

**INTEGRATION OF JUDICIAL DECISIONS IN
MULTIPLE PROCEEDINGS BEFORE THE WTO AND RTAs:
THE POTENTIAL RELEVANCE OF ARTICLE 32 OF THE VCLT**

SON TAN NGUYEN *

ABSTRACT

In the last several decades there has been an exponential growth in the number of Regional Trade Agreements (RTAs). In addition to creating a wide overlap of substantive rights and obligations with the World Trade Organisation, many RTAs are also equipped with legalized dispute settlement mechanisms, which operate independently from the compulsory, automatic and exclusive system of WTO dispute settlement. This parallel of substantive commitments and legalised mechanisms may potentially result in conflicts of jurisdiction where a single dispute is submitted simultaneously or consecutively to both fora. It has been well addressed in various studies that if such conflicts arise, there is currently no legal rule that can satisfactorily determine which forum should have jurisdiction. As a result, multiple proceedings appear unavoidable. This article seeks to offer a new way to look into the jurisdictional tension between the WTO and RTAs. It will be argued that in the absence of effective rules to determine jurisdictional priority, Article 32 of the Vienna Convention on the Law of Treaties may provide a practical and useful technique to minimise the negative consequences of multiple proceedings, i.e. inconsistent interpretations and findings over essentially the same disputes.

Key words: WTO, Regional Trade Agreements, Jurisdictional Conflicts, Principles of Treaty Interpretation.

I INTRODUCTION

The number of regional trade agreements (RTAs) has grown exponentially in the last several decades.¹ They create a wide overlap of substantive rights and obligations with the WTO.² Many of them also include legalised dispute settlement mechanisms³ operating in parallel to the compulsory and exclusive system of dispute settlement under the WTO.⁴ Previous studies have found that the parallel of substantive commitments and legalised dispute settlement mechanisms may potentially result in conflicts of jurisdiction, where a single dispute is submitted in parallel or consecutively to both fora.⁵ Even though no such cases have materialised, what happened in *Mexico - Taxes on Soft Drinks*,⁶ *Argentina - Poultry Anti-*

* PhD, Law Lecturer at RMIT International University Vietnam. Email: son.nguyentan@rmit.edu.vn. This research was done under the supervision of Professor Jeffrey Waincymer, Monash Law School, Australia. I would like to thank him for his useful comments. All errors are mine.

¹ As of 20 June 2017, 279 RTAs were in force. World Trade Organization, *Regional Trade Agreements Gateway* <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.

² See, e.g., Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 383, 400-1; World Trade Organization, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (Geneva, WTO, 2011) 128-33; Henrik Horn, Petros C. Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33(11) *The World Economy* 1565, 1565-88.

³ See, e.g., Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development* (World Bank, 2011) 467; David Morgan, 'Dispute Settlement under PTAs: Political or Legal?' in Ross P. Buckley et al (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) 241, 241-4; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465, 486-524.

⁴ See, e.g., Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) 119-208; David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge, 2nd ed, 2004) 17-48.

⁵ Peter Drahos, 'Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution' (2007) 41(1) *Journal of World Trade* 191, 198; Kyung Kwak and Gabrielle Marceau, above n 3, 465; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) 8; Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) *Journal of International Economic Law* 197, 197-206; Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 44 *Cornell International Law Journal* 77, 77-85; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081.

⁶ Panel Report, *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) (*Mexico - Taxes on Soft Drinks*); Appellate Body Report, *Mexico - Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R (6 March 2006). In this case, for many years the US had been blocking the establishment of a NAFTA panel to examine Mexico's claim under NAFTA concerning the market access of its cane sugar to the US market. In response, Mexico imposed a tax on US's soft drinks and other beverages; and this, in turn, led the US to initiating a dispute before the WTO to challenge the tax measures.

Dumping Duties,⁷ *US - Cattle, Swine and Grain*,⁸ and *US - Tuna II*⁹ suggests that multiple proceedings over the same dispute may possibly occur before the WTO and RTA fora.¹⁰ If this is the case, it might be possible that judicial bodies at different fora may provide different, even conflicting, findings over the same dispute,¹¹ undermining the predictability and consistency of international law.

The inconsistent findings produced by a North American Free Trade Agreement (NAFTA) Chapter 19 panel and a WTO panel in the softwood lumber dispute (*Lumber IV*) perhaps present a good example for the risk of incompatible judicial findings resulted from multiple proceedings.¹² In *Lumber IV*, the US International Trade Commission (USITC) determined that

⁷ Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WTO Doc WT/DS241/R (22 April 2003) (*Argentina - Poultry Anti-Dumping Duties*). In this case, Brazil requested the WTO panel to find Argentina's antidumping measures inconsistent with the WTO Anti-Dumping Agreement. However, prior to this WTO dispute, Brazil had already challenged the measures before a Mercosur tribunal.

⁸ Request for Consultations from Canada, *United States - Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WTO Doc WT/DS144/1 (29 September 1998) (*US - Cattle, Swine and Grain*). In this instance, Canada filed parallel requests for consultations under both the NAFTA and WTO procedures involving exactly the same US measures and similar WTO and NAFTA provisions. However, neither of these proceeding escalated to an adjudicative phase.

⁹ Request for Consultations by Mexico, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/1 (28 October 2008) (*US - Tuna II*); Panel Report, *US - Tuna II*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *US - Tuna II*, WTO Doc WT/DS381/AB/R (16 May 2012). In this case, Mexico initiated a WTO dispute to challenge the measures imposed by the US concerning the importation, marketing and sale of tuna and tuna products. However, the US strongly disagreed with Mexico's decision to bring the dispute to the WTO because in the US's view, the dispute must be adjudicated at NAFTA under NAFTA Article 2005.4. The US then filed a NAFTA dispute concerning Mexico's failure to move the tuna-dolphin dispute from the WTO to the NAFTA forum.

¹⁰ Andrew D. Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 135-8.

¹¹ Two disputes are the same if they involve the same parties, the same object, and the same grounds (legal claims). Strictly speaking, in multiple proceedings, the WTO and RTA disputes are not *exactly the same* because they are *formally* framed and adjudicated based on different bodies of law, namely, WTO law and RTA law respectively. However, the parties to these disputes may be the same as there is a wide overlap of membership between two regimes (an RTA is generally formed by a subset of WTO Members). The object or relief may also be the same or similar because identical or similar trade retaliatory measures are often included under both regimes, and parties may pursue these forms of relief in both proceedings. Most importantly, the legal rights and obligations on which the WTO and RTA claims are framed may be similar or identical because there is also a wide overlap of substantial rights and obligations between the WTO and RTAs. As a result, in multiple proceedings, WTO and RTA disputes might be viewed as *essentially the same* or related. It has been well-established that multiple proceedings over essentially the same or related disputes should be regulated. Kwak and Marceau, for example, pointed out that 'contrary findings based on similar rules [...] would have unfortunate consequences for the trust that the states are to place in their international institutions', undermining legal certainty and predictability of international law. Kyung Kwak and Gabrielle Marceau, above n 3, 474. See, e.g., Campbell McLachlan, '*Lis Pendens* in International Litigation' (2008) 336 *Rescueil Des Cours* 199, 217; Yuval Shany, 'The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures' (2004) 17 *Leiden Journal of International Law* 815, 825.

¹² For an excellent summary and discussion of these conflicting findings, see, e.g., Sarah E. Lysons, 'Resolving the Softwood Lumber Dispute' 32 *Seattle University Law Review* 407, 422-8; Maureen Irish, 'Regional Trade, the WTO and the NAFTA Model', in Ross P Buckley, Vai Io Lo, Laurence Boulle (eds), *Challenges to*

Canadian softwood lumber exports to the United States were threatening to injure the domestic industry.¹³ Canada challenged that determination by filing three requests for panel review under NAFTA Chapter 19.¹⁴ The NAFTA Chapter 19 panel decided that the evidence did not support a finding of threat of injury.¹⁵ In parallel to these NAFTA requests, Canada also made three similar challenges before the WTO, alleging that the US violated its WTO obligations.¹⁶ The WTO panel found in favour of Canada.¹⁷ To implement this panel ruling, the USITC made a new determination of threat of injury. Canada continued to challenge the consistency of this redetermination with the WTO original ruling. This time the WTO compliance panel found in favour of the US, stating that the USITC redetermination was not inconsistent with the United States' obligations under the Anti-Dumping Agreement and the SCM Agreement.¹⁸ Even though this decision by the WTO compliance panel was then reversed by the Appellate Body, at least for a time it was directly inconsistent with the ruling of the NAFTA Chapter 19 panel.¹⁹

At the WTO, General Agreement on Tariffs and Trade (GATT) Article XXIV,²⁰ does not refer to RTA adjudicative mechanisms, nor does the Dispute Settlement Understanding (DSU) regulate relations between the two systems.²¹ As a result, there is no WTO mechanism that can effectively prevent parties from submitting a single dispute to more than one forum. Outside the WTO, there are some norms that may potentially be able to regulate multiple proceedings.

Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements (Wolters Kluwer, 2008) 87, 105-7.

- ¹³ Panel Report, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc WT/DS277/R (22 March 2004) [II.7 - II.13].
- ¹⁴ See *Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination)*, USA-CDA-2002-1904-03 (13 August 2003); *Certain Softwood Lumber Products from Canada (Department of Commerce Final Determination of Sales at Less Than Fair Value)*, USACDA-2002-1904-02 (17 July 2003); *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07 (5 September 2003).
- ¹⁵ See Panel Report, *United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WTO Doc WT/DS257/R (29 August 2003); Panel Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc WT/DS264/R (13 April 2004); Panel Report, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc WT/DS277/R (22 March 2004).
- ¹⁶ Maureen Irish, above n 12, 105.
- ¹⁷ Panel Report, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc WT/DS277/R (22 March 2004) [VIII.646 - VIII.653].
- ¹⁸ Panel Report, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada - Report of the Panel*, WTO Doc WT/DS277/RW (15 November 2005) [2.5, 2.6].
- ¹⁹ Maureen Irish, above n 12, 106.
- ²⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*General Agreement on Tariffs and Trade 1994*) (GATT) article XXIV.
- ²¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) (DSU).

These include the choice of forum clauses included in various RTAs,²² and common jurisdiction-regulating norms such as *res judicata*, *lis pendens*, *forum non conveniens*, comity, and abuse of rights.²³ However, it has been well-established that these norms may not be able to be applied in WTO disputes.²⁴ The main barrier is DSU Article 23 which states clearly that in resolving WTO disputes, Members must have 'recourse to, and abide by, the rules and procedures' of the DSU.²⁵ It is unrealistic to expect that WTO adjudicators who are extremely mindful of their limited mandate would go against this explicit treaty language and apply norms that would override WTO jurisdiction. Inherent powers, though they may exist,²⁶ might not be a sufficiently concrete basis to enable WTO tribunals to proceed so far.²⁷ Therefore, WTO tribunals will retain jurisdiction, regardless of any non-WTO norm that may point in the opposite direction. Obviously, there may be no legal solution that can satisfactorily establish jurisdictional priority between the WTO and RTA fora.²⁸ Multiple proceedings might thus be unavoidable.

It will be argued in this article that there seem to be currently no international legal rules that can satisfactorily eliminate the risks of multiple proceedings over essentially the same disputes before the WTO and RTA fora. In this context, Article 32 VCLT might provide useful alternatives. This is not magic tool, but it can to some extent minimise the risks of inconsistent interpretations and rulings over similar or identical rules. To address these issues, this article will first consider the constraint force of judicial decisions in international law. It will then

²² For a detailed discussion on the applicability of RTA choice of forum clauses, please see Son Tan Nguyen, 'The Applicability of RTA Jurisdictional Clauses in WTO Dispute Settlement' (2013) XVI *International Trade and Business Law Review* 254.

²³ See, e.g., Yuval Shany, *The Competing Jurisdictions*, above n 5. *Res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration is conclusive in subsequent proceedings involving the same subject. *Lis pendens*, literally meaning 'a law suit pending', is a concept describing a factual situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different States at the same time. Declining jurisdiction has been the most common response to parallel proceedings, though the techniques vary significantly between legal traditions. See Son Tan Nguyen, 'The Applicability of *Res Judicata* and *Lis Pendens* in World Trade Organization Dispute Settlement' (2013) 25(2) *Bond Law Review* 123.

