Evandro Menezes de Carvalho

Law and Philosophy Library 91

# Semiotics of International Law

## *Trade and Translation*

Springer

SEMIOTICS OF INTERNATIONAL LAW

Law and Philosophy Library

VOLUME 91



For further volumes:
http://www.springer.com/series/6210

# SEMIOTICS OF INTERNATIONAL LAW

## Trade and Translation

by

Evandro Menezes de Carvalho

*Getúlio Vargas Foundation (FGV), Rio de Janeiro, Brazil*

Translation by

Luciana Carvalho Fonseca

Springer

Dr. Evandro Menezes de Carvalho
Fundação Getúlio Vargas (FGV)
Praia de Botafogo, 190. 13o andar
22250-900 – Rio de Janeiro
Brazil
evandro.carvalho@fgv.br

ISSN 1572-4395
ISBN 978-90-481-9010-2 e-ISBN 978-90-481-9011-9
DOI 10.1007/978-90-481-9011-9
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2010935811

*To my parents*
*José Maria and Maria Neusa*

# Preface

The statement that one cannot reflect or think but through words surprises no one. Each word corresponds to an idea, expresses a concept, and describes an action or thing. In information theory, it has a meaning. But this same theory teaches us that there are polysemous words, which have more than one meaning.

Among the many meanings words have, in the field of the law, they acquire specialized meanings, thus having different shades of meaning from those employed in colloquial language. *Defendant* is a word used to designate the party against which an action is brought. However, to the lay people on the street, *defendant* is someone who has been accused of a crime. It is true that a person can be accused of a crime, and after, when being represented in court, play the role of a *defendant*. Nevertheless, to the legal profession, the meaning is broader and encompasses a number of different situations.

The language of the law has, therefore, specific meanings, and these may have different shades within each field of the law. It is the field's respective meaning that shall predominate in the decisions and in the interpretations arrived at in a particular field.

It is for no other reason that in reading the decisions of the World Trade Organization's Appellate Body, we find numerous references to the dictionary of the *Real Academia de Madri*, to the *Larousse*, the *Robert*, the *Oxford Shorter Dictionary*, and to other dictionaries, that are used in interpreting WTO Agreements. But words are not employed alone in the Law. They are embedded in sentences that describe actions, define sanctions, give commands, etc. In turn, sentences – and the words that form them – are part of a bigger context, the Agreement, which, in turn, is part of the body of Agreements.

Words are, therefore, the bricks with which interpreting and the concepts applied to the Marrakech Accords are built. They are thus bound to the concept that inspired the Agreements. They have to be harmonious with the goals of the text that they shape.

---

Doctor in International Law from the University of São Paulo (USP), Brazil. Professor of International Law at the Getúlio Vargas Foundation Law School (FGV Direito Rio) and at the School of Law of the Fluminense Federal University (UFF) in Rio de Janeiro, Brazil

When we think that WTO Agreements are a result of the joint will of more than one-hundred States, and that the delegates, during negotiations, with very few exceptions were using languages other than their native languages, and that there are three original versions to the Agreements, and that these versions – in Spanish, French and English – are deemed equally authentic, we can only attempt to account for the many different possibilities of meaning.

This is very reason why Evandro Menezes de Carvalho's investigation of the legal and decisional discourse of the World Trade Organization, from the perspective of semiotics, is so important. The topic is relevant, the approach so original and creative, that we expect he does not stop here, but develops and expands it to other situations in a near future.

In this book, he starts by analysing the decision-making discourse of the Appellate Body of the WTO, firstly, by examining how interpreting takes place therein, and, secondly, by determining which are the problems raised and the solutions given when interpreting international treaties that are drafted in three equally authentic versions.

There is an agreement among the different languages in which the treaties have been drafted, and this agreement reveals the true intention of the authors of the treaties. Interpreting is always carried out by the Appellate Body aimed at establishing one single and precise meaning for the contentious term or phrase in a given context, and this meaning conveys the exact idea that all the authors of the Treaty had in mind. In other words, interpretation aims at finding the real and precise meaning of a given contextualized word or phrase.

The kind of interpretation that Evandro Menezes de Carvalho calls dictionary-based interpretation, and the way he addresses how the different language versions are compared, are expressed clearly and very useful. The rare need of comparing the different language versions does not mean they are less important, but rather that the potential polysemous nature of terms and phrases in the same language and across languages, must always be taken into account.

It is only when there are doubts concerning the real meaning of a certain word or phrase that one needs to look to the other versions for something that is missing in another. In Portuguese, for instance, "shall" in English, can mean *poderia* (could) or *poderá* (will), *deveria* (should) or *deverá* (must), but which of these meanings was the intended meaning at the time the treaty was drafted? In Spanish or in French, the verb tense is clearly expressed by the lexeme: "*pourrait*", "could", conditional, is not "pouvra", "will", future. "Devra" (stronger should) different from "*devrait*" (weaker should). It is easier to recognize the difference between the conditional and the future, both in Spanish and French. Therefore, the polysemous nature of "shall" can be clarified by terms and phrases in other languages that refer to one or another meaning.

For most terms and phrases, there will be no need to resort to language diversity in order to obtain unity of meaning. On the other hand, as Evandro Menezes de Carvalho strongly highlights, legal culture and language are two concepts that form the screen on which the Law is designed. One cannot forget that history, in its widest sense as political, economical and cultural history, is the path that leads to a legal

culture and a language, both being seen as taking place in the space and time of the interpreter.

The position of language in space and time is also important. Any Spanish speaker knows there are differences between traditional Castilian Spanish and the Spanish spoken in Argentina, Uruguay, Mexico, Venezuela or the Philippines. The same applies to many words that are used both in Portuguese spoken in Brazil and Portuguese spoken in Portugal, but that have completely different meanings; likewise the English spoken in Australia is different from North-American English. The differences are also felt across different historical moments. This is the reason behind the pursuit of a single meaning for the words and phrases used in WTO Agreements, which is the meaning that the drafters chose to employ based on consensus (even when sometimes it was not what one drafter or another actually wanted).

Precision in meaning is so important for legal stability that the rule that the members of the Appellate Body cannot add to or take away rights or obligations from the Members is understood.

I believe that the course of globalization will some day possibly lead to the unification of meanings in languages used globally. People would speak a neutral English, which is not the English spoken in California or Texas, or Australian or Scottish English. It would be a language in which there would be a single meaning for technical or commercial terms. It would be a unified language, which would not be the *lingua universalis*, but a language in which the meaning is common a common one in certain contexts. Today, there are different dialects or varieties of English, French, Spanish, etc. It is among the meanings of words that differ in general language that one attempts to retrieve a meaning common to all the speakers. This meaning will be built progressively from negotiations and the practice, where one single meaning resulting from a common will would be applied to the general use of the language and to the pursuit of an authentic interpretation in the legal field.

This is why we must take into account that in the process of building the WTO decision-making discourse, the hands-on experience of interpreting a case will provide semantic content and the precise meaning of each word or phrase employed in the Treaties.

Studies as Evandro Menezes de Carvalho's are essential to those who wish to work in the field of International Trade Law, not only because they can be directly applied to a semiotic analysis of the reports of the Appellate Body, but also because of how much they represent as a method of research and thought within the other areas of International Trade Law. For this reason, I highly recommend this book as a necessary tool to those working in International Trade Law.

By doing so, I am not relying on the excellent relationship I developed with Evandro during the time I was his supervisor, a period in which I learnt to admire his intellectual and personal qualities, nor am I being blinded by our friendship. Rather, I am doing what my vocation, which drew me to the field of the Law in the first place, imposes on me: to strive to do justice. Nevertheless, I hope that despite the poverty of my ideas, justice is done to Evandro Menezes de Carvalho's excellent work.

## Professor Luiz Olavo Baptista

Doctor, Paris II University, and HC Lisbon University. Professor of International Trade Law at the University of São Paulo Law School. *Former member of the WTO Appellate Body* (2001–2009). Member of the Permanent Court of Arbitration at The Hague since 1996, and of the International Chamber of Commerce (ICC) Institute for International Trade Practices and of its Commission on Trade and Investment Policy, since 1999.

# Introduction

Words intermediate our way of thinking and interpreting the world. Through words, we attach meaning to things and events, and by doing this, the world becomes more than a manifestation of *nature*, it becomes a manifestation of *culture*. The concept of the world resulting from this process has a practical function: it tells us something about the world and about our relationship with the world. This creative and creating intervention acting on the world offers us new ways of experiencing and understanding the world. Therefore, the world is not only what we see, but also what we produce by means of our interpretation and action in and on the world.

The human being, says Heidegger, shapes the world.[1] The process of shaping the world is not just an exclusively theoretical construction; it is also the horizon of our interests and preoccupations. It is for this reason that the concept we have of the world governs our actions, since our actions represent the standing we take or, as Berner highlighted, our actions are attitudes in the first person.[2] Each one of us experiences the world in a way that enables us to formulate an opinion about it. This opinion is shared via words, painting, sculpture, photography, video, design, etc. All these signs are ways of *representing* the world. However, the world cannot be simply reduced to our very representations. Therefore, the main question is not whether our *representation* of the world can be compared to the world itself, but whether (and how) the *representations* we make of the world can be compared to each other.

From this perspective, was Nietzsche indeed right when saying that there is no such thing as fact, only interpretation? Nietzche's reflection was based on the idea that the value of nature is attributed by man, because only man creates the world that interests man.[3] Therefore, the world is not given to us, but constructed by us through interpretation, because it is impossible to have direct access to the world, since we can only access an interpretation of the world. Consequently, it is more appropriate to state that we have "versions" of the world, and we would be much better off,

[1] Heidegger (1992), at. 264 sq.
[2] Berner (2006), at. 47.
[3] Nietzsche (1974), at. 242.

according to Goodman, should mankind focus on the versions of the world instead of on the worlds themselves.[4]

But how can we reach a *common* concept of the world if we experience the "world" in different ways based on the time and culture in which we live? How can each one of us, limited by space and time, have access to a point of view on the world that can be changed, discussed, and shared? Can we arrive at a common concept of the world when we are only in touch with a part of it? Furthermore, how can we know the world in its totality if we ourselves are only but a part of the whole? Despite the subjective divergence in understanding and apprehending reality, we assume there is an objective convergence. According to Clavier, "although disagreement is always possible with my interlocutor, we speak of the same world, and it is from this world that we speak to each other, even though we do not necessarily say the same thing".[5] We speak of the same world although we do not say the same thing. This statement brings out the objective element referred to by the interlocutors. The world is the *same*. However, when we focus on what was *said* about the world, we occupy the subjective dimension of understanding reality. Therefore, is it of the *same* world we speak of when we speak of this world *differently*? The various experiences and interpretations of the world explain the root of many international disputes and the differences in opinion about how to regulate the world.

When we limit ourselves to the domestic dimension of the State, national law mirrors the concept of the world that this particular State has created. This concept determines both the way the State regulates and interprets the social relations across its territory and the way the State defines its foreign policy, including its legal policy in the sphere of international relations. It is for this reason that domestic legal norms are clues that reveal the characteristics of a society and the way a society conceives reality, because the legal treatment given to certain facts and relations show whether the society is patriarchal or matriarchal, monogamous or polygamous, capitalist or socialist, bellicose or peacekeeping, religious or secular. The law gives important clues on the world around it, as well as on the world conceived by it, and the world it aims at regulating. And from among the myriad of possible worlds, the law protects *one* in which it hopes to ensure social order. This *legal world* serves as parameters for the individuals governed by it. Thus, acting according to this legal world means legitimizing it. On the other hand, acting against it is to threaten its very existence. Whoever attempts to recreate the world in a way that is incompatible with the world created by the law may be faced with problems in the *legal* world.

However, if each State has its own way of interpreting things and events, is it possible for international law to amalgamate all the different concepts of the world each country has? In other words, can we ensure that the terms "lawyer", "avocat", and "advogado" refer to the same state of things in the world? Cultural and linguistic diversity challenge anyone who answers yes. After all, the role of "lawyers" in

[4]Goodman (1992), at. 127.

[5]Clavier (2000), at. 21. All the quotations from sources in other languages have been translated freely.

English law are not the same as the role of an "avocats" according to French law, nor to the role of "advogados" in Brazilian law. Translating one of these terms for the other, without taking into consideration the differences that, in practice, exist among them, will lead the interpreter to making the serious mistake of distorting reality.

However, the effectiveness and legitimacy of international law depend on a potential consensus among its interpreters about the "world" they intend to regulate. This challenge cannot ignore the language issue. This does not mean that it is impossible to translate international law, but rather, this highlights the semantic analysis of legal norms as a way of gaining access to the *meaning of reality* in normative expressions. Therefore, the influence of different languages on the process of building meaning in international law is relevant to those that both wish to understand and regulate the world.

Currently, there are approximately 6,700 languages in the world.[6] However, only the first twelve are spoken by more than 100 million people. This means that 0.2% of the languages in the world are spoken by 44.3% of the world's population.[7] Most of these languages have become the official languages of the main international organizations due to geopolitical and economic reasons.[8] Managing the multilingual environment was one of the first challenges faced by these organizations. In practice, English has taken a leading role. However, the experience of other international organizations in managing multilingualism, as the case of the European Union, has renewed the debate concerning the role of languages in producing and interpreting international law.

Interpreting international legal texts raises a series of issues that can only be overcome by avoiding a superficial reading of some essential definitions, notably the definition of interpretation. According to Rousseau, "interpretation is an intellectual operation that consists of determining *the* meaning of a legal act, reaching and clarifying its obscure and ambiguous points."[9] Virally, in turn, said that "interpretation is to determine *the* meaning of a norm (or, eventually, extract *the* meaning of a legal fact)" whose signifiers "is given and known."[10] According to Dinh, interpretation consists of "bringing out *the* exact meaning and the content of the norm applied to a given situation."[11] In all these definitions, the article *the* in bold is, in their respective original texts, a singular defined article that conveys the idea that the norm contains *one single* content for the interpreter to reveal. This was not necessarily the intention

[6]UNESCO Interactive Atlas of the World's Languages in Danger, on line edition. http://www.unesco.org/culture/ich/index.php?lg=EN&pg=00136.

[7]They are: Chinese, Spanish, English, Bengali, Hindi, Urdu, Arabic, Portuguese, Russian, Japanese, German and French. See: http://www2.ignatius.edu/faculty/turner/languages.htm.

[8]Arabic, Chinese, English, French, Russian, and Spanish are official languages of the UN and are present in most of the institutions of the UN system.

[9]Rousseau (1953), at. 48. Emphasis added.

[10]Virally (1997), at. 135. Emphasis added.

[11]Dinh (2002), at. 253. Emphasis added.

of the authors. However, the text as written enables this understanding – especially when stating *exact meaning* or *given and known*.

When interpreting a text, we speak of something that pre-exists our interpretation.[12] However, linguistic diversity and the multiple cultural references present in international relations cannot be subject to a formula of the kind "sign *x* of language *A* ≡ sign *y* of language *B*". In other words, as Rigaux stated, a word from one language does not correspond exactly to a word in another language.[13] There is, however, a close interaction between the concept of the world and the system of signifiers that name the semantic units of a given community. Therefore, a certain sign in a language *A* may not only not have an equivalent in another language, but also may imply, when translated, a reorganization of the semantic experience of the legal culture of language *B*. For this reason, the choice of one language as a reference for a communicative and interpretive act may be decisive in determining the meaning to be privileged in a diplomatic dialog or in an international dispute. After all, meaning is never exact and the interpreter may not know the signifier.

As a result, for both jurist and translator, the parallel language versions of a treaty do not guarantee they are identical. As Jutras warns, "one cannot be sure that the versions, which, after being adopted, are inevitably filtered through different languages, cultures and legal traditions, produce the same effects and develop the same way across all of them."[14] There is always the possibility that the States, even when acting in good faith, associate a different meaning to the same terms used in a treaty due to language diversity or national laws.[15] Thus, analyzing how multilingualism and multiculturalism in the international system can have repercussions on international legal relations is a task worthy of attention.

This book focuses on the problems resulting from the interpretation of legal-diplomatic texts written in more than one language. The object of our study is the legal discourse of the World Trade Organization (WTO). The influence and prestige of the WTO in international relations, due to the fact that it addresses world trade and has at its disposal a group of agencies and legal rules that strengthen its jurisdiction and procedures, illustrate the importance of its discourse, and thus justifies our choice of topic. WTO discourses do not only convey contents that trigger the administrative structure of the WTO, but they also supply pragmatic instruction to WTO Member States, and help shape a common legal culture in the field of international commerce.

The concept of "legal culture" is an invitation to look at international law under another perspective. This concept connects legal norms to the material and immaterial reality of society. Therefore, legal culture controls the excesses of legal formalism, undermines the apparent impersonality of the law, and encourages us to open up for other concepts of the world regarding the legal contents conveyed

[12] Eco (1998), at. 367.

[13] Rigaux (2000), at. 188.

[14] Jutras (2000), at. 786.

[15] Simon (1981), at. 130–131.

and negotiated by States. This concept is also most opportune insofar as recent legal texts seek to express neutrality between the common law and civil law systems, which is mirrored by a clear attempt of legal drafters to avoid "culturally marked" terms.[16]

The diversity of legal cultures and languages enriches the possibilities of understanding and developing international law. On the other hand, it may also be the cause of instability and legal uncertainty in the international system. For this reason, according to Chatillon, due to the growing importance of international law and the intensifying global commerce, law professionals cannot do with out the study of foreign laws and languages, notably English, which has become the international *lingua franca*. And Chatillon warns: "legal English conveys concepts of *common law* and it's the use of English by parties who do not belong to the common law culture may lead to errors or inaccuracies [. . .]".[17] The consequences of language on the negotiation and interpretation process of treaties are still a debate that requires more investigation. "Legal culture" and "language" are, therefore, two interdependent dimensions that a study international legal discourse cannot overlook. Both of these dimensions will be addressed in this book from a semiotic perspective. Addressing them separately is how we chose to methodologically approach the core element of this study – which is also the intersection between the two dimensions: the linguistic sign. And as an element of language, the sign is not less important in the building and promoting *a* legal "reality", i.e., the legal reality of the WTO.

Therefore, "legal culture" as a *system of signification* and as a *communicative process* finds in the concept of "language" its core element, thus enabling a discussion on criteria for a typology of *international legal discourse*. However, for the purposes of this study, the discussion will be limited to the *legal-diplomatic discourse* and the *decision-making discourse*, produced by the WTO Appellate Body. Two axis of reflection will be present in this analysis. The first concerns an investigation of the *methods of interpretation* adopted by the Appellate Body, highlighting a cultural problem, since, according to Anzilotti, an English jurist tends to exclude the preparatory work according to which the norms interpreted were drafted, and a French or Italian jurist are likely to investigate the historical process of the norm and accept its influence in determining its literal meaning.[18] The second axis is devoted to the problems derived from the interpretation of international treaties that have been authenticated in more than one language. This, according to Brotons, is a topic that has often been ignored and despite its complexity, which results from the difficulty in establishing perfectly corresponding terms on the conceptual plane.[19] We believe that these two directions will enable us to investigate not only the degree of openness of the Appellate Body to perform its jurisdictional function in the light

[16] Chatillon (2002), at. 691.

[17] Ibid., at. 715, emphasis in the original.

[18] Anzilotti (1999), at. 113–114. (Collection Les Introuvables).

[19] Brotons (1987), at. 316.

of the different language versions of the WTO Agreements, but also the degree of importance of these versions in the WTO discourse.

Lastly, we cannot ignore the limits imposed by the circumstances of the interpretive act. These circumstances produce variables affecting the usage of linguistic codes, and determine the situation in which the legal-diplomatic text and the decision-making discourse is, respectively, received and the produced. The decisions of the Appellate Body are the result, nonetheless, of the characteristics of the institutional structure through which the WTO acts, modifies and transforms the conditions of the world. Furthermore, the discourses in the WTO also mirror the person of the judge. Therefore, we cannot ignore that the legal-decisional discourse of the Appellate Body is issued by a panel formed by seven members of different nationalities, who have legal backgrounds of reference from different cultures, and who speak different native languages. This cultural kaleidoscope is expected to produce a legal discourse pattern capable of promoting intelligibility and coherence across WTO Agreements, which are, in turn, written in English, French and Spanish. Such complexity is rarely found in national legal systems, this is precisely why international law fascinates those devoted to the semantic analysis of legal texts.

After revisiting the topic of interpreting international treaties, we hope to innovate in both approach and method. After all, as Eco states, the progress of thought means, at times, revisiting it, not only to understand what was actually said, but also to at least understand, what can now be said by re-reading all of what has been said before.[20] The law and *Babel* will always bring new challenges to those who study international law.

[20]Eco (2001), at. 13.

# Preliminary Considerations

To begin this study, a few issues must be taken into account due to the scientific nature of the research (item *i*), the scope of the study (item *ii*), and the epistemological assumptions that guide this research (item *iii*). For the purposes of the latter, some terms used in this semiotic study made explicit from the outset will be revisited and more thoroughly explored in the chapters that follow.

## i. Toward a Scientific Analysis of Legal Discourse

Any research in the field of international legal discourse claming to be a scientific analysis must be based on methodological precision. Although the field of semiotics has been applied herein to meet this challenge, it is important to clarify how we understand science as applied to the law, to then reveal a scientific perspective that demonstrates the relevance of this study to current academic debate.

Science is one means of discourse among many others in our society. It is the discourse of science that makes it possible to convey, learn, and *make use of science* – in order to simply acquire knowledge, experiment, interact, analyze, generate wealth, etc. The linguistic facet of science is even present in the so-called exact sciences, since text is needed to serve as a platform for mathematical or logical conclusions, thus enabling them to be understood, applied and conveyed.[21] This *use* of science should not be confused with science proper, although there is no clear-cut separation between scientific knowledge and the use of science, since all cognitive science is a means to an end.[22]

However, a *method* must be applied in order to qualify discourse as scientific. A method, in turn, is understood as a group of rules and processes that have been

[21] Highlighting the scientific problem that the axiomatic trends in language create, Warat states: "To some degree, science cannot produce its object outside the dimension of language." Warat (1995), at 15.

[22] Eco calls attention to this point: "Frequently to be really 'scientific' means not pretending to be more 'scientific' than the situation allows. In the 'human' sciences one often finds an 'ideological fallacy' common to many scientific approaches, which consists in believing that one's own approach is not ideological because it succeeds in being 'objective' and 'neutral'. For my own

observed in order to attach a scientific nature to research, or, in other words, to the research discourse. The *status* of science results from the application of a method, which is nothing more than yet another discourse to decipher a "scientific" message.[23]

Research methodologies are produced by scientists. The choice of methodology depends on the object and the epistemological stand adopted by the researcher. The researcher's stand is usually arbitrary and precedes the practice of science.[24] Therefore, the human aspect is present as of the epistemological orientation, to the choice of method, and throughout the scientific discourse that claims to be "objective".

Scientific discourse is produced *by* individuals *for* individuals: they develop and choose *their* methods, produce *their* science, and debate *their* conclusions. The different possibilities of meaning in discourse, especially in the realm of the so-called human sciences, are affected by what is supposed to be the main feature of scientific discourse: objectivity. If words and their meaning were as obvious as, say, the force of gravity, we would either control the universe by means of verbal language, or at every new word or phrase something new would be revealed in the world of facts.[25]

Theories are always prone to being (re)evaluated. Theories hold, to some extent, an own discourse which is constantly under construction. This does not mean such discourse is considered sufficient or complete; it means discourse must be continuously explored. And, if discourse cannot be completely "objective", it should at least be on the way to objectification. Therefore, it may be better to consider discourse as having a scientific *claim*. It is precisely at this point we begin our analysis, the scientific claim of the so-called human and social sciences depends on its logic and on some empirical evidence from hypotheses, even in the event they hold a provisional content. But in order to accomplish this, it is important to define the object of legal discourse (item *ii*), and indicate the methodological referential adopted in this study (item *iii*).

---

part, I share the same skeptical opinion that all enquiries are 'motivated'. Theoretical research is a form of social practice. Everybody who wants to know something wants to know it in order to do something. If he claims that he wants to know it only in order 'to know' and not in order 'to do' it means that he wants to know it in order to do nothing, which is in fact a surreptitious way of doing something, i.e. Leaving the world just as it is (or as his approach assumes that it ought to be)" (Eco, 1979), at 29.

[23]Correas points out: "It is worthy of note that 'scientific' method is not produced scientifically, but produced preceding science, since it is a set of rules stipulating how science must be done." Correas (1995), at. 54.

[24]Thus, all research starts from the epistemological orientation of the researcher and from a pre-established discourse methodology (since discourse methodology does not speak for itself), thus guiding the investigation of the object and the development of the resulting scientific discourse.

[25]From Correas, we share the view that "[. . .] science is *composed* of temporary descriptive enunciations that are always relative to the limited experience on which they finds support, enunciations that, during their social existence, often compete with opposing discourses that also present themselves as scientific" (op. cit., at 93, emphasis in the original.).

## ii. Scope of Study: Legal Discourse

Every theoretical study is the interpretation and explanation of a certain phenomenon after the object of study is observed and described. In the case of this book, our object of study is clearly defined: legal discourse. In order to better define legal discourse conceptually, it should be pointed out that legal discourse is a *continuum* of societal discourse.

We begin with the notion of the law as a cultural construct. Its existence is connected to a legal culture that is not objectively referred to as the "law" at any time or place.[26] The fact is that culture is the environment where the law is coined and culture determines the law's relationship with language. As stated by Cornu, "what ensures the connection between law and language is the mediation of a third term, the environment that nourishes it and accompanies its development, in short, the culture from where it comes. Law and language are cultural events."[27] Thus, culture and language are inseparable from the process of creating the law and law language.[28]

This language is termed the "language of the law or law language"[29] due to its connection with a legal system that has been socially developed *and* that attaches to it a specialized feature distinct from common language. There are two dimensions that complete each other and give to the language of the law its distinct features. Both the *legal system* and its own *vocabulary* shape the social perception of the law, and it is up to the former to lend a prescriptive sense to law language.

The normative prescription does not describe behaviors as they are, but rather, how they should be, in the form of the deontic operators: *it is prohibited*, *mandatory* and *permitted*. The language of the law thus becomes the instrument for intervening in the social environment, sometimes to modify it or to preserve it.[30] Once the language of the law is on the move, it becomes legal discourse.[31]

Hence, the question: Is legal discourse only revealed by legal norms or does it also involve meta-discourse? To answer this question we must make a semantic

---

[26] This statement does not necessarily attach the birth of Law to the advent of the state. It is a historical standpoint and certainly not an irrefutable verdict.

[27] Cornu (2000), at 12.

[28] We must elaborate on the multidimensional object we call "Law". The goal of this study is not a theoretical approach at the ontological level. This study is limited to the linguistic dimension, taking into consideration the expression of Landowski, to whom the "Law" is more than a linguistic dimension: "what we call 'law' is not only a corpus – although quite vast – of linguistic expressions (legal discourse and jurisprudence), it is also the set of institutions and actors, of situations and decisions, of 'legal' facts and acts whose perception, as a global system of meaning that, evidently, cannot be strictly 'textual' or linguistic" Landowski (1989), at 78.

[29] The term "language of the law" or "law language" is used in the widest sense to encompass all verbal and non-verbal manifestations in the field of the law.

[30] According to Jacques, "the legal text is a place for intervention in what is real by its prescriptive role, by the transformation of what is real by its performative component, modeling what is real by its descriptive role" Jacques (1992), at 439.

[31] According to Cornu, legal discourse is "the language of the law in action, or more precisely, *language in action in the law. Legal discourse is the operationalization of language, through words*

distinction between discourse "of the law" and the so-called "legal" discourse to then establish the position of the latter for the purpose of this study. This distinction is established by analytically breaking down the semantic content in order to focus on the object of our investigation.

The discourse "of the law" refers to prescriptive utterances that threaten with the use of force, and the meanings attached to these utterances are given by the authoritative norm and issued by an acknowledged authority.[32] Thus, it is the discourse governing the actions of the addressees due to its deontic meaning whether this meaning is in the law or in a court decision. *Legal* discourse, on the other hand, refers to the discourse "of the law" but it is empty of any coercive meaning. They are discourses, scientific or not, that speak of the law. Among such discourses one can find: legal dogmatics, grounds for opinions, discussion papers on bills, and the lectures given by a law professor.[33]

All legal discourses have the same referent: the law. Therefore, they tend to build their rationality from the "insides" of their own system of law. Upon establishing the governing law, both the *authority* producing the law, and the meaning of the law, or rather "what should be done", are acknowledged. Hence, that which is intended to describe the law will also prescribe the law, to some extent. It is exactly for this reason that, according to Correas, "it is not possible to formulate a descriptive discourse regarding the discourse of the law". However, "the discourses that speak

---

*at the service of law.* One must differentiate between the two elements that make up the definition. Legal discourse is, at the same time, an act of linguistics and an act of law" (op. cit., at 211, emphasis in the original).

[32] See Correas in *Crítica da ideologia jurídica*, op. cit., at 57–73.

[33] From a point of view different from our own, Cornu states: "*a discourse may be considered legal discourse either directly, because it establishes or states what the law is, or more generally, because it contributes to the realization of the law.* Therefore, at the first level, legal discourse can be: the passing of statute, the pronouncement of judgment, the establishment of convention. All the messages that play a role in the performance of the law, such as evidence of damages, witness statements, summons, expert opinions, etc. are also legal discourse by their necessary association. Thus, the conclusion is that legal discourse originates in *the purpose of the message: all messages that establish or apply norms of law are legal discourse*" (op. cit., p. 214, emphasis in the original.). This perspective has the merit of including, among other objects of study, other textual manifestations that are not directly related to the Law; however, they maintain a relationship with the Law. According to Ziembinski, "when one uses the term 'legal language' to determine a 'language that concerns the law', mainly aims at the language that contains the propositions according to the legal provisions and legal norms from the point of view of legal dogmatics, that is, the propositions concerning the content, the binding force and the legal effects of these norms." Ziembinski also analyzes the concept of legal discourse: "One must distinguish between two things: (1) the broad definition of 'legal language' according to which legal language contains expressions of all kinds, relative to legal norms; therefore, descriptive propositions about validity, content, and the legal effects of the norms in question (or even the relative proposition to the genesis and the social implication of these norms), as well as the evaluation of legal norms and rules of exegesis of the law. (2) the concept of 'legal language' limited only to descriptive propositions. I find it useful to distinguish between 'purely descriptive legal language' and 'legal language *sensu largo'* which is, effectively, a language of specific legal sciences, it does not mean equating these sciences to a dogmatic description of a legal system" Ziembinski (1974), at 30.

of the discourse of the law have more chances of becoming a 'scientific' *description* [. . .]"[34] by virtue of the critical analysis of the *sense* of legal discourse, a sense to which the author attaches a certain legal ideology. Therefore, at the same time in which one who studies *legal discourse* has the perspective of observing the object from inside the legal system, since he or she is also subject to the subsequent norms of discourses under examination, he or she must make an effort to observe from the "outside" perspective of the legal system at issue.

Therefore, it may be said that legal discourse analysis is based on an even greater claim of being scientific than the claim made by legal dogmatics. The same may be said about legal decision-making discourse analysis. "This is because *Jurisprudential* discourse is already void of the deontic sense of law discourse".[35] That is to say that legal decision-making discourse analysis focuses less on its deontological facet than the meanings emanating from it.

Once legal discourse refers one to the discourse of the law and the deontic sense of the latter *only appears in the discourse about itself*, one may consider both discursive manifestations to fall under *legal discourse*. Therefore, discourse analysis of legal decisions of the Appellate Body in this book involves a description of the dispute and the arguments of the parties, of the provisions involved, as well as of the conclusions reached in the reports of the Appellate Body.

Finally, the claim of being scientific when engaging in legal discourse analysis of the decision-making process is not subject to the same rules that scientific discourse (and not legal discourse) requires. It is, however, necessary to instill methodological elements, and that is where semiotics provides support to our goal of making this a scientific study, one that is relevant to academic debate.

## iii. Epistemological Assumptions and Initial Concepts

This topic has two purposes: (1) to briefly highlight the epistemological stand that guided this study, and (2) to introduce a few useful concepts to guide the reading of the following chapters. Firstly, we begin by looking to Philosophy for support, more precisely to the theory of science as a theory of the material principles of human knowledge,[36] according to which we reflect on the theoretical behavior of the spirit

[34] O. Correas, op. cit., at 121, emphasis in the original.

[35] O. Correas, op. cit., at 121. Correas gives *Law discourse analysis* and *Legal discourse* a*nalysis* the status of disciplines, stating that they may be possibly qualified as *Semiology of Law* or *Legal Semiology* – recognizing however that such qualification may be premature due to the "the recent indefinition of these very recent disciplines" (Ibid., at 97 and 98). In any case, semiotics helped Correas to produce the methodological elements to critically analyze what he calls the ideological sense of the discourse of the law.

[36] Regarding the close relationship between semiotics and the theory of knowledge, Eco (2001), at 81 states that the content construction problem in semiotics cannot be separated from the problem of knowledge as giving meaning to experience. This is why, to him, semiotics should amalgamate with the theory of knowledge.

constructed on the objective reference of thought, or rather, on the relationship and agreement between thought and its object. This correlation between thought and reality is of the essence of the knowledge *phenomenon*. It enables the individual to apprehend the object, i.e., the image of the object. Therefore, during the cognitive act the subject does not only act receptively, but also actively and spontaneously before the object.

It is neither the purpose nor the scope of this book to solve the philosophical conundrum of whether or not the center of gravity of the cognitive process lays in the subject or the object, or rather, to consider knowledge a product of the determination of the subject by the object or vice-versa. It suffices to point out that knowledge cannot do without any of the two elements and the understanding of the object by the subject is recorded, via experimentation, in thought. The subject can, through intellect, build a representation; give sense to *something* that is presented to him or her and that is related to the resulting thought, shaped by experience and by contact with reality, that is, with the object.

Subject, thought, and object are integrated in the knowledge process. Limiting ourselves to the subject would lead us to the field of Psychology, where the problem of the content of the truth of thought, in other words, of the agreement between thought and object is not paramount. Focusing only on thought places us in the domain of Logic, where one can disregard the objective reference of thought content. Finally, restricting ourselves to the ontological dimension, the object alone, is also incapable of solving the problem of knowledge, since it requires the participation of a cognitive subject.

The phenomenological description[37] of knowledge reveals that the relationship between the subject and the object is mediated to some extent by a "content" of thought.[38] When one wants to *convey* this content or the retained image of an object, one avails oneself of certain resources. These resources are called signs that shape language, in which the word, whether in isolation or in combination with other words, is paramount to this study. By taking the form of a sign, the *content* acquires a "physical" aspect; since a sign can circulate among individuals, its content can, in some way, be shared. This shared form is not the very image retained in the mind of the subject, nor is it the object itself, but rather a word or phrase that is supposed to provide access to the image and to the main characteristics of the object.

Figure 1 illustrates a "direct" relationship between the subject and the content revealed by cognitive experience. However, since conveying content largely depends on some kind of "materialness", this relationship is not possible without the mediation of an expressive form. Therefore, for the purposes of this semiotic study, the

[37] According to Hessen (2000), at p. 26, the "phenomenological method can only offer a *description* of the phenomenon of knowledge. Based on this phenomenological description, one should look for philosophical explanation and interpretation, a *theory* of knowledge".

[38] We consider "thought", "contents of consciousness" and "content" synonyms.

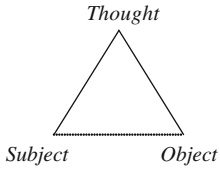



**Fig. 1** Relationship between subject and content revealed by cognitive experience

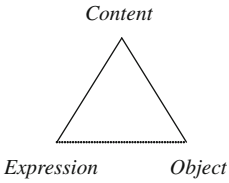



**Fig. 2** Semiotic Triangle

triangle in the previous figure has been reformulated in Fig. 2, in which the *subject* has been replaced by *expression.* This substitution by no means excludes the subject; rather, it places the subject at the center of the triangle, since there is no ideal producer of signs – another epistemological assumption in our study.[39]

The relationship between *expression* and *content* is one of signification. The "physical" dimension of expression would mean nothing if not attached to content. Content, on the other hand, cannot be conveyed without an element from the dimension expression. Thus, "Каждый человек имеет право на жизнь, на свободу и на личную неприкосновенность" conveys no meaning to the reader that is not versed in the Russian; in this case, the message would be void of signification.[40] However, the content of the Russian sentence above would certainly be better conveyed if we were to say, in English, "All individuals have the right to life, liberty, and security of the person" – supposing, of course, the addressee of the message is

[39]The triangle in Fig. 2 was coined by Ogden and Richards (1956), at 9. The authors used, however, the terms *symbol*, *reference or thought* and *referent* in order to designate, respectively, what is called *expression*, *content* and *object*. The latter also termed "referent".

[40]The message at issue, as the form of the signifier, is a graphical manifestation that endures even when not received by the recipient. On the other hand, the message as a signified corresponds to the form of the signifier to which the addressee, by means of certain codes, attached a certain meaning. Eco (2003), at 42. Since this study is restricted to textual verbal language, we will not address other dimensions of signification that one can be faced with when in contact with an unknown language. Eco explains that "under some conditions it is perfectly possible to detect the cultural origin of a gesturer because his gestures have a clear connotative capacity. Even if we do not know the socialized meanings of those gestures we can at any rate recognize the gesturer as Italian, Jew, Anglo-Saxon and so on just as almost everybody is able to recognize a Chinese or German speaker as such even if he does not know Chinese of German. These behaviors are able to signify even though the sender does not attribute such a capacity to them" (*A Theory of Semiotics*, op. cit., at 18).

a speaker of English.[41] Therefore, not only would the words utilized be understood, but also the content of the message would be conveyed.

The combination between an expression (word or phrase) and content – herein termed, respectively, signifier and signified, – make up the *sign*.[42] A sign can be defined as something that stands for something else, promoting the exchange of concepts in the world or, as the different notions of an object.[43] Peirce explains that a sign "is a thing which serves to convey knowledge of some other thing, which it is said to *stand for* or *represent*. This thing is called the *object* of the sign".[44] Eco defines a sign as "*everything* that, on the grounds of a previously established social convention, can be taken as *something standing for something else*."[45] This "something else", Eco warns, "does not necessarily have to exist or to actually be somewhere at the moment in which a sign stands in for it".[46] As Peirce had previously stated, it can be a thing that exists and is known or believed to have previously existed or was expected to exist.[47] These quotes raise the problem of the object in the semiotic triangle: how can the subject acquire knowledge of the object if the object in question may not physically exist in the real world?

Underlying this question is the problem of the relationship between *sign* and *referent* – a topic that has received little attention from semiologists. Eco states that the presence of the referent, or its absence or non-existence, does not interfere in the study of a certain symbol as it is used in a certain society and in relation to certain codes.[48] This is because, according to Eco's later work, "a referent as such has no sense at all. It is a state of the world."[49] We presume that it is impossible to

---

[41] The message is written in Article 3 of the Universal Declaration of Human Rights, enacted by Resolution 217 A (iii) of the General Assembly of the United Nations, on December 10, 1948.

[42] The definition of Saussure: "a *sign* is the combination of a concept and a sound pattern. [...] We propose to keep the term *sign* to designate the whole, but to replace *concept* and *sound pattern* respectively by *signification* and *signal*. The latter terms have the advantage of indicating the distinction which separates each from the other and both from the whole of which they are part" (F. de Saussure, 1983), at 67, emphasis in the original. Some additional considerations regarding the concept of sign will be addressed in the second part of this book, especially in Section 9.1.

[43] To apprehend the object in science is to retain it in the form of language. By mentioning the chemical substance of $H_2O$, water is not produced on this sheet of paper – neither does water appear by one simply saying "water". However, being able to say it conveys the knowledge of it without us having to attach a sample of water to this book so the reader knows what we are talking about.

[44] Peirce (1893–1913) (USA: Indiana University Press, at 13, emphasis in the original).

[45] U. Eco, *A Theory of Semiotics*, op. cit., at 16, emphasis in the original.

[46] Ibid, at 7.

[47] Peirce (2000), at 48.

[48] Eco (2001), at 112–113. To Ullmann the *referent* is outside the scope of linguistics, thus the linguist should focus his attention on the connection between the "symbol" and "thought". Ullmann (1987), at 117–118. These theoretical perspectives may exclude the cognitive-perceptive experience of the subject in the configuration of what is "real". Greimas warned against this by supporting the convenient idea of considering *perception* a non-linguistic venue where the apprehension of signification is situated. Greimas (1986), at 11.

[49] U. Eco, *A Theory of Semiotics*, op. cit., at 92.

apprehend the outside world as it *really* is, since familiarity with it would only come the moment in which *sense* is attributed to it.

The distance that separates the sign from the referent can be seen in the process of conveying reality: what is conveyed is a "reading", an experience of *a certain* "reality", but not reality itself. This *reading* of reality (or the "reality" one wishes to convey) takes place amid specific sociocultural conditions in which the sender of the message is found. The referent would therefore be a cultural construct, and not to be confused with the real world of things and phenomena that have their respective places, but with a culturally constructed "reality" that has been transformed by the action of man.[50] Accordingly, Correas states, "one who attaches signification to an experience that one believes to take place in the outside world does this as an invention or according to a preestablished cultural convention – 'code'. In both cases there is a radical arbitrariness that prevents any possibility of the outside world having any signification outside the use of language."[51]

Regardless of its communicative purpose, the subject can organize its worldly experience and reflections by replacing them with signs. When the subject wishes to make use of an object, the signs lead the subject to the content that had been previously revealed via "contact" with the object. Whether by invention or convention, the acting socially means that we separate and join objects, naming them and making adjustments to them according to both our spiritual and material needs in order to reduce the complexity of the world. The mere fact that something has a name allows it to be recorded in our memory, and thus be part of our reality. It is this memory entry that constitutes the referent, as explained by Mamede:

> What must be clearly understood is that language does not have as referent ('it does not refer to') the object of physical and external reality (that, has been shown, is inaccessible, in its essence, by the human being, from which only phenomena can be grasped); on the contrary, its referent is the object as placed in conscience, the concept of the object, shaped by ideology and by *praxis* (in the end, by culture).[52]

**"**Reality" is the reality conceived by our culture. Initially, we inherit it. However, upon re-elaborating it according to the needs of our survival instinct and our desires for the future, we build our own *conception of the world*. This conception plays a *guiding role* to the extent it serves the practical goal of enabling us to act in the world by providing parameters for our decisions. But the world is what it is and what we would like it to be. Therefore, a conception of the world is a point of view anchored in the social and cultural context of the individual who describes it. It is our individual interpretation that we exchange with the intent of obtaining its reasonableness and social acceptance. In this process of exchanging conceived images of the world we attempt to agree on the image that will serve as reference for

[50] As stated by Saussure (1983), at 8, "one might say that it is the viewpoint adopted which creates the object."

[51] O. Correas, op. cit., at 151.

[52] Mamede (2000), at 68.

discussion on other ideal or more adequate models according to the circumstances in which we live. Our concept of the world is, however, a *reading* of the reality which, once conveyed in time and space, provides, in turn, the recipients of the message with an image of the world. This is how the discourse of culture, via its reiteration, becomes the referent for other discourses and, once inserted in society, becomes a sense of reality – until it is questioned by other views of the world. As Berner stated, "the views of the world are, such as the life of language, submitted to endless review, each viewpoint of the world being confronted by the preceding one".[53]

A cultural perspective explains why the referent can be something that, in the words of Eco and Peirce, "need not necessarily exist" or something "that is expected to exist". The notion of "truth" as an *agreement* (and not *equivalence*) of thought with an object, is confirmed from a cultural perspective. Therefore, semiotics is interested in the truth or falseness of discourse, which is culturally recognized as true or false. This implies the possibility of a discourse being considered truthful as a result of the *social strength* of its content, despite eventual referential falseness.[54]

This occurs because signs are not equal to their referents. There is, between one and the other, a content elaboration on the part of the subject with regard to the object. In the event a sign represents the object as it *really is*, or in the event it could only be said before the existence of the very object, ambiguity would not exist, and science would develop at an unprecedented speed; and most certainly lawyers, politicians, diplomats, etc would find themselves in a difficult situation, because they would not be able to *lie*.[55]

A sign exists irrespective of its referent – although the first attempts to establish with the latter a relationship whose *relational force* is increasingly more powerful

---

[53] Berner (2006) at 40. According to Berner, "the concepts of the world are themselves complex elements of heterogeneous origins and one cannot reduce cultures and civilizations to just a few of their aspects. Thus, it is difficult to speak of, for example, a Western concept of the world. What is referred to as the West is actually seen via exchange, translations, etc., as a result of conflict and balance with Greek, Latin, and Hebrew cultural contributions, as well as those of the East to which we owe many beginnings of arts and sciences. In the same fashion, one sees periods such as the Middle Ages clash and reconcile with other periods such as the Renaissance or the Reformation, Romanticism, or the Enlightenment, etc. At every step, a cultural set, in the complexity of its own constitution via the transmission and appropriations experiences *from its own standpoint* a destabilization and revision of *Weltanschauung*." Ibid, at 73–74.

[54] This statement can be exemplified by looking at the burden of proof concept in the law. As long as there is no evidence of the falsity of the argument of the other party, it is legitimate that this (supposedly) false argument be presumed truthful.

[55] If the sign does not represent an object *as it is*, then it cannot be said that the discourse contains the outside world. This world would be inaccessible as a *being* if accessed merely via the sign. Furthermore, if all signs could only reach the senses if there were a true corresponding object, it would be impossible to consider someone "not guilty" if indeed guilty. These considerations enable us to understand Eco's humorous statement that *semiotics is in principle the discipline studying everything which can be used in order to lie*. (*A Theory of Semiotics*, op. cit., at 7, emphasis in the original). "To explain the semiotic import of the lie means to understand why and how a lie (a false statement) is semiotically relevant irrespective of the truth or the falsity of that statement." (Ibid, at 65). This point leads us to the subject of signs and their "social force", which will be covered in Section 6.2.

the stronger the social convention governing such relationship. It is known that the degree of precision in the confluence of individual perceptions of the content words such as "airplane" or "missile" is higher than the expressions such as "sovereign air space" or "genocide". The question at hand is not the materialness of the first two terms as compared to the abstraction of the latter two (although this may also contribute to a perhaps greater or lesser understanding of the content of these expressions), but rather, the greater flexibility in the meaning of the latter two, due to the fact they are "victims" of little convention on their meaning.

The starting point of this study is the notion that referential *content* is defined by culture. Therefore, the standard adopted to define terms matters little, for terms are relative to a social reality in motion, "to the state of things that can always be modified by the will of men", says Jacques.[56] And for Eco "even when the referent could be the object named or designated by the expression when language is used in order to mention something, one must nonetheless maintain that an expression does not, in principle, designate any object, but on the contrary *conveys a cultural content*".[57] This is why the object of the semiotics perspective adopted in this study, from a semantic point of view, is *content* defined as a *cultural unit* conveyed by discourse, and not a referent as a reality in itself.[58]

[56]F. Jacques, "Une conception dynamique du texte", op. cit., at 440. Reality is assimilated differently, according to the cultural concepts that represent it.

[57]U. Eco, *A Theory of Semiotics*, op. cit., at 61, emphasis in the original. This study does not address a theory of reference because it does not deal with extensional semantics, that is, with the conditions of truth of an utterance. This study, at present, deals with the *conditions of signification* (intensional semantics), or the possibilities to signify (and thus, to communicate) something, even if not corresponding to a real state of facts. However, we would like to stress that we are not stating there are no utterances to which it is possible to attach certain values of truth, which can be verifiable against actual events that have been experienced.

[58]This is the opinion of Eco with which we are aligned. The author states: "the semiotic object of semantics is the *content*, not the referent, and the content has to be defined as a *cultural unit* (or as a cluster or a system of interconnected cultural units)" (*A Theory of Semiotics,* op. cit., at 62, emphasis in the original.) When considering a sign an abstract entity that represents a cultural convention (or that the object of an expression is a cultural unit) one solves the problem pertaining the expressions that traditional linguistics terms "syncategorematics" (the opposite of "categorematics"), such as *to the*, *of*, *nevertheless*. "They are fundamental elements in the process of signification it is necessary to accept the idea that the notion of referent, undoubtedly useful in other contexts, is useless and damaging in this one" Ibid, at 67.

# Contents

# Part I
# International Legal Discourse: Legal Culture Building Legal Discourse

Attempting to provide a concept of "legal culture" from a semiotic perspective means discussing the meaning of the word "culture". On the semantic field of the human sciences, "culture" is placed opposite of the idea of "nature" due to its association with human features that are not innate but created, preserved, and enhanced via communication among individuals. Culture is therefore attached to a community's symbolization ability. From this point of view, culture can be associated to, for example, producing and conveying knowledge, to the process of the social development of a people, and to the set of codes and patterns that regulate human action. The various interpretations derived from the general notion of culture have led us to examine a few traditional theories about "culture" (Chapter 1). Next, we discuss the content of "culture" considering the system of signification in which it is inserted (Chapter 2), as well as the communicative processes that are associated to it (Chapter 3). Finally, at the end of this chapter, we will offer a definition of "legal culture" that will help us establish a legal discourse typology.

The goal of investigating the decision-making discourse of the World Trade Organization required an examination of the discourses that came before it: the diplomatic discourse and legal-diplomatic discourse. The former refers to the verbal manifestations in the domain of international negotiations to draft a treaty; the latter is associated with the discourse of the treaty resulting from the negotiation.

Seeing that this book is devoted to a semiotic study of International Law, legal discourse shall be analyzed not only from the perspective of the linguistic mechanisms that give rise to it but also (and more importantly), from the perspective of the underlying problem of treaties being drafted in more than one language. This important fact has received little attention from internationalists (Part II). The study of the features of these legal discourses has been performed from the perspective of Semiotics and International law. International Law, however, has deserved an approach from a cultural perspective, that is, it is considered an objective reality of the social construct, which is marked by coherence and very particular features. Thus, any of the elements of this reality can only be apprehended according to its own circumstances and context. Therefore, firstly we must establish a semiotic concept of "legal culture". This concept encompasses both the system of linguistic signs and the communicative practices of law, which interweave in and spread across the international community (Part I).

# Chapter 1
# Culture and Legal Culture: A Semiotic Approach

## 1.1 A Content for "Culture": Two Basic Concepts

The search for the semantic content of "culture" is a tall order due to the multiple meanings that can be attributed to the word "culture". One is left with the impression that one has been dealt the joker from a deck of cards, and just like the joker, the term "culture" is always changing its value – or in this case, its meaning – according to its combination with other words in the same "hand". A word such as "culture" has the feature of being applicable in diverse contexts and circumstances.[1] However, this apparent flexibility in usage, does not exempt us from allocating meaning to the word.

We do not wish to exhaust all the possible contents awarded to this term. Our aim here is to provide one single concept in order to express our understanding of "legal culture". To reach this end, we start off with two basic concepts of culture: the first one is based on the totality of the material aspects of society; and the second focuses on the immaterial aspects of social life.

Although the two concepts pertain to different dimensions of cultural manifestation, both have to do with the organization and transformation of life in society. Both concepts can be used to refer to human kind as a whole,[2] or to peoples, nations or groups within a society. Across all these different levels of analysis there is the underlying notion of *interaction* through which cultures are constantly being shaped and reshaped. This interaction is a reminder that, in addition to a certain culture's

[1] The term "culture" may be associated to science, arts, the means of production, religion, culinary, language, fashion, etc. The second part of this book covers the contextual and circumstantial factors of a message – notably the discourse one intends to investigate.

[2] An interesting theory for thinking the real world from the viewpoint of culture is made by Ortiz, in his book *Mundialização e cultura*. Reserving the term *mundialization* to specifically refer to culture, the author believes it to be inappropriate to speak of a "world culture", situated both outside and hierarchically superior to other national and local cultures. The process of *mundialization* is part of a social phenomenon that permeates all cultural manifestations. However, without denying cultural diversity, Ortiz points out the existence of a cultural *pattern* – a common background shared by all – which does not necessarily imply the uniformization of ideas and behavior Cf. Ortiz (2000), at 30.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_1, © Springer Science+Business Media B.V. 2011

history taking place in its own time and space, every culture also has a history of its relationship with other cultures. It is based upon this premise of interaction that cultural relativism has been discarded.[3]

Cultural diversity makes any effort to establish a hierarchy among cultures dangerous.[4] However, there is no denying that any discussion on this topic can have humanity as a reference. This "humanity" (the human race) is not a vague idea, and by adopting it as a reference point, we highlight the fact that the history of each culture is but a part of world history. This is why a study that limits itself to examining a single sociocultural reality cannot escape the ties to external factors resulting from the relationship with other peoples. Cultures both influence and are influenced by factors that either strengthen or jeopardize their very own survival.

There is, however, a history of cultural contributions of various origins that favor the identification and creation of common interests. Within the perspective of the international system, the quest for economic development, reducing social inequality, and reaching international standards of living are examples of interests common to many nations. In these cases, the converging interests are more obvious, perhaps because they impact on the material dimension of society. On the other hand, the same cannot be said of immaterial aspects.

The immaterial dimension of social reality is found in the second concept of "culture". This immaterial dimension is considered a means of conceiving and expressing reality. In this case, emphasis is given to the meaning a certain cultural reality has to those that live in it, the ability these individuals have of issuing messages and interpreting the reality that surrounds or is produced by them. Culture is thus associated to language, art, and both philosophical and scientific knowledge. This immaterial dimension is, according to Santos, the dimension of:

> knowledge in the broadest sense; it is the entire body of knowledge that a society has of itself, of other societies, of the material means of living, and of its own existence. [. . .] *The study of culture from this standpoint is concerned with how known reality is codified by a society,* via words, ideas, doctrines, theories, and custom and rituals[5]

The study of culture includes the analysis of the means through which knowledge is expressed and the concepts that consciousness is aware of and manipulates. In other words, it is concerned with the processes of symbolification, that is, of replacing a thing by that which signifies it.

---

[3] According to Santos, "one can only respect cultural diversity if one understands how these cultures are inserted in world history. If we insist in relativizing these cultures and only seeing them from inside out, we would be refusing to admit the objective aspects that the development of history and of the relationship between peoples and nations impose. There is no superiority or inferiority among cultures or cultural traces, there is no law that states the characteristics of one culture are superior to another. There are, however, historical processes that relate cultures and establish true and concrete connections between them" dos Santos (1996), at 16–17.

[4] Any attempt at establishing a hierarchy must be based on specific criteria. However, there is still the risk of subjugating a culture to the criteria of another since these criteria can be multiple.

[5] J. L. dos Santos, op. cit., at 41, emphasis added.

Culture when associated to knowledge is not limited to being a means of simply describing and understanding reality; culture also serves to interpret reality, and even change it. This is because signification is not mechanical and words are not neutral: they are motivated and emotive. Words are part of a complex social process that involves power and conflicts of interest, which may in turn change the conditions of society's material existence.

Regarding the two dimensions of culture: if, on the one hand, knowledge does not operate outside the boundaries of the material social relationships in which a cognizant subject is found; on the other hand, these relationships are only made possible via communicative elements and a code of action, that is, a signification system that deciphers messages that are issued during social interaction. And here is where the meaning we attach to the term "culture" lies: a *system of signification* (or semiotic system) derived from human intervention in (and on) reality and which is shared by society at large. Culture cannot be built without signs and communication.[6]

## 1.2 The Semiotic Mechanism of Culture

The definition of culture above is applicable to any society and to all aspects of society.[7] Therefore, we can speak of national, regional, or tribal cultures when referring to the culture of a given country,[8] of a certain people located in a specific region on a map, indigenous communities, etc. In addition, the same definition can be used to speak of even more specific aspects of the culture of these societies, such as their: food culture, fashion culture, literary culture, artistic culture, scientific culture, legal culture, etc.[9]

---

[6] If every act of communication between human beings presupposes a system of signification, one must recognize, as does Eco, that both domains – that of signification and that of communication – are very closely interconnected in cultural processes (*A Theory of Semiotics*, op. cit., at 9). This is not to say that culture as a whole can be reduced to communication and signification, but that its complexity may be understood through this prism, due to the fact that all aspects of culture (such as objects, behavior, values) can become possible contents of signification.

[7] The term "society" is commonly employed where there is political integration – which would be very unlikely to take place when one used the term in global scale. However, according to Braudel, "this world is, also, a kind of society, with a hierarchy like any other society, in the vulgar usage of the word, and this global society is like an amplified image and easily recognized" Braudel (1986), at 84. To Luhmann, "the fact that there is already a global society in many important aspects, so today it would be no longer appropriate to speak of a multiplicity of societies, is generally not recognized by sociologists, who have a fixation on the political system due to the classic connotation of the concept of society, according to which the political integration of society would be necessary. Nevertheless, there clearly is a context of global interaction on a global scale" Luhmann (1985), at 154. The debate is still on.

[8] In this study, the term "national" is attached to the notion of Nation-State.

[9] This distinction may be reformulated in the terms proposed by Wallerstein. According to the author, culture can be seen as a set of characteristics that differentiate one group from another (meaning 1), and as a specific set of phenomena that are different from another set of phenomena within any group (meaning 2). In meaning 1, "culture is a way of synthesizing the ways in which

The choice of one or more of these dimensions is essential to any successful interpretative study. After making this choice of culture, describing the chosen cultural segment is based on selecting the elements or relationships considered relevant or more representative of a culture (EVANDRO, confirmar). Despite the criticism made to this kind of segmentation of reality, this approach is still valid.[10]

The chosen culture of study is therefore a subset in a larger universe containing several other subsets of culture that are organized differently and have their own features that differentiate them from the chosen culture. This chosen culture of study is just one culture among many others. In other words, a system of signification separated from the other existing systems of signification present in society.

This understanding can be compared to the semiotic studies of culture by Lótman and Uspenskii. These authors consider culture "a closed area against the backdrop of non-culture".[11] This backdrop of non-culture is considered "something strange [. . .] a specific knowledge, a specific type of life and behavior".[12] It is considered "strange" because it does not share the same characteristics of the part that was separated from the whole. Therefore, the body of knowledge on French, Brazilian, Chinese, and Dutch law, for example, is "strange" to English law; although the law in other nations, as a "backdrop of non-culture", is also a deposit of cultural content. Hence, the particle "non" in the phrase "backdrop of non-culture" should not be interpreted as a linguistic term used to signify the *absence* of culture, but rather to designate the whole from which a specific part has been sectioned for investigation.

Finally, it should be noted that by understanding culture as a "closed area", the authors give margin to errors that should be avoided. The choice of this phrase does not seem adequate when applied to the sociocultural system; although Lótman and Uspenskii did not ignore the peculiarities of this system when compared to those based on mechanical or organic models. The "loose" nature would be more related to the particularities of a given culture than to the absence of the interrelation

---

groups distinguish themselves from one another. [Culture] is what is shared by a group, and, naturally, what is not shared (or not fully shared) outside the same group." In meaning 2, "the term culture is also used to designate not the totality of specific features of a certain group in relation to another, but more importantly, certain features *inside* a certain group, in opposition to the other characteristics of the same group." As an example of meaning 2, the author states: "We use the term culture to designate what is 'symbolic', the opposite of what is material" Cf. Wallerstein (1999), at 42.

[10] Geertz, in his anthropological studies to interpret culture based on an essentially semiotic concept, explains that the observer or ethnographer will always be faced with the obstacle of *situating himself* in the culture being investigated – which apparently threatens the objective *status* of knowledge. However, the author sustains that "it is not against a body of uninterpreted data, radically thinned descriptions, that we must measure the cogency of our explications, but against the power of the scientific imagination to bring us into touch with the lives of strangers" Geertz (1973), at 16.

[11] "[. . .] culture never represents a universal group, but only a subgroup with a certain organization. It never encompasses everything, until it reaches a level with an own consistency. Culture can only be conceived as a part, as a closed area against the backdrops of non-culture" Lótman and Uspenskii (1981), at 37.

[12] Ibid, at 37.

between this culture and the "backdrop of non-culture". After all, the authors admit that "over the backdrop of non-culture, culture intervenes as a *system of signs*".[13]

Reflecting on this quotation, two items must be highlighted: "intervention" *per se*, and intervention via a "system of signs". Regarding the former, the term is linked to the "interposition or interference of one state in the affairs of another", whereas "interposition" means "to bring (influence, action, etc.) to bear between parties or on behalf of a party or person".[14] It is an expression that connotes an *action* – a communicative action even – that, in this case, is practiced by culture in the direction of the backdrop of non-culture.[15] Regarding the latter, – intervention via a "system of signs" – it must be stated that intervention takes place via a system of signs in which spoken language, during the communicative action, is the most representative among sign systems.[16]

Culture finds in *language* one of its instruments of action and conservation. Language plays the role of structurally organizing the world surrounding the subject. And according to Lótman and Uspenskii, language attaches to raw empiric matter, to the amorphous and meaningless whole, name and sense which can then be shared socially. Language changes the "open" world of realia into a "closed" world of names.[17] This role attributed to language is important to the extent that culture itself would be threatened if the system of signs were subject to constant arbitrary and random movements made by the issuers of messages.[18]

---

[13] Ibid, at 38, emphasis in the original.

[14] Random House Webster's – Unabridged Dictionary, 2003. CD-ROM. The term in question may also mean the interposition of an authority: "to interfere with force or a threat of force." In this case, the object that suffers the intervening action is placed in a subordinate position in regard to the intervener.

[15] It is important to point out that "intervention" does not only occur in the sense of *culture → backdrop of non-culture*, as Lótman and Uspenskii may suggest, but also the reverse is possible. The interaction is found at the basis of cultural exchanges, whose conveyed information – even though taking place at different levels – exerts reciprocal influence among the elements that communicate.

[16] Were we to admit a "language of culture" in the broadest sense of the term, it would include other language manifestations and not only native language, it would include gesture, pictorial expressions, etc. Language can only be taken as a phenomenon in and of itself as a theoretical abstraction, since language and culture are indivisible. The real operation of the former is incorporated into the broader sense of the latter. According to Lótman and Uspenskii, "there is no such thing as a language (in the broadest sense of the term) that is not immersed in the cultural context, nor is there a culture that does not possess at its center a structure such as the kind of structure of its own language" ("Sobre o mecanismo semiótico da cultura", op. cit., at 39).

[17] I. M. Lótman and B. Uspenskii, "Sobre o mecanismo semiótico da cultura", op. cit., at 39.

[18] When Saussure states that *the linguistic sign is arbitrary*, he wishes to highlight its unmotivated feature, which means there is no real connection between the signifier and the signified. As the author observes, the word *arbitrary* "must not be taken to imply that a sign depends on the free choice of the speaker." Saussure, op. cit., at 67 and 68, respectively. Emphasis in the original. In agreement with this understanding, Warat states that "[. . .] the idea of arbitrariness should not lead one to believe that the sign depends on the free choice of the utterer, since the utterer has no power

However, one cannot ensure that the system of linguistic signs is entirely made up of cultural units whose content is always obvious, coherent, and stable across speakers of a given language. There are indications of conventionality that are both relatively unanimous and profoundly imprecise or vague regarding the meaning conveyed by words and phrases.

The unfinished and ever-changing nature of the semiotic system of culture – in this case, of language – is a necessary condition for its normal functioning. It is for this reason that a system of linguistic signs has the characteristic of being an open system,[19] meaning that the constant exchange with other systems of signs introduce in the linguistic sign system elements of variability, whether in the realm of expression or in the realm of content. This interaction among systems propagates an increasing accumulation of new words in the realm of expression that, in turn, gives rise to a systematic differentiation process in the realm of content. When new terms are received in a given system of signs, new possibilities of meaning are created and, consequently, new interpretations of previously codified signs are also made possible.

Due to this "open" nature, signs that do not belong to a given culture should not be considered "incorrect" or "non-existent". Lótman warns against this in the field of language: "In the sphere of culture, we have been constantly shocked by the tendency to consider a foreign language as a non-language, or in less extreme cases, to consider one's own language the correct one – and others' incorrect – and to justify "correctness" by difference, that is to say, to measure adequacy".[20] Communicative processes, when expanding knowledge, continuously actualize the system of signs.[21] They introduce oppositions or alternatives in meaning that represent interpretations on other levels. Thus, any effort to shape the system of signs under a common "physiognomy" of culture would be in vain.

---

to change the sign if the signifier/signified relationship has been accepted by a linguistic group. [. . .] Thus, the sign is arbitrary, insofar as signifier/signified relationship is conventional, as in all cases of spoken language. It is the result of an agreement between users, stressing the concept of convention as a reference, in most cases, of implicit processes." Warat, op. cit., at 26–27.

[19] Words are constantly evolving – words and their contents, due to the morphological, lexical and semantic aspects of the system of signs, which cannot be detached from the cultural context in which they are inserted. Some examples to illustrate this phenomenon and the "openness" of the system of linguistic signs are: Gallicisms, Anglicisms, and neologisms inspired by new scientific discoveries, among others.

[20] I. M. Lótman, "Um modelo dinâmico do sistema semiótico." In: I. M. Lótman; B. Uspenskii; V. Ivanóv et al. *Ensaios de semiótica soviética*, op. cit., at 73. Lótman and Uspenskii find that "a languages changes uninterruptedly, but speakers are not immediately aware of the continuity of this process, since linguistic changes cannot be found in the *parole* of the same generation, but in the transmission of the *langue* from one generation to the next."("Sobre o mecanismo semiótico da cultura", op. cit., at 54, emphasis in the original).

[21] Evidence of cultural stagnation could result from societies in which the process of signification is completely automated and there is no room for new meanings; thus reducing the subject's ability of mapping or responding selectively to the unending variety of information in the surrounding environment.

We may, on the other hand, postulate that every culture creates an inherent model to promote the continuity of its own "memory".[22] From a sociocultural perspective, the term "memory" invokes the idea of historical experience. When realizing behaviors, one looks to the past to establish rules – including legal rules. These kinds of rules, however, from the perspective of one who drafts a behavior-regulation program, intervene as an inverted system: since legal rules look to the future. Therefore, *legal culture* is one of the factors of conservation and *transformation* of this memory; it is an aspect of reality, which at the same time expresses and modifies reality.

## 1.3 *One* Concept of "Legal Culture"

In the above heading, by employing the term "culture", in a noun phrase, we make an attempt of drawing more precise boundaries, which the noun alone would certainly not comprise. On the other hand, focusing on a single segment of culture does also not solve the conceptual problem of the term in its broadest sense, and by no means puts an end to contradiction. Therefore, it results that developing a concept of "legal culture" with sufficiently precise content is quite a challenge.

The concept of "legal culture" as developed by Friedman refers to objects that surpass the domain of the *law*.[23] To Friedman legal culture "refers to public knowledge of and attitudes and behavior patterns toward the legal system"[24]; and consists of "attitudes, values, and opinions held in society, with regard to law, the legal system, and its various parts"[25] or of the "ideas, attitudes, expectations and opinions about law, held by people in some given society".[26] The magnitude of this definition makes it difficult to determine exactly what is included in the concept in question and what are the relationships established between its various elements. This difficulty is aggravated further when the concept of legal culture is associated to other

[22]Lótman uses the term "memory" in the sense of the theory of information or cybernetics: the ability that certain systems have to preserve and accumulate information (Cf. I. M. Lótman, "O problema do signo e do sistema sígnico na tipologia da cultura anterior ao século XX." In: I. M. Lótman; B. Uspenskii; V. Ivanóv et al. *Ensaios de semiótica soviética*, op. cit., at 126.). From a semiotic perspective, the term "memory" could apply to the existing texts within a certain culture.

[23]Let us examine what Nombela says regarding the English term *legal* when translated into Spanish: "In general, the adjective *legal* in English refers to the realm of law, not concrete laws [. . .] so that the generic translation of the term should be always 'jurídico'. [. . .] *Legal capabilities* is 'capacidade jurídica', not 'capacidade legal', as it appears in the Lacasa-Bustamante Dictionary. The *legal basis* of an act or instrument is its 'fundamento jurídico' and, lastly, on some occasions one reads the expression 'assessoria legal', the painful literal translation of *legal counseling*, which is 'assessoria jurídica'" Nombela (1991), at 264.

[24]Friedman (1975), at 193.

[25]Idem (1977), at 76.

[26]Idem (1990), at 213.

levels of the law that are not exclusively the law of a Nation-State.[27] In this respect, Cotterrell states that "legal culture does not appear as a unitary concept but indicates an immense, multi-textured overlay of levels and regions of culture, varying in content, scope and influence and in their relation to the institutions, practices and knowledge of state legal systems."[28]

In an attempt to break down such conceptual complexity, Friedman proposes a distinction between, on the one hand, the legal culture of the members of a given society that perform specialized legal activities; and on the other hand, the legal culture of other individuals.[29] The former is termed *internal* legal culture, and the latter, *external* legal culture.[30] Although Friedman stresses the impact on the awareness of citizens of the practices institutionalized and applied by legal professionals, he does not ignore the influence of external culture on the production and transformation of legal thought.[31] This influence would be the social forces that despite not operating directly on the legal system, apply pressure on the system to create new laws. As a result of this interconnection, Cotterrell raises the objection that there is no safe way of isolating internal legal culture from culture at large.[32]

Assuming that Friedman's proposition does not adopt the legal system itself as a parameter, but rather, "real forces, real people [. . .] the concrete opposition of interest groups expressed through or in the legal system",[33] we understand that the difference between cultures is based on the role of their respective social actors. Thus, internal legal culture can be identified as the culture of judges and lawyers, for example.[34] Adopting social actors as a criterion, enables one not only to determine which individuals make up a certain cultural dimension, but also allows one to establish initial conceptual distinctions. Nevertheless, this does not suffice. The legal culture of the judges in a certain court, for example, can be studied from different angles, since, according to Friedman, the concept of "legal culture" encompasses

---

[27] Friedman emphasized the idea of the plurality of legal cultures– "a dizzying array of cultures" – within countries and nations. See *The republic of choice*, op. cit., at 213.

[28] Cotterrell (1997), at 16–17.

[29] Cf. L. M. Friedman, *The legal system*, op. cit., at 233.

[30] *External* legal culture is also referred to by Friedman as "popular" in *The republic of choice*, op. cit., at 4.

[31] Cf. L. M. Friedman, *The legal system*, op. cit., at 150, 206 and 209.

[32] In the words of the author, "there seems no obviously satisfactory way of isolating internal legal culture from the larger cultural aggregate within which, insofar as it is to be treated *as* culture, it must be implicated in an immeasurable array of linkages." R. Cotterrell, "The concept of legal culture", op. cit., at 27.

[33] L. M. Friedman, *The legal system*, op. cit., at 155.

[34] Another could not be our understanding from Friedman's reason for considering the legal culture of business "especially important" in sociological terms: "All I meant was this: *lawyers* and *judges* in many societies constitute an elite and powerful group. The legal culture of business people is "especially important", too, compared (say) to the legal culture of the homeless, or of small children. Besides, the *public* accords to lawyers and judges, or may accord them, a special role" Friedman (1997), at 36. bold, our note, italic, original. See also L. M. Friedman, *The legal system*, op. cit., at 194.

ideas, values, expectations, and practices involving the law and legal institutions, which are sustained by individuals and linked to a broad social context.[35] The dilemma of defining *legal culture* remains.

The discussion surrounding the concept of culture seems to describe general impressions that do not lend themselves to empirical analysis. In spite of this, Cotterrell states that "the concept of culture – and perhaps legal culture – remains useful as a way of referring to clusters of social phenomena (patterns of thought and belief, patterns of action or interaction, characteristic institutions) coexisting in certain social environments, where the exact relationships among elements in the cluster are not clear or are not of concern."[36] The possibility of taking the concept a little under one's control appears to depend not so much on apprehending all its manifestations, but rather on specifying a content that is strictly limited in scale or aspect. It is therefore advisable to define which segment of legal culture shall be the object of our study in order to better establish our definition.

To this end, we turn to Friedman's distinction between *internal* and *external* cultures as a starting point for our attempt to establish the content for the phrase "legal culture". Whereas the subject of our study is the Appellate Body, issuer of the discourse examined herein, it becomes clear that our investigation is situated in the realm of *internal* legal culture. From this standpoint, we could propose two hypothetical paths of investigation: (a) the study of institutional practices and the professional conduct of the decision-making members within the structure of institutional decision-making; (b) the study of the established and/or shared legal knowledge by and across the decision-making body in question.

The first path is connected, in some respect, to culture in its material form, as detailed under Section 1.1. This path embraces the practices of the judges and arbitrators in the exercise of their work. This perspective reaches the foundations of the authority vested in a decision-making body. The second path is linked to the concept of culture in its immaterial form, including the body of legal knowledge as shared by its judges. This second path could aim at making an empirical study of the decisions issued by these judges.

Based on this second path toward a concept of legal culture, we propose to define legal culture as the body of legal knowledge in which jurists were educated and with which these jurists create and transform law. In other words, legal culture consists

---

[35] The comparisons between legal systems and their specific features, in order to be *sociologically* significant, should take into consideration these features. The idea of legal families is not useful to the sociology of law because the differences between them do not necessarily correlate with the contrasts present in the socioeconomic conditions where the law is found. In the opinion of Friedman, "the conventions used to classify legal systems into 'families' such as the common law and the civil law do not distinguish between living, vital aspects of a legal system, on the one hand, and legal fossils, on the other." ("The concept of legal culture: a reply", op. cit., at 36). The concept of legal culture could not discard the social circumstances in which the legal system operates; it "sets everything in motion", it "is like winding up a clock or plugging in a machine." L. M. Friedman, *Law and society*, op. cit., at 76.

[36] R. Cotterrell, "The concept of legal culture", op. cit., at 21.

of the *system of signification of law that is conceived to produce legal discourse*.[37] Returning to Lótman and Uspenskii, the notions that are not included in this domain are those that form part of the "backdrop of non-culture", in other words, all the systems of signification that are strange to that of the law. Therefore, by limiting ourselves to the legal culture of the Appellate Body, we are focusing on the Appellate Body's system of signification, or rather, on the set of signs that make up the law and the discourses of the World Trade Organization. Without a system of signification, there can be no discourse; and without discourse, the system of signification serves no end.[38] Finally, with this concept, the notion of legal culture, which is of great interest to the Sociology of Law and to Comparative Law,[39] now holds its own place in studies in the field of semiotics of law.

