oxford University Press, 2012. p. 206).

50 "In particular, Peru contends that the both the FTA and the ILC Articles are 'rules of international law', that they are 'applicable' between the parties, that they are 'relevant' to the interpretation of the above-mentioned WTO provisions, and that 'parties' in Article

The AB considered that the specific point under contention was the assessment of the nature of Peru's tariffs, not whether there had been a waiver or a consent to the violation of relevant WTO provisions. Therefore, provisions on responsibility of states were of no relevance to the interpretation within the terms of Article 31(3)(c).[51]

Arguably, this very restrictive view may have been the rhetorical choice of the AB to avoid dealing with the question whether general rules of international law relating to circumstances precluding wrongfulness and state responsibility can be invoked under the multilateral trading system as justification for violation of WTO law.

After assessing these reports, it is worth noting that the fact that the AB does not often make explicit reference to Article 31(3)(c) or the principle of systemic integration does not mean that these have nonetheless been employed it in an implicit manner. Indeed, Van Damme acknowledges that "Article 31(3)(c) is by no means the only principle that can justify treaty interpretation in the light of international law".[52]

An example is the US – Shrimp report, in which the AB confronted several international agreements relevant to the dispute in order to shed light on the meaning of "exhaustible natural resources". Notably, it was assessing the "ordinary meaning" of the term by taking into consideration other relevant conventions. Still, this is nothing less than "taking into account, together with the context" of the GATT, a "relevant rule of international law applicable in the relations between the parties". Indeed, the AB found it relevant to remark in a footnote, the acceptance of the United Nations Convention on the Law of the Sea (one of the conventions invoked by the AB) by the parties to the dispute.[53]

The AB may therefore use the rationale behind the principle of systemic integration without specifically naming it or Article 31(3)(c). However, when it does so, it normally refers to Article 31(3)(c) of the VCLT, as part of the "steps" indicated by the VCLT principles on treaty interpretation. This results in in a reference to non-WTO law that is very restrictive, since the methodology employed by the AB (and arguably by panels) is that of fulfilling the "criteria" to analyze whether a rule can be regarded within the scope of Article 31(3)(c) or not.

4. Implications of the use of Article 31(3)(c) to the WTO DSS: a potential source for judicial activism?

Judicial activism cannot be defined in an objective manner, mostly because "[w]hether something is identified as judicial activism […] is often a matter of perspective".[54] For the present purposes, three elements are taken into consideration to assess whether the recourse to non-WTO law by means of Article 31(3)(c) amounts to judicial activism: (1) the overall evolution on the use of the VCLT provision by the AB, (2) the use of external sources of law overstepping the line between applicable law and jurisdiction and, (3) from a legitimacy perspective, the reception of the reports which were analyzed in the previous section by WTO members in DSB meetings.

The use of the principle of systemic integration and Article 31(3)(c), when confronted with the limited material jurisdiction of the WTO AB, entails the question of how the jurisdiction of the DSS organs could be influenced. Through the logic of systemic integration, typically, international adjudicators may invoke sources of law that are not within their jurisdiction in order to interpret a provision. The ensuing problem is the blurred line between jurisdiction and applicable law.

As demonstrated, the applicability of Article 31(3)(c) to WTO dispute settlement was characterized by

31(3)(c) of the Vienna Convention should be understood to mean the parties to the dispute" (Peru — Additional Duty on Imports of Certain Agricultural Products, *Appellate Body report* (20 July 2015) WT/DS457/AB/R, p. 41 para 5.99).

51 PERU — Additional Duty on Imports of Certain Agricultural Products, Appellate Body report (20 July 2015) WT/DS457/AB/R, para 5.91 ff, in particular paras 5.103-5.104.

52 VAN DAMME, Isabelle. *Treaty interpretation and the WTO Appellate Body*. Oxford: Oxford University Press, 2006, p. 375. In the same sense, HOWSE, Robert. The use and abuse of other "relevant rules of international law" in treaty interpretation: insights from WTO trade/environment litigation' IILJ Working Paper, v. 1, 2007.

53 UNITED STATES — Import Prohibition of Certain Shrimp and Shrimp Products, *Appellate Body report* (12 October 1998) WT/DS58/AB/R, p. 49, fn 110. For a detailed analysis on why the AB may have been preoccupied with demonstrating the acceptance of the conventions by the disputants, see HOWSE, Robert. The use and abuse of other "relevant rules of international law" in treaty interpretation: insights from WTO trade/environment litigation' IILJ Working Paper, v. 1, 2007, p. 14 ff.