²⁴ See, e.g., Kyung Kwak and Gabrielle Marceau, above n 3; Son Tan Nguyen, 'The Applicability of *Res Judicata* and *Lis Pendens* in World Trade Organization Dispute Settlement', above n 23; Son Tan Nguyen, 'The Applicability of Comity and Abuse of Rights in World Trade Organisation Dispute Settlement' (2016) 35(1) *University of Tasmania Law Review* 95.

²⁵ DSU, article 23.

²⁶ Andrew D. Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: Selected Application of Public International Law Required by Judicial Function' (2010) 31 *Michigan Journal of International Law* 559; Appellate Body Report, *Mexico - Taxes on Soft Drinks*, WTO Doc WT/DS308/AB/R (6 March 2006) [45] (stating that WTO tribunals 'have certain powers that are inherent in their adjudicative function').

²⁷ Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007), 78 (emphasizing that 'international courts cannot simply assert the existence of inherent powers as a type of carte blanche to do whatever they want').

²⁸ Kyung Kwak and Gabrielle Marceau, above n 3, 484.

discuss whether judicial decisions can be used as supplementary means of interpretation under Article 32 VCLT. The last section will examine how WTO and RTA tribunals could use judicial decisions of the other forum as supplementary means of interpretation under Article 32 VCLT.

II THE CONSTRAINING FORCE OF JUDICIAL DECISIONS IN INTERNATIONAL LAW

The use of supplementary means of interpretation is dealt with in Article 32 VCLT, which specifies that:

[r]ecourse 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.²⁹

This article discusses the use of judicial decisions as supplementary means of interpretation under Article 32 VCLT. Thus, the first natural question is why judicial decisions merit a consideration by international tribunals. The next sections will explain why judicial decisions should be considered by tribunals.

A *The De Facto System of Precedent in International Law*

In most national legal systems, coherence and predictability of judicial decisions are normally guaranteed through reliance on precedent, whether in the form of a *de jure* (formal) doctrine, as in many common-law jurisdictions, or through a *de facto* case law, as practiced in many civil-law traditions.³⁰ In a *de jure* stare decisis system, 'there is a legal obligation incumbent on the adjudicator to accord due respect to its prior decisions', whereas in a *de facto* stare decisis system, adjudicators follow precedent without legally being bound to do so.³¹ In international law, courts and tribunals do not apply the doctrine of precedent in its *de jure* form, but generally

²⁹ VCLT, article 32 (emphasis added).

³⁰ August Reinisch, 'Investment Arbitration - The Role of Precedent in ICSID Arbitration' in Christian Klausegger, Peter Klein at al (eds) *Austrian Arbitration Yearbook* (Vienna: C. H. Beck, Stämpfli & Manz, 2008) 495, 495 and citations therein; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity, or Excuse?' (2007) 23(3) *Arbitration International* 357, 359-60, and citations therein.

³¹ Raj Bhala, 'The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)' (1999) 14 *American University International Law Review* 845, 937-8, and citations therein.

follow prior cases, thus effectively developing and enforcing a *de facto* doctrine of precedent.³² In the words of Reinisch, 'most international courts and tribunals officially disavow the principle of binding precedent, while at the same time they effectively espouse it'.³³

The ICJ Statute, for example, contains a provision that is often conceived as an exclusion of a formal stare decisis doctrine. In particular, Article 59 provides that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'.³⁴ However, in fact, past decisions are often relied on in subsequent decisions and they are highly persuasive to the Court.³⁵ The Court itself justifies this practice as follows:

it is not a question of holding [the parties in the current case] to decisions reached by the court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusions of earlier cases.³⁶

WTO tribunals also follow an analogous approach.³⁷ In *US - Shrimp (Article 21.5 - Malaysia)*, the Appellate Body stated that:

[a]dopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.³⁸

In *United States - Stainless Steel (Mexico)*, the Appellate Body even 'raises its tone a notch' and suggests that a failure to do so by a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.³⁹ Particularly, the Appellate Body held that:

[w]e are deeply concerned about the Panel's decision to depart from well established

³² Gabrielle Kaufmann-Kohler, 'Arbitral Precedent', above n 30, 357-61.

³³ August Reinisch, above n 30, 497.

³⁴ *Statute of the International Court of Justice*, article 59. Similar provisions can be found in, for example, *North American Free Trade Agreement*, opened for signature 17 December 1992 (1993) 32 ILM 605 (entered into force 1 January 1994) (NAFTA) article 1136.1; *United Nations Convention on the Law of the Sea (UNCLOS)*, opened for signature 10 December 1982 (1994) 1833 UNTS 397 (entered into force 16 November 1994) Annex VI (*Statute of the International Tribunal for the Law of the Sea*) article 33.2.

³⁵ Gabrielle Kaufmann-Kohler, 'Arbitral Precedent', above n 30, 360-1.

³⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Preliminary Objections Judgment)* [1998] ICJ Rep 275, 292.

³⁷ Gabrielle Kaufmann-Kohler, 'Arbitral Precedent', above n 30, 360-1.

³⁸ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW (22 October 2001) (*US Shrimp (Article 21.5 - Malaysia)*) [108], citing Panel Report, *Japan - Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996) (*Japan - Alcoholic Beverages II*) [5.138].

³⁹ Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) *German Law Journal* 979, 991-2.

Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system ...⁴⁰

These WTO rulings seem to be fully consistent with Article 3.2 of the DSU, which clearly specifies that a central objective of the WTO dispute settlement system is to provide 'security and predictability' to the multilateral trading system.⁴¹

The approach taken by WTO tribunals has led commentators to a forceful, and to the current author, concrete, observation that even though the WTO has no *de jure* doctrine of precedent, it effectively applies such a doctrine in practice.⁴²

Other international courts and tribunals have also effectively developed a *de facto* system of precedent.⁴³ In *Prosecutor v Kupreskić et al*, the ICTY Trial Chamber held that:

general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific areas. This being so, it is only logical that international courts should rely heavily on such jurisprudence.⁴⁴

The trend also eloquently manifests itself in investment treaty arbitral decisions and has been discussed in a rich body of literature.⁴⁵ In the annulment proceeding in *Amco v Indonesia*, the

⁴⁰ Appellate Body Report, *United States - Final Antidumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R (30 April 2008) (*US - Stainless Steel (Mexico)*) [162]. For an excellent discussion in this regard, see Felix David, 'The Role of Precedent in the WTO - New Horizons?' (Working Paper No 2009-12, Maastricht: Maastricht University Faculty of Law, October 2009) <<http://ssrn.com/abstract=1666169>>.

⁴¹ DSU, article 3.2.

⁴² The most comprehensive discussion in this regard is arguably offered by Raj Bhala. See Raj Bhala, 'The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)', above n 31; Raj Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)' (1999) 9 *Florida State University Journal of Transnational Law and Policy* 1; Raj Bhala, 'The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of Trilogy)' (2001) 33 *George Washington International Law Review* 873. For a more recent discussion, see Felix David, above n 40.

⁴³ Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar Publishing, 2012) 113.

⁴⁴ *Kupreškić, Kupreškić, Kupreškić, Josipović, Papić and Santić (Kupreškić et al) (Judgement)* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-95-16-T, 14 January 2000) [537].

⁴⁵ See, e.g., Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24(2) *Journal of International Arbitration* 129, 129-58; August Reinisch, above n 30; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent', above n 30; Stephan W. Schill, 'System-building in Investment Treaty Arbitration and Lawmaking' (2011) 12(5) *German Law Journal* 1083; Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' in Colin B. Picker, Isabella D. Bunn, Douglas W. Arner (eds), *International Economic Law: The State and Future of the Discipline* (Hart Publishing, 2008) 272; Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris' (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010) 129.

ad hoc Committee, for instance, reasoned that:

[n]either the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the *Klockner ad hoc* Committee are binding on this *ad hoc* Committee. The absence, however, of a rule of stare decisis in the ICSID arbitration system does not prevent this *ad hoc* Committee from sharing the interpretation given to Article 52(1)(e) by the *Klockner ad hoc* Committee.⁴⁶

Apparently, Lord Denning's succinct observation that 'international law knows no rule of stare decisis' reflects only one part of the more complex picture about the authority of prior decisions in international dispute settlement.⁴⁷ The missing part is that while there is no *de jure* doctrine of precedent as known in the common-law jurisdictions, international courts and tribunals in fact tend to rely on prior judicial decisions to decide the case at hand, suggesting that there may exist 'at least' a *de facto* system of precedent in international law.⁴⁸

The existence of the *de facto* system of precedent in international law seems to be rooted deeply in the need to enhance legal certainty and predictability. The indispensability of these values has been widely accepted in doctrine. Kaufmann-Kohler, for example, suggests that the rule of law can only emerge 'if it is consistently applied so as to be predictable'.⁴⁹ Similarly, to Lauterpacht, certainty and predictability are 'the essence of the orderly administration of justice' since the ultimate object of law as a tool 'to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of dispute'.⁵⁰ Thus, the creation of rules that are consistent and predictable is characterised by Fuller as part of the 'inner morality of law',⁵¹ which is explained by Kaufmann-Kohler to imply that:

[w]hen making law, decision makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents. It may be debatable whether arbitrators have

⁴⁶ *Amco Asia Corporation and Others v Republic of Indonesia* (1993) 1 ICSID Reports 521, [44].

⁴⁷ *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356, 365, cited in August Reinisch, above n 30, 498.

⁴⁸ Gideon Boas, above n 43, 361.

⁴⁹ Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth?' in Emmanuel Gaillard and Yas Banifatemi (eds), *The Precedent in International Arbitration* (Juris Publishing, 2008) 137, 144. See also Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111(1) *Michigan Law Review* 1, 31 (arguing that 'the justification of stare decisis might depend to a large extent on the rule of law').

⁵⁰ Sir Hersch Lauterpacht, *The Development of International Law by the International Courts* (London: Stevens & Son Limited, 1958) 14; Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011) 433.

⁵¹ Lon L. Fuller, *The Morality of Law* (New Haven and London, Yale University Press, Revised ed, 1969) 42 (emphasizing that '[t]he inner morality of law ... embraces a morality of duty and a morality of aspiration. It ... confront[s] us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it'), cited in Gabrielle Kaufmann-Kohler, 'Arbitral Precedent', above n 30, 374.

a legal obligation to follow precedents - probably not - but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable.⁵²

Likewise, Brierly considers that reliance on prior decisions 'is not wholly a matter of juridical theory or of the deliberate policy of judges', but may acutely originate in '*the natural desire of any court to maintain consistency in the application of law*'.⁵³ This brief survey into legal theory suggests that the preservation and enhancement of legal predictability and certainty might justify why international courts and tribunals often follow prior decisions. In essence, reliance on past decisions is a way to achieve legal certainty and predictability, which are in turn critical to the development of the rule of law and the organised administration of justice.⁵⁴

It is worth noting that scholars have increasingly revealed that the *de facto* system of precedent may not be confined within, but operate beyond, a single treaty regime.⁵⁵ In a 2002 study, Miller conducted a close examination of the case law of nine international judicial bodies to determine whether each international judicial body refers to the decision of another.⁵⁶ Miller found that, up to the year 2000, there were 184 instances in which international tribunals refer to one another's decisions, mostly to support their own reasoning.⁵⁷ Accordingly, Miller concluded that 'international tribunals do interact with one another, if not at the robust level found in domestic legal systems'.⁵⁸ Consonantly, a close examination of various cases in which a cross-fertilisation has occurred between different courts and tribunals had enabled Brown to conclude that international courts and tribunals are willing, and in fact ready, to 'look to the practice of other international courts on issues of procedure and remedies and draw on that practice'.⁵⁹

⁵² Gabrielle Kaufmann-Kohler, 'Arbitral Precedent', above n 30, 374 (citations omitted).

⁵³ James Leslie Brierly, *The Basis of Obligation in International Law* (Clarendon Press, 1958) 29 (emphasis added).

⁵⁴ See further, e.g., Jeremy Waldron, above n 59.

