Introduction

Beware, beware the interpreter! Whether interpretation is viewed as an objective or a subjective process,[1] this caution is equally relevant. But it is as much counsel about the interpreter as it is counsel for the interpreter, because the process of interpretation can be fraught with dangers. It is well understood that many normative frameworks have met with disrepute, indeed disasters, in the process of their interpretation. Others, however, have endured and better stood the test of time, precisely as a consequence of the manner of their interpretation. Thus, with caution come opportunities. If evolution is the manner of mankind's development, interpretation is its equivalent normative vehicle for development – whether viewed as an objective or subjective process. This analogy is best understood if the objective and subjective standpoints on interpretation are placed in their respective temporal boxes. Thus, the objective view of interpretation is concerned more with the present. Consequently, it is less focused on the long-term legislative, impact of interpretation, despite that impact, given its incremental nature – sometimes in the blink of an eye, or in a decade of a time frame. In contrast, the subjective, constitutive perspective on interpretation best derives its clarity from the historical, retrospective context in which it observes evolution.

This book identifies some of the underlying problems of interpreting the WTO Agreements within the context of different spheres of issues, problems, objectives and disciplines. In this process, some perspectives on interpretation are proffered, and the scene is set for the development of appropriate approaches to various issues. This book is not about the substantive interpretations of the WTO Agreements as such.

[1] See for example R. Dworkin 'Law, Philosophy and Interpretation' in F. Atria and D. N. MacCormick (eds) *Law and Legal Interpretation* (Ashgate Publishing 2003), chapter 1, 3. See also R. Dworkin *Law's Empire* (Fontana, London 1987).

Interpreting the WTO Agreements involves focusing on the text of the WTO Agreements through customary norms of treaty interpretation as set out in Articles 31–3 of the Vienna Convention on the Law of Treaties. The process of understanding the WTO Agreements is augmented by considering them against the backdrop of the jurisprudence of the WTO. In practice, this has been greatly facilitated by the *WTO Analytical Index* and further work in the WTO that highlights different provisions of the WTO Agreements in the light of the WTO jurisprudence, namely, the *WTO Appellate Body Repertory of Reports and Awards*.

Chapter 1 focuses on the actual tools of treaty interpretation relied upon in the WTO. In particular, it considers how those very tools of interpretation have themselves been adopted and shaped within the WTO to facilitate the process of interpretation. Chapter 2 focuses on the institutional set-up within which interpretation takes place and considers the problems of treaty interpretation as they relate to institutional aspects of the WTO. Chapter 3 is a consideration of the interpretative issues within the national dimension. This national dimension is considered mainly as it has been analysed in the WTO.

Chapter 4 considers the interpretative issues that arise from the interplay and engagement of exceptions in the WTO Agreements. Here special and differential treatment provisions are drawn upon as an example. Closely allied to the question of interpreting exceptions is the challenge of facilitating development through the very process of interpretation. Thus, Chapter 5 focuses on interpretation from the perspective of the development dimension. Chapter 6 looks at a discourse much considered among WTO scholars, namely, the extent to which external concerns can be taken into account in the interpretative processes. Finally, Chapter 7 examines interpretative issues in the dimension of a particular discipline – trade remedies agreements.

1

Interpreting principles of treaty interpretation in the World Trade Organization

1.1 Introduction

The jurisprudence of the World Trade Organization (WTO) is replete with references to Articles 31–2 of the Vienna Convention (VC) on the Law of Treaties. This gospel for interpretation is often the starting-point of judgments in the WTO. Its use in the WTO became established with the Appellate Body (AB) decision in the US–Gasoline case. wherein it was pointed out that the general rule of interpretation set out in Article 31 of the VC had

> 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* [Understanding on Rules and Procedures Governing the Settlement of Disputes], to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization*. . . . That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law. (Footnotes omitted)

This statement is often religiously cited in other WTO cases. Indeed, in the same vein, Article 32 of the VC has also been acknowledged as having attained the status of a customary rule of interpretation of public international law.[1] This equation of customary rules of interpretation of public international law in Article 3 (2) of the DSU with Articles 31–2 of the VC is founded ultimately on the need to ensure certainty and clarity in the process of interpretation of the WTO

[1] See for example Mexico–Telecommunications (Panel) para 7.15; US–Cotton Yarn (Panel) para 7.17; US–Sardines (Panel) para 7.12; Japan–Taxes on Alcoholic Beverages (AB) 10; US–Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (Panel).