54 ZARBIYEV, Fuad. Judicial Activism in International Law: A Conceptual Framework for Analysis. *Journal of International Dispute Settlement*, v. 3, n. 2, 2012. p. 252.

three criteria in the *Large Civil Aircraft* AB report: that the source being invoked is a *rule* of international law; that it is a *relevant* rule; and that it is "applicable in the relations between the parties".

In *Large Civil Aircraft*, the AB dismissed the agreement called into question as non-relevant because, although it "relate[d] closely" to the issues of the dispute,[55] it did inform the meaning of the specific term "benefit" in Article 1.1(b) of the SCM Agreement. By restricting the relevance of a non-WTO rule to the interpretation of one specific word of a provision in a covered agreement, the AB adopted a very narrow approach to the meaning of "relevant". This approach was maintained in the case *Peru – Agricultural Products*.

Evidently, this is a very restrictive view of the scope of application of the principle of systemic integration. The WTO covered agreements are by their very nature very technical and specific regarding their subject matter. Few other sources of law deriving from general international law (such as customary rules on state responsibility and general principles) will concern the same subject matter as WTO provisions. If one takes into consideration the broad use of written and unwritten sources of law made by the AB in the US – Shrimp report, one notices a decrease in the range of possible non-WTO law applicable to disputes.

A shift in the use of Article 31(3)(c) can be observed when the US – Shrimp report is confronted with the Peru – Agricultural products report. In the US – Shrimp report the use of the provision was very loose; the AB provided no explanations to the invocation of the provision and how good faith would fit into it. In Howse's words, perhaps the AB was "making a statement" regarding the relationship between trade and environment, and it chose to refer to other sources of conventional law when it could have arrived at the same conclusions by referring solely to the preamble and previous GATT decisions.[56]

In a subsequent dispute in which the AB recurred to Article 31(3)(c), several years later, one can see a remarkable contrast: the AB, in US — Anti-Dumping and Countervailing Duties (China), felt the need to dissect the provision into elements that had to be fulfilled. However, even then the threshold for fulfilling these criteria was not set high, and the DASR provisions at stake were considered "relevant rules of international law applicable … between the parties" without major explanations.

Interestingly, the same DASR (albeit different provisions) was discarded as not relevant in the Peru – Agricultural report. Had the Anti-Dumping and Countervailing Duties report been issued more recently, in particular having in mind the strict interpretation of "relevant" in the Peru – Agricultural report, perhaps it would not have passed the "rule of international law" (or even the "relevance") requirement. Still, the DASR could be used for providing interpretative guidance under other "step" of the VCLT Article 31, such as the ordinary meaning.

This strict reliance on the criteria of Article 31(3)(c) in order to revert to non-WTO law, in particular its focus on the "relevance" criterion, seems to be the line the AB drew for the use of these sources for interpretative purposes, rather than for its application within the DSS, and a sign contrary to judicial activism.

In light of the *Peru – Agricultural products* report, the test was much stricter than that in *US – Shrimp*. This can be explained by a possible shift in the AB's perception of its mandate. While in the early years of its functioning the organ was preoccupied with a "declaration of independence"[57] and marking itself as an international organ, more recently it may have realized that it has to be more WTO-oriented and less expansive for questions of internal legitimacy. The minutes of meetings of the Dispute Settlement Body in the context of the adoption of these reports illustrates some of the Members' perceptions towards the findings relevant to this paper.

The use of other sources of international law in *US – Shrimp* provided the underpinnings of the AB's consideration on the evolutionary nature of the concept of "exhaustible natural resources". In the DSB meeting held after the circulation of the report, the United States expressed that it was "pleased that the Appellate Body had emphasized that Article XX had to be 'read

55 EUROPEAN COMMUNITIES — Measures Affecting Trade in Large Civil Aircraft, *Appellate Body Report* (18 May 2011) WT/DS316/AB/R, para 847.

56 HOWSE, Robert. The use and abuse of other "relevant rules of international law" in treaty interpretation: insights from WTO trade/environment litigation, IILJ *Working Paper*, v. 1, p. 16, 2007.