⁵⁵ See generally Nathan Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483; Cesare P. R. Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *International Law and Politics* 755; Tullio Treves, 'Cross-Fertilization between Different International Courts and Tribunals: The Mangouras Case' in Holger P. Hestermeyer at al (eds), *Coexistence, Cooperation and Solidarity* (BRILL, 2011) 1787; Chester Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals' (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 219, 233; Chester Brown, *A Common Law of International Adjudication*, above n 27, 49-52; Patricia M. Wald, 'Tribunal Discourse and Intercourse: How the International Courts Speak to One Another' (2007) 30(1) *Boston College International and Comparative Law Review* 15.

⁵⁶ The international judicial bodies examined by Miller include the ICJ, the ECHR, the ECJ, the Inter-American Court of Human Rights (IACHR), WTO tribunals, the Iran - U.S Claims Tribunal, the ITLOS, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). Nathan Miller, above n 55, 487.

⁵⁷ Ibid 489, 499.

⁵⁸ Ibid 498.

⁵⁹ Chester Brown, 'The Cross-Fertilization of Principles', above n 55, 222-8.

Treves recently analysed the judgment of the Grand Chamber of the European Court of Human Rights in *Mangouras*,⁶⁰ and noted that this is 'a new valuable addition to the examples of cross-fertilisation between international courts and tribunals'.⁶¹ It seems now quite clear that the *de facto* stare decisis system may operate across regimes and potentially impact any subsequent pertinent tribunal applying international law. Notably, in these studies, judicial decisions are normally used to support tribunals' reasoning, fill gaps, or clarify the meaning of a rule, rather than to directly change a meaning of a treaty rule.⁶²

B The Constraining Force of Judicial Decisions

The distinction between the *de jure* and *de facto* forms of the doctrine of precedent to some extent can provide a pragmatic basis for international courts and tribunals to rely on prior decisions. However, this pragmatic reliance on past decisions, as addressed by Boas, 'leaves a sense of uncertainty about the meaning and scope of such developments and their impact on the sources of international law'.⁶³ Regrettably, Boas went no further to clarify these ambiguities. One of the most unclear aspects in the *de facto* system of precedent is 'what gives a prior holding its "binding" force?'.⁶⁴ In a *de jure* system of precedent, the answer is straightforward: 'the law itself' which imposes a legal obligation on adjudicators to follow prior decisions. However, the answer is not so obvious in a *de facto* system of precedent.⁶⁵ Bhala suggests that prior decisions are generally followed because 'there is an unstated rebuttable presumption that the prior holding governs the new case'.⁶⁶ This may be correct in a practical sense since it can reflect, at the facial level, the tendency to rely on prior decisions in international law. Nevertheless, to generalise that there is a presumption that new cases are governed by prior cases is to grant too ambitious a role for prior decisions. The essential nature of a presumption is that it 'can apply without the aid of proof and introduces a default position that trumps automatically in the absence of a rebuttal'.⁶⁷ In this sense, prior decisions claim decisional

⁶⁰ *Mangouras v Spain* (2012) 54 EHRR 25.

⁶¹ Tullio Treves, above n 55, 1788. See further Gabrielle Marceau et al, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation' (2013) 47(3) *Journal of World Trade* 481, 481-574 (identifying 150 instances in which international courts and tribunals cited WTO rules and case law).

⁶² Nathan Miller, above n 55, 499; Gabrielle Marceau et al, above n 61, 530.

⁶³ Gideon Boas, above n 43, 114.

⁶⁴ Raj Bhala, 'The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)', above n 31, 938.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Marc Jacob, 'Precedents: Lawmaking through International Adjudication' (2011) 2 *German Law Journal* 1005, 1009, 1024.

exclusivity on an issue.⁶⁸ However, legal reasoning in adjudication may be a more complex process with the involvement of various factors, especially the formal sources of international law. Regardless of how important prior decisions may potentially be, it is hard for them to claim an exclusive role in the reasoning process.

In fact, different to Bhala's suggestion, prior decisions might constrain subsequent adjudicators and litigants in *a gentler manner*. The constraining force of judicial decisions seems to stem from, as observed by Reinisch, 'the strength of the arguments' expressed in the reasoning and findings of an award or decision.⁶⁹ The more potent the arguments in prior decisions, the greater the argumentative effort that must be made by subsequent adjudicators and litigants to resist the authority of these arguments. Logically, if no compelling ground could be established to deviate from prior decisions, they should be adhered to. In this way, even though prior decisions do not create formal legalistic obligations, they may generate '**argumentative burdens** on the party seeking a different result from that reached in a pertinent previous decision'.⁷⁰ Therefore, 'if a comparable prior case exists and is referred to, a latter decisions-maker has less argumentative flexibility'.⁷¹ The operation of prior judicial decisions does not require a particular set of rules of precedent as in the case of a *de jure* stare decisis system. Instead, prior decisions in this particular case provide 'a good reason or justification why the subsequent decision should be as argued, all other things being equal'.⁷² Notably, as argumentative burdens, prior decisions 'can certainly be defeated by various means', but they are a 'real' constraint because they require effort to deviate from them.⁷³ The constraining force of prior decisions as argumentative burdens is similar, but less ambitious than a presumption since, unlike the latter, it does not claim decisional exclusivity on an issue. To borrow the figurative language of Jacob, argumentative burdens 'add[] one further weight in an attempt to tip the scales, whereas the presumption is the string tying one side of the scales down and demanding to be cut loose by whoever wants to resist it'.⁷⁴

Crucially, by imposing argumentative constraints, prior decisions do not appear to challenge the role of formal sources of international law. Surely, formal sources, as set out in Article 38

⁶⁸ Ibid.

⁶⁹ August Reinisch, above n 30, 509 (emphasis added).

⁷⁰ Marc Jacob, above n 67, 1009, 1019, 1023 (emphasis added). See also Stephan W. Schill, 'System-building in Investment Treaty Arbitration', above n 45, 1106-7.

⁷¹ Marc Jacob, above n 67, 1023.

⁷² Ibid 1024.

⁷³ Ibid.

⁷⁴ Ibid.

of the ICJ Statute, still remain as a fundamental aspect of international law.⁷⁵ Nevertheless, they are, as succinctly pointed out by Jacob:

not the only game in town when it comes to arguing and thus deciding cases; analogies, hypotheticals, consequentialist considerations, historical points, different kinds of logical or linguistic arguments, and the use of dictionaries, maps, graphs, or statistics, to name but a few, are all widespread modes of legal argument.⁷⁶

Therefore, it would be a gross simplification to characterise the reasoning process as solely consisting of arguments that are based on formal sources. The process appears to be much richer; and even though vital, formal sources are only one element in the chain of reasoning.⁷⁷ In this process, by exerting the authority in the form of argumentative constraints, judicial decisions do not replace the role of formal sources but supplement them to provide adjudicators adequate means to reach well-reasoned judgements. The functioning of judicial decisions in this manner seems to be particularly proper in a *de facto* stare decisis system, where judicial decisions cannot be employed to 'disregard' the relevant texts and the applicable law.⁷⁸ Obviously, if used as argumentative constraints, rather than formal legalistic obligations, judicial decisions do not appear to confront the position of formal sources of international law.

Moreover, the understanding of the authority of prior decisions as argumentative burdens is also not contrary to the express exclusion of bindingness set out in Article 59 of the ICJ Statute. The purpose of this provision, as the ICJ's predecessor said in 1926, 'is simply to prevent legal principles accepted by the Court in a particular case from being binding upon another States or in other disputes'.⁷⁹ In other words, each particular case must be decided individually and the reasoning and obligations of one case should not be slavishly transferred into another case without compelling explanation.⁸⁰ It would be a stretch too far to read Article 59 as aiming to eliminate all potential impacts of prior judicial decisions on subsequent adjudicators and disputants. In the form of argumentative burdens, prior decisions, as noted above, are only a 'small stone' in the larger picture of legal reasoning.⁸¹ They do not try to impose definitive authority on a matter to the exclusion of all other arguments as formal legalistic obligations may do.⁸² Thus, the tender restriction created by prior decisions does not

⁷⁵ Marc Jacob, above n 67, 1011.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid 1009.

⁷⁹ *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits)* (1926) PCIJ (ser A) No 7, 19.

⁸⁰ Marc Jacob, above n 67, 1018-9.

⁸¹ Ibid 1024.

⁸² Ibid 1019.

seem to fall into the ambit of the prohibition of bindingness specifically pronounced in Article 59.

Generally, even though prior decisions do not create formal legalistic obligations, they may be able to generate argumentative restraints on subsequent adjudicators and litigants. It is possible to deviate from these restraints, but it requires effort to do so. Also, as argumentative burdens, prior decisions do not seem to challenge the decisive roles of formal sources; nor do they appear to impose restriction in a way that is contrary to the express exclusion of bindingness in Article 59 of the ICJ Statute.

The constraining force of prior decisions might be the reasons why WTO Appellate Body in *US - Shrimp (Article 21.5 - Malaysia)* stated that '[a]dopted panel reports ... create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute'.⁸³ The constraining force might also explain why the Appellate Body in *United States - Stainless Steel (Mexico)* expressed that '[w]e are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues'.⁸⁴

III JUDICIAL DECISIONS AS SUPPLEMENTARY MEANS OF INTERPRETATION UNDER ARTICLE 32 VCLT

In light of the preceding analyses, it is obvious that judicial decisions undoubtedly merit a consideration by international tribunals. This section continues to discuss why judicial decisions should be considered by international tribunals on a clear theoretical framework rather than as a tacit technique under the *de facto* system of precedent.

International courts and tribunals have frequently referred to judgements of one another. However they are generally reluctant in expounding upon the theoretical foundation that

⁸³ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW (22 October 2001) (*US Shrimp (Article 21.5 - Malaysia)*) [108], citing Panel Report, *Japan - Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996) (*Japan - Alcoholic Beverages II*) [5.138].

⁸⁴ Appellate Body Report, *United States - Final Antidumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R (30 April 2008) (*US - Stainless Steel (Mexico)*) [162]. For an excellent discussion in this regard, see Felix David, above n 40.

enables them to do so.⁸⁵ In this context, the rulings of the NAFTA Tribunal in *CCFT v US*,⁸⁶ and the WTO panel and the Appellate Body in *EC - Chicken Cuts*⁸⁷ stand out from the general trend when they explicitly acknowledge that *judicial decisions could be used as supplementary means of interpretation within the meaning of Article 32 of the VCLT*.

Article 32 VCLT allows tribunals to have recourse to supplementary means of interpretation; and this was interpreted by the Tribunal in *CCFT v US* as allowing adjudicators to also take into account judicial decisions. The reasoning of the Tribunal is revealing and thus worth scrutinising in some detail. The Tribunal first focused on the term 'including', and held that this term clearly indicates that there may be other supplementary means available to the interpreters, apart from the preparatory work of the treaty and the circumstances of its conclusion.⁸⁸ Specifically, the Tribunal held that:

Article 32 VCLT permits, as supplementary means of interpretation, not only *preparatory work* and *circumstances of conclusion* of the treaty, but indicates by the word "including" that, beyond these two means expressly mentioned, other supplementary means may be applied.⁸⁹

This seems to be a compelling reading. Indeed, the prevailing view in international law is that the list of supplementary means, referred in Article 32, namely, preparatory work and circumstances of conclusion of the treaty, is not exhaustive.⁹⁰ These means 'serve as examples',⁹¹ or at best, the 'most commonly used' ones,⁹² and 'do not exclude other supplementary means of interpretation'.⁹³ In a recent study, Villiger pointed out six other types

⁸⁵ Malgosia Fitzmaurice and Panos Merkouris, 'Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' in Malgosia Fitzmaurice and Phoebe Okowa, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010) 153, 231; Tullio Treves, above n 55, 1791.

⁸⁶ *The Canadian Cattlemen for Fair Trade (CCFT) v the United States of America (Award on Jurisdiction)* (The Consolidated Arbitration under Chapter Eleven of the NAFTA and the UNCITRAL Arbitration Rules, 28 January 2008) (*CCFT v US*).

⁸⁷ Panel Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WTO Doc WT/DS269/R, WT/DS286/R (30 May 2005) (*EC - Chicken Cuts*); Appellate Body Report, *EC - Chicken Cuts*, WT/DS269/AB/R WT/DS286/AB/R (12 September 2005).

⁸⁸ Malgosia Fitzmaurice and Panos Merkouris, above n 85, 226.