Agreements. In effect it has rendered Articles 31–2 of the VC a Hart's 'rule of recognition' in the WTO which is binding on WTO members who are not party to the VC.[2] Similarly, the practice of other judicial organs operating in the sphere of international economic relations – for example, the European Court of Justice (ECJ),[3] North American Free Trade Agreement (NAFTA) Panels[4] and International Centre for Settlement of Investment Disputes (ICSID) arbitration[5] – involves frequent references to Articles 31–2 of the VC, accompanied by the observation that those provisions represent customary rules of treaty interpretation.[6]

In these circumstances, to question the adequacy of Articles 31–3 of the VC as aids to interpreting the WTO Agreements may well be considered heresy. The VC is certainly generally uncritically invoked. Yet there are sound reasons for a re-evaluation of the principles of treaty interpretation applicable to the WTO Agreements.[7]

First, it is the case that the drafting of the VC principles predates the spate of international agreements that have spawned international law, particularly international economic law, since 1969. Those principles were established against the background of a preoccupation with fundamental principles, in particular the principle of *pacta sunt servanda*. International relations, along with international economic relations, have since moved on to a higher level of consciousness to encompass fairness.[8] Fairness not only pervades all aspects of international economic discourse *de lege ferenda* but is also establishing itself as part of the very architecture of the international economic order.

Second, the dynamic but Byzantine manner in which international trade negotiations take place must in some measure inform the kind of aids to interpretation necessary for subsequent engagement with the agreement reached. Thus, the circumstances of the negotiations can

[2] See H. L. A. Hart *The Concept of Law* (2nd edn Oxford UP, Oxford 1994).
[3] Opinion of Advocate General Misho, Case C-257/99 (26 September 2000) para 63.
[4] NAFTA Arbitral Panel Established Pursuant to Chapter Twenty: In the Matter of Cross-Border Trucking Services (Secretariat File no. US-MEX-98–2008–01) para 220.
[5] See for example Salim Costruttori S.p.A and Jordan, ICSID Case no. ARB/02/13 para 75.
[6] See also *Case Concerning Kasikili/Sedudu Island* (Botswana/Namibia) ICJ 1999 para 18.
[7] A view shared by J. Jackson, although for somewhat different reasons – namely, that the VC 'is more suited to application to bilateral treaties' given that it was negotiated mainly against the backdrop of bilateral agreements. See J. Jackson *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge UP, Cambridge 2006) 184.
[8] See for example T. M. Franck *Fairness in International Law and Institutions* (Oxford UP, Oxford 1995).

lead to incomplete arrangements or confusion over the nature of the provisions of the agreement.

Third, the very nature of trade and trade agreements must have a bearing on the canons of interpretation drawn upon. Thus, trade negotiations are often said to be founded on reciprocity. Equally, many trade norms are not contractual in nature but partake of a legislative character. Although it is received wisdom that insofar as interpretation is concerned it does not distinguish between such variations, nevertheless there have been calls for re-visiting this wisdom.[9]

Fourth, the diversity of the participants in multilateral trade negotiations is a factor that shapes trade agreements. The arrangements for the subsequent interpretation of these agreements must be sensitive to the fact that the agreements engineered have involved both powerful and weak members. This is not to detract from the *pacta sunt servanda* principle or the text of the agreement. Rather, it is to assert that when one group of participants in the negotiations lacks information, negotiating expertise, acumen and foresight regarding the consequences of some of its actions during the negotiations and at the time of the conclusion of the agreement, it has a certain interest in these circumstances being taken into account in some measure in the apparatus of interpretation. Thus, this group may well be clear as to the overall objectives and purposes of the agreement, which usually are apparent, but somewhat at a loss at the micro/technical detail level of the subject of negotiations. In such circumstances, the group may well have a legitimate expectation that the canons of interpretation subsequently drawn upon will re-balance in some measure their negotiating deficits. One manner of taking cognisance of this negotiating deficit in the interpretative process is to give more weight to the overall objects and purposes of the agreement – in other words, the canons of interpretation should iron out some of the consequences of the deficit in the negotiations at the micro level by reinforcing the consensus of the group with regard to the overall objectives and purposes of the agreement.[10] Equally, where a vulnerable group is invited to engage in

[9] See for example Sir Humphrey Waldock [1964] 1 *YILC* para 18 (ILC 765th Meeting A/CN.4/167/Add.3): 'It was difficult to distinguish between treaties laying down rules of conduct for States and those of a contractual type involving an exchange of benefits. The rules being drafted should not become a strait-jacket capable of frustrating, for example, the institutional development of international organizations.'

[10] Note that in domestic systems unfair contracts are protected by law through, for example, duties of disclosure. It is not being suggested here that agreements should be

negotiations whose objects and purposes motivate their engagement, there is legitimacy in their expectations that the interpretative apparatus will not detract from those objects and purposes. In summary, the objects and purposes, as opposed to the 'intentions' of the parties, provide a better basis for transparency, fairness and re-distributive justice in the interpretative process.

