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Methodology in WTO Dispute resolution. Interpretation

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1. Setting the context. Fundamentals of WTO dispute resolution

2. Interpretation in WTO

- overview of international customary rules on interpretation (VCLT)
- excerpt from interview of His Honor Georges Abi-Saab
- case study (group 1)
- peculiarities of interpretation in WTO

3. Summary

- test
- area of critics

Van den Bossche, Zdouc:

*“The WTO has **a remarkable system** to settle disputes between its Members concerning their rights and obligations under the WTO agreements.”*

M.J.Trebilcock:

*“In many respects, the GATT/WTO dispute-settlement system is **the envy** of many other international legal regimes that lack any or effective enforcement regime.”*

**Why? What is so special?
Methodology?**

The prompt settlement of disputes between WTO Members and security and predictability of the multilateral trading system.

Key features:

- 1) single, comprehensive, integrated
- 2) several methods: consultations, negotiations, good offices, consultation, mediation, arbitration
- 3) multilateral procedure (not unilateral)
- 4) preference to consultations instead of adjudication
- 5) preservation of rights and obligations and interpretation. No judicial activism.
- 6) specific remedies.

Remedies:

- Final: withdrawal or modification of the WTO-inconsistent measure;
- Temporary: compensation and suspension of concessions or other obligations (retaliation).

- Compulsory
- Exclusive
- Contentious

- WTO agreement
- The DSU
- All multilateral agreements
- GATS
- TRIPS

In principle, any act or omission attributable to a WTO Member can be a measure that is subject to WTO dispute resolution system.

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Atypical measures:

- a) action or conduct by private party attributable to a Member;
- b) measures that are no longer in force;
- c) legislation “as such”
- d) discretionary legislation
- e) unwritten “norms or rules”
- f) ongoing conduct by Members
- g) measures by regional and local authorities.

Access for Member states only:

164 members since 29 July 2016

What kind of complaints?

- Violation complaint
- Non-violation complaint
- Situation complaint

Director-General and the WTO Secretariat

First-instance: Panel (of 3)

- *ad hoc*
- appointed

Appeal: Appellate Body (7 members)

- permanent
- appointed by DSB

DSB

- political institution
- composed of all Member states

Director-General and the WTO Secretariat

- offers *ex officio* capacity his/her good offices, conciliation or mediation
- upon request by the least-developed country Member offers his/her good offices, conciliation or mediation
- convenes the meetings of the DSB
- appoints panel members upon the request of either party (and in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, where the parties cannot agree on the composition within 20 days)
- appoints the arbitrator(s) for the determination of the reasonable period of time for implementation or proposed suspension of obligations

First-instance: Panel

- resolution

Appeal: Appellate Body

- appeal revision
- only issues of law (not issues of fact) and legal interpretations

DSB

- sets panels
- adopts panels and Appellate Body reports
- authorizes retaliation

- 1) Consultations
- 2) Panel proceedings
- 3) Appellate Body proceedings
- 4) Implementation and enforcement

https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

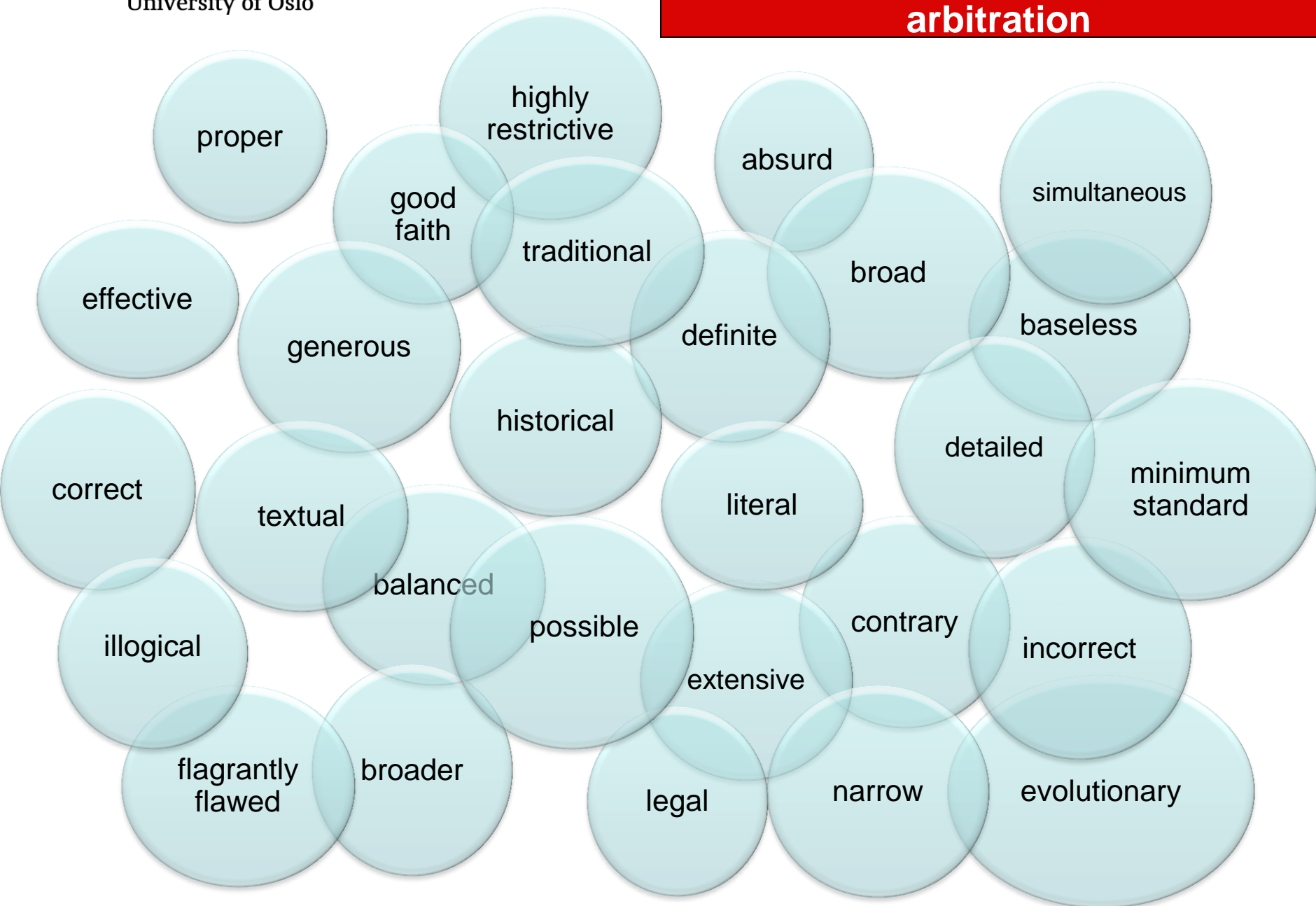
- 1) short time-frame
- 2) confidentiality
- 3) burden of proof on party asserting claim or defence
- 4) role of legal counsel
- 5) acceptance and consideration of *amicus curiae* briefs
- 6) the obligation of Members to act in good faith, the obligation on panels and the Appellate Body to ensure due process.

