CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

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 time frame of a decade. 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, Farnham UK 2003) chapters 1, 3. See also R. Dworkin, *Law's Empire* (Fontana, London 1987).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

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 (1969) (VCLT). 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 the important data to be found at www.worldtradelaw.net.

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. The chapter has a special Analytical Index on the VCLT as an Annex. 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, with some reference to the New Haven School on Treaty Interpretation. 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. Chapter 7 examines interpretative issues in the dimension of a particular discipline – trade remedies agreements. Finally, Chapter 8 responds to some fundamental perspectives that have been proffered on the challenges of interpretation arising as a consequence of the configuration of the WTO and the phenomena of regional trade agreements (RTAs) in the world trading system. Additionally it offers some comparative insights into the practice of RTAs as it relates to interpretative processes, accompanied by an Annex mapping RTA practice in the field.

© in this web service Cambridge University Press www.cambridge.org

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

1

Interpreting principles of treaty interpretation in the WTO

1.1 Introduction

The jurisprudence of the World Trade Organization (WTO) is replete with references to Articles 31–2 of the VCLT. 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 VCLT 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.)[1]

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

[1] US–Gasoline (AB) p. 7.
[2] See for example Mexico–Telecommunications (Panel) para. 7.15; US–Cotton Yarn (Panel) para. 7.17; US–Sardines (Panel) para. 7.12; Japan–Alcoholic Beverages (AB) para. 10; US–Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (Panel).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

effect it has rendered Articles 31–2 of the VCLT a Hart's 'rule of recognition' in the WTO which is binding on WTO members whether or not party to the VCLT.[3] Similarly, the practice of other judicial organs operating in the sphere of international economic relations – for example, the European Court of Justice (ECJ),[4] North American Free Trade Agreement (NAFTA) Panels,[5] and International Centre for Settlement of Investment Disputes (ICSID) arbitration[6] – involves frequent references to Articles 31–2 of the VCLT, accompanied by the observation that those provisions represent customary rules of treaty interpretation.[7] Such references and pronouncements are also to be found in the judgments of the International Court of Justice (ICJ).[8]

In these circumstances, to question the adequacy of Articles 31–3 of the VCLT as aids to interpreting the WTO Agreements may well be considered heresy. The VCLT interpretative approach is generally uncritically invoked, despite established strong criticism set mainly in the New Haven approach to international law. The New Haven approach to international law conceives of an agreement as a continuous process of communication as between the parties and is critical of the preoccupation in the VCLT with the text of the treaty, emphasizing instead the need to approximate the interpretation to the actual shared expectations of the parties arising from the agreement.[9] More recent reservations are set mainly in justice, human rights and developing country concerns.

[3] See H. L. A. Hart, *The Concept of Law* (2nd edn. Oxford University Press, 1994).

[4] Opinion of Advocate General Misho, Case C-257/99 (26 September 2000) para. 63.

[5] 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.

[6] See for example *Salim Costruttori S.p.A and Jordan*, ICSID Case no. ARB/02/13 para. 75. See J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012).

[7] See also the ILC: First report on subsequent agreements and subsequent practice in relation to treaty interpretation by G. Nolte, Special Rapporteur UN A/cn.4/660 (March 2013) Part III and Draft Conclusion 1.

[8] See Case Concerning Kasikili/Sedudu Island (*Botswana/Namibia*), ICJ Reports 1999, para. 18; Territorial Dispute (*Libyan Arab Jamahiriya/Chad*) ICJ Reports 1994, para. 41; Oil Platforms (*Islamic Republic of Iran* v. *United States of America*), Preliminary Objections, ICJ Reports 1996, para. 23; Application of the Convention on the Prevention of the Crime of Genocide, ICJ Reports 2007, para. 160 in relation to Articles 31–2 of the VCLT generally. See specifically in relation to Article 31 (3) (c) of the VCLT Case Concerning Certain Questions of Mutual Assistance in Criminal Matters, ICJ Reports 2008, para. 112; Dispute regarding Navigational and Related Rights (*Costa Rica* v. *Nicaragua*), ICJ Reports 2009, para. 47; Case Concerning Pulp Mills on the River Uruguay ICJ Reports 2010, para. 65.