[37] This definition is not limited to the discourse of law, but also encompasses the decisions of judges, doctrine, etc., which will be dealt with in item 3.3. Nevertheless, we wish to highlight the inadequacy of the expression *cultura legal*, in Portuguese or Spanish, to translate "legal culture", since it suggests a strict association of legal culture to *statute* in these languages, and, in a broader sense, to the legal system –, thus unfairly emphasizing the legislature and its discourse.

[38] We agree with Lótman and Uspenskii: "it is more accurate to speak of culture as a mechanism that creates a set of texts, and the texts as realization of culture." I. M. Lótman and B. Uspenskii. "Sobre o mecanismo semiótico da cultura", op. cit., at 46.

[39] According to Cotterrell, "a focus on legal culture might, indeed, be seen as a means of fusing the aspirations of sociology of law and comparative law." ("The concept of legal culture", op. cit., at 13). The study of legal culture would not be limited to the conceptual structures developed by comparative law to compare national legal systems. The idea of "legal families" suggests that different national legal systems may be treated as having sufficient similarities in order to be grouped together. A sociological approach is not limited to legal doctrine, but to ideas and practices that are considered inseparable from a complex social context.

# Chapter 2
# Legal Culture as a System of Signification

## 2.1 The Notion of "Code" and Its Organizing Function in the Production and Interpretation of Discourse

The notion of code, from the perspective of semiotics, involves the rules according to which a speaker produces a discourse that communicates, that is, that conveys meaning.[1] According to Eco, the code is a model based on a series of communicative conventions that enables certain messages to be communicated.[2] In discourse, the code enables the speakers to recognize the meanings of the messages conveyed: "its existence is linked to a cultural order, which is the way in which a society thinks, speaks and, while speaking, explains the 'purport' of its thought through other thoughts" and thoughts through words.[3] These are the rules that give communicative competence to the individual, enabling him to build and interpret texts.

Eco develops the notion of code from the elementary structure of communication that is apparently void of any convention. Eco highlights the structural conditions underlying informational processes. These structures are the syntax, semantics, and behavior. He calls them *s-codes* ("code as system"[4]) and considers them subject to the same formal rules, despite their containing different elements.

> The s-codes are systems or 'structures' that can also subsist independently of any sort of significant or communicative purpose, and as such may be studied by information theory or by various types of generative grammar. They are made up of finite sets of elements

[1] The term "meaning" may be considered a synonym of "signified". However, from a semiotics perspective, according to Eco, the term "meaning" refers to the dynamic process between signifier and signified, which shape and transform each other continuously. According to the author, "meaning" is a continuous and dynamic process that is established between a symbol and its signified. Whereas the former remains unchanged, the latter can change and become richer or poorer. U. Eco, *A estrutura ausente*, op. cit., at 23. The form that generates meaning is the signifier, which, because of the code, can be related to a number of contents.

[2] Ibid, at 39.

[3] U. Eco, *A Theory of Semiotics*, op. cit., at 61.

[4] U. Eco, *A Theory of Semiotics*, op. cit., at 38.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_2, © Springer Science+Business Media B.V. 2011

> oppositionally structured and governed by combinational rules that can generate both finite and infinite strings of chains of these elements.[5]

These systems are considered independent entities, nevertheless they share the same structural matrix that generates various combinations.[6] The structural organization of the units of each system falls outside the scope of this book. The study of the internal information grammar of each s-code falls under the mathematical theory of information.[7] This theory offers no explanation to our topic of interest, that is, to the question on how the *code* and the *rules of correlation* function between two or among more *s-codes*. These elements only attract the attention of a semiotic analysis when inserted in a signification framework, or rather, when a specific element of a syntactic system is associated to one or more elements of the semantic or behavioral systems. In the social sciences, Eco notes that s-codes "are usually taken into account only insofar as they constitute one of the planes of a correlation function called a 'code'".[8] It is for this reason that our study begins with *code*, although a code only exists due to *s-codes*.

Eco's proposal applies to signification processes of any kind; however, when studying linguistic signs, these s-codes are vested in the own particular properties that distinguish them from others, without depriving them from eventual intermediations. The base system is the syntactic system. Syntax is concerned with the relationship between signs, to the extent that an enunciation will not make sense when not in accordance with the rules of phrase- and word-formation in a language. Thus, if an enunciation reads "a products at specificity", for instance, it makes no syntactic sense; it will most probably need to be reformulated to "specific products", for instance. From the perspective of the sentence, as affirmed by Klinkenberg, a sequential, linear, order is paramount.[9] The elements in the syntactic system enable

---

[5] Ibid, at 38. The elements of a same s-code can be told apart by virtue of the order that is established among them, opposing one against the other due to their positions in the system. According to Eco, "taken independently of the other systems with which it can be correlated, an s-code is a *structure*; that is, a system (i) in which every value is established by positions and differences, and (ii) which appears only when different phenomena are mutually compared with reference to the same system of relations." Ibid, at 38, emphasis in the original.

[6] We use the term "structure" as employed by Eco: a model constructed and *established* to standardize diverse phenomena from a unified viewpoint. The structure is hypothetical and is a model theory, proposing that all phenomena should correspond to a theorized structural arrangement. *A estrutura ausente*, op. cit., at 36. This concept of "structure" has been adopted in his book, *A Theory of Semiotics*.

[7] It is a theory of abstract combinational possibilities in a system, in which the systems's units are told apart via binary exclusion.

[8] U. Eco, *A Theory of Semiotics*, op. cit., at 38.

[9] Cf. Klinkenberg (2000), at 145. Contrary to verbal language, whose linearity is a condition for understanding the message, the syntagmas of visual languages are spatial and their units are apprehended at the same time. "In traffic, for example, such syntagma presents three units simultaneously: /circle/ + /red/ + /pedestrian/. We apprehend these three elements simultaneously and understand 'pedestrians prohibited'. The rules, therefore, vary from code to code and each code may, strictly or loosely, manage its linearity or space" Ibid, at 146.

the elements in the *semantic* system be conveyed. Semantics is concerned with the series of contents or notions about the world that supposedly coincide with what actually takes place in real life. When syntactic and semantic elements are associated, they enable the recipient to engage in a series of *behaviors*. The role of communication under these circumstances is undeniable. Therefore, we finally arrive at a field of semiotics called *Pragmatics*: the study of relationship between signs and the individuals that use them.[10]

The ordering function of these s-codes is revealed to the extent that they limit the possibilities of combination among the elements. There is a pre-established cultural repertoire regarding the number of probable combinations in the system, which accepts certain combinations and rejects others. By limiting the number of alternatives an individual can choose from, increases the chances of intelligible message being conveyed and makes communication viable. And conveying information requires s-code criteria. Thus, for any given event, we can state – and predict even – a series of probable and possible behavioral responses, sentence- and phrase-forms, and conveyed semantic content.

> When the s-code is superimposed upon a source of extreme entropy like the typewriter keyboard, the possibilities that the latter offers for choice are reduced; as soon as I, possessing such an s-code as the English grammar, begin to write, the source possesses a lesser entropy. [. . .] Even though, of course, the number of possible messages on a typed page is still very high, nevertheless the system of rules introduced by the s-code prevents my message from containing a sequence of letters such as |Wxwxscxwxscxwxx| (except in the case of meta-linguistic formulations such as the present one).[11]

Language, in this case, establishes the semantic correlations and the syntactic combinational rules that reduce the possibilities of forming, not only words, but also phrases, sentences, and an entire text.

According to Saussure, the probability of certain signifiers occurring in a message result from the linguistic relations and differences from two perspectives: the *syntagmatic* perspective and the *paradigmatic* perspective. The former deals with the relationship between the words in a discourse. A word only acquires value due to its position in relation to other words preceding or succeeding it. The relationship between linguistic signs is therefore based on the linear nature of language, and this makes it impossible for an individual to pronounce two or more groups of words at the same time. Word combinations are supported in their extension and are made up of two or more consecutive units. Thus, Saussure states that syntagmatic relations hold *in praesentia*.[12]

---

[10] According to Maingueneau, "when one speaks of the *pragmatic component* or when one says a phenomenon is submitted to '*pragmatic* factors', it means that the component that describes the meaning of the utterance in context: 'Paul is not here', for example, is interpreted as being ironic or not ironic, a warning, or the conclusion of an argument, etc., depending on the context." Maingueneau (1996), at 65, emphasis in the original.

[11] U. Eco, *A Theory of Semiotics*, op. cit., at 44.

[12] Cf. F. de Saussure, op. cit., at 122.

On the paradigmatic axis, the relationship among words does not take place in discourse, but in the memory of the subject. "It is a connection in the brain. Such connections are part of that accumulated inventory which is the form the language takes in an individual's brain".[13] The subject internalizes (*in absentia*) the associative relationships between terms. Word-groups, differently from syntagmas (noun-phrases), do not occur in a set number or order of words. The term "commerce", for example, may invoke "trade", "market", "wealth", but may also invoke "poverty", "peace", "war", etc. The innumerous possibilities of verifiable meaning in the paradigmatic dimension are only reduced when the word is inserted into a context, or rather, a syntagmatic axis.

The signification of a sign depends on the interaction between syntagmatic relations and paradigmatic fields. Both dimensions help the interpreter in decoding a text. On the syntagmatic axis, if we begin to read the sentence "According to the report, the Appellate Body. . .", one can reasonably expect a verb will follow in order to continue the text. Thus, the combinational possibilities in the text are limited.[14] Moreover, taking into consideration the associative relationships on the paradigmatic axis, the combinational possibilities among elements are limited by semantic data. That is, we must choose, from among so many verbs, the one that best conveys the desired meaning.

This also applies to translation when the translator attempts to preserve the semantic content of a given source text. In this case, the translator aims at ascribing to another language the content conveyed by the original text. The inadequate choice of words or phrases may hinder comprehension of the translated text, and in some cases, it may completely alter the meaning of the source text. Hence the distinctive feature of translation: the content of the words and phrases in the source text, considered both individually and in context, becomes the translator-interpreter's reference for choosing the words and phrases used in the target-text. Words establish *what can be said*. There is a statistical property to the source text – in this case, the original. This property represents the amount of freedom available in the choice of words and meaning in the target language.

The correlation rules among systems of syntax, semantics and behavior, as well as the syntagmatic and paradigmatic axes, enable us to produce and interpret discourse. They are the code of a language. This code makes messages intelligible by limiting the possibilities of meaning in a certain text, and provides us with parameters to choose the content to be assigned to a certain discourse.

## 2.2 Code and Language: A Distinction and a Fundamental Relationship for the Concept of Legal Culture from a Semiotic Standpoint

The concept of "code" is much broader than that of "language". Uspenskii has clarified this distinction, although in many cases he uses "language" to refer to "code".

[13] Idem, loc. cit.

[14] For example: "According to the report, the Appellate Body *overrules* the decision of the Panel."

And this is done not without a warning about the use of the latter: "this term should evidently not be comprehended in its strict linguistic sense, but in a broader semiotic sense."[15] And he continues by stating that "language"

> determines a certain perception of facts – both real and potential – in the historical and cultural context in which it functions. [. . .] this 'language' unifies the *socius* by creating the conditions for communication among its members in a similar reaction to events. On the other hand, it organizes information, determining a selection of significant facts as well as establishing a precise nexus among them: everything happens as though what is not described in this 'language' completely escapes the social addressee and is withdrawn from his field of vision.[16]

The notion of code and of its s-codes therefore surpasses the linguistic dimension to the extent that all or any semiosis, whose relation of presumption between the form of expression and the form of content, produces signs. Whereas the system of signs is an inventory of semiotic functions; the system of signification (or code) creates new semiotic functions. Thus, we can associate the system of linguistic signs to the *vocabulary* of a language; and associate the system of signification to the rules of *communicative competence* in all its magnitude, including competence to form new signs in order to encompass, according to Greimas and Courtés, not only the "verbal world" – present in the form of natural language – but also in the "natural world" as a source of non-linguistic semiotics.[17] As a result, the meaning behind a culture's system of signification is not limited to the dimension of linguistic signs, even though these signs play a key role in the dissemination, conservation, and transformation of culture.

Language has a code, which is crystallized by society. A code results from the common use of language and, once it is established, it enables speakers to use signs according to certain rules to convey messages.[18] According to Saussure, language is understood as a set of necessary conventions, adopted by the body of society, which enable individuals to exercise the faculty of language. "It exists only in virtue of a kind of contract agreed between the members of a community".[19] Language would be like a dictionary,[20] a *system of linguistic signs* that produce ideas to which the speaker resorts to produce concrete and intelligible sign events. It is a social product defined according the set of language events.

---

[15] B. Uspenskii, "História sub specie semioticae" In: I. M. Lótman; B. Uspenskii; V. Ivanóv et al. *Ensaios de semiótica soviética*, op. cit., at 87.

[16] Idem, loc. cit., emphasis in the original.

[17] Cf. Greimas and Courtés (1993), at 102.

[18] The competence of the speaker when using the language resides in his knowledge of *combination rules*, as well as of *vocabulary* usage. These rules may be of *formation* – the way in which elementary signs are combined to form more complex signs (syntax) – or of *derivation*, allowing the creation of new expressions from other available ones (morphology). Both make up the syntagmatic process in the field of language.

[19] F. de Saussure, op. cit., at 14. "A language is a system of signs expressing ideas, and hence comparable to writing, the deaf-and-dumb alphabet, symbolic rites, forms of politeness, military sign, and so on. It is simply the most important of such systems". Ibid, at 15.

[20] Saussure gives no other explanation but that: "A language, as a collective phenomenon, takes the form of a totality of imprints in everyone's brain, rather like a dictionary of which each individual has an identical copy." Ibid, at 19.

We can state, without prejudice to what has been said at the beginning of this section, that language, as a system of linguistic signs, can be considered the "code" of speech, or rather, an individual action of producing discourse. This is so because discourse only exists within a language; it only attains signification when inserted in the system of linguistic signs. Both language and speech are interdependent because language is both the instrument and the product of speech,[21] which, in turn, is language being performed. According to Warat, if language is what enables us to understand speech, it can only be recognized inside the model in which it is produced (language). In other words, speech only attains objectiveness as a result language.[22]

The language-speech dichotomy, as canonized by Saussure, is relevant to our study. It aids us in establishing a parallel between, on the one hand, *the system of linguistic signs* and, on the other, *the process of communication* proper. The former is the necessary condition for the existence of the latter, as sustained by Hjelmslev:

> The process only exists due to an underlying system that governs it and determines its possible formation. It would not be possible to imagine a process without an underlying system because, in this case, such a process would be unexplainable, in the absolute sense of the term. A system, contrarily, is not inconceivable without a process. An existing system does not presuppose an existing process. [. . .] it is impossible to have a text without underlying language.[23]

Despite belonging to two different dimensions, linguistic signs and communicative processes appear to be inseparable. There is no categorical line between the system of signs, which is a testimony of collective usage, and the discursive process, which depends on individual freedom. Vocabulary subsidizes discourse at the same time it is enhanced by it. It is for this reason that these two dimensions – vocabulary and discourse – cannot be ignored in this study. As pointed out by Cornu, "the science of vocabulary and of discourse is the first key to legal interpretation. It develops the means and processes of text analysis: identifying key-words, selecting themes, investigating structures, etc."[24] For the moment, analyzing legal culture as a system of signification (or code) means to focus on the system of linguistic signs. This will be the topic of the next section.

---

[21] As Saussure states. Ibid, at. 27.

[22] L. A. Warat, op. cit., at 21–22.

[23] Hjelmslev (1975), at 44. In line with this reasoning, Pais states that "the discourse, the process that presupposes a system – or a competence, as an instance that legitimizes it –, is also dynamic, and is conceived by another instance, which, due to its *productivity*, as defined above, *produces the system*, a system which is not inseparable but rather underlying to the discourses and, for this reason, constantly changing, in a way that one can state that the *system is the function of discourses*." Pais (1995), at 137, emphasis in the original.

[24] G. Cornu, op. cit., at. 42. According to the author, "the language of the law is not a language, and it is not only one [language]. This language exists in the form of two elements that constitute it, its vocabulary and its discourse, on diverse levels and in diverse relations and that, against a common backdrop, multiple manifestations come to life." Ibid, at 32.

## 2.3 Legal Culture as a System of Linguistic Signs

Investigating the system of signs of a legal culture means studying the words and phrases, – and their respective content –, that have a particular meaning associated to the world of the law. From a macro-semiotic standpoint of a legal culture, these signs can include traffic signs, gesture, and even the uniforms of the judicial and law-enforcement authorities, in addition to the rites of procedure and hearings, etc. However, as previously pointed out, this study is concerned with linguistic signs, more precisely, with the graphic signs of written verbal language.[25]

The realization of legal culture, from the chosen perspective, takes place through formal written instruments, such as laws, treaties and judicial decisions.[26] These documents convey linguistic signs that have a particular meaning in the realm of law, when compared to ordinary language.[27] According to Cornu, "the law consecrates, in a new usage (with a particular sense), a term from ordinary language. Case law and doctrine contribute to this end".[28] The law could be thus regarded as a "consumer" of colloquial language and a "producer" of a specialized language.[29] The fact that certain linguistic signs are situated in the linguistic circumscription of a legal culture makes these respective linguistic signs stand out from ordinary language, attaching to the language of the law a specialized nature. This specialized language is, according to Wagner, essentially a language used professionally. The degree of technicality in formulating it fluctuates according to the communicative needs. Specialized knowledge is linguistically named according to a specific terminology, and its components are mainly syntagmas subject to conventional definitions.[30]

Such language says much about the way it is spoken within a certain professional activity. The terminological aspect ascribes specificities to this language enabling it to be mutually understood during ordinary communicative exchanges taking place

[25] We have excluded from the scope of our analysis, however, oral manifestations, i.e. vocal signs.

[26] We do not ignore the role of doctrine in the formation of legal culture. Doctrine contributes to disseminating and, many times, determining the innovation processes of the system of legal signs. The reasons for not addressing doctrine in this study will be provided further ahead. In any case, one can state that every communicative relation that has the law as its object contributes to conveying and disseminating legal culture. As a result, we could also include the briefs and motions written by lawyers on behalf of their clients.

[27] The phrase "ordinary language" (also "common language", "natural language" or simply "language") refers to the specific way a linguistic community exercises the faculty of language – more specifically, the faculty of speech. It is associated, in this study, to the concept of *national language*, which has a heterogeneous meaning: popular language with its jargons, family language, literary language, scientific language, etc. Thus, there is a distinction between "ordinary language" – in order to designate the group of linguistic signs of natural language of common usage and to which all disciplines, all sciences resort to in order to build its discourse; – and "specialized languages" that pertain specifically to certain areas of knowledge.

[28] G. Cornu, op. cit. at 10.

[29] Cf. ibid., at 39.

[30] Wagner (2002), at 15.

among members of the same linguistic community. This is not the case of making an inventory of the universe of terms that assign legal language a specialized character, but rather, of understanding that there is one section of natural language that is related to the sign system of the law. The body of these terms shape legal vocabulary (also called the legal dictionary).[31]

The word "vocabulaire", according to Le Petit Robert, means "dictionnaire succinct qui ne donne que les mots essentiels d′une langue".[32] This definition is the same as one of the meanings in the Random House Webster Dictionary: "a list or collection of the words or phrases of a language, usually arranged in alphabetical order and defined".[33] Both meanings retain the idea of "dictionary" that, according to the Webster is "a book containing a selection of the words of a language [. . .] giving information about their meanings",[34] and according to Le Petit Robert, it is a "recueil d′unités signifiantes de la langue (mots, termes, elements. . .) rangées dans un ordre convenu, qui donne des définitions, des informations sur les signes".[35] In summary, a vocabulary is an organized set of signifiers in a language with their respective meanings, or a succinct dictionary of linguistic signs. Moreover, according to the definition provided in the Webster, the dictionary also has a particular feature: it provides us with the "essential words of a language"; that is to say, the words that are indispensable in order to refer to worldly things and events. The dictionary is, therefore, selective.[36] It captures words in movement and attaches them to their meaning. It is a portrait of the language, since it does not retain the body of *in concreto* usage sequences. The dictionary is not language. It is a sign that refers us to the idea of language, as though everything we need to say the world were therein contained.

The existence of an international law vocabulary presupposes the existence of an international law *dictionary*. Such a dictionary has three essential features that distinguish it from a general language dictionary: it is thematic, specialized, and multilingual. It is *thematic* because it contains a body of essential terms related to a specific dimension of societal life; in this case, to international legal relations. The words included in this dictionary are associated to the organizational structures and norms devoted to, above all, international-conflict solving. Nation-States are the primary lexicographers that select and determine the meaning of the words in this dictionary. Thus, the basic hypothesis is that, by means of this dictionary of

---

[31] As observed by Greimas and Landowski, "lexical recurrence, in turn, enables one to claim the existence of an autonomous legal dictionary. Such a dictionary is nothing more than the manifestation of a certain semantic universe, which we call the legal universe, in the form of lexicon (words, expressions, etc.)" Greimas and Landowski (1976), at 75. According to Cornu, the "legal vocabulary is a set of words that have, at least, one legal meaning."Op. cit., at 59.

[32] Le Petit Robert – Dicctionnaire de la langue française. VUEF 2001–2003 Windows. CD-ROM.

[33] Random House Webster`s – Unabridged Dictionary. 2003. CD-ROM.

[34] Ibid.

[35] Le Petit Robert – Dicctionnaire de la langue française. VUEF 2001–2003 Windows. CD-ROM.

[36] According to the Webster, the dictionary is "a book containing a *selection* of the words of a language." Op. cit.

the law, these Nation-States shape the international order that is structured around their respective interests and objectives – often to the detriment of the interests and objectives of non-sovereign entities. This way certain nation-states ensure their own self-preservation and implement their projects for the future that therefore takes place with the affirmation of their internal and external sovereignty. Since Nation-States play the leading role in authoring International law vocabulary, they submit all actors in the field to the language it adopts. By doing so, Nation-States favor the formation of an intersubjective consensus that inhibits the emergence of meanings Nation-States themselves do not establish.[37]

As far as the *specialized* nature of an International law dictionary is concerned, the significations attributed to the words are determined by the meaning they acquire when utilized in the context of a specialized discourse, in this case, the legal-diplomatic discourse. And, finally, this dictionary is also *multilingual* because the expressions should be able to be translated into all the national languages, since they convey the legal content exchanged at the international level. In general, in these cases, Nation-State delegates and international organizations adopt a common working language in order to facilitate the legal-diplomatic discourse; despite the fact they speak a different language – from the working language – and/or come from countries with different legal cultures.

In any case, the vocabulary of the law is created and updated by individuals who have the authority to "speak" the law, whether by editing or drafting a convention (the case of lawmakers and State-Parties), or by saying the law (in the case of judges and arbitrators).[38] The power of these individuals and their discourse in establishing a legal vocabulary results from the law itself.[39] Lawmakers, judges, and the parties are not the only agents capable of utilizing legal expressions; however, the relevance

[37] An intersubjective consensus that lasted a long time was of the exclusivity of Nation-State as international legal entities. From this standpoint, only Nation-States could create international law and be, at the same time, the object of such rules. With the exception of international organizations – and precisely because they were institutions born to states – no other actor could be considered an international legal entity, and thus participate in the process of naming the world nomenclature and shaping the international scenario. The creation of international law was confiscated from non-sovereign actors. According to Vanderlinden, this granted Nation-States and international jurists "an ever increasing and ever more distant power from the ideas of the subjects of the law, which naturally resulting in a communication problem – a problem of language and tongue" Vanderlinden (1999), at 68–69.

[38] See Kalinowski (1974), at 63.

[39] For this reason, we do not, at this time, stress the creation of doctrine. According to Vanderlinden: "As individuals lose their capacity to participate effectively in the production of the legal construct, they are subject to the power that represents the law. In societies where the main means of legal production is custom, the verbal or written communication of the law is not a problem insofar as it is the fruit of collective thought in which the individual is part and in which he is participating, one may say, from the moment he his born to his death. This is not the case of the so-called modern societies in which the production of law has been confiscated from the people by jurists and legislators. Simultaneously, the Nation-State (and some would even say the same of international jurists) has developed an even stronger power which is even more far apart from the ideas of the subjects of law" Vanderlinden (Bruxelles: Bruylant, 1999), at 68–69.

and the influence of their discourse on the legal sign system cannot be denied.[40] By making a law or giving a decision, for example, these agents create, name, and validate legal "realities", and in doing so, their discourse contributes to the conservation and/or renovation of the legal vocabulary.

One of the expressions of the specialized nature of the language of the law is the existence of terms that only belong to the realm of the law, or rather, terms that only have meaning within the law. These are terms with precise technical meaning. Therefore, the meaning of these words is only found in a legal vocabulary.[41] Thus, the relationship between the content of a word and its referent can only be established within a specific legal culture.

But the largest part of the legal vocabulary is made up of terms that belong to both legal and general language vocabulary. As Cornu observed, the social basis of this set of words comes from the general language usage of their referents in connection with everyday elementary legal life.[42] These terms have one or more legal meanings in addition to one or a number of non-legal meanings. Examples of these terms are: law, justice, authority, rule, authorization, sanction, legitimate, judge, lawyer, suit, process, etc. Therefore, this legal vocabulary (or dictionary) includes not only terms that belong exclusively to the field of the law (those that have but a legal meaning), but also words and phrases to which a certain legal culture attaches one or many particular meanings, even though these words and phrases are employed outside the law, that is, in the general language.

The importance of legal vocabulary resides in the fact that its terms are one of the pillars of the language of the law. However, this vocabulary does not serve as a criterion to determine the "legal" nature of discourse due to the words and phrases belonging to both legal and general language. For this reason, the semiotics of legal culture will have more elements for analysis at hand if it examines – not only legal vocabulary – but the legal discourse resulting from the communicative processes in the legal system.

---

[40]Legal vocabulary is also the vocabulary of the community of jurists at large. If we consider legal vocabulary from the perspective of any and all recipients of a legal message, it becomes a vocabulary that is public, social; a corollary to the principle that the ignorance of the law excuses no one. The mastery of the system of legal signs by a professional group does not establish in its favor a monopoly of the law.

[41]The terms that belong only to the law are generally technical terms. They give more "precision" to the language of the law and contribute to achieving the ideal goal of legal certainty. For example: extradition, summons, assignee, creditor, debtor, illegal, unlawful, lawful, credit, antichresis, recovery of unduly paid sums, unsecured creditor, etc. These terms contribute to the specialized nature of the language of the law. However, according to Cornu, they are not representative of the legal system, "because [the legal system] does not unite the terms that designate the essential things of the law. [. . .] It is surprising that legal terms which are more used in a language, are not the most globally legal ones" (Cornu, op. cit., at 74). The introduction of new legal terms and phrases do not create an opposition between specialized and ordinary language. In the end, the technical characteristics of the language of the law are, according to Cornu, "points in relief against the clear backdrop of general." Op. cit., at 26.

[42]G. Cornu, op. cit., at 77.

# Chapter 3
# Legal Culture as Communication

## 3.1 Legal Discourse and Other Kinds of Discourse

Approaching legal culture as a communication process is to focus on the language of the law in action. It is during this communicative process that the linguistic potential offered *in intellectu* is organized *in actu*, thus resulting in legal discourse.[1] Vanderlinden highlights the importance of this approach when expressing his interest in studying the relationship between the law and language through the study of communicative processes: "of these two functions, expression and communication, I would only limit myself to the latter to the extent it implies the former".[2] To Cornu, despite his warning that the existence of a type of legal discourse is not as apparent as the existence of legal vocabulary, the importance of the form of legal discourse is highlighted as an essential element to the language of the law. Since the language of the law is not only in the legal words and phrases, but also in the legal text.[3]

The illustration that portrays the process of communication established in the framework of the legal system is the same for any other verbal communication (Fig. 3.1[4]).[5] Based on a system of signs, the subject (sender) produces an enunciation (message) addressed to another subject (recipient), who is required to

[1] It is in the process of communication that the system of legal signification is put into action. Legal discourse is, at the same time, a linguistic act – since it is the realization of natural language through which the subjects of the law communicate – and also, a legal act, serving the purposes of a legal end. To Cornu, "the legalness of discourse results from its goal. A discourse is legal when its goal is to create or carry out the law. This goal-based criterion is intellectual. It commands the logic and tone of the discourse at the same time." Op. cit., at 22.

[2] J. Vanderlinden, "Langue et droit", op. cit., at 68.

[3] G. Cornu, op. cit., at 22.

[4] Based on the structure in Jakobson (1963, p. 214).

[5] This book will not discuss the elementary structure of communication, that is, the structure that exists immediately before a signification process is triggered. This perspective is of the interest of a theory of information and is relevant to the study of informational processes between two mechanical apparatus, where the sign conveyed has no 'signifier' value. This phenomenon was addressed by Eco, who considered it a threshold semiotics case, since the relation between sender and receiver is carried out by a chain of cause and effect. See *A Theory of Semiotics*, op. cit., at 32–36.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_3, © Springer Science+Business Media B.V. 2011

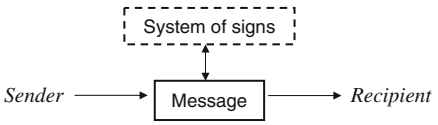



**Fig. 3.1** Communication process in verbal communication

generate an interpretative response. The key to successful communication is shared knowledge, that is, both subjects must be acquainted with same the sign system.

A common linguistic code between sender and recipient is paramount for successful communication. This is even more so in intercultural communication. Take the example of an international negotiation or controversy between two nations whose languages are different: either they interact each in their own respective languages, which requires each to have complete knowledge of the language of the other; or they choose a common language of reference for diplomatic dialog. Regardless of their choice, both grammatical and lexical knowledge of the working language – in addition to knowledge of the language of the law – is paramount for the success of international relations.

As shown in Section 2.3, legal discourse often creates its own expressions and assigns specific meaning to terms thus become part of the vocabulary of the law. However, admitting the existence of independent legal meanings does not mean that the language of the law is completely separate or not influenced by other kinds of discourse. As far as Greimas and Landowski are concerned, legal discourse is a particular case, it is defined by its specialized nature as opposed to other potential – and realized – kinds of discourse in any given natural language.[6]

Through intertextuality, legal discourse is shaped by other kinds of discourse, to which it resorts in order to make sense in the field of legal argumentation. There is a relationship of reciprocal exchange and influence between semiotic systems in constructing and deconstructing significations. This relationship is key to ensuring the viability of each semiotic system considered separately, since, as explained by Pais, these semiotic systems integrate the sociocultural and linguistic framework of a certain community, and can only function successfully "if they sufficiently preserve themselves to ensure subjects understand each other, and if they sufficiently change themselves in order to meet new communication needs."[7]

Consequently, legal discourse practices do not take place in isolation from the practices in other social discourses insofar they both contribute to situate the sender, to legitimize the sender's point-of-view, to make the sender's discourse intelligible, to privilege a given interpretation, or, all in all, to affect the production of a legal text. This overlapping between discourses does not erase the specificity of the legal semiotic system. Instead, this overlapping suggests that assigning legal signification to a sign does not result from logic, nor is it a result of an imposition of an ideal producer of signs. Legal signification is the result of the practices of discourse

[6] A. J. Greimas; E. Landowski, *Semiótica e ciências sociais*, op. cit., at 70.

[7] Pais (1994), at 164.

that are social practices that take place in a historical context.[8] Communicative processes, by means of discourse considered legal discourse, gradually implement an organizational and normative framework that regulates everyday life.

The importance of legal discourse to the evolution of the law is highlighted by Greimas and Landowski:

> If the legal system, considered at its origin – as absolute performative speech that establishes a certain conventional and explicit world order – and its organization – calls, by way of pronouncing them, beings and things into existence and assigns them precise roles, governed by prescriptive and prohibitive rules –, and appears as a sound and unchangeable architecture – and being unchangeable is one of the main connotations of the law –, *nothing stops this system from evolving, completing and transforming itself, thanks to legal discourses that are constantly renewed and that make its innovations reflect on the level of the underlying system.*[9]

It is through discourse that a legal system is implemented and modified. What must now be explored is what makes a discourse a "legal" discourse.

In the preceding topic (Section 2.3), legal culture was approached as a system of signs. If we were to adopt this approach to identify the manifestations of legal discourse, the presence of legal vocabulary in this discourse would be a sufficient criterion. The specialized nature of the language of the law would enable us to locate this discourse among texts belonging to other domains of verbal communication.[10]

---

[8] The signs supposedly belonging to the semiotic system of law may vary according to legal culture in question. For this reason, the legal professional, who transposes expressions from other semiotic systems of law without addressing the adequacy of this transposition in the target legal culture, is being negligent. Take, for example, the concept of "equity". According to Combacau and Sur, "equity" as stated in Article 38 § 2 of the Statute of the International Court of Justice (ICJ) is not the same as the concept of "equity" in Anglo-Saxon law "authorizing the judge to formulate a body of positive rules to complete or to push away from the normal application of law as a result of unpredictable cases, thus recognizing a normative power to the courts." Combacau and Sur (2001), at 106. Moreover, one cannot overlook the variations in legal meaning that other signs acquire, thus being capable of covering portions of semantic space that verbal language does not reach. Some examples are the pictorial and gesture signs that convey volition and command. They are sign manifestations whose expression and content may vary according to the legal culture – in its broad sense – they belong to. This leads us to a transcultural understanding of the law at a time when, as Vattimo warns, the 'Westernization of the world' puts the real possibilities of knowledge of cultures in check. Cf. Vattimo (1987), at 159. According to Uspenskii, "from semiotics perspective, the historical process can be represented as a process of communication during which the affluence of information does not stop conditioning the reactions-responses of the social addressee (the *socius*)." B. Uspenskii, "História sub specie semioticae", op. cit, at. 87, emphasis in the original.

[9] A. J. Greimas; E. Landowski, *Semiótica e ciências sociais*, op. cit., at 79, emphasis in the original.

[10] This criterion allow us to consider "legal" any discursive intervention that uses words and phrases that refer to the law, whether or not they have been employed within a legal context. After all, the legal discourse is not reserved solely to those that work in the law – even law professionals may use this discourse when divested of their role. Despite the adjective attributed to the vocabulary, no "legal" effect can be expected from its use except when applied in the appropriate context and circumstances. In addition, it is important to point out Ziembinski's statement: "It is not the difference in the size of vocabulary, but the differences in the semiotic nature of complete utterances that create the foundation of the difference between 'language of the law' and 'legal language', even

However, legal discourse can be produced without one having to resort to any term under its specialized vocabulary.[11] Even where no technical terms, i.e. technical language, are employed, legal discourse may still exist. This enables us to differentiate the system of signs or legal vocabulary on the one hand, and legal discourse on the other.

It is possible to hypothesize a kind discourse whose enunciations are completely made up of purely legal terms. However, this very unlikely hypothesis cannot lead us to ostracizing legal vocabulary to forgotten books in dusty bookshelves. This would be a dangerous thing to do, because legal vocabulary is present in the daily life of any legal professional. It is found in the laws, judicial decisions, and scholarly work, etc. They are key concepts, categories, and legal institutes, without which one would not be able to practice or understand the law. "Treaty", "sovereignty", "territory", "jurisdiction", "international responsibility", "competence", "nationality", "arbitrage", "domain", "ratification", among others, are terms that make up the list linguistic signs of the law.

We have stressed this point to highlight the fact that legal discourse takes us back to the legal dictionary, and its specialized vocabulary is key in differentiating legal discourse from other surrounding social discourses. Thus, semiotics of law must not overlook linguistic signs pertaining to the law. Nevertheless, as we have stated above, the vocabulary criterion does not suffice. What we must carry out is an investigation of the legal feature of discourse in the communicative processes that take place in the law. And this is the goal of the next section.

## 3.2 Criteria for a Typology of Legal Discourse

According to Cornu, legal discourse encompasses the set of utterances in the law, among which we find enunciations of: norms ("énoncé normatif"), decisions ("énoncé décisoire"), and agreements ("énoncé conventionnel").[12] The act that

---

when the criteria of this difference are, in part, vague and questionable" ("Le langage du droit et le langage juridique", op. cit., at 31).

[11] Cornu stresses that: "A discourse can be considered legal even though it employs terms that do not belong solely to the field of law (e.g. «Witness, please stand»). A discourse can be considered legal even when it does not employ any legal terms at all («Please, exit the room»). If a legal discourse can be made up of ordinary words only, it means that the legal message, produced according to the rules of natural language, which is the necessary vehicle, organizes the legal terms in this language, that is, it associates these terms to words in the general language (e.g. one who makes a promise must keep it in good faith)" *Linguistique juridique*, op. cit., at 213–214.

[12] Cf. G. Cornu, op. cit., at 237. Cornu uses the term "legal discourse" in its broadest sense, "where it encompasses not only the utterances of law *stricto sensu*, but also the utterances of fact and other types of utterances that may contain legal discourse (for example, a judgment, an utterance of law in its broadest sense as an act from a competent authority, containing reasons of both law and fact; it also contains the claim)" (Ibid, at 22, Footnote 6.) We have established the difference between "legal discourse" and "discourse of law" in the Preliminary Considerations of this book.

institutes the norm, the decision or the agreement is called a legal text.[13] The role of the act is to create law; thus, it becomes legally binding. In creating a norm, the author adopts pragmatic criteria employed to determine differences among the object of the enunciations in question: "la considération de cet objet renvoie nécessairement à la personnalité de l'émetteur (à celui qui établit la règle, ou qui prend la décision, à ceux qui concluent l'accord), car la poursuite de cet objet se mesure au pouvoir de celui qui parle."[14] By focusing on the sender it enables a certain discourse be identified as legal, in addition to indicating what type of enunciation is at issue.

The criterion concerned with the professional quality of a sender has been criticized by Ziembinski, according to whom,

> It must be pointed out that it is impossible to identify legal language with the language of a specific professional category, the language of jurists. The enunciations of a jurist acting as a lawmaker, or even of a jurist acting as judge rendering decision, or as a prosecutor submitting a claim, as a regulator formulating a decision, etc., sometimes have the same verbal form of the enunciations of a law professor, although they have a completely different semiotic character.[15]

As we know, the lectures given by law professors do not convey a deonticity meaning they do not threaten with institutionalized force.[16] Likewise the enunciations in law books are not enforceable, since its sender it not vested with any power to judge, accuse, or enact laws, etc., but these enunciations are "legal" insofar they refer to the "law". Furthermore, the criterion that is based on the sender is also limited when confronted with the discourse of legal norms that cannot be associated with any particular kind of sender, such as the legal discourse of custom.

In any case, a discourse typology seems to result from a sociological perspective (the professional capacity of the sender) and/or a legal perspective (the deontic nature of discourse). If we only take the latter perspective into consideration, the

---

[13] It is important to point out the meaning of the phrase "legal text" for the purposes of this study. It is not the same as "legal discourse", which refers to the plane of content, while the other refers to the plane of expression. This topic will be further addressed in Chapter 9.

[14] G. Cornu, op. cit., at 237. The typology of legal discourse can be guided not only by the nature of the subjects involved in communicating, but also by the nature of the message and the way it is expressed. In light of this consideration, Cornu adds that the discourse of custom is a kind of legal discourse. It identifies with the maxims and adages of the Law established by tradition.

[15] Z. Ziembinski, "La langage du droit et le langage juridique", op. cit., at 30.

[16] Ziembinski says: "One interprets the statement 'Every X must do C', written in the text of a law, and which commands all X subjects to do C – as being a non-descriptive expression, neither true nor false, which formulates a command considered mandatory, or not, in a given legal system. When such utterance is found in a legal handbook or in another legal work, it is interpreted as a proposition (in the logical sense of the word) relative to the fact that such a norm is in effect within a given system, or [it is interpreted] as a proposition (true or false) providing information relative to the legal modality of an act (which would be: 'according to the norms of the given system, carrying out C is prescribed for all X subjects'). In the domain of legal language, a statement that conforms to the structure in question is interpreted not as a legal norm, but as a proposition concerning a norm." ("La langage du droit et le langage juridique", op. cit., at 26).

discourse typology would be built according to the characteristics of the legal system in question.

Therefore, without denying the contributions of a linguistic examination,[17] we postulate that a discourse can be considered legal not only because it is the vehicle for creating the law, but also because it is the result of a law-building process that is recognized by the founding legal discourse. This discourse, in its own terms, establishes the law, and thus establishes its first signs. Any discourse that follows would obtain its legal signification via the constitutive discourse of the law, which will, in turn, receive the input of new expressions and meanings from the former.

From a domestic law standpoint, the founding discourse is found in a country's Constitution; at the international level, however, discourse is conveyed by text resulting from agreements between sovereign states, or exceptionally, by the decisions of international courts – when they recognize the normative nature of custom. It is important to highlight that we are not referring to a legal act (acte juridique) as the formal support of discourse, but to discourse that is contained or results from these acts, conveying or clarifying the content of legal norms.

## 3.3 Resorting to the Sources of Law to Determine Relevant Discourse for a Study in Semiotics of Law

The act of creating the law takes us to the sources of law, whose modern origins, as explained by Ferraz Junior, "refer to the awareness that the law is neither a *datum* of nature nor something sacred, but a cultural *construction*".[18] The theory of the sources of law was an attempt to rationalize the emerging social patterns of growing mercantile activity and the appearance of the Bureaucratic State.[19] This theory proposes a series of structural rules that establish when a norm – or a normative discourse – enter the systemic legal system. These structural rules correspond to procedures or ways of shaping legal norms, by making them elements of the legal system. In this case, by no other means is a normative discourse recognized as being legal.

Among the sources of law, we find legislation, custom, jurisprudence, and contracts. By means of these sources, legal norms, customary law, case law, and contract law are created. On one hand, there are the sources as procedures to draft the law,

[17] In this case, we would use linguistic criteria to determine whether a given text conveys legal discourse. These criteria help historians and anthropologists in interpreting ancient cultures.

[18] Ferraz (2003), at 223, emphasis in the original.

[19] Having in mind that the central problem of the source of law is ensuring the law is applied correctly, Ferraz Junior states that "the concept of source finds support in different common places provided by modern society, such as the sovereignty of law, freedom of contract, ethical rationality, history of legal phenomena, etc. Since its foundation is topical (from *topoi*, commonplaces), theory has no strictly logical finishing. Commonplaces are merely formulas for searching and guiding reasoning, which become explicit due to problems in decision-making. Among these commonplaces one should mention, as a kind of general guiding principle for the organization of other commonplaces, the liberal values of legal safety and certainty" Ibid, at 227–228.

techniques that identify a rule as being part of the law; and, on the other hand, legal norms as the content of rules created according to the "procedural" requirements of the respective source of law.[20]

Such a clear-cut distinction clashes with the problem of defining which elements should be part of the list of sources of law. Take what happens to case law, for example. Determining whether or not it is a source of law depends on the legal culture in question. In the Romano-Germanic tradition, case law plays an active role in creating law in spite of the fact that statute is considered the primary source of law and judges, in turn, are considered the spokespersons of the law. The indispensable work of judges in interpreting the law, especially in cases of a gap in statute and due to the prohibition of *non liquet,*[21] results in substantial authority to significantly modify the scope of a legal norm. However, this authority is not exercised when a certain dispute is previously regulated by statute. This is to say that decisions must fall under the law in general. Romano-Germanic case law would therefore be, in the words of Ferraz Junior, an "interpretative 'source' of law, but is not a source of law *per se*".[22]

In the Anglo-Saxon tradition, jurisprudence is the primary source of law. Rules result from court decisions as new cases are presented. The law is less of a series of legislative acts identified by their date of enactment or a part of a theoretically self-sufficient system, and is more of a practice recorded in collective memory. Thus, the force of precedent is the foundation of the common law. This rule, is mirrored by the *stare decisis* doctrine, which binds lower courts to the *ratio decidendi*[23] of

[20]The lessons of Ferraz Jr. on the distinction between *norm* and *law* [statute] are worthy of note: "A norm is a prescription. A law [statute] is the shape which the norm or group of norms take in a legal system. Thus, a statute is a source of law, or the structural package of the norm that gives it the quality of a legal norm" (Ibid, at 233.) In addition, Dinh says that: "the confusion between norm and source is even more frequent when spurred by vocabulary. In order to overly, but comfortably, simplify this statement, the same word or the same phrase may simultaneously aim at a source and at the norms from which they stem: this is the case of the 'general principles of law' or 'custom'. Thus, for more clarity, one should speak of customary norms in order to distinguish them from custom as a formal source" Dinh et al. (2002), at 114. The concept of formal source is different from the concept of material source. According to Combacau and Sur, material sources "are associated to the *group of outside facts that are non-legal*, which will inform the content of rules and influence in their development: power relations, cultural systems, ideological systems, etc. . ." (J. Combacau; S. Sur, op. cit., at 42, emphasis added). The idea of material source differs from the content of legal norm, even though it informs such content, by making use, as Dinh points out, of "direct translation of international structures and of predominant ideologies." N. Q. Dinh et al., op. cit., at 112.

[21]The general prohibition of *non liquet* means that a competent court, must not refuse to decide a case on the ground that there is no law governing the matter.

[22]T. S. Ferraz Junior, *Introdução ao estudo do direito*, op. cit., at 246.

[23]The *ratio decidendi* is the general principle of law employed as a premise for providing grounds for a decision; nevertheless, the court, by invoking it, may also interpret it according to the court's own reasoning. There is also the rule of precedent, or *stare decisis*, which should not be considered a mechanism that freezes the rules stemming from previous decisions. Although *ratio decidendi* never loses its force and effect, the passage of time may render it inapplicable – in the event the court is compelled to reshape its decisions in order to keep up with new situations. If *stare decisis* promotes legal certainty, the swings of case law ensure a relative flexibility to the common law.

decisions previously rendered by higher courts. It is for this reason that, according to Garapon and Papadopoulos, the common law does not pertain, thus, to a technique of interpretation, but to a method of differentiating via cases that have already been decided. It is an open system, where the role of case law is not only applying the law, but also the creating the law. In this perspective, statutes are exceptions. They will be completely integrated into the system when they are applied and reaffirmed by the Courts during cases proper; this is the normal condition of building the common law.[24]

The classification of the sources of law should take into account the legal culture in question. In the sphere of international law, if we refer to positive law, Article 38 of the Statute of the International Court of Justice (ICJ) is an indispensable reference. This Article lists the formal sources of law that are directly applicable by the judges of this Court:[25]

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
>    a) *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
>    b) *international custom*, as evidence of a general practice accepted as law;
>    c) the *general principles of law* recognized by civilized nations;
>    d) subject to the provisions of Article 59[26], *judicial decisions* and the *teachings* of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[27]

This provision lists five different items: treaties, customs, general principles of law, judicial decisions, and legal doctrine. The first two are considered pillars of

---

[24] Garapon and Papadopoulos (2003), at 52. In Section 5.1, we will address the topic of legal traditions in more detail, thus discussing the differences and similarities among them according to Lótman's typology.

[25] This is a non-exhaustive list. Public law scholars include two other important sources of public international law: the unilateral acts of Nation-States and the Resolutions of international organizations. This diversity of sources of law should come as no surprise. In fact, the term "sources", in the plural, denotes the impossibility of having one single basis for the law, whether in the historical or logical sense of the term. Lastly, the absence of hierarchy among sources does not imply there is no hierarchical structure among legal norms, due to, for example, the degree of generalization of the norm's content or according to its chronological position, resulting, thus, in two well-known adages: *specialia generalibus derogant* and *lex posterior priori derogat*.

[26] Article 59 of the Statute of the International Court of Justice states that "the decision of the Court has no binding force except between the parties and in respect of that particular case."

[27] Emphasis added. According to Article 38(2) of the Statute of the ICJ, "this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." The problem of the role of equity may be raised as an incidental issue. It is an independent basis for dispute resolution the ICJ may adopt upon prior agreement of the parties to the dispute. According to Dinh when writing about a decision of the ICJ in 1982 (*Plateau continental Tunisie-Libye, Rec. 1982, at 60*), "equity is not a source of law, but a reference system for jurisdictional resolution of international conflicts" (N. Q. Dinh et al., op. cit., at 355). Equity would thus be a means of interpreting the rules of law.

international law.[28] However, a fundamental distinction must be made: custom, by definition, is not written. The authority of custom does not come from compliance with regulated procedures that result in a written instrument; instead, it comes from the generally accepted practices of the international community that have the force of law. Conversely, the same cannot be said about treaties, if we consider the Vienna Convention on the Law of Treaties (VCLT), of 1969[29]: "'treaty' means an international agreement concluded between States *in written form* and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[30] The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986, by recognizing the power of international organizations to sign treaties, also disregards verbal agreements, manifested orally and without any supporting written document.[31]

The meaning attached to the term treaty as stated by the VCLT is closer to the notion of a written document that formalizes a legal act as an expression of the agreement of minds between subjects of law. The customary norm is not shaped in the same way; it is not supported by a written instrument. For this reason, the discourse of custom, as a legal discourse originated from customs, can only be apprehended by means of legal texts such as treaties, international judicial decisions, and in legal doctrine. The discourse of custom would be encompassed by legal, decision-making or scientific discourses.

---

[28] Shaw explains that "some writers deny that custom can be significant today as a source of law, noting that it is too clumsy and slow-moving to accommodate the evolution of international law any more, while others declare that it is a dynamic process of law creation and more important than treaties since it is of universal application. Another view recognizes that custom is of value since it is activated by spontaneous behavior and thus mirrors the contemporary concerns of society. *However, since international law now has to contend with a massive increase in the pace and variety of state activities as well as having to come to terms with many different cultural and political traditions, the role of custom is perceived to be much diminished*." Shaw (1997), at 57, emphasis added. The increasing movement towards positivation of international law may be contributing to the decreasing importance given to custom when compared to the role custom played in the past.

[29] For the purposes of this study also called "the Vienna Convention of 1969", "Vienna Convention" or simply, the VCLT.

[30] Article 2, § 1, "a", of the Vienna Convention. Emphasis added.

[31] As written under Article 2 (1): "For the purposes of the present Convention: (a) 'treaty' means an international agreement governed by international law and concluded in *written form*: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation." (Emphasis added). However, it is important to point out that the 1969 Convention, by defining "treaty" as a *written* agreement, does not deny the legal value of the so-called *verbal* agreements. This is evidenced by Article 3 of the Convention: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to *international agreements not in written form*, shall not affect: (a) the legal force of such agreements; [. . .]." Emphasis added.

It may be that these written instruments serve only to express a single or biased perspective of the content of customary law. This possibility leads Combacau and Sur to stating that "the customary norm, referred to in a written text, is only materialized in a supposed or hypothetical manner. [Custom] *appears to be a component of legal reasoning that establishes and formulates it*, and cannot be identified with any kind or a certain kind of legal act."[32] According to this viewpoint, custom is seen more as an instrument that integrates the legal system than as a source of law proper. Custom is an integrating instrument *praeter legem* used to fill the gaps in the legal system. This is also the case of the general principles of law and equity in legal cultures that belong to the civil law system. In other words, customary law serves as a rule to guide a decision. Thus, customs are gap-fillers when the law is silent.

Something similar occurs with respect to the general principals of law. Although they are considered the structural rules of a system, and, as such, the framework of norms as a whole, the general principles of law can also be used to fill gaps in customary and conventional law. These principles give judges the means to offer a legal solution to the parties, therefore ensuring the coherence and integrity of the legal system. These principles are usually revealed in the course of judicial activity, but they are also addressed by legal scholars in legal books and papers. Scholarly work, despite lacking legal authority, provides guidance to interpreting the law. It is not, however, considered a source of law, despite being mentioned in Article 38(1) of the Statute of the ICJ.

In any case, we wish to point out that in the process of creating and formulating international law, and taking into account the sources listed under the Statute of the ICJ, it is case law that "speaks", law books and papers that "teach", and treaties that "stipulate" the law. They are the sources through which the content of law is "uttered". This is why, from the standpoint of semiotics of law devoted to the verbal written discourse of international law, the objects of study are the discourses of legal decision-making, legal convention, and legal doctrine.[33] However, out of these

---

[32] J. Combacau; S. Sur, op. cit., at 57–58, emphasis added. The author rightly calls attention to the fact that the mechanisms through which customary norms are established are not the direct source of their content or authority.

[33] This book, in dealing with international law, does not emphasize the *legal-legislative discourse*, or the discourse of statutory law that make up the legal systems of Nation-States. Cornu, in his book, *Linguistique Juridique*, discusses legislative discourse (statutes), jurisdictional discourse (court decisions), and the discourse of custom (maxims and adages of the law), and although shifting from his focal point of analysis he also points out two other types: *contractual discourse* and *administrative discourse* (cf. op. cit., p. 215). The typology proposed by Wroblewski organizes legal language around four models: *legal language*, which imposes the authority of the legislator; *jurisprudential legal language*, enabling the assessment of legal language; *scientific legal language*, which focuses on understanding the dogmatism in interpreting the two previous languages; and *common legal language*, which is used by society, enabling us to assess to what extent legal language is socially. Wroblewski (1988), at 13. In trying to define a content for the term "legal discourse", Troper states: "As legal discourse, one may understand [. . .] the language used in the texts expressing norms, laws, international treaties, etc. [. . .] and in the scientific works that describe or attempt to describe the law in effect." M. Troper, "La notion de personne juridique" *Realités du Droit International Contemporain: Discours Juridique et Pouvoir dans les Relations*

three objects of study, only the latter is void of deontic meaning. The teachings of scholars concern the law, but in no way bind people, prohibit conducts, authorize action, modify the state of things, or threaten with force. In short, they do not make up legal discourse in the sense we have chosen to define the phrase in this study.[34]

It is for this reason that in Cornu's typology of legal discourse, – which includes the discourse of custom –, Cornu identifies the three essential legal messages – normative, decision-making, and conventional: "they are the *utterances of the law*. The law is born from these three messages. One can, at least, say that these three kinds of utterances govern the creation of law."[35] Legal doctrine does not fall under any of these, thus, as mentioned above, are not part of legal discourse, – the same applying to custom, – since no specific legal instrument conveys them.[36] Because of this, we now turn to the analysis of the international decision-making and conventional legal discourse.[37] Both are considered normative legal discourse because they both serve as vehicles for legal norms.[38]

---

*Internationales: l'Exemple des Sujets de Droit* (Actes de la Cinquième Rencontre de Reims, Centre d'Études des Relations Internationales, Faculté de Droit de Reims, n. 3, 28/29, juin, 1980), at 4.

[34] Deontic meaning in the discourse of legal doctrine can only be assumed in the connotative plane. When speaking of the law, one also speaks of a discourse that threatens with its force or that is vested with a sense of imperativeness over the conscience of its addressees. The deontic connotation is therefore understood. It is not derived from the discourse of legal doctrine, but this discourse makes this connotation explicit when speaking of the law. According to Greimas and Landowski: "the very expression *legal discourse* already includes a certain number of presuppositions that must be explained: 1. It suggests that legal discourse should be understood as a subset of texts that belong to a larger group, consisting of all the texts expressed in any given language; 2. [. . .]; 3. Considering a subset of discourses a legal discourse, implies, in turn, both the specific organization of the units which make up this discourse, and the existence of a certain connotation which is understood in this type of discourse, or, even both things at the same time." *Semiótica e ciências sociais*, op. cit., at 72–73.

[35] G. Cornu, op. cit., at 237, emphasis in the original.

[36] It cannot be denied that Cornu has in mind the legal acts that convey these utterances, that is, the formal support against which the discourse *of law* is written. The fundamental role of writing is very apparent, as suggested by Timsit: "But, if in fact the law were more than the Word, Scripture? The law would not exist as a notion, [. . .]. In fact, the law only exists in its manifestations. Thus, [the law] is manifested in and through scripture. And if it were to exist outside its texts – custom [. . .] -, then, [the law] only comes into existence through outside manifestations which transform it into scripture [. . .] This is what the law is: it is scripture, text [. . .]", and also the court decisions and international conventions. Timsit (1991), at 44–45.

[37] Since this book is on international law, I shall not address the legal discourse of municipal law.

[38] One must bear in mind the difference between normative text and legal norm proper. As explained by Caffé Alves: "[. . .] the legal norm has no meaning, it 'is' itself its meaning. One must differentiate the legal norm (as the meaning) from the normative text that shapes it, as its material support. A normative text, even with the same words, may have numerous meanings, i.e. numerous norms, which will be determined according to the hermeneutical effort. The legal norm is not a 'thing' that has, among other properties, the property of meaning. The literal normative text is what can have a meaning, precisely one that is established by a decision determining – among the many possible meanings that the text can have – it is a valid norm to be applied to a concrete situation in the law." Alves (1996, at 165).

# Part II
# International Legal Discourse: On Diplomatic Discourse and the Legal-Diplomatic Discourse

This part is devoted to the legal discourse of international conventions, herein called legal-diplomatic discourse. It is a discourse that establishes a particular normative system from which a body of new legal-textual practices is triggered. The process of narrowing down its meaning, which results in the legal decision-making discourse, begins in the phase of the diplomatic negotiations that precede the conclusion of a treaty. For this reason, we find it appropriate to begin this section with an examination of diplomatic discourse, which will help us understand the importance of the role played by the languages and the senders involved during the negotiation process of an international treaty. This is the topic of Chapter 4. In Chapter 5, we will show how the sought-after constructive ambiguity in the drafting of conventions is benefited by these two factors, i.e. language and senders. Then, in the last chapter of this section, we seek to demonstrate that the active role of language and the ideological determinations are relevant aspects in shaping and legitimizing the legal-diplomatic discourse.

# Chapter 4
# Diplomatic Discourse

## 4.1 Diplomacy and Intercultural Communication

During the Renaissance period, the appearance of permanent diplomatic missions in Europe and the creation of rules of protocol – to ensure smoothness in the relationship of diplomats in association with the authorities representing a receiving entity – contributed to the shaping of a European diplomatic culture that later spread across the globe. As is noted by Kappeler, "when countries with different cultures, like the Ottoman empire, Japan and China, were admitted to international diplomatic interaction, they did not try to impose their own cultural approaches but were willing or forced to adjust to Western diplomatic culture".[1] Thus, diplomacy was born under the sign of Europe.[2]

The great international conferences held in the nineteenth and twentieth centuries widened the participation of an increasingly higher number of non-European countries in defining international rules. The resulting diplomatic culture, which in the past was mirrored in European usages and customs, was challenged by the new ways of thinking and acting of delegates of non-European States. For no other reason, diplomats who had been traditionally operating in the international arena were also attempting to protect their already established and known diplomatic practice. The relationship between colonizing countries and their former colonies is illustrative of this situation. The former strove to convey their ways and practices to the diplomats representing the latter, thus offering training to them at the expense of the colonizer's foreign service. However, according to Kappeler,

[1] Kappeler (2004), at. 355–356.

[2] The tradition of adopting certain rules of conduct, to be taken in and followed by negotiators representing political entities in trade-related controversies in more complex political disputes, dates from the earliest empires. And, as happens today, the delegates of these political entities had to be experts in analyzing the local customs and politics of the foreign society at hand, in order to supply relevant and invaluable information to their governments. These "diplomats" had the difficult task of defending the interests of their princes and, at the same time, maintaining the relationship with the ruler of the country of accreditation on a friendly basis. These two goals, which are seemingly paradoxical at first, placed the diplomat on the thin line between being considered a loyal and trustworthy servant or a traitor of his people.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_4, © Springer Science+Business Media B.V. 2011

> the diplomatic culture instilled into them was largely of the traditional sort and frequently not adjusted to new international realities. The result was often that such new diplomats either felt ill at ease and tried to copy an alien approach or, on the contrary, revolted against traditional diplomatic attitudes and attempted to follow 'authentic' values.[3]

Diplomatic practices are subject to the influence of the most powerful States. These, while viewing the remaining countries as a distorted image of themselves, tend to stress the political, psychological, and ideological differences among their diplomats and the delegates of other States. This is precisely what occurred during the Cold War. The conflict between the United States and the former Soviet Union (USSR) monopolized the global scenario and, – due to each side's pretension in stating what the world should be like – influenced the diplomatic practice and discourse of other countries. "The two antagonistic camps simply accepted the incompatibility of their respective views and thus tried to extend their influence by recruiting still undecided players to their side".[4] There was no space for views of the world and for diplomatic practices that significantly differed from those supported by the two superpowers. The so-called Third World countries were obliged to withstand interference, which on many occasions was not very diplomatic, from the two powers that considered themselves to be – and in fact were – superior to other nations. The cultural particularities of the poorer States and the nations recently integrated to the international system were neglected on behalf of the two conflicting ideological views of the two powers in question. To Biancheri,

> the interference of the East-West competition in any political issue in the world during almost half century, inevitably led to overly simplifying or even neglecting the complexity of regional events and realities. The countries in one and in the other bloc behaved as though the clash between democracy and communism was to last forever and the sudden downfall of the former caught international diplomacy by surprise.[5]

With the end of the Cold War, the cultural diversity topic in international relations becomes ever more present in the diplomatic agenda. States formerly outcast by the international system began to claim a broader participation in the forms of expression of international diplomacy and in the process of drafting international norms.[6] Therefore, while previously considered a linguistic or behavioral peculiarity, which could, at best, frustrate expectations and possibly surprise diplomats who had not taken it into account during a negotiation, culture becomes a key element in maintaining world order and legitimacy of international law.

Several factors contributed to this shift in the diplomatic horizon. Among them, one could highlight: (1) the proliferation of international organizations and the

---

[3] D. Kappeler, "The birth and evolution of a diplomatic culture", op. cit., at. 357.

[4] Kappeler (2004), at. 82.

[5] Biancheri (2005), at. 15.

[6] To Kappeler, "whenever countries belonging to one culture have a dominant position in a multilateral forum, they therefore attempt to impose their view on countries belonging to other cultures. The latter will then criticize the views of the dominant culture in fora in which they are the majority". D. Kappeler, "The impact of cultural diversity on multilateral diplomacy and relations", op. cit., at. 79.

development of multilateral diplomacy; (2) the variety and complexity of the scope of the negotiations within international organizations; (3) the hike in the number of States due to the decolonization process,[7] and (4) the increase in cultural diversity resulting from the debut of new countries in the international system. Diplomats played a central role in the negotiation and creation of international organizations as well as in the adaptation of diplomatic practices to the new circumstances. However, the learning process of the language used by diplomats in professional circles found in national culture a limiting factor. To Kappeler, "this culture may put constraints and restrictions on their freedom of action and also promote attitudes that are not entirely compatible with an overall diplomatic culture".[8]

Hofstede provides five dimensions to describe national cultures with the goal of identifying similarities and differences among them. Here, we would like to highlight two of these dimensions.[9] The first concerns *power distance* (PD), that is, the distance between those who hold power and those who do not. In countries where there is a high power distance, society is very hierarchical and people tend to consider power inequality a natural phenomenon. To Robinson, "in a high power distance cultural context it is not what you know, but where you are in the hierarchy that matters".[10] Importance of discourse is presupposed merely because the sender occupies a prominent position in the existing power hierarchy. Form of discourse prevails over discourse content due to the fact the discourse is issued by an authority. Therefore, in the communicative process, little or no importance is given to the opinion and participation of the recipient. On the other hand, in countries where there is a low power distance, power inequality is considered artificial and fabricated by society. The authority of discourse results from it being acknowledged by the recipients. There is, as a result, much more space for dialog and for expressing diverging points of view.

The second dimension takes into account how people deal with the unpredictable, that is, whether they have strong *uncertainty avoidance* (UA). This addresses the degree of openness and tolerance of society in regard to what the society in question perceives as different. Therefore, whereas some cultures perceive "dangerous" as "different", others interpret it as being "interesting". From this point of view, a culture, which is more tolerant and receptive to cultural differences, tends to possess

[7]The decolonization process that took place after the Second World War spurred the birth of new States. Before 1960, approximately 60 countries made up the international system. By the end of the twentieth century, the number of nations was over 200.

[8]D. Kappeler, "The birth and evolution of a diplomatic culture", op. cit., at. 358.

[9]G. Hofstede (2004), at. 31–32. The other three dimensions are in regard of the following: the relationships established among people and which establish an individualist or collectivist society; the social and emotional consequences resulting from the relationship between genders, assessing whether a given society mirrors a masculine or a feminine culture; and, finally, the gratifications of needs, in other words, whether people in a given culture expect immediate payback for efforts expended.

[10]Macfarlane and Robinson (2004), at. 49. Still, according to Robinson, "some cultures place greater value on *who* you know, and others a greater value on *what* you know" (Ibid., at. 49).

| SMALL PD, WEAK UA | LARGE PD, WEAK UA |
|---|---|
| *NORDIC COUNTRIES*<br>*ANGLO COUNTRIES, USA*<br>*NETHERLANDS* | *CHINA*<br>*INDIA* |
| *GERMAN SPEAKING COUNTRIES*<br>*HUNGARY*<br>*ISRAEL* | *LATIN COUNTRIES*<br>*MALTA, MUSLIM COUNTRIES*<br>*JAPAN, KOREA, ESTAERN EUROPE* |
| **SMALL PD, STRONG UA** | **LARGE PD, STRONG UA** |

**Fig. 4.1** Power distance and uncertainty avoidance[11]

a richer repertoire of signs since it is open to other views of the world, and requires from diplomats an additional effort to attain mutual understanding. The latter is thus rewarded by a higher legitimacy rate of diplomatic decisions. Contrariwise, discursive intolerance towards the "different" brings to the surface identity atavisms and hinders the diplomatic communication process by reinforcing the borders that separate one country from another. In these cases, as Reimann notes, "the presumption is that what is inside these boundaries is of superior quality to what is outside" (Fig. 4.1).[12]

Both these dimensions suggest there is a trend in the profile of diplomats according to their State of origin. The chart above reveals that countries with a small power distance can be intolerant with ambiguity, when compared to countries marked by a highly hierarchical social framework, but which are tolerant with what is considered "different". These cultural attitudes may influence intercultural communication in the international relations plane. Macfarlane and Robinson[13] point out two more significant aspects. The first assesses how much the circumstances of interaction apply in terms of relevance to a successful outcome in the communication process in another culture. Therefore, in low context cultures, "there are fewer shared experiences and less shared understanding". As a result, "what *is* said is more important than what is not said".[14] On the other hand, in high context cultures, "words are not always the primary carriers of meaning. What is *not* said may be more important than what is said". An example of high-context culture takes place in Asian countries where individuals frequently utilize non-verbal communication, and the latter's consequences are explained in Rana,

> This has implications for the non-Asian negotiator, and for the diplomat in everyday contact; it affects the way foreign interlocutors might effectively deal with the local people, and

[11] G. Hofstede, "Diplomats as Cultural Bridge Builders", op. cit., at. 33.

[12] Reimann (2004), at. 84.

[13] L. R. Macfarlane and H. Robinson, "Lessons from two Fields: a Diplomat and an Interculturalist Converse", op. cit., at. 40. The authors also examine cultural "time-orientation" aiming at comparing how much relative consideration or importance the interlocutor attaches to the past, present, and future.

[14] Ibid., at. 52 and 53, respectively. The difference between low and high context was explored by Hall (1976), at. 91.

> handle everyday situations. One practical consequence: one should understand that Asians see the world in relative, rather than absolute terms, more as shades of grey than black and white; they are disinclined to extreme positions; they have a propensity, real or latent, to empathize with the other's viewpoint, even when they rigidly hold on to their own positions in hard negotiations.[15]

The second aspect concerns whether cultures are universalist or particularist. To the former, rules must be applied to all individuals regardless of the social and historical circumstances in which they live. To particularist cultures, circumstances must be taken into account and they can influence the way we behave in a certain situation, regardless of rules. This perspective can be summarized by the formula: "what is right in one situation, may not be right in another".[16] These distinct discursive postures can explain certain attitudes of and choices made by diplomats in international negotiation processes.[17] From this point of view, one can ask whether it is possible to build a common diplomatic culture that mitigates the effects of cultural differences among State delegates.

The notion of "diplomatic culture" presupposes the existence of a set of linguistic and non-linguistic signs shared by diplomats in their professional relations. This culture must take two aspects into account: (1) the circumstances surrounding it, and (2) the choice of language.[18] The first aspect concerns the set of signs serving as a backdrop for exercising diplomacy.[19] Diplomatic language, in turn, encompasses the set of rites and other signs, linguistic and non-linguistic, employed by diplomats in their relations. According to Cohen, "the diplomatic profession has evolved over many years a very subtle and variegated stock of words, phrases, euphemisms, gestures and maneuvers, each item having its own weight and shade of meaning [. . .]

---

[15] Rana (2007), at. 173.

[16] L. R. Macfarlane and H. Robinson, "Lessons from two Fields: a Diplomat and an Interculturalist Converse", op. cit., at. 51.

[17] The choice of the method of negotiation is likely to reveal the influence of culture in diplomatic relations. According to Mingst and Warkentin (1996), at. 177, in negotiations to establish a New International Economic Order (NIEO) Southern countries adopted an "axiomatic-deductive" approach, which moves from general principles toward more specific cases. "This approach conveniently masked conflict over details until a later stage; it was also consistent with the *general* proclivities of different legal and cultural systems in the South, even though the *specific* economic and political interest of states in the South differed". This approach contrasts with the "factual-inductive" approach, which is preferred by many Northern countries.

[18] To Kappeler, "diplomatic culture is the product of interaction between representatives of states and international institutions of various kinds" ("The birth and evolution of a diplomatic culture", op. cit., at. 358). Zartman and Berman define an international diplomatic culture as "a finite number of behavioral patterns"; while defining domestic culture as merely the "differences in style and language". Zartman and Berman (1982), at. 226.

[19] The location chosen for international negotiation is an example of a circumstance that diplomats do not ignore. Negotiating a treaty in one's own territory gives the hosting State an advantage in regard to the remaining parties. For this reason, one of the basic principles of negotiations is choosing a neutral location. International organizations play the role of a "neutral" territory and within such organizations a diplomatic practice that does not identify exclusively with the habits and language of a single country has been developed.

All this is thanks to the possession of a common code or language of discourse".[20] Mastering this signic repertoire is a *sine qua non* for successfully performing one's diplomatic function.

The international's system cultural diversity compels diplomats to carefully monitor their attitude and discourse during multilateral exchanges, to the extent that building a diplomatic culture becomes, in the words of Sharp, "an exercise in soft power on behalf of particular agendas not necessarily consistent with the aims of an organization, its members or those on behalf of whom they work".[21] Diplomatic discourses are culturally biased. Accepting new references to interpret new concepts and circumstances requires being open and willing to learn new ways of understanding reality. Diplomats must know how to act within and across cultures in order to be able to identify in the discourse they utter or receive meanings that express authority, knowledge of the circumstances of the negotiation, preestablished forms of prejudice, tolerance towards ambiguity, among other aspects.[22]

The diplomat is the most emblematic sign of the world's political map. Diplomatic discourse and practices are based on the postulate that they defend the interests of the governments they represent. Diplomatic culture, therefore, is erected on the pillars of difference and estrangement established under the shadows of States. Even considering the differences among nations could be ignored in favor of a more homogenous culture, the representation carried out by diplomats of their respective countries' cultural identity is a sign that guides and drives, in a certain way, their actions and thinking. The very States are devoted to affirming an individual sovereign identity capable of differentiating them from other States. This discursive construct of identity plays an important role in the international life of the State according to the political circumstances of the time. It is the role of international organizations to constructively manage these discourses changing these representations and cultural differences into an organizational advantage. The role of diplomats, in turn, is to acquire the necessary linguistic competence to choose the words and phrases that best mirror their intentions, and to have the necessary skills to be able to interpret the discourse of foreign interlocutors taking into account the circumstances of the negotiation.

## 4.2 An "International Signification" for Diplomatic Discourse

In the international arena, the discourse of legal conventions is the result of the law established to regulate the legal relationships between the subjects of international law. This discourse is one of the meeting points between the semiotics of international law and international relations. Here, we understand international

[20] Cohen (1981), at. 31.

[21] Sharp (2004), at. 367–368.

[22] As stressed by Rana, to the diplomat the "ability to handle the cross-cultural interface is central to the professional tasks, as is language and area expertise" Rana (2004), at. 383.

relations according to Merle: "the ebbs and flows that cross borders, or tend to cross borders".[23]

The term "borders" as mentioned above refers to the inhabited portions of the globe that are occupied by the political units we call "States". The criterion used for dividing the world in states is based on the political and legal division of the space where the movement of the actors of the international scenario takes place. The border, in semiotic terms, as in Delahaye's pioneering work on the semiotics of international relations, "is a sign from which all the other signs adopted in international relations are derived, either by contrast or opposition".[24] According to the author:

> Encompassing a signifier, the ideal limit drawn across land and capable of being represented graphically (on the map), and a signification, which can be defined as 'a line whose crossing implies internationality', the border is a sign in the fullest sense of the term. As a sign, it is, at the same time, a *line* left by history and an *instrument* that serves to separate concepts, since it distinguishes what is international from what is not. A sign that is, thus, at the origin of the first binary opposition, *International vs. Internal,* found in our path.[25]

The "border" is one of the central elements in defining the international relations according to Merle. It is a definition that enables us to redirect our focus from the state, – or rather, from the actors on the international scenario, – and to the "flows" that "cross" and "tend to cross" the lines of the State. Due to this change in focus, many factors, besides the actors, become the object of study in international relations insofar they participate in cross-border "flows", such as the circulation of people, products, capital, ideas, and even discourse – including legal discourse.[26]

Considering the fundamental phenomenon of dividing the world in States, the aforementioned definition of *international relations* is of particular interest to a semiotic study of international law, since it includes all significant manifestations that cross borders.[27] There is a connection between the "domestic" and

---

[23] Merle (1997), at 110.

[24] Delahaye (1977), at 18.

[25] Ibid, at 75.

[26] Today, there is no political, economic, scientific, cultural or technical domain that is free from being the object of relations among Nation-States. Nation-States are incapable of completely shutting themselves off from these "flows"; thus they witness the decrease in the ability of their borders controlling what comes in from abroad. This does not invalidate the criterion adopted, but actually proves that the life inside Nation-States has become increasingly more international.