⁸⁹ *CCFT v US*, above n 72, [50] (emphasis in original).

⁹⁰ Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 302; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009) 310; Malgosia Fitzmaurice and Panos Merkouris, above n 85, 225; Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 445-6.

⁹¹ Mark Eugen Villiger, above n 90, 445.

⁹² Richard Gardiner, above n 90, 302.

⁹³ Mark Eugen Villiger, above n 90, 445.

of supplementary means that may be '**included** but not listed in Article 32'.⁹⁴ Notably, 'agreements and *practice* among a subgroup of parties to a treaty not falling into the ambit of authentic interpretation in Article 31' are also considered by Villiger as supplementary means.⁹⁵ Even though Villiger does not explain the meaning of the term 'practice', it might include judicial decisions related to the application and interpretation of the relevant agreements. It can be ascertained that by using the term 'including' in Article 32, the drafters of the VCLT seemed to intentionally 'allow certain flexibility in the interpretative process'.⁹⁶ The drafting history of the VCLT reveals that this was not an irrational choice but reflects a compromise of conflicting views as to whether and how the rules of interpretation should be included in the VCLT.⁹⁷ Particularly, in the drafting process, some proposed to include principles, not rules, whereas others were concerned that putting any rule in the black-letter law might be too rigid and thus may hamper the judicial tasks. In this context, it was not surprising that the drafters had incorporated a certain level of flexibility in the rules of interpretation as a way to achieve agreement.⁹⁸ These analyses confirm that the Tribunal in *CCFT v US* was correct in emphasising that the list of supplementary means in Article 32 is not exhaustive, and may include other supplementary means.

From this correct starting point, the Tribunal went on to reinforce the relevance of prior decisions by 'linking'⁹⁹ Article 32 VCLT with Article 38 of the ICJ Statute.¹⁰⁰ Even though the Tribunal did not explain why it referred to Article 38 of the ICJ Statute, its approach, as suggested by Fitzmaurice and Merkouris, might fit into the systemic method of treaty interpretation specified in Article 31(3)(c) VCLT, more exactly its customary equivalent since the US has not ratified the VCLT.¹⁰¹ Assessed against the framework of Article 31(3)(c), the Tribunal's reference to Article 38 of the ICJ Statute seems to be a valid one. Indeed, the

⁹⁴ Ibid 445 (emphasis in original). These include *travaux préparatoires* of an earlier version of the treaty; interpretative declarations made by treaty parties which do not qualify as reservations; documents not strictly qualifying as *travaux préparatoires*; the rational techniques of interpretation; agreements and practice among a subgroup of parties; and non-authentic translations of the authenticated text. Ibid 445-6.

⁹⁵ Ibid 446 (emphasis added).

⁹⁶ Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 225.

⁹⁷ 'Summary records of the sixteenth session 11 May-24 July 1964' [1964] I *Yearbook of International Law Commission* 1, 20-2; 275-91. See also 'Draft Articles on the Law of Treaties with Commentaries' [1964] II *Yearbook of International Law Commission* 176, 199-201.

⁹⁸ Ibid.

⁹⁹ Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge University Press, 2012) 119

¹⁰⁰ *CCFT v US*, above n 72, [50].

¹⁰¹ Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 228.

universal character of the ICJ Statute¹⁰² means that the rules contained in the ICJ statute are 'applicable between the parties'.¹⁰³ The remaining question is whether Article 38 is 'relevant' to the interpretation of Article 32.¹⁰⁴ In this respect, the Tribunal appeared to address the relevancy when it stated that:

Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as 'subsidiary means'. Therefore, they must be understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT.¹⁰⁵

Article 38 is widely accepted as outlining an informal list of sources of international law,¹⁰⁶ with paragraphs 1(a), (b), and (c) being the formal sources, and paragraph 1(d) being the material or quasi-formal sources.¹⁰⁷ Therefore, judicial decisions, which are listed in Article 38 (1)(d), are considered 'not to create, but evidence, or indicate' the existence of rules of international law.¹⁰⁸ This is perhaps the relevance that the Tribunal was implying.¹⁰⁹

Thus, the Tribunal appeared to be correct in conceiving the relevance of Article 38 of the ICJ Statute. Nevertheless, there may be some issues with its wording.¹¹⁰ Specifically, it may not be entirely accurate to restate that 'judicial decisions are applicable for the interpretation of public international law' under Article 38(1)(d).¹¹¹ Actually, Article 38 outlines the sources that the ICJ applies to resolve disputes; it does not deal with the interpretation of public international law.¹¹² Similarly, the equation between the terms 'subsidiary' and 'supplements' may not be fully satisfactory. In the plain meaning, 'subsidiary' means 'less important than but related to or supplementary to [something]', whereas 'supplementary' means 'completing or enhancing

¹⁰² Article 93.1 of the UN Charter provides that '[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice'. See *Charter of the United Nations*, opened for signature 26 June 1945 (1945) 1 UNTS XVI (entered into force 24 October 1945) article 93.1.

¹⁰³ Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 228.

¹⁰⁴ Ibid.

¹⁰⁵ *CCFT v US*, above n 72, [50] (emphasis in original).

¹⁰⁶ Jeff Waincymer, above n 4, 374. See also Bruno Simma and Theodore Kill, 'Harmonizing Investment Protections and International Human Rights: First Steps towards a Methodology' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 678, 695; Richard Gardiner, above n 90, 261.

¹⁰⁷ Panagiotis Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (PhD Thesis, Queen Mary University of London School of Law, 2010) 15 <https://qmro.qmul.ac.uk/jspui/bitstream/12345678_9/477/1/MERKOURISArticle%2031%283%29%28c%292010.pdf>. See also Georg Schwarzenberger, 'Myths and Realities of Treaty Interpretation: Article 27-29 of the Vienna Convention on the Law of Treaties' (1969) 22 *Current Legal Problems* 205, 220.

¹⁰⁸ Malgosia Fitzmaurice and Panaos Merkouris, above n 85 229.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ *CCFT v US*, above n 72, [50] (emphasis in original).

¹¹² Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 229.

something'.¹¹³ The term 'supplementary' thus corresponds to the term *complémentaire* in French, rather than denoting 'subsidiary' means.¹¹⁴ Moreover, the drafting history of the VCLT reveals that the term 'supplementary' was also intentionally chosen to emphasise the nature of Article 32, that is, to complete the interpretation arrived at through Article 31, whereas the drafting history of the ICJ Statute indicates that the term 'subsidiary' was purposely used to highlight the subordination of judicial decisions to the formal sources.¹¹⁵ Thus, 'subsidiary' and 'supplementary' may not express the same meaning as read by the Tribunal.

Regardless of these weaknesses, the Tribunal did not seem to err in substance to conclude that judicial decisions can fall into the scope of article 32. As *evidence* of the existence of rules of international law, judicial decisions may certainly be able to shed useful light on the meaning of rules of international law arrived at through Article 31. They, therefore, might be reasonably used as supplementary means of interpretation within the meaning of Article 32.

Significantly, the Tribunal in *CCFT v US* is not the only one in international law that grounds the use of judicial decisions on Article 32. The WTO panel and the Appellate Body in *EC - Chicken Cuts*¹¹⁶ also follow an analogous approach. In this case, the panel had to decide whether the ECJ judgements in *Dinter*¹¹⁷ and *Gausepohl*¹¹⁸ could qualify as 'circumstances of conclusion' of the EC Schedule within the meaning of Article 32 VCLT.¹¹⁹ The panel started its reasoning by citing *EC - Computer Equipment*,¹²⁰ in which the Appellate Body already stated clearly that Members' classification *practice* and *legislation* that were applicable at the time of the Uruguay Round should have been taken into consideration as 'circumstances of conclusion' under Article 32.¹²¹ On this basis, the panel further articulated that the list of the Appellate Body in *EC - Computer Equipment* was not exhaustive, but merely linked to the particular facts of that case, implying that 'other unlisted items may also qualify' as 'circumstances of conclusion'.¹²² In particular, the panel reasoned that:

¹¹³ *Oxford Dictionary* <<http://oxforddictionaries.com>>, cited in Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 229. See also Richard Gardiner, above n 90, 311.

¹¹⁴ Mark Eugen Villiger, above n 90, 446. See also Martins Paporinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) *British Yearbook of International Law* 264, 348.

¹¹⁵ Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 229.

¹¹⁶ Panel Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/R, WT/DS286/R; Appellate Body Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/AB/R, WT/DS286/AB/R.

¹¹⁷ *Dinter v Hauptzollamt Köln-Deutz* (C-175/82) [1983] ECR 969.

¹¹⁸ *Fleisch GmbH v Oberfi-nanzdirektion Hamburg* (C-33/92) [1993] ECR I-3047.

¹¹⁹ Panel Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/R, WT/DS286/R, [7.390]

¹²⁰ Appellate Body Report, *European Communities - Customs Classification of Certain Computer Equipment*, WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (22 June 1998) (*EC - Computer Equipment*).

¹²¹ *Ibid* [86], [94].

¹²² Panel Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/R, WT/DS286/R, [7.391].

the Appellate Body was merely making a pronouncement on the basis of the facts that were available to it in that case rather than seeking to provide an exhaustive list of items qualifying as "circumstances of conclusion" in all cases. This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the *Vienna Convention*. [footnote 681]¹²³ Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32...¹²⁴

The Appellate Body essentially agreed with the panel on the above issues, and provided some general theoretical considerations as to whether court judgements fall into the scope of article 32. Noticeably, the Appellate Body stated that:

Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they include the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.¹²⁵

This statement suggests that the Appellate Body did in fact follow the prevailing view in international law, as discussed above, as to the non-exhaustive nature of the list of supplementary means and the inherent flexibility in Article 32. This seems to be a desirable endorsement since it correctly emphasises that Article 32 should not be read in an 'inflexible or rigid manner'.¹²⁶ Given the awareness of the inherent flexibility in Article 32, it was not surprising that the Appellate Body then 'share[d] the Panel's consideration that judgments of domestic courts are not, in principle, excluded from consideration as "circumstances of the conclusion" of a treaty if they would be of assistance in ascertaining the common intentions of the parties for purposes of interpretation under Article 32'.¹²⁷ Nevertheless, the Appellate Body clarified that court judgments which basically deal with a specific dispute, by their nature, are less relevant than legislation, which is of general application.¹²⁸

Observably, in both *CCFT v US* and *EC - Chicken Cuts*, the NAFTA and WTO tribunals have

¹²³ 'This conclusion would seem to be particularly valid in relation to the present case where the ECJ judgements in question interpret EC legislation. In our view, it would be an odd situation if such legislation could be considered under Article 32 of the *Vienna Convention* but not court judgements, which interpret that legislation'. Panel Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/R, WT/DS286/R, [7.391], footnote 681.

¹²⁴ *Ibid* [7.391].

¹²⁵ Appellate Body Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/AB/R, WT/DS286/AB/R, [283].

¹²⁶ Henrik Horn and Robert L. Howse, 'European Communities - Customs Classification of Frozen Boneless Chicken Cuts' (2008) 7(1) *World Trade Review* 9, 31-2.

¹²⁷ Appellate Body Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/AB/R, WT/DS286/AB/R, [309].

¹²⁸ *Ibid*.

recognised the possibility for judicial decisions to be used as supplementary means of interpretation under Article 32. The difference between them is that while the Tribunal in *CCFT v US* viewed judicial decisions as falling into the non-defined notion of supplementary means, the panel and the Appellate Body in *EC - Chicken Cuts* perceived judicial decisions as an element of 'circumstances of conclusion'.¹²⁹ However, this difference might not indicate a disagreement as to the interpretative relevance of judicial decisions, but seems to reinforce a widely accepted point that there is some flexibility intrinsic in Article 32. The ILC, for example, stated to this effect in its 1966 Report that 'recourse to [supplementary means] is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science'.¹³⁰ Similarly, Gardiner observed that 'a literal approach to treaty interpretation has not been applied to this element [that is, Article 32] of the Vienna rules'.¹³¹ This might imply that what kinds of, and to what extent, instruments and documents are relevant as supplementary means under Article 32 will be 'a matter of judgment and finesse', and depend on the issue and the circumstances,¹³² rather than being subjected to a mechanical and formalistic prescription. Therefore, the divergence between the NAFTA Tribunal and the WTO tribunals in justifying the employment of judicial decisions seems to fall within the permissible scope of the flexibility inherent in Article 32. The more significant issue is that they all agreed that judicial decisions may be used as supplementary means of interpretation under Article 32.