57 See HOWSE, Robert. The World Trade Organization 20 Years On: Global Governance by Judiciary. *European Journal of International Law*, v. 27, n. 1, p. 9-77, 2016.

by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment"'.[58]

On the other hand, this issue was criticized by other WTO members. The Philippines, for instance, one of the third parties in the dispute, considered that the "body of international treaties did not constitute one single code of conduct, they were instead an accumulation, each treaty separate and independent from the other".[59] Thailand, India, Pakistan and the Philippines are members with a less political influence than countries like the United States. Yet, while the United States welcomed the approach by the AB in *US – Shrimp*, it did not express the same satisfaction when the AB interpreted the meaning of "public body" in *US – Anti-Dumping and Countervailing Duties (China)*.

When the AB report in *US – Anti-Dumping and Countervailing Duties* was circulated, China manifested its appreciation of the reasoning, "in particular, the Appellate Body's affirmation of the requirement under Article 31(3)(c) of the Vienna Convention to take into account relevant rules of international law as part of the process of treaty interpretation".[60] The United States, on its side, manifested discontent with the report and criticized the AB approach.[61] While the United States regarded the report in general as a "clear case of overreaching by the Appellate body",[62] it did not mention the recourse to the ILC DASR in interpreting the term "public body".

The AB may have relied on the ILC DASR's rules on attribution to determine the meaning of "public body" to a larger extent than what is explicitly in the report. However, the rhetoric it used was focused on the principles of interpretation of Article 31(1) (namely, ordinary meaning in light of its context and purpose) of the VCLT. Indeed, despite the fact that, for instance, Japan criticized the use of the Draft Articles by the AB in this case,[63] the United States' criticism was aimed at the substance of the finding rather than the recourse to this source of law.

The approach of the AB towards Article 31(3)(c) was not discussed in the DSB meetings regarding the reports on Large Civil Aircraft nor in Peru – Agricultural Products. Nevertheless, in commenting the latter, the United States remarked that, in its reasoning,

> the Appellate Body had refrained from addressing certain issues of interpretation and public international law raised by Peru that were not necessary to resolve the dispute. This approach had allowed the Appellate Body to issue a concise, high-quality report, and the United States appreciated these efforts.[64]

The United States has arguably adopted a consistent position regarding the perhaps expansive role taken by the AB in the interpretation of WTO provisions.[65] Yet, in *US – Shrimp*, it did not criticize the progressive approach taken by the organ; instead, it "welcomed" it. The approval of the United States towards AB reports which adopt a cautious (not to say narrow) view with relation to "certain issues of interpretation and public international law" is certainly contrasting with its position towards the *US – Shrimp* AB report.

In any case, the current AB approach lowers the chances of overstepping the line between interpretation and application of other international law within WTO dispute settlement. When the AB restricts the relevance of a non-WTO source of law to a specific expression in a WTO Agreement, and when it takes such a narrow approach to what can be considered 'relevant' in this sense, it is very unlikely that it will overreach its mandate by applying, in the WTO context, sources which are not part of the multilateral trading system.

On the other hand, the overreach in the use of non-WTO law may appear when the AB invokes it to clarify the meaning of WTO provisions, as seen in US – Anti-dumping and Countervailing Duties (China). However,

58 Minutes of Meeting Held in the Centre William Rappard on 6 November 1998 (14 December 1998) WTO Doc WT/DSB/M/50, p. 11.

59 Minutes of Meeting Held in the Centre William Rappard on 6 November 1998 (14 December 1998) WTO Doc WT/DSB/M/50, p. 14.

60 Minutes of Meeting Held in the Centre William Rappard on 15 March 2011 (9 June 2011) WTO Doc WT/DSB/M/294, p. 17.

61 Minutes of Meeting Held in the Centre William Rappard on 15 March 2011 (9 June 2011) WTO Doc WT/DSB/M/294, p.18 ff.

62 USTR Statement Regarding WTO Appellate Body Report in Countervailing Duty Dispute with China, available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/march/ustr-statement-regarding-wto-appellate-body-report-c, accessed: 17 October 2018.

63 Minutes of Meeting Held in the Centre William Rappard on 25 March 2011 (9 June 2011) WTO Doc WT/DSB/M/294 27.

64 Minutes of Meeting Held in the Centre William Rappard on 31 July 2015 (25 September 2015) WTO Doc WT/DSB/M/366 3.

65 For a detailed analysis of the criticisms addressed by the Unites States towards the AB alleged judicial overreach since the early years of its functioning, see McDOUGALL, Robert. The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance, *Journal of World Trade v.* 52, n. 6, p. 867-896, 2008.

since this report, the AB seems to have taken a stricter approach towards the possibility of invoking these sources. Moreover, this is a general problem of interpretation, not just one linked to the recourse to other sources of international law.