[27] The object of a semiotic analysis of international relations includes all sign manifestations that are relevant to the international scenario. For example, the investigations regarding the sign value of the movements of military troops across the territory of another country. Delahaye elaborates: "Signification in international relations, is not manifested only through text proper; it can also be expressed via other channels besides word and scripture. Many times it will be expressed through *movements*, *gestures*: relocating troops from one ocean to another, relocating military bases, troop movement, population movement, movements of capital, specialist envoys to a specific region of the world, etc." (Y. Delahaye, op. cit., at 29). Further along, the author explains: "reducing, even symbolically, the military budget has as much a sign value as discourse on disarmament. Not allowing a foreign company to control a national corporation has as much sign value as a discourse on independence." Ibid, at 33–34. Changes in government, a cultural revolution or a

"international" dimensions resulting from the *international signification* attached to the crossing of borders. Therefore, a speech, a statement, a law produced by a nation's government – even when addressed to this nation's citizens – may be of significance to the international community.[28] "Foreign eyes" may give importance to these texts, even when said texts have been produced without aiming at producing any effect outside a nation.

These foreign eyes that provide international signification to a domestic fact or event enable us to consider "internationality"[29] a feature of internal legal discourse. Consider, for instance, a constitutional reform carried out by a given State: the result may be of interest to other actors on the international scenario. In this case, an internal event may acquire international signification to a foreign subject outside the bounds of a sovereign state.

With regard to legal-diplomatic discourse, the judgment of an outside subject is not what attaches "internationality" to it. This is because legal-diplomatic discourse has international signification by nature. "Internationality" is a prerequisite for the very existence of this kind of discourse. It is an inherent characteristic since legal-diplomatic discourse can only result from the legal text produced by two or more subjects of international law. The crossing of borders is presumed, given that the message moves through and among the sovereign spaces of the States that produced the text in question. From the perspective of the semiotics of international relations, a discourse may interest countries that did not participate in producing it. Heads of state, for instance, do not only "look" in the direction of their own negotiations. The agreements between third-party states may well produce direct and indirect social, political, and economic effects both domestically and internationally.

Legal-diplomatic discourse, however, must not be confused with the concept of diplomatic language, which refers to and includes the former and all forms of communication and signification by the intermediaries that establish the relations between or among countries – the practice of diplomacy. And diplomatic language is a direct consequence of diplomacy. This understanding is relevant to this study whether we consider diplomacy "the science and art of the relationship between sovereign entities, between states", as explained by Plantey,[30] whether we see it according to Ostrower to whom diplomacy is "the method of adjusting

---

simple statement made by a charismatic leader to his people are examples of sign manifestation on the domestic scenario that may be of international interest.

[28] According to Braillard and Djalili, "today we see States becoming increasingly exposed to foreign eyes. This phenomenon, which has over time characterized democracy to a certain extent, is progressively spreading to the rest of the international community. Nation-States can no longer hide their internal affairs for very long. Sooner or later, the domestic behavior of Nation-States is known and judged by the international public opinion via media and government and non-government organizations. Insofar as this behavior is contrary to the rights of man, the Nation-State in question runs the risk of suffering foreign pressure." Braillard and Djalili (1988), at 64.

[29] The "internationality" of a sign – that is, the features that make a given sign international – takes place the moment a border is crossed.

[30] Plantey (2002), at 13.

differences between states in official international relations".[31] Be it art, science or method, diplomacy is inherently connected to the idea of *negotiation*[32] as one of the forms of creating relationships between countries in order to accommodate and protect certain interests. The power of diplomacy is in its discourse. As stated by Aron, "diplomacy can be defined as the art of convincing without using force".[33] Therefore, the language of diplomacy becomes an important instrument in international negotiation.

This negotiation, according to Plantey, "is a way of solving disputes, that is to say, a type of combat conducted through means that, without using open force, are not always peaceful."[34] It is for this reason that *diplomatic tactics are founded on the analysis of divergence and of conflict, as well as – if not more – on the desire of reconciliation, compromise, and understanding*.[35] This perception of negotiation suggests that the use of diplomatic language should be at the service of negotiation strategies and of the different interests expressed by the actors on the international scenario[36] – and this also applies to diplomatic discourse, herein understood as a

[31] Ostrower (1965), at 107.

[32] The term "negotiation" is herein used in its broadest sense in order to include the *art* or *method* of negotiating in any kind of conflict resolution, such as direct conversations between Nation-States, the good offices, mediation, international conciliation, etc., besides the negotiations in course at the international organizations and its jurisdictional mechanisms. About the latter, Dinh, states "many times, the negotiation is but one of the elements of a vaster compromise; it intervenes both as a necessary preliminary step of a more complex procedure – together with other processes of conflict resolution, for example, arbitration – and to facilitate closure of the process – to avoid other processes, such as judicial resolution." Dinh et al., op. cit., at 829. This is corroborated by Article 5(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU") of the WTO: "Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel."

[33] Aron (2002), at 73. Besides diplomacy, another common instrument in the relation between states is *force*. The first is carried out by the diplomat, the latter by the soldier. According to Aron, "the two and only the two – fully act not as members but as *representatives* of the group to which they belong: the *diplomat*, in the exercise of his role, *is* the political entity in whose name he speaks; in the battlefield, the *soldier is* the political entity in whose name he kills another. [. . .] The diplomat and the soldier *live* and *symbolize* international relations that, while inter-Nation-State, lead diplomacy to war." (R. Aron, op. cit., at 52, emphasis in the original). However, Roche explains, "if diplomacy and war are privileged means of action of the State's power, they are essentially ambivalent. Diplomacy resolves tensions, but at the same time it also reveals relations of power." Roche (2001), at 114–115.

[34] A. Plantey, op. cit., at 73.

[35] Idem, loc. cit., emphasis in the original. Plantey goes on: "However, unlike war – where the feeling of hostility reaches an uncontrollable paroxysm and sometimes even exceeds the will of the belligerent parties, and where, as Clausewitz noted, each adversary is prone to exerting extreme violence and even cruelty – *diplomacy is a rational activity, which is carried out according to the pace agreed to by the participants.* In both cases, each protagonist seeks to impose his will and not accept the will of the other." Ibid, at 74, emphasis added.

[36] The negotiator should have semiotic competence, which enable him/her to pay attention to anything that may influence the result of a negotiation, even if it is something apparently trivial, such

linguistic form of expression, whether oral or written, of the language of diplomacy, and one that does not coincide with the legal-diplomatic discourse.

Hence, the ambiguity of diplomatic discourse: instead of being considered a weakness to be avoided at any cost, it can be presented as a virtue, a semiotic competence in which negotiators are expected to be knowledgeable. It is marked by the ambiguity of the word that enables the sender to position himself strategically between consensus and dissent, between a "no" and a "yes", so as to achieve a margin for political action without contradicting his terms, and thus preserving his credibility as a negotiator. "It resorts to a flexible phraseology that would not preclude a change of position in the future, and favors understatement", states Ostrower.[37]

Of course we also find cases of diplomatic statements that are intended to be explicit and straightforward and which, for this reason, are drafted in order to deliberately remove any doubt regarding the meaning of the words they contain. However, when dealing with a situation in which "one is against the other", where both parties attempt to protect their respective positions and interests, incompatible alternatives (but not contradictory alternatives, since these would be mutually excluding) tend to be the object of laborious and meticulous work to reconcile the meaning of the proposed wording in order to reach a possible consensus. In this case, what is being negotiated are the words and phrases used and their corresponding semantic values. According to Allot, "the passionate and formless world of politics is re-born as a world of words. Matters of great practical consequence, perhaps involving life and death on a great scale, are concentrated into the tiny mass of a few words, in a sort of ritualized trench warfare, in which big victories are measured in small gains of verbal territory".[38] Mastering diplomatic discourse is thus a key success factor in a negotiation. It enables the interested parties to understand each other and make themselves better understood if they so desire.

## 4.3 Diplomatic Discourse and the Problem of Choosing a Common Language

Diplomatic discourse has been developed in the exercise of diplomacy in the course of a long evolution of custom. One of the main issues concerning its consolidation is the adoption of a common language of reference to be used by and among

---

as the selecting a venue, the qualities and characteristics of the participants, the sitting arrangement of the negotiators at the table, etc. These considerations transcend the linguistic aspects of negotiation and encompass the diplomat's judgment and ability to intervene in the relations according to the rules, protocols, etiquette, and recognized customs of diplomacy. It is the manifestation of diplomatic *language* in its broadest sense, which includes non-verbal sign manifestations. The negotiator is required to be have semiotic competence to "read" and interpret the signs that cross and overlap both explicitly and implicitly.

[37] A. Ostrower, op. cit., at 124–125.

[38] Allott (1999), at 46.

states. One of the obstacles to solving this problem is the interdependence between language and nationality associated to nationalist points of view. "Languages so capable of developing national consciousness and general understanding within a political community of men, have tended to erect insurmountable barriers and obstacles in international relations", states Ostrower.[39] A national language resists the influence of foreign languages capable of weakening a nation's power in forming its national awareness, seeing that "when one speaks of the French language France quite naturally invades the train of thoughts; Italian brings Italy somehow to mind, and so forth."[40] The threat posed by a foreign language resided in the assumption that speaking it would consequently attract an entire body of cultural information related to the country of the language in question.

Although having a national language may be one of the conditions of nationality, language alone is not equal to *being* English or French, for instance. This is highlighted by Hobsbawm who affirms that it is not the use of the French language that makes people French, "but the willingness to acquire this, among the other liberties, laws and common characteristics of the free people of France".[41] *Being* French depends on the acquisition of a body of (in)formational culture. Furthermore, national languages are semi-artificial constructs, and sometimes entirely made up constructs, in a way that identifying nationality with language "is much more characteristic of the ideological construction of nationalist intellectuals [. . .] than of the actual grassroots users of the language".[42]

Anderson reinforces this understanding by sustaining that national languages are a creation of the educated or governing elite, transformed into a kind of model to be followed by a wider intercommunicating community, a "nation".[43] These languages

[39] A. Ostrower, op. cit., at 55.

[40] Ibid, at 39–40.

[41] Hobsbawm (1990), at 21.

[42] Ibid, at 57. Languages, according to Hobsbawm, "are the opposite of what nationalist mythology supposes them to be, namely the primordial foundations of national culture and the matrices of the national mind. They are usually attempts to devise a standardized language out of a multiplicity of actually spoken languages, which are thereafter downgraded to dialects, the main problem in their construction being usually, which dialect to choose as the base of the standardized and homogenized language." Ibid, at 54.

[43] Cf. Anderson (1989), at 53–55. The concept of "nation" should not be confused with that of "State". It is a term difficult to define and analyze. According to Anderson, "nation" is an imagined political community, limited and sovereign. It is a *community* due to the fellowship of those that make it; it is *imagined* because it is impossible to know all of its compatriots, regardless of the appearance of unity; it is *limited* because it has finite borders that delineate other nations; and it is *sovereign* "because the concept was born at the time in which the Enlightenment and Revolutions were destroying the legitimacy of dynastic and hierarchical reigns created by divinity." (Ibid, at 14–16.). Hobsbawm states that there are no satisfactory criteria to classify a group of human beings as a "nation": the criteria of language, ethnicity, common cultural traces, among others, would be ambiguous and convenient to propagandistic and programmatic ends than to descriptive ones. For this reason, nations are "dual phenomena, constructed essentially from above, but which cannot be understood unless also analyzed from below, that is in terms of the assumptions, hopes, needs, longings, and interests of ordinary people, which are not necessarily national and still less nationalist." *Nations and nationalism since 1780*, op. cit., at 10.

received the status of the "languages of power".[44] The language of the modern Nation-States would thus be the official language of the dominating elite, a language built and imposed through public education, government mechanisms, and with the support of the development of editorial-publishing houses, and notably the press, which would have contributed to conferring fixedness to the language – making it seem "eternal". By institution of an elite that controlled the power of the Nation-State, languages may be more appropriately allocated as "of the State" than "national".[45]

From these explanations we can conclude that national languages have been implemented through power relations and language policy.[46] The principle of sovereignty associated to the principle of equality among Nation-States has served not only to justify these internal policies, but also to support initiatives to protect and promote national language in international fora.

Based on these principles, Nation-States have been allowed to use their official languages when communicating with other countries. The equality principle among sovereign states includes the prerogative of linguistic equality. According to Ostrower, this attitude has been a mark of the theory and practice of diplomacy throughout history. "Nations have always considered it of vital importance that their languages be used in international contacts, notwithstanding the frictions and misunderstandings which the use of numerous tongues has created in such official

[44] Cf. B. Anderson, op. cit., at 46–52. Hobsbawm states: "However, given that the dialect which forms the basis of a national language is actually spoken, it does not matter that those who speak it are a minority, so long as it is a minority of sufficient political weight. In this sense French was essential to the concept of France, even though in 1789, 50% of Frenchmen did not speak it at all, only 12–13% spoke it 'correctly' – and indeed outside a central region it was not usually spoken not even in the area of the *langue d'oui*, except in towns, and then not always in the suburbs. In Northern and Southern France virtually nobody spoke French. If French at least had a state whose 'national language' it was considered, the only basis for Italian unification was the Italian language. Italian was responsible for uniting the educated elite of the peninsula as readers and writers, even though it has been found that at the moment of unification (1860) only 2.5% of the population used the language for everyday activities. For this tiny group was, in a real sense *a* and therefore potentially *the* Italian people. Nobody else was." Ibid, pp. 60–61.

[45] According to Bourdieu, "the official language is the one bound to the State, in both its genesis and in its social usage. It is in the constitution process of the State that conditions are created for a unified linguistic market dominated by the official language: mandatory during official events and in government facilities (schools, public administration, political institutions, etc.), this language of the State turns into the norm with which all linguistic practices are objectively measured." In line with this, "the integration in the same 'linguistic community', which is a product of the constantly reproduced political domination carried out by institutions capable of imposing the universal recognition of the dominant language, constitutes relations of enforcement of linguistic domination." Bordieu (1999), at 19. Bourdieu does not hide the political process of unification to the extent that a group of "speakers" is virtually compelled to accept the official language. Promoting this language to the position of the national language gives the dominant group the monopoly over politics. It would not be farfetched to make an analogy from the perspective of the international system.

[46] On language conflict in States, see Calvet (1999).

encounters."[47] The same was witnessed in the wake of the Second World War, as highlighted by Roland: "one of the most difficult aspects of the post-World War II period, so far as international relations are concerned, has been the proliferation of languages that their nationalistic speakers insist upon using for the purpose of international negotiation".[48] However, conducting international relations through the official languages of Nation-States, despite satisfying the aspirations and pride of their government, created obstacles that would not have been faced had these Nations-States agreed on the use of a common language.

The choice of a common language to be used in the communication between the different actors of the international system did not only result from practical advantages,[49] but also from power relations. These were factors that came to mitigate the doctrine of the equality and sovereignty of Nation-States, and favor the adoption of one or more languages as the working languages in diplomatic communication. Adopting the same language system of signs would enable communicators to set a minimum standard of communication that, according to Bourdieu, "constitutes the conditions for economic production and also symbolic domination".[50]

A common language for diplomatic discourse facilitates the understanding among actors in a multilingual environment. A common language, avoids losses – whether economic, social, environmental, etc. – resulting from mutual linguistic miscomprehension in the course of the international relations between states.

## 4.4 The Language War in Diplomacy

"Everyday, all over the world, hundreds of thousands of people come together, and need to communicate, but they do not speak the same language. Commerce is the social practice that is most often faced with this problem: how to buy and sell to people who speak different languages?"[51] Calvet makes this inquiry based on the reasoning that the history of languages, – as a chapter in the history of societies –, is marked by the violence of languages against each other "because, if there is a *war of languages*, it is because there is *multilingualism*".[52] This Hobbist view of linguistic inter-relations does not ignore the initiatives to manage multilingualism. After all, "the *market,* due to the number of languages it brings, in certain cases,

[47] A. Ostrower, op. cit., at 732.

[48] Roland (1999), at 132.

[49] "A reconciliation between the rights stemming from the doctrine of state equality and the disadvantages arising from the exercise of such rights was inevitable. Convenience and necessity, which dictate a practical approach to official international relations and to the function of language, have suggested the return to a common form of linguistic communication even if such a practice should represent an infringement on the concept of state equality." A. Ostrower, op. cit., at 733.

[50] P. Bourdieu, *¿Qué significa hablar?*, op. cit., at 19.

[51] L.-J. Calvet, *La guerre des langues et les politiques linguistiques*, op. cit., at 107.

[52] Ibid, at 10, emphasis in the original.

face-to-face, and by the necessary communication it implies (to value its merchandise, call a client, ask and discuss prices, etc.), the market does in fact reveal the kind of multilingualism management that govern social practice."[53] This statement, however, does not shift the author's focus. According to him, the war of languages is also waged in the domain of international commercial relations.[54]

The logical consequence of this reasoning would be the supremacy of one language over the others, which, to an extreme, would mean the existence of a single universal language. The universal nature of this language would be reached after a long terminological battle waged against other languages that would eventually be wiped off the map. Therefore, the universality ideal as understood herein would be reached through disputes, thus differentiating it from other more peaceful perspectives according to which universality would not imply the annihilation of other language systems. Take, for example, the initiatives dedicated to institute an International Auxiliary Language (IAL), artificially projected and analogous to natural languages, so it could be perceived as "neutral" by all its users.[55]

In any of the two cases, linguistic universality would concern the signifiers of the linguistic system adopted around the globe. But this would not completely eradicate the "noise" during international communication processes. Eco's warning against an IAL illustrates this question well: "a fundamental objection that can be applied to any of the *a posteriori* projects generically is that they can make no claim to having identified and artificially reorganized a content-system. They simply provide an expression-system which aims at being easy and flexible enough to express the contents normally expressed in a natural language".[56] This leads us to believe that the utopia of an international auxiliary language – or even a universal language – would not eliminate the problems of meaning in messages sent insofar the interlocutors may not share the same world vision. Despite being able to use the same words and phrases, the contents connected to them could be as distinct as the distinct cultures in the world.

According to White, insisting on a universal language is tantamount to tyranny, since the innumerous languages in the world cannot be appropriately translated into a "superlanguage". Furthermore, in White's opinion, it is in this linguistic diversity – multilingualism – that the radical equality among individuals paradoxically resides.

---

[53] Ibid, at 108, emphasis in the original.

[54] According to Calvet, "vehicular languages which are only employed in this case and which sometimes gain space in another place with other functions besides their role in trade. Because these languages are required in these places and in this role, it may be that, in society at large, they are the vehicular languages of tomorrow" (Ibid, at 108.). According to the *Le Petit Robert* Dictionary "Vehicular language" ("Langue véhiculaire") is the language "which serves communications between groups of different mother languages" (Dictionnaires Le Robert/VUEF 2001–2003 Windows, version 2.2 – CD ROM).

[55] Calvet deliberately chose the adjective. He called the inventors of these artificial languages "dreamers". Cf. Calvet (2002), at 177. Eco made an inventory of these auxiliary systems, highlighting Volapük and Esperanto. Cf. Eco (1997).

[56] U. Eco, *The Search for the Perfect Language – The Making of Europe*, op. cit., at 330.

> For if we all speak differently, and there is no superlanguage in which these differences can be defined and adjudicated, what is necessarily called for is a kind of negotiation between us, I from my position – embedded in my language and culture – you from yours. We can and do make judgments, but we need to learn that they are limited and tentative; they can represent what we think, and can be in this sense quite firm, but they should also reflect the recognition that all this would look quite different from some other point of view.[57]

The defense of multilingualism receives important support from Hagège in his work entitled, *La souffle de la langue*, in which he addresses the European linguistic reality. This author does not favor the adoption of a common language. According to Hagège:

> The Europe of languages has a destiny that suits it, and it would not know how to find inspiration in foreign models. As though the United States were to adopt one different language for each new immigrant, as a stamp on his identity, what makes Europe unique is, on the contrary, the immense diversity of languages and cultures. The domination of a single language, such as English, does not fit this destiny, but multilingualism does. Europeans live with multilingualism. Europe should educate its children in a variety of languages – not only in one. This is Europe's appeal to both the past and the future.[58]

It is worth pointing out, however, that Hagège does not ignore the role of English as a common language in Europe. "To Europeans, English seems to respond better to the uncontrollable need of communicating, which one may call the *drive of dialog.* As a result, English plays the role of a common language."[59] But the author's concession is not made without some reserve: "the power of English" is promoted by the countries that speak this language. Thus, "the means of hegemony are still

---

[57] White (1994), at 264.

[58] Hagège (2000), at 8–9. Sharing this idea, Vega states that "the idea of a 'Europe of the peoples' carries the underlying idea of unity in plurality. The proposed goal – unity – must be realized from the real and existing perspective of plurality, which must be safeguarded at all costs. Unity may be an abstract fetish of technocrats, financiers and specialists in market technique: for culture, for the historical vitality of peoples, for literature and the arts, imposing or decreeing unity would lead to the death by asphyxiation of all peoples (except for one, perhaps?) The victory of this culture would not only be pyrrhic, it would also be ghastly." Vega (1991), at 39. Regarding the language debate in the European context, see also Forrest (1998), at 101–120. Herbulot, at the time president of the International Federation of Translators (IFT), warned that those that defend the use of a "universal language", in this case English, based on "unbearable" costs of translation: "have they considered the unbearable cost of non-translation?" He states that "A researcher, thinker, or author should be free to express themselves in their mother tongue, with all the subtleties that only the use of mother tongue permits, and then translated into quality English by a quality translator, by an Anglophone, who is also working in his mother tongue, thus, in control of all the means [his mother tongue] has to offer." Herbulot (2002), at 14.

[59] C. Hagège, op. cit., at 41, emphasis in the original. The language map of Europe seems to be limited to five languages: English, French, German, Spanish, and Russian. But English remains the most widely spoken foreign language throughout Europe. According to the Eurobarometer report, "38% of EU citizens state that they have sufficient skills in English to have a conversation. Fourteen percent of Europeans indicate that they know either French or German along with their mother tongue." European Commission, Special Eurobarometer, 243, "Europeans and their languages", February, 2006, at 12. Available at http://ec.europa.eu/education/languages/languages-of-europe/doc137_en.htm

those of the times of the Roman Empire. A world economic power is determined to serve its language as well as to conquer markets for its products. The two enterprises are, therefore, united because exporting language, in a natural way, opens up markets for these products".[60] Promoting a common language involves both obvious political and/or economic interests, and the dominant role played by this language is key to increasing a country's competitiveness in the course of its international commercial relations.

The predominance of English[61] is discussed by Phillipson in *Linguistic Imperialism,* in which the author shows, from a linguistic viewpoint, the structural relations among rich and poor countries and the mechanisms through which the unequal conditions between them are maintained via linguistic means. One reflection is particularly interesting: "For our purposes it is necessary to establish *linguistic imperialism* as a distinct type of imperialism, in order to be able to assess its role within an imperialist structure as a whole. *Linguistic imperialism permeates all the types of imperialism, for two reasons. The first has to do with form (language as a medium for conveying ideas), the second with content*.[62] According to Phillipson, linguistic imperialism is the primary component in cultural imperialism, since it not only supplies a system of signification to be shared, but it

[60] C. Hagège, op. cit., at 42. Still according to the author "to these external factors, economic expansion, need of a common tongue, support policy, others can be added that, as a result of the former, produce in turn, an increase in the spread [of this common language]. English, among all the other languages in the world, appears to have evolved closer to these needs and to have been the first language to express them. This should come as no surprise, since it is language of the countries located in North America, where, in the intellectual and material life, needs are born, thus consequently giving rise to an activity of scientific and technical research to respond to this. Therefore, English words are the words that translate contemporary appetites, which are natural in some cases and artificially created in others, and that spread everywhere obviously disseminating these appetites; and other English words designate the products that satisfy these appetites; the very products in question penetrate everywhere, and together with them, the names [in English] that express them. As a result, an intense activity of creating neologisms is developed in many countries, such as in France and Quebec in regard to French, in order to contain this invasion by creating equivalents in other languages. However, the number of new English words and the pace of their growth is so considerable that the terminology commissions are constantly threatened with not being able to complete this task, unlike the interpreters of language in the nineteenth century, these commissions examine material that is almost industrial in terms of the dimension of the task and in terms of the techniques the task requires" (Ibid, at 42–43.). It is important to point out, however, the following statement by Bourdieu: "the effects of domination with regard to market unification only take place via a group of institutions and specific mechanisms, among which is language policy [. . .]." (P. Bourdieu, *¿Qué significa hablar?*, op. cit., at 24.).

[61] When referring to the "English language", one cannot ignore that it has several manifestations, especially when used as a second language (and not as a foreign language), which differ from British or North American English. According to Barber, "in formal writing, the essential structure of the language is practically the same throughout the English-speaking world; the differences in vocabulary are perceptible but not enormous; and the differences in spelling negligible. There is, therefore, a standard *literary* language which is very much the same throughout the English-speaking community, and it is this, if anything, which deserves to be called Standard English." Barber (2000), at 261, emphasis in the original.

[62] Phillipson (1993), at 53, emphasis added.

also exports cultural contents to other systems of signification, or rather, to other cultures.[63]

A system of linguistic signs and, consequently, a culture, attains supremacy by means of diffusion and prevalence of its signifiers, as well as by the dissemination and permanence of its significatiors. The success of this endeavor favors other forms of imperialism. However, if the propagation of words and phrases – the concrete face of the signs in a specific linguistic system – can be more easily quantified and compared,[64] the same cannot be said of the contents they convey.

The organization of content in a system of signification occurs differently and is mutually indeterminable in each country, in each culture. Even in the case of a universal language, – whether imposed by force, whether peacefully implemented via an international auxiliary language –, despite establishing a certain uniformity of expression, will not escape the inconvenience of having no control over content. Eco puts this clearly when discussing the viability of an auxiliary language (which is analogous to any common language): "such seems to be the fate of artificial languages: the 'word' remains pure only if it does not spread; if it spreads, it becomes the property of the community of its proselytes, and (since the best is the enemy of the good) the result is 'Babelization'".[65] Disseminating a system of signs does not only mean sharing its expressions, but retrofeeding it and broadening the possibilities of meaning for new and other practices of communication and diffusion. In this dissemination, it is the signifier who first crosses borders. However, it is at the level of content, i.e. of discourse, where we find the shades of

[63] Although linguistic imperialism may be associated to the English language, it does not ensure absolute supremacy throughout the course of history. Calvet explains: "Some believe the international dominance of English is an obstacle to diversity and jeopardizes the 'small languages'. Others believe the contrary, seeing English as a way of protecting these languages. Yet others are against [English] dominance because it undermines, little by little, the spread of their own language. Thus, the same fear apparently stems from very different interests. The fact remains that, ever since the first universal language, which according to myth precedes Babel, until the most recent and real [languages], whose universality was more regional than global, all languages end up disappearing and leaving room for the next, and there is no reason why English should escape this rule." (*Le marché aux langues*, op. cit., at 179). According to Phillipson, "to the thesis of the increased dominance of English needs to be added the antithesis of the advance of English. Opposition has come from many parts. Those protesting include colonized peoples, European members of parliament, political enemies of core-English nations, guardians of the purity of languages which English invades, and intellectuals from core and peripheral-English countries. What protesters have in common is a recognition of evidence of linguistic imperialism and dominance, and a desire to fight it." Op. cit., at 35.

[64] Take, for example, one of the criteria suggested by Delahaye for classifying the actors on the international scenario: "One of these criteria could be the greater or lesser *abundance of conveyed messages and sign manifestations detected across borders.* One could thus note that some actors are great senders in a number of different ways, thus being, at the same time, producers of text, creators of images, builders of institutions, presenters of shows, whereas others are not." Y. Delahaye, *La frontière et le texte*, op. cit., at 48, emphasis in the original.

[65] U. Eco, *The Search for the Perfect Language*, op. cit., at 319.

meaning which will be taken up by the actors who will use this meaning in making decisions and taking action.

Despite the risk of semantic divergence, the use of a common language meets the communicational needs of peoples, governments, and merchants, etc.[66] Competing languages would not encourage a *modus vivendi* in the international system. Therefore, the choice of a common language is always the first step in diplomatic dialog, but its limited as is any other natural language, meaning that: it presumes translatability. In other words, it presupposes that discourse can be translated into other languages, despite their different ways of perceiving, organizing, and interpreting the world.

## 4.5 The Senders of Diplomatic Discourse and Legal-Diplomatic Discourse

Diplomatic language is not to be mistaken for a universal language or an international auxiliary language. The latter two refer to linguistic systems that are intended to be used by anyone and in a global scale. They include, therefore, the private communications between individuals who speak different languages and a plethora of communicational needs. Diplomatic language, on the other hand, corresponds to the language used by Nation-States when communicating with each other. Despite its importance, however, diplomatic language has not deserved much linguistic or historical study, as stressed by Ostrower: "what has been said or written on the subject of diplomatic languages by historians, linguists, and jurists is very brief, incidental, and marginal, and is relevant only to a specific language, a special situation, or a particular period."[67] The importance of such study resides in the fact that Nation-States are increasingly concerned with issues of terminology and interpretation of the documents they produce and exchange. There is, however, one particular aspect of such study that presents a problem and must be highlighted: the difficulty in identifying the senders of this language.

In an international negotiation, Nation-States are present in the person of their delegates, whether ambassadors, ministers, business managers, etc. They are spokespersons that act in the name of the government and bind the Nation-State both legally and politically. In principle, the opinions of these authorities express the will of a sovereign government. On the other hand to what extent is this true? How can we be sure that the discourse of a diplomatic agent really corresponds to

[66] Hagège recognizes this fact when advocating for European multilingualism: "The multiplication of independent Nation-States, whether unilingual or, more appropriately, multilingual, should certainly be considered fruitful and beneficial. It is the foundation of the cultural wealth of Europe. However, at the same time and as a result, it increases the number of jobs with the same content, notably in the field of science and technology. This situation could spur the desire for a common language, which meets economic interests." *Le souffle de la langue*, op. cit., at 16.

[67] A. Ostrower, op. cit., at 806.

the political position and interests of the Nation-State that he represents? This is the point of contention for a semiotic study of international relations.

Whereas the phrase "international relations" has been defined as "the ebbs and flows that cross borders", in defining "author", it is possible to include *all* the actors involved in these flows, or rather, all the senders of discourse that has international signification. This perspective is adopted by Delahaye who considers the "actor" "all entities, even individuals, whose message crosses borders or whose signifying manifestation, even when expressed internally, is detected across a border".[68] From this semiotic perspective of international relations, it is possible to focus not only on the *entities*, but also on the *individuals* representing this entity. The role of these individuals cannot be ignored because, even though they represent the Nation-State, they have an ambiguous persona. The individual is both a person himself and the social role he plays as the delegate of a Nation-State. One role can influence the other. This ambivalence is fundamental to diplomatic relations: convenience will dictate when to play the role of the individual, in private, and when to be the foreign interlocutor, the delegate representing the Nation-State, with all the authority vested in him.[69]

Although it may be said that the voice of diplomats is the voice of the Nation-State, one must not forget that these diplomats are individuals who have interests and feelings, and therefore also deserve to be studied as signs and senders of signs. This is particularly important in international negotiations, especially when the delegate imprints his personal mark on the actor he represents. In this case, his discourse is identified as the expression of the individual person and as the voice of the international actor. As a delegate, he sometimes wears and sometimes does not wear the hat of the Nation-State, thus playing an ambivalent role. The difficulty comes when we try to find out exactly when the delegate does not consider his – but of his Nation-State – a sign he issues. Decoding diplomatic discourse as a kind of manifestation of both personae is a challenge for researchers investigating the semiotics of international relations.

---

[68] Y. Delahaye, op. cit., at 45. Thus, any individual or entity playing a significant role in the international scenario can be considered an international actor, regardless of whether or not the sender of the message has independent decision-making authority. A semiotic study of international relations reinforces the argument of those that consider the individual as an actor in the international system.

[69] To explain this ambivalence, Delahaye turns to the allegory of puppet theater: "The puppeteer, dressed in a black bodysuit and covering his face, holds a puppet in his arms, which is almost his own size. The movements of his body, head and arms reproduce, as a shadow would, the movements that he imprints on the character he manipulates. Puppeteer and puppet are both visible, but the puppeteer, thanks to his clothing and the coincidence of his gestures with those of the marionette, becomes part of the scenario. The audience focuses on the puppet. The same takes place in politics where one sees men instead of the Nation-States. What is more surprising is what [the audience] finds more interesting: it is not his joints that show flexibility and movement, and not even his size, which are so close to the size of a human being, but it the mask. Masks of a great variety, with make-up, and that change according to all dramatic situations. And it is on them, in the end, that the spectator focuses his attention both in the theater and in politics" (op. cit., at 50).

The subtle shades of the producer of diplomatic language are taken into account in the processes of negotiating international treaties. However, although a semiotic analysis of this language is allowed to distinguish between the *sender as an individual* and the *sender as the entity he represents* in the negotiation of an international treaty, we understand that once the treaty is signed it conveys the legal-diplomatic discourse of the *entities* that have signed the agreement, and not the discourse of individual negotiators. Thus, from a semiotic perspective of legal-diplomatic discourse, the sender of the message will always be an entity, whether a Nation-State or an international organization.

This distinction is drawn because our study is inserted, not in the field of international relations, but of international public law, where the individual has no international legal capacity, *per se.* In this arena, the individual has no legal capacity to sign international treaties or conventions, and neither means of becoming a member of international intergovernmental organizations or of acting in his own name before Nation-States or international organizations.[70] This is why, according to Soares, "the concept of 'international actors', which is extremely important to International Politics, and undoubtedly much wider than the concept of 'subject of International law', serves no purpose to International Public Law".[71]

This should by no means imply that diplomatic discourse should be looked down on by those studying the semiotics of international law – much to the contrary – one cannot ignore that this diplomatic language, with all its peculiarities, constitutes an important tool for the subjects of international law in their negotiating activities. And, therefore, diplomatic language precedes and determines legal-diplomatic discourse. The latter, in turn, once it is established, and as it helps shape the international legal system, serves as a reference framework for new communicative diplomatic practices.[72] It may thus be concluded that diplomatic discourse is closely connected to international law – the latter being dependent on the existence of the former, which, in turn, is very much based on previously established legal norms.

---

[70] We mention three of the five fundamental categories Dupuys calls the "international capacities of the Nation-State." Cf. Dupuys (1993), at 43 et seq. Combacau and Sur state that "international law – meaning, the Nation-States that make it – denies this power [the capacity to act] to the inside subjects, considering them incapable, internationallywise, of binding themselves: insofar legal effects are bound to their behavior which results from international relations, it is in the domestic legal system that they fully express themselves, although it is not ultimately in this system that they find their ultimate origin" (op. cit., at 317). It is worth stressing however that we are fully aware that currently the individual is considered an international law entity insofar as individuals are held liable for international crimes and have the right to international jurisdictions.

[71] Soares (2002), at 141.

[72] According to Ostrower, "the practice itself, however, clearly indicates that the linguistic practices developed between states must have been felt to contain legal implications which could cause the establishment of a legal obligation regarding the employment of certain diplomatic languages [. . .]" A. Ostrower, op. cit., at 784.

# Chapter 5
# Legal-Diplomatic Discourse

## 5.1 Codes of National Legal Cultures

International law is a legal language code created to enable different legal systems to coexist in regulating actions and situations pertaining to two or more States. A uniform interpretation of the content of international law is put in check not only by the multiple interests at stake and by the typical kinds of miscomprehension resulting from intercultural communication, but also by the different views of the world that uphold (and act upon) international law. According to Kennedy, "jurists from different cultures proclaim the framing of 'international law' at the image of a legal system that corresponds, in the strictest sense, to the term 'law' as understood according to their own experience".[1] This is so, because, in addition to an own way of thinking, in creating and enforcing the law each national legal tradition has, according to Glenn, its "pastness".[2] The law of a country results from the combination of information captured in the past with the interpretation of this same information carried out at a later period taking into account the circumstances of the present. This information can be repeatedly reaffirmed or renewed depending on the degree of openness of this legal system to the exchange of legal experience with other cultures. Therefore, certain legal traditions may be more or less adaptable to

[1] Kennedy (2000), at. 12. Still according to Kennedy, "if national law is situated in the courts and in codes, it would be difficult to imagine that international law could be something completely different. Moreover, if international means North Atlantic or GATT, then international law would focus strictly on these two agreements. If international law is defined in a military war scenario, then international law shall find its object of study in regulating warfare. In conclusion, in line with this, where international law means "the North", international law is more concerned with trade than with conflict". Ibid., at. 12.

[2] By using the phrase "*national* legal traditions" we mean the legal tradition established by the States through their organizations and their law. Glenn warns against misunderstanding the phrase "non-traditional societies" to mean modern or post-industrial societies based on the ideal of rationality, as opposed to the so-called "traditional societies" meaning societies lacking critical and independent thinking concerning the past. "History, with its relativizing effect, tells us, however, that we are all part of a tradition, or traditions. (. . .) Western societies, in spite of what is often said, are thus traditional societies, and western law is traditional law, as western lawyers often explicitly acknowledge". Glenn (2004), at. 2–3.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_5, © Springer Science+Business Media B.V. 2011

foreign circumstances and influences and, as a result, are more or less open to taking part in a project to build a common legal culture at the international level. However, the challenge posed to creating this common culture is promoting a common language code that enable interlocutors to understand the meaning of a legal norm when arriving at the crossroad between national law and international law. Such a challenge is similar to the one raised by Legrand to comparative law scholars:

> Is it possible for a French jurist to master English law *like an English legal professional or professor*? Should the French jurist, by attempting to reproduce the English legal experience, try to apprehend the way the English perceive English law in England, that is, try to reproduce English law according to its strangeness, or should he aspire to convey this English law in the ways of French law in order to give meaning to it in the eyes of the French legal profession?[3]

Mastering a foreign legal system presupposes knowledge of the language and of the cultural referent of the corresponding State. However, every comparative analysis presupposes an epistemological problem: what meaning should one attach to a foreign legal culture when the cognoscente subject himself is an individual who is a stranger to this culture? The complexity of the process of apprehending a certain reality and the process of comparing this reality to other realities requires the comparatist choose an approach based on successive approximations of models that represent the legal cultures under scrutiny in order to identify their distinctive features.

The models of the French and English legal cultures, for instance, usually serve as a reference to establish the differences between civil law and common law traditions, respectively.[4] It is commonplace to state that civil law systems are *statutory*. The normative content of reference results from legislation. Finding support in statute in order to reach a legal solution for a particular case is how the courts provide legal grounds for their decisions.[5] From this perspective, legal cultures that follow this tradition have the perception that the primary role of the jurist, while interpreting a legal norm, is but finding the meaning that corresponds to the lawmaker's originally aspired meaning. The court's decision shall be legally valid and the more legitimate when the discourse is justified as being the manifestation of the meaning of the law or statute, as though the content of the decision could have been produced regardless of the volition of the court while interpreting the legal norm at

---

[3] Legrand (1999), at. 11–12.

[4] Cohen-Tanugi establishes the difference between the American and the French model according to whether the model is founded on the rule of law or on the power of the State. Cohen-Tanugi (2007), at. 33–45. The fact that legal authority is carried out by society in its own name and against the excesses of the State, or carried out by government in defense of the State and in the name of society, has determined the way the law is perceived, created, and enforced in the United States and in France.

[5] "The law, in all countries belonging to the Romano-Germanic family, seems to encompass the entire legal system", says David. However, the author adds, "for historical or sociological reasons, it may be that, in this or that country, there is a greater concern in maintaining the appearance that the law is the only element complied with when decisions are issued". David (1998), at. 110, 108–109, respectively.

issue. As a result, the responsibility for the decision, following this line of reasoning, would ultimately lie with the all mighty lawmaker.[6]

Contrary to what takes place in legal cultures stemming from Roman law, in which the courts "legislate" when statute is silent,[7] in the Anglo-American tradition, pieces of legislation are adopted when there is a gap not filled by case law. "It is common for judges to understand statutory provisions as exceptions, clarifications, or minor modifications to the body of law build by the common law", state Poirier and Debruche.[8] The law is primarily built from precedent based on usage and custom. As pointed out by Garapon and Papadopoulos, in the common law "the law is less a series of statutory provisions, from which it would be possible to identify the date of enactment or the authors, than a practice or a custom recorded in collective memory, a collective work produced in the course of time, whose perennial nature and lack of changes to its essence increase its prestige".[9] The obligation of resorting to the laws established by the courts (*stare decisis*) establishes a case-law-based legal system. It must be highlighted that applying the rule of precedent requires examining the *reasons* given by the courts in providing grounds for their decisions.

Both the civil law and the common law are legal traditions that are expressed through written linguistic signs. As noted by David, "in Romano-Germanic law countries, the starting point of any legal reasoning is found in written law materials".[10] The same applies to the common law, which according to Poirier and Debruche, is "a written – but not codified – legal tradition".[11] The difference between one and the other resides in that the legal culture inspired in the civil law is governed by one set of rules and that of the common law is guided by a repertoire of cases. In the civil law system, the prevailing form used in the law is the form of statute. The decision of the judge must be in harmony with the rules about combining legislation that determine the validity of the decision and the legal context relevant to the applicable norm. As a result, one has a set of metatexts, that is, model-rules established before the facts and based on which the court decisions are issued. In the common law, validity and legitimacy of legal norms result from decisional texts produced *a posteriori* and which may serve as reference to solving new

[6] It is by no means our intention to state that this is what actually takes place in civil law cultures, but to affirm that this is the discourse used to legitimize the exercise of authority on behalf of those representing the courts and the legislature, regardless of the transformations through which the law is undergoing due to the increasing exchange of legal experience with foreign cultures.

[7] Today, this is called the creative role of the court in establishing the meaning of a legal norm. The legal solution provided to a controversy would not result from a logical interpretation of the law; but from a rational operation on which the action of a series of ideological and cultural motivations are found in the judge's ethos. In any case, David stresses "the role of case law in Romano-Germanic countries can only be defined in connection with the role of statute". R. David, op. cit., at. 118.

[8] Poirier and Debruche (2005), at. 394.

[9] Garapon and Papadopoulos (2003), at. 51.

[10] R. David, op. cit., at. 108.

[11] D. Poirier and A.-F. Debruche, op. cit., at. 83.

conflicts.[12] There is no combination rule previously and compulsorily establishing the applicable norm. Legal cultures that follow this tradition are organized around the accumulation of successive precedents, which serve as a model for the jurist.

Lótman provides a typology of cultures that aids in establishing a few distinctive features between these two legal traditions. Lótman calls cultures based on repertoires of examples and models *textual*; and cultures governed by a system of rules *grammatical*. "Cultures of the first type are distinctive in their fundamental principle, custom; whereas the distinctiveness of cultures of the second type lies in statute".[13] Therefore, in *textual cultures* "law" is considered the practice and habits to which a meaning of legal obligation is attached; and in *grammatical cultures*, a rule is considered "legal" when previously established as being the "law". Taking this distinction into account, Eco states that "a good example of grammatical culture would be Roman law, in which the rules of each case are established in detail, and any kind of detour is excluded; whereas an example of textual culture would be the Anglo-Saxon common law, which adopts precedents as texts by which the courts should find inspiration in order to solve, in an analogous manner, analogous cases".[14]

To Lótman, considering a certain culture "a set of texts" or "a set of rules" is to stress its society's organizing principle, which applies to any subject later introduced into collective consciousness.[15] "It is interesting to observe how statutes and norms introduced in a culture built upon the principle of text start to function almost like precedents, whereas in the opposite situation, customary law moves towards codification, culture actively segregates its own grammar".[16] Therefore, importing or merely introducing grammatical structures in textual cultures will not necessarily change the law of these cultures in the image and resemblance of law applied to civil law countries – especially when the elements of a foreign semiotic system are implanted in an artificial manner.[17] In the same way, a forced absence of codified rules will not lead grammatical cultures to a generalized normative chaos.

Regardless of their differences, what common law and civil law share is *writing* as a way of *par excellence* expressing the legal norm. In regard to the common law,

---

[12] To Cohen-Tanugi, in the Anglo-Saxon tradition, "only facts really matter, as well as the creativity of lawyers". Differently from the French legal spirit which "has a profound distaste for facts, which are by nature rebellious, and strives to classify them in preestablished categories of what it calls 'the law'". *Le droit sans État: sur la démocratie en France et en Amérique*, op. cit., at. 78. Thus, a fundamental difference between these two legal cultures comes to the surface: one is oriented by custom, the other by legal norm.

[13] Lótman (1998), at. 125.

[14] Eco (2000), at. 126.

[15] I. Lótman, op. cit., at. 127. The phrase "collective consciousness" conveys the idea of culture as "the collective programing of the mind that distinguishes the members of one group or category from people from another". Hofstede (2001), at. 10.

[16] Ibid., at. 127.

[17] Quoting examples from the Russian legal experience, Lótman notes that grammars introduced "top down" in a textual culture system in fact operate as texts. In other words, in these cases, "the laws are enforced as customs". Ibid., at. 131.

writing enables the accumulation of precedent recording the solution found for each particular case; in the civil law, writing enables the multiplication of legal provisions to govern facts that have not yet been regulated. If writing is a cultural trait that brings these two traditions together, it is also what distinguishes them from cultures in which the law has an important *unwritten* dimension. Legal experience, in these cases, are based on the collective representations of social practices and habits which, renewed in time, preserve what is understood as a mandatory, allowed, or prohibited. Differently from written law cultures, which present a more homogenous semiotic culture, grammatical and syntactical nexus of the legal symbols of unwritten-law cultures are more imprecise and often based on oral tradition.

Let us take African legal cultures as an example. Although African legal regimes incorporated many aspects of the law of their respective colonizing countries, norms and customary proceedings of the precolonial period continued to exist. With the undoing of colonialism these norms were considered outdated since they delayed the process of "modernizing" the new States. In a way, this perception was based on the idea that modern law would be the law of Western written legal cultures.[18] To Chiba, contemporary African legal culture resulted from the clash between the transplanted Western system of law and the various native legal systems.[19] Thus, its basic characteristics result from a not always harmonious relationship between written legal culture, whether textual or grammatical, and unwritten legal culture, which is no less *textual* since it involves symbolic rituals that have, to society as a whole, an undeniable legal meaning. Therefore, certain day-to-day practices are guided not by laws, but by local customs, and the authority of African governments is marked by this circumstance.

In line with this, a look at Islamic legal culture reveals another characteristic that stands out from the features of mainstream legal cultures: it is founded not on the writings of man but on divine scripture. This is so because man, being unable to repress his evil tendencies, did not have the legitimacy to – alone – create the rules to promote the common good. Thus, the law should originate from a divine and revealing inspiration. As pointed out by Khadduri, "in Islam, the faithful adhered to a doctrine according to which their legal system ultimately emanated from a higher

[18]However, Roberts notes, "recent signs have shown that 'traditions' norms and practices are perceived as a proud memory of a precolonial past, symbols of unity in an uncertain contemporary world". Roberts (1998), at. 183.

[19]M. Chiba, "Ce qui est remis en question dans la culture juridique non-occidentale". In: W. Capeller and T. Kitamura (dirs). *Une introduction aux cultures juridiques non occidentals,* op. cit., at. 249. Notwithstanding the high frequency with which the phrases "Western law" and "non-Western law" are employed, this classification oversimplifies the world's legal systems. It assumes that the law in non-Western countries share common features that differentiate them from Western legal systems. Chiba himself warns that the notion of "non-Western law" has not been scientifically established because it comprises many meanings. Therefore, he states, "the phrase 'non-Western law' may mean (1) the law in non-Western countries, (2) state law in non-Western countries, (3) non-state law in non-Western societies in capitalist and socialist countries, (4) the coexistence of state law with non-state law in non-Western countries, or still (5) the legal culture in non-Western countries". Ibid., at. 37.

and divine source. In its earthly shape, this source consists of the Revelation and Knowledge, the former expressed by the *Qur'an* (Koran), and the latter by the words of the prophet Muhammad.[20] The actions and sayings of Muhammad have been conveyed to the generations by means of the *hadîth*, oral traditions, which, together, make up the *Sunna* (Way). The *Qur'an* (which means "Recitation") and the Sunna are two authorized sources of Muslim law and the whole set of such norms is called the *sharî'a* (Path) which, being "normativeness revealed", is considered "an expression of natural law".[21] The *Sharî'a* is, therefore, the legal material based upon which the erudites (*ulema*) develop other rules (*ijtihad*) to be followed by the faithful and adapted, if the case may be, to the circumstances. Muslim jurists consider the body of these *non-revealed* rules, such as the ones deriving from the *fiqh* and the *qânûn*, positive law.[22]

This ambivalence in Islamic law does not affect its main feature: the religious meaning of the norms in the *sharî'a*, which is a body of rules "known and recognized by all past, present, and future Muslims".[23] Therefore, Islamic law is marked by being eternal, unchangeable, and unfailing.[24] Differently from other written legal cultures, whose norms and founding principles are more capable of being penetrated

[20] M. Khadduri, "Le droit islamique dans la culture, la structure du style de vie islamique". In: W. Capeller and T. Kitamura (dirs). *Une introduction aux cultures juridiques non occidentales*, op. cit., at. 192. According to the words of the Koran, "man is the enemy of man" (Q. XX). Based on this belief, only a Supreme authority would have the power of preserving society. And given that "God bestows his sovereignty to whomever He wishes" (Q, II, 248; III, 25), it was the Prophet Muhammad the one chosen, through divine inspiration – and, in a certain way, through delegation – to be the interpreter of God's will.

[21] B. Botiveau, "Le droit islamique comme ensemble de normes et de valeurs, comme savoir et techniques, comme modes de realization d'une exigence sociale de justice". In: W. Capeller and T. Kitamura (dirs). *Une introduction aux cultures juridiques non occidentales*, op. cit., at. 200. Milliot and Blanc explain that Muslim law is the law that governs the followers of Islam. "The term *muslim* comes from the word 'isläm', which means submission to God. Islam is the group of all peoples that have accepted the religion revealed by Muhammad in the Koran" Milliot and Blanc (2001), at. 1.

[22] *Fiqh* corresponds to "case law". However, despite being considered positive law, it has a special feature: it must be "inspired" by the *sharî'a*. The "*qânûn wad'î*", which translates as the established law, and is concerned with tax, trade, military and criminal legislation. Botiveau notes that, "in the twentieth century, the term means the law 'imported' (*wâfid*) from Europe and more widely the law of the Nation-State in the form of laws and regulations. The current Islamic movements express their independence from religion, and often label this kind of law as 'heretical' or 'sacrilegious', incapable of carrying out justice". Ibid., at. 201.

[23] B. Botiveau, "Le droit islamique comme ensemble de normes et de valeurs, comme savoir et techniques, comme modes de realization d'une exigence sociale de justice". In: W. Capeller and T. Kitamura (dirs). *Une introduction aux cultures juridiques non occidentales*, op. cit., at. 197–198. To Milliot and Blanc, "if one brusquely considered Muslim Law anachronistic, no spiritual foundation would remain to the State. Islam has no Cromwell, or Joan of Arc, Voltaire, Goethe, Lincoln; nor the Storming of the Bastille, or Independence Day. Their heroes are the companions of the Prophet and their only classic the Koran". *Introduction à l'étude du droit musulman, op. cit.,* at. 76.

[24] The Law of Islam assembles religion, morality and law. "There is, therefore, a close connection between the birth and formation of religion and the development of the law; it is impossible to

by the political circumstances of the time, in Islamic culture, the legal texts of the *sharî'a* convey models of behavior that are presumed perennial and valid at any time or place. "It is not a code, nor legal texts conceived as such: the Koran has a global feature; it concerns all the behaviors of the faithful, and these behaviors are indivisible and inseparable from Islam", state Pansier and Guellaty.[25]

As we can note, in Islamic legal culture, moral rules play a significant role. This also takes place in the Chinese legal culture, despite the fact the latter does not attach a sacred nature to its law as does the former. According to Tay, "traditional Chinese thinking considers that constantly resorting to '*fa*' or positive law, is evidence of social decay and lack of harmony between State and society".[26] The law, differently from civil law and common law traditions, is more a legal power at the service of the State and the Party than of individuals. In conflicts involving civil issues, the search for a peaceful out-of-court resolution is not only the preferred path, but also evidence of moral superiority.[27] Maybe this is one of the reasons why Chinese business people and employees "attach a smaller role to contracts and written agreements".[28] To Tay, "the apparent exaltation of the law is, to a great extent, aimed at pleasing foreigners".[29] Once tradition and social customs have more "legal" value than when compared to positive law, we could state that Chinese law has the typical elements of an unwritten textual legal culture (Fig. 5.1).

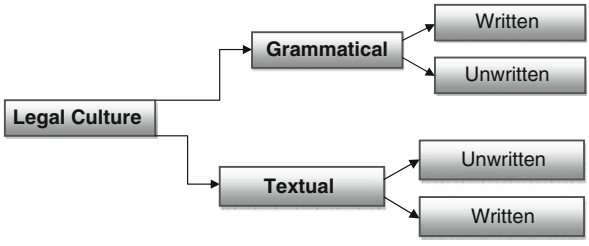



**Fig. 5.1** Typology of cultures

separate them at birth", state Milliot and Blanc. *Introduction à létude du droit musulman, op. cit.*, at. 78.

[25] Pansier and Guellaty (2000), at. 24.

[26] A. Ehr-Soon Tay, "Culture Juridique Chinoise". In: W. Capeller and T. Kitamura (dirs). *Une introduction aux cultures juridiques non occidentales*, op. cit., at. 206. For this reason, according to Tay, "China is not and has never been a legal culture focused on the Law. It prioritizes social relations as well as the duties resulting from them in detriment of an abstract and impersonal idea of laws and rights". Ibid., at. 205.

[27] Piquet notes that the number of disputes submitted to the courts has increased lately, and that this is a result of the increasing awareness of the population of having rights and legal means to enforce these rights. But he calls attention to an exception: "the Chinese no longer fear to resort to the courts, except when the other side is perceived as being protected by the Party". Piquet (2005), at. 65.

[28] Ibid., at. 207.

[29] Ibid., at. 218

All the above cultures can be seen as models resulting from a State semiotics that confers "legal" meaning to a set of actions and events selected according to the prevailing values of a certain society. A typology that aims at classifying legal cultures in grammatical or textual, written and unwritten cultures does not mirror the complexity of national legal experiences. Legal syncretism is present, at a lesser or greater extent, in all States, above all in those originating from decolonization processes and in those, which at the pretext of adopting a modernizing legal policy, have "Westernized" their law. The possible clashes among different semiotic and cultural legal frameworks is a challenge to be faced by governments and delegates when playing their role in creating and enforcing international law. Each State possesses an own prevailing cultural code that adapts itself – in its own way – to outside circumstances. The knowledge of this code is likely to help diplomats in contextually and circumstantially translating the information sent by foreign legal cultures and to avoid misunderstandings during intercultural communication.[30]

The activity of comparing legal systems is anchored by a *cultural* standpoint.[31] David says "comparative law shows one a variety of ways of understanding the law. It puts one in touch with societies in which the notion of law is ignored; it introduces one to societies in which the law is a synonym of oppression and even a symbol of injustice, others in which, quite to the contrary, the law is closely connected to religion and is part of this society's sacred nature".[32] This enables one to notice, according to Constantinesco, "that the Law is part of the individuality of the peoples, and this impedes blind imitation of legal systems".[33] The study of legal cultures must lead the international jurist to comparing *realities,* thus going beyond the mere comparison of laws and their effect on the different legal systems, in order perform, with a higher likeliness of success, the task of harmonizing and uniformizing national laws through international law.

Therefore, going back to Legrand's question asking whether a French jurist is able to master English law as an English legal professional or professor, the answer is that this jurist is able to make a representation of this law based on the legal texts of English authors, and on his experience with English law and on his legal

---

[30] According to Milliot and Blanc, while interacting with interlocutors belonging to Islamic legal culture "it is necessary to respect, a appear to do so, the religious prohibitions that hamper economic processes, hinder trade relations, separate genders". *Introduction à létude du droit musulman*, op. cit., at. 76. An example of the wrongful use of a legal code is pointed out by Cao concerning the Chinese expression "quanli". According to Cao, the idea conveyed is "rights", as conceived in Western political science, and introduced in China in the nineteenth century through the word "quanli". However, this word was already used in ancient times to mean "power" (*Quan*) and "profit", "interest" or "benefit" (Li), thus completely subverting the meaning intended to be attached to "rights". To Cao, "this linguistic ambiguity may indicate a perspective ambivalence in the Chinese thinking since the two terms may not be conceptually very different to the Chinese, and not as mutually incompatible as they are usually understood in Western languages". Cao (2006), at. 42.

[31] P. Legrand, op. cit., at. 119.

[32] R. David, op. cit., at. 4.

[33] Constantinesco (1998), at. 229.

experience in France. "The comparatist [. . .] translates less the language of the other than the observations *he* makes of another legal universe seen through *his* foreign eyes: 'when I translate, I cannot avoid the practice of comparing, not only words, meanings, but above all worlds, that is, ways of building a universe'".[34] What he does is to interpret representations of English law based on the discourse of English and French jurists. Thus, the epistemological assumption that all knowledge of a foreign law resided in that this knowledge is established based on two perceptions of reality and legal experience: the perception of the national of that legal system and the perception of the foreign interpreter. Access to foreign legal content requires not only access to information about the law in question, but also a communication relationship with the one who is inserted in the dynamics of the law that the jurist intends to study and translate. In this dialog, there is the inescapable interference of all the linguistic constructs of reality representing the various national legal systems.

However, the task of understanding different legal cultures is still a task to be fulfilled. There are two obstacles that need to be overcome: the pretense non-cultural attitude of internationalists, and the statements on behalf of cultural relativism made by comparatists.[35] The reason for this, according to Kennedy, is that internationalists, concerned with regulating the world, seem to be more at ease with power; whereas comparatists, more interested in understanding the world, feel less drawn to governance-related issues.[36] Both intellectual postures contribute to maintaining a relative indifference between national and international law. Bringing together these two discursive dimensions may ensure a greater legitimacy and effectiveness to international legal norms.

## 5.2 Mutual Influences Between National Discourses and Legal-Diplomatic Discourse

The content conveyed by State law is shaped within and by the culture of its people. Since this kind of law is essentially "exclusive" and "unique", considering "only its own norms as legal norms" and considering "all other norms as irrelevant",[37] its image could but be the image that surfaces under the sign of "unification". This is the only way a State affirms its legal identity before all the remaining sovereign

[34] P. Legrand, op. cit., at. 23.

[35] Kennedy himself warns against the differences between comparatists and internationalists notwithstanding being of the opinion that they have more things in common than one could imagine. Kennedy writes "to comparatists, internationalists seem to be people more concerned with the present, relentlessly looking for lessons, ways of applying them, and solutions, and are convinced that the other was understood if he consented in being dominated. To internationalists, comparatists are considered snobbish or dilettantish, believing that society could be organized through understanding without domination". ("Les clichés revisités, le droit international et la politique".) In: P-M. Dupuy and C. Leben, *Droit international*, op., cit., at. 61.

[36] Ibid., at. 83.

[37] Romano (1975), at. 106.

legal systems.[38] Besides being an instrument of power, the law is also an expression of a State's legal identity. From a formal point of view, this law is self-referential because it finds within itself the foundation of its own validity. But from the point of view of content, it finds legitimacy in the cultural references acknowledged by its people as being the representations of their way of acting and thinking. This is where the law opens up to the contribution and influence of foreign legal cultures.[39]

The relationship that national legal systems establish with each other and the degree of openness of certain legal systems in regard to others are conditioned to a series of *contextual* and *circumstantial* factors. For instance, the very legal system can promote a greater interaction with other sovereign laws, by being receptive towards them – as when admitting that foreign law shall apply in cases of conflict of laws regulated by international private law – or by tolerating transplants of foreign legal experiences. A national legal system's adherence to the dominating legal models favors semantic convergence in the international scenario, with repercussions in international law itself.

The influence of state law over international law depends on a series of factors, such as: the economic, political, and military authority of the State in question, its ability to spread ideas and practices in the heart of international organizations, the participation of national jurists in international courts and decision-making bodies, the number of diplomatic representations in the world, etc. But there is also another factor that interests this chapter: the leading role of national legal discourse in regard to the meaning of international law. The American international law tradition is, according to Kennedy, less formalist and less focused on the State when compared to its European counterpart.[40] Therefore, the study of international law is not independent from the study of how international society operates. "International law forms the framework of a 'behavioral regime'. It is a 'discourse' of claims, a 'language' of 'relationships' among States".[41] The antiformalism of Northern-American legal culture stresses communication – albeit guided by international legal norms – in detriment of legal information as a structuring element of international society. The international relations resulting thereof are organized, not based on legal norm, but according to the actual relations stemming from the political game among States. It is a more pragmatic and a less syntactical approach to international

[38] The legal identity is spurred by national legal entities. This identity teaches and reproduces the way we create the law and what we consider as being the law. In the international sphere, the idea of an identity attached to national law is responsible for reinforcing a certain feature unique to a certain State that differentiates it from the remaining sovereign entities.

[39] For instance, the Napoleonic Codes, as well as the ideals of the Enlightenment and of the French Revolution in favor of human rights spread across the globe and were elements that made French legal culture and values a reference to numerous national legal systems in the nineteenth century.

[40] "Les clichés revisités, le droit international et la politique". In: P-M. Dupuy and C. Leben, *Droit international*, op. cit., at. 13.

[41] Ibid., at. 16. "An American international jurist considers international law a relatively stable "process" according to which reciprocal claims, whether political or legal, are made or addressed". Ibid., at. 16.

law. This contrasts significantly with the perception of international law in France where, according to Jouannet, "the culture of legality is deeply rooted in the French mindsets".[42]

Notwithstanding these differences, internationalist scholars have something in common: concerned with the goal of ruling the world, they insist in ignoring cultural differences because they see them as elements disturbing the international order. "The goal of the internationalist discourse is to create a zone, a dimension or a perspective above the relations among States and to build bridges between States, and to remain agnostic in the field of culture, not having a culture", says Kennedy.[43] This cultural agnosticism is perceived as a virtue and as an important part of the prevailing ideology of international law. For this reason, internationalists have adopted four strategies to conceal cultural differences among countries.[44] The first aims at keeping cultural differences within State borders. The second consists of promoting assimilation – mainly in less developed countries – of the form of social and political organization adopted by hegemonic countries. The third strategy is stating there is a one and only international legal system, thus pushing away the possibility of other nations organizing their relations based on an alternative legal system. And,

[42] Jouannet (2008), at. 60–61. Cohen-Tanugi holds a different opinion. To him, in the relations between France and the United States there is a clash between two kinds of international relations practice: the American approach tends to be more legalist and the French approach privileges diplomacy and the *Realpolitik*. There is a difference in the kind of language. "Whereas Americans firmly believe in the superiority of legal instruments, both in the domestic and foreign environments, and take advantage of them, Europeans traditionally believe that conflicts resulting from policies related to trade, industry, technology, and strategy, actually belong to the field of diplomacy and should be solved mainly through purely political negotiations before being submitted to legal arbitration or court proceedings". *Le droit sans État: sur la démocratie en France et en Amérique*, op. cit., at. 40. The author ponders, however: "legal Europe has today become a more important reality in [our] daily life than political Europe". Ibid., at. 41.

[43] D. Kennedy, "Les clichés revisités, le droit international et la politique". In: P-M. Dupuy and C. Leben, *Droit international*, op. cit., at. 60.

[44] See Kennedy, op. cit., at. 62–68. Dubrulle notes that cultural identity associated to the State is defined by geographical borders. Dubrulle (2005), at. 172. And, according to Duroselle, "from the moment a border exists, the two sovereign entities it separates, the two social groups it divides, commence to drive themselves apart in opposite directions". Duroselle (2000), at. 77. It is important to stress, however, that "culture" and "nation" are terms that carry different meanings. The attempt to conceal this difference is corroborated by the ideological authority of the notion of "state border", as though the geographical separation produced by it could not only separate a people from a certain State from all the peoples on Earth, but also unify this people around a so-called "national" culture, which would stand out from all the other national cultures and be placed above the remaining "minor" cultural manifestations that may be present in the same sovereign territory. To consider "culture" and "nation" as synonyms simplifies international reality in behalf of greater control over international relations. The association of these terms seems to be decisive for the very own legitimacy of international law. After all, to separate "culture" from the term "nation" can weaken the power of persuasion of the State's legal discourse and disclose the role played by the State as not being the role of an international agent with own identity and own cultural characteristics, but by being the role of a formalist and bureaucratic apparatus, a mechanism of making law, controlled by a myriad of social and cultural groups. In such a case, the borders would not fulfill their role of being the material projection of a national project validated by domestic law.

lastly, the fourth strategy consists in outcasting subversive cultures by pushing them to 'beyond the borders of civilization".[45] These strategies attribute different roles to State and culture. It is the role of the former to affirm itself in the international scenario by means of diplomatic language conveying a code that promotes the fundamental goals of the society of States. Culture, in turn, plays an organizing role in terms of national unity around the image of the State in order to support the State in question in its international claims in the name of an alleged national interest.

But what is behind this discursive strategy of hiding cultural traits when the States operate at an international level? By so doing, is this an attempt to confer certain "neutrality" to international legal culture in regard to national legal systems? The central question is knowing whether it is possible to build an international legal culture that is, at the same time, *common* and *neutral* to all countries. To Jouannet, the internal dysfunctions of the current international legal system and the international context of the post-cold war period promote the competition of national and cultural views claiming for more valid models.[46] Therefore, in the middle of so many legal cultures – grammatical and textual, written and unwritten, of divine inspiration or authored by politically organized individuals – international law tends to be a relatively unstable legal mosaic depending on the center of gravity of the poles of power in international politics.

Two are the obstacles to implementing a common legal culture to all States: (1) ideological conflicts and conflicts of interest among sovereign governments capable of attaching to any controversy a political connotation, with potential to become a virtually insurmountable conflict and; (2) the defense of a certain legal model in detriment of others under the cover of the discourse of legal and economic efficiency which, in fact, hides a desire of projecting in the international scenario a certain national legal identity. These identity atavisms can hamper consensus in the process of negotiating treaties. Even in areas considered less subject to value judgments, such as economic international law according to some, cultural interference is also felt. As noted by Kennedy, a considerable part of this law depends on a choice between a free trade reference and a reference of state intervention, and "the difficulties appear because this distinction differs depending on the legal cultures involved".[47]

---

[45] D. Kennedy, op. cit., at. 64–66.

[46] E. Jouannet, "Les visions française et americaine du droit international: cultures juridiques et droit international". In: *Droit international et diversité des cultures juridiques,* op. cit., at. 48.

[47] Kennedy, op. cit., at. 70. The goal of creating an international economical and commercial legal system free from the political interference of the numerous governments and protected from the influence of the myriad of national legal systems, was responsible for the Sates deciding to set up a group of specialized bodies, such as the International Monetary Fund, the World Bank, and the WTO, devoted to standardizing legal terms and practices. The complexity of topics and issues being negotiated in these organizations started to increasingly require the presence of specialists to aid diplomats. This had a significant impact on traditional diplomatic culture. Specialized language used by specialists, because it is less susceptible to variations of humor and semantic subtleties than the political language employed by the States, was able to establish a standard language code that reduced the influence of culture on the negotiations.

Notwithstanding these hurdles, the State finds, in international law, a legal language code to be employed in the course of its relations with other sovereign entities. The instability of history and the dynamism of international circumstances have resulted in an increasingly written international law.[48] But instead of us discussing herein the prevalence of one culture over another, we would like to point out that, from the viewpoint of each and every State, international law conveys two discourses: one is internal and taken on by the national laws that incorporate the former; and the other is external and is directed at the remaining States. It is because of this dual facet that international law contributes not only to the project of regulating the world, but also to creating a common legal culture.[49] By regulating inter-state relations, international law standardizes terms and phrases, and resignifies national reality, thus relativizing the perception that domestic law, due to being inherent to every people, would not suit any other nation. The pursuit of semantic convergence of state legal systems by means of international law requires, however, comparing these systems by taking into account a translation ethics that, in turn, takes into account the many cultural referents in the process of negotiating the meanings of international legal norms.

## 5.3 A *Third Thing*

Legal-diplomatic discourse is the result of diplomacy and is a kind of diplomatic language. It is therefore one of the ways signs are manifested under the scope of the semiotics of international relations, and more specifically, of international law. It is one of the privileged instruments of communication in the international system.[50] Being able to use this discourse, means being competent to produce legal effects within this system.[51]

---

[48] To Legendre, to submit oneself to written text is a profession of faith on the part of jurists that presume that "the truth corresponds to a *being written*". Legendre (1983), at. 52.

[49] Jouannet highlights that "yes, there is a common language which is international law itself and, therefore, in this sense, it is a common embryonic culture". E. Jouannet, "Les visions française et americaine du droit international: cultures juridiques et droit international". In: *Droit international et diversité des cultures juridiques, op. cit*., at. 43.

[50] This discourse is also a relevant and significant manifestation for countries that do not take part in it. Thus, legal-diplomatic discourse may be studied from the viewpoint of communication (as far as the signing parties of a treaty are concerned), or from the viewpoint of signification – the perspective of a third-party country with regard to an agreement signed by other subjects of international law to which it is a third party.

[51] Therefore, those who are able to communicate in their field participate in the international system. This opinion is different from Aron's, who opted for political and military criteria in detriment of communication criteria in order to define the participation of an actor in the international system. According to Aron, the essential aspect of this system would be to shape the power relations so as to eliminate Nation-States that are militarily insignificant, because only "the political units that the government of the main Nation-States take into consideration when making their calculations of force" would be full members of the international system. (R. Aron, op. cit., at 152.)

Legal-diplomatic discourse is conveyed through international treaties. It is called *legal* due to its normative value,[52] and *diplomatic* because it crosses borders in the exercise of bilateral or multilateral diplomacy.[53] But what are the other features of this discourse? Kovacs creatively explains that *treaty-making*, a result of complex negotiation processes, has much in common with a salami because "it is best not to be around during preparation in order to be able to appreciate the taste".[54] Kovacs clearly refers to the complexity of the process of negotiating the content of the text of a treaty. According to the author, "negotiating and mainly drafting the text of international treaties involve political commitment and compromise favoring the acceptance of the treaty, but not the clarity of the text."[55] As Cornu would say, "politics is in the word".[56] The treaty would ultimately be a patchwork quilt made to cover (meet) all the interests envisaged by the parties involved. These parties, however, may have different intentions and attribute different meanings to what was agreed upon in the international treaty.

Negotiations are conducted based on proposed drafts, previously prepared by the Nation-States. The most serious clog in the negotiations lies in the search for "wording" that is acceptable to all participants. According to Delahaye, "the negotiator, who labored for weeks or months on a draft, obviously gives much more importance to his draft than to any other text or word he may have either heard or pronounced during the course of debate – regardless of his rate of authorship pride."[57] Therefore, according to Allott, a negotiation is a process aimed at finding a *third thing*, which none of the parties involved really want, but come to accept. This understanding motivated Allot to suggest a curious definition for the term "treaty": "a treaty is a

---

The weight of this realist position is reduced if one takes into consideration the capacity of producing legal-diplomatic discourse as a criterion to determine the participation of an actor in the international system.

[52] In a less strict definition, legal-diplomatic discourse can include the content conveyed by international organizations. These organizations use three kinds of normative instruments: *conventions*, *regulations* for mainly technical questions, and *recommendations.* The normative characteristic of the latter two is questionable: their legal value is defined by the treaty. This is what takes place in the International Labour Organization for instance example. Recommendations are generally addressed to Nation-States in the form of a simple proposal that creates no legal norm. On the other hand, the power of a recommendation's legal-diplomatic discourse is, in some international organizations, noteworthy: for example, the supremacy of community law over national law in the European Community.

[53] While bilateral diplomacy is characterized by the involvement of only two Nation-States, multilateral diplomacy takes place within international organizations and in international conferences.

[54] Kovacs (2003), at 269.

[55] Ibid, at 269. Flesch, points out that in international organizations only rarely are texts written by only one author: "as a general rule, it is done by 'groups' in which there is the contribution of drafters belonging to different languages and cultures, in detriment of, in many cases, clarity and conciseness." Flesch (1999), at 98.

[56] G. Cornu, op. cit., at 317.

[57] Y. Delahaye, op. cit., at 28.

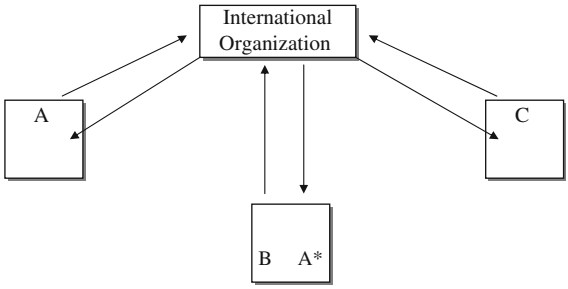



**Fig. 5.2** Legal-diplomatic discourse not reflecting the will of the Nation-States

A, B, C – texts proposed by different Nation-States
A* - final text adopted by the international organization

disagreement reduced to writing (if one may be permitted to do such violence to an ancient definition of a contract)."[58]

The first consequence of this understanding is that the legal-diplomatic discourse does not necessarily reflect the real will of the Nation-States in the negotiation. Whether in terms of content or form, the discourse in question, as a rule, differs from the discourse in the draft submitted and desired by each one of the Nation-States involved in the negotiation phase (Fig. 5.2). This is particularly common at the level of international organizations.[59]

The second consequence is that legal-diplomatic discourse, although putting on end to the negotiation phase, initiates another phase: the dispute for the meaning of the so-called *third thing*. In other words, the wording that enabled the parties to agree now becomes a point of disagreement. Attached to the "form of the word" agreed to in the text of the treaty, the parties turn their attention to content, and start waging semiotic battles eventually submitted to the appropriate mechanisms of conflict resolution. The decision-making entities called upon to examine the dispute have the opportunity and mission of eliminating the linguistic uncertainties and ambiguities in the legal-diplomatic discourse.[60] This process, however, is additionally complex because it takes place in an institutional environment that is not only

[58] P. Allott, "The concept of international law", op. cit., at 43.