The tribunals in *CCFT v US* and *EC - Chicken Cuts* thus can be seen as pioneering a new trend in international law in which judicial decisions may be utilised in the interpretative process, not as a tacit technique, but based on a clear theoretical framework of Article 32 VCLT.¹³³ If Article 32 indeed 'represented the crystallization of an emerging rule',¹³⁴ the rulings in *CCFT v US* and *EC - Chicken Cuts* seem to make a meaningful clarification as to a possible application of that emerging rule.

While the preceding analysis suggests that the utilisation of judicial decisions in international

¹²⁹ Malgosia Fitzmaurice and Panos Merkouris, above n 85, 233.

¹³⁰ 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session' [1966] II *Yearbook of International Law Commission* 165, 218[4]. See also Panos Merkouris, 'Introduction: Interpretation is a Science, is an Art, is a Science' in Malgosia Fitzmaurice and Phoebe Okowa, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010) 1, 1-16.

¹³¹ Richard Gardiner, above n 90, 303.

¹³² Henrik Horn and Robert L. Howse, above n 131, 32.

¹³³ Malgosia Fitzmaurice and Panos Merkouris, above n 85, 233. This trend has been increasingly supported in doctrine. See Malgosia Fitzmaurice and Panos Merkouris, above n 85, 217-34; Chester Brown, *A Common Law of International Adjudication*, above n 27, 42.

¹³⁴ Luigi Sbolci, 'Supplementary Means of Interpretation' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 145, 162 (emphasis added).

adjudication has already been an existing practice, there seems to be, as explained below, significant added benefit in qualifying that practice under Art.32.

First, this approach provides a channel, i.e. Article 32, by which the relevance of judicial decisions could be reinforced in the interpretative process. Even though the consideration of judicial decisions is at the interpreters' discretion,¹³⁵ the qualification of judicial decisions as supplementary means suggests that it remains possible for judicial decisions to be taken into account in the interpretative process. This approach effectively responds to the longstanding and difficult question in international law as to whether judicial decisions may be relevant to subsequent tribunals. In essence, even though judicial decisions are not binding, they can be considered by subsequent tribunals to the extent that 'they throw useful light on' the case at hand.¹³⁶

Second, grounding the use of judicial decisions on Article 32 VCLT would create a more principled approach.¹³⁷ Indeed, instead of being employed pragmatically, the use of judicial decisions under the current approach is institutionally framed within the scope of Article 32. Although Article 32 may contain some built-in leeway, constraints may not entirely be absent.¹³⁸ For examples, it has been widely accepted that supplementary means only provide a complement,¹³⁹ not an alternative, to the means provided in Article 31;¹⁴⁰ and moreover, Article 32 may not be used to displace an interpretation based on the primary means specified in Article 31.¹⁴¹ Clearly, the use of judicial decisions on the basis of Article 32 is more disciplined than that under the *de facto* stare decisis doctrine.

Third, framing the use of judicial decisions on Article 32 is also a way to ensure a proper use of judicial decisions. It is widely accepted that judicial decisions should not replace or undermine the role of formal sources of international law. This problem would not arise if judicial decisions are utilised as supplementary means under Article 32. This is because, as complementary means to complete the interpretation reached through Article 31, judicial decisions do not have the capacity to claim exclusive authority on a matter. They, at best, can

¹³⁵ 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session' [1966] II *Yearbook of International Law Commission* 165, 218 [4].

¹³⁶ *CCFT v US*, above n 72, [51].

¹³⁷ Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 233.

¹³⁸ For a discussion on possible constraints in this regard, Richard Gardiner, above n 90, 320-1; Mark Eugen Villiger, above n 90, 447; Isabelle Van Damme, above n 90, 306.

¹³⁹ Mark Eugen Villiger, above n 90, 447.

¹⁴⁰ Isabelle Van Damme, above n 90, 306.

¹⁴¹ Henrik Horn and Robert L. Howse, above n 131, 32.

serve as a useful interpretative aid, rather than challenge the governing role of formal sources of international law.

Fourth, the application of Article 32 is discretionary; and thus it is a particularly attractive legal framework. The consideration of judicial decisions would depend on their relevance, and the circumstances, which are subject to a discretionary determination by the interpreters. Article 32 does not impose on the interpreters an inescapable obligation to take judicial decisions into account.

Fifth, the utilisation of judicial decisions under Article 32 VCLT appears to have a solid basis in the DSU, the WTO jurisprudence and international law. Indeed, as to the methods of interpretation, Article 3.2 of the DSU states that WTO law will be clarified in accordance to the 'customary rules of interpretation of public international law'.¹⁴² Articles 31 and 32 VCLT have traditionally been considered as customary international law;¹⁴³ and this has been forcefully confirmed by the Appellate Body. Indeed, in *US – Gasoline*, the Appellate Body stated that Article 31 VCLT 'has attained the status of a rule of customary or general international law'.¹⁴⁴ In *Japan - Alcoholic Beverages II*, the Appellate Body went further and firmly confirmed that '[t]here can be no doubt that Article 32 of the [VCLT] has also attained the same status'.¹⁴⁵ Thus, if the use of judicial decisions is grounded on the framework of Article 32 VCLT, it can certainly benefit from the legitimacy and credibility provided by Article 32 VCLT which has gained a status of a customary international rule.

In general, judicial decisions can be used in the interpretative process, 'not tacitly, but within a clearly-defined theoretical framework'.¹⁴⁶ This shift from the *de facto* stare decisis to Article 32 may not alter the weight of judicial decisions. However, it can certainly increase the discipline, legitimacy, and appropriateness in the use of judicial decisions in international law.

¹⁴² DSU, article 3.2.

¹⁴³ Jean D'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Courts as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and Andre Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2012) 141, 151, and citations therein; Vassilis P. Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) 31 *Michigan Journal of International Law* 621, 631, and citations therein.

¹⁴⁴ See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) (*US - Gasoline*) 17.

¹⁴⁵ [Appellate Body Report, Japan - Alcoholic Beverages II](#), WTO Docs [WT/DS8/AB/R](#), [WT/DS10/AB/R](#), [WT/DS11/AB/R](#), (1 November 1996), 10.

¹⁴⁶ Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 233.

IV INTEGRATION OF JUDICIAL DECISIONS IN MULTIPLE PROCEEDINGS BEFORE THE WTO AND RTA DISPUTE SETTLEMENT MECHANISMS ON THE BASIS OF ARTICLE 32 VCLT

Obviously, judicial decisions be considered by international tribunals, and that should be done on a clear theoretical framework provided by Article 32 VCLT rather than as a tacit technique under the *de facto* system of precedent. The remaining question is *how* this could be done, especially in the WTO and RTA context. To answer this question, this section discusses how, in multiple proceedings, WTO and RTA tribunals could use judicial decisions of the other forum as supplementary means of interpretation under Article 32 VCLT. Article 32 VCLT itself provides useful starting points. It specifies that supplementary means could serve to **confirm** the interpretation reached by Article 31 or to **determine** the meaning when the interpretation according to Article 31 leaves the meaning ambiguous, obscure; or leads to a result which is manifestly absurd or unreasonable. The following sections will further elaborate these techniques in the context of WTO and RTA dispute settlement.

A *Judicial Decisions as Means to Confirm the Interpretation Reached by Article 31 VCLT*

From the language of Article 32 VCLT, one of the possible roles for judicial decisions is to confirm the meaning resulting from the application of Article 31. Specifically, if the obligatory and authentic means in Article 31 have generated an outcome, its validity may be established by resorting to supplementary means in Article 32, including judicial decisions.¹⁴⁷ Functioning in this particular manner, judicial decisions seem to play a truly 'secondary and supportive', rather than primary, role in treaty interpretation¹⁴⁸ because they do not independently decide the meaning of the rules under interpretation, but only establish the truth or correctness of the meaning produced by the means in Article 31. It may be legitimate to question why, if the meaning was already clear from the application of the general rule of interpretation, was it really necessary to resort to supplementary means, including judicial decisions?¹⁴⁹ The answer seems to lie in the nature of the confirmatory process which may be more meaningful than merely repeating the obvious. As seen from the dictionary definition, 'confirm' means to 'establish the truth or correctness of (something previously believed or suspected to be the case)'.¹⁵⁰ Gardiner succinctly captures the solidity added by the confirmatory process in the following useful

¹⁴⁷ Mark Eugen Villiger, above n 90, 447.

¹⁴⁸ Richard Gardiner, above n 90, 308.

¹⁴⁹ Ibid 323.

¹⁵⁰ *Oxford Dictionaries* <<http://oxforddictionaries.com/definition/english/confirm?q=confirm>>.

analogy:

[i]n a transitive mood, I may contact someone to confirm a provisional booking which I have made. I am actually going a little further than I had when originally booking because I am making firm something which previously was not. In an interrogative mode, I may telephone an airline or hotel asking them to confirm that they have received my internet booking and payments, and are keeping my reservation. I expect an affirmative response, but lurking is the fear that something may have gone wrong, in which case I have to think again. Both situations show the comparable potential in the Vienna Convention's usage of 'confirm'.¹⁵¹

Confirmation is thus not an insignificant interpretative process. If a tribunal finds that the interpretation reached independently on the basis of Article 31 is also supported by prior judicial decisions, the tribunal can be more confident that it has produced a valid interpretation. Moreover, as observed by Sbolci, a judgment by an international tribunal in which the reasons for interpreting a treaty rule in a particular way are not only established by the means provided under Article 31 but also confirmed by other supplementary means will be 'more convincing' for the parties in dispute, and thus likely induce them to respect the ruling.¹⁵² Importantly, confirmation also implies the possibility of not confirming.¹⁵³ Even though a result arrived at by the primary means in Article 31 may prevail over the meaning suggested by the supplementary means,¹⁵⁴ it appears reasonable to believe that a non-confirmation might lead the interpreters to 'reconsider[ing] the application of the general rule to find a permissible interpretation which is then confirmed'.¹⁵⁵ Furthermore, the confirmatory process may reveal the unperceived ambiguity (or obscurity of meaning, manifest absurdity or unreasonableness of result), and thus transfers the process from a potential confirming role to one of determining the meaning.¹⁵⁶ Clearly, the usefulness of confirmation 'should not be overlooked'.¹⁵⁷

The suggestion that judicial decisions might play a confirmatory role is not entirely novel. In practice, international courts and tribunals often apply the 'cross-checking' technique to reinforce a position on an issue that they have independently established. For example, in

¹⁵¹ Richard Gardiner, above n 90, 321.

¹⁵² Luigi Sbolci, above n 139, 162.

¹⁵³ Richard Gardiner, above n 90, 309.

¹⁵⁴ Mark Eugen Villiger, above n 90, 447; Henrik Horn and Robert L. Howse, above n 131, 32.

¹⁵⁵ Richard Gardiner, above n 90, 309. See also Stephen M. Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision' in Stephen M. Schwebel (ed), *Justice in International Law: Further Selected Writings* (Cambridge University Press, 2011) 289, 289-96.

¹⁵⁶ Richard Gardiner, above n 90, 309.

¹⁵⁷ Luigi Sbolci, above n 139, 162.

Mangouras, after performing an autonomous interpretation of what constitutes a reasonable bond,¹⁵⁸ the ECHR made a reference to the jurisprudence of the ITLOS Tribunal.¹⁵⁹ The ECHR was aware of the fact that the Tribunal's jurisdiction differs from its own; it, nevertheless, found that the Tribunal '*applies similar criteria*' in assessing the amount of security.¹⁶⁰ It is apparent that the ECHR referred to the jurisprudence of the ITLOS Tribunal to confirm the correctness of its own interpretation on the constituting elements of a reasonable bond. Similarly, in *Gas Natural*, the tribunal emphasised that:

it has *rendered its decision independently*, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it *useful to compare* its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that *we have not found or been referred to any decisions or awards reaching a contrary conclusion*.¹⁶¹

Notably, WTO case law has also been referred to by international tribunals to support a position that they have independently reached. For example, in determining the conditions for a discrimination claim under the national treatment clause contained in the Mongolia-Russia BIT, the tribunal in *Paushok*¹⁶² 'is of the view' that 'the sectors covered should relate to competitive and substitutable products'.¹⁶³ The tribunal pointed out that this is 'an expression regularly used in WTO/GATT cases'.¹⁶⁴ Even though the tribunal was 'aware of the differences between the Treaty and the one governing the WTO', it considered that 'such a requirement is a reasonable one to apply when considering allegations of discrimination'.¹⁶⁵ Evidently, the tribunal referred to WTO decisions to reinforce the rationality of its view on the conditions for a discrimination claim. The convincing reasoning of WTO cases on this issue seems to be the reason why the tribunal chose to refer to them.