There is a final element worth remarking, which relates to what the United States calls "Issuing Advisory Opinions on Issues Not Necessary to Resolve a Dispute".[66] This practice can be seen in US — Anti-Dumping and Countervailing Duties (China), Large Civil Aircraft and Peru – Agricultural Products.

In Countervailing Duties, the AB tried to circumvent addressing the status of the DASR as rules of international law, but eventually implicitly did so by correcting the Panel's findings on the matter. One can argue that, having ascertained the meaning of "public body", the AB could have concluded the analysis and not touched upon the question of whether the DASR is to be considered a "relevant rule of international law applicable in the relations between the parties".

In Large Civil Aircraft, the AB did not have to make considerations regarding the meaning of "the parties" in Article 31(3)(c) since it ultimately dismissed the applicability of the 1992 Agreement invoked for being "not relevant". Still, it drew conclusions that clearly stated its disagreement with the findings regarding the same issue in the EC – Biotech panel report.

In Peru – Agricultural products, the AB could have dismissed the allegations regarding the relevance of the free trade agreement on the basis that the treaty was not in force between the parties. It did not do so, and went on to analyze specific aspects of its applicability.

Therefore, it seems that the AB makes statements which are unnecessary to reach the same conclusion, but which are necessary to "send messages" through obiter dicta to its membership.[67] In this sense, the jurisdictional constraints of the AB may not be as narrow as they seem at first sight when it comes to interpreting Article 31(3)(c). Whether this is a positive or negative take by the organ depends on one's view of its judicial function.

5. Conclusion

This paper addressed one element among several which may have contributed to the criticisms directed at the role played by the Appellate Body in its functioning: the use of VCLT Article 31(3)(c) and the reference to non-WTO sources of law for the interpretation of WTO obligations through this provision and the principle of systemic integration. While this specific interpretative tool has not been an object of direct criticism, the way in which the AB refers to other "relevant sources of international law" could give rise to claims of judicial activism.

Three main conclusions can be drawn from the practice of the AB with regard to its use of Article 31(3)(c) and the principle of systemic integration. First, it opts to refer to the codified provision rather than to the principle of systemic integration. The long-standing "tradition" of following the codified rules on treaty interpretation in the resolution of the disputes and the "authorization" granted by DSU Article 3.2 to invoke to customary rules on treaty interpretation can explain why AB, panels and parties have preferred to invoke Article 31(3)(c) of the VCLT rather than the principle of systemic integration. These reasons enhance the legitimacy of resorting to this mechanism for taking into account non-WTO rules.

This consideration is bolstered by the second conclusion: the approach of the AB towards Article 31(3)(c) has shifted from a very broad one, in *US – Shrimp*, to a strict one, as seen in particular in the *Peru – Agricultural products* dispute. The AB, in its more recent case law, developed a very strict benchmark for assessing whether a rule of international law is "relevant" for interpreting WTO terms and provisions.

The third conclusion flows from the foregoing two: the current AB approach on the use of Article 31(3)(c) does not in fact promote systemic integration. While the interpretative practices of the AB in general fall outside the scope of the present paper – for instance, to what extent the interpretation of the term "public body" amounted to judicial overreach –, it is apparent from the analysis advanced here that the tendency to invoke

66 USTR, 2018 Trade Policy Agenda and 2017 Annual Report - Chapter I - The President's Trade Policy Agenda, available at: https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017, accessed 05 December 2018.

67 For a discussion on *obiter dicta* and the AB, see GAO, Henry. Dictum on Dicta: Obiter Dicta in WTO Disputes. *World Trade Review*, 2018, v. 17, n. 3. pp. 509–533 and SACERDOTI, Giorgio. A Comment on Henry Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes'. *World Trade Review*, v. 17, n. 3. p. 535–540, 2018.

non-WTO law by the AB is becoming less frequent. In fact, a very limited role has been given to general international law sources in the interpretation of the covered agreements, in particular by means of Article 31(3)(c).

The more deferential approach adopted by the AB in more recent case law, in contrast with the more liberal one in US – Shrimp, may have been a response to the criticisms which now threaten its very existence. Systemic interpretation is no longer at the center of the debate; now, there must be a compromise between tackling vague-worded provisions and its own internal legitimacy.

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