Finally, the built-in international power ratio in the administrative and adjudicative processes involved in the interpretation of WTO Agreements can have a bearing on the manner in which international principles of treaty interpretation are applied. In particular, the neutrality and resilience of the principles of treaty interpretation in terms of that power ratio are germane. The de-coupling of the interpreters from the principles of treaty interpretation is logically not coherent. Principles of treaty interpretation cannot be conceived of in isolation. A measure of their objectivity is the degree to which they lend themselves to the preferences of the interpreters. Thus, the more ambiguous the principles of treaty interpretation, the more susceptible they are to partisan use.

In conclusion, there is a case for principles of treaty interpretation to be founded on a number of factors – not necessarily confined to the traditional set of standards. Certainty, predictability and the intentions of the parties as manifested in the text of the agreement are indeed relevant factors by which to measure the adequacy of principles of treaty interpretation. However, the adequacy of the international customary principles of treaty interpretation needs to be evaluated from the perspective of a wider range of legitimate expectations and concerns. Thus, how the principles of treaty interpretation deliver in terms of the fulfilment of the objects and purposes of the negotiations, how they take into account the circumstances leading to the conclusion of the agreement (including disparity in the knowledge and expertise of the negotiators), the extent to which they lend themselves to manipulation by the power structure enshrined within the institution after the agreement is reached, and how indeed they further internationally agreed community goals are all relevant.

In particular, the principles for treaty interpretation set out in the VC ascribe a custodian role to an interpreter. The application of the principles involves judgements, in particular 'allocative' judgements, about the placement of material sources into the interpretative pool,

re-written, rather that to the extent there is scope in the interpretative process, such scope should be drawn upon for some measure of redress.

which ultimately informs the interpretation. Parties in litigation, as well as divergent policy claims, compete for the inclusion of particular sources as material within the parameters of the principles of treaty interpretation set out in the VC. Interpreters thus perform an allocative/gate-keeper function in this process. The interpretative process as set out in the VC partakes of a form of distributive justice. In the circumstances, expectations of fairness – albeit within the constraints of the interpretative process and the interpretative mandate – are indeed legitimate. Interpretation, contrary to popular belief, is not completely non-judgemental in terms of the substance of the agreement or in relation to the process of the conclusion of the agreement. Thus, good faith is an aspect of the process.[11] By the same token, the consensus arrived at is set against the background of the international legal order – wherein are to be found principles of justice and fairness.[12]

In international trade discourse there is much ado about trends in the interpretation of WTO Agreements. This may be a legitimate concern, but it certainly is a passing one. What is more, evaluating trends involves judgements and assumes objective criteria. In a sense, the more critical query is not so much about trends as such as about the underlying interpretative apparatus which facilitates trends. Focusing on how the principles of treaty interpretation have been applied and have themselves been interpreted within the WTO thus serves to shed light on the trends that might emerge. This is achieved here through a focus on the adequacy and propriety, both generally and specifically, of some of the aspects of the application and interpretation of the principles of treaty interpretation drawn upon in the WTO.[13]

1.2 Interpretation of the VC in the WTO generally

The practice within the WTO, and indeed other international organisations, of equating 'customary rules of interpretation of public

[11] See Article 31 of the VC. See also [1966] 1(Part II) *YILC* 205 para 30 (ILC 870th Meeting A/CN.4/186 7 Addenda; A/CN.4/L.107, L.115), wherein Mr Rosenne explained that it was impossible to arrive at a decision that was manifestly absurd or unreasonable if good faith was applied in the process of interpretation.

[12] See for example Article 31 (3) (c) of the VC. See also [1964] 1 *YILC* 312 para 41 (AC/CN.4/167Add.3): 'Mr Amado said that anyone interpreting a treaty in good faith could hardly help assuming that it had been drafted in the light of the rules of international law.'

[13] This focus here excludes an evaluation of Article 33 of the VC, on the basis that it is not at the core of the issues being considered.

international law' with Articles 31–2 of the VC invites the question whether it is appropriate, indeed permissible, to freeze in time such customary rules, at least within the WTO. The pace of international treaty-making, the length of time since the VC and the nature of customary international law all call into question such a rigid equation. It is this equation which has contributed in the WTO, and indeed in other organisations, to the paucity of references to practices of interpretation in other international organisations as well as to State practice which contributes to the formation of customary or general international law in this sphere. Indeed, the interpretation has been based mainly on the work of publicists and the International Law Commission (ILC) deliberations on the VC. This observation is valid despite the fact that the practice in certain comparable international organisations (e.g. NAFTA, the ECJ and the ICSID) is not necessarily exemplary. Thus, there is little evidence of 'subsequent practice' (subsequent to the VC) being taken into account in the development of the principles of treaty interpretation.

