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978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition

Asif H. Qureshi

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## INTERPRETING WTO AGREEMENTS

The case law of the World Trade Organization is extensive, now running into some three hundred decided cases and thousands of pages. The interpretative process involved in this jurisprudence constitutes a form of legislative activity, and is therefore of great significance not only to the parties to disputes, but to the membership of the WTO. Qureshi identifies some of the underlying problems of interpreting WTO agreements, and examines the conditions for the interpretation of these agreements. Since the first edition of this book, the case law has grown, and the interpretation evolved further. This second edition addresses these developments and engages in the contemporary discourse on the subject. Also included is a new section on issues of interpretation relating to preferential trade agreements and the WTO. This book is an essential tool for WTO trade specialists, as well as government and judicial officers concerned with interpreting these agreements.

ASIF H. QURESHI is Professor of International Economic Law in the School of Law at Korea University, Seoul, a barrister attached to Quadrant Chambers, London and Editor-in-Chief of *Manchester Journal of International Economic Law*.

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University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107043299](http://www.cambridge.org/9781107043299)

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First published 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Qureshi, Asif H. (Asif Hasan), 1956– author.

Interpreting WTO agreements : problems and perspectives / Asif H. Qureshi. –  
Second edition.

pages cm

ISBN 978-1-107-04329-9 (hardback)

1. Commercial treaties – Interpretation and construction. 2. Foreign trade regulation – Interpretation and construction. 3. Tariff – Law and legislation – Interpretation and construction. 4. World Trade Organization. 5. Judicial process. I. Title.

K4610.Q87 2015

382'.92–dc23

2014029902

ISBN 978-1-107-04329-9 Hardback

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To my parents who live on in me

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## PREFACE TO FIRST EDITION

My interest in the problems of interpreting the WTO Agreements is a long-standing one. My first monograph on the WTO focused on the implementation of the WTO Agreements,<sup>1</sup> and interpretation is very much a part of implementation. When that book was published, however, interpretation was not that big an issue. Some of the inspiration for this work also comes from my earlier research on IMF conditionality.<sup>2</sup> Anyone working on the legal aspects of IMF conditionality at that time had to engage with the works of Joseph Gold – in particular his work on interpretation.<sup>3</sup> Judge Rosalyn Higgins's work on problems and processes no doubt provided the idea for a problems-based approach to the subject,<sup>4</sup> although it is a matter of judgement whether my work is in any way process oriented. Another inspiration for the writing of the current book is irritation (which can also be a motivating factor for research) stemming from the preoccupation in the existing literature on the interpretation of the WTO Agreements with the interaction of international environmental and human rights norms with the WTO Agreements. Diverse perspectives even on a seemingly technical subject can have significance in the development of international law.<sup>5</sup>

This monograph was researched and written while I was visiting Fudan Law School, Shanghai, China; the Law School, University of Malaya, Kuala Lumpur, Malaysia; and the Graduate School of Law and Politics, University of Osaka, Japan. Of course, a substantial part was also

<sup>1</sup> See A. H. Qureshi, *The World Trade Organization: Implementing International Trade Norms* (Manchester University Press, 1996).

<sup>2</sup> See A. H. Qureshi, *International Economic Law* (Sweet and Maxwell, London 1999) part two.

<sup>3</sup> See J. Gold, *Interpretation: The IMF and International Law* (Kluwer Law International, The Hague 1996).

<sup>4</sup> See R. Higgins, *Problems and Processes: International Law and How It Works* (Clarendon Press, Oxford 1995).

<sup>5</sup> See A. H. Qureshi (ed.), *Perspectives in International Economic Law* (Kluwer Law International, The Hague 2002).

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PREFACE TO FIRST EDITION

completed at my base in the Law School, University of Manchester. I am particularly grateful to Professor Lu Zhian, Professor Khaw Lake Tee and Professor Mari Nagata for their very kind hospitality during my sojourns in China, Malaysia and Japan, respectively. I am also very grateful to my colleagues in Manchester for facilitating these trips.