None of the tribunals in *Mangouras*, *Gas Natural*, or *Paushok* stated the legal basis for their

¹⁵⁸ *Mangouras v Spain* (2012) 54 EHRR 25, 928.

¹⁵⁹ *Ibid* 929.

¹⁶⁰ *Ibid* (emphasis added).

¹⁶¹ *Gas Natural SDG (S.A. v Argentina) (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/10, 17 June 2005) [36] (emphasis added).

¹⁶² *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia (Award on Jurisdiction and Liability)* (UNCITRAL Tribunal, 28 April 2011) (*Paushok*) [313]-[315].

¹⁶³ *Ibid* [315].

¹⁶⁴ *Ibid*. The tribunal referred to WTO/GATT case law generally without citing specific decisions. See further Gabrielle Marceau et al, above n 61, 519.

¹⁶⁵ *Paushok*, above n 143, [315].

reference to the case law of other tribunals. Nevertheless, it is arguable that the cross-checking technique utilised by these tribunals might fall squarely within the confirmatory role under Article 32. Indeed, the tribunal in *CCFT v US* justified its reliance on the jurisprudence of other tribunals exactly in this direction and stated its reasoning as follows:

[a]fter a review of the relevant decisions in other cases as supplementary means of interpretation (Article 32 VCLT) it can thus be concluded that some of these decisions *provide support to the interpretation the present Tribunal has chosen* in earlier sections above of this Award, and that none of these decisions has been found to contradict this Tribunal's interpretation.¹⁶⁶

These analyses suggest that when an RTA tribunal interprets the incorporative RTA rules, it might refer to WTO jurisprudence on the equivalent norms to confirm the correctness of its interpretation. If the RTA tribunal finds support from WTO jurisprudence, it essentially follows the interpretation of WTO tribunals. Conversely, if the interpretation by the RTA tribunal is inconsistent with WTO jurisprudence, there is no rule of international law that requires the RTA tribunal to follow the interpretation made by WTO tribunals. Nevertheless, it might be reasonable and logical for the RTA tribunal to reconsider its position arrived at through the application of the general rule of interpretation. In doing so, the RTA tribunal might need to set out factors that ensure a different interpretative outcome. This is perhaps the manner in which decisions of WTO tribunals may impose, not a formal legalistic obligation, but an argumentative burden on subsequent RTA tribunals. The constraints may be soft, but appear sufficient to minimise unreasonably inconsistent interpretation produced by RTA tribunals on equivalent norms.

B *Judicial Decisions as Means to Determine the Meaning*

The other possible role for supplementary means envisioned in Article 32 is to **determine** the meaning when the interpretation according to Article 31 leaves the meaning ambiguous, obscure; or leads to a result which is manifestly absurd or unreasonable. The dictionary definition indicates that 'ambiguous' could be understood as 'open to more than one interpretation; not having one obvious meaning'.¹⁶⁷ This is perhaps the most common situation envisaged by Article 32 because a treaty term may not have a single ordinary meaning, but point in different directions.¹⁶⁸ However, ambiguity under Article 32 may have a narrower

¹⁶⁶ *CCFT v US*, above n 72, [223] (emphasis added).

¹⁶⁷ *Oxford Dictionaries* <<http://oxforddictionaries.com/definition/english/ambiguous?q=ambiguous>>.

¹⁶⁸ Richard Gardiner, above n 90, 328.

scope than that in the dictionary sense since Article 32 refers to ambiguity that still remains after the application of the general rule of interpretation provided in Article 31. Various primary means such as the context, subsequent agreements, object and purpose, etc. may help to eliminate any dictionary ambiguity without the need to resort to supplementary means. The other qualifying condition is 'obscure', which may be defined as 'not discovered or known about; uncertain'.¹⁶⁹ Obscurity appears to be a less common situation than ambiguity; and in practice, international tribunals often perceive the existence of obscure meaning by contrasting provisions that are 'clear' with those ones that are 'uncertain'.¹⁷⁰ For example, in *Prosecutor v Dusko Tadic*, the tribunal stated that '[a]s the wording of article 5 is clear and does not give rise to uncertainty ... there is no need to rely upon those statements'.¹⁷¹ As to the last condition, it is hard to find a particular instance in which the application of the general rule of interpretation produces a 'manifestly absurd or unreasonable' result.¹⁷² Nevertheless, this condition is sometimes used as an aid to exclude certain meanings in determining the ordinary meaning of a term.¹⁷³

Clearly, ambiguity, and to a lesser extent, obscurity that remain after the application of the general rule of interpretation leave a 'generous scope' for resort to supplementary means, including judicial decisions.¹⁷⁴ Indeed, if the above qualifying conditions are satisfied, Article 32 seems to provide what is in effect a 'replacement' of the inadequate outcome achieved by the general rule with an interpretation suggested by supplementary means.¹⁷⁵ Although both confirmation and determination are incorporated under the same heading 'supplementary means', to determine the meaning is essentially to perform a primary interpretative function, whereas confirmation only plays a secondary and supportive role in the interpretative process.¹⁷⁶ Thus, Villiger appears to be correct in suggesting that Article 32 allows the utilisation of supplementary means to determine the meaning 'in most situations and does not restrict the manner in which they may be employed'.¹⁷⁷ In other words, it is hard to 'imagine'

¹⁶⁹ *Oxford Dictionaries* <<http://oxforddictionaries.com/definition/english/obscure?q=obscure>>.

¹⁷⁰ Richard Gardiner, above n 90, 329.

¹⁷¹ *Prosecutor v Dusko Tadic (Judgement of 15 July 1999)* (1999) 124 ILR 61, 183-4 [303].

¹⁷² Richard Gardiner, above n 90, 329.

¹⁷³ *Ibid.* For example, the Tribunal in *Champion Trading Company* held that '[t]he Tribunal does not rule out that situation might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, article 32(b)'. See *Champion Trading Company Ameritrade International, Inc. & Others v Arab Republic of Egypt (Jurisdiction)* (2004) 19 *ICSID Review-Foreign Investment Law Journal* 275, 288.

¹⁷⁴ Richard Gardiner, above n 90, 328.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Mark Eugen Villiger, above n 90, 447.

a situation in which supplementary cannot be used to assist the determination of the meaning.¹⁷⁸ The following sections will further examine the common ways in which international tribunals have utilised judicial decisions to determine the meaning, and ascertain their potential relevance in the context of the WTO and RTAs.

1 Clarify

Similar to the confirmatory role, the use of judicial decisions to determine the meaning is not an unknown technique in international dispute settlement. One of the most common practices is the employment of judicial decisions of other tribunals that interpreted similar or identical provisions in order to **clarify** the ambiguous or uncertain legal questions under interpretation.¹⁷⁹ In this technique, the equivalent features between norms play a crucial role because they provide a useful interface for cross-reference and make the decisions of other tribunals more relevant to the interpretation of the rules at hand. The tribunal in *Eureko v Poland*,¹⁸⁰ for example, had effectively employed this interpretative method.¹⁸¹ In this case, the tribunal had recourse to prior arbitral decisions concerning the interpretation of umbrella clauses under the Switzerland - Pakistan and the Switzerland - Philippines BITs in order to make clear the function and meaning of a comparable clause in the Netherlands - Poland BIT.¹⁸² The tribunal appeared to perform a comprehensive and credible interpretation. Particularly, the majority of the tribunal not only relied on the ordinary meaning of the clause under interpretation and the principle of effective interpretation, but also made recourse to other investment awards,¹⁸³ noting that it 'finds the foregoing analyses of the Tribunal in *SGS v The Republic of the Philippines* ... cogent and convincing'.¹⁸⁴ Even though the tribunal paid intensive consideration to the interpretation of the umbrella clause by the tribunal in *SGS v The Republic of the Philippines*, it did not adopt that interpretation as a binding precedent, but performed an independent interpretation of the Dutch - Polish BIT.¹⁸⁵ Apparently, the tribunal did not use prior arbitral awards as a primary interpretative tool, but only as an additional means that

¹⁷⁸ Ibid.

¹⁷⁹ Jacob, above n 36, 1012; Stephan W. Schill, 'System-building in Investment Treaty Arbitration', above n 45, 1097-8.

¹⁸⁰ *In the Matter of an Ad Hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment (Eureko B.V. v Republic of Poland) (Partial Award)* (UNCITRAL Arbitral Tribunal, 19 August 2005).

¹⁸¹ For a detail discussion, see Stephan W. Schill, 'System-building in Investment Treaty Arbitration', above n 45, 1097-8.

¹⁸² Ibid 1098.

¹⁸³ Ibid.

¹⁸⁴ *Eureko B.V v Republic of Poland (Partial Award)* (UNCITRAL Arbitral Tribunal, 19 August 2005) [257].

¹⁸⁵ Stephan W. Schill, 'System-building in Investment Treaty Arbitration', above n 45, 1098.

provides interpretative aid to the determination of the meaning of the umbrella clause. The use of judicial decisions in this particular manner seems to fall squarely into the scope of the determining role of judicial decisions under Article 32.

Similarly, in *Pope & Talbot*,¹⁸⁶ the NAFTA tribunal had also employed GATT jurisprudence to clarify an uncertain legal question under interpretation. In this case, Canada argued that a national treatment violation under NAFTA Article 1102 'can be found only if the measure in question disproportionately disadvantages the foreign owned investments or investors'.¹⁸⁷ Canada acknowledged that this disproportionate disadvantage test does not appear in the NAFTA text, and asserted that it originates in WTO/GATT precedents.¹⁸⁸ The tribunal first reviewed WTO/GATT cases cited by Canada, and rejected Canada's assertion that these cases support its position on disproportionate disadvantage.¹⁸⁹ However, what is striking is that the tribunal then examined GATT decisions in *United States - Section 337 of the Tariff Act of 1930*,¹⁹⁰ and *United States - Measures Affecting Alcoholic and Malt Beverages*¹⁹¹ to prove that cases indeed exist for 'the contrary position'.¹⁹² Specifically, as noted by the NAFTA panel, GATT panels in these decisions already stated that national treatment is to be accorded to each individual product,¹⁹³ and forcefully rejected the notion to balance treatment between different sets of products since that interpretation 'would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III'.¹⁹⁴ In light of these GATT rulings, the tribunal in *Pope & Talbot* then rejected the disproportionate disadvantage test since it would 'hamstring foreign owned investments

¹⁸⁶ *Pope & Talbot v Canada (Award on the Merits of Phase 2)* (NAFTA Chapter 11 Arbitral Tribunal, 10 April 2001) (*Pope & Talbot*).

¹⁸⁷ Ibid [43]. Specifically, as asserted by Canada, a violation of NAFTA Article 1102 only exists if the size of the group of Canadian owned investments that are accorded the same treatment as the Investor is smaller than the size of the group of Canadian owned investments receiving more favourable treatment than the Investment. Ibid [44].

¹⁸⁸ Ibid [45].

¹⁸⁹ Ibid [46]-[67].

¹⁹⁰ GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 - 36S/345 (16 January 1989).

¹⁹¹ GATT Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, GATT Doc DS23/R - 39S/206 (16 March 1992).

¹⁹² *Pope & Talbot*, above n 167, [68].

¹⁹³ Ibid, citing GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 - 36S/345, [5.13]-[5.14] (the panel stated that 'the "no less favorable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products'); and GATT Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, GATT Doc DS23/R - 39S/206, [5.6] (the panel stated that 'the fact that only approximately 1.5 per cent of domestic beer in the United States is eligible for the lower tax rate does not immunize this United States measure from the national treatment obligations of [GATT] Article III').