[9] See M. S. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

The need for a continued re-evaluation of the principles of treaty interpretation generally, and in particular as they apply to the WTO Agreements, continues.

First, it is the case that the drafting of the VCLT 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 substantial bilateral treaty practice[10] and 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 multilateral consciousness to encompass, for example, fairness.[11] 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.

In the same vein, as E.-U. Petersmann in his various writings has emphasized, the interpretation of treaties should be informed by principles of justice, including the human rights obligations of UN member states.[12] Thus, the somewhat often overlooked preamble to the VCLT, which informs the interpretation of Articles 31–2, *inter alia* specifically states:

> Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,
>
> Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,
>
> Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,
>
> Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights

Nijhoff, Netherlands 1994). See also R. K. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) chapter 2.

10 A view shared by J. Jackson, namely, that the VCLT '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 University Press, 2006) p. 184.

11 See for example T. M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995).

12 See for example E.-U. Petersmann, *International Economic Law in the 21st Century: Need for Stronger Democratic Ownership and Cosmopolitan Reforms* EUI Working Paper LAW 2012/17 at http://cadmus.eui.eu/bitstream/handle/1814/22797/LAW_2012_17_Petersmann.pdf?sequence=1 (last visited 9 January 2014).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

> and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Second, the protracted and Byzantine manner in which multilateral trade negotiations take place must in some measure inform the kind of aids to interpretation necessary for subsequent engagement with the agreement reached. Thus, trade negotiations are often founded on reciprocity and consensus decision making. Moreover, the circumstances of the negotiations can lead to incomplete arrangements or confusion over the nature of the provisions agreed.

Third, the very nature of trade and its place in the universe of other policy concerns must have a bearing on the canons of interpretation drawn upon. Trade norms are not just contractual in nature but also partake of legislative and constitutional characteristics. Moreover, they simply cannot exist without co-existing with non-trade-norms. Although it is received wisdom that insofar as interpretation is concerned it does not distinguish between such variations and peculiarities, nevertheless there is the need, and indeed there have been calls for, re-visiting this wisdom.[13]

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 are usually 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

[13] 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.'

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

subsequently drawn upon will re-balance and/or take into account in some measure their negotiating deficits. One manner of taking cognizance 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.[14] Equally, where a vulnerable group is invited to engage in 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/adjudicators, including the processes of their appointment, from the principles of treaty interpretation, is logically not coherent. The formulation and application of principles of treaty interpretation cannot be conceived of in isolation from the persona of the interpreters, the substance and nature of the treaty, and the circumstances of the conclusion of the treaty. A measure of their objectivity and function is the degree to which they do not 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 relevant. 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

[14] 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 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.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

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 such as human rights and justice are all relevant.

In particular, the principles for treaty interpretation set out in the VCLT ascribe a custodian role to an interpreter. The weight of this custodianship is greater the more important the treaty in question. Important multilateral agreements facilitate the development of global welfare and even carry with them the opportunity to further that welfare. Moreover, they are repositories not only of the means to certain goals but also the hopes and aspirations of a particular generation for itself and for future generations. The application of the principles involves judgements, including 'allocative' judgements about the placement of material sources into the interpretative pool, 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 VCLT. Interpreters thus perform an allocative/gate-keeper function in this process. The interpretative process as set out in the VCLT partakes of a form of distributive justice. In the circumstances, the realization of expectations of fairness and opportunities to further welfare – 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 and justice inform the process of interpretation.[15] 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.[16]

In international trade discourse there is much ado about trends in the interpretation of WTO Agreements. This may be a legitimate concern,

[15] See Article 31 of the VCLT. 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. See also preamble to the VCLT.

