

Sources of law in the WTO

- What is our objective when studying “sources of law”?
 - Assess interpretative arguments in light of general principles of sources of law in international law?
 - Predict how a panel or the Appellate Body will reason a case?
 - Predict which reasoning would be acceptable to most states?
- Is the WTO a “self-contained regime”?
 - Art. 3.2 of the DSU
- Objective, subjective or teleologic?
- Availability as an important factor?
 - Analytical Index

Special position of the DSM?

■ Key features:

1. Several methods: consultations, negotiations, good offices, consultation, mediation, arbitration
2. Preference to consultations instead of adjudication
3. Promptness
4. Single, comprehensive, integrated
5. Multilateral procedure (not unilateral)
6. Preservation of rights and obligations and interpretation. No judicial activism.
7. Specific remedies

■ Flow-chart for dispute settlement

DSU art. 3.2

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.

"context" (VCLT art. 31.2)

- What do we mean by "context" – contextual arguments
- Context as "authoritative"?
 - The principle of "effective interpretation"
- Understandings: Annex 1A and not the "Dispute Settlement Understanding"
- Special features of the WTO:
 - Interpretative notes: Annex I to GATT
 - Footnotes
 - The Schedules of Concession

“subsequent agreement” (VCLT art. 31.3.a)

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

WTO-Agreement art. IX:2

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

GATT 1994 para. 1(b)(iv)

The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of: ... (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement: ... (iv) other decisions of the CONTRACTING PARTIES to GATT 1947

"subsequent practice" (VCLT art. 31.3.b)

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

“relevant rules of int. law” (VCLT art. 31.3.c)

- The issues of “self-contained regime” and fragmentation of international law
- Is the relationship to other areas of international law sufficiently regulated?
 - Customary rules concerning treaty interpretation (DSU art. 3.2)
 - Issues concerning state responsibility (DSU art. 21, 22, 26)
 - Issues concerning lex posterior and lex specialis (VCLT art. 30)
 - General exceptions (GATT art. XX and GATS art. XIV)

"preparatory works" etc. (VCLT art. 32)

- The preparatory works and history
 - Differences in opinion
 - Availability: Havana Charter and GATT 1947 vs. the Uruguay Round
 - Subsequent Members
 - The practice of the Appellate Body
- Experts and authors
 - Art. 38.1.d of the Statute of the ICJ
 - The practice of the Appellate Body

Interview with Georges Abi-Saab

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