¹⁹⁴ GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 - 36S/345, [5.14], cited in *Pope & Talbot*, above n 167, [68].

seeking to vindicate their Article 1102 rights', and thus be inconsistent with the objective of NAFTA.¹⁹⁵

Obviously, the tribunal in *Pope & Talbot* had effectively utilised GATT decisions to clarify the uncertain legal question as to whether the disproportionate disadvantage test is consistent with NAFTA Article 1102. Like the tribunal in *Eureko v Poland*, the NAFTA tribunal also did not state the legal basis of its reference to GATT cases. However, in light of the previous analysis, such a utilisation of judicial decisions might be justified under the framework of Article 32 VCLT.

(b) Analogising with Prior Decisions

Analogising with prior decisions is another common way in which international tribunals have utilised judicial decisions.¹⁹⁶ The tribunal in *AES Corporation v Argentina*, for example, followed this approach and stated clearly that even though prior decisions are not binding upon it, they could be considered as a source of 'comparison and ... of inspiration'.¹⁹⁷ Specifically, the tribunal characterised that:

[o]ne may even find situations in which, although seized on the basis of another BIT, ... a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.¹⁹⁸

The essence of this technique is that if a term was credibly interpreted by a previous tribunal in a particular way, the interpretation of that tribunal could serve as an illumination for the subsequent tribunal to ascertain the meaning of a comparable term. In this way, even though the subsequent tribunal does not treat the previous ruling as a formal legal obligation, it in effect integrates the reasoning of the earlier decision into its own decision,¹⁹⁹ and performs an interpretation in a normatively consistent manner with the earlier decision.²⁰⁰ It is obvious that when used as a source for analogy, judicial decisions could assist the determination of the meaning by suggesting how the subsequent tribunal should interpret a comparable treaty term.

¹⁹⁵ *Pope & Talbot*, above n 167, [72].

¹⁹⁶ Stephan W. Schill, 'System-building in Investment Treaty Arbitration', above n 45, 1096.

¹⁹⁷ *AES Corporation v The Argentine Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/17, 26 April 2005) [31].

¹⁹⁸ *Ibid.*

¹⁹⁹ Stephan W. Schill, 'System-building in Investment Treaty Arbitration', above n 45, 1098.

²⁰⁰ N'Gunu N. Tiny, 'Judicial Accommodation: NAFTA, the EU and the WTO' (Working Paper No 04/05, New York University School of Law, 2005) 23.

The decision of the NAFTA Panel in *Broom Corn Brooms*²⁰¹ can succinctly illustrate these points, particularly in the context of the WTO and RTAs. In this case, in order to elucidate the concept 'like product', the NAFTA Panel had followed closely WTO jurisprudence, specifically, the definitions of 'like product' in GATT/WTO decisions.²⁰² The Panel openly acknowledged at the outset of its reasoning that:

[i]n attempting to perform this analysis, the Panel carefully examined the way in which the "like product" concept had been defined in prior GATT/WTO decisions, and noted, in particular the degree of discretion accorded to governments and panels in applying those definitions.²⁰³

In particular, the Panel noted that in *Japan - Alcoholic Beverages II*,²⁰⁴ a factor test has been used to define 'like product',²⁰⁵ which emphasises that 'the term "like product" should be interpreted on a case by case basis', and that different criteria could be used 'in order to establish likeness, such as the product's properties, nature and quality, and its end-uses; consumers' tastes and habits, which change from country to country; and the product's classification in nomenclatures'.²⁰⁶ The Panel also noted that the WTO Appellate Body in the same case explained that the application of the factor test is not mechanical, but 'will always involve an unavoidable element of discretionary judgment'.²⁰⁷ Lastly, the Panel found that in the view of the WTO Appellate Body, the definition of likeness can vary from WTO provision to WTO provision according to the legal context in which it is being used.²⁰⁸ On the basis of these observations, the Panel then reached its own finding that:

whether the analysis offered by the ITC in support of its ultimate conclusion would have been erroneous in one or more respects if it had been offered in support of the legal conclusion that plastic brooms were "not like" broom corn brooms - would depend on whether the ITC's appraisal and weighting of the various factors was within the range of discretion permitted by the case-by-case approach and the multi-factor definitions

²⁰¹ *In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico (Final Report)* (Panel Established under Chapter Twenty of the NAFTA, Secretariat File No USA-97-2008-01, 30 January 1998) (*Broom Corn Brooms*). For a detail analysis of this ruling, see, e.g., N'Gunu N. Tiny, above n 205, 17-20, 22-8; David A. Gantz, 'Regional Trade Agreements' in Daniel Bethlehem et al, *The Oxford Handbook of International Trade Law* (Cambridge University Press, 2009) 238, 262-3.

²⁰² Panel Report, *Broom Corn Brooms*, above n 189, [66]-[67]; N'Gunu N. Tiny, above n 205, 22-3.

²⁰³ Panel Report, *Broom Corn Brooms*, above n 189, [66].

²⁰⁴ Panel Report, *Japan - Alcoholic Beverages II*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R.

²⁰⁵ Panel Report, *Broom Corn Brooms*, above n 189, [66].

²⁰⁶ Panel Report, *Japan - Alcoholic Beverages II*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R, [6.21], cited in Panel Report, *Broom Corn Brooms*, above n 189, [66].

²⁰⁷ Appellate Body Report, *Japan - Alcoholic Beverages II*, WTO Doc WT/DS8/AB/R (4 October 1996) 20-1, cited in Panel Report, *Broom Corn Brooms*, above n 189, [66].

²⁰⁸ *Ibid.*

employed in the GATT/WTO definitions of "like product."²⁰⁹

Evidently, the NAFTA Panel had intensively utilised the GATT/WTO definitions of 'like product' to make 'clear', to use exactly the word of the Panel,²¹⁰ the meaning of the same term under NAFTA law. Even though the Panel still performed an independent analysis, the WTO reasoning had become the corner stone on the way the Panel reaching its own conclusion. It is observable that when the WTO reasoning is modelled by an RTA tribunal, it may not only have the capacity to work as an interpretation aid, but may also enhance the consistency between the interpretations made by WTO and RTA tribunals. In this case, for example, the NAFTA Tribunal in fact read the term 'like product' in conformity with WTO jurisprudence on this issue.²¹¹

Another case at the WTO and RTA nexus in which WTO decisions were utilised as 'guidance by analogy'²¹² is the *Decision of the Binational Panel in Accordance with Article 1904 of the North American Free Trade Agreement*.²¹³ In this case the US Investigating Authority (IA) argued that it could use 'facts available' in its dumping investigation because of the failure to cooperate by the producers during the course of its investigation.²¹⁴ The claim of non-cooperation was grounded on the fact that certain producers did not 'come forward with information'.²¹⁵ This argument was rejected by the panel. Remarkably, in doing so the NAFTA panel had effectively integrated WTO panel interpretations of Article 6.8 of the Anti-Dumping Agreement into its analysis. Specifically, the panel noted that in *US - Hot-Rolled Steel*,²¹⁶ and *Argentina - Ceramic Tiles*²¹⁷ the WTO panels already stated that the 'facts available' under Article 6.8 of the Anti-Dumping Agreement can only be resorted to if there has been a clear request for such information and the necessary information is not provided within a reasonable period.²¹⁸ The NAFTA panel agreed with this analysis of WTO panels and used it as guidance

²⁰⁹ Panel Report, *Broom Corn Brooms*, above n 189, [66].

²¹⁰ Ibid [67].

²¹¹ N'Gunu N. Tiny, above n 205, 23.

²¹² *Mondev International Ltd. v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/2, 11 October 2002) [144].

²¹³ *Decision of the Binational Panel in Accordance with Article 1904 of the North American Free Trade Agreement (Mexico v US)* (NAFTA Case No MEX-USA-00-1904-02, 15 March 2004).

²¹⁴ Ibid [11.40]-[11.44].

²¹⁵ Ibid [11.50]. See also Gabrielle Marceau et al, above n 61, 526.

²¹⁶ Panel Report, *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Doc WT/DS184/R (28 February 2001) (*US - Hot-Rolled Steel*).

²¹⁷ Panel Report, *Argentina - Definitive Antidumping Measures on Imports of Ceramic Floor Tile from Italy*, WTO Doc WT/DS189/R (28 September 2001) (*Argentina - Ceramic Tiles*).

²¹⁸ Panel Report, *US - Hot-Rolled Steel*, WTO Doc WT/DS184/R, [7.51]-[7.52]; Panel Report, *Argentina - Ceramic Tiles*, WTO Doc WT/DS189/R, [6.53]-[6.55], cited in *Decision of the Binational Panel in Accordance with Article 1904 of the North American Free Trade Agreement (Mexico v US)*, above n 194, [11.51]-[11.53].

to conclude that:

the IA may not resort to “available information” *when* the particular information necessary to calculate a dumping margin for the non-certified meat *was never requested by the IA from the participants*.²¹⁹

This reasoning by analogy in effect, as acknowledged by the panel, led the panel to interpreting the law applicable before it ‘harmoniously’ with the relevant WTO panel interpretations.²²⁰

3 *Abbreviation of Reasoning*

Beside the cautious use of judicial decisions as an interpretative aid for clarification of the meaning, or as a source for analogy with earlier decisions, a more liberal technique can also be detected. International tribunals sometimes invoke prior decisions to abbreviate reasoning.²²¹ The tribunal in *Enron v Argentina*,²²² for example, relied on a number of prior decisions adopted by other ICSID tribunals as a ‘shorthand argument’ to turn down the objections to jurisdiction by Argentina in the case before it.²²³ Specifically, in rejecting Argentina’s arguments on jurisdiction, the tribunal found that ‘shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company’.²²⁴ However, instead of performing its own analysis, the tribunal stated that the reasons supporting this finding ‘have been amply considered in recent decisions’ and thus do not need to be re-examined.²²⁵ It does not mean that the tribunal entirely abandoned explaining its approach. In fact, it stated clearly that even though prior decisions are not ‘a primary source of rules’, references to them could still be made because the tribunal ‘believe[d] that in essence the conclusions and reasons of those decisions are correct’.²²⁶ Evidently, if judicial decisions are used as an abbreviation of reasoning, they can create an imminent impact on the decision-making of the subsequent tribunal. Thus, where this technique is applied, it leaves almost no gap for inconsistent interpretations of similar terms by different tribunals to arise.

Again, this technique was effectively utilised by the NAFTA tribunal in *Broom Corn*

²¹⁹ *Decision of the Binational Panel in Accordance with Article 1904 of the North American Free Trade Agreement (Mexico v US)*, above n 194, [11.54] (emphasis added).

²²⁰ *Ibid.*

²²¹ Stephan W. Schill, ‘System-building in Investment Treaty Arbitration’, above n 45, 1098-9; Gideon Boas, above n 43, 113-4.

²²² *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No Arb/01/3, 14 January 2004).

²²³ Stephan W. Schill, ‘System-building in Investment Treaty Arbitration’, above n 45, 1098-9.

²²⁴ *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No Arb/01/3, 14 January 2004) [39].

²²⁵ *Ibid* [38]-[39].

²²⁶ *Ibid* [40].

Brooms.²²⁷ In this case, the Panel found that the US Government definition and subsequent application of 'like product' was neither legally correct nor incorrect because the legal explanation put forward by that authority 'was simply inadequate to permit review on this issue'.²²⁸ In determining the legal consequence of this inadequacy, the Panel found an answer that did not flow from its own analysis, but directly and immediately from WTO reasoning.²²⁹ Particularly, the Panel first pointed out that:

[a] GATT panel confronted a similar situation in the *Polyacetal Resins* case, where it was asked to review an antidumping determination by the Korean Trade Commission (KTC) that failed to make clear the grounds on which the KTC had determined "material injury." ... The *Polyacetal Resins* panel concluded that KTC's failure to make clear the basis of its decision violated the provisions of Article 8.5 of the 1979 Antidumping Code.²³⁰

The Panel then felt 'compelled to reach the same conclusion' in the case before it. In particular, since the US safeguard measures were not explained in a sufficiently clear manner, they 'must be held' to be inconsistent with NAFTA rules, specifically, Annex 803.3(12), which requires that safeguard determinations provide 'reasoned conclusions on all pertinent issues of law and fact'.²³¹ It is almost impossible to fail to observe that the NAFTA Panel grounded its finding *directly* on the WTO reasoning. The same technique was also exercised when the Panel decided to rule on the inadequacy of the US legal explanation regardless of the fact that Mexico did not raise this issue. To justify this position, the Panel adopted the reasoning reached in *Polyacetal Resins*, in which the WTO panel found the Korean measures were inconsistent with WTO law even though the complaining party did not make such a claim.²³² Similar to the *Enron v Argentina* case discussed above, the compelling WTO reasoning is the justification for the Panel in *Broom Corn Brooms* to follow the WTO approach.