[59] Based on Y. Delahaye, op. cit., at 46.

[60] As previously mentioned, the negotiator of an international treaty usually employs words that carry an undetermined semantic load when terminological precision does not favor consensus. However, in the normative discourse of international treaties – as in all legal text – there are terms, which are extremely precise, and others that are purposely flexible. As a result, I would like to highlight that the *vagueness* of words is not only a feature of general language and that *precision* is also not only inherent to specialized legal language. The law is often based on general concepts (such as good-faith, indivisibility, etc.). The choice for excessive precision is usually found, above all, when one is employing terms belonging exclusively to the field of law (or employing terms in their legal meaning in the case of terms that also belong to general language) or when one is attempting to regulate aspects only somewhat related to the political dimension of normative discourse. On the other hand, vagueness of terms and phrases is significant in legally dealing with highly political topics or when the normative content may be better specified or defined as a result of experience.

multi-legal but also multicultural, and also multilingual. In terms of international law, the intricate relationship between legal-diplomatic discourse and the language of the treaty cannot be underestimated.

## 5.4 Legal-Diplomatic Discourse and the Language of Expression

An event in contemporary history resulted in a conflict between two languages, in this case, French and English. It was the end of the First World War (1919). The Allied War Council met to discuss which language to use at the Versailles Conference. At that time, Stephen Pichon, the French minister for foreign affairs, and French delegate, Georges Clemenceau, suggested French be the working language. In disagreeing, US president Thomas Woodrow Wilson and U.K. Prime Minister Lloyd George noted that English was spoken by some 170 million people, surpassing the number of French speakers.

Concerned with the *political advantage* to speakers of English as a first language due to the use of English as one of the working languages, and conscious of the fact that French would not be adopted as the only official language, Georges Clemenceau suggested that Italian also be included as one of the official languages, although only the French version of the Treaty of Versailles should be considered *authoritative*. This proposal came to no avail: both French and English became the two official languages of the Conference and the Treaty of Versailles, and both versions of the text were equally treated as authoritative. "Thus, more than 200 years of French language dominance on the international scene came to an end", sentenced Roland.[61]

This event, only briefly reported here, demonstrates that the importance of language in international relations is more than a matter of facilitating communication; it is an issue with many consequences. The concern of the French government with the political advantage the United States and Great Britain would gain with the use of the English language is emblematic. These two English-speaking nations argued in favor of their language based on the number of speakers. The argument of France appeared to be based on tradition. Other arguments, however, could also support a country's claim to the adoption of its language at an international conference: economic power, cultural and intellectual dominance, proximity with other languages, etc.[62] There is no international law rule that establishes criteria to determine which language should prevail in diplomatic negotiations.[63]

---

[61] R. A. Roland, op. cit., at 123.

[62] According to Ostrower, "Numerical superiority of speakers alone has never sufficed to bring about linguistic ascendancy but does, of course, represent a significant factor. National wealth or commercial prominence is also an important element in the attainment of linguistic universality, but only in conjunction with other factors." A. Ostrower, op. cit., at 80.

[63] See Hudson (1932, at 368–372). However, according to Ostrower, "there seems to be no reason to doubt that official linguistic practices could not be solved by way of treaty to eliminate the complexity of official intercommunication." A. Ostrower, op. cit., at 781.

In a bilateral agreement, the languages of both Nation-States involved are adopted. Arriving at such a solution, however, becomes more complicated in the event of an international conference or a multi-lateral agreement. In these cases, out of convenience and necessity, the Nation-States give up their rights under the principle of legal equality and usually adopt a single common language, or two or more languages of greater acceptance. Universal international organizations[64] have contributed to the consolidation of this practice; as stated by Ostrower, "with the creation of world organizations, the states belonging to them were bound to lose, and have in fact lost, some of their exclusive prerogatives in international linguistic practices. Specific language rules were devised and adopted in those organizations – [. . .] – which have bypassed national aspirations and linguistic claims in order that the international community as a whole is benefited."[65]

In a multilingual environment, adopting one or more languages for an organization demonstrates the need to facilitate communication between political entities. There is, however, one distinction to be made: the concept of *working* language is not the same as the concept of *official* language. The former refers to the administrative language used by all the services of an international entity (written and oral communications); the latter refers to the language in which authentic documents are drafted and published (conventions and treaties).[66]

The language issue present in international organizations is also felt at the level of international courts. The Statute of the International Court of Justice (ICJ), under Chapter III, which deals with due process, states:

Art. 39.

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.
2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.
3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

---

[64] Universal international organizations do not make any restrictions to the admission of new Nation-States. They are divided in organizations that have general goals, such as maintaining world peace and safety (the UN), and organizations that have specific missions, such as the World Health Organization (WHO), the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

[65] A. Ostrower, op. cit., at 803.

[66] This distinction was debated at the San Francisco Conference in 1945. On the occasion, Chinese, Spanish, French, English, and Russian were considered the official languages pursuant to Article 111 of the UN Charter. The UN Charter was translated into all of these languages, although the working languages were only English and French. Many times the official and working languages are the same, as a result of this condition the differences in the specific roles attached to each individual language disappear.

The ICJ does not establish the use of English and French as the only working languages. In the light of paragraph 3 above, the parties are authorized to use any other language of their choice, in writing or orally.[67] Judgments, however, are only given in the official languages.

On the other hand, within the Court of Justice of the European Communities (CJEC) 23 languages are admitted.[68] These are all considered working languages.[69] The language of the dispute will be selected by the plaintiff, except otherwise provided under the Rules of Procedure of the CJEC.[70] The president of the Court and the presidents of the sections hearing the case, the judges giving the preliminary hearing report, the judges and general attorneys when putting forward their issues, and in the latter two cases, when presenting their closing statements, are allowed to use one of the working languages, even when this language differs from the language adopted in the proceedings.[71] In these situations, the secretary shall provide translations into the language of the proceedings.

From this, we can conclude that one system of law cannot not be restricted by language; "what this means is that the same legal system can be expressed in various languages", says Cornu.[72] As trivial as this statement may sound by today's standards, it was anything but trivial in the nineteenth century during the nationalization of legal systems and unilingualism. At the time, the idea that a certain legal system was necessarily attached to a certain language prevailed. However, upon entering the international scenario, such legally system was faced with the problem of linguistic diversity.[73] The challenge resided in the linguistically conveying legal reasoning and meaning from many legal cultures into different languages.

---

[67] See Article 43 do Statute of the Court.

[68] Article 29, § 1, Chapter VI, "Languages" of the Rules of Procedure of the CJEC reads: "The language of a case shall be Bulgarian, Czech, Danish, Dutch, English, Estonian**,** Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish."

[69] Pursuant to Article 31 of the Rules of Procedure of the CJEC, "The texts of documents drawn up in the language of the case or in any other language authorized by the Court pursuant to Article 29 of these Rules shall be authentic."

[70] Take the example of the Article 29, § 2, of the Rules of Procedure of the CJEC: "The language of a case shall be chosen by the applicant, except that: (a) where the defendant is a Member State or a natural or legal person having the nationality of a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them; (b) at the joint request of the parties, the use of another of the languages mentioned in paragraph 1 for all or part of the proceedings may be authorized; (c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in paragraph 1 as the language of the case for all or part of the proceedings may be authorized by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by an institution of the European Communities."

[71] Article 29, § 5, of the Rules of Procedure of the CJEC.

[72] G. Cornu, op. cit., at 12.

[73] There are countries that have established multilingualism, such as Switzerland, where, according to Article 4 of the 1999 Constitution, there are four official languages: German, French, Italian, and Romansh. This multilingualism coexists in the middle of a single legal system promoted by

This is especially important when dealing with the authoritative versions of international treaties. The equal status of the many versions of a treaty is, in practice, disdained when the text is originally written in one official language and then translated into the other official languages. Cornu warns against this:

> When law born of one language is transposed to another, the principle of equality of the two versions shall never impede that, regarding the natural affinity held between the law and its language of birth, the success of transposing [it into another language] depends on much struggle, fruit of labor and pain, which, in fact – the difference is sociological – shall not necessarily ensure the equal reception and the same clarity to a version inevitably marked by artificialness.[74]

We would only disagree with these words if we admitted the hypothesis that the languages in question had the same "spirit", – that is to say, the same cultural reference –, and the intellectual process of capturing and perceiving events and things in all peoples involved were identical. Exception made to this hypothesis, drafting an international treaty in a certain language and translating it into the other official languages of an international organization would raise questions concerning the uniformity of meaning in the text. Translation thus plays an important part in the legal-diplomatic discourse and, consequently, in the study of international law.

## 5.5 The Translation of Legal-Diplomatic Discourse

Translators and translation, despite being upstaged by the leading actors, play a role not be neglected. They assist in founding national languages, integrating nationalist projects and propagating ideologies, often in support of their government and institutions. The work of translators produces social transformation; they leave their imprint in history in an almost imperceptible form.[75] From this perspective, we can also include translators among the architects of international law, alongside with jurists. Jurists, however, still do not recognize the power translators exercise over the meaning of the law.

The term "translate" is made up of a prefix from the Latin term *transducere*, the prefix *trans-* ("cross") applied to the verb *ducere* (conduct). Another parallel is drawn with the Latin verb *transferre*, from *ferre*, "to take", "to bring". Each of these

---

the Swiss state. It is not the same as what takes place in Canada, where both two official languages (Article 16 of the Constitution Act of 1982) and two different legal cultures coexist. The Canadian situation places translation – or co-drafting – at the heart of the rules that govern drafting of laws and creating a common *law* terminology in French and *civil law* terminology in English. Cf. Levert (1995), at 255 et seq. Gaudreault-DesBiens warns that linguistic barrier is one of the causes that explain "the indifference of most Canadian *common lawyers* with the dual legal system and their hesitation in promoting increased dialog with their civil-law colleagues in Québec." Gaudreault-DesBiens (2007), at 114.

[74] G. Cornu, op. cit., at 12.

[75] On the contribution of translators to the different spheres of society, see Delisle and Woodsworth (1995).

terms convey a sense of "transference", "transport", "to take or bring by means of", which leads us to a definition with a meaning of "crossing borders", that is, transporting the meaning of a given text to the "territory" of signs of another language.[76] The prototypical situation for translation is when there is a partial or total barrier in the communication between *sender* → *recipient* due to the lack of a system of linguistic signs shared by both parties.

The communication barrier is overcome when the sender-recipient relationship is re-established by a new act of communication, i.e. by translation, which in turn is performed by a third party who masters the system of linguistic signs of both parties. Therefore, translation is more than the mere process of transcoding the source text, since it has the objective of re-establishing the communication process that was previously interrupted due to linguistic differences. The translator is, simultaneously, the recipient of the source text and the sender of the target text (Recipient 2 of Fig. 5.3), thus making the communication between the two subjects possible; in this case, between Sender 1 and Recipient 1.[77] As a result, by means of translation, a second communicative relationship replaces the first, in an attempt to establish an approximation between the contents of the languages at issue. This is known as a bilingual communication process.

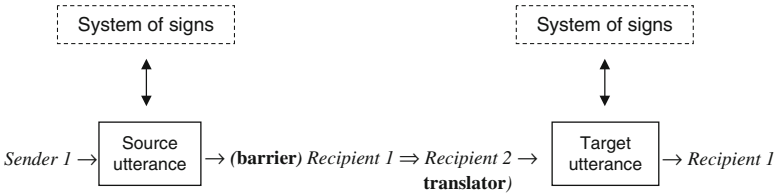



**Fig. 5.3** Bilingual communication process

[76] This definition is by no means the only one applicable to translation studies. According to Rey, "translation is a complex process where the source-discourse, produced by an utterance which is suppressed or absent, must be analyzed and deeply understood before being able to move, with the help of other formal laws and semantic contents, towards a new utterance, articulated based on both the source-utterance and on rules and lexical resources that are completely different from the ones in the target language." Rey (1992), at 21. Goetschalckx, while admitting that all the definitions given to date are incomplete, makes an attempt to provide his own definition: "To translate is to recreate in a B language, – and fully and exclusively resorting to all the resources of this B language,– a text is produced in an A language that has a given content, form and emotional load, and in which each one of these three factors may vary between 0 and infinity and may be present at different levels; nevertheless, they must find in the B language the same value and the same proportions." Goetschalckx (2003), at 271.

[77] The translation of spoken discourse can be done in many ways. In consecutive interpreting, the person speaking pauses periodically in order to let the interpreter convey the message from the source to the target language. In simultaneous interpreting, the interpreter speaks, from a sound-equipped interpreting booth, at the same time as the sender with a lag of only a few words. Simultaneous interpreting can also take place without the use of sound equipment. In this case, the interpreter whispers the message in the ear of the recipient. This kind of simultaneous interpreting is known as whispering or "*chuchotage*".

We would like to remind the reader that the term "language" is used here to designate a system of linguistic signs that, for cultural, political, historical, and geographical reasons defines a linguistic community and which, for the purposes of this study, is associated to the official language of a given country.[78] Therefore, it would be plausible, for instance, that a written legal text in Portuguese by a jurist in Portugal be translated into Brazilian Portuguese so as to enable Brazilian readers to better understand what the Portuguese author wants to say. This kind of situation may occur because the cultural content of the first system of signs, in which the source text was written, differs from the cultural content found in the culture of the target language. When translating, a translator translates culture and not only linguistic signs. Hadi gives some examples that demonstrate sign variations in the same language – in this case, French – when analyzing different legal cultures.

> [. . .] the 'Conseil d'État' is a governmental instance in the Republic and Canton of Geneva whereas in France it is an administrative court. The institution in Geneva of '*prend* des *arrêtés*' has its homonym in French as '*rend* des *arrêts*'. The English or Arabic translator will be astounded by some expressions, such as the term 'parastatal', which in Belgium is used to refer to something or someone that is on the margin of the State, whereas in French law, it is completely unknown word, and is not even listed in the Larousse. On the other hand, the legal concept of this term exists in French law, but it is included in another expression. The '*organismes parastataux*' in Belgium correspond to the '*collectivités publiques*' in France.[79]

We can thus see how translation must focus on *content*, and not limit itself to comparing words or phrases. The content is far from being stationary or immutable; unlike what the "concrete" face of linguistic signs seems to be. This means that there is a marked cultural correlation between signifier and signified, and this is where the fundamental challenge of translation resides. For this reason, legal French, in France, Belgium or Africa have particularities that differentiate one from the other. These differences may pose practical problems resulting from inadequate translations of a legal source text into the culturally diverse target context.

The work of a translator consists of identifying the meanings in the source text and conveying them to another system of linguistic signs. The act of translation is therefore not a mere transfer of syntactically reorganized words.[80] It is not a matter

---

[78] Translation concepts that fall outside the scope of this book include the notion of translation encompassing linguistic variations in the broadest sense, such as regional dialects, social variants (sociolects), and individual variants. We have also chosen to leave aside the concept of intralingual translation, such a paraphrases or signifier-signified relationships. This stand would probably bring confusion to Language Sciences and Translation Theory. Thus, this book is only concerned with *interlingual* translation.

[79] Hadi (1992), at 49–50, emphasis in the original.

[80] It is worth stressing that according to Vega, literal translation is not problematic when dealing with contents that refer to elements in the physical-natural, biological, or chemical worlds, or elements of the "the natural sciences as they are universally understood, from the perspective of positivist Western rationalism." However, the same cannot be said of the historical and cultural world, "where languages attain the highest degrees of subtlety and differentiation." ("La Europa futura y los problemas de la traducción", op. cit., at 42.). According to García, "translation is not

of representing a word in the source text with another in the target language, since translation may require, for example, structural changes and semantic compensations when conveying idiomatic expressions that may not be found in the target language. Therefore, it is an action that involves understanding and conveying the *meaning* of the source. As stated by Lederer,

> If one were to translate a text sentence by sentence, inspired more by the original language than by the *continuum* of thought of the writer, one would juxtapose isolated linguistic elements that individually would correspond to the elements in the other language, but that, combined, represent a maladjusted puzzle when compared to the natural form that the thought would have had in the other language. It is that every isolated word, every phrase that is out of context, every incomplete enunciation have many virtual significations, but no real meaning.[81]

Therefore, it is not enough to be able to recognize the linguistic signs of a source language; one must also know what they mean in the context they are inserted. In other words, the search for meaning should be based on the significations of the linguistic terms and on the source text as a whole. This source text serves as the framework of expression to guide the translator in producing the target text. The object of the translator is thus the meaning of the text and not the text itself. According to Lederer, however, the meaning should be considered as "what the author wanted to say".[82] From this standpoint, the problem the translator faces is to find, by means of the source text, the meaning that originally inspired the author, or what the author *wanted to say*. Respecting the *desire* of the author would inspire the search for meaning and determine the degree of faithfulness of the translation with regard to the "original" discourse. Thus, translation should not only take into consideration the individual words and context of the original text, but also the *intention of the author*, which leads us to the question: how does one identify the intention of the author when the author is an organization or government entity? In other words, how does one identify the intention of the Nation-State when those that speak on its behalf are so many and so different? More than remaining faithful to the *desire* of

---

only the translation of words, but also the translation of words plus concepts (especially concepts that are paramount, although they will always be), plus culture, plus customs, and plus everything else that shape the ways of the peoples." García (2002), at 88.

[81] Lederer (2002), at 24. It is important to mention the importance of the author's opinion concerning the value of words in isolation: "A word out of context, for language that did not become message, is like a coin unspent. A 50-franc bill, while still unused, may serve to buy food, books or a train ticket; its realization however is no more than one of these possibilities. The analysis of the worth of a 50-franc bill can lead us far in its description, but will not allow us to foresee how it will be used. It is the same for words when compared to text; the knowledge of language is an elementary and essential pre-requisite for translation, but it is not its realization; only the use of language is of interest to translation." Ibid, at 24.

[82] M. Lederer, "Transcoder ou réexprimer?", op. cit., at 25. According to the author, "[. . .] what matters to translation is the faithfulness to what the author wants to say, it is the refusal in allowing it to be replaced by a message resulting from insufficient knowledge or a desired inflection that some other interest would possibly attribute to the utterance." Ibid, at 23.

the author, the translator, in these cases, is guided by faithfulness to the text of the convention, presuming that the text holds the intention of those who signed it.

The problem between the original text and the translated text is in seeing the latter as a mediator of the former that, in turn, becomes a "thing in itself", that is the place of meaning that the translation simply replaced. The opposition between *original* and *translation* is derived from the traditional concept of sign and its relationship with the referent. As explained by Arrojo, "if in the sign/referent opposition, a sign fits in the secondary position as an imitation, in the 'original'/translation opposition, the signs that make up the target text lose their 'inferior' position and become stable and 'original'."[83] The translation then takes the position of the "original" text, a place where meaning would supposedly be safe from any imbalance of sense, which becomes idealized and concentrates an illusion of stability. However, every "original", as the signs that form it, is also a mediation, and thus also temporary and secondary. Arrojo points out that:

> [. . .] meaning cannot be forever deposited in the text, waiting for a competent reader to decipher it correctly. The meaning of a text is only defined, and created, from the act of interpretation, which is always temporary and is based on the ideology and the aesthetic, ethical and moral patterns, on the historical and psychological circumstances that constitute the sociocultural community– [. . .] – in which it is read. What we see in a text is exactly what our 'interpretive community' allows us to read . . . [. . .] *Thus, no translation can be completely faithful to the 'original' because the 'original' does not exist as a stable object, or as a ruthless guardian of the original intentions of the author.*[84]

This is due to the fact that there is no meaning in the original discourse that refers to itself, but rather to something that is "outside" itself, in other words, to the culturally shaped referent. Therefore, any attempt to *fully* translate the meaning of an "original" text will be frustrated, precisely because this "*fullness*" does not exist: texts are simply not immune to multiple interpretations. It is thus possible for the target text to modify the content of the discourse in the target text.[85] The translation process is also not immune to the conscious or unconscious participation of the translator in choosing the meanings as a result of the content of the original text. No matter how faithful the translator attempts to be to the original text, the intention of the translator always underlies each and every translation.

It is impossible to convey the meaning of the original discourse without taking the risk of promoting some change in meaning. As White observes, in the process

---

[83] Arrojo (1993), at 73–74.

[84] R. Arrojo, op. cit., at 19, emphasis added.

[85] If the goal of translation is to convey sense, it cannot be denied that translation takes place through an act of interpretation. As a result, one can state that there is no such thing as an "untranslatable" word. The absence of a *certain* expression capable of representing the term in another language does not mean it is impossible to translate it, rather, it means it is impossible transcode it. What is put in check is the correspondence between a word and another word in a different language; but never a correspondence between meaning and the target language, between thought and speech, between signified and signifier. "Languages fall outside of the process of translation; they are the recipient of meaning that may be conveyed in any one of them. Languages are not to be confused with sense", explains Lederer. ("Transcoder ou réexprimer?", op. cit., at 36.)

of translation "there is always a gain and always a loss, always a transformation; that the 'original meaning' of the text cannot be our meaning, for in restating it in our terms, in our world, no matter how faithfully or literally, we produce something new and different".[86] Translation of legal discourse is no exception to this transposition of legal meaning, requiring the translator constantly reflect upon the source discourse and the legal context in which it is inserted. The effort to remain "faithful" to the original text would require, among other efforts, the understanding of the legislative policy in which the document is found; the relationship of the source document with other legal texts and with the law in general; familiarity with the subject of the text and with the legal problems involved, as well as with the solutions proposed; and a good knowledge of events in the political scenario.

This does not imply that legal discourse can be freely recreated in another language, but that it is unlikely that a translation be capable of expressing exactly all the meanings conveyed in the target text, or of "faithfully" reproducing the intentions of the author.[87] This is because in conveying one language into another, the

[86] J. B. White, op. cit., at 241. Reinforcing his opinion, the author states: "No sentence can be translated into another language without change"; "The meaning and identity of the original are defined in the differences we perceive in it, in what makes it strange to us. To another it will present a different set of differences, and thus be a different text, with a different meaning"; "To try to 'translate', in the sense of fully reproducing meaning, is to experience radical failure." Ibid., at 250, 252 and 254, respectively. Nombela distinguishes a faithful translation from literal translation. "As far as loyalty is concerned, it is important to again point out that it does not mean the same as literalness. The translation of English legal topics into Spanish is difficult due to the disparity of the two legal systems: one, the Anglo-Saxon, is case law based; the other, the Spanish, is notably codified. To translate faithfully, respecting the abovementioned principle, will often require finding equivalents for terms that, in our language, either do not exist or have different characteristics that make any attempt to convey them in our language appear dubious. Thus, loyalty to the original obliges us to maintain the terms in the original language." R. G. Nombela, "Sugerencias para la traducción de textos jurídicos en inglés", op. cit., at 259.

[87] As Arrojo points out, "the reader of a text is not capable of protecting the original meaning of the author, because, strictly speaking, not even the author can be fully aware of all the intentions and all the variables that the production and disclosure of his text allow." (op. cit., at 18–9). In addressing the boundaries of "fidelity", Aubert explains that the communicative interaction carries three types of messages: "the *intended message*, the *virtual message* and the *actual message*. The intended message is what the author 'wants to say', or his *communicative intention*. The virtual message is a group of possible readings from the linguistic expression generated. The actual message is the one realized by the addressee, and conditioned in part by linguistic expression, in part by the *knowledge* and *receptive intention* of the recipient." The author continues: "In the specific case of interlingual translation, a further dimension is added: The translation act takes as a starting point an actual message, that is, the message derived from the original text, as decoded by the recipient-translator, and which is converted into a new intended message (not identical to the actual message). This second intended message will be prey to the same vicissitudes of the original intended message, undergoing a new linguistic expression, in another linguistic code, and taking into account an extralinguistic framework whose potentials and limitations differ from those that governed the original text, culminating in a new virtual message that, in turn, will be apprehended as a new set of actual messages (one for each act of reception/reading)." This is why the author asserts that "one cannot not demand fidelity from something which is by definition inaccessible: the intended message of the original sender." Aubert (1994), at 73–75, emphasis in the original) (Translation by Aubert).

universe of reference also tends to change, thus involving the distinct realities of each culture. Therefore, the challenge of translation is not only the search for equivalence between linguistic words and phrases from and into different languages, but also the translation of the cultural referent that was uttered in one language and that must be expressed in another. For this reason, it is a major battle to say the *same* thing. It may be more appropriate to say, as Eco highlighted, *almost* the same thing. Within this "almost" lies all the frustration and, at the same time, the responsibility of the translator, because "almost" evokes the impossibility of fulfilling the promise of translating something into a *same* thing and it suggests that the translator has a margin for unfaithfulness.[88]

The apprehension of the original text takes place against the backdrop of the target language/culture referent, resulting in that the end product – the translated text – may contain expressions whose meaning do not *exactly* coincide with the source discourse. Something that appears to be culturally well defined in one language may become obscure or ambiguous in another. These factors affect the process of translation according to the linguistic and referential competence of the translator. For these reasons, legal translation – although linked to the original text (to a higher or lesser degree) – requires from the recipient-translator *an act of interpretation.*

The proximity between translation and interpretation is due to the fact that both are a form of producing a certain text in response to another text. White explains that:

> Translation and interpretation have in common that they invite their reader to hold in his head the prior text or to refer to it, or at least to acknowledge that it is there, if only as a ghost behind the form; and both establish a relation of fidelity to that text, though in somewhat different ways. In both cases the meaning of the second text depends upon its relation to the first.[89]

---

[88] See Eco (2007), Introduction.

[89] J. B. White, op. cit., at 236. Still about the difference between translation and interpretation, the author states: "the difference is that the translation offers itself as a kind of substitute for the original and undertakes to have an analogous form, as the interpretation does not." And he asks: "Is there otherwise a difference in principle between translation and interpretation? I think not: one could imagine, for example, a translation that was 'looser', more 'free', than a particular interpretation which tied itself as closely as possible to the verbal forms of the original. The heart of both is the same: the presence of two texts, two voices, and the making of a relation between them" (Ibid, at 236–237). According to Lederer, "no translation can be carried out without a minimal analysis of sense; inversely, the interpretive method is never fully realized because, in many cases, it requires the interpreter to increase his knowledge and command of language to the extent it is not always possible. The theoretical differences between the two methods are, nevertheless, so profound and have so many repercussions in practice that they are worth stressing. Linguistics has, by obligation, approached translation via language, but the problems it has detected are not translation problems, but transcoding problems. It is our opinion that it is impossible to disassociate translation operations from mental operations in general; on the contrary, the study of the normal operation of language appears to open more fruitful horizons for research in translation than the horizons offered by comparing languages". M. Lederer, "Transcoder ou réexprimer?" op. cit., at 34–35. Seleskovitch emphatically states that "all translation is interpretation, even though all interpretation is not translation!" (D. Seleskovitch, "Interpréter un discours n'est pas traduire une langue" In: D. Seleskovitch; M. Lederer, *Interpréter pour traduire*, op. cit., at 112.). According to García,

In both translation and interpretation, a new text is produced that refers to another. Thus, the acts of translation and interpretation are creative acts, although the text and discourse of the original text are not to be ignored. However, the problem of identifying the intention of the author remains. This search for the author's intention is particularly important in international law when an agreement resulting from an international negotiation and initially written in one language, is translated to the other official languages established in a provision of the same document or by an international organization. White points out that "the effect of such a provision is not to give, by *fiat*, both versions the same meaning, for that is impossible; it is simply to postpone the problem of language difference and make it the subject of negotiation at some later date, when the two sides propose differing constructions of the treaty, each relying on its own version."[90] The differences in meaning among the versions of the treaty would be resolved in the future by dispute resolution mechanisms.

In this sense, the *texts* of the official versions of the treaty are, in some respect, different legal-diplomatic *discourses,* differing both in form and content. This means that, although they are equally authoritative and share equal faith, they are not identical. But despite the differences among the versions, we cannot say that they are completely incompatible. As Aubert observes, the relationship between the original text and the translated text differs from the relationship between texts that convey two completely different discourses, since the goal of the first relationship is attaining equivalence of message. But Aubert points out that "*They cannot be said to be the same message: indeed, they are two messages, draped in two distinct linguistic trimmings, but with similar communicative purposes, close enough for one to be perceived as the translation – or the equivalent – of the other, but without merging into one and same speech act*".[91] The practical effect of this assertion would be to demystify the idea that a plurality of texts does not at all affect the content of the normative text. There is a weakening of the claim that there are no changes (losses and/or gains) in the translated versions of treaties – even if very particular – when compared to the legal discourse of the original version.

Furthermore, this also demystifies the ideological game according to which the author of the "original" is the only one with power to determine meaning. The power to signify does not only belong to the author but also to the translator – even the most "faithful" translator. Therefore, those who try to justify the authority of legal-diplomatic discourse based on the language of the original text are in for a challenge. One cannot escape considering all the other translated versions. The question is whether this linguistic plurality strengthens or weakens legal-diplomatic discourse.

---

interpreting norms is not the task of a translator. The translation of any legal document would be, however, a starting point, which in the case of litigation "only the judge could interpret, or at least give the ultimate and final interpretation." ("Dificultad de la traducción de textos jurídicos", op. cit., at 92).

[90] J. B. White, op. cit., at 245.

[91] F. H. Aubert, *As (in)fidelidades da tradução*, op. cit., at 32, emphasis in the original. Translation by Aubert.

# Chapter 6
# The Power of Legal-Diplomatic Discourse

## 6.1 A Founding Discourse for International Legal Systems: The WTO

The discourse of conventions is conveyed either by a bilateral or multilateral legal instrument according to the will the parties involved. This discourse plays an important role in contemporary international law due to the rapid transition from "slow-motion law making to instant law-making".[1] The complexity and the density of international relations have made it necessary to adopt measures that promote greater predictability and meet the demands of shaping the law according to the development of our living conditions. The speed in which social transformation takes place can no longer wait for international customs to be established. Therefore, treaties become the appropriate legal instruments to respond to the organizational and regulatory needs of the international system.

The treaty – also called agreement, convention, pact or protocol – is the main formal vehicle for the legal discourse of international conventions.[2] It is, in the words of Reuter "an expression of the agreement of two or more subjects of international law and intended to have the effect of law according to the rules of international law."[3] Its utterances are the expression of consensus. Its provisions stem from the proposed drafts presented by the countries involved, during the negotiation process. The final text resulting from these negotiations, once adopted, is presumed to be in accordance with the intentions of all the negotiators. According to Cornu, "by 'adopting' [a treaty], each party appropriated the whole, transforming [the treaty] into a single message that is neither the discourse of one nor of the other, but a

[1] P. Allott, "The concept of international law", op. cit., at 42. As the author points out, "the hand of the invisible systemic legislator began to give way to the very visible hand of the institutional legislator." Ibid, at 42.

[2] Contractual instruments under domestic law fall outside the scope of this book – even those executed by a Nation-State. In the case of these instruments, according to Combacau and Sur, "the contracting parties are international legal entities and have the required international capacity, but they agree to be bound by domestic law or a set of rules of their choice." Op. cit., at 78.

[3] Reuter (1995), at 26.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_6, © Springer Science+Business Media B.V. 2011

common discourse".[4] Except in the event that one or more countries may express reservations regarding one or more provisions of a treaty,[5] the discourse conveyed by this treaty is considered to have been authored by all of the signatories.[6]

By entering into treaty together, the parties 'speak' what was agreed – but there is more – by 'speaking' the parties create rights and reciprocal obligations for themselves, define rules to regulate their behavior. The binding nature of the treaty not only results from the proceedings followed to validate it, but also from the legal content it contains.

One could raise an objection about the legal force of this discourse, claiming that a treaty is unenforceable, or rather, that there is no possibility of using force in the event of breach. This argument is based on the assumption that it is enforceability that defines the law. And, according to this claim, since there is no possibility of coercion, one could not speak of norms of international law. Therefore, in the absence of international law, there could be no legal discourse, since this discourse would not be able to bind, threat with the use of force or with the filing of a claim against a defaulting party.[7]

---

[4] G. Cornu, op. cit., at 223.

[5] A reservation is a unilateral declaration made by a Nation-State stating that specific parts of a convention do not receive the support of the "voice" of this Nation-State. Via reservations, the Nation-State refutes its commitment to abiding by one or more of the sections of the treaty. The parties to a treaty have the right to make reservations, except in the event reservations are not allowed by the treaty in question or in the event reservations are incompatible with the scope and goal of the document. See Article 19 of the Vienna Convention of 1969.

[6] The same applies to the case of any future accessions to the treaty, and, especially, to the case of *open* multilateral treaties, that is, treaties open for signature by any Nation-State at any time, such is the case of the Agreement Establishing the World Trade Organization. See Article XII.1: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto." Dinh explains that the "accession to an international organization is a very specific kind of adhesion and is governed by complex procedures: state candidacy, which is a declaration of intent; admittance, which results from a unilateral decision of the respective bodies of the organization, according to internal procedures of the organization in question that open the way to the act, which is in principle unilateral, by which the state accedes to the instrument. However, it may be that, in this case, accession results from an agreement between original signatories and acceding State." (N. Q. Dinh; P. Daillier; A. Pellet, op. cit., at 178). At any rate, the fact that a country accedes to a preexisting convention does not make the country in question any less the author of the legal discourse than the original member-states.

[7] Sistach, in addressing the (paradoxical) coexistence between a right to social repression and a right to an individual guarantee within the framework of domestic law, notes: "the paradox essentially resides in the ideology, that is, in the source of values acknowledged by society, of the impossibility of conducting a legal policy outside the semiological context of repression/prevention. However, this albeit invincible logic is the result of the historical contradiction of the double ideology of law. It does not represent in any way a form of truth or an inescapable framework of social organization." Sistach (2000), at 39–40. The so-called international law could take its rightful place if we presented in its defense the doctrinarian concept that conceives the law as a model for judging conduct. Thus, the nature of the law would not reside in its deontic

This argument is largely based on the absence of a central supra-sovereign international authority with powers to apply sanctions against any and all Nation-States that do not comply with their obligations. Arising from this question is the concept of sovereignty, which is a starting point to reflections on the role of international law in a political order marked by legal equality among Nation-States.[8] Sovereignty is a structural element of the international legal system whose organization can be understood as a result of the joint action of Nation-States to create stable disciplinary rules governing the exercise of sovereignty; or as a result of the successful balance of power in international relations. In the latter case, legal norms resulting from the agreement of the parties would play a secondary role on the stage of international relations. The body of countries would form a kind of free-zone of law where legal discourse would only have a marginal rhetorical function.

This view is grounded on the realist conception of international law, which considers States to be inherently inclined to expansion and domination. In this scenario, norms resulting from conventions are subordinate to the Nation-State's objectives and needs in terms of power. According to Fonseca Junior, "the word given will or will not be kept depending on the opportunity cost of complying".[9] It would however be precipitate to say that this 'calculation' would be what defines a discourse as having legal weight or not. Realists acknowledge the existence of international law, but the effectiveness of international law is conditioned to the interest of the countries wielding power.

This effectiveness 'deficit' in international law does not mean international law does not exist. As Reuter warns,

---

sense, but in it being an instrument of measurement, of reference, in order to assess how things should be. According to Miaille: "*A normative system is, before anything else, a system of measurement* [. . .] *legal norm is an instrument of measurement* [. . .]." Miaille (1978), at 103. In line with this, the work of the Groupe Stéphanois de Recherches, at the Université de Saint-Étienne by Jeammaud, understands that, "contrary to what is often taught, the natural logic of a rule of law is not to prescribe, prohibit or allow conduct (under threat of sanctions applied by social authority). Because of its universal nature, it is an ideal model, that is, an instrument of measurement, of reference, enabling one to assess, every time its conditions are met, how things should be" (Groupe Stéphanois de Recherches, at 11).

[8]The concept of sovereignty is born to the Nation-State along with its "self-consciousness" of being a legal entity in public law, who as such has the decision-making authority as an instance of last resort. The life of the law depends on this authority that, according to Reale, is the power to decide "what should be considered legal as a norm and what should be regulated." Reale (2000), at 341. Only to the Nation-State can this "consciousness" be attributed, and not to the law. Thus, decision-making authority lies in the hands of the Nation-State. This opinion, supported by Reale, is contrary to Kelsenian formalism. According to Kelsen, "[. . .] sovereignty can only be a quality of a legal system in the role of the authority it represents as a source of rights and obligations." Kelsen (2000), at 365. This theoretical perspective differs from the notion of sovereignty as a quality of state power.

[9]Fonseca (1998), at 53. For this reason, the author asserts "from a realistic viewpoint, there is no room for institutional reformism in the form of arrangements that resort to ethics or the law." Ibid, at 46.

> If the legal effects of a treaty could, in certain cases, be sufficiently limited, it is difficult to imagine that a treaty does not imply any legal effect of any nature whatsoever: a treaty, even if reduced to a simple behavior, occupies its place as a series of other actions and behaviors that are connected to one another; [a treaty] defines interests, justifies or establishes interpretations, creates legitimate expectations that are situated in the dimension of the law.[10]

Some of these effects appear to depend more on the power of legal discourse than on a repression mechanism in the international sphere.[11] However, our goal is not to exhaust the controversial discussion on the nature of international law. We merely intend to point out that if being able to apply a sanction is a condition for the effectiveness of international law, it is not a condition for the existence of international law. The international legal order is a product and the result of the evolution of history. Discourse is therefore considered *legal* because they are acknowledged by the international community – as it should be.[12] After all, as Dinh observed, "international law exists because Nation-States, politicians, opinion-makers, and both governmental or non-governmental international organizations all recognize and call upon international law; moreover, it would be completely unbelievable that so many people for such a long have spent so much time, energy, intelligence and, at times, money on a chimera."[13]

The hardest evidence of the existence of international law is the recognition of Nation-States in the field of international relations. Take for example the preamble of the Charter of the United Nations (1945), which reads "the peoples of the United Nations" resolve "to establish conditions under which justice and respect

---

[10] P. Reuter, op. cit., at 30.

[11] For the meaning of this *power* of legal discourse, see Sections 6.3 and 6.4.

[12] The term "society" is commonly used where political integration takes place. A usage that would be unlikely when applying the term to a global scope. On the other hand, by choosing the phrase "international community" would also mean a departure from the objective features that characterize international relations. According to Seitenfus, "the term *community* implies the *communion of interests* and the will to live congruously. However, international relations have shown that congruousness has not been their main or the least of their concerns. Therefore, we have adopted the term *international society* in its sociological sense, which demonstrates at least a minimum will of living together." Seitenfus (1997), at 23, emphasis in the original.

[13] N. Q. Dinh; P. Daillier; A. Pellet, op. cit., at 88. The author mentions several constitutions (among which the French, Italian, and German constitutions) as proof that Nation-States do recognize, in different ways, their submission to international law. In fact, the need to bridge gaps in sovereignty has lead countries to pull efforts together, so that certain goals (e.g. social, political, economic goals, etc.) are better reached when shared in the regional or multilateral scale. According to Canotilho, Nation-States that were formerly autarchical in their foreign policy have become "open and internationally 'friendly' and 'cooperative'", acting in an international legal and political system made up by international public law entities – such as, for example, international cooperation and integration organizations – and no longer solely based on the traditional paradigm of horizontal relations. It is due to this international scenario that "the right to 'opt out' of international law and of international organizations is increasingly becoming a fiction." Canotilho (1998), at 1275 and 1277, respectively. According to Allott "national decision-making has increasingly become more conditioned by products of the international decision-making processes" ("The concept of international law", op. cit., at 41).

for the obligations arising from *treaties* and other *sources of international law* can be maintained" (Emphasis added). In the domain of the World Trade Organization (WTO), international law is recognized not only because of the very nature of the organization, but also in certain passages of the text of the Agreement Establishing the WTO. Article II, for example, in establishing the scope of the organization reads:

> 1 – The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the *agreements* and *associated legal instruments* [. . .]
> 2 – The *agreements* and *associated legal instruments* [. . .] are integral parts of this Agreement, *binding on all Members*. [. . .]
> 4 – The General Agreement on Tariffs and Trade 1994 [. . .] is *legally* distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 [. . .] (Emphasis added).

It is also worth noting the passages that establish the conduct that, in principle, should be observed by the parties to the Agreement. The legal nature of the document is expressed in the deontic sense found in certain provisions. For example, Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM) prohibiting certain subsidies within the WTO:

> 1- Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, *shall be prohibited* [. . .]
> 2- A Member *shall neither grant nor maintain* subsidies referred to in paragraph 1 (Emphasis added).

The expression "shall be prohibited" and "shall neither grant nor maintain" occur in the deontic sense. The text in question does not describe reality; it prescribes conduct with the intent of interfering in reality, whether by authorizing punishment against parties that ignore the provisions in question, or by exercising control through persuading Member-States not to engage in unlawful practices. In any case, the expressions in italics reinforce the "feeling of obligation" – to use the words of Dinh in analyzing the legal-diplomatic discourse.[14]

The text of a treaty is recognized as an expression of international law, and more: a social practice. Thus, one cannot say that the legal-diplomatic discourse in the international arena does not exist. Its form and content are part of modern legal practice and have found in the Nation-State its radiating and legitimizing mechanism. The problem of effectiveness, or of the real compliance issue of this discourse, remains an unsolved problem in the international community at large. The size of the international stage and the amount of space for politics certainly hamper satisfactory solutions to the problem. This problem, however, is not our focus in this study.[15] For now, it suffices to point out that sovereign entities provide consent to

[14] Cf. N. Q. Dinh, P. Daillier, A. Pellet, op. cit., at 91.

[15] It is worth noting that some international organizations are endowed with more effective sanction mechanisms against Nation-States in breach of their obligations under a convention or treaty. The

the authority of conventional discourse, a consent which, on one hand, allows states to participate in the international arena, and on the other hand, legitimizes their exercise of power within their borders. For this reason, we understand that one cannot overlook the *devoir-être* sense that conventional discourse carries.

A discourse is considered *legal* discourse even when not produced by a supranational legislative entity. In the absence of such an entity, the international society has assigned the entity's role to the "treaty".[16] As Allott points out, "there is a common interest of international society as a whole in the creation of micro-legal systems of treaties, just as there is a common interest of national societies in the creation of the micro-legal systems of legislation. They are an integral part of a society's legal self-building, of its self-ordering through law."[17] In this sense, the conventional discourse contained in the treaty is the founding discourse of the international *legal* system. It is this discourse that triggers a sequence of new legal-textual manifestations – including in decision-making.

When we say that treaties establish the *founding discourse* of the international legal system, what we aim at pointing out is that it is the textual source of subsequent legal communication and decision-making practices between Nation-States. This is by no means saying that this discourse is a fundamental norm of law in the international legal system, but that this discourse is an established – conveniently placed – cultural referent for new legal discourses.

Therefore, we do not wish to debate on the existence or inexistence of a legal discourse matrix from which the sociopolitical conditions for all textual legal practices in the contemporary international legal system are established. Our goal is another. Treaties should be understood as instruments through which a founding legal discourse of international *legal* relations is conveyed, including discourse across frameworks that are not the equivalent to Nation-State frameworks, and frameworks that are not necessarily connected to the international order as a whole. This is the case, for example, of the discourse contained in the agreements creating international organizations.[18]

The treaty, via its legal discourse, creates a micro legal system within the international society. It becomes a kind of "Constitution" of the organization

---

WTO is an example. This fact strengthens the deontic sense of the discourse of conventions, giving it an important role in stopping conduct detrimental to an agreement.

[16] According to Dinh, "it is true that there is no organization specialized in publishing norms; however, as in any legal system, international norms undergo a formal drafting process in which, firstly, Nation-States participate, together with the authors and main addressees of the rules in question (the same way as in domestic law according to which the parties to a contract are both its authors and addressees), as with all legal system." Op. cit., at 90.

[17] P. Allott, "The concept of international law", op. cit., at 43.

[18] International organizations are defined by Seitenfus as "the voluntary association among Nation-States, established through a treaty which provides for a permanent organizational framework and an independent legal entity from the Member-States, with the goal of pursuing common interests through the cooperation of its members." (*Manual das organizações internacionais*, op. cit., at 27.). The Vienna Convention on the Law of Treaties (1969) gives a succinct definition: "'international organization' means an intergovernmental organization" (Article 2, *i*.).

it creates insofar as it determines its structure and function.[19] In the WTO, for example, the founding legal discourse is in the Agreement Establishing the World Trade Organization (herein called the "WTO Agreement" or "Agreement Establishing the WTO") and in the amendment to the "covered agreements" or "WTO Agreements".[20]

These documents were the result of international negotiations known as the Uruguay Round[21] and they establish the legal norms that control international commerce among signatories. This legal discourse is therefore currently issued by more than 150 countries,[22] among which are developed and developing nations that by means of the same instrument are both the authors and main recipients of the discourse. The conventional discourse resulting from the Uruguay Round

[19] This is the only way one can speak of UN law, the European Union law, Mercosur law, or WTO law, etc., each of which has its own legal vocabulary that regroups lexical units that possess legal meaning in the heart of these organizations.

[20] See the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, April 15, 1994. According to the terms of Article 1.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), "covered agreements" are the accords numbered in Appendix 1 of this legal instrument. It includes the Agreement Establishing the WTO, the Multilateral Trade Agreements, the DSU, and the Plurilateral Trade Agreements. It does not include, however, the Trade Policy Review Mechanism. The Multilateral Agreements which are the following: the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (GATS), the Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the DSU.

[21] The Uruguay Round was fostered by the old General Agreement on Tariffs and Trade (GATT) and lasted more than 7 years (1986–1994) with 123 countries taking part. The origins of the GATT are found in the disastrous negotiations for the creation of the International Trade Organization (ITO). The negotiations for creating the organization were successfully concluded in Havana in 1948. However, the fact that the United States' Congress did not ratify the agreement rendered the ITO unfeasible. The GATT was the only result of the negotiation. In 1947, it had been signed by 23 countries only, but became the legal benchmark for the governments of industrialized nations that sought to reduce or eliminate the trade barriers. But there was more: the GATT also became a non-official, but rather *de facto*, international organization. In this context, international negotiation rounds started being held periodically. It was the beginning of this regular practice. The Uruguay Round has been considered the most important of these rounds. "It encompassed every kind of commerce, from toothbrushes to cruise ships, from banking services to telecommunications, from wild rice genes to AIDS treatment. It was simply the greatest commercial negotiation of all times and, most probably, the most wide-encompassing in the history of mankind." OMC (2001), at 12. The Doha Round, started in 2001 and still has not been concluded. It addresses negotiations in many areas, such as agriculture and services, and it also approaches the problems regarding the application of WTO Agreements. It is worth noting that with the advent of the WTO, the GATT as an "international organization" ceased to exist. Nevertheless, the GATT as an agreement still exists as the "1947 GATT." Using the year 1947 to identify it as such serves the purpose of distinguishing it from its updated version on the occasion of the Uruguay Round, which resulted in the "GATT 1994". Chapter 7 of this book will include a more detailed study of the historical circumstances that involved the creation of the GATT and the advent of the WTO.

[22] According to the explanatory note of the WTO Agreement, the terms "country" or "countries" "are to be understood to include any separate customs territory Member of the WTO"

is the founding discourse of a multilateral system of commerce,[23] and sets the first linguistic signs of the law of the WTO.

## 6.2 The Subjective and Objective "Camouflage" of Legal-Diplomatic Discourse

According to what we have said under the preliminary considerations, it is important to point out that the discourse of conventions includes not only the utterances expressing rules, that is, that convey the normative content of the treaty, but also other utterances that are part of the *acte juridique* in question – most notably, the Preamble of the treaty. The relevance of the Preamble as part of conventional discourse is indicated in article 31.2 of the Vienna Convention: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes [. . .]".[24]

Between the preamble and the provisions of the treaty, there is a linguistic difference that, from an interpretive standpoint, attaches different meanings to its wording. The text of the preamble expressly mentions the subjects, or parties, to the treaty. The authors are clearly identified and make a point of being mentioned. They do not hide behind words, but take on these words during the period the treaty is in force.

In the WTO Agreement, the "parties", or authors of the discourse, desire and resolve to implement a multilateral system of commerce, based on the premise that all the members recognize the need for the economic development to which all countries aspire, And for this reason, the members decide to adopt and agree to a treaty to establish the WTO.[25] The text is considered to be the work of a 'we' – which is not hypothesized. The words are uttered by the 'voice' of the members of the WTO, and not through a spokesperson or entity. The words carry various desires and interests, but are uttered in chorus by the governments of the States-Parties.

---

[23]The "multilateral" system of commerce refers to the system regulated by the WTO. Since the WTO does not encompass all the countries in the world, it cannot be described as "global". However, for the purposes of the WTO, the term "multilateral" refers to activities at the global level, distinguishing these from activities carried out regionally.

[24]Emphasis added. The legal discourse of conventions includes any latter agreements entered into by the parties thereof confirming the interpretation of the treaty or the application of its provisions (Article 31.3, *a*, of the Vienna Convention de 1969). We could also extend the criterion and include the *adoption* of a text – that is, its conclusion and authentication– as part of the legal discourse of conventions.

[25]The Preamble to the WTO Agreement reads: "The *Parties* to this Agreement, *Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living [. . .]; *being desirous* of contributing to these objectives [. . .]; *resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system [. . .]; *determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system, *agree* as follows: [. . .]" (Emphasis added).

The same cannot be said in regard to the *body* of the treaty. Although it is also the fruit of the joint work of the members of the WTO Agreement, it is textually different from the preamble. There is a deliberate intent to hide behind the artifices of language in order to set a distance between the real sender and the text of the treaty. The discourse is structured to omit the sender, erasing his imprint on the utterance. The subject that 'desires' something in the preamble gives way to the subject of 'truth' that is imposed by the dogmatics of the normative text.

The discourse is impersonal but camouflaged to appear otherwise through certain linguistic maneuvers. The subject of the utterance, as well as its authority to establish legal rules, becomes implicit and presupposed, never expressed in the discourse uttered in the body of the treaty. "The law never says neither 'I' nor 'you'", states Cornu,[26] the same may be said of the normative provisions of the legal-diplomatic discourse.

The presence of the authors in the discourse is not completely obvious to the readers of the text. The document does not say "*We* shall neither grant nor maintain subsidies referred to in paragraph 1" or "*None of us* should cause [. . .] adverse effects to the interests of other Members"; instead the document reads "*A Member* shall neither grant nor maintain subsidies referred to in paragraph 1"[27] and "*No Member* should cause [. . .] adverse effects to the interests of other Members",[28] as though the message were detached from its real authors and issued by a third party directing its voice to the recipients of the normative utterance – and not to its very authors. The use of the third person singular facilitates the general relativity of the person and number, thus expressing the generic unit instead of an object individually considered.[29] On the other hand, according to Cornu, the present indicative tense offers psychological advantages:

> It hides the subject giving the order and does not highlight the power to give an order. It is a more discreet manner, softer and more diplomatic to employ [. . .] It gives one the impression that the uttered rule is not imposed arbitrarily, but naturally founded, or that the law is close to the nature of things. [. . .] The present indicative implies respect. Its employment is, thus, intentional.[30]

---

[26] G. Cornu, op. cit., at 282.

[27] Article 3(2) of the ASCM.

[28] Article 5 of the ASCM.

[29] The term "government" in Article 1(a.1) of the Agreement on Subsidies and Countervailing Measures (ASCM) of WTO refers to *all* the Members of the agreement, and reads "For the purpose of this Agreement, a subsidy shall be deemed to exist if: a.1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") [. . .]." The same may be said of the phrase "granting authority" in Article 2 of the ASCM. However, in this case, the general application of the term does not intend to encompass any and all persons, but only those in a certain situation – that is, the situation of an authority granting a subsidy – according to the ASCM. Behind the seemingly general wording, the text is of camouflaged objectiveness, thus including government authorities, businessmen, workers, labor unions, social groups, etc.

[30] G. Cornu, op. cit., at 272.

The style of the language in the body of the treaty appears to have an ideological purpose. Insofar as it hides the subject – author – of the discourse, it makes it difficult to identify the interest at hand and respective interested parties, persuading the recipient of the normative message to accept the rule, thus contributing to its observance. Impersonalization associated to the deontic sense is a linguistic strategy that attaches authority to a text and makes it appear to be uttered by one single voice. The message becomes static and solitary. "The voice of the legislator falls from the heights and comes from far away", according to Cornu's metaphor.[31] This bounding voice inspires some fear, as though the legislator were omnipresent, omniscient, and omnipotent.

In any case, the variations in person that we find in the preamble and in the body of the treaty represent the different ways the authors are expressed in the text. However, as literary theory teaches us, there is no fundamental difference between a text written in the first or in the third person, "since both act as narrator, as a mask for the author", explains Barros.[32] Therefore, if the "neutrality" of the subject of the utterance in relation to the discourse aims at "acceptance by recipient", the same can be said of the text contained in the preamble. The apparent explicitness of the subject of the utterance serves as "camouflage" – a mask – that does not necessarily show the real intentions of the authors. As Beividas warns, "the *I* uttered in the discourse is not in any way the subject of the utterance itself."[33]

Therefore, conventional discourse is shaped not only to persuade, but also to be persuaded. The authors of a treaty, who also become the recipients of their own discourse, will eventually to want to reconstruct the meaning of the conventional text if motivated by more concrete and specific interests. The generalizing features of the body of the text receive new semantic input. It is no longer the case of considering the "commanding authority" in general, but a specific country, "A" or "B", that would have allegedly provided unlawful subsidies according to the law of the WTO. The text is no longer seen as a perception of a "we", but it conforms to the interests of an "I", conditioned by economic, social, political, and cultural circumstances. The disputes arising out of the meaning of this conventional discourse will result from actual interests, which will define how the treaty shall be construed. A Member may try to impose its own and individual reading of the text – to the detriment of the common good inscribed in the treaty.

Aware of this problem, Nation-States create ways of solving conflicts of interpretation through procedures for preventing and settling disputes. They create mechanisms of conflict resolution in which the words of the treaty are put in motion with the objective of eliminating ambiguities, and making the words more precise. Consequently, the resulting decision-making discourse establishes how the founding discourse is understood. However, the power of the legal diplomatic discourse does not only result from institutional apparatus. The language and cultural contents it conveys contribute to its acceptance by and legitimacy in international society.

---

[31] Ibid, at 267.

[32] Barros (2001), at 78.

[33] Beividas (2000), at 42.

## 6.3 The Active Role of Foreign Language

The power of legal-diplomatic discourse resides in the *social force* of its signs that are capable of establishing and spreading a common legal culture in the international system. This force is primarily the result of the deontic sense, which is understood insofar as *legal* discourse is concerned. The fact that this discourse is connected to the law means it has a connotative meaning of a legal obligation, and its recipients will immediately know how to interpret it differently from, say, moral or religious discourse. The provisions that list conducts that are legally permitted, prohibited or optional, supply parameters, which guide the actions of individuals, and which (it is believed) society as a whole sanctions and expects such provisions be observed.

However, the notion of power we associate to legal discourse is connected to its ability to contribute to the formation of a common legal culture across the international society. From this perspective, the power of legal-diplomatic discourse is as big as its effect in consolidating a *legal reality* and consequently, a *social reality,*[34] shared by the international society, thus increasing the possibility of international law effectiveness and conferring increased legitimacy to the content of international law.

Therefore, it is presumed that language, via the cognitive process of the human mind, cannot only be used to represent reality, but also to have an important role in *creating* and *transforming* this reality. Moreover, it can also play a role in, according to Beaulac, shaping the "shared consciousness of society".[35] Each word would thus be a *form of social power*,[36] an instrument that could be employed to (re)build a vision of the world to express this same world. Expressions such as "state", "sovereignty", "free trade", "globalization", "law", among others, shape our perception of the international reality, that is, they yield power on our comprehension of the international system as *was*, *is* and as how it *should be*.[37] Words not only describe or stand for the referent; they also make up the referent.

---

[34] According to Merry: "legal words and practices are cultural constructs which carry powerful meanings not just to those trained in the law or to those who routinely use it to manage their business transactions *but to the ordinary person as well*." Merry (1990), at 8–9, emphasis added.

[35] Beaulac (2004), at 1.

[36] Ibid, at 1, emphasis in the original.

[37] On the word "law", Williams (1963), at 134. On the term "state", Brancourt (1976), at 39. On the words "globalization" or "mondialisation", see the work of Stern (2000), at 274. On the term "sovereignty", Allott states: "sovereignty is not a phenomenon of the physical world. It is not even some sort of necessary and ineradicable idea within consciousness. It is a word-idea formed, like any other word-idea, from and in human consciousness. Sovereignty is not a fact but a theory. [. . .] The sovereignty of state-societies, which they are supposed to use when they make international law and which they are supposed to limit by making international law, is only the externalization [. . .] of particular theories of society developed in a particular period of history in particular social circumstances." Allott (1990), at 302.

Language is seen as an instrument that shapes reality and, as words change, reality would adjust itself accordingly to the new circumstances.[38] A change *to* the signification system, by the introduction of a new signifier via a new signifier, would require the referent to be adjusted. However, the opposite is also possible: a new reality could require the signification system modify the content dimension to adjust to a corresponding element in the dimension of expression. Thus, a change in the referent would require a change *in* the signification system.

In the first case, language plays an *active* role; in the second, it plays a *passive* role. These functions of language are explained by Beaulac accordingly: when there is a *perceptible* change in the referent, language adjusts to represent the new 'reality', thus playing a passive role. The sequence of this change is illustrated by the author as: *referent* → *content* → *expression* → *content*.[39] Conversely, words may also change the perception of the referent, in which 'reality' adjusts to words: *expression* → *content* → *referent* → *content*.[40] Therefore, transformations in the field of the referent change our knowledge about the world; words, in turn, produce new contents, building new and different realities.

The dynamics of the cognitive process form the basis of the changes in the two 'concrete' dimensions in question: the extra-linguistic reality and the word as physically considered.[41] The changes *to our* perception, caused by the first dimension, lead us to retaining these changes in our intellect and name them for the purposes of signification and communication. One the other hand, the changes *in* our perception of 'reality' lead us to re-naming it, based on the conscious content shaped by our minds.

What we would like to stress, concerning this adjusted perception of reality occasioned by language, is the dynamic role of the word as an element that contributes to the creation of new view of the world. According to Allott,

> the reality within which a life is lived in words is a world of its own. Our words make our worlds. To choose our words is to choose a form of life. To choose our words is to choose a world. To oppose words is to oppose a form of life and a world. To change words is to change a form of life and a world. We can make new forms of social life, new social worlds by choosing new words communally, including the new words constantly created through

[38] In line with this, Beaulac states that: "[. . .] a change in words may, through the cognitive process, influence and modify reality." (*The power of language in the making of international law*, op. cit., at 25.).

[39] Beaulac uses the terms "*thought*" or "*reference*" and "*symbol*" which are synonymous in this book with "content" and "expression", respectively.

[40] Cf. S. Beaulac, op. cit., at 24–25.

[41] Beaulac does not ignore this and states: "Therefore, just as linguistic signs, *through the mind*, indirectly describe and represent reality (passive role), linguistic signs also model and change reality *through the same cognitive process* (active role)." (op. cit., at 25, emphasis added). However, the sequence proposed by the author concerning the active and passive role of language, despite being very schematic, does not clarify the nuances and reciprocal influences that are established among word-thought-reality.

> the redefinition of old words. To make a new word or to alter the meaning of an old word is to make possible new realities.[42]

It is because of this active role of language that linguistic signs are able to exert *power* in socially building reality. To say that reality is 'socially' built, means admitting that creating and transforming reality takes place within a *historical* process, in which social and economic circumstances are not limited to the action of human intellect. Therefore, to state – as we have – that the cognitive process is at the basis of the transformation of language and of the transformation of extra-linguistic reality does not mean to say we side with an idealist, subjective perspective – this will be explained later.

Before however, to exemplify and better understand the active role of language, let us return to the topic of translation. Translation intermediates the communication process to facilitate the interaction among groups and nations, as well as to convey *cultural values*. When the content of the source text is important to another language, translation is the bridge between two cultures, two ways of seeing the world that meet. The sender-translator of the text cannot (or at least should not) ignore the possible particularities of meaning of the sender-author. The translator conveys cultural content – a view of the world that may or may not collide with, adapt to, identify itself with, or influence the other language/culture.

When conveying cultural content, the translator may give rise to new perceptions of the world. It is for this reason that a Chinese or Russian jurist, for instance, may have difficulties in understanding Islamic law due to the challenges in finding appropriate signifiers to convey certain legal meanings. If these legal meanings are not translated to the linguistic and legal code of the recipient, there is a risk of truncating comprehension of legal content. For this reason, translation can be illustrated as follows, where the active role of the linguistic signs is revealed accordingly: *expression of language A* → *expression of language B* → *content* → *referent* → *content*. A *new* content is introduced in the signification system of language *B* when the *words* in language B correspond to the referent in the source text, in other words, to the words of language *A*. This explanation reinforces the understanding of Voloshinov, according to whom "it is not experience that organizes expression, but the other way around – *expression organizes experience*. Expression is what first gives experience its form and specificity of direction".[43] In other words, there is no mental activity without semiotic expression.

These considerations are relevant in the realm of international law. The intellectual process involved in translating is, although unconsciously, present in the negotiation process of international treaties. It is a mental process that negotiators engage in to be able to communicate in a multilingual and multicultural legal

---

[42] P. Allott, *Eunomia*, op. cit., at 6.

[43] Voloshinov (1986), at 85, emphasis in the original. The complex authorship issue concerning this book – whether it was written by Bakhtin or Voloshinov – still remains. Therefore, depending on the translation consulted, the references shall refer to Bakhtin (Voloshinov), Voloshinov, or Bakhtin.

system. Even using a single working language (such as English, for example), does not eliminate the active role of language – this goes for speakers of other languages as well as for negotiators that find English to be their most active language.[44] In any case, translating into the working language of the legal contents at issue is a method that enables us to know exactly what is being negotiated; since what is brought to the negotiation by the common language is cultural content – or, to use the words of Bourdieu, the cultural capital, which is the legal capital.[45] This alone is enough to ensure a position of authority.[46]

According to this explanation, the active role of language is highlighted considering that it is the *foreign word* that conveys new ways of 'seeing' reality to the recipient. Voloshinov stressed the "historical role" – or "active" role – of the foreign language in the process of shaping all civilizations, although both the philosophy of language and linguistics are still not aware of this role.

> It was the alien, foreign-language word that brought civilization, culture, religion, and political organization [. . .]. This grandiose organizing role of the alien word, which always either entered upon the scene with alien force of arms and organization or was found on the scene by the young conqueror-nation of an old and once mighty culture and captivated, from its grave, so to speak, the ideological consciousness of the newcomer-nation – this role of the alien word led to its coalescence in the depths of the historical consciousness of nations with the idea of authority, the idea of *power*, the idea of *holiness*, the idea of *truth*, and *dictated* that notions about the word be pre-eminently oriented toward the alien word.[47]

Following Calvet's line of though, one could make conjectures and consider the organizing role of foreign words to be part of the war among languages. However, seeing that this word 'conveys foreign forces and structures' we could postulate that the war of languages would be an epiphenomenon of a much more profound cultural

---

[44] The phrase "most active language" is more appropriate than "native language". Aubert explains that "with the ever-expanding cultural globalization and increasing migratory movements – which may vary in their direction but, apparently, not in intensity – one will quite frequently encounter "linguistic biographies" in which a more or less radical change in linguistic competence has occurred at some vital moment of an individual's life story. In the case of immigrant children – but not only in this group – it is quite common to observe certain linguistic/referential specializations, i.e., a greater ease in speaking of certain subjects in one language and of other subjects in another, e.g. the language of the parents to deal with the family and home and the language acquired at school to express the realities of the outside world." F. H. Aubert, *As (in)fidelidades da tradução*, op. cit., at 54–55. Translation by Aubert.

[45] Bourdieu (2002), at 242.

[46] Control of legal knowledge is one of the aspects of contemporary power relations. Thus, the constant dispute for the prevailing meaning of legal terms and phrases in international relations, – such as in drafting laws, treaties, and international accords, or in judicial proceedings that end with a decision of recognized jurisdiction by the litigants –, is by no means a coincidence. In any case, one who masters legal discourse is at an advantage (in terms of power) when compared to one who does not. According to Bourdieu, "the formation of the legal field is inseparable from the establishment of a monopoly by legal professionals over the production and commercialization of this category of products, which are legal services. Legal competence is a specific power that enables one to control the access to the legal field, determining the conflicts that are allowed to enter this field and the specific *way* they must be presented in order to engender legal debates." P. Bourdieu, *O poder simbólico*, op. cit., at 225–226 and 233, respectively. Emphasis in the original.

[47] V. Voloshinov, *Marxism and the philosophy of language*, op. cit., at 75.

dispute that includes the legal dimension. This hypothesis seems to be supported by the current debate regarding the (wrongly called) "Americanization of the law".[48] At the heart of this debate is the question about the weight and rate of influence of American legal culture on the laws and legal practices of other countries. This concern is expressed by Garapon and Papadopoulos: "all jurists (except, of course, American lawyers that have imposed their way of working everywhere, regulating the offer and demand for the law, according to their ability to offer) have the feeling of living a certain generalized legal acculturation due to the competition among legal systems".[49] Abi-Saab even states that the WTO "is American" and further states that "terminology such as *antitrust*, *antidumping*, etc, reflect American institutions."[50]

Farnsworth's answer to explain the "clear American influence" is within the scope of this study. It highlights the importance of taking into account the relationship between law and language. He says: "Obviously, as with many *common law* countries, the Americans have the advantage of speaking English. It is difficult to project oneself into international negotiations without familiarity with the English language. Having English as a mother tongue is a great advantage. Interpreting is expensive and rarely available."[51] In addition, the market is much better for professionals specialized in legal discourse capable of working in English. That is why that the word of *experts*, of those who interpret law, is expensive. And here we raise a question: Is interpreting carried out by people who speak English as their most active language 'better'? After all, who but this kind of speaker would be better qualified to interpret the 'true' content of a legal text in English? The risk of a predominating legal 'reality' over other 'realities' appears plausible.

Reimann also cites the influence of American law, but he sees it from the wider perspective of legal culture, not only restricted to positive law.[52] Legal culture is

---

[48] The use of this phrase refers to the law of the United States of America. Greenhouse provides a summary of the different usages of the term "Americanization". It can mean: "the incorporation of the indigenous nations to the federal State; the assimilation of immigrants; the transformation – with the help of a legal framework regulating trade among the pioneers – of the law in the Louisiana Territory; the 'Americanization' of the law in Japan, as a result of occupation; and, controversially, the reform of legal systems adopted by the Southern states after the American Civil War. Obviously, in the United States, 'Americanization' usually means the assimilation of minority cultures by the New World due to institutions promoting citizenship." Greenhouse (2001), at 46.

[49] A. Garapon; I. Papadopoulos, *Juger en Amérique et en France*, op. cit., at 13–14.

[50] Georges Abi-Saab. Interview to Evandro Menezes de Carvalho. Geneva, Switzerland, 10 October 2005.

[51] Farnsworth (2001), at 24. The author lists other advantages of the influence of the United States which: is an economic "superpower"; plays an active role in the globalization (or mondialisation) process; has a large number of "experts"; has a legal system – the common law – that is less "strange" to Western legal systems when compared to English law; has codes (e.g. the Uniform Commercial Code and the Restatement of Contracts); has the advantage that most of its legislation is recent; and, lastly, benefits from the wide array of jurists from other countries that come into direct contact with the US legal culture through scholarships, research, education, conferences, etc.

[52] According to the author, the Americanization of European *legal culture* would be more significant in the long term than the changes made to *positive law* itself. Positive law refers to the system of rules created by the legislature, the courts, and scholars. Legal culture, in turn, refers to everything surrounding these rules. It is legal culture that gives meaning. Legal culture can be found in

associated to legal practice that has undergone a transformation process as a result of the globalization of the market for legal services "under American supremacy".[53] And the author adds:

> This evolution is directly connected to the supremacy of (American) English as the international language of the law. International legal negotiation in Europe, and actually almost anywhere in the world, employs English, American databases, and frequently American approaches to negotiation, drafting contracts, and conflict resolution.[54]

Language is once more presented as an important factor in shaping the scenario of the prestige of one law over another. As noted by Watt,

> Naturally, it is difficult to conceive legal prestige separately from other cultural phenomenon, such as language and economic model. The current preference for American law over other systems across the globe accompanies the widespread diffusion of the English language, which is difficult to separate from the economic prosperity whose law is the vector.[55]

Associating *economics* to the *language of the law* brings new elements to the study of the power of legal-diplomatic discourse that serve as a counterweight to the highly idealized vision that only the linguistic viewpoint could bring. The legal discourse in question could not be dissociated from the material conditions for existence of its senders and recipients. Legal discourse expresses the power relations (productive forces) present in the economic dimension of the international system. On the other hand, even though the prevailing role of the English language in the international system results from the weight of American economy and from the adoption of English as the language of trade and diplomacy, the consequences of adopting English in decision-making processes cannot be overlooked. After all, the English language also conveys a view of the world. And adopting English in the international arena without bringing it together with other languages and views of the world would mean to assume that the words and phrase in the English language suffice to represent the entire international reality.

## 6.4 Ideology in Legal-Diplomatic Discourse

The debate over the domination of American legal culture can be understood as a *social process* (i.e. a social activity that produces social existence). This process is widely known as "globalization".[56] The transformation of the legal culture in

---

the way in which the legal profession works, in the way organizations operate, in the teaching of the law, etc. It involves, therefore, traditions and mindsets. These (new) cultural realities can shape positive law and positive law can also influence it notwithstanding. Reimann (2001), at 75.

[53] M. Reimann, "Droit positif et culture juridique", op. cit., at 72.

[54] Idem, loc. cit.

[55] Watt (2001), at 32.

[56] We use the term "globalization" in the sense used by Ost to differentiate it from "mondialisation" and "universalization". The author presents the terminological difference among these as follows: mondialisation "means the increasing planetary interdependence in a growing number of spheres of social life. It means that the flows generally replace territories, and networks replace

domestic law is motivated by "market forces" that, in turn, establish mechanisms and legal rules aimed at ensuring the safety and predictability of international commercial relations. In line with this, it should be the influence of the United States on the *globalization of law,*[57] and not the Americanization of national law,[58] that

borders. The inside-outside difference loses much of its relevance, thus making Nation-States radically rethink their means of intervention. Opposing to mondialisation defined as such serves no purpose. *Globalization*, on the other hand – even if generally considered the Anglo-Saxon translation for 'mondialisation' – has an ideological meaning: it is an interpretation of 'mundialization' in exclusively economic terms, privileging efficiency and competition, and is translated as the 'commercialization' of all aspects of the social life in regards to legal liberalization." On "universalization", Ost says: "an equally ideological concept, 'universalization' consists in reinterpreting the fact of mondialisation as an opportunity for widely 'sharing meaning', in line with the moral universalism of the Englightment, according to which universal human rights are today the most clear translation." Ost (2001), at 6–7. Delmas-Marty is also in favor of this distinction. She considers "mondialisation" neutral in a way that "globalization" and "universalization" are not. They are respectively, the phenomena of unilateral diffusion and hegemony of economic law, and a shared meaning regarding human rights. Delmas-Marty (1998), at 14–15. For more on the difference between "globalization", "internationalization" and "universalization" see also M. Kohen, "Internationalisme et mondialisation" In: C.-A. Morand (Dir.). *Le droit saisi par la mondialisation*, op. cit., at 108–110.

[57] *Globalization law* differs from the *globalization of the law*. Albeit inseparable, Chevallier offers a clear explanation of their different dimensions. The author uses the expression "mondialisation" the way in which we use "globalization". "The mondialisation of the law translates into the creation of a *common backdrop of rules* to be applied generally. Certainly, these rules do not constitute a coherent and unified framework that is a true 'transnational legal system' above the law of Nation-States. The scope of these rules vary and their contents evolve; they unfold in a flexible manner, while being incorporated by domestic legal systems; and the conventional technique by which they are propagated gives the Nation-State control – at least theoretically – of the process. However, during its evolution, what is designed is an actual outline of 'global law'." J. Chevallier, "Mondialisation du droit ou droit de la mondialisation?" In: C.-A. Morand (Dir.). *Le droit saisi par la mondialisation*, op. cit., at 39. According to Chevallier, the development of globalization law "has strengthened the domination of the Anglo-Saxon understanding of the law over the Romano-Germanic legal tradition: when they have to choose the rules to govern their transactions (legal shopping), international operators of the economy tend to choose the most flexible and most pragmatic, and the powerful American law firms put significant pressure to this end. *However, the very international organizations are more and more impregnated with Anglo-Saxon legal concepts.* The globalization of law appears to be a privileged axis of the 'Americanization of law', which is but a by-product of the economic power of the United States." J. Chevallier, "Mondialisation du droit ou droit de la mondialisation?", op. cit., at 55. Emphasis added. Chevallier states that, although the *globalization law* ("droit de la mondialisation") is initially "conceived and applied outside Nation-States", States play a role in its development while adopting rules aimed at promoting the security and development of international trade: "The law of globalization is also a product of *inter-national construction*: the rules that organize trade are, largely, born from conventions among Nation-States or produced by international organizations that create them; as globalization progresses, it is found that conventional drafting tends to be a combined means of production." (op. cit., at 47–48). The author cites the WTO as emblematic.