In the same vein, by limiting the scope of 'customary rules of interpretation of public international law' to Articles 31–2 of the VC, WTO practice has restricted the spectrum of rules of treaty interpretation to these provisions. It can be argued that the corpus of customary rules of interpretation of public international law may be at variance with these provisions.[14] Conversely, have customary rules of treaty interpretation not otherwise directly associated with Articles 31–2 of the VC been squeezed into this VC straitjacket?

From a starting-point of taking their cue in matters of interpretation from the VC, the judicial organs of the WTO have now acquired the confidence to clarify and formulate their own 'interpretative gloss' on Articles 31–2 of the VC. Indeed, in this respect, the WTO judicial organs can be said to be the most distinguished of all international judicial organs with respect to their imprint on international agreements. However, this contribution needs to be evaluated in terms of the adequacy of the set of standards drawn upon in the clarification process.

The process of interpretation of the VC in the WTO has been essentially in response to the exigencies of particular disputes. This practice is indicative of a judicial acknowledgement of the need for a clear set of rules

[14] A view shared by A. Lindroos and M. Mehling 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO' (2005) 16(5) *JIEL* 857–77, 869: 'Article 3.2 of the DSU refers to "customary rules of interpretation of public international law". By itself , this wording would seem to allow the application of other rules of treaty interpretation than those stipulated in Articles 31 and 32 VCLT.'

for interpretation with respect to the WTO Agreements. It is the case that some aspects of the principles set out in the VC are not clear, even when properly interpreted. Be that as it may, it is legitimate to enquire whether, in this process of interpretation, the organs of the WTO are engaged in interpreting the VC, in developing customary rules of interpretation of public international law, in formulating special rules of interpretation under Article 31 (4) of the VC or in establishing subsequent practice in the interpretation of the VC. Are such interpretations of the VC *qua* convention binding on non-signatories to the VC?

1.3 Interpretations of the VC

1.3.1 Purpose of interpretation

According to the WTO jurisprudence, the purpose of interpretation is to identify the common intention of the parties.[15] However, this common intention of the parties can be ascertained only by applying the process set out in Article 31 to the text of the agreement. Thus, the AB has stated:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require 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.[16]

This also means that the common intentions cannot be determined with reference to the 'subjective and unilateral' expectations of one of the parties alone.[17]

[15] See EC–Chicken Classification (Panel) para 7.94, wherein the Panel observed: 'The Panel also understands that the primary purpose of treaty interpretation is to identify the common intention of the parties and that the rules contained in Articles 31 and 32 of the *Vienna Convention* have been developed to help assessing, in objective terms, what was or what could have been the common intention of the parties to a treaty.' Confirmed by the AB (para 7.254). See also EC–Computer Equipment (AB) para 93.

[16] India–Patent Protection for Pharmaceutical and Agricultural Chemicals Products (AB) para 45.

[17] EC–Computer Equipment (AB) para 84.

A number of observations need to be made here on this apparent identification of the purpose of interpretation with ascertaining the common intentions of the parties, albeit with some caveats. First, the common intentions are by no means the only or sole purpose of interpretation. As the ILC pointed out in its deliberations on the VC:

> Writers . . . differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to –
>
> (a) the text of the treaty as the authentic expression of the intentions of the parties;
> (b) the intentions of the parties as a subjective element distinct from the text; and
> (c) the declared or apparent objects and purposes of the treaty.[18]

Second, this reference to common intentions in the WTO can be said to mark a departure from the textual/restrictive approach to interpretation to which the institution might have been more wedded in its early days. Third, the reference to common intentions must be considered against the background of other, related assertions which touch upon the purpose of interpretation in the WTO. Thus, references to the expressed objects and purposes are to be found in AB jurisprudence.[19] The relative importance of objects and purposes was widely recognised by the ILC in its preparatory work on the VC.[20] This importance has been somewhat dwarfed (but not diminished) by the concern over the potential for relying too much on, or giving undue weight to, the objects and purposes. The relative significance of the objects and purposes is implicit in the following observation with respect to the intentions of the parties made by Mr Lachs in the deliberations of the ILC: 'The burden of the operation of a treaty, in the light of the realities of international relations, fell upon all its signatories; there was therefore no reason for giving a higher standing to the intentions of the original parties in the matter of interpretation.'[21] Similarly, the affirmation of the principle of effectiveness, founded on the principle of good faith,[22] as an aspect of the interpretative apparatus of the WTO incorporates the function of the objects and purposes as expressed in the WTO Agreements. Finally, that objects and purposes and the

[18] Sir Humphrey Waldock [1964] 2 *YILC* para 4. [19] See for example US–Shrimp (AB).
[20] See for example Mr Bartos [1964] 1 *YILC* para 77 (ILC 766th Meeting).
[21] [1964] 1 *YILC* para 46. [22] See section 1.3.2.