4 Limitations to the Use of Judicial Decisions to Determine the Meaning

Apparently, judicial decisions have been proven to be helpful in assisting international courts and tribunals to determine the meaning of the rules under interpretation, as either an interpretative aid to clarify the meaning, a source for analogising, or an abbreviation of

²²⁷ Panel Report, *Broom Corn Brooms*, above n 189. For a discussion on the application of this technique in this case, see N'Gunu N. Tiny, above n 205, 17-20, 23-6.

²²⁸ Panel Report, *Broom Corn Brooms*, above n 189, [68].

²²⁹ N'Gunu N. Tiny, above n 205, 24.

²³⁰ Panel Report, *Broom Corn Brooms*, above n 189, [69]-[70]. For the cited case, see GATT Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, GATT Doc ADP/92 (2 April 1993) [217].

²³¹ Panel Report, *Broom Corn Brooms*, above n 189, [71].

²³² *Ibid* [70]-[71].

reasoning. Thus, these practices might suggest useful ways in which judicial decisions could be utilised as supplementary means of interpretation within the determining role under Article 32. Accordingly, in multiple proceedings before the WTO and RTAs involving equivalent norms, tribunals might use judicial decisions from the other forum as supplementary means within the meaning of Article 32 to determine the meaning of the norms under interpretation. In doing so, tribunals could employ judicial decisions as either an interpretative aid to clarify the meaning, a source for analogising, or an abbreviation of reasoning.

However, in accordance with the complementary nature of supplementary means provided in Article 32, the utilisation of judicial decisions might need to be subject to certain limitations. Perhaps, the most important restriction is that, as supplementary means, judicial decisions cannot be invoked as an 'alternative' to the means of Article 31,²³³ or at the outset of the interpretation.²³⁴ This seems to be a reasonable restriction, given 'the pitfalls inherent in the use of supplementary materials which lack the authentic element present in the means of Article 31'.²³⁵ Accordingly, a proper utilisation of judicial decisions as supplementary means to determine the meaning of the rules under interpretation might require tribunals to first reasonably exhaust the means provided in Article 31. Only when it could be established that these means leave the meaning ambiguous, obscure, or lead to a result which is manifestly absurd or unreasonable, recourse may then be made to supplementary means, including judicial decisions to determine the meaning of the rules under interpretation.

The tribunal in *Eureko v Poland*²³⁶ discussed above seemed to faithfully follow this logic, and only made recourse to prior judicial decisions to clarify the meaning of the umbrella clause after an independent interpretation in accordance with Article 31. Thus, even though the tribunal in *Eureko v Poland* did not spell out the theoretical foundation for its approach, the case might still be seen as a good example where judicial decisions are appropriately utilised as supplementary means of interpretation under Article 32. In light of these analyses, it might be said that had the NAFTA Panel in *Broom Corn Brooms* decided to justify its use of GATT/WTO decisions on the basis of Article 32, the Panel would, first of all, need to establish that the primary means of interpretation could not resolve, for example, the ambiguity or obscurity, in the meaning of the rules under interpretation, before it could utilise GATT/WTO decisions as either a source for analogy, or an abbreviation of reasoning. The rationale of this restriction is

²³³ Isabelle Van Damme, above n 90, 306.

²³⁴ Mark Eugen Villiger, above n 90, 447.

²³⁵ Ibid.

²³⁶ *Eureko B.V v Republic of Poland (Partial Award)* (UNCITRAL Arbitral Tribunal, 19 August 2005).

to ensure that judicial decisions will not be appealed to as the sole element, but only *part of a wider interpretative process* involving other primary and supplementary means 'that in fact may point in different directions'.²³⁷ As a product of complementary means, an interpretation suggested by judicial decisions may only be useful and credible to the extent that there is no other primary means pointing to a different interpretation. If there is such an obligatory means indicating a different reading, the best supplementary means can do is to suggest the tribunal revisit its application of the general rule of interpretation, rather than to directly modify the interpretation arrived at by the obligatory interpretative techniques.

The utilisation of judicial decisions as part of the wider interpretative process does not mean that judicial decisions will lose their constraining force. Actually, when a tribunal employs judicial decisions to confirm the meaning resulting from the application of Article 31, it is in fact performing an interpretation that is in conformity with the interpretation of the prior tribunal. Similarly, where a tribunal utilises judicial decisions as supplementary means to determine the meaning, it also accords a substantial weight to prior decisions, and in effect follows the interpretation made by earlier tribunals. The constraining force of judicial decisions, as analysed previously, does not stem from formal legalistic obligations, but from argumentative burdens that judicial decisions may generate on subsequent tribunals. Indeed, as far as equivalent norms are concerned, if a tribunal is interpreting the equivalent rules that were already interpreted by a previous tribunal, it may take that interpretation into consideration to either confirm or determine the meaning of the equivalent rules. In doing so, the subsequent tribunal may make a different interpretation of the equivalent rules, but, to be reasonable, it may need to pronounce clearly factors that cause it to reach a different interpretative outcome. It is clear that even when invoked under the framework of supplementary means of interpretation, rather than a *de facto* stare decisis doctrine, judicial decisions may still retain their argumentative power on subsequent tribunals where Article 31 has not provided a clear answer, and thus contribute to an enhancement of consistency between interpretations made by different tribunals on equivalent rules.

Nevertheless, the requirement to be used as part of the wider interpretive process also means that judicial decisions could not ensure a completely homogeneous interpretation by different tribunals on similar or identical norms. Certainly, even though international courts and tribunals

²³⁷ Andre Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011) 237-8. See also Benedikt Pirker, 'Interpreting Multi-Sourced Equivalent Norms: Judicial Borrowing in International Courts' in Tomer Brode and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011) 93, 114; Christoph Schreuer, above n 45, 139, 143; Andrea K Bjorklund, above n 45, 278.

could refer to the jurisprudence of one another, each of them still remains as 'an independent body, based on a different instrument binding its parties, which do not necessarily coincide with those of other courts and tribunals'.²³⁸ Thus, differences in the constituting instruments and applicable law may explain why a completely unified interpretation cannot be achieved across regimes even on similar or identical rules. Moreover, as mentioned above, various primary means of interpretation provided in Article 31, such as the context, object and purpose, or subsequent agreements may suggest a different reading of the rules under interpretation, over which judicial decisions, as supplementary means could not prevail. Therefore, the ICTY seems to be correct to spell out in *Zejnir Delalic* that although other decisions of international courts should be taken into account to promote consistency, stability, and predictability between international judicial bodies, the tribunal may, '*after careful consideration*, come to a different conclusion'.²³⁹ However, to the extent that incompatible judicial pronouncements are backed by defensible reasons, they may still be within the scope of reasonable differences, and thus may not be contrary to the principle of reasonableness in law.²⁴⁰ In this light, even though judicial decisions cannot eliminate all sorts of inconsistencies, their use as supplementary means of interpretation may still be meaningful since they can help to minimise unreasonably inconsistent interpretations, that is, inconsistent interpretations that are not supported by any concrete reason.

In theory, the integration of WTO and RTA decisions should be a two way process. However, the use of RTA decisions to clarify or determine the meaning of WTO rules may be more limited than the reverse way. Indeed, even though RTA decisions may certainly be useful to WTO tribunals, they are generally not a source to articulate drafting intention of a WTO rule. This is because, as analysed previously, the equivalence between WTO and RTA rules is not a coincidence but generally results from the fact that RTAs intentionally incorporate WTO rules into their texts. Moreover, while the WTO has a rich jurisprudence, from which RTA tribunals could generally find valuable interpretative aids, RTA decided cases, with a relative exception

²³⁸ Tullio Treves, above n 55, 1795.

²³⁹ *Prosecutor v Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnir Delalic (Appeal Judgement)* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-96-21-A, 20 February 2001) (*Prosecutor v Zejnir Delalic*) [24] (emphasis added). See also Tullio Treves, above n 55, 1795.

²⁴⁰ Robert Alexy, 'The Reasonableness of Law' in Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds), *Reasonableness and Law* (Springer London, 2009) 5, 12-3. See also Alberto Artosi, 'Reasonableness Common Sense and Science' in Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds), *Reasonableness and Law* (Springer London, 2009) 69, 70; Andre Nollkaemper, above n 242, 158.

for Mercosur and NAFTA, are still very rare.²⁴¹ In the future when RTAs are able to develop a comparably rich and credible jurisprudence, there would be more pressure to reconstruct a balanced interaction between the two fora. Given the greater advantage in many respects of the WTO procedure which may lead to the flowing of most disputes between WTO Members into the WTO forum,²⁴² that day does not seem to come in the near future. At this stage, the far richer and well-established jurisprudence of the WTO means that the integration of WTO and RTA decisions on equivalent norms may in fact amount to the interpretation of the incorporative RTA rules in relative conformity to WTO jurisprudence. This seems desirable because it signifies that the WTO still in fact retains some control over RTAs, ensuring a necessary level of security and predictability for the world trading system as a whole.

IV CONCLUSION

Currently, there seem to be no international legal rules that can satisfactorily eliminate the risks of multiple proceedings over essentially the same disputes before the WTO and RTA fora. In this context, Article 32 VCLT might provide useful alternatives. This is not magic tool, but it can to some extent minimise the risks of inconsistent interpretations and rulings over similar or identical rules.

Indeed, instead of being invoked as a pragmatic technique, judicial decisions might be employed on a more clearly-defined theoretical foundation, that is, as supplementary means of interpretation under Article 32 VCLT. Accordingly, in interpreting the incorporative RTA rules, RTA tribunals might utilise WTO decisions interpreting the equivalent WTO rules as supplementary means of interpretation to either confirm or determine the meaning of the incorporative RTA rules on the basis of Article 32 VCLT. Where judicial decisions are employed to determine the meaning, they might be utilised as either an interpretative aid to clarify the meaning, a source for analogising, or an abbreviation of reasoning. This approach can meaningfully assist the integration of WTO and RTA decisions on equivalent norms into each other because by using WTO decisions in such a manner, RTA tribunals in effect interpret

²⁴¹ Compared to 457 WTO complaints, 149 panel reports, and 90 Appellate Body reports as of April, 2013, there have been only 25 known decisions under RTAs relating 16 disputes. See Amelia Porges, above n 3, 492; David Morgan, above n 3, 244; World Trade Organization, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (Geneva, WTO, 2011) 175-8.

²⁴² William J. Davey, 'Dispute Settlement in the WTO and RTAs: A Comment' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreement and the WTO Legal System* (Oxford University Press, 2006) 343, 349-57; David Morgan, above n 3; Joost Pauwelyn, 'Going Global or Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with Other Jurisdictions, in particular that of the WTO' (2004) 13 *Minnesota Journal of Global Trade* 231, 354-7.

the incorporative RTA rules in conformity with WTO jurisprudence. However, this does not mean that a completely homogeneous interpretation of equivalent norms by WTO and RTA tribunals could be ensured. As supplementary means, judicial decisions are only *part of a wider interpretative process* involving other primary means 'that in fact may point in different directions'.²⁴³ If there is such an obligatory means indicating a different reading, judicial decisions, as supplementary means, cannot modify the interpretation arrived at by the obligatory interpretative techniques. Thus, incompatible judicial findings on equivalent norms may at times be both reasonable and unavoidable.

The diminished availability of contradictory outcomes in international trade adjudication has the potential to render parallel or subsequent claims in different fora less attractive. By becoming a deterrent for submitting the same claims in different fora, an interpretative tool like Articles 32 VCLT could, implicitly, provide a solution to jurisdictional conflicts and international forum shopping.

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²⁴³ Andre Nollkaemper, above n 242, 237-8. See also Benedikt Pirker, above n 242, 114; Christoph Schreuer, above n 45, 139, 143; Andrea K Bjorklund, above n 45, 278.

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