[58] According to Legrand, in regard to the influence of "American" law over foreign law: "A rule of law from the United States that comes to be established in France, Italy or somewhere else, cannot be introduced without modification. In order to be received, in order to "make sense" in the locale, to become part of the network of significations that inevitably constitute the fruit of the history of a certain society, this American rule should – as a manner of speaking – be metabolized. The moment a rule of American law is intended to become part of French law, for example, French law transforms it and makes it no longer American. In other words, it is a Francophied American law,

should be investigated in the light of that portion of international law, which differs from other international norms due to its (economic) object and its application (international exchange); and which is thus crucial to the unification of the global market.[59]

However, as Chevallier points out, globalization law, as all law, is impregnated with a set of values that mirror a certain *conception of the world*, which in this case he calls the "*ideology of globalization*".[60] This ideology projects a representation of the international reality and incorporates significations that contribute to preserving the power relationships. However, it is not enough to say that the economic conditions that concern the basis of the materialistic existence of the States are able to define the social scenario of international relations. It must be pointed out that globalization ideology is part of this scenario as a semantic system built to give shape to the world, and more, to maintain and justify the power relations in international relations. It is because the world is always interpreted in part that hides the contradictory nature of each and every semantic system cannot always be seen. This is how the ideology of globalization is able make a sign intangible, and monomorphous, and, by doing so, ideology neutralizes other significations that threaten the international acceptance, and the force, the power of this same ideology.[61]

---

which is neither the same thing nor the same rule." Legrand (2001), at 38. The author defends the argument with an example taken from banking law, the "crédit consortial" (the Anglo-American innovation, called the "syndicated loan" in the US and later introduced in France). The author also expresses the local mutation, or "metabolism as a "process of cultural *resistance*." Ibid, at 38, emphasis added.

[59] From this perspective, we can say that "American" law is also submitted to the formation process of the globalization of law, given that other legal systems – to a higher or lesser degree – take part in it. Farnsworth states that the Principles of UNIDROIT contain concepts strange to "American" law, such as pre-contractual liability and hardship (E. A. Farnsworth, "L'américanisation du droit", op. cit., at 22–23). Furthermore, this cultural permeability of legal cultures is not new to the law or to domestic laws. Research could be carried out to establish a parallel between the contemporary "Americanization" of the law and the Romanization of European law in the Middle Ages. As Reimann notes, "one can cite the domination of academic institutions cultivating a model of law (in the past, in Italy, and now in the US), the influence of foreign students that return to their countries after studying in these institutions (on the other side of the Alps in the Middle Ages, and today above the Atlantic), the role of an international common legal language (formerly Latin, today English), and the inclusion in a broader context of cultural transfer (formerly the Renaissance, currently the Americanization of Western lifestyle)." M. Reimann, "Droit positif et culture juridique", op. cit., at 62.

[60] This ideology of globalization lies on some fundamental beliefs: "in growth, ensuring an unlimited amount of produced, traded and consumed goods; in the superiority of market mechanisms, fostering a social and economic *optimum*; in the benefits of competition, promoting constant efforts toward competitiveness, innovation and modernization; in the positive effects of the opening of borders, and the development of exchange, which would be essential drivers of dynamism and efficiency; in the obsolescence of state protection, which is a factor of rigidness and sclerosis and is currently in disuse due to the growing interweaving of economies." J. Chevallier, "Mondialisation du droit ou droit de la mondialisation?", op. cit., at 52.

[61] Chaui explains that "the ideology is a logical, systematic and coherent set of representations (ideas and values) and of norms and rules (of conduct) that indicate and prescribe to the members

To understand the ideology as a construction of *a* reality, we look to our field of interest: semiotics. As Voloshinov states, *without signs there is no ideology* because *ideological things possess semiotic value*.[62] Thus, they correspond to each other. However, the production of signs contributes to maintaining and altering power relations.[63] And, communication practices are the basis of this process. This implies that the active role of discourse is only realized in a socially interactive environment, and not by a purely individual activity. This brings us to three conclusions: first, reality is *created* (or *ideologically shaped*) and has a social nature. The active role of discourse, while manifested as speech, would be more the product of social relations than an individual manifestation.[64] Therefore, the distinction made by Saussure between language (*langue*) and speech (*parole*) in order to separate social language

---

of society what they should think and how they should think, what they should value and what they should not value, what they should feel and what they should not feel, and what they should do and what they should not do." Chaui (2001), at 108. This partial vision of the world is associated with the concept of the ideology as "false consciousness" – the theoretical occultation of the concrete physical relations in life.

[62] V. Voloshinov, *Marxism and the philosophy of language*, op. cit., at 9 and 10, emphasis in the original. According to Fairclough, "ideology is significations generated within power relations as a dimension of the exercise of power and struggle over power." Fairclough (1992), at 67.

[63] To say that discourse practices may alter the balance of power is to say that the semantic system of ideology may be put in check by other views of the world. However, as Eco puts it, the statement received as semantically anomalous is "'ideologically' interpreted as a malignant effort to disrupt the 'law and order', which governs one's uncontradicted semantic universe (i.e. one's culture, world vision, religion, 'way of life', etc.)." U. Eco, *A Theory of Semiotics*, op. cit., at 297.

[64] Voloshinov makes a concession to the constitutive role of consciousness ("as organized, material expression") concerning reality. According to the author: "[. . .] consciousness, so conceived, is an objective fact and a tremendous social force. To be sure, this kind of consciousness is not a supraexistential phenomenon and cannot determine the constitution of existence. It itself is part of existence and one of its forces, and for that reason it possesses efficacy and plays a role in the arena of existence. Consciousness, while still inside a conscious person's head as inner-word embryo of expression, is as yet too tiny a piece of existence, and the scope of its activity is also as yet too small. But once it passes through all the stages of social objectification and enters into the power system of science, art, ethics, or law, *it becomes a real force, capable even of exerting in turn an influence on the economic bases of social life*." V. Voloshinov, op. cit., at 90, emphasis added. Even so, this action of consciousness would be, according to Voloshinov, a social fact and not an individual one, since the content of consciousness ("individual psyche") is as social as ideology. "Thus every sign, even the sign of individuality, is social", he states. We understand that this assertion aims at affirming that thought is subordinate to the ideological system. "The individual, as possessor of the contents of his own consciousness, as author of his own thoughts, as the personality responsible for his thoughts and feelings, – such an individual is a purely socioideological phenomenon. Therefore, the content of the 'individual' psyche is by its very nature just as social as is ideology, and the very degree of consciousness of one's individuality and its inner rights and privileges is ideological, historical, and wholly conditioned by sociological factors." Op. cit., at 34. Voloshinov's position appears to make the social nature of psychic reality absolute, infiltrated in the intellect of the individual making no room for the possibility of words relativizing the hegemony of the ideological sign, that is, of *creating* other realities that are not the one established by the dominant sign.

from individual language, despite being instructive and explanatory, loses some of its theoretical consistency.[65]

The second conclusion is that, since discourse is social, its power is linked to the conditions and forms of communication: conditions refer to the situational variables (or, if one prefers, circumstantial variables) in which signs are produced.[66] Therefore, the act of *creating* and *transforming* "reality" through words cannot be separated from the actual social circumstances in which the sender and the recipient of a message are found. This prevents us from placing unnecessary emphasis on the role of discourse as a source of society. The active role of discourse is played in society at a certain time and place, meaning that it's the power of discourse and its effects work together with other social practices, and this role is also played in a certain historical context. The forms of communication (including legal communication), on the other hand, are concerned with how texts are presented, and can, as they indeed do, convey ideological meaning.[67]

The third conclusion is that, embedded in the practice of discourse (which is a from of social practice), ideological contents change: the ideological values attached to them are not fixed or immutable. Adopting a common semiological basis can be put in check from other points of view, since the system of signification – a concept much broader than ideology – of a social group includes a set of cultural contents that allows sign functions that are capable of resulting in a number of different interpretations, including the function of *criticizing ideology*. For this reason, the concept of power attributed to *a* legal discourse should not hide other discursive manifestations of competing discourses. The combination of innovative discourse conventions can deconstruct existing discourse and reconstruct new ones – changes that could take place at the organizational level and transcend it to reach to social body politic.

In other words, the same linguistic event can be interpreted differently by employing different cultural codes. For this reason, we agree with Voloshinov when he states that "each word, as we know, is a little arena for the clash and criss-crossing of differently oriented social accents. A word in the mouth of a particular individual person is a product of the living interaction of social forces".[68] Situations of conflicting meaning are, therefore, foreseeable; the legal disputes in the international arena only support this affirmation.

---

[65] In the words of Saussure: "*By distinguishing between the language itself and speech, we distinguish at the same time: (1) what is social from what is individual, and (2) what is essential from what is ancillary and more or less accidental*. The language itself is not a function of the speaker. It is the product passively registered by the individual. [. . .] Speech, on the contrary, is an individual act of the will and the intelligence [. . .]." Op. cit., at 13–14, emphasis added.

[66] "*The sign and its social situation are inextricably fused together*", says Voloshinov, op. cit., at 37, emphasis in the original.

[67] As Fairclough notes, "a rigid opposition between 'content' or 'meaning' and 'form', is misleading because the meaning of texts are closely intertwined with the forms of texts, *and formal features of texts at various levels may be ideologically invested*." Op. cit., at 89, emphasis added.

[68] V. Voloshinov, *Marxism and the philosophy of language*, op. cit., at 41.

# Conclusion to Parts I and II

The power and influence of legal discourse on consciousness is difficult to calibrate, due to its social nature, which is linked to communicative practices and to transporting contents that are somewhat temporary. However, one could state that the power of legal discourse is weakened – or illegitimated – when the content it carries does not correspond to the cultural referent. This situation is particularly relevant to international law, in which a multicultural and multi-legal social system is applicable. It is up to the ideologies of globalization and *mondialisation* to bring together views of very different worlds, facilitating the acceptance and effectiveness of existing legal norms.

The ideology of globalization is reinforced institutionally by the WTO. This organization has in its legal discourse its main instrument of action, and this discourse integrates in the aforementioned law of globalization. By means of the WTO, the reality of global trade is replaced with an *idea* of a world trade "organization", sustained by its own rules, practices and linguistic signs.

As a discourse built with the consent of the Members of the Organization, the legal norms agreed to are accepted as a representation of the minimum regulatory standards for international commerce. Legal becomes legitimate. The entity, thanks to its legal discourse, 'embodies' an authority that belongs to no single Nation-State, thus gaining autonomy and appearing to have its own history – its own discourse. It is not by chance that the WTO has its own *discourse-making* bodies.

The power of the legal discourse of the WTO in building the "reality" of the multilateral system of commerce and shaping the legal culture of its members must not be underestimated. In this matter, the WTO decision-making discourse plays an important role.

# Part III
# The WTO Decision-Making Discourse: the Circumstances of Decision-Making Discourse

The circumstances of discourse concern many semiotic systems (not necessarily linguistic) that are outside the text and that surround the sender at the moment the discourse is produced. These circumstances are relevant insofar as they supply the information that supports the interpretant when interpreting. From this perspective, examining the circumstances of the utterance in the WTO decision-making discourse involves two main aspects: the historical factors influencing the meaning of legal discourse, and the organization's restrictions on text production. These aspects will be addressed in Chapters 7 and 8, respectively, and both supply the necessary information governing the interpretation of the Appellate Body, and elucidate the grounds of the authority of the WTO decision-making discourse.

A wide variety of codes, situations and texts may cause a message to be susceptible to a number of interpretations. And this is one of the reasons why our perception of the facts taking place in the world around us can differ or even clash. Therefore, the codes of legal language, the circumstances and the text in which legal discourse is found are vital to determine the relevance of a given interpretation to the detriment of another.

The interpretation of a legal text requires not only terminological knowledge, but also semiotic competence to enable one to interpret the text within the context of the relevant legal norms, and the actual circumstances to which the interpreted text applies. It is thus necessary to consider the *circumstances of the utterance* of our object of study, which is the decision-making discourse of the Appellate Body of the WTO – the topic of our next section. Part III is important to the extent that any discourse analysis requires an exam of the historical context involving the text. After all, sign production is the result of connecting both expression and content, and connecting signs and real-life events. These two connection processes are in themselves interconnected. The choice of expression is related to the discourse to be conveyed and to the world around us.

Among the circumstances of the utterance we have included institutional variables that must be observed in dispute resolution. A study of the organizations and the applicable rules in the WTO dispute settlement system shows the growing importance of legal control over international trade relations. This has elevated the degree of authority of the WTO decision-making discourse.

Finally, in Part IV, the *linguistic context* of the legal-diplomatic text as a crucial element of the interpretation process will be analyzed. To this end, we will return to the semiotics of Eco in order to investigate the 'structure' that underlies the interpretation process.

# Chapter 7
# From GATT to the WTO: Regulating International Trade

## 7.1 GATT: "A Mere Agreement"

At the beginning of the twentieth century, the two great World Wars revealed that the main means of Nation-States reaching their respective political and economic objectives was through the use of armed force. The result proved to be disastrous to both vanquishers and victors. According to Hobsbawm, the Wars could have been avoided if they had restored the pre-war economy with a global system of prosperous growth and economic expansion.[1] The Great Depression (1929–1933), however, did not contribute to this goal by sinking the world economy into a dramatic crisis, jeopardizing the very capitalist system. Stagnation of trade remained on par with reduced international capital flows.[2] The economic and financial debacle increased unemployment rates in many countries and provided fertile ground for the changes to the world's political map with the emergence of fascism in Central Europe.

The foundations of the old free market liberalism – already damaged by World War I – were brought to ruin during the 1929 crisis. The search for short-term solutions to deal with the crisis led the world's main players in international trade to protect their markets and national currency against foreign threats. High barriers were raised against international commerce and quantitative restrictions on imports were imposed. The productive segments of the economy were protected from foreign competition via unilateral quotas and customs tariffs levied on imports, as well as by means of concession of government subsidies to assure domestic prices. Protectionist ideas gained ground. International commerce became a battlefield. "On the eve of World War II, all the arms of commercial warfare had already been employed", states Jouanneau.[3]

Raising tariffs in order to protect the domestic industry to the detriment of commercial partners only deepened the Depression. By forcing the substitution of imports for domestic products, governments projected the crisis to countries that

[1] Hobsbawm (1995), at. 43.

[2] World trade decreased by 60% in 4 years (1929–1932); between 1927 and 1933, international loans dropped by 90% (Ibid., at 98 and 93, respectively).

[3] Jouanneau (1996), at. 6. (Que sais-je?).

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_7, © Springer Science+Business Media B.V. 2011

practiced free trade. In the end, these countries' exports were badly affected and, thus, they felt compelled to protect their own economies with repressive measures.[4] The tariff war between governments brought out the weaknesses of unilateral trade policies. The pro-commerce discourse gained ground in international political and economic circles. As affirmed by Bhagwati, the failure of tariff policies during the Depression favored pro-commerce partisans, and triggered the ideological drive for commercial liberalism, which prevails to date.[5]

Defending free trade as a policy capable of maximizing national advantage acquired prestige among the countries tormented by the Depression. One of its main defenders – although also having been one of the culprits of protectionism – was the United States. Emerging as an important economic power, the United States proposed to its trading partners reciprocal tariff disarmament and no-tariff agreements. These initiatives were intensified with the end of World War II. Political leaders went out to support the importance of establishing economic institutions to prevent mistakes made in the past from being repeated in the future. The historical moment proved favorable for an organized multilateral effort to reduce or bring down all the obstacles to international trade, and to introduce rules capable of prohibiting anti-competitive practices.[6]

In order for such a multilateral effort to be effective, nations were required to adhere to the principle of free trade and to eliminate government intervention in the market, such as subsidies and dumping practices – artificial advantages enjoyed by certain industries in their respective economies. There was a need to spread the idea of commerce based on reciprocity, that is, on the balance of rights and obligations among the Nation-States involved. This was on the mindset of the architects of the free market in the post-war period. The free trade discourse overlapped with the interests of the United States' powerful market economy. These interests were

---

[4]One example was the Smoot-Hawley Tariff act of 1930 in the US. The "customized" tariffs for American companies (which actually meant restricting imports) were followed by foreign retaliation; thus contributing to the severity of the Great Depression.

[5]To Bhagwati, "It is plausible, therefore, that the United States' embrace of postwar trade liberalization, even if actuated by the aforementioned considerations of sectional interests and national interest, was reinforced by the essential confidence in the country's likelihood of surviving – and, hence, its national interest in – the Darwinian struggle that freer trader entails". Bhagwati (2000), at. 38.

[6]At the beginning of the twentieth century, there was a more receptive atmosphere to the re-establishment of international law for cooperation. Note the Charter of the United Nations (1945), Article 13, mentioning the promotion of international cooperation in the political sphere and incentive for "progressive development of international law and its codification." According to Bhagwati, "where the nationalist theory of free trade glosses over the use of tariffs, quotas, and subsidies, by other countries, urging free trade for a nation regardless of what others do, the cosmopolitan theory requires adherence to free trade everywhere. The trade regime that one constructs must then rule out artificial comparative advantage arising from interventions such as subsidies and protection. It must equally frown upon dumping, insofar as it is a technique used successfully to secure an otherwise untenable foothold in world markets. The two theories of free trade therefore stand in somewhat striking contrast to one another in terms of what they imply about unilateral and universal free trade". J. Bhagwati, *Protectionism*, op. cit., at. 34.

motivated not only by the belief in the advantages of free market, – seing that these advantages implied domestic political costs, to some extent – but by what was to be gained in terms of foreign policy with the upkeep of an international free market order.[7]

The new order stemmed from the restructuring of the world economic system, drafted at the Bretton Woods Conference in 1944, which resulted in the creation of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD, also called the "World Bank").[8] On the occasion, the need for a third institution for commercial issues became clear. In 1946, at the proposal of the United States, the Economic and Social Council of the UN held the Conference on Trade and Employment in Havana, Cuba in order to draft the constitution of the International Trade Organization (ITO).

The conference resulted in the signing of the Final Act of the Conference of Havana on March 24, 1948. The document established the ITO as a specialized agency of the UN, and gave it a double mission: to promote full employment and to develop international trade. However, the Agreement never came into force due to US Congress refusal to ratify it. The US legislature (with the support of free market economist) refused to accept the provisions on reducing customs duties and bringing down quantitative restrictions on imports, as well as not accepting preferential tariffs, because the US Congress considered this to be a distortion of the most-favored nation clause.[9] The ITO never came to life.

The effort, however, was not in vain. Twenty-three nations ratified Chapter IV of the ITO Charter on the trade of industrialized products.[10] Chapter IV was to later became the General Agreement on Tariffs and Trade (GATT), signed on October 30, 1947 and enacted on January 1, 1948. The GATT, considered by

[7]The Marshall Plan, for example, in allocating financial resources for rebuilding Europe, not only favored free trade between this continent and the US, but also served as an instrument to contain the advance of communist political parties in Europe.

[8]The IMF was created to regulate and manage an international financial system, which was indispensable for promoting international trade. Thus, nations could no longer freely manipulate the price of their currencies. The World Bank, in turn, appeared to play the role of financially aiding Member states in regard to their short- and long-term development goals.

[9]These exceptions to free market resulted from the efforts of European and developing nations. To the former, the re-organization of their economies in the post-war period implied the protection of certain industry segments of their economy until they could become competitive; and, to the latter, accepting the obligations on equal par with industrialized nations would prevent their economies from growing. Thus, developing nations criticized the most-favored nation clause and defended the possibility of signing preferential agreements.

[10]The 23 nations were: Australia, Belgium, Brazil, Burma, Canada, Ceylon (current Sri Lanka), Chile, China, Cuba, the US, France, India, Lebanon, Luxemburg, Norway, New Zealand, Pakistan, the Netherlands, South Rhodesia (current Zimbabwe), the UK, Syria, former Czechoslovakia, and South Africa. Jackson noted that one of the reasons for implementing the GATT before the creation of the ITO was due to the fact that US negotiators were backed by a piece of American legislation, dated from 1945, that authorized the approval of the GATT without having to submit it to Congress. This authorization, however, would expire in the middle of 1948. Cf. Jackson (1997), at. 39.

Flory a "historical accident",[11] became the only multilateral instrument to regulate international commerce, fulfilling the mission that had been planned for the ITO.

Free trade ideas predominated and the GATT was the springboard. Capitalism survived a triple threat: the Great Depression of 1930, Fascism, and war. The signatories of the agreement re-established and availed international economic relations. It was a fundamental initiative toward world peace together with the restoration of political relations with the advent of the UN in 1945. The political and economic upheaval that marked the first part of the twentieth century gave way to a period of relative peace and receptiveness to more multilateral control over the conduct of nations.

The GATT was drafted as an international treaty[12] and, while it was in force, several multilateral trade conferences were held to reduce or eliminate tariffs. They were called the *rounds* or *cycles* of negotiation, which took place periodically, according to a tactic coined by Washington as the "bicycle theory": you fall if you stop pedaling. The continuity and the object defined by these rounds lead to the creation of a secretariat aimed at providing the necessary facilities where negotiations could be held and where the records and memory of the deliberations and discussions could be stored. This was the first step in the direction of creating a larger entity as a result of what had originally been conceived as just another agreement. The *multilateral nature* of GATT and the sense of *permanence* it inspired – due to the constant International Conferences – characterized the GATT as more than an Agreement, but as an organization. The term "GATT" would come to refer to both the multilateral treaty as well as to the organization – according to Bhagwati "a contractarian arrangement"[13] – which supervised trade in the post war period.[14]

Of the eight multilateral commerce conferences held under the auspices of the GATT, six were devoted to the reduction of customs tariffs on manufactured products.[15] The seventh round, known as the Tokyo Round (1973–1979), was marked

---

[11] Flory (1999), at. 4.

[12] It therefore had the nature of a contract. However, the US agreed with a contract lacking symmetrically reciprocal obligations, due to US political interest in collaborating to rebuilding Europe and to reducing the precarious socioeconomic situation of developing nations. This position, however, was temporary. As soon as Europe recovered and as the recently industrialized nations showed signs of growth, the US would request such reciprocity in terms of access to markets.

[13] J. Bhagwati, *Protectionism*, op. cit., at. 40.

[14] GATT signatories were not called "members", but rather "contracting parties", since the GATT referred to an agreement and not an international organization. When acting collectively, the contracting parties wielded several powers, among which was overseeing whether the GATT provisions were being complied with. In 1960, the Council of representatives was created to receive a variety of powers. There was also a Secretariat with a Director-General.

[15] The Conference Rounds were: Geneva (April–October 1947); Annecy (1949); Torquay (1950–1951); Geneva (1955–1956); the Dillon Round (1961–1962), taking the name of the subsecretary of US, Douglas Dillon, who proposed to complete the negotiation of Article XXIV, § 6 of the General Agreement via tariff negotiation; and the Kennedy Round (1963–1967). It is worth noting that the Kennedy Round also resulted in an agreement on anti-dumping practices, which would be modified on the occasion of the Tokyo Round.

by negotiations in wider fields, and also included the progressive reduction of non-tariff barriers to trade.[16] The last round, the Uruguay Round (1986–1994), was the most ambitious of the GATT conference era. It was opened with a Ministerial Conference in Punta del Este (September 15–19, 1986) and was aimed at: reinstating agriculture[17] and textiles in the multilateral system of commerce; signing new agreements in new fields (trade in services, intellectual property and investments),[18] and strengthening organizational structure. The political circumstances, during the Uruguay Round, were marked by the end of the Cold War. At the time, the restructuring of the political map announced the end of a world organized around well-defined polarities and made way for the creation of the WTO.

On the occasion of the Conference of Marrakesh, the conclusion of the Uruguay Round, resulted in the Final Act (April 15, 1994) signed by the parties, and containing the following attachments: the Agreement Establishing the WTO (also called the Marrakesh Agreement), the GATT and other goods agreements,[19] the General Agreement on Trade in Services (GATS), the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Trade Policy Review Mechanism (TPRM), the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU"), as well as four other plurilateral agreements.[20] Together are referred to as the Marrakesh Accords or the WTO Agreements.[21] However, whereas the plurilateral agreements are not mandatory,[22] the others – that is, the multilateral agreements – are. The multilateral agreements are part of an indivisible set: a "single-package" or "single undertaking".[23] Therefore, by joining the WTO, a nation must ratify the

[16] There are many non-tariff barriers, among which are: *quantitative restrictions*; *subsidies* granted to domestic products and exports, and *dumping*, the latter corresponds to exporting a product at a lower price than the price practiced in the market of origin or below the cost of production.

[17] Agriculture played a central role in the Uruguay Round. Including agriculture under the free trade mechanisms gave rise to major divergence between the US and the European Community: the US demanded the elimination of agricultural subsidies, while the EU only accepted their reduction.

[18] Another dispute between developed and developing nations resulted from these new fields. Developing nations diverged from developed nations in including textiles and in being against opening negotiations in the field of services, intellectual property, and investments.

[19] The legal obligations under the GATT 1947 continued under the text of the GATT 1994 as part of the goods agreements.

[20] In 1994, the plurilateral agreements included: the Agreement on Government Procurement, the Agreement on Trade in Civil Aircraft, the International Dairy Agreement and the International Bovine Meat Agreement. The latter two were scrapped at the end of 1997.

[21] These Accords were effective as of January 1, 1995 for nations that ratified them domestically.

[22] Article II.3 of the Agreement Establishing the WTO.

[23] Article II.2 of the Agreement Establishing the WTO. Jackson explains that "the idea was that there should be one complete elaborate text to which all those who wanted to become members of the new structure must adhere and accept." *The world trading system*, op. cit., at. 47. It was the end of the "GATT *à la carte*" which stemmed from the Tokyo Round, and which granted contracting parties the possibility of adhering or not adhering to non-tariff codes applied by a limited number of countries. According to Lafer, "the GATT *à la carte* was a byproduct of its

entire body of the multilateral agreements.[24] It is the most complex and extensive body of rules in the realm of international trade. The WTO became, in the words of Lafer, a "great expression of the deepening and enlargement of post-Cold War economic globalization".[25] The end of the East-West conflict practically universalized the axiological acceptance of the vision of mankind living in peace through commerce.

## 7.2 From the Diplomatic Control in the GATT to Strengthening WTO Control

We have just covered some of the historical circumstances that made up the background for the negotiations that gave rise to the GATT, and pointed out that the GATT, in the beginning, had indeed the nature of an agreement among contracting parties. However, later on, the GATT started to be seen as a real entity and had increasing responsibility for the resolution of commercial disputes among the contracting parties. Nevertheless, the control it in fact had over the conduct of nations was far too diplomatic in nature. The parties involved in a commercial dispute tended to use the relative authority they enjoyed in order to influence the final result of a dispute. Therefore, a developed country always had the possibility of imposing its desired outcome for a dispute when the other party was a less developed nation.[26] This "power-oriented" approach favored the most – economically, militarily or politically – powerful country in the dispute.

On the other hand, there is the "rule-oriented" approach for solving disputes, according to which opposing parties voluntarily comply with the general rules of conduct. These rules govern how the interests of the nations involved are managed and make government policies more transparent. By promoting this, these rules protect economic activities from abuse of power, from public or private entities, and abuse resulting from strictly economic or political reasons.[27]

These two approaches are not mutually exclusive and generally tend to be adopted jointly and to various degrees, since no conflict between nations is solely

---

strictly contractual nature, derived from the fact that it was conceived as a mere legal relationship between the contracting parties." Lafer (1998), at. 24.

[24] According to the Explanatory Notes contained in the Agreement Establishing the WTO, the terms "country" or "countries" include any separate customs territory Member of the WTO.

[25] C. Lafer, op. cit., at. 103. The WTO became the main institution for international commerce and, together with the IMF and the World Bank, became part of the Bretton Woods System. Article III.5 of the Agreement Establishing the WTO reinforces the ties of this institutional triad.

[26] For example, an importer developed country could influence the opinion of a less developed exporter country by signaling that the support for development and/or the commercial preference would be interrupted in the event the developing country in question does not "voluntarily" reduce its textile and agricultural exports. The example is from Petersmann (1997), at. 66.

[27] J. H. Jackson discusses this dichotomy between settlement by negotiation with reference to relative power status of the parties and settlement by negotiation or decision with reference to norms or rules in *The world trading system*, op. cit., at. 109–110.

political or legal. In any case, the jurisdictional mechanisms and entities for conflict resolution inhibit the indiscriminate use and abuse of authority. The control over the conduct of nations is based on the legality of their acts.[28] On the other hand, diplomatic recourse tends only to accentuate the disparities of power between the States. The control over government acts, in the case of diplomatic recourse, can be done according to evaluation criteria that are purely subjective (according to national interests, for instance), and according to a strictly legal evaluation. To Petersmann,

> The 'diplomatic' means of dispute settlement are characterized by the flexibility of the procedures, the control over the dispute by the parties, their freedom to accept or reject a proposed settlement, the possibility of avoiding 'winner-loser-situations' with their repercussions on the prestige of the parties, the only limited influence of legal considerations, and the often larger influence of the current political processes in, and relative political weight of, each party.[29]

The direct consultation between litigants in good offices, mediation, and conciliation are the means for settling international disputes through direct negotiations.[30] They are therefore the non-jurisdictional means for dispute settlement. The parties involved participate in the decisional process and the negotiation of the outcome does is not always governed by legal parameters. On the other hand, in the jurisdictional means of dispute settlement, legal norms – and thereby, legal discourse – establish the basis for the relationship between the parties and the judge or arbitrator. The parties involved seek to satisfy their interests in light of previously agreed legal rules. The judge or arbitrator decides not only on the basis of accommodating the interests in question, but also to preserve the coherence of the legal system, thus reducing the possibility of an outcome that necessarily mirrors the power relationship between the parties. Such legal control is made by a decision-making framework that issues binding decisions on the parties.

In the sphere of the GATT, the mechanism for dispute settlement was closer to an almost mandatory conciliation system.[31] Article XXII foresees bilateral

---

[28] It is important to point out that the GATT is referred to in this book as a *de facto* institution. Only by doing so can we attach to it the controlling power that international organizations are endowed with. It is worth noting that the control exercised over a certain Nation-State that does not comply with its obligations under the international organization can take three forms: (a) via a claim against the State in alleged breach; (b) at the discretion of the organization; or (c) at the discretion of individuals or groups. Control over commercial issues in the realm of the WTO falls under (a).

[29] E.-U. Petersmann, *The GATT/WTO dispute settlement system*, op. cit., at. 69.

[30] The non-jurisdictional procedures for conflict resolution in the WTO are provided for in Article 5 of the DSU. Different from the consultations, where only litigant States are present in the negotiation toward an amicable solution for the conflict, in the other means of conflict resolution third-party states are present. Third parties may be a State, an international organization, or an independent entity.

[31] The opinion supported by Canal-Forgues (1993), at. 687. According to Pace, the dispute settlement mechanism of the GATT was strongly conciliatory: "It tried to resolve conflicts not by means of decisions legal in nature, but by means of recommendations to re-establish the balance of concessions and advantages between litigants. [. . .] The Contracting Parties had the main task of reaching a solution via conciliation, and not to reach a decision under a court of jurisdiction." Pace (2000), at. 203.

consultations "with respect to any matter affecting the operation of this Agreement", or multilateral consultations "in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1." Article XXIII is the centerpiece for GATT dispute settlement and complements the previous provision. The Article deals with the procedures a contracting party has to adopt when the party considers that an advantage resulting from the General Agreement has been annulled or breached, or when the objective of the Agreement has been adversely affected.

Despite the fact that the outcomes of dispute settlements under the GATT cannot be legally enforced, due to being dependent on political consensus, the Contracting Parties joined efforts to strengthen their legal character. In 1955, The Contracting Parties decided that disputes should be conducted by a panel of independent experts, who were not appointed to represent the governments involved. According to Jackson, "this development [...] represented a shift from primarily a 'negotiating' atmosphere of multilateral diplomacy to a more 'arbitrational' or 'judicial' procedure designed to arrive impartially at the truth of the facts and the best interpretation of the law".[32] According to Hudec, the measure was the reinforcement of the "diplomatic jurisprudence" of the GATT.[33] However, Ehlermann believes that "despite some reforms, dispute settlement under the GATT 1947 remained governed by elements of diplomacy and consensus, which allowed the contracting parties to block the process, thus rendering it occasionally ineffective".[34] The need to reform the dispute settlement system became obvious. The Uruguay Round revealed the desire of the nations to strengthen the *legal* control of the multilateral agreements.

With the creation of the WTO, a common organizational framework for international commerce between Members was established for questions falling under the scope of the Marrakesh Accords.[35] The WTO became the appropriate forum for multilateral negotiations and the legal framework for international commercial relations, having voice and autonomy in the international system.[36] The Ministerial

---

[32] J. H. Jackson, *The world trading system*, op. cit., at. 116. Despite the change to a "rule-oriented" solution, during the life of the GATT 1947, the procedures for dispute settlement went through phases of falling into relative disuse. Some contracting parties feared that invoking the procedures could be considered a deliberately contentious act or, in the words of Jackson, an "unfriendly act". Cf. ibid., at. 114.

[33] See Hudec (1993), at. 138.

[34] Ehlermann (2002), at. 607.

[35] Article II.1 of the Agreement Establishing the WTO. Hereinafter, "Members", with a capital M, refers to the nations that take part in the WTO.

[36] Article III, paragraphs 1 and 2, and Article VIII.1 of the Agreement Establishing the WTO. As a legal entity, the WTO has the authority to enter into agreements with other intergovernmental organizations – especially those that operate in WTO-related fields – aiming at establishing "effective cooperation" (Article V of Agreement Establishing the WTO). It is important to point out that, contrary to what had been established in the ITO project, the WTO did not receive the status of specialized agency from the UN. According to Flory, the reason for not giving the WTO the status of a UN-specialized agency was probably the very "need of recognizing the specificity of this new

Conference is the WTO's highest body and meets at least once every 2 years. Between meetings, the functions of the WTO are performed by the General Council, which meets as: (1) the Trade Policy Review Body and as (2) the Dispute Settlement Body. These Bodies are political in nature and comprised of representatives of Member States.[37]

Each Member wields a vote in the decision-making process, which, in general, obeys the rule of consensus. Thus, there is consensus when none of the Members present at the meeting formally objects to the proposed decision to be adopted. In the event consensus is not reached, the decisions must be submitted to a majority vote.[38] Among the cases that are exceptions to this rule we emphasize the one related to the Dispute Settlement Body ("DSB").[39]

The DSB administrates the dispute settlement system of the WTO.[40] It plays a fundamental role in the effectiveness of WTO rules to the extent the DSB is results oriented. Its recommendations or decisions are made with the intent of finding satisfactory solutions for cases submitted to its jurisdiction, which is binding on Members of the WTO.[41] It is essential that speedy solutions be provided order ensure the effectiveness of the DSB in situations in which a Member claims that the advantages under the "covered agreements"[42] have been violated by another Member. However, in order to provide speedy solutions, it was necessary to change the decision-making process that was based on consensus. Not making any changes would mean that it would take a single nation objecting to a proposed decision to unilaterally block the adoption of a ruling. To avoid this situation, the negotiators of the Uruguay Round reversed the consensus rule as stated under the GATT of 1947. Croome explains,

> whereas consensus had been required in order to move the dispute settlement process forward at each stage, they provided that, in the future, consensus agreement would be required *not* to move it forward. The effect would be to end the possibility of a country unilaterally

---

international economic organization, due to the particularities of the commercial matters involved and the negotiating procedures." (*L'Organisation mondiale du commerce*, op. cit., at. 15).

[37] See Article IV of the Agreement Establishing the WTO. Also, the Secretariat of the WTO, which is run by a Director-General. Article VI of the Agreement Establishing the WTO.

[38] Article IX.1 of Agreement Establishing the WTO.

[39] The other cases concern: the procedures of amending the provisions in the Agreement Establishing the WTO and of the Multilateral Trade Agreements (Article X of the Agreement Establishing the WTO), the procedures of interpreting and granting waivers to a Member for an obligation under aforementioned Accords (Article IX of the Agreement Establishing the WTO).

[40] Article III.3 of the Agreement Establishing the WTO. Although representing a specialized function of the General Council, the DSB holds its own institutional identity, with a president and own internal regulation.

[41] Article 3 of the DSU.

[42] According to the terms of Article 1.1 of the DSU, "covered agreements" are the numbered agreements in Appendix 1 of the DSU: the Agreement Establishing the WTO, the Multilateral Trade Agreements, the DSU, and the Plurilateral Trade Agreements. Therefore, the Trade Policy Review Mechanism is not one of them.

> blocking the dispute mechanism, and to build automatisin into the process of a dispute through the system, unless all countries agreed that the process should be halted.[43]

The *negative consensus* approach, or *reverse consensus*, was therefore implemented. According to this procedure, a request or a proposed decision could only be rejected by the DSB if all the Members were in agreement.[44] The consensus is thereby not required to authorize, but to halt the adoption of a decision or recommendation; thus, one nation no longer had the power to block a ruling against the will of all other nations.

The negative consensus mechanism made the DSB decisions and recommendations be adopted almost automatically, since there is most probably at least one Member interested in settling a given dispute. According to Pace, "the role of the Member States will considerably reduce – and this should favor compliance to WTO rules and agreements – the inequality of power among the parties to a dispute."[45] We can say that despite the political and diplomatic nature of the DSB being preserved, the decision-making process has strengthened the legal control of WTO dispute settlement, thus giving more weight to the legal discourse produced within its domain. In the following chapter, we will analyze other aspects that support this assertion.

[43] Croome (1995), at. 324. Emphasis in the original.

[44] See Articles 6.1, 16.4 e 17.14 of the DSU.

[45] V. Pace, *L'Organisation mondiale du commerce et le renforcement de la réglementation juridique des échanges commerciaux internationaux*, op. cit., at. 171.

# Chapter 8
# The WTO Dispute Settlement System and the Influence of the Decision-Making Instances of the Dispute Settlement Body

## 8.1 The Increased Legalness of the Rules Under the Dispute Settlement Understanding

The Dispute Settlement Understanding (DSU), a result of the Uruguay Round, regulates WTO-related disputes. It is Annex 2 of the Agreement Establishing the WTO, and, as such the DSU is an integral part of obligations undertaken by the Members. The legal nature of this new mechanism is qualified as "*sui generis*" by Flory, to whom the procedures it contains "are half-way between diplomatic negotiation and jurisdictional solution".[1] It cannot be denied that the current system is based on legal rules when compared to the previous practice that was based on political consensus. This is an opinion shared by Canal-Forgues, who believes "the system is no longer founded solely on the principles of a kind of diplomacy, which at many times in the past resulted in outcomes mirroring the power of the States involved".[2] According to Lafer, the DSU goes far beyond the GATT, because it represents an increased legalness of the decision-making process, due to the rule of reverse consensus and automatic triggers to prescribed procedures.[3]

This increased jurisdictional role reduced the incidence of diplomatic control in favor of legal control in WTO dispute settlement. Article 23 of the DSU, entitled "Strengthening of the Multilateral System", is emblematic in this respect. Article 23 provides that Members must abide by the norms and procedures under the DSU when seeking recovery resulting from non-compliance with WTO agreements covered or from failure to attain any of the objectives under such agreements due to obstacles lifted by another Member. With Article 23, the WTO dispute settlement

[1] T. Flory, *L'Organisation mondiale du commerce,* op. cit., at. 21.

[2] É. Canal-Forgues, *Le règlement des différends à L'OMC*, op. cit., at. 11. Pursuant to Article 3.7 of the DSU, priority shall be given to a solution mutually acceptable by the parties. It encourages the Members of the WTO to end conflicts on an amicable basis. However, even a mutually accepted solution must be in conformity with the WTO agreements. This reinforces the judicial nature of the new dispute settlement system. In other words, the proposed solutions for a litigant cannot be in violation of the rules of multilateral trade. See Article 3.5 of the DSU.

[3] C. Lafer, *A OMC e a regulamentação of the comércio internacional*, op. cit., at. 31–32.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_8, © Springer Science+Business Media B.V. 2011

system became an *integrated* system, meaning that the WTO has the exclusive power to handle all disputes among Members concerning the enforcement and interpretation of the rules under the covered agreements.[4] Unilateral measures are strictly prohibited. Therefore, a Member cannot independently establish that a violation of rules has taken place without resorting to the procedures under the Dispute Settlement Understanding. The WTO is the only competent authority to – pursuant to the DSB – determine whether a Member is or is not in violation of WTO agreements.

Without furthering the debate on the legal nature of the WTO decision-making system, Canal-Forgues considers it "almost judicial".[5] There is no doubt that the "negative consensus" formula, which makes the DSU procedures automatic, and its strict time limits, are aspects that have contributed to the system's judicial nature.[6] This has represented a rupture with the previous system under the GATT of 1947, which proved incapable of rapidly resolving disputes since it relied too heavily on the goodwill of all parties – who usually took advantage of the procedural imperfections of the system in order to stall final decisions.

The DSU, on the contrary, as Petersmann notes, has strengthened the "rule-orientation" and the "legal methods" in many aspects of the WTO dispute settlement system.[7] One example of this new orientation is the presumption that all violations of the norms under the covered agreements produce unfavorable effects on other Members that are parties to the agreement in question.[8] The advantages of this increased jurisdictional nature of the system are mentioned by the author:

> Rules, and their 'rule-oriented' rather than 'power-oriented' interpretation and application, enhance predictability and legal security, limit the risks of abuses of authority, reduce transaction costs of traders and producers, increase the scope for decentralized decision-making and thereby promote liberty and economic welfare. It is an everyday experience that traders, investors and consumers prefer to do business where rules are observed and are enforceable.[9]

The WTO dispute settlement system endows the Organization with credibility, insofar as it is based on well-defined rules and on the strength of procedures that can be triggered automatically – thus, resulting in increased effectiveness of the

---

[4] Article 1.1 of the DSU. The Members may, however, according to Article 25 of the DSU, resort to arbitration as an alternative means of dispute settlement in order to facilitate "the solution of certain disputes that concern issues that are clearly defined by both parties."

[5] É. Canal-Forgues, *Le règlement des différends à L'OMC*, op. cit., at. 25. See also Ruiz-Fabri (2000), at. 303–334; and Carreau and Juillard (1998), at. 82–84.

[6] Among DSU provisions that establish the automatic nature of the procedures for dispute resolution are the articles on the consultation phase (Articles 4.3, 4.7, 4.8, and 4.11), the establishment of panels (Articles 6.1), Duration for procedure in special group (Articles 12.8, 12.9, 12.10, 20 and, 21.4), adopting the panel report (Article 16.4), procedure for the Appellate Body (Articles 17.5, and 17.14), and the supervision for the enforcement of recommendations and decisions of the DSB (Article 21.3).

[7] E.-U. Petersmann, *The GATT/WTO dispute settlement system*, op. cit., at. 85.

[8] Article 3.8 of the DSU.

[9] E.-U. Petersmann. Loc. cit.

covered agreements and legitimized legal decisions. The system has three phases: (1) bilateral consultation,[10] (2) panel and Appellate Body findings and conclusion, and (3) enforcement of DSB recommendations and rulings.[11] For the purposes of this study, we will focus on the second phase, in order to demonstrate that the role of the two DSB instances reinforces legal control and, consequently, strengthens the authority of the WTO decision-making discourse in the regulating the multilateral trade system.

## 8.2 The Dispute Settlement Body: The Panels and the Appellate Body

The DSB, in managing the dispute settlement system, has two decision-making sessions to which disputes are submitted: the panels and the Appellate Body (AB). The complaint is first heard by a panel, and in the event of appeal – an innovation from the Uruguay Round – the Appellate Body examines the panel rulings. Each represents a *tertius* that is positioned both *between* and *above* the parties.[12]

According to Article 11 of the DSU, "the function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements". In complying with this rule, the DSB must make an objective assessment of the facts of the case in order to help the Dispute Settlement Body "in making the recommendations or in giving the rulings provided for in the covered agreements". The panels are set up *ad hoc*[13] by the DSB[14] and are generally comprised of three qualified individuals,[15] who must act independently and not in the name of any government or organization.[16] The Members of the WTO are strictly prohibited to give

[10] Article 4 of the DSU. If the parties are not able to produce a satisfactory outcome within the pre-defined time periods, the complaining party may initate the next phase, that is, the panel phase of the DSB (see Article 4, paragraphs 5 and 7 of the DSU). The same applies to the lack of consultations when the respondent does not answer within the legal time period (Article 4, paragraph 3 of the DSU). This is a "sanction" against the respondent, in order to avoid the respondent blocking the conflict resolution procedure. There is no obligation to hold the consultation phase in order to move to the panel phase.

[11] This phase is established under Article 21 of the DSU.

[12] The panels and the Appellate Body differ, however, from the amicable means of non-jurisdictional solutions to international conflict, such as mediation and conciliation.

[13] Article 6 of the DSU.

[14] Article 2.1 of the DSU.

[15] See Article 8.1 of the DSU. Within 10 consecutive days after the establishment of the panel, the parties may request the panel be comprised of five individuals (Article 8.5 of the DSU). The Secretariat of the WTO will maintain a roster of qualified individuals, employees, government and non-government employees to be arbitrators (Article 8.4 of the DSU). According to 8.2 of the DSU, "panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."

[16] To ensure impartiality of panel decisions, nationals of Members whose governments are parties to the dispute or third parties shall not participate on the panel, unless the parties previously agree (Article 8.3 of the DSU). In the terms of footnote n. 6 of the DSU, if a customs union or common

instructions or try to influence the panelists in any way regarding the issues that have been submitted to them.[17]

From this, we can see that the action of litigant States is not the same as in international dispute resolution. In addition, contrary to what took place under the GATT 1947, the States no longer appoint the members of a panel. Panelists are appointed by the Secretariat or Director-General of the WTO, depending on the case, after consultation with the parties in controversy.[18] According to Pace, the panelists enjoy greater credibility the more formal and solemn their form of appointment, – which is no longer an attribution of the States –, the more their competence, – which is less and less challenged –, is increased, and they unquestionably play a role in the *juridictionnalisation*(or *jurisdictionalization*) of the dispute-settlement mechanism.[19] These are aspects that strengthen the authority of the panels and, consequently, also strengthen the legal control of the WTO.

The establishment of a panel takes place almost automatically upon request of a complaining party. Except in the event all Members agree not to convene, (negative consensus rule), the panel is established no later than the DSB meeting following that in which the question appeared on the agenda for the first time.[20] The request for the establishment of a panel determines the scope of the panel upon identifying the specific measures at issue and providing a brief summary of the *legal* basis of the complaint.[21] The request defines the scope of the dispute, and circumscribes the legal grounds for the complaint.

In examining the claims[22] in the party's request for a panel, the panel shall objectively evaluate the issue in order to provide a conclusion to assist the DSB

---

market is one of the parties, the aforementioned Article applies to nationals of all the Members – countries of the of the economic bloc in question.

[17] Article 8.9 of the DSU.

[18] Article 8.6 of the DSU. According to paragraph 7 of the Article 8 of the DSU, in the event there is no agreement among the Members as to the composition of the panel after 20 days after its establishment, the Director-General, at the request of the parties, after consulting the Chair of the DSB and the Chair of the relevant Council or Committee, shall determine the composition of the panel.

[19] V. Pace, *L'Organisation mondiale du commerce et le renforcement de la réglementation juridique des échanges commerciaux internationaux*, op. cit., at. 198.

[20] Article 6.1 of the DSU.

[21] Article 6.2 of the DSU. According to Pace, the terms of reference of the panel are better legally defined in the WTO than during the GATT, when the definition of the terms of reference was done by consulting the parties in controversy. In the framework of the WTO, the litigant states have no power to decide on the terms of reference – they is prescribed by the organization, thus strengthening the jurisdictional nature of the procedure (Op. cit., at. 199). This model for terms of reference is prescribed in Article 7.1 of the DSU: "to examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[22] A "claim" must state the alleged violations of an agreement. The claimant must present his *arguments* in the written submissions and on the occasion of the panel hearing.

in rendering a decision.[23] These conclusions are specified in the *final report* which is circulated to the Members of the WTO.[24] The report shall "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes".[25] In the event the panel considers a certain measure to be inconsistent with the covered agreement, the panel shall recommend that the Member receiving the recommendations to make the measure in question consistent with the covered agreements.[26] The DSB shall adopt the report within 60 consecutive days after circulation to Members, unless it is rejected by consensus at the DSB or in the event of notice of appeal from one of the parties to the dispute.[27] In this last case, the parties must await the conclusion of the Appellate Body.[28]

The Appellate Body is comprised of 7 individuals with demonstrated expertise in law, international trade, and the subject matters of the covered agreements generally. They are appointed by the DSB to serve for 4-year terms, with the possibility of being reappointed once. The Appellate Body shall examine an appeal within "the issues of law covered in the panel report and legal interpretation developed by the panel".[29] Its final report may uphold, modify, or reverse the legal findings and conclusions of the panel,[30] and shall be adopted within 30 consecutive days after its circulation to WTO Members – unless the DSB rejects it by consensus. The legal authority of the reports of the Appellate Body is not only strengthened by the practical effects of negative consensus, but also by the impossibility of further appeal. Once adopted, the parties to the dispute must comply with DSB decisions unconditionally.[31]

Lafer has observed that Appellate Body reports are written in the style of "a text of a more legal nature and, without failing to be 'persuasive', [the language used in the reports are] much closer to the language of a '*prescriptive document*', that is, to the style of a court ruling".[32] However, these rulings, as in arbitration, are not court decisions but *opinions*. This could be interpreted as a sign of the fragility of legal control *vis-à-vis* political control in the WTO. Furthermore, according to Canal-Forgues, "the political control with which the DSB is empowered continues to be, at

[23] Article 11 of the DSU. The panel shall examine the evidence submitted by the parties.

[24] Article 15.2 of the DSU.

[25] Article 12.7 of the DSU.

[26] Article 19.1. of the DSU.

[27] According to Article 17.4 of the DSU, only the parties to the controversy may appeal the report of the panel. Third parties or interested parties do not have this capacity.

[28] Article 16.4 of the DSU.

[29] Article 17.6 of the DSU. Questions and factual conclusions not covered by the report cannot be appealed See *European Communities – Measures affecting importation of certain poultry products*, report of the Appellate Body, paragraph 107 (WT/DS69/AB/R).

[30] Article 17.13 of the DSU.

[31] Article 17.14 of the DSU.

[32] C. Lafer, *A OMC e a regulamentação of the comércio international*, op. cit., at. 125. Emphasis in the original.

least to date, widely theoretical, since the mechanism of reverse consensus imposes an almost automatic decision, as long as the claimant remains determined in his action."[33] The coexistence of the political control of the DSB and the legal control of the DSB decision making instances favors the latter, i.e., legal control, since reports are virtually automatically adopted. This is so because in practice, the DSB ratifies *a posteriori* the conclusions and findings of the panel, which are upheld, modified, or overruled by the Appellate Body – a process that only strengthens the authority of the WTO decision-making discourse.[34]

From a formal and organizational viewpoint, the fact that DSB dispute settlement bodies are subordinate to the political power of the organization does not inhibit their "spirit" of independence. In the end, it is the DSB that gives meaning to the legal-diplomatic discourse. And if we assume that it is the one that establishes the real meaning of discourse, the one that wields power, then the real authority is in the "hands" of the members of the panels and of the Appellate Body. The Appellate Body deserves special attention not only because it is a permanent decision-making last-resort body, but because it is devoted to examining issues of law and legal interpretation. Therefore, the Appellate Body plays a fundamental role in shaping a legal culture for the multilateral system of trade. Next, we will see how the procedural particularities of the Appellate Body reinforce the legal dimension of the dispute settlement system of the WTO.

## 8.3 The Appellate Body and Its Working Procedures: Strengthening the Legal Control of the WTO

The Working Procedures for Appellate Review (Working Procedures)[35] have contributed to the independence and unbiased nature of the Appellate Body when arriving at decisions. These procedures have been established by the Appellate Body itself, together with the President of the DSB and the Director-General.[36] The persons sitting on the Appellate Body should not have professional activities that are incompatible with their function and responsibilities at the WTO, and should neither

---

[33] É. Canal-Forgues, *Le règlement des différends à L'OMC*, op. cit., at. 26–27.

[34] Some Members are concerned with the authority of this discourse insofar as the conclusions and recommendations of the panels and the Appellate Body could mean an increase or decrease of the rights and obligations resulting from the covered agreements. On the matter see Articles 3.2 and 19.2 of the DSU. The Appellate Body called attention to the fact that it is not within the scope of the DSB "to legislate" in order to clarify the provisions of the WTO Agreement in a context other than the resolution of a certain dispute (WT/DS33/AB/R. *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, at. 22). See also *United States – Import Measures on Certain Products from the European Communities*, the Appellate Body report, paragraph 92 (WT/DS165/AB/R). This debate could have been avoided if the Ministerial Conference and the General Council, as the political entities, exerted their authority to adopt formal interpretations according to Articles X and IX.2 of the Marrakesh Agreement, and Article 3.9 of the DSU.

[35] The most recent version became effective on January 1, 2005. Working Procedures for Appellate Review are hereinafter called "Working Procedures".

[36] Article 17.9 of the DSU.

accept nor exchange instructions with any organization, whether public or private, international, governmental or non-governmental.[37]

In the event of appeal, the appellant gives written notice of appeal to the DSB, and simultaneously files the notice of appeal with the Secretariat of the Appellate Body.[38] The notice of appeal must contain, among others, the following information: (1) identification of alleged errors regarding *issues of law* and of *judicial interpretation* in the panel report; (2) a list of the *legal provisions* of the covered agreements in connection with the allegations of the appellant; and (3) a list indicating the paragraphs of the panel report containing the alleged errors.[39]

The appeal is reviewed by a group of three persons serving on the Appellate Body that, together, constitute a "division".[40] The persons in a division shall be selected on the basis of rotation in order to ensure random selection, for all Members on the Appellate Body to examine an equal number of appeals, regardless of their national origin.[41] The nationality criterion is not relevant in the process of selecting a division; if it were, this could lead to an unbalanced workload among Members. Ehlermann notes:

> Statistically, the United States and the European Union are the most active participants in Panel and Appellate Body proceedings. The members of the Appellate Body who happen to be nationals of the United States or one of the EU Member States would therefore be either privileged or disadvantaged in the selection process if national origin were a positive or negative element for the composition of divisions hearing appeals in which one of these WTO Members is the appellant or appellee.[42]

The decisions concerning an appeal are taken *solely* by the division assigned to that appeal.[43] However, there is no provision prohibiting members of a division to exchange opinions with other members of the Appellate Body before concluding and circulating their reports to WTO Members.[44] This exchange reduces the risk of contradictory interpretations between the various reports and preserves the coherence and continuity of the decisions issued by the Appellate Body – an

[37] Rule 2, Paragraphs 2 and 3 of the Working Procedures of the Appellate Body. According to Article 17.3 of the DSU, all persons serving on the Appellate Body "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest" and "shall be available at all times and on short notice", implying a priority work relationship with the WTO.

[38] Rule 20 (1) of the Working Procedures.

[39] Rule 20 (2)(d) of the Working Procedures.

[40] Article 17.1 of the DSU. According to Ehlermann, there is a close connection between the decision to limit the number of members of a section assigned to a case and the short deadlines for the procedure to examine an appeal. In C.D. Ehlermann, "Six years on the bench of the 'World Trade Court'", op. cit., at. 611–612. The term "members" as used in the Working Procedures refers to the members of the Appellate Body. When referring to the signatories of the WTO, the expression "WTO Members" is used.

[41] Rule 6 (2) of the Working Procedures.

[42] C.-D. Ehlermann, "Six years on the bench of the 'World Trade Court'", op. cit., at. 614.

[43] Rule 3 (1) of the Working Procedures.

[44] Rule 4 (3) of the Working Procedures.

aspect that promotes predictability and legal transparency of the multilateral trading system.[45]

The Appellate Body has a Chairman, who oversees internal operations. The chairman is elected by the members of the Appellate Body for a 1-year term, which may be extended for an equal period.[46] Each division has a Presiding Member elected by the members of that division. The Presiding Member coordinates the overall conduct of appeal proceedings, chairs hearings and meetings related to an appeal, and coordinates the writing of the final report.[47] The Appellate Body and its divisions shall strive to reach a decision by consensus. This gives even more authority to the legal interpretations of the Appellate Body. In the event a consensus cannot be reached, the issue will be decided by a majority vote.[48] The report is drafted without the presence of the parties and the opinions expressed therein remain anonymous.[49] This anonymity of the members of the Appellate Body covers personal imprints to the decisional text to benefit of *institutional* authority of the same text.

The Appellate Body is an unprecedented decision-making entity in the realm of international economic relations. Its composition, the rules that regulate its working procedures, the short timeframes,[50] and automatic adoption of its reports are elements that reinforce and stress the judicial authority of its decisions in the WTO dispute settlement system. The Appellate Body is not a judicial body, but it acts as one. The reports convey not only the conclusions of its members; but they also convey truly legal discourses that are built upon the legal norms of the WTO and international law.

## 8.4 The Authority of the Decision-Making Discourse of the Appellate Body

In Chapter 7, we addressed the historical circumstances in which the WTO emerged. Contrary to the project of the ITO, the WTO had a more auspicious destiny: with over 150 countries, it has become one of the most influential and active international organizations of our time. Being part of the organization has become a condition *sine qua non* for promoting national economic development. Its legal system reflects the

[45] See Article 3.2 of the DSU.

[46] Rule 5 paragraphs 1–3 of the Working Procedures.

[47] Rule 7, paragraphs 1 and 2 of the Working Procedures.

[48] Rule 3 (2) of the Working Procedures.

[49] Article 17, paragraphs 10 and 11, of the DSU.

[50] The Appellate Body should distribute the report within 60 consecutive days as of the date the interested party formally notified its desire to appeal. In the event this time limit is impossible to comply with, the Appellate Body should inform the DSB in writing as to the reasons why the AP cannot comply with the deadline and offer a new deadline to present the report. Under no circumstance shall the time limit exceed 90 days. (Article 17.5 of the DSU. See also Articles 4.9 and 20 of the DSU.)

ideals of free trade, which were strengthened in the aftermath of World War II, and, consequently, its legal discourse is not one based on protectionist market concepts.

If historical circumstances have guided the action and discourse of the WTO, the organizational structure and procedural rules for the dispute settlement system reveal the importance of WTO *legal* discourse, when compared the strictly *diplomatic* discourse. The reports of the DSB instances, once adopted, are an important source of international law, especially of international trade law. This opinion is shared by Palmeter and Mavroidis according to whom "other than the texts of the WTO Agreements themselves, no source of law is as important in WTO dispute settlement as the reported decisions of prior dispute settlement panels. These include the reports of GATT panels as well as WTO panels, and now, of course, reports of the Appellate Body."[51] But what would be the legal grounds for this assertion?

In fact, the DSU has no provision establishing that the decisions of the panels and of the Appellate Body are sources of law for the WTO. However, Article 38 (1.b) of the Statute of the International Court of Justice (ICJ) provides that:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [. . .] d) subject to the provision of Article 59, *judicial decisions* [. . .] as subsidiary means for the determination of rules of law (emphasis added).[52]

The judicial decisions *help* the court interpret legal norms. They are among the subsidiary sources of international law. Therefore, they are not binding on the ICJ; but nothing stops the court from referring to them as important precedents when interpreting the law. This understanding is analogous to that of the panel in the *Japan – Taxes on Alcoholic Beverages*. On the occasion, the panel used DSB reports as subsidiary sources of WTO law, as though they had the *status* of judicial decisions. The Panel stated that the reports should be taken into consideration by future panels when addressing the same or similar issues. Despite all of this, the recognition of the importance of prior reports is far from meaning the adoption of *stare decisis* in the WTO; because the panel is not *bound* by prior reasoning or conclusions in former decisions.[53]

According to the Appellate Body, the reports raise legitimate expectations in WTO Members, and should therefore be taken into consideration in face of similar disputes. Even though the reports have no binding effect – except on the parties involved[54] – the Appellate Body understands that this does not stop it from creating case-based law that gives considerable importance to precedent.[55] A report adopted by the DSB is a decision that can be taken into consideration by the panels and by the

---

[51] Palmeter and Mavroidis (1998), at. 400.

[52] Article 59 prescribes: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[53] WT/DS8/R-WT/DS10/R-WT/DS11/R. Panel Report, Paragraph 6.10.

[54] WT/DS8/AB/R-WT/DS10/AB/R-WT/DS11/AB/R. Appellate Body Report, page 17. Adopted by the DSB on November 1, 1996.

[55] Ibid., footnote 30.

Appellate Body, even if it does not have the binding authority of a legal precedent. Palmeter and Mavroidis reinforce this view when affirming that

> adopted reports have strong persuasive authority and may be viewed as a form of non-binding precedent, whose role is comparable to that played by *la jurisprudence* in the contemporary civil law of many countries, such as France, and that played by decisions of courts at the same level in the United States. As a practical matter, parties will continue to cite prior reports to panels, and panels will continue to take them into account by adopting their reasoning – in effect, following precedent – unless panels conclude, for good and articulated reasons, that they should do otherwise.[56]

The reference to precedent, even when they are non-binding, gives consistency and promotes the continuity of the decision-making discourse of the WTO. The Appellate Body plays an important role in this continuity, since it is a second instance body and its decisions tend to be taken into account by the panels. Furthermore, the fact that it is permanent and its decisions fall under the collegiality principle,[57] the reports of the Appellate Body tend to be considered as true case law in international trade.

[56] D. Palmeter; P. Mavroidis, "The WTO Legal System", op. cit., at. 401–402.

[57] Rule 4 of the Working Procedures.

# Part IV
# The WTO Decision-Making Discourse: the Linguistic Context in the Decision-Making Discourse of the Appellate Body

When interpreting, besides the cultural and organizational *circumstances*, the interpreter should take into consideration the *context* of the discourse under analysis. This context means "the abstract possibility, registered in code, of a specific term appearing in connection with other terms in the same semiotic system".[1] Two aspects of this definition should be highlighted: (1) contrary to *circumstances* that involve elements from different semiotic systems, context is based on elements from the *same* semiotic system (in this case, the linguistic system); furthermore, (2) the context of a text states the *possibilities* of a term affecting the meaning of the discourse at issue. As far as the second aspect is concerned, a contextual analysis cannot neglect the co-text occurrences that take place at the same time of the interpretive act and that are related to the text being interpreted.

This concept of linguistic context permeates our study of the decision-making discourse of the Appellate Body, based on what Lifante calls the "interpretation of expressions", that is, "the consistent activity of determining the meaning of legal expressions".[2] For this reason, this Section examines the structural conditions that underpin any and all discourse in Chapter 9, and explores the problem of the intentions in determining the meaning of text in Chapter 10. Then, most importantly, in Chapter 11, we will explore the decision-making discourse of the Appellate Body, emphasizing the textual interpretation method. For the purposes of this Section, the words and utterances highlighted between bars refer to the plane of expression

---

[1] U. Eco, *Lector in fabula: la cooperazione interpretativa nei testi narrativi* (Milano: Bompiani, 1998), at. 16. There is no consensus on the nature of the elements of context. According to Maingueneau, the nucleus of context is made up by the *participants* in the discourse and the time-space frame. Context involves the knowledge we have on the interlocutors and the cultural background of the society from where the discourse emerges. D. Maingueneau, *Les termes clés de l'analyse du discours* (Paris: Seuil, 1996), at. 22–23. Klinkenberg makes a distinction between social context, instrumental context and referential context. J.-M. Klinkenberg, *Précis de sémiotique générale* (Paris: De Boeck Université, 2000), at. 276–278. The notion of context is not the same as the notion of *co-text*, that is, an existing text that occurs at the same time as other texts that have already been produced. Co-text is not defined as the *possibility* of a text emerging, but as the updated version of a text amid other texts and a text that one wishes to analyze.

[2] I. Lifante, *La interpretación jurídica en la teoría del derecho contemporánea* (Madrid: Centro de Estudios Políticos y Constitucionales, 1999), at. 47.

and the words or statements highlighted between angle brackets, refer to the plane of content. Therefore, the expression (word or phrase) |xxx| means «xxx». On the other hand, when having to name a non-linguistic object as an object – and not as a word that names an object – double bars have been used (‖xxx‖).[3]

[3] We have adopted the same graphic conventions as used by Eco in *A Theory of Semiotics*, op. cit.

# Chapter 9
# The Choice of Meaning in Discourse

## 9.1 Sign-Function: Denotation and Connotation

In Chapter 2, we saw that the code enables us to associate syntactic, semantic, and pragmatic elements. Each isolated element of a system is not, alone, a semiotic phenomenon. However, when a unit from the conveying system is connected to a unit of the conveyed system, a semiotic phenomenon occurs because a *sign-function*, also called a *semiotic function* is established. The sign-function occurs when a unit from the conveying system becomes an *expression* of a *content* revealed by the unit of the conveyed system. If there is indeed a correlation of this type, and it is recognized by society, then there is sign. Therefore, "a sign is always an element of an *expression plane* conventionally correlated to one (or several) elements of a *content plane*".[1] It is for this reason that, according to Hjelmslev, "the sign is a greatness with two faces, the head of Janus looking in both directions: 'to the outside', in the direction of the substance of the expression; 'to the inside', in the direction of the substance of the content."[2]

Semiotic function is therefore situated between two conventionally correlated greatnesses: *expression* and *content*. Each constitutes a *functive* of the sign-function.[3] Interdependence is established between semiotic function and its two functives so that the semiotic function cannot take place without the simultaneous presence of the two functives; likewise, the two functives cannot exist without the semiotic function that unites them. Therefore, the sign is the meeting point between elements of different systems that are allowed to

[1] *A Theory of Semiotics*, op. cit., at. 48. Emphasis in the original.

[2] *Prolegômenos a uma teoria of the linguagem* (São Paulo: Perspectiva, 1975), at. 62.

[3] According to Hjelmslev, "the terminals between which a function exists are each called a *functive*, which is understood as an object that has a function in relation to other objects. [. . .] From these definitions, it results that functions can also be functives, since there can be function between functions." (*Prolegômenos a uma teoria of the linguagem*, op. cit., at. 39). A functive is not a *function* of the other; rather "a functive *has a function with the other*." Hjelmslev, op. cit., at. 40, emphasis in the original. The term |function| is used to designate the relationship that takes place, in language, between signifier and signified.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_9, © Springer Science+Business Media B.V. 2011

associate with each other under certain *circumstances* and *contexts* established by the code.[4]

The first consequence of this definition is that a sign is not a fixed entity. Its variability is determined by the possibilities of correlation between the units of the expression plane and the content plane, from which new sign-functions arise. It is for this reason that Eco states that "the sign-function is a very temporary marriage".[5] The second consequence is that the sign is not a "physical" entity, since its occurrence is only manifested in the element that integrates its expression plane. Thus, the correlation between functives is based on the reciprocal transfer between two heterogeneities: the sign-function lives of the dialectics of presence and absence.[6] This means that each expression *in praesentia* corresponds to one or several contents *in absentia*, where "the expression is the *continuum by which* one speaks, the content is the continuum *of which* one speaks" – even when the *continuum* employed *to* speak is the same as the continuum *of which* one speaks.[7]

The notion of sign-function helps us to understand the underlying semiotic mechanism in the interpretation process. It is the basis to a complex mechanism that is triggered in the mind of the interpreter during the communicative process. Upon receiving a *message,*[8] the individual decodifies it in order to respond in a certain way. This response is the result of an interpretation made by the recipient-interpreter of the message. The interpretation of the source text can be converted into a new text in order promote the continuity of the communicative relationship. This reasoning can be illustrated as follows (Fig. 9.1):

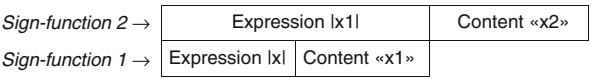



**Fig. 9.1**[9] Hjelmslev diagram illustrating communication *continum*

[4]In this sense, to Hjelmslev, there are no signs proper, but rather sign functions.

[5]Eco (1984), at. 23.

[6]Idem, *Semiotics and the Philosophy of Language*, op. cit., at. 21.

[7]Idem, *O conceito de texto*, op. cit., at. 21. This is the case when words are used to speak about "words". On the other hand, Eco warns "if one uses language to speak of geography, it seems that I am employing a sonorous continuum to speak of the geological and geographical *continuum* " (loc. cit.). This *continuum* Eco speaks of reproduces Hjelmslev's concept of *continuum* and corresponds to Peirce's *Dynamic object* of Peirce. Peirce (2000), at. 177. The existence of the dynamic object motivates us to create expressions to speak of "reality"; therefore, the expressions do not give us the *dynamic object*, but rather what Peirce calls the *immediate object*: "I term the *Object* of the sign; – the *immediate* object, if it be the idea which the sign is built upon, the *real object*, if it be that real thing or circumstance upon which that idea is founded, as on bedrock." *The Essential Peirce: selected philosophical writings, 1893–1913* (Bloomington, USA: Indiana University Press, 1998), at. 407. In other words, he is speaking of *content*.

[8]The word |message| is used to mean the group of signifiers correlated according to the code of a language in the form of *text*. The content of this text may represent various levels of *discourse*. Therefore, "message" is a wide term that involves, simultaneously, the concept of text and discourse.

[9]This diagram drawn by Hjelmslev was explored by Eco in several of his works devoted to semiotics. Some modifications have been made according to the terminology used in this book.

The content of sign-function 1 becomes functive, in the expression plane, of sign-function 2. In other words, content «x1», when revealing its "physical" face, that is, its phonic or graphic substance, via |x1|, creates a new semiotic function that replaces the signifier and conveys another signified, «x2». The first content is called denotative because it is correlated to the source expression without previous mediation; the second content is considered connotative because it is related to a previous meaning. The difference between one and the other is explained by Eco as the following: "denotation is the content of an expression, connotation the content of a sign-function".[10]

It becomes apparent that the connotative plane depends on a previous sign-function, that is, on a content conveyed by the signification of the first level. Para Eco, "what constitutes a connotation as such is the connotative code which establishes it; the characteristic of a connotative code is the fact that the further signification conventionally relies on a primary one".[11] Connotation is based therefore on a previous denotation and is not defined as having a more subjective – and at times vague – meaning that a word may have along side its more supposedly "stable" meaning in which a word is most commonly employed. It is not the unstableness of the content of the expression that characterizes connotation. The same way that denotative codes are not defined as being those carrying contents that are supposedly consolidated by society. This is because a connotative meaning can be just as stable and rooted into the common semantic heritage of a society. What connation refers to is to the consequent content of a previous content denoted by the source expression.

The denotative and connotative contents of an expression are not fixed by grammatical rules for formulating words, phrases and sentences. One cannot say that expression |x| will always and necessarily denote and connote «x1» e «x2» at any time or anywhere. This correlation will depend on the code of reference, circumstances and contexts, as well as on the conventionality of the meanings in question. Therefore, the relevance of certain content must be verified on a case-by-case basis. As a result, proving the relevance of the expression's content is a task for semiotics, and not a result of scientific certainties.

What matters is that society registers the semiotic adequacy of a relation such as "*if x*, *then w*". This implication relation takes place by virtue of more or less stable meaning postulates that have been culturally established, irrespective of the conditions of truth and of the content conveyed. Therefore, the phrase *if . . . then* does not operate mechanical nor logical relations between functives. It is established based on circumstantialized and contextualized signification processes. Thus, the relation between functives could be adjusted as: "*if x*, in the circumstances and context of *y* and *z*, then *p*. However, *x* could be *k*, in the event of circumstances *q* and in the

[10] U. Eco, *A Theory of Semiotics*, op. cit., at. 86. Insofar as the consequential element becomes, in the next step, the preceding element of a new sign-function, one can agree with Hjelmslev that expression and content "are greatnesses of the same kind, equal in all aspects" (*Prolegômenos a uma teoria of the linguagem*, op. cit., at. 64).

[11] U. Eco, *A Theory of Semiotics*, op. cit., at. 55.

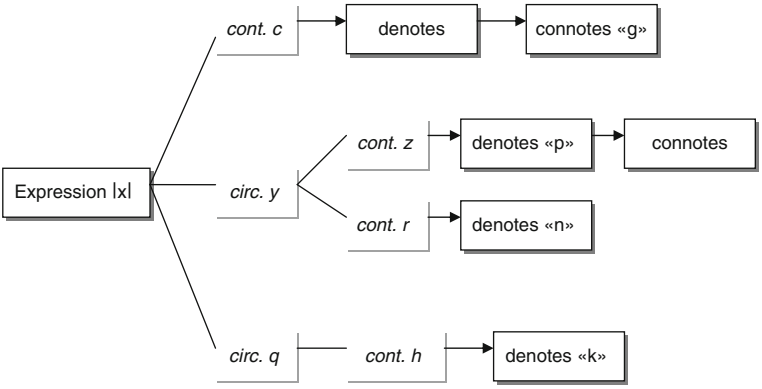



**Fig. 9.2** Relationship between connotative and denotative contents

light of context *h.*[12]" A semantic model that takes into account various contextual and circumstantial selections is illustrated in Fig. 9.2 above.

As previously mentioned, this is a semantic model in which there is nothing stopping content «k» from connoting «n» and/or «m». This figure merely conveys the idea that the circumstances and contexts may offer reading parameters for the interpreter of a text.[13] The choice of meaning in a text is, above all, cultural. Therefore, when Eco states that "*the conditions of necessity of a sign are socially determined*, either according to weak codes or according to strong codes",[14] we are left to understand that the strength or weakness of a code – which may even determine interpretive choices – not only depends on the context and circumstances in which it is employed, but also on the possibility of the code being intersubjectively verifiable in light of the culture of the subjects involved in the communication process.[15]

[12] According to Eco, "if signs were rooted in mere equivalence, their understanding would represent a simple case of *modus ponens*: every time one utters /man/ one means «rational mortal animal». But one uttered /man/; therefore, one meant «rational mortal animal». This is in fact the absolutely deductive process we implement when dealing with substitution tables, as it happens with the dots and dashes of the Morse alphabet. But it does not seem that we of the same with all the other signs, that is, when we are not invited to recognize the conventional equivalence between two expressions belonging to two different semiotic systems, but when we have to decide what content should be correlated to a given expression." *Semiotics and the Philosophy of Language*, op. cit., at. 39.

[13] According to Eco, the contexts and circumstances to be taken into account are those that "*statistically*, according to a hypothesis of average competence" are considered part of the semiotic competence of the sender or recipient. Eco (1988), at 119, emphasis in the original.

[14] U. Eco, *Semiotics and the Philosophy of Language*, op. cit., at. 38.

[15] As the series of interpretants allow us to enrich and clarify content, a "habit" (Peirce) is acquired, that is, a disposition to recognize the dynamic object of which one speaks or, if one prefers, a *disposition to act*. We can simplify this by saying that this habit is made up by the culturally disseminated opinions regarding the states of the world, or "socially cultural data accepted due to their statistical 'stability'." Eco (1998), at. 18.