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm

- **Aim:** guaranteeing the integrity, impartiality and confidentiality of the dispute settlement system.
- **“Covered persons”:** panel members, Appellate Body members, experts assisting panels, arbitrators, members of the Textile Monitoring Body, and (WTO) Secretariat and Appellate Body Secretariat staff.
- **Essence:** “covered persons” are required to be independent and impartial, to avoid direct or indirect conflicts of interest, and to respect the confidentiality of dispute settlement proceedings.







Isabelle Van Damme:

“The success of the WTO dispute settlement system is **undisputed**. Its success can be measured in different ways and by different audiences of its decisions.”

Interpretation is one of the indication of success.

- Objective?
- Subjective?
- Teleological?

Article 3.2 DSU

“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.”

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 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.
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.
4. A special meaning shall be given to a term if it is established that the parties so intended.

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.

**The Appellate Body report: Measures
affecting the cross-border supply of
gambling and betting services 7 April 2005**

Interview with His Honour Judge Georges Abi-Saab

<http://www.jus.uio.no/english/services/knowledge/podcast/guest-lectures/2016/interview-with-his-honour-judge-georges-abi-saab.html>

- What is meant by “context” – contextual argument
- Context as “authoritative”? (principle of effective interpretation)
- Understandings: Annex 1A and not the “Dispute Settlement Understanding”
- Special feature of the WTO:
 - Interpretative notes: Annex I to GATT
 - Footnotes
 - the Schedules of Concession

- New decisions: limited to Article IX:2?
- Decisions under GATT: GATT 1994 para. 1(b)
 - Individual vs. general decisions
 - Declarations
 - Recommendations
 - Guidelines
 - Decisions related to negotiations
- Link to “state practice”
 - Formalistic vs. realistic approach

- State practice
 - Evidence of “agreement”
 - Taken into account in disputes?
- Institutional practice – decisions:
 - May back up state practice – taken together?
- Case law Link
 - Art. 38.1 d of the Statute of the ICJ
 - Subsequent decision-making – DSU art. 16.4 and 17.14
 - Panel reports v. AB report
 - What does the AB do in practice?

- The issues of “self-contained regime” and fragmentation of international law
- Is the relationship to other areas of international law sufficient regulated?
 - Customary rules concerning treaty interpretation (DSU art.21, 22, 26)
 - Issues concerning *lex posterior* and *lex specialis* (VCLT art.30) May back up state practice – taken together?
 - General exceptions (GATT art.XX and GATS art. XIV)

- The preparatory works and history
 - Differences in opinions
 - Availability: Havana Charter and GATT 1947 vs. the Uruguay Round
 - Subsequent Members
 - The practice of the AB

- Experts and authors
 - Art.38.1.d of the Statute of the ICJ
 - The practice of the AB

- call for greater transparency
- expanding the opportunities for participation of non-state interveners
- permitting private parties to initiate complaints
- providing “direct effect” in the domestic legal systems of member states so that GATT/WTO becomes a kind of global constitution

- strengthening remedies for non-compliance with dispute settlement ruling:
 - a) **monetary compensation** for past and (perhaps) future losses;
 - b) **disproportionate or non-equivalent retaliation** as a form of punishment or punitive damages to deter violations;
 - c) **tradeable retaliation rights** that small could trade;
 - d) providing **for collective retaliation rights/obligations**, where all member countries are obliged or entitled to adopt retaliation sanctions against another member's violation.

Isabelle Van Damme:

“The WTO dispute settlement system is **unusually strong but not necessarily unique**. The Appellate Body comes to interpretation from within its chosen function in the WTO institution as a judicial body. The uniqueness of the WTO dispute settlement system needs to be emphasized but not overestimated. The system was created by a treaty to apply and interpret a treaty.”

1. The political control exercised by the DSB over panel and Appellate Body reports may not be able to block the adoption of reports because of the reverse consensus rule (it matters in terms of the context in which panels and the Appellate Body operate and justify their interpretations).
2. Article 3.2 DSU may seem self-evident but the provision emphasizes that WTO members expect that they will be able to understand panel and Appellate Body reports in the light of the customary principles of treaty interpretation.
3. Strong policy for coherent and unified interpretation.

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Thank you for your attention!

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