There are a host of others to whom gratitude needs to be expressed. I thank these people and apologise for not naming all of them here individually. I would, however, like to mention Finola O'Sullivan of Cambridge University Press for facilitating this publication and for her firm advice on deadlines! I am also grateful to Valerie Hughes, former Director of the Appellate Body of the WTO, for her comments on chapter 2, and to Willie Chatsika, Counsellor in the Technical Cooperation Division of the WTO, for his observations on an earlier draft of chapter 5.

Last but not least, this book would not have been possible without the love and care that sustained me while I worked on it. Mianghi 'Kamsa Hamnida', as they say in Korean.

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## PREFACE TO SECOND EDITION

The first edition of this monograph published in 2006 was the first ever monograph fully devoted to a comprehensive examination of the problems relating to the interpretation of the WTO Agreements. Eight years have now elapsed since the first edition. Between 2006 to April 2014 there have been some thirty-seven WTO Appellate Body reports and sixty-three Panel reports. Additionally, there has been much scholarly engagement on the subject of interpretation of international treaties focusing not only on the issues relating to the interpretation of WTO Agreements but also deliberating on those relating to the interpretation of bilateral investment agreements. This has been accompanied by some in-depth studies on treaty interpretation generally, including an important focus by the International Law Commission on fragmentation in international law. Against this background also has been the slow progress of the Doha Round of trade negotiations and a consequent pegging of hopes in some quarters on the development of world trade law through the auspices of the WTO dispute settlement process. In the same vein, the mushrooming of regional trade agreements with their respective, albeit mainly dormant, dispute settlement mechanisms, has placed a greater responsibility, as much as complexity, on the shoulders of the legal custodians of the WTO Agreements. This second edition tries to take into account these developments. In particular, the perspective here has taken into account, wherever appropriate, development issues in the analysis, as should be the case in any serious work on interpretation of WTO Agreements. In some measure the practice in investment arbitration on interpretation has also been taken into account. All the chapters have been substantially revised and a new chapter added.

I am very grateful to Ms Minyoung Ko from the Law School at Korea University for her research assistance in bringing about this second edition. Selflessly, she took time off from her own PhD research and delivered, as and when I needed her, valuable and thorough research assistance. I am also grateful and fortunate to have worked on this

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second edition in the very congenial environment of the Law School, Korea University alongside my distinguished colleagues and friends, in particular Professors Nohyoung Park, Park Ki-Gab, Jae-Hyung Lee, Byung-Geun Kang, and Keechang Kim, Tae-Jin Kim and Lin Zhang. Finally a special mention to all the students in the Law School for making it a pleasure to teach!

## ABBREVIATIONS

AB	Appellate Body
ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BIT	Bilateral investment treaty
BOP Committee	Balance of Payments Committee
CERD	Charter of International Economic Rights and Duties of States
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECJ	European Court of Justice
FCN	Friendship, commerce and navigation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HS	International Convention on the Harmonized Description and Coding System
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDL	International development law
IIA	International investment agreement
ILC	International Law Commission
IMF	International Monetary Fund
ITO	International Trade Organization
LDC	Least-developed country
MFN	Most-favoured nation
MTN	Multilateral trade negotiations
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
PCIJ	Permanent Court of International Justice
PTA	Preferential trade arrangements
RTA	Regional trade agreement
SA	Agreement on Safeguards

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## LIST OF ABBREVIATIONS

S&D	Special and differential treatment
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TPR	Trade policy review
TPRM	Trade Policy Review Mechanism
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VAT	Value added tax
VCLT	Vienna Convention on the Law of Treaties 1969
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO Agreements	The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts



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Cambridge University Press

978-1-107-04329-9 - Interpreting WTO Agreements: Problems and Perspectives: Second Edition

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