The above demonstrates that the role played by a sign is not one of mere substitution (*aliquid stat pro aliquo*),[16] but one that depends on the sign being able to be *interpreted*.[17] In other words, the idea of a sign is not based on the equivalence between expression and content, that is, on the fixed correlation established by the code, but rather it is based on the interpretation, the dynamics of semiosis in light of the cultural reality. According to Eco, "to interpret a sign means to define the portion of continuum which serves as its vehicle in its relationship with the other portions of the continuum derived from its global segmentation by the content. It means to define a portion through the use of other portions, conveyed by other expressions".[18] This definition may suggest a high degree of indetermination in interpreting, to the extent that when decoding discourse, the interpreter can be faced with an unlimited and open-ended process of semiosis.

## 9.2 Unlimited Semiosis Versus Limits of Interpretation

In order to translate the content of an expression, one must resort to another expression, which in turn conveys another content that can be manifested as another expression, thus creating a chain of signifiers. As long as the content of an expression is possible of being manifested through other signifiers, the conditions are established for an unlimited process of semiosis, as represented in the following chart:

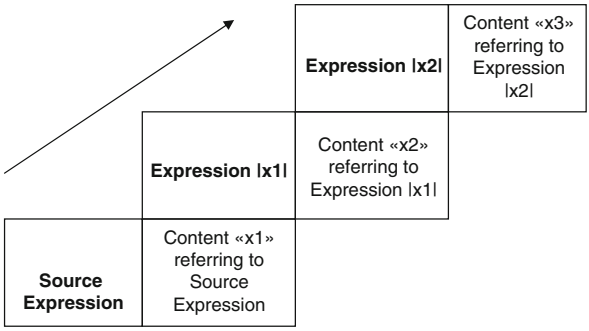



**Fig. 9.3** Unlimited process of semiosis

The content of an expression is not revealed without recourse to another expression.[19] The expression that replaces the signified constitutes, in principle, what Peirce calls the "interpretant". According to Eco, the interpretant should be understood as "an expression that substitutes another expression".[20] However, while

[16] *Aliquid stat pro aliquo* can be translated as: something standing for something else.

[17] U. Eco, *Semiotics and the Philosophy of Language*, op. cit., at. 43.

[18] U. Eco, *Semiotics and the Philosophy of Language*, op. cit., at. 44.

[19] This view should not lead to the conclusion that from the sign one can only know the signifier. This would be a criticism to the concept of sign derived from the obvious finding that signs can only be named through other signifiers.

[20] U. Eco, *O conceito de texto*, op. cit., at. 33.

Eco's statement clarifies one of the properties of the interpretant, it does not exhaust the notion of the term in question. For, when the interpretant reveals the content of an expression, there is no denying that it also plays the role of the signified. The interpretant, besides being the signified of a signifier, is also a sign in itself[21] – hence the concept of unlimited semiosis.[22]

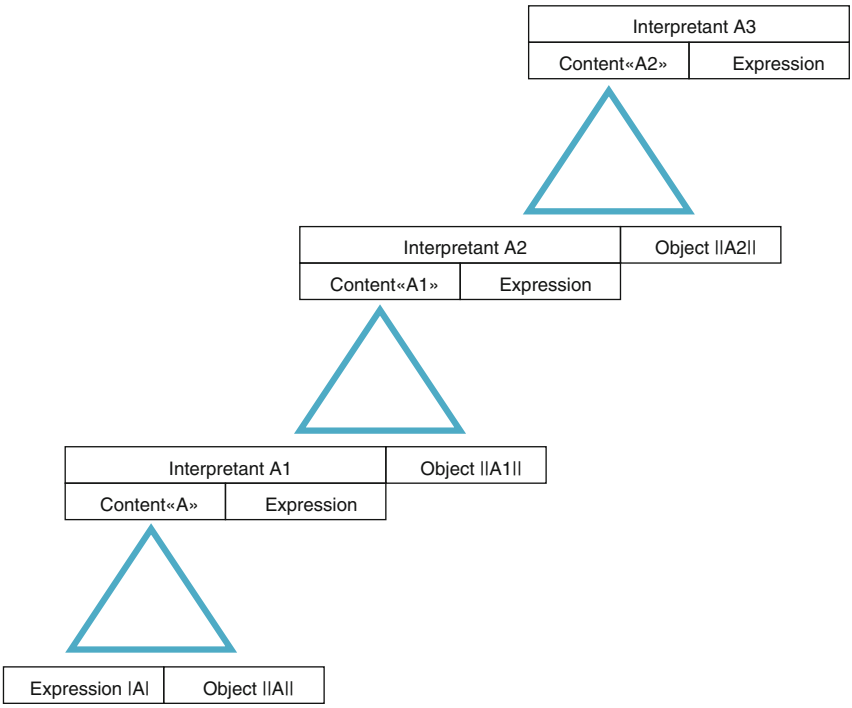



**Fig. 9.4** Unlimited process of semiosis

Eco points out the attributes of the interpretant in the following way:

> [. . .] the richness of the notion of interpretant is not only a result of the fact that it describes the only way through which human beings establish, fix and recognize the meaning of the signs they employ. The notion is rich because it shows how semiotic process, through continuous shifts, that refer one sign to other signs or to other chains of signs, circumscribe meanings (or content, in a word, the 'units' that a culture has established in the process

[21] According to Santaella: "the interpretant is the signified of the sign, and at the same time it becomes another sign." Santaella (2000), at. 65. According to the author, in a genuine semiosis, the sign, the object, and the interpretant have the nature of signs. "The first is called sign because it represents the object; the second is called object because it determines the sign; the third is called interpretant because it is immediately determined by the sign, and mediately determined by the object." (Ibid., at. 66).

[22] According to Peirce, "as a result of the fact that every sign determines an interpretant, which is also a sign, there is an overlapping of signs." (*Semiótica*, op. cit., at. 29).

attaching relevance to content) in an asymptotic fashion, without ever directly 'touching them', but making them accessible through other *cultural units*.[23]

Precisely because it is asymptotical to the object to which it refers, it is possible to say that a "sign is *almost* (a representation of) that thing".[24] This is because "the sign always *opens up* something new. No interpretant, in adjusting the sign interpreted, fails to change its borders to some degree".[25] At each interpretation something is added or taken away from the referent of which one speaks, thus transforming the properties regarding the cultural unit in question. Therefore, looking at Fig. 9.4, it is no longer certain that interpretant "A3" refers to object ||A||.

In the process of semiosis, the way to interpret an expression is via other signifiers. This process of interpretation results in the growth of the global meaning of the first representation, "since each new interpretant explains, on a different basis, the object of the previous interpretant, and, in the end, one knows both the point of origin of the chain [of interpretants] and the chain itself".[26] It is for this reason that Eco states "the sign (or the sign-function) appears, therefore, as the manifest and recognizable end of a net of aggregations and disintegrations constantly open to further combinations."[27] The act of interpretation can lead to a series of countless interpretants. Thus, there are no limits to interpretation.

The interpretant can be a single isolated word or a text in which the discourse encloses *an* interpretation among other interpretations that are eventually possible.[28] The text and its discourse form a sign that, once interpreted, give rise to another text that can be the object of further explanation, forming an even greater sign. There is, therefore, a set of cascading discourses, where the resulting text conveys the discursive content of the preceding textual manifestation, covering an entire series of denotations and connotation in a source text. The continuous cascading movement from one text to the next is aimed at discovering and showing the discourse previous texts convey, as though each one revealed *something more* about the meaning of the source text. According to Eco, this is the normal condition of signification. "To call this condition a 'desperate' one is to refuse the human way of signifying, a way that has proven itself fruitful insofar as only through it has cultural history developed."[29]

---

[23] U. Eco, *Sémiotique et philosophie du langage*, op. cit., at. 109, emphasis in the original.

[24] C.S. Peirce, *Semiótica*, op. cit., at. 282, emphasis added.

[25] U. Eco, *Semiotics and the Philosophy of Language*, op. cit., at. 44.

[26] Idem, *Los limites de la interpretación*, op. cit., at. 361.

[27] Idem, *Semiotics and the Philosophy of Language*, op. cit., at. 21.

[28] The proposal of a general theory of semiotics by Eco establishes a meeting point between the concept of sign and text, which can be summarized in the following formula: "in a well organized semiotic system a sign is already a virtual text, and in a communication process, a text is no more than the extension of the virtuality of a system of signs." (*O conceito de texto*, op. cit., at. 4).

[29] U. Eco, *A Theory of Semiotics*, op. cit., at. 71. This unending semiosis, this uninterrupted chain of cultural units that conform to other cultural units would, paradoxically, in the opinion of Eco, be "the only guarantee for the foundation of a semiotic system capable of checking itself entirely by its own means. Language would then be an auto-clarification system, or rather one which is clarified by successive systems of conventions that explain each other" (Ibid., at. 68–69).

However, this cascading movement of signifiers does not take place in a linear fashion, as may suggest Figs. 9.3 and 9.4. We know that "an expression can *fish* in different semantic axes"[30] by casting its net in the direction of different meanings that may come from various semiotic systems. As a result, it would be presumptuous to state that, for example, |subsidy| would always be an expression of a sign-function whose content is «a financial contribution from public authority in favor of one or more companies». The very term |subsidy| becomes the signifier of a semantic content that is not restricted to that which defines it as economic support by government to a company; it can also be semantically conceived as a «protectionist attitude» or a «support for free trade» or «commercial retaliation».

If, within the circumstances of the WTO and in the context of WTO legal discourse, |subsidy| can denote «government financial support» and connote, for example, «state intervention in the invisible hand of the market» and/or «distortion of competitive conditions», it can also have other meanings if employed in the legal culture of a socialist State or if utilized circumstantially in the context of a conversation between students whose concern are "subsidies" for the writing of a thesis. In this latter case, the students could be referring to either a scholarship or reference material necessary for scientific research.

The complexity involving the path of reading a discourse is also revealed by the possibility of |subsidy| denoting, to a certain interpreter, «state intervention in the invisible hand of the market», who, however, does not signify it as «government financial support». Furthermore, there is the possibility of these connotations being mutually exclusive, as is the case of |subsidy| connoting, on the one hand, «protectionist attitude», and on the other hand, «support for free trade».[31] This fact demonstrates that there is no hierarchy, but a plurality of interpretants.[32] The possible meanings of an expression could be demonstrated in the following fashion:

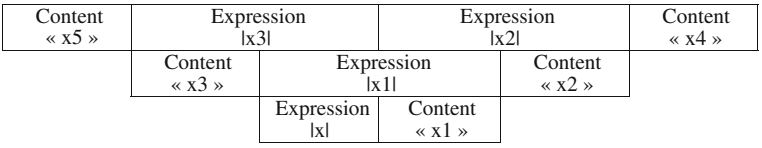



**Fig. 9.5** [33] The many meanings of an expression

Therefore, expression |x1| can denote both « x2 » and « x3 », and the corresponding connotative unfoldings may lead to diverse and even conflicting points of view. This occurs because in natural language cultural units are rarely univocal,

[30] U. Eco, *A Theory of Semiotics*, op. cit., at. 101.

[31] If subsidies to exports granted by law or in fact, are strictly prohibited within the scope of the WTO (cf. Part II of Agreement on Subsidies and Countervailing Measures – ASCM), others, which are termed "non-actionable" under Part IV of the ASCM, are not.

[32] This is why to Eco "there is no difference in the semiotic structure of first- and second-level signification." *Semiotics and the Philosophy of Language*, op. cit., at. 36.

[33] The figure has been adapted from the original presented in *A Theory of Semiotics*, op. cit., at. 56.

and form what cultural language calls "fuzzy concepts", that is, concepts that have vague limits and that are subject to some gradation.[34] Precisely because it is not formalized as language, a system of signs of a legal culture can be translated into another legal culture, and witness some of its concepts being incorporated by the target culture. The units of the semantic system of a legal system are analyzed in their plurality of meaning; to the contrary, it would not be possible to carry concepts from one legal system to another. The signified has no universal and immutable structure. Therefore, there is no such thing as a transcendental memory of a certain word corresponding to a perfectly single, true, objective, clear and identified content inexorably connected to a certain expression at any given time and place. A sign-function, as we have attempted to demonstrate, can be linked to and combined other sign-functions *ad infinitum*.

In summary, the spectrum of semantic space is synchronic and diachronic. This implies it is highly unlikely that a sender or interpreter of a message will be able to know all the possible denotations and connotations of a signifier. Figure 9.5 illustrates, in part, the complexity of the path of meaning in the text. It shows a transitory artifice created to control the semantic environment of the given unit of content.[35] Any attempt to describe the structure of the semantic horizon of a given culture will be faced with the theory of unlimited semiosis.[36] But if this theory supports

[34]On the concept of "fuzzy interpretation", Adams and Farber state: "as almost everyone else, judges usually speak and write in bivalent terms. An especially rigorous type of this bivalent logic is used extensively in certain technical fields, including mathematics and computer science, where it is particularly useful to work with strings of zeroes and ones and to eliminate fractions. In employing this type of logic, however, one 'trades accuracy for simplicity'. The alternative descriptions 'my lawn is green' and 'my lawn is brown' are bivalent statements. They describe one's view of the lawn. Yet, rarely is either precisely accurate – grass is seldom completely green or completely brown. Fuzziness, or multivalence, is useful everywhere between these two extremes. A fuzzy interpretation of the statement 'the lawn is green' takes the statement to be a partial truth. Fuzziness attempts to capture a more nuanced and precise picture of the world, not merely a bivalent description of it. Fuzziness does not, however, reject absolutes – multivalence reduces to bivalence in extreme cases. Occasionally, a lawn really is purely green or purely brown. Yet, fuzziness recognizes that this description is rarely accurate. More often, a lawn is best described as both green and brown or, in fuzzy terms, as both green and not green. Multivalent logic trades the 'rounded-off simplicity of bivalence' for 'the expressive power and accuracy of fuzziness'. *Fuzziness recognizes that every statement, every word, is a matter of degree.*" Adams and Farber (1999), at. 1289–1290. Emphasis added.

[35]This transitory nature of signification frameworks is a methodological condition of semiotics. The awareness of its very limits does not take away its aspiration of being a scientific discipline, because, even so, the indeterminacy principle that characterizes it does not belong exclusively to the field. According to Eco, "the semiotic approach is ruled by a sort of *indeterminacy principle*: insofar as signifying and communicating are social functions that determine both social organization and social evolution, to 'speak' about 'speaking', to signify signification or to communicate about communication cannot but influence the universe of speaking, signifying and communicating" (*A Theory of Semiotics*, op. cit., at. 29, emphasis in the original).

[36]Eco is categorical regarding the possible existence of a global semantic framework: "the *global form* of content is an utopia, it is a regulating hypothesis." (*O conceito de texto*, op. cit., at. 40). Eco only accepts, as a working hypothesis, the control of the semantic environment of a given unit

the stands taken by theorists that sustain that cultural units may be freely associated with each other in an everlasting process of linguistic creativity, we must investigate, however, if this process can be (or if it is convenient it be) done without any parameter within the scope of communicative relations.

Eco refutes the idea that unlimited semiosis means that interpretation is not based on any criterion: "to say that interpretation (as the basic feature of semiosis) is potentially unlimited does not mean that interpretation has no object and that it 'riverruns' merely for its own sake".[37] In our opinion, the communicative conditions of a given message define the paths of possible or relevant meaning. Therefore, the possibilities of meaning in a text derive from the *circumstances*, the linguistic *context* and the *code* utilized by the subjects that are communicating. If this code, as a signification system, supplies the semiotic competence for successful communication, the contexts and the circumstances determine the relevance of certain denotations and connotations to the detriment of others. These elements govern the attraction and distancing among sign-functions, thus providing conditions for the existence of certain limits to interpretation, even though such limits are necessarily flexible as is the line between the sand and the sea.

## 9.3 The Legal Code: Limiting Meaning

Let us take as an example two parameters of reference in an interpretation process: one capable of holding a minimum amount of information and another capable of holding a maximum amount of information. In the first case, the interpretation process has been limited to deducing *the* meaning of the sign. In the second case, the interpretation contains *all* the possibilities of signification and presupposes complete knowledge of the sign. This is a theoretical postulate, where the first situation can be associated to the denotative meaning of a sign, and the second to the set of all the related connotations of the denoted content.

Interpretation must specify the meaning of a sign. However, the margin for interpreting a specific sign – besides being governed by circumstances and linguistic context – is fixed in a code adopted by the subjects in communication. The code can often be decisive in defining which reading shall be made. The code can also promote a greater or lesser stability in the deduction of denotations and connotations in the message. The more a code is known, recognized and shared by a social group, the more stable it will be. The code will also have a greater chance of promoting consensus regarding the contents it conveys in communicative processes, and, consequently, the code will be less likely to result in decontextualized meaning.

Although the discourse of a text is the result of various co-existing codes, *language* is the base-code from which sub-codes may arise in a communicative relation.

---

of content. This view is expressed in *A Theory of Semiotics*, op. cit., at. 127 and in *Semiotics and the Philosophy of Language*, op. cit., at. 68.

[37] Eco (1992), at. 23–24.

Language establishes the possibilities in sentence-formation and the amount of available expressions, in addition to defining the possible contents at the disposal of the interpreter. If we take the word |state|, considered in isolation, it can have a number of different meanings: «a particular condition of mind or feeling», «the condition of a person or thing, as with respect to circumstances or attributes», «status, rank, or position in life», etc.[38] One could speak of many things: state of health, state of mind, state of slavery. However, were we to say "l'État est la force, mais la force qualifiée: celle qui est exercée au nom de la loi",[39] two codes affect the same text: one is the French language; the other, the legal code.[40]

The linguistic context in which the word |état| is inserted triggers some codes for the interpreter to consider. The nouns *loi* and *force* associated to *État* (with a capital letter) trigger (or at least lead to) the employment of legal code by the interpreter. From that point onwards, the entire set of information concerning the "legal world" may guide the interpretive act, pushing certain contents away from the set of possibilities of meaning.[41]

By inserting |state| in the signification system of the law the possible interpretations are automatically reduced, and consequently, the greater the the interpreter's expectations for successful communication. However, this situation does not eliminate the possibility that a new set of content possibilities is opened to the interpreter. Therefore, |state| can refer to a "republican state", a "democratic state", a "totalitarian state", for example. Although the legal code (as any code) is able to give rise to other combinations, we can also assume that it regulates the multiplication process of sign-function interpretants. It is the legal code, for example, that determines that the French word |avocat| is employed to mean «lawyer» and not «avocado».

Once the decision has been made to employ the legal code to the reading and interpretation of a text, the interpreter will have the minimum parameters necessary to choose the path of meaning. The following illustration exemplifies the possible paths in interpreting |état| in the context above.

---

[38] Random House Webster's Unabridged Dictionary, op. cit.

[39] "The State is force, but qualified force: the force that is exercised in the name of the law." D'Entrèves (1969), at. 5).

[40] With this example, we do not mean to state that decodification takes place in steps –, where the sentence is first translated with reference to one code of reference and then to another. What actually occurs is that, in the process of interpretation, a number of codes exert their influence.

[41] The circumstances of the communicative relation contribute to checking the relevance of a certain code. Ducrot warned that it is impossible to conceive semantic meaning that does not aim at explaining signification. Therefore, certain utterances should be described semantically, taking into account the indication of certain elements of the utterance level. Thus, this is the contact point between semantic theory and pragmatics, especially if one does not define semantics according to conditions of truth. Cf. Ducrot (1977); and also O. Ducrot et al. (1980). Although the pragmatic dimension has not been approached in this book (see Section III), linguistic *context* has been addressed, since our analysis focuses on the semantic dimension of legal text.

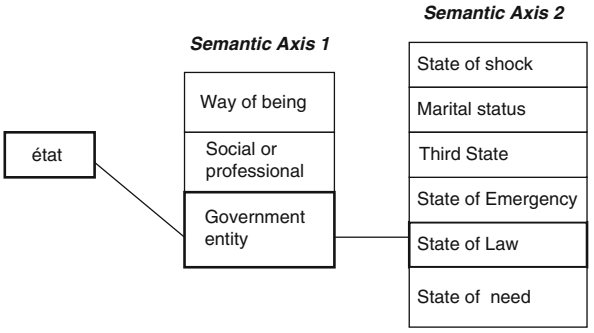
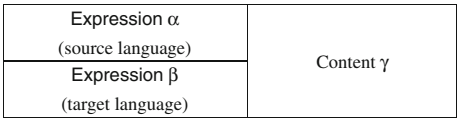



**Fig. 9.6** Semantic axes of the term 'état' in which the incidence of the legal code guides the interpretative act

The semantic possibilities in each axis are varied and even other semantic axes may be added to the path of meaning of the source expression.[42] Figure 9.6 above illustrates how the incidence of a legal code can guide the interpretive act, by making some possibilities of content completely inapplicable to the text at issue. However, the interpretive act acquires additional complexity when intertextuality takes place in a multilingual environment that is marked by different legal cultures, which is the case of the international system.

If we look back to the concept of translation discussed in Section 5.5 of Part II, we will see that, in an ideal translation procedure, the content conveyed by term |α| in the source language would be equivalent to the content of term |β| in the target language. This operation is schematically represented in the following Fig. 9.7:

**Fig. 9.7** Ideal translation procedure




We assume that the content carried by the two expressions refers to the same referent. We also assume that the cultural object is identical and invariable regardless of fact the content in question has been carried by different expressions due to language diversity. For these reasons, it is assumed that expressions |α| and |β| are indeed equivalent.

[42]The expression in question can be compared to other expressions that integrate the legal culture of reference. In the universe of meaning of WTO law, for example, the semantic entity «subsidy» is part of an axis opposing other units of meaning, such as: dumping, countervailing measures, antidumping measures, technical barriers to trade, etc. Naturally, in this spot-the-difference game, there is nothing stopping |subsidy| from being contrasted with the term |State|. However, by placing it under the semantic field of |non-tariff barriers|, the opposing relationship that is established can better contribute to defining the term's content.

However, if translation is interpretation, as we have attempted to demonstrate in Section 5.5, the relationship between one expression and another will not be one of equivalence, but a relationship that implicates all the existing circumstantial and contextual elements. Therefore, it would be far too naïve to argue for identity of content in the expressions in the following equation: *lawyer* ≡ *avocat* ≡ *advogado*.[43] Since the relationship between linguistic signs and reality is conventional and not natural, the word that denotes a class of objects, designating the common properties they share, can be replaced by another word from another language. However, this fact does not stop the (very frequent) possibility of supposedly equivalent expressions having (and they generally do have) certain particularities of meaning. This situation does not necessarily render a translation incorrect from a certain standpoint. The very term |law| may claim various contents, including: «order», «power», «symbolic violence», «value», «norm», «rule of conduct», «coercion», «effectiveness», etc. According to this understanding, even if the idea of achieving justice via legal norms is universal, the interpretation of the content of these norms is not. Interpretation only meets the characteristics of the language in which it is built, within a certain symbolic system – and this has profound consequences in the application of the law.

There is always the possibility that expressions from different languages have different shades of meaning or even completely different possibilities of meaning. There is never a one-to-one correspondence between the expressions in a source language and the content in the target language. This can be represented, *grosso modo*, as the following:

The Fig. 9.8 above illustrates a situation in which the expressions in question, despite a possible semantic convergence, have certain particularities (hence the signs "−" and "+") as a result of the influence of the referent culture. Take as an example the impasse created in the Appellate Body by the content of the expression |*prima face* case|. According to Canal-Forgues, there was, at first, a hesitation regarding the meaning of the phrase. The author explains:

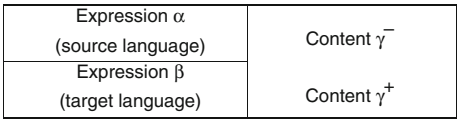



**Fig. 9.8** Translation impasse

[43]For example, the term |justice|, whose symbols are the *sword* representing power and the *scales* representing impartiality, and a blindfold covering the eyes of the goddess of Justice, Themis, representing equal treatment of those that turn to her. These three attributes symbolize something that is not a *thing*. Therefore, ontologically speaking, the thing-justice does not exist. It is relation whose representation takes place through these specific features brought together. Godino states that, besides choosing the term to express what one wishes to name, by agreeing to represent justice via these attributes, we are managing a code or convention: the convention of 1789. Our code therefore results in something created in a specific moment of history and is established promoting a specific direction of meaning. Cf. Godino (1982), at. 51–52. Therefore, the cultural character of the signified is made clear, and it can vary across space and time in history.

> in common law systems, [*prima facie*] can designate the fact of abridging, in a preliminary way, certain elements that convince the judge that the case deserves in-depth examination, without pre-judging its outcome. The same expression can also designate a situation in which all the evidence has been produced. In its first sense, the phrase would cover what a French jurist would qualify as '*commencement de preuve*'. In the second sense, it appears to designate the existence of the necessary group of facts necessary that would lead to a successful outcome, in a way that a presumption would be made.[44]

The translations of the first reports of the panels and of the Appellate Body mirrored this double meaning and the phrase *prima facie* was at times translated into the French as "présomption" and as "commencement de preuve".[45] Therefore, it becomes clear that the reading of the legal text based on a certain legal code is not enough to help the international judge to fulfill his duty of interpreting and deciding on the law. The same expression can be associated to different contents, depending on the legal culture of reference of the interpreter. To prioritize one over another will have different consequences in the application of law.

In the dispute of *Canada – Measures Affecting the Export of Civilian Aircraft*, the Appellate Body heard the case. It was shown that a *prima face* case occurred when the body of evidence presented was sufficient to enable a conclusion that an alleged fact had taken place or existed.[46] The impasse over the phrase was the result from the lack of a definition of its content in the WTO covered agreements. What did not lack were the different preexisting legal referents of each party to the dispute of and each member of the Appellate Body.

However, this example should not take away the credit treaties deserve. Treaties inaugurate and organize a new legal code that establishes the organizational mechanisms by which law is created (and enforced). In addition, treaties convey the discourse that is aimed at guiding, not only social behavior, but also other discourses stemming from the original discourse, such as the decision-making discourse of the

---

[44] É. Canal-Forgues, *Le règlement des différends à l'OMC*, op. cit., at. 71–72.

[45] Take the following passage from an Appellate Body report in the controversy *Japan – Measures Affecting Agricultural Products*, stating that the authority of a panel to seek information based on Article 13 of the DSU "cannot be used . . . to rule in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it" (WT/DS76/AB/R, paragraph 129. Report adopted March 19, 1999. Emphasis added.).

[46] The Appellate Body confirmed that "a *prima facie* case, it is well to remember, is a case which, in the absence of effective refutation by the defending party (that is, in the present appeal, the Member requested to provide the information), requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case." (WT/DS70/AB/R, paragraph 192, page 52). In this controversy, Canada alleged that its refusal in supplying information requested by the panel based on Article 13 of the DSU did provide sufficient grounds for the panel to come to conclusions considered unfavorable to the Canadian intentions since the other party, Brazil, had not established its argument on a *prima facie* basis. In other words, the pieces of evidence presented by the Brazilian government were not sufficient to demonstrate that the funding in the form of credit by the *Société pour l'Expansion des Exportations* (SEE) resulted in a competitive advantage to *Atlantic Southeast Airlines* (ASA) because it had been granted according to conditions more favorable than those practiced by the market, which therefore satisfied one of the pre-requisites of an export subsidy not allowed under the Agreement on Subsidies and Countervailing Measures.

Appellate Body. Treaties are, in effect, "what has been said", that is, the original text on which the Members of the decision-making bodies base themselves in order to fulfill their jurisdictional role.

Because the text of a treaty comes prior to decision-making discourse, it can help the interpreter in delineating the possible meanings of a text. Take the term |subsidy| for example. Among the possible contents, we have «the information and bibliographical materials» that a researcher uses the write his thesis. However, when applying the expression *circumstantially* within the an international organization, such as the WTO, this particular content – which is better applied in the circumstances of the "academia" – and a series of other contents would tend to be eliminated from the semantic field of the interpreter. And if the "WTO circumstances" are the circumstances of a commercial dispute within the framework of the dispute settlement system, the code that would best suit the interpreter would be the legal code, and not the code of economics for instance. Therefore, the interpreter will be lead to search for the content of the expression at issue in the relevant treaty; in this case, the Agreement on Subsidies and Countervailing Measures (ASCM).

Examining the circumstances is an important fact in determining the content of |subsidy| insofar as it is situated in the semantic field of WTO law, and not Brazilian, French, Indian, or Chinese law. This is a pragmatic assumption. However, once it is made, it is the text of the treaty that will supply the definition of the term. The meaning of |subsidy| is contained in Article 1 of the ASCM, according to which certain financial support is only considered a subsidy if three characteristics are present together. Figure 9.9 above illustrates this. Therefore, *if* «state financial support + benefit + specificity», *then* |subsidy|. To the definition it is not *every government financial support* that matters. What matters is government financial support given to a specific company and resulting in an advantage to the subsidized company. It is up to the parties to the dispute to prove the existence or non-existence of the three elements. Thus, if a Member of the WTO wishes to deny the other party's claim that a certain |subsidy| was provided, the Member must disqualify one of the

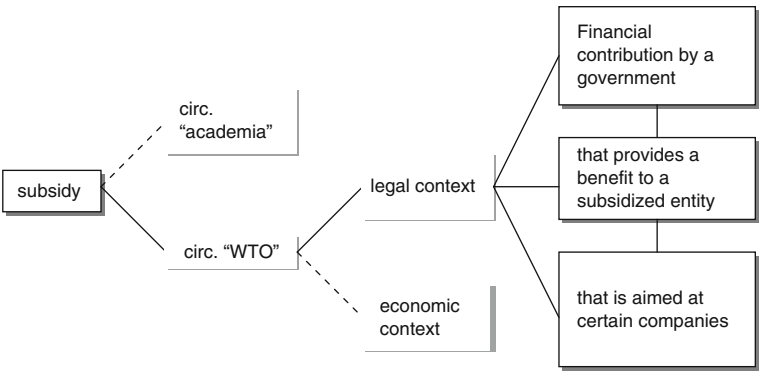



**Fig. 9.9** Three necessary characteristics under Article 1 of the ASCM to consider a certain financial support a subsidy

three contents of the expression in question. The Member must at least prove that the financial aid received by a certain company was not *government* aid or that it did not represent a competitive *advantage* to the company, or even that it was not granted to certain companies *in specific.*

It is at this point that the process of semiosis reaches another level, since it will be necessary to scrutinize the content of the interpretants |financial contribution|, |benefit| and |specific|, which are now considered expressions of other contents. This task is left to decision-making bodies that, upon deciding, bring new meaning to the legal code of the WTO. Their discourse constitutes a kind of connotative code of the legal code previously established in the text of the treaty. Thus, the effects and difficulties of a multilingual and multicultural environment at the decisional level must not be taken for granted, since they play a role in actualizing the meaning applied to the international trade law. The circumstantial and contextual factors help the international interpreter in finding possible meanings.[47] However, these factors neither reveal nor disguise the *intention* that is privileged during the interpretation process of legal text. This is the subject of the next chapter.

[47] According to Eco, "the decision to 'read' the sememe according to one or other connotation will be motivated by contextual or circumstantial factors" (*A Theory of Semiotics*, op. cit., at. 101). These contextual and circumstantial factors involve the signification system in order to subsidize (and influence even) the interpretive act, which puts to test the interpreter's knowledge regarding the possible denotations and connotations of the signifier being interpreted.

# Chapter 10
# The Authors of Legal-Diplomatic Discourse: Interpreters and Intentions

## 10.1 Author and Reader: Between Empirical and Imagined Subjects

The preceding chapter discussed the concept of sign and examined the codification and decodification process of text in order to point out the underlying structural conditions for the interpretive act. We have seen that text interpretation can, due to the chain of interpretants, lead us to an unlimited semiotic process. However, interpretation in the communication relationship is not a mere exercise of semiosis. Interpretation is based on data that enable (at least hypothetically and temporarily) one to put an end to the chain of possible interpretants. The efforts to restrain the free and unlimited process of interpretation are identified when, for example, we state that, to interpret a text is to clarify its objective nature or to clarify the intentional meaning of the author.

Any written text presupposes the existence of a source of discourse, that is, an author. The author is an empirical subject with his own personality and culture, and an entity from which information can be obtained. In the theory of discourse, this empirical author is called the *subject of the utterance*. He does not appear in the text, that is, in the uttered-discourse, but does leave his imprint. Once the discourse has been produced, the subject of the utterance comes into being and is always implicit and understood. It makes little difference whether or not the text explicitly states an *I* or a *we* as authors (as in the preamble of a treaty), or if the text is in the third-person in order to create the illusion of absence of the utterer (as in the provisions of a treaty).[1]

From the standpoint of international law, the authors of treaties are States and not the plenipotentiaries or governments. The States are a culturally established legal fiction that stabilizes the image of the author in time, regardless the "fluctuations" in national politics and in the human condition. This is the only way in which Nation-States, as legal entities of public law, equally sovereign and independent,

[1] There is no difference between a text written in the first or third person from the point-of-view of the subject of the utterance. The subject is never excluded and its presence is always presupposed, although such subject may not exactly correspond to the one that may appear in the utterance.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_10, © Springer Science+Business Media B.V. 2011

acquire by an artifice of theory, the appearance of sameness. The "I" of each State, despite the social, cultural and economic peculiarities, seems to accommodate to the constitutive "we" of treaty. On the other hand, Benveniste has a different perspective on this and states:

> The singleness and subjectivity inherent to the 'I' contradict the possibility of a plurality [of subjects]. If there cannot be several 'I's coming from the 'I' that is speaking, 'we' is no longer a multiplicity of identical objects, but a *combination* between 'I' and 'non-I'. This combination forms a new and very unique wholeness, in which the elements are not equal to each other: in 'we' it is always the 'I' that dominates because there is no 'we', if there is no 'I', and this 'I' prevails over the 'non-I' element by virtue of its transcendental feature. The existence of 'I' constitutes 'we'.[2]

The "we" in the text of a treaty becomes an inflated "I" that gives way to a less defined person (in the plural). "The 'we' attaches to 'I' an indistinct generality of other people".[3] Therefore, the sociocultural diversity of the empirical authors tends to be covered by the legal face (fiction) of the State that, supported by a theory of public international law, results in all States being presented in the text as identical entities, as though they all had the same view of the world, the same experience, etc.

However, the subjects of the enunciation (*l'énonciation*) are not equal to the subjects of the utterance (*l'énoncé*): the former are empirical authors *of the* text, from which some impressions or information can be collected; they are concrete and contradictory subjects that act and react, revealing and dissimulating their will according to the interest and circumstances at hand. The subjects of the utterance, however, are those identified *in* the text and, thus, their will is considered as being what – and only what – is expressed in the text.

It is true that the information concerning the subject of the utterance may be relevant in investigating the circumstances of a text. After all, it may be useful for the actors in the international system to know that the People's Republic of China, as a subject of the utterance, is a country with a population of more than 1.3 billion, having a GDP of U$1.3 trillion, a geographic area of 9,572,900 $km^2$, and armed forces of 2.4 m people; or that Brazil has a population of 180 million, a GPD of U$500 billion, a territory of 8,514,205 $km^2$, and armed forces of 300,000 people.[4] However, in examining the legal discourse of the WTO, the most relevant information is that China and Brazil, as subjects of the utterance, are part of the "we" *in the* text of the WTO, which recognizes that "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[5]

The subject of the utterance is the one that appears *in the* text and that establishes semantic conventions without which it is not possible to interpret the text.

---

[2] Benveniste (1971), at. 169.

[3] Ibid., at. 171.

[4] Data extracted from the Almanaque Abril (2005).

[5] Preamble of the Agreement Establishing the WTO.

Based on the subject of the utterance, the reader formulates a hypothesis concerning the subject of the enunciation. However, from the standpoint of the reader, this subject of the enunciation would be what Eco calls the Model-Author: the image the reader builds of the author based on the text in which the empirical author left his mark.[6] On the other hand, it must also be taken into account the fact the author, while producing a text, assumes there is a Model-Reader capable of understanding the cooperative textual operation proposed. In other words, the subject of the enunciation takes the risk of assuming that the cultural units to which it refers are the same as those to which the reader must refer.[7]

Due to this reciprocal operation of representing the concrete subject – an operation carried out by both the empirical author and reader – one can agree with the statement that "creating a text means implementing a strategy of which foreseeing the movements of others is part".[8] There is a clear attempt to anticipate the likely reading paths to be adopted by the empirical subjects involved in the communicative process. Thus, this is the only way the author will be able to gather the minimum conditions to produce a text that can lead the reader to reason and react in certain way, and even to imagine the image of author – as the image offered through the text. If, as a result of the text, the empirical reader behaves the way the empirical author had intended, then the author will have been successful in the communication. However, as Eco warns, it may be that the author has not adequately assessed the competence of the Model-Reader, "due to lack of historical analysis, error in semiotic evaluation, cultural prejudice, or underestimating the target circumstances".[9] Author and Model-Reader are interpretation hypotheses and should therefore be understood as textual strategies "that must be satisfied so a text fully attains its potential content."[10]

---

[6]The circumstances of the utterance have a considerable influence of the choice of Model-Author, that is, in formulating a hypothesis on the will of the empirical subject of the utterance.

[7]When referring to the Author and Reader *models*, the words start with a capital. Words written in lower-case refer to the *empirical* author and reader.

[8]U. Eco, *Lector in fabula*, op. cit., at. 54.

[9]Ibid., at. 57.

[10]Ibid., at. 62. Regarding the concept of Author and Reader-Model as interpretive hypotheses, Eco wrote: "If the Author and the Model-Reader are two text strategies, we are faced with two situations. On one hand, [. . .] the empirical author, as the subject of textual utterance, formulates a hypothetical Model-Reader and, by translating this hypothesis into a strategy, the author shapes himself as the subject of the utterance, according to equally 'strategic' terms, as a way of operating the text. But, one the other hand, the empirical author again, as a concrete subject of the cooperation efforts, must establish for himself a hypothetical Author, which is created based on text strategy data. The hypothesis formulated by the empirical reader concerning the Model-Author, seems to be more stable than the one the empirical author formulates concerning the Model-Reader. In fact, the latter has to postulate something which currently does not exist and carry it out as a series of textual operations; the former, on the other hand, forms a type-image of something that has taken place before as an utterance and is textually present as an utterance." (U. Eco, *Lector in fabula*, op. cit., at. 62).

In this game of cooperative strategies, the text is at the center of the web from which every assumption originates. Therefore, to say that "the text determines its own Model-Reader"[11] is to say that the text supplies instructions that enable us to draw an image of the Reader, who is not necessarily the empirical reader. There are many ways a text can give evidence of its Model-Reader. Some examples are: the choice of language (which would leave out non-speakers of that language); the selection of code (such as the legal code, leaving out those who are not knowledgeable in this specialized language); the definition of geographical scope (the case of texts establishing regional international organizations, such as the OAS, the NATO and the MERCOSUR, which excludes non-signatories); and the supply of signs that select the audience (the legal discourse of the WTO directly addresses the internal bodies and the state entities as legal entities of public law, leaving out private entities and other subjects of international public law). It is for this reason that the empirical author not only writes *to* a Model-Reader, but he also defines the Model-Reader.

Between the author's textual strategy and the empirical reader's response, there is the idealized Author and Reader. The relationship between them is, as Eco warns, not one of loyalty; it can be a relationship of conflict.[12] Therefore, when the members of the DSU stipulate that "the Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law",[13] they activate (or require) a Model-Reader whose intellectual profile includes knowledge about the norms of interpretation that will guide the reading of the diplomatic discourse. If the interpreter does not correspond to the image of the Model-Reader projected by the empirical author, then the interpreter may direct the meaning of the text according to the will of the author.[14]

---

[11] U. Eco, *O conceito de texto*, op. cit., at. 98.

[12] U. Eco, *O conceito de texto*, op. cit., at. 100.

[13] Article 3.2 of the DSU.

[14] This would be the case of the empirical reader refusing to accept the presuppositions of the author's discourse. In line with the reasoning of Ducrot, Barros calls attention to this respect: "[. . .] by presupposing certain content, the utterer determines his acceptance as a condition for maintaining the 'dialog', thus attaining the right of speech of the recipient and establishing limits of what can and cannot be said so the discourse may continue. If the recipient refuses the assumption, the discourse can no longer continue, and a controversial situation is created. Such refusal puts in check the right of the utterer to organize his discourse to his convenience – a right that is part of the linguistic regulations for social interaction. One may discuss, deny or not accept what has been uttered, the content made explicit, but one may never do the same with what is presupposed, since this would bean disqualifying the utterer and stopping discourse from continuing." *Teoria of the discurso: fundamentos semióticos*, 2. ed. (São Paulo: Humanitas/FFLCH/USP, 2001) at. 100. The presupposed content is the set of reputedly shared beliefs and knowledge among communicating subjects, in which discourse should proceed. Therefore, the presupposition that countries, by signing a multilateral treaty for commerce, intend to establish a legal regulatory framework based on the principles of free trade and market economy cannot be denied. Thus, to sustain that the legal

The fact is that the imagined subjects are not necessarily the real authors or readers, nor can they be identified as the subjects of the utterance insofar as they are representations of the subjects of the enunciation based on the text. These distinctions supply us with new elements to explore the *intentions* that must be considered in the interpretation process.

## 10.2 Interpretation: Searching for the Author's Intention

The States, as empirical authors, have authority to interpret treaties that differs from the kind of authority decision-making bodies have. According to Virally, interpretation by the States "has a legal authority that is identical to that of the original document, it has the same reach as the original, and it is not susceptible to any impugnation or any review (except for those made by the authors of the document)".[15] The same cannot be said when interpretation is carried out by the international decision-making bodies.[16] In this case, given that the jurisdiction of such bodies is defined by the States, the formers' interpretation authority is established by the limits drawn by the treaty. Thus, decision-making bodies are prohibited from imposing, via interpretation, obligations that are not prescribed or previously authorized in the convention signed by the States. This limited authority to interpret is applied

---

norms of the WTO should promote more cooperation and less competition means not understanding the presuppositions at the foundations of the legal discourse of the WTO. Notwithstanding, one can always consider the act of presupposing a kind of argument strategy.

[15] Virally (1997), at. 137. This is called an authentic interpretation, that is, one emanating from the authors of the act to be interpreted, according to the classical maxim *ejus est interpretari cujus est condere*: the duty to interpret belongs to the author. Still according to Virally, in this type of interpretation, "the author(s) of the document to be interpreted generally feel more comfortable with the document than any other interpreter; consequently, they can better avoid the confusing boundaries that separate clarifying from modifying the meaning of a text; the meaning that can be deduced from uttering [said text]." (Loc. cit.). According to Dinh, one of the reasons why resorting to intergovernmental organizations can be unsatisfactory is because the interpretation of the treaties is carried out based on the prevailing political views instead of being based on legal arguments. Cf. N. Q. Dinh, *Droit international public*, op. cit., at. 259. In the WTO, many interpretive texts were adopted simultaneously with the Accords of Marrakesh. For example: Understanding on the Interpretation of Articles II:1.b, XVII, XXIV, XXVIII and XXXV, besides the Understanding on the Balance-of-payments provisions and the Understanding in respect of Waivers of Obligations, all of which are related to the GATT 1994. Article 1 of the Understanding on the Interpretation of Article XVII of the GATT 1994 establishes, for example, that the content of |state trading enterprises| is the following: "governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports".

[16] Rousseau states that there are two types of international interpretation, which should be distinguished: interpretation by the very signatory States acting by common accord (international governmental interpretation), and interpretation by international institutions – tribunals and international arbitrators – "called to examine a case regarding the meaning and reach of a treaty", which the author calls *international jurisdictional interpretation*. Cf. Rousseau (1953), at. 48.

to the bodies of the dispute settlement system of the WTO in the following terms: "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"[17]; and "[. . .] in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."[18] Therefore, the authority to interpret a treaty or convention is not to be confused with the authority to modify or review treaties. The latter belongs exclusively to the authors of the diplomatic discourse.[19]

Despite the relevance of the interpretation carried out by the very WTO Members,[20] this study focuses on the interpretation performed by the Appellate Body. The interpretation carried out by the Appellate Body is subject to certain restrictions, since the diplomatic text serves as a parameter for the members of the Appellate Body to arrive at possible meanings. Therefore, the text of the treaty is the starting point for the exercise of the Appellate Body's decision-making role. It is the duty of the international court to state the meaning contained in the text in order to make it legally enforceable. This however raises a question: should the meaning stated by the court correspond to the meaning intended by the author of the treaty (i.e. the State) or to the meaning which the reader (in this case the court) considers adequate for resolving the dispute?

Simon analyzes the court's interpretative role based on two perspectives: (i) the court *extracts* the meaning of the norm from the normative text, and (ii) the court *gives* meaning to the norm.[21] While the latter stresses the reader's participation in construing the content of the legal norm, the former (and this is the focus of Section 10.2) considers that the interpreter's utmost goal is to decipher the treaty according to the meaning attributed by the authors. Several methodological orientations can be applied to this task. However, the traditional debate rotates around two main approaches: (1) the interpretation that searches the text for what the author wanted to say (subjectivist approach), and (2) the interpretation that searches for what the text itself actually states (objectivist approach). If in the subjectivist approach it is more important to know what the States wanted to say instead of

[17] Article 3.2 of the DSU, *in fine*.

[18] Article 19.2 of the DSU.

[19] The line dividing the power to interpret from the power to modify treaties is not so easily identifiable, especially when the two are found within the same entity. This implies admitting a significant degree of difficulty in any attempt to rigorously determine the authority of the authors of the legal-diplomatic text to exercise these powers. According to Article IX of the Agreement Establishing the WTO, the Ministerial Conference and the General Council hold the sole authority to adopt interpretations of this Agreement and any other Multilateral Trade Agreements if the decision to do so is obtained with a three-quarter majority of the Members. However, the Ministerial Conference may also submit proposals for amending the provisions of the Multilateral Trade Agreements. This is provided under Article X of the Agreement Establishing the WTO. The required quorum, in these cases, is higher-than-majority.

[20] An important study on authentic interpretation of international treaties was carried out by Ioan Voïcu (1968).

[21] Simon (1981), at. 97 et seq.

investigating what they actually said, the objectivist approach is concerned with what the authors actually said *in the text* better expresses what they in fact wanted to say when signing the treaty. In commenting these two approaches, Simon states that

> in fact, it is not a matter of putting the interpretation of the text and the search for the intentions of the parties against each other – which is often what doctrine proposes to do: *interpretation, by definition, is aimed at investigating the intention of the parties*; a method of interpretation that is not directed at implementing the will of the authors of the treaty would be radically incompatible with the principle of good faith [. . .][22]

According to Simon, both approaches have a common objective: to investigate the intention of the contracting parties. The difference between the two is the degree of importance each approach attaches to the text. Therefore, whereas according to the objectivist approach the text alone expresses the will of the parties, that is, the text would be enough to identify the content that the author of the treaty wished to express; in the subjectivist approach, the interpreter is driven to translate the real will of the signatory States going beyond what is expressed in the text. In this latter case, the text of the treaty is paramount to interpretation, but not the only source to be considered. An *ab initio* investigation of the intentions of the parties is also necessary and, for this reason, knowledge of the preparatory work in producing a treaty and of the circumstances governing the moment the treaty was concluded is also fundamental. In light of the objectivist and subjectivist approaches, Brotons holds the opinion that the former "favor grammatical or textual methods and systemic-logic", and the latter "historical and pragmatic methods".[23]

Whether based on the objectivist or subjectivist approach, interpretation as a search for the intention of the parties cannot escape some relevant questions such as: How to determine the intention of the author who appears in the text of the treaty as a homogenous "we", although in practice the empirical authors are heterogenous? Is the intention of the author the intention of Eco's Model-Author projected by the empirical reader? These questions can be answered based on what takes place in the WTO – and in other international organizations. When a WTO Member, vested in the authority of the DSB, rejects a report from the Appellate Body, it is understood

[22] Ibid., at. 97, emphasis added. Interpretation would be a linguistic activity of decoding a message issued by the author of the treaty. According to Simon, "the text, a true 'sacred circle where all is said', contains a set of rules formulated in the language of the negotiators of the treaty, *that the interpreter must 'translate' into the language of the litigants, carefully avoiding, as any translator, betraying the intentions of the original drafters:* in fact, the judge is the intermediary, a 'spokesperson', a link in the chain between the author of the norm and addressee." (Ibid., at. 80, Emphasis added). The international judge is, therefore, a *translator* in the communicative relation established between the sender-author (signatory State) and the final recipient (States parties to a dispute) of the text of the convention.

[23] Brotons (1987), at. 308. Brotons clarifies further that, "in practice, the *preparatory work* is the set of documents that make up the diplomatic correspondence, official minutes, amendments of the Conferences and the organizations where the negotiation developed." (Ibid., at. 314–315).

that the Appellate Body decision does not correspond to the Member's interpretation of the diplomatic text. There is, therefore, an objection from the very author of the treaty regarding the content of the decisional discourse. The interpretation given by the Appellate Body would not mirror what the State in question really wanted to say, but perhaps what the Model-Author would have said. And the Model-Author is nothing other than a representation of the empirical author built by the reader. For this reason, the *intentio*, the Member objecting to the report would say, could be the intention of the author conceived by the members of the Appellate Body as empirical readers of the WTO Agreement, but not the Member's – the State's – intention as the empirical author.

The relationship between the *text* and the *will of the author* cannot be left aside in examining the role played by the interpreter in interpreting and updating text meaning. Therefore, the investigation of legal meaning should not only take into account what the text says according to the code and the legal culture of the authors, but also what is said or could be said in light of the code and legal culture of the readers. These two possibilities invite us to reconsider the debate on the above-mentioned interpretation approaches based on the subjectivist-objectivist dichotomy. And by reconsidering the debate we are faced with the following questions: How can we accept the objectiveness of an interpretation approach that, while limiting itself to the text of the treaty, also includes the collaboration and cooperation of the empirical reader in building the meaning of the text? Could the content derived from the text, from a subjectivist point of view, be the result of the amalgamation between the alleged intention of the author, based on a Model-Author, and the intention of the reader?

The ghost of the reader would always be haunting the text. After all, as Eco observes, "a text, in an even more decisive manner than any other kind of message, requires from the author cooperative, aware and active movements. [. . .] a text defines its own recipient as an indispensable condition not only of its concrete ability to communicate, but also of the text's own meaning potential".[24] In other words: "any text wants someone to help it work".[25] There is, therefore, an active role played by the interpreter in discovering the meaning of the legal and diplomatic text.[26] As a result, we are led to re-assess the concept that the court, in the interpretive act, *extracts* from the legal text *the* meaning of the norm. The presence of the intention of the reader strengthens the concept that court *attributes a* meaning to the legal text.

---

[24] U. Eco, *Lector in fabula*, op. cit., at. 51, 52 and 53.

[25] Ibid., at. 52.

[26] One can therefore question Cornu when stating, "the communication is under the almost exclusive influence of the sender." Certainly, Cornu refers to the communicative relation between the agent of expression, one who is an expert in the language of law, and the citizen who is the addressee and who has no knowledge of this language. However, "almost" means the measure of awareness that the recipient also plays an important role in attributing meaning to legal text. Cf. *Linguistique juridique*, op. cit., at. 25.

## 10.3 The "Ghost of the Interpreter" in Defining the Meaning of Norms

Interpretation could be defined as archaeology of the author's will to be investigated in (or via) the text. The objectivist and subjectivist approaches conduct the interpreter to a result that presupposes meeting the 'horizon of expectations'[27] of the States as recipients of decisional discourse and authors of the diplomatic text. From this standpoint, the legal text corresponds to a merely *declaratory* act stating the meaning of the norm, whether this meaning is contained in the diplomatic text itself or elucidated with the support of the preparatory work carried out by the treaty's negotiators.

The approaches that consider interpretation as the search for the intention of the author repress (or aim at repressing) the interpreter's creative role in construing the meaning of the norm. From this point of view, the international court should be a kind of spokesperson for the Member States and therefore be void of an own will. The role of the court is only to reveal the "original" or "correct" meaning of the norm. However, affirming that a legal norm only admits one single interpretation, with one single meaning being attributable to a given expression, only serves the purposes of consolidating the ideal of legal security and legal stability, but does not correspond to what actually takes place in practice. The fact is that, as Eco observes, once a text is drawn apart from its author and from the circumstances governing its drafting, this text is open to a potentially infinite number of possible interpretations.[28] It is up to the entity implementing the law to choose from among the possible reading paths revealed by the act of interpreting the text.

The argument in defense of the "original" or "correct" meaning is not sustainable due to the incidence of the intention of the reader as an intrinsic component of the interpretive act. The interpreter cannot be ignored, in addition to all its idiosyncrasies; the interpreter is the result of cultural circumstances that influence his way of thinking and acting. Meaning does not jump off a page into the mind of the reader; much to the contrary, meaning is construed intellectually by the interpreter in a new form of text: a decision or a ruling. The reader builds his interpretation based on the reading of the source text that serves as a parameter.

Therefore, interpretation as imposing the intention of the reader is in line with the concept that the jurisdictional function of the interpreter consists of *choosing* – and not merely "discovering" – one among various possible meanings of a same legal provision. According to Simon, "the judge, in interpreting, does not discover 'the' hidden meaning, but attributes 'a' meaning, opting among the different, possible,

[27] Phrase used by Eco to refer to the system of cultural and historical expectations held by the addressee of a certain message. Cf. *Los límites de la interpretación*, op. cit., at. 26.

[28] Eco (1993), at. 48. The strength of the subjective and objective approaches is weakened in the absence of a single, shared and clear intention of the contracting parties, in regard to the content of the convention provisions in question.

logical meanings of the treaty, exercising an authority which, far from being exclusively 'declaratory', is essentially 'constitutive'."[29] Even the concept of the "clear meaning" of an expression, based on the maxim of *in claris non fit interpretatio*, does not invalidate the affirmation that the court provides content to norms. The clarity or obscurity of a term does not reside in the term itself, but in determining whether or not the expression in question is an object of an actual social convention and is strongly expressed in the legal culture of the interpreter so that the correlation between the expression and its content would operate almost automatically.

The intention of the reader may contribute to increasing the *hiatus* between the content of the treaty and the intention of the empirical authors. For partisans of the traditional theory, this is a factor that increases the legal uncertainty of international relations, because, according to them, interpreter creativity presents a high risk of uncertainty regarding the meaning of norms, and the demands of systemic coherence would be threatened in the event the interpretive power of the court were unlimited.[30] However, this alleged legal uncertainty is not the exclusive result of the will of the decision-making entity regarding a text; it is also fruit of the ambiguities and vagueness inherent to linguistic signs – even more so in an increasingly more multilingual and multicultural social system.

In any case, in order to avoid the hiatus between what the empirical author meant to say and what the empirical reader says, both subjects should concentrate on the *text*. It is up to the author, when establishing the treaty, to propose the discursive basis on which the reader must carry out the interpretation of such treaty, keeping in mind the application of law. The reader, in turn, limited to the semantic possibilities of the expressions established by the author, and through interpretation expressed in the decision, must not only retrofeed the legal discourse in the source text, but also put other discursive hypotheses forward.[31]

---

[29] D. Simon, *L'interprétation judiciaire des traités d'organisations internationales*, op. cit., at. 116.

[30] Kelsen warned against the impossibility of a certain method bringing out, from among all various possibilities of meaning, the 'correct' meaning of a norm. Kelsen (1998), at. 391. With this statement, Kelsen is not advocating the idea of unlimited semiosis of norms or an exaggeration of the rights of the interpreter. The "various verbal meanings" alluded to are not all those meanings covered by an entire series of interpretants *ad infinitum*, but the "possible meanings". (Cf. loc. cit.). Kelsen attributes to what he calls "scientific interpretation" the duty of describing, and not prescribing, all the meanings attributable to a norm. Losano understands – and we agree – that it is impossible to attain the intended interpreter neutrality required by Kelsen's scientific interpretation. This would require a subject immune to all historical circumstances. Cf. Losano (1981), at. 115–116. A *Pure Theory of Law* does not proceed with the examination of the processes of interpretation that would reveal which would be the possible meanings of a norm. More than the *process*, Kelsen is concerned with the *result* of the interpretation, which would be derived from the will of entity enforcing the law. (H. Kelsen, *Teoria pura of the direito*, op. cit., at. 392). The problems regarding the intentions of the author and of the reader cast a shadow over the silence of Kelsen's doctrine and remain as an uncomfortable absence in his theory insofar as they are put in check by the 'scientific nature' of an interpretation termed legal and scientific.

[31] According to Timsit, the norm "is the result of – a silent, but real – 'dialog' that continually takes place between the author, subject of the norm, and reader: 'dialogism' of the law, co-determination of the norm . . . This co-determination is common to the set of legal norms" (Timsit, 1991), at. 105.

If the author should decide that a certain reading path is to prevail, while drafting the treaty, he should be concerned with eliminating the maximum number of other possible interpretations, so that if the reader attributes term |x| a meaning «y» it would be because this connotation is allowed *by the text*. Therefore, if the reader concentrates on what the text says – and not on what he, the reader, would like it to say – there will be a greater chance of the interpretation agreeing with the intentions of the author. The decision-making discourse would then be the result of cooperation between those that produce it and the authors of the diplomatic text from which it is derived.

However, in order for this cooperative relationship to work, the empirical reader must not obfuscate the subject of the utterance with the information the reader has on the empirical author as the subject of the enunciation. This risk, Eco warns, makes textual cooperation dangerous.[32] In order to avoid it, the object to which the diplomatic text refers (a culturally existing object) must be intersubjectively verifiable by both authors and readers in the light of linguistic context. This textual cooperation should not be understood, however, as actualizing the intentions of the empirical subject of the enunciation, but rather as the "intentions contained in the utterance".[33] In other words, the aforementioned textual cooperation can only take place by means of the Author and Model-Reader suggested in the text. In the interpretive act, the intention that the reader attributes to the author is actually the intention of the Model-Author that the text helps to build. This is because the real reader does not have access to the real intention of the empirical authors. As a result, we are left with the question: How can the existence of a certain intention be attributed to an imagined subject? An answer would be: The intention is not the intention of the Model-Author imagined by the reader, but the intention of the *text* itself.

## 10.4 Interpretation as the Search for *Intentio Operis*: An Equidistant Method Between *Intentio Auctoris* and *Intentio Lectoris*

We have seen that interpretation, as the mere search for the author's intention, is strictly limited due to the difficulty in discovering what was the real intention of the author. On the other hand, we have also seen that the text requires the cooperation of the reader as a condition for actualizing the text. Both the search for the author's and the reader's intention may result in providing an interpretation that *goes beyond*

[32] U. Eco, *Lector in fabula*, op. cit., at. 46. We understand that this obfuscation occurs precisely because the reader, influenced by perceptions or prejudices regarding the subject of the utterance, creates an idea of the Model-Author that does not correspond to the subject of the utterance.

[33] Ibid., at. 62. The author reinforces this position by affirming that "textual cooperation is a phenomenon that takes place, we repeat, between two discursive strategies and not between two individual subjects" (Ibid., at. 63).

the scope of legal discourse, thus excessively broadening the number of possible reading paths, which can result in disfiguring what the subject of the utterance says, in other words, what the text says.

Eco suggests that between the author's intention – which is difficult to discover and is in general irrelevant to text interpretation[34] – and the interpreter's intention, who can strip the meaning of text for personal ends, there is a third possibility: the intention of the text. Eco's semiotics thus articulates a trichotomy among interpretation as the search for *intentio auctoris*, interpretation as an imposed *intentio lectoris*, and interpretation as the search for *intentio operis*.[35] In the latter case, what the text says is investigated based on context and on the signification systems it refers to.

According to Collini, the provocative concept of *intentio operis* restricts the freedom resulting from the *intentio lectoris*.[36] A way of conjecturing about the *intentio operis* is to check the text as a coherent whole. From this standpoint, as Eco points out, a certain interpretation of a certain part of the text can be accepted if it is confirmed by another part of the same text. To the contrary, it should be rejected.[37] This interpretation methodology was adopted in international law in the Vienna Convention, and later endorsed by the Convention of 1986.[38] Article 31, § 1 stipulates that "a treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its object and purpose". (Emphasis added.) According to Kohen, this provision makes the text of the convention prevails and "has contributed decisively to the foreseeability of conventional obligations, eliminating any and all subjectivism in determining their resulting obligations."[39]

The ICJ accepts the preeminence of the textual method and has affirmed that interpretation should, *above all,* be based on the text of the treaty itself.[40] The

---

[34] U. Eco, *Interpretação e superinterpretação*, op. cit., at. 29.

[35] See also Eco (1998), at. 29 et seq.

[36] S. Collini, "Introdução: interpretação terminável e interminável." In: U. Eco, *Interpretação e superinterpretação*, op. cit., at. 11. For example, to say that |subsidy| has the qualities of «government financial support», «benefit» and «specificity» is not the interpreter's personal decision, since, objectively, these qualities have already been attributed to the term and have been incorporated into the reader's cultural inventory. The interpreter building the content for |subsidy| is not something that takes place at the interpreter's sole discretion.

[37] U. Eco, *Interpretação e superinterpretação*, op. cit., at. 76.

[38] The *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, May 21, 1986.

[39] M. G. Kohen, "La codification du droit des traités: quelques éléments pour un bilan global" *Revue Génerale de Droit International Public* 104/3 (2000), at. 598.

[40] Decision of the ICJ, *Affaire du Différend Territorial* (Jamahiriya Arabe Libyenne/Tchad), February 3, 1994, paragraph 41; see also *Affaire de la Délimitation Maritime et des Questions Territoriales entre Qatar et Bahreïn* (Qatar c. Bahreïn), ICJ, *Arrêt* of February 15, 1995, paragraph 33; *Affaires des Plates-formes Pétrolières* (République islamique d'Iran c. Etats-Unis d'Amérique), preliminary exception, *arrêt*, December 12, 1996, ICJ., paragraph 23; *Affaire de L'Île de Kasikili/Sedudu* (Botswana/Namibie), *arrêt*, ICJ., December 13, 1999, paragraph 18.

preparatory work of a treaty and the circumstances of its conclusion and the elements of interpretation based on a subjectivist approach would be resorted to as a secondary source. Therefore, they are not to be considered indispensable.[41] According to the ICJ and as Simon explains, the recourse to preparatory work and the historical circumstances would only have "a confirmatory or supplementary value".[42] This assertion is supported by Article 32 of the Vienna Convention of 1969, which says:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to *confirm* the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. (Emphasis added)

Supplementary interpretation resources merely *confirm* – and do not determine – the meanings of the norm as a result of the interpretative activity, which is based on what is actually stated in the conventional discourse analyzed.

In the WTO, on the dispute *Japan – Taxes on Alcoholic Beverages*, the Panel stated, based on Article 32 of the Vienna Convention, that recourse to supplementary means of interpretation was necessary only exceptionally and in specific circumstances.[43] If interpretation as the search for *intentio auctoris* is not completely

---

After highlighting that the provisions of the Vienna Convention on the Law of Treaties may be applied analogously to cases of interpretation of statements of unilateral acceptance of jurisdiction, the ICCJ affirmed that all interpretation "must be interpreted as it is presented, *taking into account the words as actually employed*" (Anglo-Iranian Oil Co., preliminary exception, *arrêt*, ICJ, Recueil 1952, at. 105. Emphasis added.).

[41] The ICJ confirmed this understanding when examining the dispute between Indonesia and Malaysia concerning the sovereignty over Ligitan and Sipadan Islands: "the Court does not consider it necessary to resort to supplementary means of interpretation [. . .]to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention"*Affaire Relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)*. ICJ, *Arrêt* December 17, 2002, paragraph 53.

[42] D. Simon, *L'interprétation judiciaire des traités d'organisations internationales*, op. cit., at. 107.

[43] (WT/DS/8/R – WT/DS/10/R – WT/DS/11/R. *Japan – Taxes on Alcoholic Beverages*. Panel's Report of July 11, 1996, footnote n. 87, at. 140). It must be noted however that the preparatory work and the historical circumstances serve as means of confirming the interpretations given by the Appellate Body. For example, in *Canada – Certain Measures Concerning Periodicals*, regarding the interpretation of Article III:8, *b*, of the GATT 1994 (WT/DS31/AB/R, at. 38. Report adopted by the DSB on July 30, 1997); and in *European Communities – Customs Classification of Certain Computer Equipment*, the Appellate Body expressed: "The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to: '. . . supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.' With regard to 'the circumstances of [the] conclusion' of a treaty, *this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated*." (WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R, paragraph 86. Emphasis added. Report adopted by the DSB on June 22, 1998.).

outside the scope of the Vienna Convention,[44] it at least plays a secondary role as a method of interpretation. According to Brotons,

> An interpretation based on historical elements, subjectivist in nature, will never take the place of a reasonable interpretation deduced from a text, which, in the opinion of the decision-making body, is considered clear. If the meaning of a clear text is reasonable, there are no grounds for invoking the preparatory work, or other circumstances surrounding the signing of the treaty, in order to change the interpretation.[45]

According to Combacau and Sur, "the preparatory work, which is not necessarily published, does not completely clarify the exact motives of the negotiators and usually address the process or history of the convention more than its content".[46] Without denying the importance of the intentions of the parties, the authors understand that the Vienna Convention has demonstrated an "apparent preference for text",[47] meaning that the textual manifestation supplies an objective basis for interpretation "as though the text acquired an autonomous and independent scope from the motives and subjective intentions of the parties".[48]

The Vienna Convention stresses in interpretation as the search for *intentio operis*. Thus, interpreting begins with an analysis of the terms of the treaty in their "ordinary meaning".[49] It is a linguistic procedure that, for this reason, should take into account not only the lexical elements (vocabulary), but also the grammatical elements (syntax). However, as the ICJ pointed out in accordance with Article 31, "words must be interpreted according to their natural and ordinary meaning within

---

According to Canal-Forgues, these and other cases do not express the preference of the Appellate Body and of the panels of referring to preparatory work. Cf. *Le règlement des différends à l'OMC*, op. cit., at. 99.

[44] See paragraph 4 of Article 31 of the Vienna Convention of 1969: "A special meaning shall be given to a term if it is established that the parties so intended."

[45] Additionally, the author states that "it is not possible, on the other hand, to ask the *preparatory work* what they cannot provide: to overcome the obscurity or ambiguity in a text when the parties created them on purpose, even if aimed at furthering negotiations or leaving open escape routes. On the contrary, resorting to *preparatory work* may serve only to render the interpreter more blind." A. R. Brotons, *Derecho internacional público*, op. cit., at. 315, original emphasis. According to Brotons, the Vienna Convention of 1969 intended to block recourse to unequal, heterogeneous, or even contradictory materials, accumulated in the long process of negotiation, in order to rebut a clear and reasonable interpretation resulting from the text of the treaty.

[46] J. Combacau; S. Sur, *Droit international public*, op. cit., at. 176. According to Dinh, " it is interesting to find that, although it can reflect the intentions of the parties, the *preparatory work* that, due to particularities of the procedures of international negotiations, is chaotic, confidential, and have little probative force; it intervenes only to confirm an interpretation obtained by other means, or when these means do not enable a 'useful effect' be extracted." N. Q. Dinh, *Droit international public*, op. cit., at. 261–262.

[47] J. Combacau; S. Sur, op. cit., at. 176.

[48] Id., loc. cit.

[49] In this paper, the phrase "ordinary meaning" can also be used as "common", "actual" or "usual meaning". It is important to point out that in the search for the ordinary meaning the interpreter should pay attention to the cases in which the expression has a specific or technical meaning.

the *context* in which they are found".[50] Therefore, decodification cannot do without an examination of the context in which the word or phrase to be interpreted is being used.

According to Brotons, interpretation begins with a textual analysis of the provisions of the convention and "opening up in increasingly wider and consecutive circles" it would continue in the direction of its content and, then, in the direction of other relevant instruments. "It starts, therefore, from the center and then advances in the direction of the middle and external layers of the convention or agreement."[51] According to this procedure, it is perfectly reasonable to assume that the results of the interpretation of a text may be different according to the contexts considered. However, this does not mean there is a hierarchy in the *text* and *context* relationship where the latter defines the former. There is a relationship of mutual influence between the two, as Eco pointed out: "one cannot think of the sign without seeing it in some way characterized by its contextual destiny, but at the same time it is difficult to explain why a certain speech act is understood unless the nature of the signs which it contextualizes is explained".[52] Taking this into account, we agree with Timsit to whom "a text can only be read within its context".[53] However, it is in determining the size of this context where an essential task of the interpreter resides. According to Simon,

> The size of context is not in the least pre-determined and may vary completely according to what is taken into consideration during interpretation, it may be the phrase where the term is inserted, the letter, the article as a whole, the articles immediately preceding or following, the section or chapter, alone or as a result of its place in the text of the agreement, the totality of the treaty, including the preamble, the other treaties between the parties relative to an analogous object, or even the entire body of international law in effect.[54]

The Vienna Convention states that the concept of |context| shall include the text of the treaty, together with its preamble and attachments, as well as "any agreement

---

[50] Emphasis added. *Affaire du Temple de Préah Vihéar*, exceptions préliminaires, Arrêt, May 26, 1961, at. 32.

[51] A. R. Brotons, *Derecho internacional público*, op. cit., at. 310. The 'view' of the context enables the interpreter to choose one among the possible meanings of an expression. Furthermore, context prevents the interpreter from making the mistake of confusing the *ordinary* meaning with the *vulgar* meaning of a term. According to Brotons, "the ordinary meaning of a term in the legal context, conventional or specialized, will often be technical or specialized." (Ibid., at. 310).

[52] U. Eco, *Semiotics and the Philosophy of Language*, op. cit., at. 22.

[53] G. Timsit, *Les noms de la loi*, op. cit., at. 139.

[54] D. Simon, *L'interprétation judiciaire des traités d'organisations internationales*, op. cit., at. 135. Timsit also discusses what can be considered context: "When a text has an objective reference to another text – an explicit reference or applied text, for example, – or is objectively connected to another text – a common insertion of two texts in the same set making a formal unit: a same law or a same code (in the traditional and legal meaning of the word) –, one can consider the texts in question form each others' context. The situation is, often, much less marked. There is no objective reference, or any connection enabling one to objectively decide on the size of the context. In this case, the interpreter/enforcer of the norm must decide which elements should be considered in the context of reading the text." *Les noms de la loi*, op. cit., at. 139.

concerning the treaty and that has been established by all the parties regarding the conclusion of the treaty" and "any instrument established by one or more of the parties on the occasion of the conclusion of the treaty and accepted by the other parties as an instrument concerning the treaty".[55] This context corresponds to the facts of reference used by the interpreter to comply with the interpreter's jurisdictional function. It is up to the interpreter to select them. Once the contextual selection is done, the context itself becomes a text to be interpreted. It is encompassed by the set of legal-diplomatic discourses of which the international judge must be aware. Text and context, thus, become one, single, wider text.

The concept of interpretation as the search for the *intentio operis* falls upon the entire text selected by the interpreter, and thus creates a universe of discourse that enable conjecturing about possible interpretations. The very textual manifestation prescribes or suggests which contents of a given term or phrase should be included or excluded. However, when Eco states that "it is in the text that meaning is given, and prior to text, terms have no meaning",[56] he implicitly assumes the role played by the reader in construing the meaning. It is the reader who attaches content to the norms, despite the fact that the words and phrases have been supplied by the authors of the treaty. Therefore, to speak of *intentio operis* is only possible in light of the difficulties in knowing the intention of the subjects of the enunciation and in virtue of the greater feasibility in estimating the intentions of the subjects of the utterance that amalgamate, to a higher or lower degree, with the Model-Author projected by the reader interpreter. According to Eco, the search for the intention of the text controls the reader's impulses, which would otherwise be uncontrollable.[57]

---

[55] Article 31, § 2 of the Vienna Convention of 1969. It is important to point out that in the terms of paragraph 3 of the same Article, together with the context, the following also must be taken into account: "(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties."

[56] U. Eco, *O conceito de texto*, op. cit., at. 96. The author explains that "the way the text establishes which properties should be disregarded and which should be taken into account, is not part of the semantic representation of terms, but of some strategies according to which the text prescribes the topic of the very text, and the set of pre-text and intertext assumptions that will apply and act in order to make the operation of narcotizing and blowing up sememes possible and establish textual coherence in the amalgam of chosen and relevant sememes." (Loc. cit.).

[57] Idem. *Interpretação e superinterpretação*, op. cit., at. 76.

# Chapter 11
# The Decision-Making Discourse of the Appellate Body: Treaties and Dictionaries as Referents

## 11.1 Resorting to the Vienna Convention and the Prevalence of Ordinary Meaning

The jurisdictional function of the Appellate Body, pursuant to Article 17.6 of the DSU, shall be limited to the examination of questions of law and legal interpretation formulated in the Panel's report. Its decision-making process is not facts-oriented, but text-oriented. As a result, the decision-making discourse of the Appellate Body does not make statements of the kind «the supposition of fact *F* falls within the area of application of provision *D*», but rather, «*D* means *N*».[1] In other words, "*D*" represents a provision in the expression plane of a norm and *N* corresponds to the content chosen by the members of the Appellate Body as having the meaning of *D*.

Determining the meaning of words and phrases employed by a treaty's authors requires uniform procedures with the aim of solving the issues posed by the convention having been drafted in several languages. A treaty may even establish a hierarchy among the languages of the different versions. The DSU does not lay down specific rules regarding this question. It simply establishes that, according to Article 3.2, the WTO dispute settlement system is useful to "clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law*" (emphasis added). However, the provision does not state which customary rules of interpretation should be adopted. In the absence of any legal guidance regarding this issue, Simon explains that "the interpreter should present his own solutions for reconciling and prioritizing texts written in different languages, recognized by the convention."[2] The aim of this section is to examine how the Appellate Body has faced this question.

---

[1] The Appellate Body is not a "trier of fact". Factual conclusions are the domain of the Panels, and shall not, in principle, be the object of appeal. However, the distinction between "fact" and "law" is not easily established. Take for example the Appellate Body on European *Communities – Measures Concerning Meat and Meat Products (Hormones)* (WT/DS26/AB/R – WT/DS48/AB/R, paragraph 132. Report adopted by the DSB, February 13, 1998).