[16] See for example Article 31 (3) (c) of the VCLT. 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.'

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

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. Importantly it is an invitation to interpreters to heed the inadequacy of the tools of interpretation. 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.[17]

The WTO interpretative practice has now been extensively examined both in WTO specific literature as well as general works on treaty interpretation. In general treaty interpretation works, it has been used to demonstrate how it has featured in the development of customary principles of treaty interpretation. In WTO specific works, the major focus has been on the interpretative practice of the WTO. In this chapter the primary focus is on the manner in which the principles of treaty interpretation in international law have themselves been interpreted in the WTO. However, the practice of other institutions is also relevant and, where appropriate, has been referred to (see Analytical Index on VCLT at the end of this chapter). In particular the purpose of this exercise is (1) generally to engender a critical approach to this process. Interpreting the very principles of treaty interpretation is not merely a technical process that needs simply to be described. There is here an *adoption* of principles that is informed by certain 'value' drivers. In addition, there are three strands which will be specifically taken into account viz., (2) wherever the process lends itself to it the relationship between consensus decision making in the WTO and the interpretative *modus operandi*; (3) the extent to which the process contributes to *de*-fragmentation in international law; and (4) finally, the implications of that process for developing countries generally. The first, in recognition of the political configuration within which the adjudication functions in the WTO; the second, in recognition of the now accepted desideratum of systemic integration in international

[17] This focus here excludes an evaluation of Article 33 of the VCLT. This is for two reasons – first space and time in the context of this work and second because in terms of importance the subject matter has not traditionally featured as one of the core preoccupations of interpretation in WTO jurisprudence. Nevertheless see for example B. J. Condon, 'Lost in Translation: Plurilingual Interpretation of WTO Law' (2010) 1(1) *Journal of International Dispute Settlement* 191–216.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition
Asif H. Qureshi
Excerpt
More information

law; and, finally, the third because the interpretative process involves the notion of justice which in turn carries with it at the least a reflection for the weaker participants. Much of the existing literature, both general and specific, in terms of interpretation is essentially Euro-centric and noticeably on occasion incestuous in its citation tendencies.

1.2 Interpretation of the VCLT in the WTO generally

There are two fundamental questions arising from the equation of Articles 31–2 of the VCLT with 'customary rules of interpretation of public international law'. One relates to the temporal nature of the customary international law in question and the other is concerned with the very nature of the customary rules of interpretation.

First, the practice in the WTO and other international organizations, of pegging 'customary rules of interpretation of public international law' with Articles 31–2 of the VCLT invites the question whether it is appropriate, indeed permissible, to freeze in time such customary rules to those encapsulated in the VCLT. The pace of international treaty making and consequent interpretative practice, the length of time since the VCLT, and the nature of customary international law since that time, all call into question such a rigid equation. Thus, it can be argued that the corpus of customary rules of interpretation of public international law may be at variance with these provisions. It is this pegging which in part has contributed in the WTO and other organizations, to the relative paucity of references to practices of interpretation in other international judicial fora, as well as to state practice, which contributes to the formation of customary international law in this sphere. Indeed, the discernment of the customary international law has been based mainly on the work of publicists and the deliberations of the International Law Commission (ILC) at the time of the negotiations of the VCLT. This observation is valid despite the fact that the practice in certain comparable international organizations (e.g. NAFTA, the ECJ and the ICSID) is not necessarily exemplary. In sum, there is little contemporary evidence of subsequent developments, for example the existence of 'subsequent practice' (subsequent to the VCLT), as such being considered in the international jurisprudence on Articles 31–2 of the VCLT. In this respect the observations of Gardiner need to be highlighted, viz.:

> That the second limb of the intertemporal rule as formulated by Judge Huber is applicable to treaty interpretation is perhaps best evidenced by the Vienna rules themselves. This is both shown by their content and

© in this web service Cambridge University Press www.cambridge.org