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Reply to Joshua Meltzer

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REPLY TO JOSHUA MELTZER

When interpreting or giving meaning to WTO treaty terms, what other rules of international law can or must WTO panels take into account? As Mr. Meltzer points out, I have taken the view that those rules, referred to in Art. 31.3(c) of the Vienna Convention, must reflect the common intentions of all WTO members. To my mind, it is not sufficient for a rule to be binding only on the disputing parties (it must reflect the common intentions of *all* WTO members), nor is it necessary that the rule is legally binding on all WTO members (it suffices that the rule reflects their common intentions). In my book, I also elaborate on: (i) the types or sources of rules that can be referred to (essentially any source, be it general principles of law, custom, treaties or even decisions of international organizations); (ii) the requirement that the rules be “relevant”; and (iii) the timing of those rules (distinguishing between contemporaneous and evolutionary interpretation).¹ Yet, the question of membership to the rules is, as Mr. Meltzer’s comments demonstrate, probably the most controversial one.

It is hard to imagine that any one would argue that a purely bilateral treaty between, for example, the EC and the US could change the way WTO panels ought to interpret the multilateral WTO treaty. It is a firmly established principle that “the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.”² Or as the Appellate Body itself found: “The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties,”³ not the intentions of one or just a few parties to the WTO treaty. On that basis, I am quite confident that a rule applicable only between the two parties disputing a case before a WTO panel cannot influence the interpretation of what a WTO term means.

At the same time, I am not convinced that Article 31.3(c) rules must be *legally binding* on all WTO members, in the strict sense that these rules must confer rights or obligations on all WTO members. I see three reasons to come to this conclusion.

First, the process of treaty *interpretation*, at least the way I understand it, is a fairly limited one. A word or string of words in a WTO provision—be it “exhaustible natural resources” in GATT Article XX,

1. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* 253 (2003).

2. Advisory Opinion on the Question of Jaworzina, PCIJ, Series B, No. 8 (1923).

3. Appellate Body Report, European Communities—Computer Equipment, WTO Doc. WT/DS62/AB/R, ¶ 84 (1998) (emphasis in the original).

“foreign-source income” in footnote 59 to the Subsidies Agreement or “development, financial and trade need” in the Enabling Clause—is not entirely clear and must be given meaning. In the process of *defining* those specific terms, must a panel limit itself to outside material that is *legally binding* on all WTO members? I do not think so. Rather, it suffices that those outside sources reflect a definition or provide a meaning that is *commonly understood* by all WTO members. After all, interpreting a WTO term with reference to other sources is *not* adding legally binding rights or obligations to the WTO term, but a rather technical, linguistic exercise of defining the very meaning of the WTO term. Indeed, the very first outside source that panels consistently refer to is surely one that is *not* legally binding on all WTO members, namely the *Oxford English Dictionary* where the Appellate Body looks for “ordinary meaning.” Equally so, in my view, the distinguishing factor for rules under Article 31.3(c) ought not be that they are legally binding on all WTO members, but rather that they reflect a common understanding between WTO members.

Second, although the terms in Article 31.3(c) are themselves ambiguous, they can support my broad interpretation: reference is made to rules “applicable in the relations between the parties”, not rules “legally binding on all the parties.”

Third, and not least important, the Appellate Body has, in its interpretation of WTO terms, already referred to rules that are *not* legally binding on all WTO members. It even referred to rules not binding on the disputing parties. In *US—Shrimp*, it stated that the terms “exhaustible natural resources” in GATT Article XX must be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment” and referred to other treaties that were not binding on all WTO members (not even on the disputing parties!) to come to the conclusion that “exhaustible natural resources” includes both non-living *and* living resources.⁴ The same can be said about the double taxation treaties and domestic taxation rules referred to by the Appellate Body in *US—FSC (Article 21.5—EC)* when it was interpreting the term “foreign-source income” in footnote 59 of the Subsidies agreement.⁵ Those treaties and domestic rules are, obviously, not binding on all WTO Members. Nonetheless, the Appellate Body found that “certain widely recognized principles of taxation emerge from them” and

4. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, ¶ 129 (1998).

5. Appellate Body Report, United States—FSC (*Article 21.5—EC*), WTO Doc. WT/DS108/AB/RW, ¶¶ 141–145 (2002).

that “it is appropriate . . . to derive assistance” from these principles when giving meaning to the WTO term “foreign-source income.”⁶

As a result, I would not even accept Mr. Meltzer’s requirement that Article 31.1(c) rules at a minimum, be legally binding on the parties to a WTO dispute. The Appellate Body has, indeed, referred to rules that are *not* binding on both disputing parties. For example, neither Thailand nor the US are bound by UNCLOS or the Convention on Biological Diversity and yet the Appellate Body in *US—Shrimp* referred to them. In my view, the Appellate Body can do so as long as the meaning imparted from those rules can still be said to reflect a common understanding of all WTO members.

One further caveat: having said that rules binding only between the disputing parties (and not reflecting the common intentions of all WTO members) cannot be referred to when interpreting the WTO treaty, does not mean that they have no role to play before a WTO panel. To the contrary, I have argued that such rules can even play a more important role, namely that they can be invoked by the defendant as part of the *applicable law* to a WTO dispute on the basis of which a WTO panel may have to decline jurisdiction or find that a WTO provision no longer applies and is, therefore, not violated.⁷ Other commentators (such as Petros Mavroidis and Gabrielle Marceau) would achieve the same result but do so within the process of treaty *interpretation*, arguing that also rules binding only between the disputing parties are relevant under Article 31.3(c). In my view, however, what one is then doing is no longer interpreting a treaty with reference to other law, but applying other law to see whether a WTO rule can still be said to be violated. In other words, the fact that I take a rather broad view on Article 31.3(c) rules—in that they do not need to be *legally binding* on all WTO members—is not because otherwise one severely limits the extent to which the WTO is able to reflect and respond to the larger body of public international law. In my view, even if Article 31.3(c) would limit the process of *interpretation* to rules legally binding on all WTO members (*quod non*), a bilateral treaty binding only between the disputing parties could still be part of the *applicable law* before a WTO panel and excuse a potential WTO violation.

Finally, Mr. Meltzer’s warning about the “formal legitimacy” of rules that the Appellate Body can refer to when interpreting WTO terms must be taken seriously. Article 31.3(c) should, in the first place, be used to refer to rules explicitly agreed to by all WTO members, especially well-established general principles of law, custom and other treaties or decisions. Opening the door to rules not legally binding on all WTO

6. *Id.* ¶ 142.

7. *See supra* note 1, at 456–472.

members, not even on the disputing parties, may be permissible, but it remains a risky step: When and how will the Appellate Body decide that something rises to the level of a “contemporary concern of the community of nations”, “a widely recognized principle” or a “broad-based recognition of a particular need”? Any such conclusion should not be reached lightly and must be convincingly explained. The best safeguard against abuse is, however, that the reference must be to something that is part of the common understanding of all WTO members (much like the *Oxford English Dictionary*!). So far, in none of the cases discussed, did a single WTO member complain that this was not the case. Let us hope that the Appellate Body will be careful enough to keep it this way.

JOOST PAUWELYN