[2] Simon (1981), at. 104.

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9_11, © Springer Science+Business Media B.V. 2011

In its first report, regarding the dispute *United States – Standards for reformulated and conventional gasoline*,[3] the Appellate Body established the interpretative method that would prevail in its subsequent reports. It stated on the occasion that Article XX of the 1994 GATT has to be interpreted according to "the fundamental rule of treaty interpretation", regarded as having been neglected by the Panel.[4] The referred rule is set forth by Article 31.1 of the Vienna Convention. According to the Appellate Body,

> That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other 'covered agreements' of the Marrakech Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.[5]

The Appellate Body decided to recognize the authority of the Vienna Convention due to the lack of provisions in WTO law specifically about interpretation rules to be observed by the decisional bodies. The Appellate Body understands that the norm contained in Article 31 of the aforesaid convention is part of customary international law and serves as a reference for the clarification of the content of the rules concerning the WTO's Agreements. In the second report, regarding the dispute *Japan – Taxes on alcoholic beverages*, the Appellate Body added Article 32 of the same Convention as a customary rule of international law.[6] This provision establishes supplementary rules of interpretation. Both of the abovementioned articles were regarded as "highly relevant" in examining the appeal.[7]

It can be noticed that since the beginning of its work, the Appellate Body has established what should be understood as |customary rules of interpretation of public international law|. Reference to the Vienna Convention takes the WTO away from its *clinical isolation* in the international legal system and is the general justification for the frequent adoption of the principles and rules of public international law that followed in subsequent reports.

By referring to Article 31.1 of the Vienna Convention, the Appellate Body defines as a basic rule that the terms of a treaty must be interpreted in accordance

---

[3] WT/DS2/AB/R. *United States – Standards for reformulated and conventional gasoline*. Report adopted by the DSB on May 20, 1996. The Division of the Appellate Body that examined the case was comprised of Florentino P. Feliciano (Chairman), Christopher Beeby and Mitsuo Matsushita.

[4] Ibid., at. 14.

[5] WT/DS2/AB/R. *United States – Standards for reformulated and conventional gasoline*, at. 14–15.

[6] WT/DS8/AB/R – WT/DS10/AB/R – WT/DS11/AB/R. *Japan — Taxes on alcoholic beverages*, at. 12. Report adopted by the DSB on November 1, 1996. The Division of the Appellate Body for the case was comprised of Julio Lacarte-Muró (Chairman), James Bacchus and Said El-Naggar.

[7] Ibid., at. 13.

with three criteria: (1) ordinary meaning, (2) context of the term or phrase in question, and (3) object and purpose of the treaty.[8] According to Ehlermann,

> among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e., 'the ordinary meaning of the terms of the treaty'. [. . .] The second criterion, i.e., 'context' has less weight than the first, but is certainly more often used and relied upon than the third, i.e., 'object and purpose'.[9]

When the Appellate Body states that "the *words* of the treaty form the foundation for the interpretive process",[10] it considers that the words used in the legal provision being scrutinized offer the basis for an interpretation capable of providing meaning and effect to the legal text. The adequate interpretation is "first of all, a *textual* interpretation", it adds.[11] This understanding means that the Appellate Body essentially considers interpreting to be a search for the *intention operis*. However, the *intentio auctoris* is not completely left aside. In *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the Appellate Body stated that "the duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties",[12] and in *European Communities – Customs Classification of Certain Computer Equipment*, the Appellate Body ruled that "the purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties". Nevertheless, just after it warned that "these *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty".[13]

Notwithstanding these statements, the Appellate Body does not lose sight of what the legal-diplomatic text *says,* since the Appellate Body provides that the principles of interpretation as stated in *Article* 31 of the Vienna Convention, "neither require

---

[8]The Appellate Body states that one of the corollaries of the "general rule of interpretation" of the Vienna Convention is that the interpretation must provide both meaning and effect to all the terms of the treaty (WT/DS2/AB/R. *United States – Standards for reformulated and conventional gasoline*, at. 20). It establishes a fundamental principle for the interpretation of treaties: *usefulness*. Therefore, when a treaty is prone to two interpretations, goodwill, and the need to meet the ends of the treaty in question require adopting the interpretation that enable the originally intended effects of the convention to take place. According to Brotons, "*object* and *end* are the most celebrated and coinciding duo of the Law of Treaties. Some have mistaken the two as synonymous. Others seem to believe the *object* is absorbed by the *ends*. Both opinions are inaccurate. Object and ends make up an interpretation criterion in which the first element – the *object* – plays a role of realism and moderation, and the second element – the *end* – the role of idealism and progress. One is ember; the other is smoke." *Derecho internacional público*, op. cit., at. 313.

[9]Ehlermann, Claus-Dieter. "Six years on the bench of the 'World Trade Court'", op. cit., at. 615–616.

[10]WT/DS8/AB/R – WT/DS10/AB/R – WT/DS11/AB/R. *Japan — Taxes on alcoholic beverages*, at. 11. Emphasis added.

[11]Ibid., at. 17, Emphasis added.

[12]WT/DS50/AB/R, paragraph XLV. Report adopted on January 16, 1998.

[13]WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R, paragraph 84. Report adopted on 22, 1998. Emphasis in the original.

nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[14] The text is the ground for interpretation. Hence, the search for the *intentio operis* becomes a method to prevent exorbitant interpretations resulting from an exaggeration in the search for the *author's intention* or the inappropriate imposition of the *reader's intention*.[15]

The declarations of Lacarte-Muró, a former member of the Appellate Body, support the notion of the interpretive act as the search for the intention of the text. When asked about which intentions prevail in the Appellate Body's decision-making process, he answered: "The negotiator's intention does not apply. The text – and this I believe has been the understanding of my colleagues as well – does. The only text that applies is the one which has been consigned, that is the one which has been ratified by the parliaments. Only what is written serves me".[16] According to Ehlermann, also a former member of the Appellate Body, the transparent choice of this interpretation method and the "clear option in favor of a predominantly literal approach",[17] have produced important consequences regarding both the conditions of efficacy of the Appellate Body's internal works and the reports. In Ehlermann's opinion, the importance given to the ordinary meaning of the treaty's terms has been a "precious guidance" to the Appellate Body members in the exercise of their jurisdictional functions, and has contributed to the consistency and coherence of its reports. Such interpretation method is aligned with the security and transparency of the multilateral trade system.[18]

These observations would seem trivial if the literal interpretation method were admittedly the only method predominantly adopted by all of the international decision-making bodies – which is indeed not the case. Ehlermann himself, an experienced jurist in EU law, made the following comment:

> I do not remember that the ECJ [European Court of Justice] has ever laid down openly and clearly the rules of interpretation that it intended to follow. What I do remember is

[14] WT/DS50/AB/R, paragraph XLV. The Appellate Body stated that "the Panel in this case has created its own interpretative principle, which is consistent with neither the customary rules of interpretation of public international law nor established GATT/WTO practice. Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement" (Ibid., paragraph XLVI).

[15] Recognizing that the Panel's interpretation decision would lack grounds in the scope of the Sanitary and phytosanitary measures, the Appellate Body declared: "It appears to us that the Panel reads much more into Article 3.3 [of the SPS Measures] than can be reasonably supported by the actual text of Article 3.3." Further along the AB stated, "the fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used." WT/DS26/AB/R – WT/DS48/AB/R. *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, paragraphs 168 and 181, respectively.

[16] Lacarte-Muró, J., Interview granted to Evandro Menezes de Carvalho. Recife, Brazil, 21 May 2004.

[17] Ehlermann, C.-D., "Six years on the bench of the 'World Trade Court'", op. cit., at. 616.

[18] Cf. id., loc. cit.

> that among the interpretative criteria effectively used by the ECJ, the predominant criterion was – and probably still is – 'object and purpose'. While the Appellate Body clearly privileges 'literal' interpretation, the ECJ is a protagonist of 'teleological' interpretation.[19]

It cannot be denied that the literal interpretation method has its limits and, for this reason, resorting to other methods might become necessary.[20] However, interpretation based on the ordinary meaning has indeed protected the Appellate Body from being accused of expanding or restricting the rights and obligations under the covered agreements. Therefore, the literal method has contributed to the legitimacy of Appellate Body reports. Nevertheless, this methodology has not solved the question of interpreting agreements made in different language versions. Hence, resorting to the Vienna Convention could solve the lack of a formal provision or ruling on the matter within the WTO law. Article 33 deals with the interpretation of treaties authenticated in two or more languages. Paragraph 1 sets forth that: "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail".

The equality among the authenticated texts is presumed, except for cases when a legal rule determines the primacy of one over the other(s). However, the DSU does not establish any hierarchy among the languages used in WTO Agreements. Thus, it can be stated that, besides the texts drafted in English, the ones drafted in French and Spanish are *equally authentic* – i.e. have the same legal value – without one legally prevailing over another. Hence, both French and Spanish are also considered official languages within the scope of the WTO.

---

[19] Cf. id., loc. cit.

[20] Article 31 of the Vienna Convention of 1969 not only upholds interpretation based on the text, but also on objectives and ends. Furthermore, Article 32 of the Vienna Convention leaves open the possibility of resorting to supplementary means of treaty interpretation, to which the Appellate Body has resorted only scarcely. According to Ehlermann, "the low value of the negotiating history results from the secondary rank attributed to this criterion by the Vienna Convention, the lack or reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties" (op. cit., at. 616). Upon interpreting Article XX of the GATT, which deals with the exceptions to the rules of the said agreement, the Appellate Body expressed that "In our view, the language of the chapeau [of Article XX of the GATT] makes clear that each of the exceptions in paragraphs (a)–(j) of Article XX is a limited and conditional exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau. *This interpretation of the chapeau is confirmed by its negotiating history*." (WT/DS58/AB/R. *United States – Import prohibition of certain shrimp and shrimp products*, paragraph 157. Report adopted by the DSB on November 6, 1998. Emphasis added.). And further stated that: "Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention" (Ibid., footnote no. 152). See also Appellate Body reports for the controversies: *European Communities – Customs Classification of Certain Computer Equipment* (WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R, paragraph 92. Report adopted on June 22, 1998), and *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103/AB/R – WT/DS113/AB/R, paragraphs 132, 138 and 139. Report adopted by the DSB on January 17, 2003).

In order to solve interpretation problems concerning multilingual texts, paragraph 3 of Article 33 states that "the terms of the treaty are presumed to have the same meaning in each authentic text". This was precisely what the ICJ did when interpreting the *Friendship, Commerce and Navigation Treaty* of 1948 in a dispute between the United States and Italy. On the occasion, the ICJ ruled that it was possible to interpret the English and Italian versions "as significantly meaning the same thing", despite a possible divergence on the scope of the expressions in question.[21] This *discoursive unity* assumption many times does not withstand a strict analysis of the semantic components involved in the texts. To state the contrary is to admit the possibility of there being full and complete equivalence among the chains of interpretants resulting from expressions belonging to different languages and legal cultures. Nonetheless, in cases where there is a situation of insolvable discrepancy among the versions, Brotons claims that:

> The priority of one among the authenticated texts, having the effort towards their compromise failed, is determined by the parties catering for rather diverse motivations (the spread of a language, its technical appropriateness, the superiority during the negotiation process, third-party participation in the process and their relation with the other parties…) and is usually expressed *eo nomine* or concerning the fulfillment of a goal.[22]

In the WTO, having been the negotiations carried out in English was one of the reasons why English became the prevailing language in the interpretation of covered agreements. As Lacarte-Muró points out: "although the texts in Spanish and French exist and have the same value as the English text, it should be remembered that the negotiation of the texts was conducted in English". Therefore, he believes that "it is the English text which reflects best what the negotiation [of the WTO Agreements] was like". His argument emphasizes that "there is a clear tendency to search for subtle interpretations in the English text; i.e. when a discrepancy of interpretation concerning the English, the French or the Spanish is detected, everybody is aware that the English version is the *most authentic*"[23] (Emphasis added.). It is not a matter of establishing multiple degrees of authenticity for the languages of a treaty – especially since there is no grounds for doing so according to the Vienna Convention or to WTO law – but rather a matter of conferring greater legitimacy

---

[21] The difference between the English term "interests" and the Italian terms "diritti reali" were discussed. According to the ICJ, "'Interest' in English no doubt has several possible meanings. But since it is in English usage a term commonly used to denote different kinds of rights in land (for example rights such as charges, or easements, and many kinds of 'future interests'), it is possible to interpret the English and Italian versions of Article VII as meaning much the same thing; especially as the clause in question is in any event limited to immovable property." *Case concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, 20 July 1989, ICJ, paragraph 132.

[22] A. R. Brotons, *Derecho internacional público*, op. cit., at. 316.

[23] Lacarte-Muró, J., Interview granted to Evandro Menezes de Carvalho. Recife, Brazil, 21 May 2004. The Ambassador further said, "What happens in the interpretation of texts? In general, one does not refer to the translated text, that is, to French or Spanish versions, because the original text of the negotiation was obviously written in English; and even if the translators were very good, and even if the Spanish and French versions of the text are just as legitimate, just as legitimate as the English version, subconsciously, it is known that the pact was done in English, the wording selected in English, and the negotiations were conducted in English."

to the English text due to the fact that the multilateral negotiations are carried out in this language. And this, by no means, invalidates what is set forth in Article 33 of the Vienna Convention. The possibility of resorting to Article 33 remains. After all, WTO members have been strived to avoid any trace of hierarchy among equally authenticated texts.

Interpretation based on texts drafted in French or Spanish is therefore perfectly legally grounded, despite the relative legitimacy attached to them. The following topic will examine how the interpretative practice of the Appellate Body has addressed this issue.

## 11.2 English-Language Based Dictionarization of the Decision-Making Discourse of the Appellate Body

We begin this topic by addressing the dispute *Canada – Measures Affecting the Export of Civilian Aircraft*.[24] In this controversy, the Canadian government, after claiming that the Panel had not applied treaty interpretation principles according to the Vienna Convention, claimed that the Panel had erred in concluding that the provisions under Article 14 of the Agreement on Subsidies and Countervailing Measures (ASCM) established criteria to determine the "benefit" under Article 1.1(b) of the same document.[25] This provision, entitled "Definition of a Subsidy", reads:

> 1.1. For the purpose of this Agreement, a subsidy shall be deemed to exist if: a.1) there is a *financial contribution by a government or any public body* within the territory of a Member (referred to in this Agreement as "government") [. . .] and b) a *benefit* is thereby conferred (Emphasis added)

In light of this article and considering the abovementioned controversy, a subsidy is defined as a financial contribution,[26] granted by government, and resulting in a benefit to the recipient.[27] In interpreting the term |benefit|, the Panel concluded that:

---

[24] WT/DS70/AB/R. Appellate Body Report adopted by the DSB on August 20, 1999. The Division was composed of James Bacchus (Chairman), Florentino Feliciano, and Mitsuo Matsushita.

[25] Article 14 of the ASCM deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient.

[26] The concept of |financial contribution| is broad and has deserved elaboration in Article 1 of the ASCM. According to the terms of the Article, financial contribution by government takes place when "(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i)–(iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." It is clear that the term is not restricted to the notion of the direct transfer of government money to the recipient, but also includes the government measures that indirectly transfer capital, whether by not charging taxes due by the recipient, or by supplying specific and privileged infrastructure to a firm or productive segment, or by the mere possibility of transferring resources that encourage the recipient to take on risks that it would not take under normal market conditions.

[27] A government financial contribution must hold up to the *specificity* test. According to paragraph 2 of Article 1 of the ASCM, "A subsidy as defined in paragraph 1 shall be subject to the provisions

> [. . .] the ordinary meaning of "benefit" clearly encompasses some form of advantage. [. . .] In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a "benefit", i.e., an advantage, it is necessary to determine whether the financial contribution places the *recipient* in a *more advantageous position than would have been the case but for the financial contribution*. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the *market*. Accordingly, a financial contribution will only confer a "benefit", i.e., an advantage, if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market*.[28]

Canada contextualized the term in question, based on Article 14 of Annex IV to the ASCM. This provision establishes commercial criteria to determine whether the subsidy represents a gain to the subsidized entity. According to the criteria, there is no "benefit" when the subsidy is compatible with market practices. Furthermore, the Canadian government attached the notion of "cost to government" to the concept of "benefit" under Annex IV.[29] To Canada, it does not suffice that the subsidy be granted under more favorable conditions than those practiced in the market, thus resulting in a benefit to the recipient. To Canada, the financial contribution from government must also represent a burden to the public treasury. In other words, to the economic advantage given to the recipient, there must be a corresponding cost to the government granting the financial contribution.

Brazil refuted this interpretation. Among other arguments, Brazil understood that the "cost to government" criterion in Annex IV does not apply to situations in which government provides financial resources at a lower tax, in comparison to the tax charged by a private investor.[30] The understanding of the Panel corroborates

---

of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is *specific* in accordance with the provisions of Article 2." (Emphasis added). This is to determine whether the subsidy granted suspiciously or discriminately privileges certain to companies or productive segments, to the detriment of others; or, on the contrary, if it the subsidy obeys the criteria or objective conditions that govern the right to obtain government aid. In this case, the subsidy may be compatible with the objectives and principles of the WTO. Therefore, to qualify as a government measure as being a "subsidy", there must be a *financial contribution*, together with *specificity,* and the *benefit* of certain enterprises. The lack of government financial contribution, advantage, or specificity, determines there is no subsidy. Confirming the presence of the first two criteria, and there being no specificity, the subsidy is, in principle, allowed and should not be rejected by the WTO system.

[28] WT/DS70/R, April 14, 1999. Panel report, paragraph 9.112 and 9.120, emphasis added.

[29] According to Annex IV, item 1, "Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government." Article 6 lists the cases in which "serious prejudice" to the interests of a Member is caused by the subsidy of another Member of the WTO.

[30] WT/DS70/AB/R. *Canada – Measures Affecting the Export of Civilian Aircraft*, paragraph 30. According to Brazil the Revenue Canada's Special Import Measures Act Handbook states that: "[I]t is also possible that a benefit would accrue to an exporter or an importer as a result of a government guarantee which would not necessarily result in a cost to the government. The benefit could be a lower interest rate or a loan at a commercial rate which the company would otherwise not get without government involvement." WT/DS70/AB/R. *Canada — Measures Affecting the Export of Civilian Aircraft*, paragraph 9.108.

Brazilian interests. According to the Panel, the contextual relevance of Annex IV is "very different" from that of Article 14. Whereas the latter expressly addresses the amount of an advantage "conferred pursuant to paragraph 1 of Article 1", Annex IV only addresses an *already existing* amount and does not expressly apply to the calculation of a "benefit" in the sense of Article 1.1 of the ASCM.[31]

In dealing with this issue, the Appellate Body examined the ordinary meaning of the expression |benefit| in the following terms:

> The dictionary meaning of "benefit" is "advantage", "good", "gift", "profit", or, more generally, "a favorable or helpful factor or circumstance". Each of these alternative words or phrases gives flavour to the term "benefit" and helps to convey some of the essence of that term.[32]

And then stated the following:

> A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient.[33]

This reading supports the interpretation of Article 1.1(b) of the ASCM from the standpoint of the beneficiary and not from the standpoint of the granting authority. The ordinary meaning of the term |conferred|, in the aforementioned provision, confirms this understanding. Noting that the term in question, based on *The New Shorter Oxford English Dictionary* and on Webster's *Third New International Dictionary*, means to «give», «grant» or «bestow», the Appellate Body decided that the usage of the term in the past participle, associated with the expression |thereby|, "naturally calls for an inquiry into what was conferred on the recipient".[34] As a result, the Canadian argument that the "cost to government" is a relevant aspect to define "benefit" does not correspond to the ordinary meaning of Article 1.1(b) of the ASCM, which emphasizes the *beneficiary* and not the *government* that grants the "financial contribution". This is what the Appellate Body said on the matter:

> the structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the "benefit" to the recipient, and not with the "cost to government". The definition of "subsidy" in Article 1.1 has two discrete elements: "a financial contribution by a government or any public body" and "a benefit is thereby conferred". The first element of this definition is concerned with whether the *government* made a "financial contribution", as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the "financial contribution". That being so, it seems to us logical

---

[31] WT/DS70/R, paragraph 9.116. The Panel stated: "In our opinion, the need to calculate the *value* of a subsidy only arises once the *existence* of the subsidy, and therefore the *financial contribution* and *benefit*, have been established. Because 'benefit' must be established *before* the value of the alleged subsidy may be considered, provisions concerning the valuation of subsidies are not necessarily relevant for the purpose of establishing the existence of a subsidy (and therefore 'benefit')." (Ibid., paragraph 9.116, emphasis in the original).

[32] WT/DS70/AB/R, paragraph 153.

[33] Ibid., paragraph 154.

[34] Ibid., paragraph 154.

> that the second element in Article 1.1 is concerned with the "benefit . . . conferred" on the *recipient* by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a "subsidy" by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that "cost to *government*" is relevant to the question of whether there is a "benefit" to the *recipient* under Article 1.1(b) disregards the overall structure of Article 1.1.[35]

The Appellate Body further noted that the Canadian claim to include "cost to government" in the interpretation of the term |benefit| would thereby exclude the situation under number *iv* of Article 1.1(a.1) of the ASCM. Under number iv, the financial contribution is granted by a private entity under the orientation of government; therefore, there would be no cost to the public. Thus, were Canada's interpretation to prevail, Article 1.1 of the ASCM would become contradictory. In the end, the Appellate Body ruled that the Panel did not err in interpreting the term |benefit| as used in Article 1.1(b) of the ASCM.[36]

In *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*[37] the measures taken by the Canadian government for the commercialization of dairy products were the object of the dispute. The US and New Zealand claimed that these measures clashed with certain provisions under the 1994 GATT, the Agreement on Agriculture, the ASCM and the Agreement on Import Licensing Procedures.[38] The Panel report, distributed to the WTO Members on May 17, 1999, concluded that the price at which industrial milk is made available under Special Classes 5(d) and 5(e), and negotiated by the Canadian Dairy Commission (CDC) directly with exporters, is "significantly lower" than the price of industrial milk destined for domestic use. Therefore, this would represent a subsidy for exports, and would violate the Agreement on Agriculture and Canada's obligations to limit subsidies.

The dispute addressed the interpretation of the phrase |direct subsidies, including payments-in-kind| under 9.1(a) of Agreement on Agriculture.[39] The Panel reported that the payments-in-kind are a kind of direct subsidy.[40] And since these payments

---

[35] WT/DS70/AB/R, paragraph 156. Emphasis in the original.

[36] Ibid., paragraphs 160 and 161.

[37] WT/DS103/AB/R.

[38] The provisions involved were the following: (a) Articles II, X, XI and XIII of the GATT; (b) Articles 3, 4, 8, 9 and 10 of the Agreement on Agriculture; (c) Article 3 of the ASCM; and (d) Articles 2 and 3 of the Agreement on Import Licensing Procedures. WT/DS103/AB/R – WT/DS113/AB/R. Report adopted by DSB on January 17, 2003. The Division was composed of Mitsuo Matsushita (Chairman), Florentino Feliciano, and Julio Lacarte-Muró.

[39] Article 9.1(a) of the Agreement on Agriculture that deals with *Export Subsidy Commitments*: "1- The following export subsidies are subject to reduction commitments under this Agreement: (a) the provision by governments or their agencies of *direct subsidies, including payments-in-kind*, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance; [. . .]" (Emphasis added).

[40] "A determination in the instant matter that 'payments-in-kind' exist would also be a determination of the existence of a direct subsidy." WT/DS103/R – WT/DS113/R. *Canada – Measures*

were made by "Canada's governments or its agencies", and the Panel concluded that "the making available of milk under Classes 5(d) and (e) constitutes an export subsidy within the meaning of Article 9.1(a)".[41]

Canada claimed that |subsidies| should be interpreted as provided for in the ASCM, since in the term is not defined under the Agreement on Agriculture.[42] In addition, Canada also claimed that the Panel had made an error by equating "payments-in-kind" with "direct subsidies" since "a subsidy may take the form of a 'payment-in-kind', but a 'payment-in-kind' is not necessarily a 'subsidy'".[43] Canada understood that the ordinary meaning of |payments| was replaced by a special meaning, according to which |payments| would mean «a gratuitous act, a bounty or benefit provided, for example, in pursuit of a policy objective».[44] Due to this interpretation, Canada claimed that the Panel associated |payments| to «benefit». "In so doing, the Panel has confused the form of a transaction ('payments-in-kind') with its *economic consequences* ('benefit')".[45] Moreover, Canada added that the term |payments|, under letter *c* of Article 9.1 of the Agreement on Agriculture and the expression |payments-in-kind| under letter *a* of the same provision, have different meanings. According to Canada, this interpretation is supported by both the French and Spanish texts of the Agreement.[46]

Referring to the *Oxford English Dictionary*, the Panel considered that the term |payments| under Article 9.1(c) of the Agreement on Agriculture[47] encompassed |payments-in-kind| as established in letter (a) of the same Article, and stated:

---

*Affecting the Importation of Milk and the Exportation of Dairy Products*. Panel report, paragraph 7.43.

[41] Ibid., paragraph 7.87.

[42] According to the Canadian government, the Panel did not take into due consideration the need to offer a coherent interpretation of the two agreements: "The *Agreement on Agriculture* and the *SCM Agreement* are both Multilateral Agreements on Trade in Goods and, in the language of Article II:2 of the *WTO Agreement*, are 'integral parts' of the *WTO Agreement*." WT/DS103/AB/R – WT/DS113/AB/R, paragraph 18. Emphasis in the original.

[43] WT/DS103/AB/R – WT/DS113/AB/R, paragraph 20. According to Canada, it must be determined whether the subsidies are "direct". To Canada, "direct" means "it is funded directly from government funds; it is paid directly to the beneficiary by the government itself; *and* it does not involve the activities of non-governmental actors acting through a government-mandated scheme." And Canada concluded in its behalf: "In this case, since the alleged subsidy is not funded by government, it is not 'direct'" (Ibid., paragraph 19. Emphasis in the original).

[44] WT/DS103/R – WT/DS113/R, paragraph 7.44. According to the Panel, this meaning "is further mandated by the general context of this provision which includes Article 1 of the SCM Agreement" (Loc. cit.).

[45] WT/DS103/AB/R – WT/DS113/AB/R, paragraph 21. Emphasis in the original.

[46] Ibid., paragraph 32.

[47] Article 9.1(c) of the Agreement on Agriculture: "1- The following export subsidies are subject to reduction commitments under this Agreement: [. . .] c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived."

> [. . .] the ordinary meaning of the word "payment" includes both the act of remunerating a person with money and the act of remunerating a person with its equivalent in kind, a so-called "payment in kind".[48]

The Appellate Body reviewed the Panel's report.[49] After examining whether or not economic resources transferred via "payment", as stipulated in Article 9.1(c), must be necessarily made in cash, the Appellate Body stated:

> [. . .] the Shorter *Oxford English Dictionary* describes a "payment" as a "sum of money (*or other thing*) paid". (Emphasis added) Thus, according to these meanings, a "payment" could be made in a form, other than money, that confers value, such as by way of goods or services.[50]

The context of Article 9.1(c) enables |payments| to be interpreted as including |payments-in-kind|. This context also applies to the other letters under the same provision.[51] However, the Appellate Body explained that the latter phrase designates one of the forms of direct subsidy and "denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient".[52] On the other hand, the Appellate Body warned that a mere payment-in-kind made by a government or any governmental entity is not necessarily a subsidy, whether direct or indirect, because |payment| does not always mean «gratuitous act», «bounty» or «benefit». As the Appellate Body noted, these three terms convey the idea that the economic resources transferred via payment are transferred to the beneficiary regardless of any consideration (such as a "gratuitous" payment) or transferred in exchange for very little compensation. However, the ordinary meaning of the term in question also includes the transfer of economic resources in exchange of full and complete consideration on the part of the beneficiary.[53] In this particular case,

---

[48] WT/DS103/R – WT/DS113/R, paragraph 7.92.

[49] WT/DS103/AB/R – WT/DS113/AB/R, paragraphs 112 and 113.

[50] WT/DS103/AB/R – WT/DS113/AB/R, paragraph 107. Emphasis in the original. Reinforcing this view, the Appellate Body says: "A payment made in the form of goods or services is also 'financed' in the same way as a money payment, and, likewise, 'a charge on the public account' may arise as a result of a payment, or a legally binding commitment to make payment by way of goods or services, or as a result of revenue foregone" (Ibid., paragraph 108). And the AB concludes that "[. . .] since the ordinary meaning of the word 'payments' in Article 9.1(c) includes 'payments-in-kind', there was no need for 'payments-in-kind' to be expressly provided for" (Ibid., paragraph 111).

[51] According to the Appellate Body, "under Articles 9.1(b), the export subsidy identified may involve the disposal of agricultural goods *at less than domestic price*. Under Article 9.1(e), the provision of transport services for export shipments at *prices lower than the price charged for domestic shipments* is also an export subsidy." Therefore, the Appellate Body concluded that these lines expressly foresee that an export subsidy may not necessarily come in the form of monetary payment, and further considered that "In our view, the foregoing of revenue usually does not involve a monetary payment. Thus, if a restrictive reading of the words 'payments' were adopted, such that 'payments' under Article 9.1(c) had to be monetary, no account could be taken, under Article 9.1(c), of 'revenue foregone'. [. . .] We, therefore, prefer a reading of Article 9.1(c) that allows full account to be taken of 'revenue foregone'. The contrary view would, in our opinion, elevate form over substance and permit Members to circumvent the subsidy disciplines set forth in Article 9 of the *Agreement on Agriculture*" (Ibid., paragraphs 109 and 110, emphasis added).

[52] Ibid., paragraph 87.

[53] Ibid., paragraph 89.

there is no subsidy, insofar as the government support received does not constitute a *benefit* for the beneficiary.

The mistake of the Panel was to include |payments-in-kind| in |benefit|, and to conclude that there had been subsidies for exports according to the terms of Article 9.1(a) of the Agreement on Agriculture.[54] To reach this conclusion, the fact that the Panel considered that the Provincial Milk Marketing Boards were *government organizations* in Canada was crucial. And they were so considered because they wielded powers delegated by the Canadian federal government via the Canadian Dairy Commission (CDC) and provincial governments.[55] In order to interpret the expression |government|, the Appellate Body once again referred to a dictionary:

> According to *Black's Law Dictionary*, "government" means, *inter alia*, "[t]he *regulation*, *restraint*, *supervision*, or *control* which is exercised upon the individual members of an organized jural society *by those invested with authority*".[56]

Based on this definition, the Appellate Body ruled that a |government agency| is "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens".[57] Government was, therefore, at the source of the powers assigned to the provincial milk marketing boards.[58] Thus, these organizations play a typically "governmental" role,[59] and the Appellate Body maintained the decision of the Panel.[60]

---

[54]The Appellate Body warned that this reasoning does not justify the conclusion that export subsidies were granted. WT/DS103/AB/R – WT/DS113/AB/R, paragraphs 90 and 91.

[55]Furthermore, the provincial milk marketing boards participated in the decision-making process of the Canadian Milk Supply Management Committee (CMSMC), which is, in turn, a government organization in the understanding of Article 9.1(a). The CMSMC is an organization established in the framework of the NMMP a federal-provincial agreement to regulate the commercialization of dairy products in Canada. See /DS103/R – WT/DS113/R, paragraph 2.22.

[56]WT/DS103/AB/R – WT/DS113/AB/R, paragraph 97. Emphasis in the original. The Appellate Body observed that other dictionaries attributed similar meanings, citing *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), volume I, at. 1123; and the *Merriam Webster's Collegiate Dictionary*, Frederick Mish (ed) (Merriam Webster Inc., 1993), at. 504.

[57]Ibid., loc. cit.

[58]In the terms employed by the Panel, the powers of the provincial milk marketing boards "are established and operate within a legal framework set up by federal and provincial legislation" (WT/DS103/R – WT/DS113/R, paragraph 7.76). Therefore, the powers and roles of these provincial milk-marketing boards can only be modified by the "Canadian governments" (Ibid., paragraph 7.78).

[59]The Appellate Body concluded that "the 'governmental' character of the boards' functions, as well as the extent of their regulatory control, is underlined by the fact that their orders and regulations are enforceable in courts of law. Thus, the powers of the provincial boards are augmented by the machinery of the State itself, and the boards have at their disposal the public force to ensure that their regulatory functions and decisions are carried out." Furthermore, the Appellate Body stated that "the presence of dairy producers as officers of the provincial boards does not compel a change in our view. Irrespective of the composition of the boards, the source of their powers is still 'governments' and the nature of the functions that they exercise is still 'governmental'." WT/DS103/AB/R – WT/DS113/AB/R, paragraphs 100 and 101, respectively.

[60]Ibid., paragraph 102.

In the *United States – Tax Treatment for Foreign Sales Corporations* (*FSC*), the object of the dispute are a number of provisions and legal measures of the US government giving special tax treatment for "foreign sales corporations". These corporations are responsible for certain activities connected to the sales of products produced in the US for export. The so-called FSC exempted from income tax part of the profits resulting from exports made by these corporations.[61]

In examining the case, the Panel reported that the FSC measure was a subsidy for exports and, therefore, a violation of Articles 1.1 and 3.1(a) of the ASCM and Articles 3.3 e 9.1(d) of the Agreement on Agriculture,[62] since the measure in question resulted in not taxing revenues that "would normally be taxed"[63] by the government. In the case of Article 9.1(d), the Panel assessed whether or not the FSC measure was a subsidy to reduce the cost of marketing exports, and concluded the following:

> [. . .] we note that, as a practical commercial matter and in ordinary parlance, *income taxes are a cost of doing business*. Because FSC subsidies reduce an exporter's income tax liability with respect to marketing activities, *they effectively reduce the cost of marketing agricultural products*.[64]

To provide grounds for this reasoning, the Panel adopted the meaning of the term |marketing| according to the *Webster's Third International Dictionary*.[65] The US, however, claimed that the Panel had errered in interpreting Article 9.1(d) by

---

[61] Despite there being no legal obligation requiring a Foreign Sale Corporation be affiliated or even controlled by a US company, the advantages resulting from this measure made many FSC companies become foreign affiliates controlled by US companies. It is important to point out that US legislation does not levy tax on revenues obtained by foreign companies outside the US. There is, however, the possibility of taxes being levied on revenues obtained by foreign companies within US territory. Therefore, the Appellate Body explained that "such 'foreign-source' income of a foreign corporation generally will be subject to United States taxation when such income is 'effectively connected with the conduct of a trade or business within the United States'." WT/DS108/AB/R, paragraph 7. Report adopted by the DSB on March 20, 2000. The Division of the Appellate Body was composed of Julio Lacarte-Muró (Chairman), James Bacchus, and Florentino Feliciano.

[62] Article 3.3 of the Agreement on Agriculture reads: "Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule." Article 9.1(d) of the Agreement on Agriculture establishes: "1- The following export subsidies are subject to reduction commitments under this Agreement: [...] d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight."

[63] WT/DS108/R – *United States — Tax Treatment for "Foreign Sales Corporations" (FSC)*, Panel Report of October 8, 1999, paragraph 4.889.

[64] WT/DS108/R, paragraph 7.155. Emphasis added. The Panel further stated that "a subsidy such as the FSC, which is provided to offset costs of marketing agricultural products, should be considered to reduce the costs of marketing agricultural products." (Ibid., paragraph 7.156).

[65] The definition is the following: "an aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing,

addressing the nature of the beneficiary's commercial activity instead of examining the nature of the subsidy itself, or inquiring on whether it really reduced "the costs of marketing exports".

Showing that the *New Shorter Oxford Dictionary* gives a similar meaning to the term "marketing",[66] the Appellate Body pointed out that the income tax under the FSC measure are only levied when the products in question are actually sold for export, "that is, *when they have been the subject of successful marketing*".[67] The Appellate Body further states that "such liability arises *because* goods have, in fact, been sold, and not as *part of the process* of marketing them".[68] As a result of this interpretation, the Appellate Body considered the tax on revenues should apply because sales for export is not part of the "costs of marketing" of a product, therefore, overruling the Panel's report, and ruling that the *FSC measure* was not a subsidy to exports under Article 9.1 of the Agreement on Agriculture, and, consequently, that the measure did not violate Article 3.3 of the Agreement.[69]

The Appellate Body also ruled on the other claims of the European Communities according to which the FSC measure does not comply with Article 10.1 and 8 of the Agreement on Agriculture. These provisions aim at preventing export *subsidies* that are not foreseen in the Agreement, from being applied "in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments".[70] Based on the *New Shorter Oxford English Dictionary* in which the term |commitments| "generally connotes" «engagements» or «obligations»,[71] the Appellate Body established the difference between the phrases |export subsidy commitments| and |reduction commitment levels| found in Article 10, paragraphs 1 and 3, respectively,[72] on the grounds that the latter has a narrower meaning and only covers commitments undertaken in relation to agricultural products listed in the Member's Schedule. The former, on the other hand, has a much broader meaning and encompasses commitments and obligations concerning agricultural products

---

transporting, standardizing, financing, risk bearing and supplying market information" (Ibid., paragraph 7.154).

[66] According to the *New Shorter Oxford Dictionary*, the expression "marketing" means "the action, business, or process of promoting and selling a product [. . .]." WT/DS108/AB/R, Appellate Body's Report, paragraph 129.

[67] Ibid., paragraph 131. Emphasis in the original.

[68] Ibid., paragraph 131. Emphasis in the original.

[69] Ibid., paragraphs 131 and 132.

[70] Article 10.1 of the Agreement on Agriculture. Article 8 of the same text establishes the following: "*Export Competition Commitments* – Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule."

[71] WT/DS108/AB/R, paragraph 144.

[72] Paragraph 3 of Article 10 reads: "Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question."

that are not necessarily covered in the Schedules.[73] The goal of the provision under Article 10.1 is to avoid Members from violating their commitments concerning export subsidies.

According to *The New Shorter Oxford English Dictionary,* |circumvent|, under the same provision, means to «find a way round, evade».[74] Therefore, the Appellate Body concluded that the FSC measures were applied as a detour round the export subsidy obligations undertaken by the US.[75] By granting subsidies that are not compatible with Article 10.1, the US violated its obligation under Article 8 of the Agreement on Agriculture.

In another dispute, the *United States – Continued Dumping and Subsidy Offset Act of 2000*,[76] the term in question was |against| as employed in Article 18.1 of the Anti-Dumping Agreement[77] and Article 32.1 of the ASCM. According to the latter instrument, "no specific action *against* a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". (Emphasis added.).[78] The Panel understood that a measure acts "against" a subsidy if it has an "adverse bearing" on it, regardless of whether the bearing on the imported product, or on the entity responsible for the product, is direct or indirect.[79]

Appealing the decision of the Panel, the US based its argument on the ordinary meaning of |against|, according to the definitions in the *New Shorter Oxford English Dictionary*: (1) «of motion or action in opposition», (2) «in hostility or active opposition to», and (3) «in contact with». According to the US, in order for a measure to be considered "against" a subsidy, it should be "in contact with" or "operating directly" on the imported product or entity responsible for the product benefiting from government support.[80]

The Appellate Body pointed out that the third dictionary definition cited by the US was incomplete, since it means not only «in contact with», but also «supported by». This latter meaning redirected the interpretation of the Appellate Body, according to which "this latter element is difficult to reconcile with any idea of opposition, hostility or adverse bearing".[81] Based on this, the Appellate Body

---

[73] WT/DS108/AB/R, paragraph 147.

[74] Ibid., paragraph 148.

[75] Ibid., paragraphs 150, 153 and 154.

[76] WT/DS217/AB/R – WT/DS234/AB/R. Appellate Body Report adopted on January 27, 2003. The Division of the Appellate Body was composed by Giorgio Sacerdoti (Chairman), Luiz Olavo Baptista, and John Lockhart.

[77] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[78] According to Article 18.1 of the Anti-Dumping Agreement, "no specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

[79] WT/DS217/R – WT/DS234/R. Panel Report of September 16, 2002, paragraph 7.18.

[80] WT/DS217/AB/R – WT/DS234/AB/R, paragraph 247.

[81] Ibid., paragraph 249.

thereby rejected the notion that a measure against a subsidy must be in direct contact with the imported product or the organization responsible for the subsidized product. Furthermore, the Appellate Body pointed out that Article 32.1 of the ASCM refers to a particular measure against a "subsidy", and not against a subsidized imported product or against entities responsible for such a product, such as importers, exporters or foreign producers.[82]

Referring to the two other elements of the definition of |against| according to the *New Shorter Oxford Dictionary*, the Appellate Body stresses the need of examining whether the concept and the structure of the government measure create the "opposition" to the subsidization given by another Member, and of assessing whether it has a negative influence or the effect of discouraging subsidization practices. In the end, the Appellate Body found that the US law in question was "undoubtedly" a measure against subsidies.[83]

All the abovementioned controversies show the importance of the textual method of interpretation and, more importantly, the importance of ordinary meaning in the Appellate Body's method of interpreting the terms and phrases of a treaty.[84] As Ehlermann pointed out, "this is easily illustrated by the frequent references to dictionaries in Appellate Body reports, in particular to the *Shorter Oxford Dictionary*, which, in the words of certain critical observers, has become 'one of the covered agreements'"[85] – a surprising comment if it were not for the fact that the decision-making discourse of the WTO really seems to be undergoing a dictionarization

[82] Ibid., paragraph 251.

[83] WT/DS217/AB/R – WT/DS234/AB/R, paragraph 256.

[84] In the controversy the *United States — Continued Dumping and Subsidy Offset Act of 2000*, the Appellate Body made a statement that pushes away from its interpretation efforts any economic analysis: "In our view, in order to determine whether the CDSOA [Continued Dumping and Subsidy Offset Act of 2000] is 'against' dumping or subsidization, *it was not necessary, nor relevant, for the Panel to examine the conditions of competition* under which domestic products and dumped/subsidized imports compete, and to assess the impact of the measure on the competitive relationship between them. *An analysis of the term 'against', in our view, is more appropriately centered on the design and structure of the measure*; *such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete*." (WT/DS217/AB/R – WT/DS234/AB/R, paragraph 257, emphasis added). The fact is that the interpretive method favors words over figures. This is not an unimportant consideration. After all, one could establish a hypothesis for future studies that interpretation based on economic analyses could lead to conclusions, which would not necessarily be the same as those reached solely based on linguistic content of the treaty or convention. Further contributing to the argument against the economic approach is the fact that official figures are not always trustworthy. The possibility of manipulating economic indicators would undermine the credibility of legal interpretation. However, one could ask: Can works not be manipulated by the interests at hand? The fact is that in the WTO Agreements the object of negotiation was words. Words that not only have legal but also economic implications on the international system of commerce. Words are negotiated without losing sight of their influence on the figures and statistics of international trade.

[85] Ehlermann, Claus-Dieter. "Six years on the bench of the 'World Trade Court'", op. cit., at. 615–616.

process.[86] As shown, this discourse frequently resorts to English language dictionaries. This can be considered a predictable and frequent practice, since English is – except on rare occasions – the working language of the WTO. However, three subsequent Appellate Body reports have broken this trend and have adopted a linguistic interpretation, thus resorting to the authenticated versions of the WTO document in question.

## 11.3 Sardines, Softwood Lumbers and GSP: Precedents for a Decision-Making Discourse Based on the Three Language Versions of the WTO Agreements

Three Appellate Body reports triggered what proved to be a new phase in the Body's decision-making practice. To variable degrees, the Appellate Body has chosen to examine the linguistic contents of the terms and phrases of a WTO agreement in the light of the authentic versions in other languages. The first report, regarding the *European Communities – Trade Description of Sardines* dispute, resorted to the dictionary contents of different languages as evidence of certain claims presented by the parties. In this particular case, Article 2 of Regulation (EC) no. 2136/89[87] establishes that only products prepared exclusively from fish of the *Sardina pilchardus (Walbaum)* species may be marketed as |sardines|.

The Peruvian government, which exports preserved products of the species *Sardinops sagax*,[88] argued that the Regulation in question is incompatible with Article 2.4 of the Agreement on Technical Barriers to Trade (TBT Agreement).[89] This provision covers the *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies* and establishes the following:

---

[86] See the examples of the controversies: in *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, where the meaning of the term |probability| was discussed (WT/DS26/AB/R-WT/DS48/AB/R, paragraph 184); in *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico*, the Appellate Body addressed the meaning of the term |matter| as stated under Article 17.4 of the Anti-Dumping Agreement (WT/DS60/AB/R, paragraph 70 et seq.); in *European Communities — Measures Affecting Importation of Certain Poultry Products*, the meaning of the phrase |global quota| was established (WT/DS69/AB/R, paragraphs 91 and 92.); in *Korea — Taxes on Alcoholic Beverages*, discussion attempted to draw the line between |competitive| or |substitutable| products (WT/DS75/AB/R – WT/DS84/AB/R, paragraph 112 et seq.); and in *Japan — Measures Affecting Agricultural Products*, the Appellate Body interpreted the meaning of the word |sufficient| in Article 2.2 of the Sanitary and Phytosanitary Measures (SPS Agreement) (WT/DS76/AB/R, paragraph 72 et seq.).

[87] This Regulation was adopted by the Council of European Communities on 21 June, 1989, and entered into force on 1 January, 1990 (Journal Officiel n_ L 212 du 22 juillet 1989).

[88] The Appellate Body clarified that *Sardina pilchardus* and *Sardinop sagax* both belong to the Clupeidae family and the *Clupeinae* subfamily. However, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*. WT/DS231/AB/R. *European Communities – Trade Description of Sardines*, paragraph 8. Report adopted by the DSB on October 23, 2002.

[89] WT/DS231/R. Panel Report, paragraph 8.1 and 8.3.

> Where technical regulations are required and *relevant international standards* exist or their completion is imminent, Members shall use them, or the relevant parts of them, *as a basis for* their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems (Emphasis added).

According to Peru, the European Regulation could only be considered compatible with Article 2.4 of the TBT Agreement if it had used the *Codex Stan 94 as a basis for* its drafting. This *Codex*, adopted in 1978 by the Commission of the *Codex Alimentarius* of the Food and Agriculture Organization of the United Nations (FAO) and World Health Organizations (WHO), regulates many aspects regarding sardines or conserved sardine-type products prepared from some 21 species of fish, including the *Sardinops sagax*. However, Section 6 of the Codex Stan 94 establishes the following:

> 6. LABELLING
> In addition to the provisions of the Codex General Standard for the Labeling of Prepackaged Foods (CODEX STAN 1-1985, *Rev. 1-1991*) the following specific provisions apply:
> 6.1 NAME of the FOOD
> The name of the product shall be:
> 6.1.1 (i) *'Sardines' (to be reserved exclusively for Sardina pilchardus (Walbaum))*; or (ii) *'X Sardines' where 'X' is the name of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer*. (Emphasis added)

Peru claimed that number *ii* is not taken into consideration by Regulation (EC) no. 2136/89 and, thus, concluded that the European norm does not comply with the *Codex Stan 94*, which is the "relevant international standard". These were the grounds provided for Peru's request that the Panel find the Regulation inconsistent with Article 2.4 of the TBT Agreement.[90]

---

[90] WT/DS231/R, paragraph 4.44. Initially, the European Communities claimed that the Panel erred in stating that *Codex Stan 94* would be a "relevant international standard" in the sense of Article 2.4 of the TBT Agreement. The EC rejected *Codex Stan 94* because they consider that only norms adopted by *consensus* by international entities would be considered a "relevant international standard" for the purposes of Article 2.4 of the TBT Agreement. Furthermore, the EC claimed that the Codex, in the event it be considered an international standard, would not be *relevant* insofar as it does not include the same products as Regulation (EC) no. 2136/89. Whereas the regulation only considers sardine, the Codex Stan 94 considers "sardine-type" products. The Appellate Body rejected the argument of the EC. However, the AP took note of the definition of "standard" as stated in Annex I of the TBT Agreement, which supports the idea that consensus is not required in the case of norms adopted by an international community of standards. Item 2 of the Annex foresees that the term "standard" should be understood as a: "Document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method." The respective *Explanatory note* clarifies: "The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2

The European Communities claimed that the term |sardines| applied to products other than preserved *Sardina pilchardus* violates the laws and customs of its Member States and would mislead European consumers. This is why the Regulation prohibits labeling and commercializing fish products that are not *Sardina pilchardus* under the "sardine" label – even when fulfilling one of the four naming standards under number *ii* of Article 6.1.1 of the Codex.[91] According to the European Communities, European consumers only consider the term |sardines| to refer to the *Sardina pilchardus*; and the names "Pilchard du Pacifique", "Sardinops" ou "Pilchard" refer to *Sardinops sagax*.[92]

Peru denied the European position and sustained that the other species of fish included in the *Codex* may be commercialized as "X sardines", whereas "X" refers to one of the four possibilities under number ii in question: (1) a country, (2) a geographic area, (3) the species, or (4) the common name of the species. Therefore, it was the understanding of the Peruvian government that their sardines could be legally commercialized as, for example, "Peruvian *sardines*" or "Pacific *sardines*". The Peruvian government further cited that the French and Spanish texts of *Codex Stan 94* corroborate this interpretation.[93]

---

may be mandatory or voluntary. *For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus*" (Emphasis added). The Appellate Body sustained that the *Codex Stan 94* is a *relevant* standard as it is connected to the European Regulation, insofar as they both include preserved *Sardina pilchardus*. WT/DS231/AB/R, paragraphs 227 and 231–233.

[91] The European Communities claimed that number *ii* of Article 6.1.1 of the *Codex* authorized its Member states to choose between the phrase "X sardines" and the common name of the species. Supporting this interpretation, the European Communities referred to the former negotiations of the *Codex Stan 94*. The EC said that in the framework of the negotiations of the wording of Article 6.1.1, the article was divided in three paragraphs so that "the common name of the species" was a third distinct possibility, and the phrase "in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer" stood out from the other paragraphs. The European Communities stated that, considering the meeting of the *Codex Alimentarius* Commission, the wording of the article in question was modified, however, the substance of the provision remained unaltered so the term "sardine" would exclusively refer to *Sardina pilchardus* (WT/DS231/R, paragraph 4.48). The Panel was not convinced by the argument that the history of the negotiations provided support to the interpretation according to which the *Codex Stan 94* authorizes the Members to choose between "X sardines" on one side and the common name of the species on the other. The Panel ruled "the text of Codex Stan 94 is clear on its face that it provides Members with four alternatives." (Ibid., paragraph 6.7).

[92] Ibid., paragraph 4.47. To support their arguments the European Communities submitted copies of regulations between 1981 and 1996 regarding the labeling of food products in the UK, and a copy of the *Lebensmittelbuch*, in German, published in 2000, which adopted the term "sardines" for *Sardina pilchardus*, and "pilchard do Pacífico", or "pilchard" for *Sardinops sagax* (Ibid., paragraph 4.45).

[93] "Peru argues that the official languages of the FAO and WHO are English, French and Spanish and that the French text makes it absolutely clear that the Codex Stan 94 was not meant to permit countries to choose between 'X Sardines' and the common name of the species". Translated word for word, Peru states that the French text would read in English: "'X sardines', 'X' designating a country, a geographic area, the species or the common name of the species." Peru claims that

The recommendation of the Panel favored Peru and read that:

> the French version confirms the interpretation that a Member is to choose among the four available alternatives and that it does not offer the option of choosing between "X Sardines" of a country, a geographical area or the species on the one hand and the common name in accordance with the law and custom of the country on the other hand. The Spanish version also confirms the view that the name of the species or common name must be added to the word "sardines" and not replace the word "sardines".[94]

The Division of the Appellate Body (James Bacchus, chair, Georges Abi-Saab, and Luiz Olavo Baptista) confirmed the interpretation by stating that "The French version is drafted in a manner that puts all four qualifiers on an equal footing".[95]

Resorting to other languages as reference systems for the interpretation of legal norms also serves as an effective means of producing evidence. Claiming that European consumers do not associate the term |sardines| exclusively to «Sardina pilchardus», the Peruvian government presented as evidence several dictionaries drafted by the European Communities, by international agencies, as well as by specialized institutions. These publications demonstrated that one of the common names of the fish species *Sardinops sagax* in European countries is the term |sardines|, qualified by the name of the country or geographical area where the species can be found, thereby confirming the legitimacy of the following denominations: |Peruvian sardine| in English, |Sardine du Pacifique| in French, and |sardinha| in Portuguese.[96] Among other publications, Peru submitted the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants*, published in collaboration with the European Commission and the Member-States of the European Communities, and the *Dictionnaire multilingue des poissons et produits de la pêche* by the Organisation for Economic Co-operation and Development (OECD). The former included information on the common name of |sardines| as *Sardinops sagax* in nine European languages, or the equivalent in the national language accompanied by the name of the country of origin or geographic zone. The latter indicated that the common name of *Sardinops sagax* is indeed "sardines".[97]

---

the French text thus leaves no doubt that the common name is not an option separate from the 'X Sardines' option but is one of the four designators defined by 'X'. According to Peru, the Spanish text is also clear on this point; translated word for word, the Spanish text would read in English: 'Sardines X' from a country or a geographic area, with an indication of the species or the common name of the species. "Peru asserts that the Spanish text thus clarifies that the drafters of the Codex Stan 94 meant to create the option of adding the common name to the word 'sardines', not the option of replacing the word 'sardines' with a common name" (WT/DS231/R, paragraph 4.54).

[94] Ibid., paragraph 7.109. The French version of Article 6.1.1 (ii) of the *Codex Stan 94* reads: "'Sardines X', 'X' désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur." The Panel noted the official languages of the *Codex Alimentarius* Commission are English, French, and Spanish (Ibid., paragraph 7.108).

[95] WT/DS231/AB/R, paragraph 239.

[96] WT/DS231/R, paragraph 4.85.

[97] Ibid., paragraph 7.131.

The European Communities objected to the use of dictionaries as evidence capable of demonstrating that European consumers do not associate the term |sardines| exclusively with «*Sardina pilchardus*».[98] However, the Panel disagreed and stated the following:

> we are of the view that the use of the dictionaries referred to by both parties is *an* appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market transparency.[99]

The Panel concluded:

> in our weighing and balancing of the totality of evidence before us, including the examination of the *Oxford Dictionary* referred to by Peru and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de la lengua espanola* referred to by the European Communities, we were persuaded, on balance, that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name in the European Communities and that the consumers in the European Communities of the not associate the term "sardines" exclusively with *Sardina pilchardus*.[100]

After pointing out that the Panels are have discretionary authority to determine the value and the importance of evidence, the Appellate Body concluded that "the Panel did not exceed the bounds of this discretion by giving some weight to dictionary definitions [. . .]"[101]This recognition of "a certain weight" given to the contents conveyed by dictionaries in different languages triggered a process of decision-making bodies increasingly resorting to the WTO's official languages for interpretation purposes.

In the *United States – Final countervailing duty determination with respect to certain softwood lumber from Canada*[102] dispute, the Appellate Body made an interpretation based on the three language versions of the WTO Agreements. In

---

[98]Ibid., paragraph 4.76.

[99]Ibid., paragraph 6.12. Emphasis in the original.

[100]WT/DS231/R, paragraph 6.12, emphasis in the original. In footnote number 37 the Panel stated: "We noted that *Grand Dictionnaire Encyclopédique Larousse* refers the term 'sardine' to *Sardina pilchardus*. We also took note of the fact that the same dictionary states '[o]n trouve des espèces voisines dans le Pacifique (*Sardinops caerulea*), ainsi que sur les côtes du sud de l'Afrique (*S. sagax*) et d'Australie (*S. neopilchardus*)'. *Diccionario de la lengua espanola* defines the term 'sardina' as 'pez teleósteo marino fisóstomoto, de 12 a 15 centímetros de largo, *parecido al arenque*, pero de carne más delicada, cabeza relativamente menor, la aleta dorsal muy delantera y el cupero más delicada y el cuerpo más fusiforme y de color negro ayulado por encima, dorado en la cabeza y peteado en los costados y vientre.' (Emphasis added) These two dictionaries referred to by the European Communities support the view that the term 'sardines' is not limited to just *Sardina pilchardus* but includes other species, including *Sardinops sagax*."

[101]WT/DS231/AB/R, paragraph 300.

[102]WT/DS257/AB/R. *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*. Report adopted by the DSB on February 17, 2004.

this dispute, the Panel was requested by the Canadian government making a claim regarding US compensation rights levied on imports of certain softwood lumber products made in Canada. The dispute concerned a determination from the United States Department of Commerce ("USDOC") establishing that softwood lumber received subsidies since a number of Canadian provincial governments, under their forest programs, grant rights to certain individuals and entities to enter government property to cut timber, and to have exclusive rights of fruition over the wood collected in the area. Thus, the US claimed that Canadian provincial governments were *providing goods* to their softwood lumber producers, therefore giving them an advantage in the market place.

Canada claimed that the forest programs in question did not constitute financial contributions and argued that standing timbers are not "goods" in the sense of Article 1.1 (a.1) (iii) of the ASCM. According to Canada, the term |goods| is limited to "tradable items with an actual or potential tariff classification",[103] therefore does not include "standing timber".[104] In support of its reply, Canada put forth two arguments: (1) that Article 3.1(b) of the ASCM[105] covers subsidies in terms of preferential treatment of national products over *imported products*, where "imported goods" means "tradable goods"; and (2) that the term |goods| in Article 1.1(a.1)(iii) of the ASCM has the same meaning of the term |product| contained in Part V of the ASCM.[106] According to the Canadian government, Part V details Article VI of the 1994 GATT,[107] which is, in turn, an exception to Article II of the 1994 GATT.[108] Since the latter provision addresses the consolidation of customs rights on private

[103] WT/DS257/AB/R, paragraph 54.

[104] Furthermore, the Canadian government understood that the legal qualification given by the Panel was incorrect, because it claimed that the trees rooted to the ground were considered "personal property". The Appellate Body declared the reference to domestic law irrelevant to examining controversies in the realm of the WTO: "[. . .] we observe that the arguments put forward by Canada relating to the nature of 'personal property', raise issues concerning the relevance, for WTO dispute settlement, of the way in which the municipal law of a WTO Member classifies or regulates things or transactions. Previous Appellate Body Reports confirm that an examination of municipal law or particular transactions governed by it might be relevant, as evidence, in ascertaining whether a financial contribution exists. However, municipal laws – in particular those relating to property – vary amongst WTO Members. Clearly, it would be inappropriate to characterize, for purposes of applying any provisions of the WTO covered agreements, the same thing or transaction differently, depending on its legal categorization within the jurisdictions of different Members. Accordingly, we emphasize that municipal law classifications are not determinative of the issues raised in this appeal" (Ibid., paragraph 56). Moreover: "[. . .] the manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO covered agreements" (Ibid., paragraph 65).

[105] Article 3.1(b) of the ASCM: "1- Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: [. . .] b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

[106] Part V of the ASCM, "Countervailing Measures".

[107] Article VI of the GATT 1994, *Anti-dumping and Countervailing Duties*.

[108] Article II of the GATT 1994, "Schedules of Concessions".

"products", then these "products" – and therefore, the "goods" under in Article 1.1(a.1)(iii) of the ASCM – should indeed be subject to tariff classification.[109]

The Appellate Body Division, Luiz Olavo Baptista (Chairman), John Lockhart and Giorgio Sacerdoti, began to examine the dispute based on the text of art. 1.1(a.1) of the ASCM. After pointing out that the definition of subsidy depends on two elements – notably, a government financial contribution and an advantage to the beneficiary –, the Division noted that Canada's appeal was essentially based on the existence of a financial contribution – that is, on the first element. In accordance with Article 1.1(a.1) (iii) of the ASCM, a financial contribution is established when a government provides goods or services – other than general infrastructure – or when government purchases goods. Therefore, there are two different roles government can play: in the first one, government artificially reduces the production cost of a product by providing a company with those goods or services in the form of financial value. In the second, government artificially raises a company's revenues by purchasing the goods the company produces. In this dispute, the first situation is the one being discussed in the Appellate Body. This being the case, it was important to establish whether or not the Canadian provincial governments were indeed *providing goods*.

Without failing to note that "the meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used",[110] the Appellate Body started by establishing the need to verify whether the term |goods| encompasses standing timbers (trees before being removed from the soil). The Appellate Body pointed out that the Panel had adopted the definition of the term |goods| according to *Black's Law Dictionary*, in which |goods| encompasses «tangible or movable personal property other than money». Moreover, the Appellate Body observed that, according to the same dictionary, the term |goods| also included «growing crops, and other identified things to be severed from real property».[111]

The Appellate Body noted that the *Shorter Oxford English Dictionary* gives a more general definition to the term in question, which in this case includes «property

[109] WT/DS257/AB/R, paragraphs 48 and 49. Canada claimed that the Panel had erred by stating that standing timber, that is, the trees attached to the land were "provided" to the harvesters through the conferral of a right to harvest resulting from forest programs. The Canadian government claimed that it does not "provide" the trees, but only grants the rights to harvest them. "This right makes [the trees] available." Referring to the *New Shorter Oxford English Dictionary*, the US answered the Canadian interpretation, claiming the term |provides| means, among other things, the «supply or furnish for use; to make available». The Appellate Body, citing the *Collins Dictionary of the English Language*, supported another definition of the term |provides|, which is «to put at the disposal of» (Ibid., paragraph 69). At any rate, the Appellate Body saw no difference whether the term |provide| is interpreted as «supply», «to make available » or as «to put at the disposal of » – what matters is whether there is a subsidy – and whether or not public power *provided* goods in the sense of Article 1.1(a.1)(iii) of the ASCM (Ibid., paragraph 73). The Appellate Body concluded that the Canadian provincial governments had *provided* goods to the harvesters via state measures by granting the right to the timber on land belonging to the Canadian government. See the Panel decision in paragraph 7.30 of its report. (Ibid., paragraphs 75 and 76.)

[110] Ibid., paragraph 58.

[111] WT/DS257/R, paragraphs 7.23 and 7.24.

or possessions», and in particular – but not limited to – «movable property».[112] The Appellate Body also stated that although dictionary definitions may be a good starting point for interpretation, such definitions are limited regarding the ordinary meaning of a term. The reason for this is that, according to the referred body, the expressions used in different authentic texts of a given WTO Agreement might present differences regarding the reach of their content. The Appellate Body thus brought to light the issue of interpreting treaties that have been authenticated in more than one language. By doing so the Appellate Body developed an investigation of the meaning of the word in French and Spanish dictionaries – especially *Le Nouveau Petit Robert* and the *Diccionario de la Lengua Española* of the Royal Spanish Academy. It is worth reproducing an excerpt from the report dealing with this question:

> We note that the European Communities, in its third participant submission, observed that in the French version of the SCM *Agreement*, Article 1.1(a)(1)(iii) addresses, inter *alia*, the provision of "*biens*".[113] In the Spanish version, the term used is "*bienes*".[114] The ordinary meanings of these terms include a wide range of property, including immovable property. As such, they correspond more closely to a broad definition of "goods" that includes "property or possessions" generally, than with the more limited definition adopted by the Panel. As we have observed previously, in accordance with the customary rule of treaty interpretation reflected in Article 33(3) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"), the terms of a treaty authenticated in more than one language—like the WTO *Agreement*—are presumed to have the same meaning in each authentic text. It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language. With this in mind, we find that the ordinary meaning of the term "goods" in the English version of Article 1.1(a)(1)(iii) of the *SCM Agreement* should not be read so as to exclude tangible items of property, like trees, that are severable from land.[115]

The Appellate Body report emphasized the importance of interpreting the expressions in the WTO Agreements in the sense they are used in the several authentic language versions. Therefore, based on the interpretation resulting from this methodological procedure, the Appellate Body rejected the Canadian argument that the expressions |goods| and |products| convey the same content.[116] Furthermore, the Appellate Body claimed that the latter term was qualified by the term |imported|. As a consequence, since the word |goods| in Article 1.1(a.1) (iii) of the ASMC is not the object of such qualifier, |goods| do not necessarily have

---

[112] WT/DS257/AB/R, paragraph 58.

[113] "European Communities' third participant's submission, paragraph. 7. The term *biens* includes *chose matérielle susceptible d'appropriation, et tout droit faisant partie du patrimoine* and can mean *acquêt, … capital, cheptel, domaine, fortune, … fruit, héritage, patrimoine, possession, produit, propriété, récolte, richesse*. (*Le Nouveau Petit Robert*, P. Robert (ed.) (Dictionnaires le Robert, 2003), at. 252.)"

[114] "According to the *Diccionario de la Lengua Española*, the term *bienes* encompasses both *bienes muebles* and *bienes immuebles* (*Diccionario de la Lengua Española*, (22nd ed.) (Real Academia Española, 2001), at. 213)."

[115] WT/DS257/AB/R, paragraph 59.

[116] The Appellate Body established that: "'Goods' in Article 1.1(a)(1)(iii) of the *SCM Agreement* and 'products' in Article II of the GATT 1994 are different words that need not necessarily bear the same meanings in the different contexts in which they are used." WT/DS257/AB/R, paragraph 63.

to be "imported". Due to this understanding, the Appellate Body concluded that even tangible things, which are not interchangeable, i.e., fungible (such as standing timber) and are not the object of tariff classification, should not be excluded from the content of the word |goods| as written under Article 1.1(a.1) (iii) of the ASMC.[117]

Moreover, the Appellate Body once again mentioned expressions contained in other language versions of the ASMC while interpreting Article 14 (d) of the Agreement. Said article establishes that the provision of goods by public bodies shall be considered as a benefit, if the provision is made for less than adequate remuneration.[118] In addition according to the same article, the adequacy of remuneration shall be determined "*in relation to prevailing market conditions for the good* or service in question *in the country of provision* or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".[119]

The Panel considered that the market conditions that determine remuneration should be those established in the supplying country "as can be found".[120] In other words, "the market conditions 'as they exist' or 'which are predominant' in the country of provision".[121] However, the United States argued that the phrase |market conditions| meant those *necessarily* established by a market, *per se*, and not in a falsified market due to government financial contributions. The Appellate Body disagreed with this interpretation, stating that the wording of Article 14(d) of the ASCM makes no explicit reference to a "pure" market, or a market "undistorted by government intervention". The Appellate Body concluded that: "This [interpretation] is confirmed by the Spanish and French versions of Article 14(d), neither of which supports the contention that the term 'market' qualifies the term 'conditions' so as to exclude situations in which there is government involvement".[122]

The interpretation of the same article continued with the analysis of the phrase |in relation to|. The Panel stated that this phrase, in the context of Article 14(d), meant «in comparison with».[123] Thus, it concluded that the determination of the adequacy of remuneration should be done "in comparison with" the prevailing market conditions for the good in the country of provision, and that no other comparison would be appropriate if there were prices practiced in the private market place. The Appellate

[117] Ibid., paragraph 67.

[118] The instrument is also applicable to situations in which the financial contribution takes the form of supplying services or government procurement opportunities.

[119] Article 14 (d) of the ASCM, emphasis added.

[120] WT/DS257/R, paragraph 7.51. The Panel: "In sum, a plain reading of the text of Article 14 (d) leads us to the initial conclusion that the market which is to be used as the benchmark for determining benefit to the recipient is the market of the country of provision, in this case Canada" (Ibid., paragraph 7.50).

[121] Ibid., paragraphs 7.48 and 7.50.

[122] WT/DS257/AB/R, paragraph 87. The French phrase used is |aux conditions du marché existantes| and the Spanish version is |condiciones reinantes en el mercado|.

[123] WT/DS257/R, paragraph 7.48.

Body rejected this interpretation since |in relation to| does not only mean «in comparison with», explaining that "the phrase 'in relation to' has a meaning similar to the phrases 'as regards' and 'with respect to'. These phrases not only denote the rigid comparison suggested by the Panel, but may imply a broader sense of 'relation, connection, reference'".[124] The Appellate Body also added that "the French version of Article 14(d) of the SCM *Agreement* supports our view, using the term *par rapport aux*. *Le Nouveau Petit Robert* includes the following definition for 'rapport': *Lien, relation qui existe entre plusieurs objets distincts et que l'esprit constate*".[125] From this perspective, the Appellate Body stated that the use of the expression |in relation to| suggests, as opposed to the Panel's interpretation, that the authors of the treaty wanted to include other parameters – besides private sector pricing practices in the market place of the country of provision – to calculate benefits to recipients.

This interpretation changed the orientation of the normative content of the abovementioned article. Its importance lies in admitting that other parameters to investigate adequate remuneration can be used when it is observed that the prices practiced by the private sector are false due to the significance of a government's role in the provision of goods.[126] This interpretation of the phrase |in relation to| is corroborated by the introductory text of Article 14, which reads:

> For the purpose of Part V, *any method* used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. [. . .]. (Emphasis added)

The use of the word |any| implies that the authorities responsible for the investigation have *more than one method* to calculate the benefit to the recipient. However, the Appellate Body warns that the method selected for calculating the benefit "must *relate or refer to, or be connected with, the prevailing market conditions in the country of provision*, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)".[127] With this interpretation, the Appellate Body modified the Panel's recommendation.

Finally, in the dispute *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*,[128] the Appellate Body Division, formed

---

[124] WT/DS257/AB/R, paragraph 89.

[125] Ibid., footnote no. 108, emphasis in the original.

[126] Interestingly, the Panel itself admitted that, in some situations, the prices practiced by private suppliers maybe artificially fixed due to prices practiced by governments regarding the same goods. In this case, the Panel said, "[. . .] a comparison of the conditions of the government financial contribution with the conditions prevailing in the private market would not fully capture the extent of the distortion arising from the government financial contribution, a result that in our view would not necessarily be the most sensible one from the perspective of economic logic." WT/DS257/R, paragraph 7.58.

[127] WT/DS257/AB/R, paragraph 96. Emphasis added.

[128] WT/DS246/AB/R. *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*. Appellate Body report adopted by the DSB on April 20, 2004. This was

by Georges Abi-Saab (Chairman), Giorgio Sacerdoti, and Luiz Olavo Baptista, used the French and Spanish versions of the Decision about the *Differential and more Favourable Treatment Reciprocity and fuller participation of Developing Countries*[129] (also known as the "Enabling Clause") to interpret footnote 3 regarding paragraph 2(a) of this document.[130] Paragraph 1 of this clause authorizes WTO members to give "differential and more favorable treatment to developing countries, without according such treatment to other contracting parties". Therefore it consists of a normative provision that excludes the effects resulting from the observance of

---

first controversy involving the Enabling Clause, one of the most significant forms of "special and preferential" treatment foreseen in the WTO Agreement in favor of developing countries.

[129]GATT L/4903 document. Decision of November 28, 1979.

[130]In this controversy, India challenged the conditions according to which the European Community granted preferential tariffs to developing countries via Regulation (CE) no. 2501/2001, claiming that "special arrangements to combat drug production and trafficking" (the "Drug Arrangements") is incompatible with Article 1.1 of the GATT 1994 and is not justified by the Enabling Clause. The litigants presented different interpretations to the expression |non-discriminatory| in the context of paragraph 2(a) of the Enabling Clause.

Before the Panel, the litigants presented competing definitions of the term |discriminate|. India found support on *The New Shorter Oxford English Dictionary*, claiming that the meaning was «to make or constitute a difference in or between; distinguish» or «to make a distinction in the treatment of different categories of peoples or things». On the other hand, EC also based on *The New Shorter Oxford English Dictionary*, interpreted the term as «to make a distinction in the treatment of different categories of people or things, esp. *unjustly* or *prejudicially* against people on grounds of race, colour, sex, social status, age, etc.». The Panel established that the main difference between the interpretations was that India's was *neutral* when making a distinction and the EC's was *negative* with the connotation of an unjust or detrimental distinction. WT/DS246/R, paragraph 7.126.

Therefore, India claimed that |non-discriminatory| defines a treatment that does not distinguish between different categories of developing countries (WT/DS246/R, paragraph 4.187). Based on this interpretation, the Enabling Clause would require the countries granting preferential treatment gave *identical* treatment to all developing countries, regardless of the level of development. On the other hand, according to the EC, the obligation to grant non-discriminatory treatment does not mean to give *identical* preferences to *all* developing countries (Ibid., paragraph 4.82.). The "non-discriminatory" criterion cited in paragraph 2(a) is different from the criterion of the most favored nation (MFN) clause of Article 1.1 of the GATT 1994. According to the EC, the latter means "providing equal conditions of competition for imports of like products originating in all Members", whereas "the Enabling Clause is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries." (European Communities' appellant's submission, paragraph. 71. Apud WT/DS246/AB/R, Appellate Body report, paragraph 149.). As a result, the EC claimed that it is not discriminatory to treat developing countries differently, since they have *distinct development needs*, according to objective criteria.

The Appellate Body believed that the ordinary meaning of the expression |discriminate| means that a distinction is discriminatory only if made in regard to beneficiaries in similar situations. Therefore, the tariff preference granted by developed nations should be identical only if the situation of the developing nations were also identical. Thus, the Appellate Body concluded that the term in question does not prohibit developing nations from imposing different customs regimes on products from beneficiaries of the Generalized System of Preferences (GSP), as long as the preferential tariff treatment fulfills the other conditions of the Enabling Clause. WT/DS246/AB/R, paragraphs 151–174.

the clause of the most-favored-nation (MFN) established by Article 1.1 of the 1994 GATT.[131] Paragraph 2(a) and Footnote 3 of the Enabling Clause establish:

> 2. The provisions of paragraph 1 apply to the following:
> (*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries *in accordance* with the Generalized System of Preferences(3); [. . .]
>
> (3) *As described* in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries' (BISD 18S/24). (Emphasis added)

As the Appellate Body noted, in paragraph 2(a) and Footnote 3 of the Enabling Clause, the differential tariff treatment of products from developing countries shall be conceded "in accordance" with the Generalized System of Preferences (hereinafter the GSP) "as described" in the 1971 Decision. This decision refers to a "generalized, non-reciprocal and non discriminatory" preferential tariff treatment.[132] As a result, the fact of qualifying the GSP as *generalized*, *non-reciprocal* and *non discriminatory*, imposes obligations that must be fulfilled so that the preferential tariff treatment can be justified in the light of the referred paragraph. Regarding this interpretation, the Appellate Body states the following

> We find support for our interpretation in the French version of paragraph 2(a) of the Enabling Clause, requiring that the tariff preferences be accorded '*conformément au Système généralisé de préférences*'. The term 'in accordance' is thus '*conformément*' in the French version. In addition, the phrase '[a]s described in [the 1971 Waiver Decision]' in footnote 3 is stated as '*[t]el qu'il est défini dans la décision des PARTIES CONTRACTANTES en date du 25 juin 1971*'. Similarly, the Spanish version uses the terms '*conformidad*' and '*[t]al como lo define la Decisión de las PARTES CONTRATANTES de 25 de junio de 1971*'. In our view, the stronger, more obligatory language in both the French and Spanish texts – that is, using 'as defined in' rather than 'as described in' – lends support

[131] This was the understanding of the Appellate Body (WT/DS246/AB/R, paragraph 126). Article 1.1 of the GATT of 1994, devoted to *General Most-Favored-Nation Treatment*, establishes: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

[132] The Appellate Body used in its report a relevant excerpt from the preamble of the 1971 Decision: "*Recalling* that at the Second UNCTAD, unanimous agreement was reached in favor of the early establishment of a mutually acceptable system of *generalized, non-reciprocal and non-discriminatory* preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries; *Considering* that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of *generalized, non-discriminatory, non-reciprocal preferential tariff treatment* in the markets of developed countries for products originating in developing countries." WT/DS246/AB/R, paragraph 144 (Emphasis in the original).

> to our view that only preferential tariff treatment that is 'generalized, non-reciprocal and non-discriminatory' is covered under paragraph 2(a) of the Enabling Clause.[133]

It can be seen that the Appellate Body, in an unprecedented interpretation, regards the phrases in the French and Spanish texts as stronger and more obligatory than the one used in the English version and, therefore, they give more support to the Appellate Body's view.

Interpretation as a search for the *intention of the text* seems to have been opened to the many possibilities of meaning and legal consequences resulting from the different readings of the three authentic versions of the WTO Agreements. Although, on the one hand, the frequent reference to dictionaries and the "certain weight" that is granted to them demonstrate that the Appellate Body has been giving significant importance to the textual method of interpretation; on the other hand, reference to the treaties drafted in Spanish or French point out that the Appellate Body is undertaking the challenge of finding the intention of the text from other linguistic perspectives – even though this does not, in practice, necessarily lead to, in practice, distinct or contradictory interpretations about the meaning of the legal norm. In any case, despite its legitimacy, the dictionarization of decision-making has its limits, and this has not ignored by Appellate Body members.

## 11.4 The Challenges of "Looking Beyond" Dictionarization

When choosing between what a certain expression "says" according to language conventions and what the author "wanted to say" by using a certain expression, the interpretive method adopted by the Appellate Body tends to favor the former. The Appellate Body gives preference to the interpretation that captures the *lexical meaning* in detriment of the *circumstantial meaning* at the time of ratification. Were preference given to circumstantial meaning, reference to the minutes and documents of the negotiated treaty would be paramount. In this case, the interpreting authority would be able to compare the content according to the language used and the content as a result of the complex negotiations of the norm.

To the lexical approach, the meaning of an expression such as |subsidy means benefit|, for example, is only analyzed based on the function of the contents of |subsidy| and |benefit|, according to the meaning they have in a certain language system in a given language of reference. Therefore, the meaning of these terms is based on the contents of the *lexical meaning* of the enunciation. This explains why the interpretation of the legal-diplomatic text is carried out with the aid of a *dictionary,* and is concerned only with the ordinary meaning of the word or phrase in question.

Resorting to dictionaries to provide grounds for interpretations could be adopted as a methodology and strategy to "immunize" legal-diplomatic texts against their

[133] Ibid., paragraph 147, emphasis added.

*usage* when formulating discourse.[134] By doing this one avoids loss of normative content due to "*ad hoc*" or unreasonable interpretations that often take away the practical effect and, above all, the legitimacy of the law. By adopting the dictionarized content, the interpreter aims at ensuring certain stability and uniformity in legal discourse.

However, we do not intend to say that the Appellate Body investigates the lexical content of words regardless of the context in which they are employed. The reports demonstrate that the Appellate Body often analyzes an a word or phrase taking into account the sentence or Article in which it occurs, the treaty in question, or the law of the WTO as a whole. Thus, the attribution of meaning takes place within a series of contexts.

This could lead us to conclude that contextual meaning determines lexical meaning. Therefore, if the former determined the latter, then it would make sense to speak of lexical meanings. However, we are not entirely convinced of this. The examples provided in topics Sections 11.2 and 11.3 demonstrate that the search for ordinary meaning is often – and in spite of the dictionary's limitations – the tone of the interpretation given by the Appellate Body and what determines the reading path adopted by this decision-making entity.

This interpretation method is not intended to create a "legal Esperanto" capable of suppressing polysemy and implementing a system of legal terms comparable to pre-determined concepts of formalized axiological systems.[135] After all, the imperfection of the language itself is evidence of the limitations of literal meaning and, as a consequence, of dictionarized interpretation – a limitation of which the Appellate Body members are well aware. In the dispute of *Canada – Measures affecting the export of civilian aircraft*, the Appellate Body stated that "dictionary meanings leave many interpretive questions open".[136] In another occasion, concerning the report in regard to the *United States – Continued Dumping & Subsidy Offset Act of 2000*, the Appellate Body warned of the following: "It should be remembered that dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents."[137] Finally, in the dispute the *United States – Tax treatment for "Foreign Sales Corporations"*, the Appellate Body stated that "we must look beyond dictionary meanings [. . .]".[138]It is around this "look

[134]The distinction between the *use* and *interpretation* of a text is proposed by Eco in *Lector in fabula* (op. cit., at. 43–44) and is later revisited in *Los limites de la interpretación* (op. cit., at. 39–40). To use a text is to approach it in the freest way possible, exploring it indefinitely in an unlimited semiosis. To interpret a text is a decoding exercise that considers the lexical, contextual, and textual coherence of the document.

[135]SIMON, Denys, *L'interprétation judiciaire des traités d'organisations internationales*, op. cit., at. 119.

[136]WT/DS70/AB/R, paragraph 153. Appellate Body report adopted by the DSB on August 20, 1999.

[137]WT/DS217/AB/R – WT/DS234/AB/R, paragraph 248. Report adopted by the DSB on January 27, 2003.

[138]WT/DS108/AB/R, paragraph 129. Report adopted on March 20, 2000.

beyond" that gravitates the debates on the interpretation methods that apply to the decision-making process in the WTO.

We know that the meanings of a term are not limited to those listed in dictionaries. The search for circumstantial meaning is one of the interpretive measures leading the interpreter to investigate the meaning *beyond* the *fixed* dictionary content. And from this stems an important question for semiotics: Does investigating meaning from a circumstantial perspective (such as the moment of treaty negotiations) lead us to think of meaning not as a primary issue of semantics, but rather as an issue of pragmatics? After all, certain contents and the subsequent chains of interpretants depend on a wide range of knowledge of the world (and of other cultures), which can hardly be represented or determined in dictionaries. It may be said, according to Eco's semiotic hypothesis, that language contains, among its signification rules, pragmatically-oriented instructions.[139] Thus, language should be understood "not as a succinct *dictionary*, but as a complex system of *encyclopedic competencies*".[140]

Language construed as an encyclopedia would register its uses as *frames* or *scripts*, which would correspond to schemes of pre-established actions and behavior.[141] Such frames are idiosyncratic experiences of the subjects involved in the communicative relation, or rather, the intertextuality of each legal culture. As a result, when standing before a text of a convention, the interpreter should not only identify the language of reference, but also perform a preliminary inspection about the enunciative situation of the text. That is to say, the interpreter should know, among other things, who utters the text and under which circumstances. Such inferences are not included in language construed as dictionary, but in the language construed as encyclopedia, which assists the interpreter in his interpretation process and is closely related to the influence of these inferences on the interpretation process, since it involves considerations about cultural differences among WTO members. After all, those frames (and the subsequent chains of interpretants) can vary according to the legal culture of reference, or according to the encyclopedic competence of the legal interpreter when situated in the WTO circumstance.

Therefore, when Eco states that "contextual meaning *goes far beyond* lexical meaning"[142] it is because this "going beyond" is only made possible by virtue of the language supplying not only the lexical meaning for instruction on contextual insertion, but also the so-called frames or scripts. If this model of

---

[139] According to Eco, "if the encyclopedia is an unordered set of markers (and of frames, scripts, text-oriented instructions), the dictionary-like arrangements we continuously provide are transitory and pragmatically useful hierarchical reassessments of it. In this sense, one should turn upside down a current distinction between dictionary (strictly 'semantic') and encyclopedia (polluted with 'pragmatic' elements); on the contrary, *the encyclopedia is a semantic concept and the dictionary is a pragmatic device*" (*Semiotics and the Philosophy of Language*, op. cit., at. 85).

[140] U. Eco, Umberto, *Sémiotique et philosophie du langage*, op. cit., at. 75. Emphasis in the original.

[141] U. Eco, *Semiotics and the Philosophy of Language*, op. cit., at. 70 and seq.

[142] U. Eco, Umberto, *Sémiotique et philosophie du langage*, op. cit., at. 77.

language construed as encyclopedia falls short of formal viability in describing the possible correlations between expressions and contents, it gains in proximity with the task culture continuously performs while enriching and rearranging its own codes.

In any case, language construed as encyclopedia is a semiotic postulate. After all, an individual will hardly know all the possible significations of a word or phrase – especially when one is in a multicultural and multilingual environment as is the international system. According to Eco, "whereas, from the perspective of general semiotics, one can postulate encyclopedic competence as being a global one, from the social-semiotic perspective, it is interesting to recognize the different levels of encyclopedic competence, or the partial encyclopedias (group, sect, class, ethnical encyclopedia and so forth)".[143] Studies in comparative law and legal anthropology are here to demonstrate the differences between Western and non-Western views of the law, Eurocentric legal discourses, the processes of Americanization of the law and of tropicalization of Western legal models, and the peculiarities of signification system pertaining to Brazilian, Canadian, Japanese or Indian law, as well as to WTO law, European Union law, Mercosur law, etc.

The interpreter is not obliged to be knowledgeable of the entire encyclopedia, but only the portion needed for understanding the text. The question here is knowing which portion is required for the interpretation. Of course the circumstances might assist the interpreter in defining the possible reading paths; however, they often do not suffice. Resorting to a dictionary will always be an acceptable option as a starting point for interpretation.

The concept of encyclopedia has been raised herein only with the aim of demonstrating that assigning meaning to conventions is not done based on unchangeable meaning, but rather on historically determined content, which serves as an intersubjective guarantee of the relevance or appropriateness of the interpretive act.[144] There is no transcendental memory of the word, but rather a historical memory of it. If there were, this transcendental memory would not be at the origin of the semiotic process, but would be postulated as a possible – although very short-lived – end of interpretation.

Any interpretation that based on a community's consensus will be privileged over any other interpretation. Therefore, the process of building a common legal culture within the multilateral system of trade largely depends on the building a shared semantic heritage. And the Appellate Body, due to the weakness in the political control of the DSB, plays a paramount role in this semantic heritage-building process to the extent the interpretations it gives define the WTO "reality". It is the Appellate Body that ultimately defines the meaning of the linguistic signs in the WTO legal code. Therefore, establishing *precedent* would be a measure promoting the stability of the contents attached to the covered agreements, thus contributing to greater predictability in interpreting decisions.

---

[143] U. Eco, Umberto, *Sémiotique et philosophie du langage*, op. cit., at. 111.

[144] For more on Eco's concepts of "dictionary" and "encyclopedia", see: Eco (1999, Chapter 4).

The Appellate Body's interpretations, once recognized and adopted by the WTO members, tend to integrate the cultural heritage of the Organization. This can be actually be seen as a dictionarization process of the WTO legal discourse. After all, as Eco stated, "we presuppose a local dictionary every time we want to recognize and to circumscribe an *area of consensus* within which a given discourse should stay, because no single discourse is designed to change our world view globally".[145] This consensus, – which despite being temporary, is required of any community of interpreters of a given text, and is what grants legitimacy to the discourse conveyed.[146]

It is important to point out that this legitimacy is reinforced by the features of the formation of the Appellate Body, which pursuant to Article 17.3 of the DSU, should be largely representative of the WTO. According to Pace, "nationality is, obviously, especially significant insofar as the members of the Appellate Body may be naturally inclined to preserve, in their legal reasoning, the same line of thought prevailing in the States to which they belong".[147] What is in check is the influence of the reference legal culture of the members of the Appellate Body on the interpretations of WTO law. It is for this reason that the formation of the Appellate Body should observe not only geographical criteria, but must also be representative of the world's main legal systems.[148]

In order to "look beyond" dictionarization, the methods of interpretation cited in Article 31.1 of the Vienna Convention must be considered. It is also necessary to open up to the possibilities of meaning from the perspective of the other legal cultures present at the WTO. Recourse to English, French and Spanish language dictionaries contribute to this new methodological approach to interpreting legal-diplomatic text, but hardly puts an end to the debate. After all, the manifestation of the terms that belonging to these languages does not halt the entrance of contents from other signification systems. In other words, the interpreter should not

---

[145] U. Eco, *Semiotics and the Philosophy of Language, op. cit*., at. 85. Emphasis added. According to Eco, the dictionary is not the stable condition of the semantic universe, but rather a useful tool for conversational interaction (Ibid., at. 84).

[146] Although a text may be used for an exercise in unlimited semiosis, the community must agree that, in some situations, it is necessary to interrupt, consensually, the "play of musement" for the sake of communicative interaction (Umberto Eco, Los limites de la interpretación*, op. cit., at. 370).*

[147] *V. Pace,* L'Organisation mondiale du commerce et le renforcement de la réglementation juridique des échanges commerciaux internationaux, op. cit., at. 208. Debating the initial composition of the Appellate Body, the European Community objected to the selection of a greater number of representatives from countries reputedly allied with the US. The response of the DSU was to determine that the members of the Appellate Body, differently from the provision for members of the Panels, should not be connected to any government (Ibid., at. 208 et seq.).

[148] It is worth noting that this is also the criterion adopted by the ICJ. Article 9 of the ICJ Statute, on the election of 15 Court judges by the General Assembly and the UN Security Council, established: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." Emphasis added.

necessarily associate the official languages of the WTO to the legal cultures that symbolize them.

The question remains: How do we find common meaning? Doctrine has been trying to find an answer to this problem, by making a presumption in favor of the *original* text of the negotiation, which would reputedly be the clearest text, or the *most restrictive*.[149] The Vienna Convention prefers adopting the meaning that reconciles all the texts involved. Therefore, in the event that the authentic texts of a treaty are compared and this comparison results in a discrepancy that the criteria established under Articles 31 and 32 cannot eliminate, "the meaning which best reconciles the texts, *having regard to the object and purpose of the treaty*" shall be considered.[150] Thus, the search for consensual meaning is connected to the teleological method.[151]

What we have stated above reveals two important topics for the debate surrounding the decision-making discourse of the Appellate Body: (1) attention to the diversity of legal signification systems (or legal cultures) of WTO Members, and (2) observance of the *goal* and the *ends* of WTO Agreements. On the latter, we understand hat the theological method affords the interpreter more discretion in constructing the decision-making discourse in a way as to *look beyond* the initial intentions of the authors of the legal-diplomatic discourse. However, in order to lend the necessary legitimacy to this discourse, the "review" of the Appellate Body should represent the translation of the languages of the various legal cultures engaged in the WTO.

[149] *See Brotons,* Derecho internacional público*, op. cit., at. 316 et seq.*

[150] *Art. 33.4 of the Vienna Convention of 1969. Emphasis added.*

[151] The Appellate Body, on one of its first controversies, stated the importance of referring to the "object" and the "purpose" of the treaty, but only when determining the meaning of the "terms of the treaty", and not as an independent basis for interpretation (WT/DS8/AB/R – WT/DS10/AB/R – WT/DS11/AB/R. Report adopted by the DSB on November 1, 1996, footnote no. 20).

# Conclusion

The linguistic diversity in international legal texts highlights the fact that the legal norm is not to be confused with the face of treaties, but rather that legal norm can be identified with the content conveyed by the treaties. International legal discourse is a result of the negotiation and dispute processes concerning the legal content of treaties and conventions, and of the official languages of international organizations. The law of the WTO, for example, is the product of negotiations and decision-making processes that adopt English as the language of reference. However, we have noted that the Appellate Body has clearly shown a tendency of resorting to the Spanish and French versions of the WTO Agreements. Based on this finding we could broaden the scope of investigation in order to examine whether WTO law is a common legal culture that amalgamates all legal inputs coming from its Members, or whether this common legal culture is based on an apparent impartiality that, in fact, masks an actual clash between legal cultures that have been translated into one or another language.

It is important to point out that that the legal code of the WTO, once accepted and incorporated by Member States, conveys legal discourses that create a certain "reality", which is the current multilateral system of trade. The disputes arising from debatable content in WTO Agreement have become the field of a battle to establish the meaning of international trade law. Solving these disputes is the role of the WTO dispute settlement system in which the Appellate Body plays a major role. The reports issued by the Appellate Body determine, in practice and by virtue of negative consensus, the meaning of a rule.

Different interpretation methods are found in legal doctrine and jurisprudence to attribute the meaning to a norm. Since there is no hierarchy among these methods, the interpreter may reach contradictory conclusions. In the domain of the Appellate Body, an examination of the reports has demonstrated that there is a tendency to turn to the letter of the law when interpreting legal-diplomatic texts. By grounding its methodological choice on the Vienna Convention, the Appellate Body, without completely disregarding a subjectivist and finalist approach, has given priority to the wording of legal texts.

We have seen that all linguistic signs may be interpreted even when shifted from the context in which they were produced. Therefore, the interpretive act can do without an investigation into what an empirical author had actually intended to say when

E.M. de Carvalho, *Semiotics of International Law*, Law and Philosophy Library 91,
DOI 10.1007/978-90-481-9011-9, 

uttering a text. Once uttered, the text becomes independent from the author – who no longer controls the possible subsequent discourses. However, it may not be good interpretation policy to ignore the intention of the Member States when interpreting a legal-diplomatic text. After all, the authors can be easily identified and do, in fact, often refute the interpretations of the dispute resolution bodies. The authors of a treaty cannot be simply ignored by the interpreter and considered irrelevant in the search for the meaning of a legal word or phrase. There are cases in which the legitimacy of the interpretive act appears to depend on referring to what had been the original intention, such as is the case of the act of translation. The legal discourse as conveyed in the reports produced by the Appellate Body would therefore be a "translation" of the intention of the author of the treaty.

However, referring to what the empirical author intended to say is done more to fulfill a purpose of legitimizing a certain interpretation than proof of the respect to (or the success in) searching for the *intentio auctoris*. The role of the interpreter shows how the construction of legal discourse is the result of a cooperative effort between interpreter and author. There is, therefore, a role played by the *intentio lectoris*, which cannot, however, be taken to the letter in order to continuously move or freely shift meaning at will.

The legal-diplomatic *text* is the measure of good interpretation: it intermediates the communicative relation between the author and reader, by providing parameters for the interpretive act. The Appellate Body's search for the *intentio operis* has the benefit of setting limits to interpretation and, therefore, controlling the open-endedness of possible meanings that could be applied by the decision-making entity. The text's intention is essential in legitimizing legal-decisional discourse insofar as it neutralized any loose or authoritarian connotation from the original intention of the author or even the reader.

This does not mean that the text provides an *only* possible interpretation. An examination of the auxiliary decision-making bodies of the DSB illustrates well the dilemmas in meaning surrounding various words and phrases, whether legal words and phrases or not. A margin of discretion is always left to the interpreter; however, this margin is presumed to be based on an examination of the intention of the text, according to which the plausibility of a term's interpretation is only accepted when confirmed in another part of the text. The historical circumstances and the linguistic contexts play an important role to this end. After all, the fact that the discourse is produced by the WTO provides an entire set of possible interpretants that define a more or less precise semantic field for the interpreter.

The WTO law is neither a clear-cut image of reality nor an arbitrary creation of its authors, but rather a product and producer of social reality and, thus, of a legal culture. Every interpretant produced materializes a given discourse and always represents an actualization of the signification system of the WTO. Even though this actualization is merely relative, since new interpretations constantly surface. In any case, the legal code of the WTO, which is initially established in the legal-diplomatic text and bolstered by the decision-making discourse, gains increased legitimacy as it spreads as a linguistic practice among the jurists that work in the field of international commercial law.

Studying the decision-making discourse of the Appellate Body helps to understand the WTO legal system. On the other hand, because the covered agreements are conveyed in Spanish, French, and English fully understanding the WTO legal code is a complex task. It is impossible to guarantee that a specific legal word or phrase in one language will find its exact equivalent in another language system – not because it does not exist in a given language, but because it belongs to a different and independent meaning network whose reference is another legal culture. The "dictionarized" or "dictionary-based" interpretation of the Appellate Body is a clear attempt to reduce this complexity.

The notion of encyclopedic knowledge in the semiotics of Eco addresses the limitations of a dictionarized interpretation – which is in line with the concept of legal culture as discussed in this book. Encyclopedic knowledge is a competence that requires the interpreter to be knowledgeable beyond the mere operational aspect of applying law. However, no jurist is capable of storing the amount of encyclopedic knowledge encompassing all the different national laws, including their practices, and organization. Therefore, the dictionarized interpretation method the Appellate Body utilizes appears to adequately ensure a minimum consensus on the meaning of law in a multilingual and multicultural society. Despite its limitations, the dictionarized interpretation method has the advantage of being a legitimate way of promoting semantic cohesion and convergence in negotiating meaning during the decision-making process of the Appellate Body members. Through this method, one hopes that the legal discourse of the WTO be understood and accepted by each of the Member States, in order to ensure the uniform application of norms within the multilateral trade system.

The dictionarized method contributes to defining a safe margin for interpretation. The effectiveness of the meanings resulting from this procedure will be proven with time, when certain paths of meaning in earlier decision-making practices are reiterated. However, this method does not make the act of interpretation a mechanical one: the Appellate Body has been aware of this since the start of its activities. It stated that "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world".[1]

Nevertheless, the "real world" is culturally constituted. Therefore, the referent will be no other than the one established by the signification system of the WTO. The "reality" of this world – or, if one prefers, the truth values in discourse – depends on whether it is the subject of common opinion, that is, on whether it is accepted by the group of Member States. Believing that free trade promotes economic justice and the development of nations may mean much to the Member States and also to sustaining the legal discourse of the WTO, regardless of whether or not this assertion is proven true or false.

[1] WT/DS8/AB/R – WT/DS10/AB/R – WT/DS11/AB/R. Japan – Taxes on Alcoholic Beverages, at. 36.

The fabrication of reality gains new possibility of meaning based on interpretation referenced in other linguistic systems that, in turn, carry their own view of the world. Despite the complexity of the interpretive act, it is based on firm legal ground and reinforces the legitimacy of the WTO. But not without facing a number of challenges. What Umberto Eco said on his attempt of writing a book in a language other than his own, touches the heart of the matter:

> [. . .] penetrating another semantically organized system of the universe, the Anglo-Saxon (which was not only a culture, that adopted different signifiers, but that organized signifieds in a different way) [. . .] I noticed that [. . .] by writing in a language I did not know, I was less intelligent.[2]

We hope that this semiotic study of the decision-making discourse of the WTO contributes to furthering the debates on interpretation methods of treaties authenticated in more than one language, thus attracting the attention of jurists to the challenge that the international system poses: resignifying international law via linguistic interaction. We believe that this form of interaction is able to truly open the doors of international law to the possibilities of learning from and with the many different world legal cultures.

[2] **O conceito de texto**, op. cit., at. 2.

# List of Sources

## 1. Articles and Monographs


ADAMS, Edward S.; FARBER, Daniel A. Beyond the formalism debate: expert reasoning, fuzzy logic, and complex statutes. **Vanderbilt Law Review**, v. 52, pp. 1243–1340, 1999.

ALLOTT, Philip. **Eunomia: new order for a new world**. New York: Oxford University Press, 1990.

ALLOTT, Philip. The concept of international law. **European Journal of International Law (EJIL)**, Oxford University Press, v. 10, n. 1, pp. 31–50, 1999.

ALMANAQUE ABRIL. **Mundo 2005**. São Paulo: Editora Abril, 2005.

ALVES, Alaôr Caffé. **Linguagem, sentido e realidade da norma jurídica**: dialética da norma jurídica. Tese (Livre-Docência) – Departamento de Filosofia e Teoria Geral do Direito, Universidade de São Paulo, São Paulo, 1996.

ANDERSON, Benedict. **Nação e consciência nacional**. São Paulo: Ática, 1989.

ANZILOTTI, Dionisio. **Cours de Droit International**. Paris: Éditions Panthéon Assas; L.G.D.J., 1999.

ARNAUD, André-Jean. **Entre modernité et mondialisation**: cinq leçons d'histoire de la philosophie du droit et de l'Etat. Paris: LGDJ, 1998 (Droit et Société).

ARON, Raymond. **Paz e guerra entre as nações**. Trad. Sérgio Bath. Brasília: Editora UnB; São Paulo: Imprensa Oficial do Estado de São Paulo, 2002.

ARROJO, Rosemary. **Tradução, desconstrução e psicanálise**. Rio de Janeiro: Imago, 1993.

AUBERT, Francis Henrik. **As (in)fidelidades da tradução**: servidões e autonomia do tradutor. 2. ed. Campinas: Editora da UNICAMP, 1994.

AUBERT, Francis Henrik. Introdução. Conversas com tradutores: diálogos da prática com a teoria. In: BENEDETTI, Ivone C.; SOBRAL, Adail (Orgs.). **Conversas com tradutores**: balanços e perspectivas da tradução. São Paulo: Parábola, 2003, pp. 7–15.

AZENHA JR, João. **Tradução técnica e condicionantes culturais**: primeiros passos para um estudo integrado. São Paulo: Humanitas/FFLCH/USP, 1999.

BAPTISTA, Luiz Olavo. Temas inacabados na Rodada Uruguai. In: MARCOVITCH, Jacques (Coord.). **O futuro do comércio internacional**: de Marrakesh a Cingapura. São Paulo: FEA-USP, 1996, pp. 39–50.

BAPTISTA, Luiz Olavo; FONSECA, José Roberto Franco da (Coords.). **O direito internacional no 30 milênio**: estudos em homenagem ao Prof. Vicente Marotta Rangel. São Paulo: LTr, 1998.

BAPTISTA, Luiz Olavo; RODAS, João Grandino; SOARES, Guido Fernando Silva (Orgs.). **Normas de direito internacional**, t. III, v. 2: comércio internacional – OMC. São Paulo: LTr, 2001.

BARBER, Charles. **The english language:** a historical introduction. Cambridge: Cambridge University Press, 2000.

BARTHES, Roland. **Elementos de semiologia**. São Paulo: Cultrix, 1997.

BEAULAC, Stéphane. **The power of language in the making of international law**: the word *sovereignty* in Bodin and Vattel and the myth of *Westphalia*. Leiden; Boston: Martinus Nijhoff Publishers, 2004.

BEIVIDAS, Waldir. **Inconsciente et verbum**: psicanálise, semiótica, ciência, estrutura. São Paulo: Humanitas/FFLCH/USP, 2000.

BENVENISTE, Émile. **Problemas de lingüística general**. México: Siglo XXI, 1971.

BERGER, Peter L.; LUCKMANN, Thomas. **A construção social da realidade**: tratado de sociologia do conhecimento. Trad. Floriano de Souza Fernandes. 2. ed. Petrópolis: Vozes, 1974.

BERGMANS, Bernhard. L'enseignement d'une terminologie juridique étrangère comme mode d'approche du droit comparé: l'exemple de l'allemand. **Revue Internationale de Droit Comparé**. Paris, année 39, n. 1, pp. 89–110, janvier-mars, 1987.

BERNER, Christian. **Quést-ce quúne conception du monde?** Paris: J. Vrin, 2006.

BHAGWATI, Jagdish. **Protecionism**. Cambridge: MIT Press, 2000.

BIANCHERI, Boris. **Conciliar o Mundo: a diplomacia na era global**. São Paulo: Martins Fontes, 2005.

BLANCO GARCÍA, Pilar. Dificultad de la traducción de textos jurídicos. **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 1, 2002, pp. 86–105.

BOTIVEAU, Bernard. Le droit islamique comme ensemble de normes et de valeurs, comme savoir et techniques, comme modes de realization d'une exigence sociale de justice. In: CAPELLER, Wanda; KITAMURA, Takanori (dirs). **Une introduction aux cultures juridiques non occidentales**. Bruxelles: Bruylant, 1998, pp. 197–203.

BOURDIEU, Pierre. **¿Qué significa hablar?** Economía de los intercambios lingüísticos. 2. ed. Madrid: Akal, 1999.

BOURDIEU, Pierre. **O poder simbólico**. 5. ed. Rio de Janeiro: Bertrand Brasil, 2002.

BOUTARD-LABARDE, Marie-Chantal. Propos communautaires autour de deux mots: vocabulaire juridique et définition. In: Écrits offert à G.C. Paris: PUF, 1994.

BRAILLARD, Philippe; DJALILI, Mohammad-Reza. **Les relations internationales**. Paris: PUF, 1988 (Que sais-je?).

BRANCOURT, **Jean-Pierre**. Des 'estats' à l'Etat: évolution d'un mot. **Archives de Philosophie du Droit**, Paris, t. 21, 1976.

BRAUDEL, Fernand. **A dinâmica do capitalismo**. Lisboa: Teorema, 1986.

CALVET, Louis-Jean. **La guerre des langues et les politiques linguistiques**. Paris: Hachette, 1999.

CALVET, Louis-Jean. **Le marché aux langues**: les effets linguistiques de la mondialisation. Paris: Plon, 2002.

CAMPBELL, Ian B. Réflexions autour de la rédaction de la décision de justice. **Revue Internationale de Droit Comparé**. Paris, année 50, n. 3, pp. 827–840, juillet-septembre, 1998.

CANAL-FORGUES, Éric. **L'institution de la conciliation dans le cadre du GATT**. Bruxelles: Bruylant, 1993.

CANOTILHO, J. J. Gomes. **Direito constitucional e teoria da Constituição**. Coimbra: Almedina, 1998.

CANAL-FORGUES, Éric. Sur l'interprétation dans le droit de l'OMC. **Revue Générale de Droit International Public**, Paris: Pedone, t. 105, v. 1, pp. 5–24, 2001.

CANAL-FORGUES, Éric. **Le règlement des différends à L'OMC**. Bruxelles: Bruylant, 2003.

CAO, Deborah. Key words in Chinese law. In: WAGNER, Anne; PENCAK, William, **Images in law**. Aldershot: Ashgate, 2006, pp. 35–50.

CARREAU, **Dominique**; JUILLARD, **Patrick**. **Droit international économique**. 4e. éd. Paris: LGDJ, 1998.

CHATILLON, Stéphane. Droit et langue. **Revue Internationale de Droit Comparé**. Paris, année 54, n. 3, pp. 687–715, juillet-septembre, 2002.

CHAUI, Marilena. **O que é ideologia?** 2. ed. São Paulo: Brasiliense, 2001.

CHEVALLIER, Jacques. Mondialisation du droit ou droit de la mondialisation? In: MORAND, Charles-Albert (Dir.). **Le droit saisi par la mondialisation**. Bruxelles: Emile Bruylant; Editions de l'Université de Bruxelles; Helbing & Lichtenhahn, 2001.

CHIBA, Masaji. Ce qui est remis en question dans la culture juridique non-occidentale. In: CAPELLER, Wanda; KITAMURA, Takanori (dirs). **Une introduction aux cultures juridiques non occidentales**. Bruxelles: Bruylant, 1998, pp. 235–271.

CLAVIER, Paul. **Le concept de monde**. Paris: P.U.F., 2000.

COHEN, Raymond. **International politics: the rules of the game**. New York: Longman, 1981.

COHEN-TANUGI, Laurent. **Le droit sans État: sur la démocratie en France et en Amérique**. 2e éd. Paris: Quadrige; P.U.F., 2007.

COLLINS-WILLIAMS, Terry; SALEMBIER, Gerry. International disciplines on subsidies: the GATT, the WTO and the Future Agenda. **Journal of World Trade**, Werner Publishing, v. 30, n. 1, pp. 5–17, 1996.

COMBACAU, Jean; SUR, Serge. **Droit international public**. 5e éd. Paris: Montchrestien, 2001.

CONE, III, Sydney M. The Appellate Body and Harrowsmith country life. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 32, n. 2, pp. 103–117, 1998.

CONE, III, Sydney M. The Appellate Body, the protection of sea turtles and the technique of 'completing the analysis'. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 33, n. 2, pp. 51–61, 1999.

CONSTANTINESCO, Leontin-Jean. **Tratado de direito comparado**: introdução ao direito comparado. Rio de Janeiro: Renovar, 1998.

CORNU, Gérard. **Linguistique juridique**. 2e. éd. Paris: Montchrestien, 2000.

CORREAS, Óscar. **Crítica da ideologia jurídica**: ensaio sócio-semiológico. Porto Alegre: Sérgio Antonio Fabris Editor, 1995.

COTTERRELL, Roger. The concept of legal culture. In: NELKEN, David (Ed.). **Comparing legal cultures**. Aldershot: Dartmouth, 1997, pp. 13–31.

COUSTON, Mireille. La multiplication des juridictions internationales: ens et dynamiques. **Journal du Droit International**, Paris, 129 année, n. 1, pp. 5–53, janv./févr./mars, 2002.

CROOME, John. **Reshaping the world trading system**: a history of the Uruguay Round. Geneva: World Trade Organization, 1995.

DAVEY, William J. Supporting the World Trade Organization dispute settlement system. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 34, n. 1, pp. 167–170, 2000.

DAVID, René. **Os grandes sistemas do direito contemporâneo**. 3. ed. São Paulo: Martins Fontes, 1998.

de BARROS, Diana Luz **Pessoa. Teoria do discurso**: fundamentos semióticos. 2. ed. São Paulo: Humanitas/FFLCH/USP, 2001.

DELAHAYE, Yves. **La frontière et le texte**: pour une sémiotique des relations internationales. Paris: Payot, 1977.

de la VEGA, Rafael. La Europa futura y los problemas de la traducción. **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 3, pp. 37–44, 1991.

DELISLE, Jean; WOODSWORTH, Judith (dir.). **Les Traducteurs dans l'histoire**. Ottawa: Presses de l'Université d'Ottawa, Éditions UNESCO, 1995.

DELMAS-MARTY, Mireille. **Trois défis pour un droit mondial**. Paris: Seuil, 1998.

D'ENTRÈVES, Alexandre Passerin. **La notion de l'État**. Paris: Sirey, 1969.

DINH, Nguyen Quoc; Daillier, P.; Pellet, A. **Droit international public**. 7e. éd. Paris: LGDJ, 2002.

DUBRULLE, Jean Baptiste. Frontière Dépassé, Frontière Recomposée. **International Journal for the Semiotics of Law**. New-York: Springer, v. 18, n. 2, 2005, pp. 159–173.

DUCROT, Oswald. **Princípios de semântica lingüística (dizer e não-dizer)**. São Paulo: Cultrix, 1977.

DUCROT, Oswald et al. **Les mots du discours**. Paris: Minuit, 1980.

DUPUYS, Pierre-Marie. **Droit international public**. 2e. éd. Paris: Précis Dalloz, 1993.

DUROSELLE, Jean-Baptiste. **Todo império perecerá**: teoria das relações internacionais. Brasília: Editora Universidade de Brasília; São Paulo: Imprensa Oficial do Estado, 2000.
ECO, Umberto. **A theory of semiotics**. Bloomington: Indiana University Press, 1976.
ECO, Umberto. **O Conceito de Texto**. São Paulo: Edusp, 1984.
ECO, Umberto. **Semiotics and the philosophy of language**. Bloomington: Indiana University Press, 1986.
ECO, Umberto. **Sémiotique et philosophie du langage**. Paris: P.U.F, 1988.
ECO, Umberto. **The open work**. Cambridge: Harvard University Press, 1989.
ECO, Umberto. **Interpretation and overinterpretation**. Cambridge: Cambridge University Press, 1992.
ECO, Umberto. **Interpretação e Superinterpretação**. São Paulo: Martins Fontes, 1993.
ECO, Umberto. **The search for the perfect language**. Cambridge: Blackwell, 1995
ECO, Umberto, **The search for the perfect language – the making of Europe.** Oxford: Blackwell, 1997
ECO, Umberto. **Lector in fabula**: la cooperazione interpretativa nei testi narrativi. Milano: Bompiani, 1998.
ECO, Umberto. **Los Limites de la Interpretación**. 2. ed. Barcelona: Editorial Lúmen, 1998.
ECO, Umberto. **Kant and the Platypus**: essays on language and cognition. First Harvest edition. New York : Harcourt Brace and company, 1999.
ECO, Umberto. **As Formas do Conteúdo**. 3ª. ed. São Paulo: Perspectiva, 2001.
ECO, Umberto. **Sémiotique et philosophie du langage.** Paris: P.U.F., 2001, p. 13.
ECO, Umberto. **Obra Aberta**. 8th ed. São Paulo: Perspectiva, 2001, pp. 112–113.
ECO, Umberto. **A Estrutura Ausente**. 7. ed. São Paulo: Perspectiva, 2003.
ECO, Umberto. **Quase a mesma coisa**. Rio de Janeiro: Record, 2007.
EHLERMANN, Claus-Dieter. Six years on the bench of the 'World Trade Court': some personal experiences as member of the Appellate Body of the World Trade Organization. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 36, n. 4, pp. 605–639, 2002.
EUROPEAN COMMISSION. **Special Eurobarometer**, 243, "Europeans and their languages", February, 2006.
FAIRCLOUGH, Norman. **Discourse and social change**. Cambridge: Blackwell, 1992.
FARNSWORTH, E. Allan. L'américanisation du droit: mythes ou réalités. **Archives de Philosophie du Droit**, Paris: Dalloz, t. 45, pp. 21–28, 2001.
FERRAZ JR., Tercio S. **Teoria da norma jurídica**: ensaio de pragmática da comunicação normativa. 4. ed. Rio de Janeiro: Forense, 2000.
FERRAZ JR., Tercio S. **Introdução ao estudo do direito**: técnica, decisão, dominação. 4. ed. São Paulo: Atlas, 2003.
FLESCH, Colette. Le Service de traduction de la Commission face au défi du multilinguisme dans l'Union Européenne élargie. **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 1, pp. 92–100, 1999.
FLORY, Thiébaut. Remarques à propos du nouveau système commercial mondial issu des Accords du cycle d'Uruguay. **Journal du Droit International**, Paris: Juris-classeur, 122 année, n. 4, pp. 877–891, oct./nov./déc. 1995.
FLORY, Thiébaut. **L'Organisation mondiale du commerce**: droit institutionnel et substantiel. Bruxelles: Bruylant, 1999.
FONSECA JR, Gelson. **A legitimidade e outras questões internacionais**. São Paulo: Paz e Terra, 1998.
FORREST, Alan. The challenge of languages in Europe. Terminologie et Traduction, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 3, pp. 101–120, 1998.
FRANK, Jerome. **La influencia del derecho europeo continental en el 'common law'**: algunas reflexiones sobre el derecho 'comparado' e 'contrastado'. Barcelona: Bosch, 1957.
FRIEDMAN, Lawrence M. **The legal system**: a social science perspective. New York: Russel Sage Foundation, 1975.

FRIEDMAN, Lawrence M. **Law and society**: an introduction. Englewood Cliffs: Prentice-Hall, 1977.

FRIEDMAN, Lawrence M. **The republic of choice**: law, authority and culture. Cambridge: Harvard University Press, 1990.

FRIEDMAN, Lawrence M. The concept of legal culture: a reply. In: NELKEN, David (Ed.). **Comparing legal cultures**. Aldershot: Dartmouth, 1997, pp. 33–39.

GAFFNEY, John P. Due process in the World Trade Organization: the need for procedural justice in the dispute settlement system. **American University International Law Review**, Washingtion, D.C., v. 14, n. 4, pp. 1173–1221, 1999.

GARAPON, Antoine; PAPADOPOULOS, Ioannis. **Juger en Amérique et en France**: culture juridique française et common law. Paris: Odile Jacob, 2003.

GAUDREAULT-DESBIENS, Jean-François. Les solitudes du bijuridisme au Canada: essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires. Montréal: Thémis, 2007.

GEERTZ, Clifford. **The interpretation of cultures**. New York: Basic Books, 1973.

GLENN, Patrick. La civilisation de la common law. **Revue Internationale de Droit Comparé**. Paris, année 45, n. 3, pp. 559–575, juillet-septembre, 1993.

GLENN, Patrick. **Legal traditions of the world**: sustainable diversity in Law. Oxford: Oxford University Press, 2004.

GODINO, Antônio Cabas. **Curso e discurso da obra de Jaques Lacan**. São Paulo: Moraes, 1982.

GOETSCHALCKX, Jacques. Que peut-on attendre d'une théorie de la traduction? **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 3, pp. 270–271, 2003.

GOODMAN, Nelson. **Manières de faire des mondes**. Paris: Jacqueline Chambon, 1992.

GREENHOUSE, Carol J. Perspectives anthropologiques sur l'américanisation du droit. **Archives de Philosophie du Droit**, Paris: Dalloz, t. 45, pp. 43–59, 2001.

GREIMAS, Algirdas J. (coord.) **Analyse Sémiotique d'un Discours Juridique**. Itália: Centro Internazionale di Semiotica i Linguistica, Università di Urbino, n. 7, ago. 1971.

GREIMAS, Algirdas J. **Sémantique structurale**. Paris: P.U.F., 1986.

GREIMAS, Algirdas J.; COURTÉS, Joseph. **Sémiotique**: Dictionnaire raisonné de la théorie du langage. Paris: Hachette, 1993.

GREIMAS, Algirdas J.; LANDOWSKI, Eric. **Semiótica e ciências sociais**. São Paulo: Cultrix, 1976.

GROUPE STÉPHANOIS DE RECHERCHES (Dir. Antoine Jeammaud). Les mutations des formes du droit. **Procès**, n. 9.

HADI, Maher Abdel. Géographie politique et traduction juridique: le problème de la terminologie. **Terminologie et Traduction**, Bruxelles, Luxembourg: Commission des Communautés européennes, n. 2/3, pp. 43–55, 1992.

HAGÈGE, Claude. **Le souffle de la langue**. Paris: Odile Jacob, 2000.

HALL, Edward T. **Beyond culture**. New York: Anchor Books, 1976.

HEIDEGGER, Martin. **Les concepts fondamentaux de la métaphysique**. Paris: Gallimard, 1992.

HERBULOT, Florence. De la traduction comme une nécessité vitale. **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 2, pp. 11–14, 2002.

HESSEN, Johannes. **Teoria do conhecimento**. São Paulo: Martins Fontes, 2000.

HJELMSLEV, Louis. **Prolegômenos a uma teoria da linguagem**. São Paulo: Perspectiva, 1975.

HOBSBAWM, Eric J. **Nações e nacionalismos desde 1780**. Rio de Janeiro: Paz e Terra, 1990.

HOBSBAWM, Eric J. **Era dos extremos**: o breve século XX (1914–1991). São Paulo: Companhia das Letras, 1995.

HOFSTEDE, Geert. **Culture's consequences**. Thousand Oaks/London/New Delhi: Sage Publications, 2001.

HOFSTEDE, Geert. Diplomats as cultural bridge builders. In: Slavik, Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 25–38.

HUDEC, Robert E. **Enforcing international trade law**: the evolution of the modern GATT legal system. Salem: Butterworth, 1993.

HUDSON, **Manley O**. On languages in treaties. **American Journal of International Law**, XXVI, pp. 368–372, 1932.

IZDEBSKI, Hubert. Le rôle du droit dans le sociétés contemporaines: essai d'une approche sociologique du droit comparé. **Revue Internationale de Droit Comparé**. Paris, année 40, n. 3, pp. 563–582, juillet-septembre, 1988.

JACKSON, John H. **The world trading system**: law and policy of international economic relations. 2nd ed. Cambridge: MIT Press, 1997.

JACQUES, Francis. Une conception dynamique du texte: le problème de son applicabilité à la textualité juridique. In: BOURCIER, Danièle; MACKAY, Pierre. **Lire le droit**: langue, texte, cognition. Paris: LGDJ, 1992, pp. 423–440 (Droit et Société).

JAKOBSON, Roman. **Essais de linguistique générale**, 1: Les fondations du langage. Paris: Les editions de Minuit, 1963.

JOUANNEAU, Daniel. **Le GATT et l'Organisation mondiale du commerce**. 3e. éd. Paris: PUF, 1996 (Que sais-je?).

JOUANNET, Emmanuelle, Les visions française et americaine du droit international: cultures juridiques et droit international. In: Société Française pour le Droit International, **Droit international et diversité des cultures juridiques**. Paris: Pedone, 2008, pp. 43–90.

JUILLARD, P. **Droit international économique**. 4e. éd. Paris: LGDJ, 1998.

JUTRAS, Daniel. Énoncer l'indicible: le droit entre langues et traditions. **Revue Internationale de Droit Comparé**. Paris, année 52, n. 4, pp. 781–796, octobre-décembre, 2000.

KHADDURI, Majid. Le droit islamique dans la culture, la structure du style de vie islamique. In: CAPELLER, Wanda; KITAMURA, Takanori (dirs). **Une introduction aux cultures juridiques non occidentales**. Bruxelles: Bruylant, 1998, pp. 191–196.

KALINOWSKI, Georges. Sur les langages respectifs du législateur, du juge et de la loi. **Archives de Philosophie du Droit**. Le langage du droit, Paris: Sirey, n. 19, pp. 63–74, 1974.

KAPPELER, Dietrich, The impact of cultural diversity on multilateral diplomacy and relations. In: Slavik, Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 79–82.

KAPPELER, Dietrich. The birth and evolution of a diplomatic culture. In: Slavik, Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 353–359.

KELSEN, Hans. **Teoria pura do direito**. 6. ed. São Paulo: Martins Fontes, 1998.

KELSEN, Hans. **Teoria geral do direito e do Estado**. 3. ed. São Paulo: Martins Fontes, 2000.

KELSEN, Hans; CAMPAGNOLO, Umberto. **Direito internacional e Estado soberano**. Organizador Mario G. Losano. São Paulo: Martins Fontes, 2002.

KENNEDY, David. Les clichés revisités, le droit international et la politique. In: DUPUY, Pierre-Marie; LEBEN, Charles. **Droit international**. Paris: Pedone, 2000.

KLINKENBERG, Jean-Marie. **Précis de sémiotique générale**. Paris: De Boeck Université, 2000. (Points Essais).

KOHEN, Marcelo G. La codification du droit des traités: quelques éléments pour un bilan global. **Revue Génerale de Droit International Public**, Paris: Pedone, t. 104. n. 3, pp. 577–613, 2000.

KOHEN, Marcelo G. Internationalisme et mondialisation. In: MORAND, Charles-Albert (Dir.). **Le droit saisi par la mondialisation**. Bruxelles: Emile Bruylant; Editions de l'Université de Bruxelles; Helbing & Lichtenhahn, 2001.

KOMURO, Norio. The EC Banana regime and judicial control. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 34, n. 5, pp. 1–87, October, 2000.

KOMURO, Norio. The WTO dispute settlement mechanism: coverage and procedures of the WTO understanding. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 9, n. 4, pp. 5–85, 1995.

KOVACS, Péter. Developpement et limites de la jurisprudence en droit international. In: **La juridictionnalisation du droit international**. Colloque de Lille. Société Française pour le Droit International. Paris: Pedone, 2003, pp. 269–341.

LAFER, Celso. **A OMC e a regulamentação do comércio internacional**: uma visão brasileira. Porto Alegre: Livraria do Advogado, 1998.

LAFER, Celso. O sistema de solução de controvérsias da Organização Mundial do Comércio. In: CASELLA, Paulo Borba; MERCADANTE, Araminta de Azevedo. (Coord.). **Guerra comercial ou integração mundial pelo comércio?** A OMC e o Brasil. São Paulo: LTr, 1998.

LAFER, Celso. Réflexions sur l'OMC lors du 50e. anniversaire du système multilatéral commercial: l'impact d'un monde en transformation sur le droit international économique. **Journal du Droit International**, Paris: Juris-classeur, 125 année, n. 4, pp. 933–944, oct./nov./déc. 1998.

LANDOWSKI, Eric. **La société réfléchie**: essais de socio-sémiotique. Paris: Seuil, 1989.

LEGENDRE, Pierre. **L'empire de la vérité**. Paris: Fayard, 1983.

LEGRAND, Pierre. **Le droit comparé** (Que sais-je?). Paris: P.U.F., 1999.

LEGRAND, Pierre. L'hypothèse de la conquête des continents par le droit américain (ou comment la contingence arrache à la disponibilité). **Archives de Philosophie du Droit**, Paris: Dalloz, t. 45, pp. 37–41, 2001.

LEVERT, Lionel A. Bijuridisme et bilinguisme législatifs, un enjeu et un pari. In: FRANÇAIS JURIDIQUE ET SCIENCE DU DROIT. COLLOQUE INTERNATIONAL DU C.I.C.L.E.F. (Centre international de la *Common law* en français), 2e., Université de Moncton, Bruylant, 1995.

LIFANTE VIDAL, Isabel. **La interpretación jurídica en la teoría del derecho contemporánea**. Madrid: Centro de Estudios Políticos y Constitucionales, 1999.

LOSANO, Mario G. **Forma e realtá in Kelsen**. Milano: Comunitá, 1981.

LÓTMAN, Iúri M. O problema do signo e do sistema sígnico na tipologia da cultura anterior ao século XX. In: LÓTMAN, Iúri M. et al. **Ensaios de semiótica soviética**. Lisboa: Livros Horizonte, 1981, pp. 101–129.

LÓTMAN, Iúri M. Um modelo dinâmico do sistema semiótico. In: LÓTMAN, Iúri M. et al. **Ensaios de semiótica soviética**. Lisboa: Livros Horizonte, 1981, pp. 67–86.

LÓTMAN, Iúri M. **La semiosfera II – semiótica de la cultura, del texto, de la conducta y del espacio**. Madrid: Ediciones Cátedra, 1998.

LÓTMAN, Iúri M.; USPENSKII, Borís A. Sobre o mecanismo semiótico da cultura. In: LÓTMAN, Iúri M. et al. **Ensaios de semiótica soviética**. Lisboa: Livros Horizonte, 1981, pp. 37–65.

LUHMANN, Niklas. The world society as a social system. **International Journal of General Systems**, v. 8, 1982.

LUHMANN, Niklas. **Sociologia do Direito II**. Rio de Janeiro: Tempo Brasileiro, 1985.

MACFARLANE, Lewis R.; ROBINSON, Heather. Lessons from two Fields: a Diplomat and an Interculturalist Converse. In: Slavik Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 39–56.

MAINGUENEAU, Dominique. **Les termes clés de l'analyse du discours**. Paris: Seuil, 1996.

MAMEDE, Gladston. **Semiologia do direito**: tópicos para um debate referenciado pela animalidade e pela cultura. 2. ed. Porto Alegre: Síntese, 2000.

MARCEAU, Gabrielle. A call for coherence in international law: praises for the prohibition against 'clinical isolation' in WTO dispute settlement. **Journal of World Trade**. Geneva: Kluwer Law International, v. 33, n. 5, pp. 87–152, 1999.

MATURANA, Humberto. Estratégias cognitivas. In: PIATELLI-PALMARINE, Massimo (Org.). **Teorias da linguagem, teorias da aprendizagem**: o debate entre Jean Piaget e Noam Chomsky. São Paulo: Cultrix; Edusp, 1983.

MEAGHER, Niall P. The sound of silence: giving meaning to omissions in provisions of World Trade Organization Agreements: a note on the World Trade Organization Appellate Body Decision in United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 37, n. 2, pp. 417–427, 2003.

MELLINKOFF, David. **The language of the law**. Boston: Little, Brown, 1963.

MERLE, Marcel. **Sociología de las relaciones internacionales**. Madrid: Alianza Editorial, 1997.

MERRY, **Sally Engle**. **Getting justice and getting even**: legal consciousness among working-class americans. Chicago: University of Chicago Press, 1990.

MIAILLE, Michel. **Une introduction critique au droit**. Paris: Masperò, 1978.

MICHAUT, Françoise. Le rôle créateur du juge selon l'école de la 'sociological jurisprudence' et le mouvement réaliste américain. Le juge et la règle de droit. **Revue Internationale de Droit Comparé**, Paris, année 39, n. 2, pp. 343–371, avril–juin, 1987.

MILIAN-MASSANA, Antoni. Le régime juridique du multilinguisme dans l'Union européenne. Le mythe ou la réalité du principe d'égalité des langues. **Revue Juridique Thémis**. Montréal, v. 38, n. 1, pp. 211–260, 2004.

MILLIOT, Louis; BLANC, François-Paul. **Introduction à l'étude du droit musulman**. 2e éd. Paris: Dalloz, 2001.

MINGST, Karen A.; WARKENTIN, Craig P. What difference does culture make in multilateral negotiations? **Global Governance: a Review of Multilateralism and International Organizations**. New York: Lynne Rienner, v. 2, n. 2, 1996, pp. 169–187.

MOCCIA, Luigi. Les bases culturelles du juriste européen: un point de vue continental. **Revue Internationale de Droit Comparé**. Paris, année 49, n. 4, pp. 799–811, octobre-décembre, 1997.

NIETZSCHE, Friedrich. **The gay science**. New York: Random House, 1974.

NOMBELA, Ramón Garrido. Sugerencias para la traducción de textos jurídicos en inglés. **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 3, pp. 255–267, 1991.

OGDEN, Charles K.; RICHARDS, Ivor A. **The meaning of meaning**. New York: Brace & Co., Inc., 1956.

OMC. **Con el comercio hacia el futuro**. 2. ed. rev. Ginebra, marzo de 2001.

ORTIZ, Renato. **Mundialização e cultura**. São Paulo: Brasiliense, 2000.

OST, François. Mondialisation, globalisation, universalisation: s'arracher, encore et toujours, à l'état de nature. In: MORAND, Charles-Albert (Dir.). **Le droit saisi par la mondialisation**. Bruxelles: Emile Bruylant; Editions de l'Université de Bruxelles; Helbing & Lichtenhahn, 2001. pp. 5–36.

OSTROWER, Alexander. **Language, law and diplomacy**: a study of linguistic diversity in official international relations and international law. Philadelphia: University of Pennsylvania, 1965., v. 1.

PACE, Virgile. **L'Organisation mondiale du commerce et le renforcement de la réglementation juridique des échanges commerciaux internationaux**. Paris: L'Harmattan, 2000.

PAIS, Cidmar T. Conceptualisation, information, signification, production du sujet. **Acta Semiotica et Lingüística**, São Paulo: Plêiade: SBPL, v. 5, pp. 41–60.

PAIS, Cidmar T. O percurso gerativo da enunciação: produtividade léxica e discursiva. **Confluência** (Revista do Departamento de Lingüística da Unesp), Assis, v. 3, pp. 162–181, 1994.

PAIS, Cidmar T. Texto, discurso e universo de discurso. **Revista Brasileira de Lingüística**, São Paulo: Plêiade, v. 8, n. 1, pp. 135–164, 1995.

PALMETER, David. The WTO Appellate Body needs remand authority. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 32, n. 1, pp. 41–44, 1998.

PALMETER, David; MAVROIDIS, Petros. The WTO legal system: sources of law. **American Journal of International Law**, Washington D.C., v. 92, n. 3, pp. 398–413, 1998.

PANSIER, Frédéric-Jérôme; GUELLATY, Karim. **Le droit musulman** (Que sais-je?) Paris: P.U.F., 2000.

PEIRCE, Charles S. **The essential peirce**: selected philosophical writings (1893–1913), v. 2. Bloomington: Indiana University Press, 1998.

PEIRCE, Charles S. **Semiótica**. 3. ed. São Paulo: Perspectiva, 2000.

PETERSMANN, Ernst-Ulrich. **The GATT/WTO dispute settlement system**: international law, international organizations and dispute settlement. London: Kluwer Law International, 1997.

PFERSMANN, Otto. Le droit comparé comme interprétation et comme théorie du droit. **Revue Internationale de Droit Comparé**. Paris, année 53, n. 2, pp. 275–288, avril–juin, 2001.
PHILLIPSON, Robert. **Linguistic imperialism**. Oxford: Oxford University Press, 1993.
PIQUET, Hélène. **La Chine au carrefour des traditions juridiques**. Bruxelles: Bruylant, 2005.
PLANTEY, Alain. **La négociation internationale au XXIe siècle**. Paris: CNRS, 2002.
POIRIER, Donald; DEBRUCHE, Anne-Françoise. **Introduction générale à la common law**. 3e. éd. Bruxelles: Bruylant; Éditions Yvon Blais, 2005.
RANA, Kishan S. Diplomatic culture and its domestic context. In: Slavik, Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 381–390.
RANA, Kishan S. **Asian diplomacy**: the Foreign Ministries of China, India, Japan, Singapore and Thailand. Malta; Geneva: DiploFoundation, 2007.
REALE, Miguel. **Teoria do direito e do Estado**. 5. ed. São Paulo: Saraiva, 2000.
REIMANN, Mathias. Droit positif et culture juridique: l'américanisation du droit européen par reception. **Archives de Philosophie du Droit**, Paris: Dalloz, t. 45, pp. 61–75, 2001.
REIMANN, Heinrich. On the importance and essence of Foreign Cultural Policy of States: the interplay between diplomacy and intercultural communication. In: Slavik, Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 83–87.
REMIRO BROTONS, Antonio. **Derecho internacional público**, v. 2: derecho de los tratados. Madrid: Tecnos, 1987. v. 2.
REUTER, Paul. **Introduction au droit des traités**. 3e. éd. rev. et augmentée par Philippe Cahier. Paris: PUF, 1995.
REY, Alain. Traduire, interpreter: les mots pour le dire. **Terminologie et Traduction**, Bruxelles, Luxembourg: Office des Publications Officielles des Communautés européennes, n. 2/3, pp. 13–23, 1992.
RIGAUX, François. **A lei dos juízes**. São Paulo: Martins Fontes, 2000.
ROBERTS, Simon. Culture juridique africaine: nature de l'ordre juridique en Afrique. In: CAPELLER, Wanda; KITAMURA, Takanori (dirs). **Une introduction aux cultures juridiques non occidentales**. Bruxelles: Bruylant, 1998, pp. 179–183.
ROCHE, Jean-Jacques. **Relations internationales**. 2e. éd. Paris: LGDJ, 2001.
RODRÍGUEZ-AGUILERA, Cesáreo. **El lenguaje jurídico**. Barcelona: Bosch, 1969.
ROLAND, Ruth A. **Interpreters as diplomats**: a diplomatic history of the role of interpreters in world politics. Ottawa: University of Ottawa Press, 1999.
ROMANO, Santi. **L'ordre Juridique**. Paris: Dalloz, 1975.
ROUSSEAU, Charles. **Droit international public**. Paris: Recueil Sirey, 1953.
RUET, Laurent. Les fonctions juridiques de la langue. **Journal du Droit International**. Paris: Juris-classeur, 125 année, n. 3, pp. 697–719, juillet-août-septembre, 1998.
RUIZ-FABRI, H. Le règlement des différends dans le cadre de l'Organisation mondiale du commerce. **Journal du Droit International**, Paris: Juris-classeur, 124 année, n. 3, pp. 709–755, juil./août/sept. 1997.
RUIZ-FABRI, H. L'appel das le règlement des différends de l'O.M.C.: trois ans après, quinze rapports plus tard. **Revue Générale de Droit International Public**, Paris: Pedone, t. 103, v. 1, pp. 48–128, 1999.
RUIZ-FABRI, H. Le contentieux de l'exécution dans le règlement des différends de l'Organisation mondiale du commerce. **Journal du Droit International**, Paris: Juris-classeur, 127 année, n. 3, pp. 605–645, juil./août/sept. 2000.
RUIZ-FABRI, H. Chronique du règlement des différends. **Journal du Droit International**, Paris: Juris-classeur, 128 année, n. 3, pp. 901–953, juil./août/sept. 2001.
RUIZ-FABRI, H. Le règlement des différends au sein de l'OMC: naissance d'une juridiction, consolidation d'un droit. In: LEBEN, Charles; LOQUIN, Eric; SALEM, Mahmoud (Eds.). **Souveraineté étatique et marchés internationaux à la fin du 20ème siècle**: a propos de 30 ans de recherché du Credimi, mélanges en l'honneur de Philippe Kahn. Paris: Litec, 2000, pp. 303–334.
SACCO, R. Le droit muet. **Revue trimestrielle de droit civil**, Paris, pp. 783–796, 1995.

SANTAELLA, Lucia. **A teoria geral dos signos**: como as linguagens significam as coisas. São Paulo: Pioneira, 2000.

SANTOS, José Luiz dos. **O que é cultura**. 14. ed. São Paulo: Brasiliense, 1996.

SAUSSURE, Ferdinand de. **Course in general linguistics**. Chicago: Open Court, 1986.

SEFTON-GREEN, Ruth. Compare and contrast: monstre à deux têtes. **Revue Internationale de Droit Comparé**. Paris, année 54, n. 1, pp. 85–95, janvier–mars, 2002.

SEITENFUS, Ricardo. **Manual das organizações internacionais**. Porto Alegre: Livraria do Advogado, 1997.

SELESKOVITCH, Danica; LEDERER, Marianne. **Interpréter pour traduire**. 4. éd. revue et corrigée. Coll. Traductologie. Paris: Didier Érudition, 2002.

SHARP, Paul. The idea of diplomatic culture and its sources. In: Slavik, Hannah (Ed.). **Intercultural communication and diplomacy**. Malta: DiploFoundation, 2004, pp. 361–379.

SHAW, Malcolm N. **International law**. 4th. ed. Cambridge: Cambridge University Press, 1997.

SIMON, Denys. **L'interprétation judiciaire des traités d'organisations internationales**: morphologie des conventions et fonction juridictionnelle. Paris: Pedone, 1981.

SISTACH, Dominique. Mots, langues, langages et droit: essai de relecture des concepts juridiques essentiels. In: MATZNER, Elsa (Dir.). **Droit et langues etrangeres**: concepts, problemes d'application, perspectives. Presses Universitaires de Perpignan, 2000, pp. 25–41 (Collection Études).

SLOTBOOM, Marco M. Subsidies in WTO Law and in EC Law: broad and narrow definitions. **Journal of World Trade**, London: Kluwer Law International, v. 36, n. 3, pp. 517–542, June, 2002.

SOARES, Guido Fernando Silva. **Common law**: introdução ao direito dos EUA. 2. ed. São Paulo: Editora Revista dos Tribunais, 2000.

SOARES, Guido Fernando S. **Curso de direito internacional público**. São Paulo: Atlas, 2002. v. 1.

SOURIOUX, Jean-Louis; LERAT, Pierre. **Análise de texto**: método geral e aplicações no direito. São Paulo: Martins Fontes, 2002.

STEGER, Debra S. Appellate Body jurisprudence relating to trade remedies. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 35, n. 5, pp. 799–821, 2001.

STEHMANN, Oliver. Export subsidies in the regional aircraft sector: the impact of two WTO panel rulings against Canada and Brazil. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 33, n. 6, pp. 97–120, 1999.

STERN, B. How to regulate globalization? In: BYERS, M. (Ed.) **The role of law in international politics**: essays in international relations and international law. Oxford: Oxford University Press, 2000.

TAY, Ehr-Soon. Culture Juridique Chinoise. In: CAPELLER, Wanda; KITAMURA, Takanori (dirs). **Une introduction aux cultures juridiques non occidentales**. Bruxelles: Bruylant, 1998, pp. 205–219.

TCHIVOUNDA, Guillaume Pambou. Le droit international de l'interprétation des traités à l'épreuve de la jurisprudence: réflexions à partir de la sentence rendue le 15 février 1985 par le tribunal arbitral pour la délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau. **Journal du Droit International**. Paris: Techniques, 113 année, n. 3, pp. 627–650, juillet-août-septembre, 1986.

THOMPSON, John B. **Ideology and modern culture**: critical social theory in the era of mass communication. Cambridge: Polity Press, 1990.

TIMSIT, Gérard. **Les noms de la loi**. Paris: PUF, 1991.

TRACHTMAN, Joel P. The domain of WTO dispute resolution. **Harvard International Law Journal**, Cambridge, v. 40, n. 2, pp. 333–377, 1999.

TROPER, Michel. La notion de personne juridique. In: **Realités du Droit International Contemporain**: Discours Juridique et Pouvoir dans les Relations Internationales: l'Exemple des Sujets de Droit. Actes de la Cinquième Rencontre de Reims, Centre d'Études des Relations Internationales, Faculté de Droit de Reims, n. 3, 28/29, juin, 1980.

ULLMANN, Stephen. **Semântica**: uma introdução à ciência do significado. 5. ed. Lisboa: Fundação Calouste Gulbenkian, 1987.

USPENSKII, Boris A. História sub specie semioticae. In: LÓTMAN, Iúri M. et. al. **Ensaios de semiótica soviética**. Lisboa: Livros Horizonte, 1981. pp. 87–98.

VAN DER BORGHT, Kim. The review of the WTO understanding on dispute settlement: some reflections on the current debate. **American University International Law Review**, Washington, D.C., v. 14, n. 4, pp. 1223–1243,1999.

VANDERLINDEN, Jacques. Langue et droit. In: CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, 15., 1998, Bristol. **Langue et droit**: XVe Congrés. . . Éd. Erik Jayme. Bruxelles: Bruylant, 1999. pp. 65–121.

VATTIMO, Gianni. **La fin de la modernité**: nihilisme et herméneutique dans la culture post-moderne. Paris: Seuil, 1987.

VERHOEVEN, Joe. Traités ou contrats entre États? Sur les conflits de lois en droit des gens. **Journal du Droit International**, Paris: Juris-classeur, 111 année, pp. 5–36, 1984.

VERMULST, Edwin; MAVROIDIS, Petros C.; WAER, Paul. The functioning of the Appellate Body after four years: towards rule integrity. **Journal of World Trade**, Netherlands: Kluwer Law International, v. 33, n. 2, pp. 1–50, 1999.

VIRALLY, Michel. **El devenir del derecho internacional**: ensayos escritos al correr de los años. México: Fondo de Cultura Económica, 1997.

VITANYI, Béla. L'interprétation des traités dans la théorie du droit naturel. **Revue Générale de Droit International Public**. Paris: Pedone, t. 84, v. 2, pp. 535–586, 1980.

VOGT, Carlos. **Linguagem, Pragmática e Ideologia**. 2ª. ed. São Paulo: Hucitec, 1989.

VOÏCU, Ioan. **De l'interprétation authentique des traités internationaux**. Paris: Pedone, 1968.

VOLOSHINOV, Valentin Nikolaevic. **Marxism and the philosophy of language**. Cambridge: Harvard University Press, 1986.

WAGNER, Anne. **La langue de la common law**. Paris: L'Harmattan, 2002.

WAHLENDORF, H. A. Schwarz-Liebermann von. **Introduction à l'esprit et à l'histoire du droit anglais**. Paris: L.G.D.J., 1977.

WALLERSTEIN, Immanuel. A cultura como campo de batalha ideológico do sistema mundial moderno. In: FEATHERSTONE, Mike (Org.). **Cultura global**: nacionalismo, globalização e modernidade. 3. ed. Petrópolis: Vozes, 1999, pp. 41–67.

WARAT, Luis Alberto. **O direito e sua linguagem**. 2. ed. aum. Porto Alegre: Sérgio Antônio Fabris Editor, 1995.

WATT, Horatia Muir. Propos liminaires sur le prestige du modèle américain. **Archives de Philosophie du Droit**, Paris: Dalloz, t. 45, pp. 29–36, 2001.

WEISFLOG, Walter E. Problems of legal translation. In: **Rapports suisses présentés au XIIème Congrès international de droit comparé**. 7, 1986, Sydney/Melbourne, Publications de l'Institut suisse de droit comparé, 1987, pp. 179–218.

WHITE, James Boyd. **Justice as translation**: an essay in cultural and legal criticism. Chicago; London: The University of Chicago Press, 1994.

WILLIAMS, **Glanville Llewelyn**. The controversy concerning the word 'law'. In: LASLETT, P. (Ed.). **Philosophy, politics and society**. 1st series. Oxford: Basil Blackwell, 1963.

WILLIAMS, Jorge N. **Interpretación de las leyes en el derecho norte-americano**. Buenos Aires: Abeledo-Perrot, 1959.

WROBLEWSKI, Jerzy. Les langages juridiques: une typologie. In: **Le discours juridique**: langage, signification et valeurs. Paris: LGDJ, 1988. http://www.reds.msh-paris.fr/francais/accueil.htm. (Droit et Société, 8).

ZARTMAN, I. William; BERMAN, M. R. **The practical negotiator**. New Haven: Yale University Press, 1982.

ZIEMBINSKI, Zygmunt. La langage du droit et le langage juridique: les critères de leur discernement. **Archives de Philosophie du Droit**. Le langage du droit. Paris: Sirey, n. 19, pp. 25–31, 1974.

## 2. WTO Reports

WORLD TRADE ORGANIZATION. United States – **Standards for Reformulated and Conventional Gasoline**. WT/DS2/AB/R, April 29, 1996. Appellate Body's Report.

WORLD TRADE ORGANIZATION. Japan – **Taxes on Alcoholic Beverages**. WT/DS8/R – WT/DS10/R – WT/DS11/R, July 11, 1996. Panel's Report.

WORLD TRADE ORGANIZATION. Japan – **Taxes on Alcoholic Beverages**. WT/DS8/AB/R – WT/DS10/AB/R – WT/DS11/AB/R, October 4, 1996. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Measures Affecting Imports of Woven Wool Shirts and Blouses from India**. WT/DS33/AB/R, April 25, 1997. Appellate Body's Report.

WORLD TRADE ORGANIZATION. European Communities – **Regime for the Importation, Sale and Distribution of Bananas**. WT/DS27/AB/R, September 9, 1997. Appellate Body's Report.

WORLD TRADE ORGANIZATION. India – **Patent Protection for Pharmaceutical and Agricultural Chemical Products**. WT/DS50/AB/R, December 19, 1997. Appellate Body's Report.

WORLD TRADE ORGANIZATION. European Communities – **Measures Concerning Meat and Meat Products** (**Hormones**). WT/DS26/AB/R – WT/DS48/AB/R, January 16, 1998. Appellate Body's Report.

WORLD TRADE ORGANIZATION. European Communities – **Customs Classification of Certain Computer Equipment**. WT/DS62/AB/R – WT/DS67/AB/R – WT/DS68/AB/R, June 5, 1998. Appellate Body's Report.

WORLD TRADE ORGANIZATION. European Communities – **Measures Affecting Importation of Certain Poultry Products**. WT/DS69/AB/R, July 13, 1998. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Import Prohibition of Certain Shrimp and Shrimp Products**. WT/DS58/AB/R, October 12, 1998. Appellate Body's Report.

WORLD TRADE ORGANIZATION. Guatemala – **Anti-Dumping Investigation Regarding Portland Cement from Mexico**. WT/DS60/AB/R, November 2, 1998. Appellate Body's Report.

WORLD TRADE ORGANIZATION. Korea – **Taxes on Alcoholic Beverages**. WT/DS75/AB/R – WT/DS84/AB/R, January 18, 1999. Appellate Body's Report.

WORLD TRADE ORGANIZATION. Japan – **Measures Affecting Agricultural Products**. WT/DS76/AB/R, February 22, 1999. Appellate Body's Report.

WORLD TRADE ORGANIZATION. Canada – **Measures Affecting the Export of Civilian Aircraft**. WT/DS70/R. April 14, 1999. Panel's Report.

WORLD TRADE ORGANIZATION. Canada – **Measures Affecting the Importation of Milk and the Exportation of Dairy Products**. WT/DS103/R – WT/DS113/R, May 17, 1999. Panel's Report.

WORLD TRADE ORGANIZATION. Canada – **Measures Affecting the Export of Civilian Aircraft**. WT/DS70/AB/R, August 2, 1999. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Tax Treatment for "Foreign Sales Corporations"**. WT/DS108/R, October 8, 1999. Panel's Report.

WORLD TRADE ORGANIZATION. Canada – **Measures Affecting the Importation of Milk and the Exportation of Dairy Products**. WT/DS103/AB/R – WT/DS113/AB/R, October 13, 1999. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Tax Treatment for "Foreign Sales Corporations"**. WT/DS108/AB/R, February 24, 2000. Appellate Body's Report.

WORLD TRADE ORGANIZATION. European Communities – **Trade Description of Sardines**. WT/DS231/R, May 29, 2002. Panel's Report.

WORLD TRADE ORGANIZATION. Chile – **Price Band System and Safeguard Measures Relating to Certain Agricultural Products**. WT/DS207/AB/R, September 23, 2002. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Continued Dumping and Subsidy Offset Act of 2000**. WT/DS217/R – WT/DS234/R. September 16, 2002. Panel's Report.

WORLD TRADE ORGANIZATION. European Communities – **Trade Description of Sardines**. WT/DS231/AB/R, Septemper 26, 2002. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Continued Dumping and Subsidy Offset Act of 2000**. WT/DS217/AB/R – WT/DS234/AB/R, January 16, 2003. Appellate Body's Report.

WORLD TRADE ORGANIZATION. United States – **Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada**. WT/DS257/R, August 29, 2003. Panel's Report.

WORLD TRADE ORGANIZATION. European Communities – **Conditions for the Granting of Tariff Preferences to Developing Countries**. WT/DS246/R, December 1, 2003. Panel's Report.

WORLD TRADE ORGANIZATION. United States – **Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada**. WT/DS257/AB/R, January 19, 2004. Appellate Body's Report.

WORLD TRADE ORGANIZATION. European Communities – **Conditions for the Granting of Tariff Preferences to Developing Countries**. WT/DS246/AB/R, April 7, 2004. Appellate Body's Report.

# Index