



THE APPLICATION OF CUSTOMARY
INTERNATIONAL RULES ON TREATY
INTERPRETATION IN THE WTO DISPUTE
SETTLEMENT SYSTEM

BY

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ABSTRACT

The customary international rules on treaty interpretation are widely applied by the international adjudicators (international courts and tribunals), including the WTO Dispute Settlement Body (Panel and Appellate Body). These international adjudicators recognized the rules codified in Articles 31 – 33 of the Vienna Convention on the Law of Treaties (VCLT) as the customary rules of treaty interpretation. This research examines the application of the customary international rules on treaty interpretation as generally sets out in Article 3.2 of the WTO Dispute Settlement Understanding (DSU). For that purpose, it analyzes the application of the customary rules of treaty interpretation as codified in Articles 31 – 33 of the VCLT by the WTO Panel and Appellate Body in the selected cases in order to clarify the provisions of the WTO Agreement. In addition, it analyzes the extent of the application of the customary rules in interpreting the WTO Agreement in order to evaluate the sufficiency and compatibility of the interpretation rules in the WTO dispute settlement system. This research adopted library-based research by utilizing the primary and secondary legal sources. It concludes that the customary interpretation rules as codified in Articles 31 – 33 of the VCLT are significantly important not only to give effect to the provisions of the WTO Agreement and to determine the substantive rights and obligations of the WTO Members, but also to assure the coherency and consistency of WTO regime with the rules of public international law.

خلاصة البحث

يعتمد محكمو التحكيم الدولي (*the international adjudicators*) بشكل كبير على القواعد الدولية العرفية المتعلقة بتفسير الإتفاقيات. ويشمل هذا أيضا هيئة تسوية المنازعات التابعة لمنظمة التجارة العالمية (على مستوى فرق التحكيم وهيئة الإستئناف). كما يستند محكمو التحكيم الدولي على المواد 31-33 المقررة في اتفاقية فيينا لقانون المعاهدات المنظمة لاستعمال القواعد العرفية لتفسير الإتفاقيات. من هذا المنطلق، يدرس هذا البحث تطبيقات هذه الأخيرة كما وردت بصيغتها العامة في المادة 3 الفقرة 2 من تفاهم تسوية المنازعات التابع لمنظمة التجارة العالمية (*WTO Dispute Settlement Understanding*). يحلل البحث تطبيقات فرق التحكيم وهيئة الاستئناف التابعة لمنظمة التجارة العالمية (*WTO Panel and Appellate Body*) للقواعد العرفية المتعلقة بتفسير الإتفاقيات كما تم النص عليها في المواد 31-33 من اتفاقية فيينا لقانون المعاهدات في جملة من القضايا المختارة، وذلك لتوضيح أحكام اتفاقية منظمة التجارة العالمية. أيضا، يحلل البحث تطبيق القواعد العرفية لتفسير أحكام منظمة التجارة العالمية لتقييم مدى تناسب التفسيرات في نظام تسوية المنازعات التابع لمنظمة التجارة العالمية. اعتمد هذا البحث في جمع مادته العلمية على المصادر القانونية الأولية والثانوية. يصل البحث في الأخير إلى أن قواعد التفسير العرفية كما تم النص عليها في المواد 31-33 من اتفاقية فيينا لقانون المعاهدات ذات أهمية بالغة ليس فقط من حيث إعطائها الأثر اللازم لأحكام اتفاقية منظمة التجارة العالمية أو تحديد الحقوق الجوهرية والتزامات الأعضاء، بل تلعب هذه القواعد دورا حاسما في ضمان استمرارية وتناغم نظام منظمة التجارة الدولية مع مقررات وأحكام قواعد القانون الدولي العام.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Wan Ahmad Al-Baqir bin Wan Adam Al-Baqir (Son)

Wan Najla Sumayyah binti Wan Adam Al-Baqir (Daughter)

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Agreement on Subsidies and Countervailing Measures (SCM Agreement)
Agreements on the Technical Barriers to Trade (TBT Agreement)
General Agreement Tariffs and Trade 1994 (GATT 1994)
General Agreement on Trade and Services (GATS)
Dispute Settlement Understanding (DSU)
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
Charter of United Nations (UN Charter)
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

LIST OF ABBREVIATION

AIDCP	Agreement on the International Dolphin Conservation Program
BTI	Binding tariff information
CN	Combined Nomenclature
CPC	Central Product Classification
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
ECA35	Economic Complementary Agreement
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ETP	Eastern Tropical Pacific Ocean
GATS	General Agreement on Trade and Services
GATT 1994	General Agreement Tariffs and Trade 1994
HS	Harmonized Commodity Description and Coding System/Harmonized System
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
ICTY	International Criminal Tribunal for the Former Yugoslavia
ISO/IEC	The International Organization for Standardization and the International Electrotechnical Commission

ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
LA/MSF	Launch Aid/Member State Financing
NGISC	National Gambling Impact Study Commission
TBT	Agreements on the Technical Barriers to Trade
TEDs	Turtle Excluder Devices
US	United States
USITC	United States International Trade Commission
v.	versus, against
VCLT	Vienna Convention on the Law of Treaties 1969
WCO	World Customs Organization
WTO	World Trade Organization

CHAPTER 1

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE RESEARCH

The World Trade Organization (WTO) dispute settlement system plays a vital role in the interpretation of the WTO Agreement. The function of the dispute settlement system which consists of the Panel and Appellate Body is basically described in Article 3.2 of Dispute Settlement Understanding (DSU):

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves predictability to the multilateral trading system. 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*. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. [emphasize added]

Hence, Article 3.2 of the DSU not only indicates the role of the WTO Dispute Settlement Body (DSB), but also recognizes the importance or paramount function of the customary rules of interpretation of public international law in clarifying the provisions of the WTO Agreement. In other words, it provides guidance on how the WTO Agreement should be interpreted in striking a balance between the rights and obligations of the WTO Members. Therefore, the provision recognizes the importance of the general principles or customary rules of treaty interpretation as the basic groundwork in interpreting the WTO Agreements.

In the eyes of general international law, the customary rules of treaty interpretation are basically categorized as, firstly; codified customary rules of treaty

interpretation as expressly mentioned in Articles 31 – 33 of the Vienna Convention on the Law of Treaties 1969 (VCLT) which respectively provides the general rules for treaty interpretation, rules concerning the usage of supplementary means of interpretation, as well as the general rule for the interpretation of treaties authenticated in more than one language. Secondly, non-codified customary rules of treaty interpretation, for instance, the principle of effectiveness and the prohibition of abusive interpretation. However, the first category of the rules is the focal point of this research as they are widely applied and accepted as reflecting customary international law on the interpretation of treaty by the international Courts and tribunals.¹ Therefore, the rules specified in Articles 31 – 33 of the VCLT are applicable to all WTO Members regardless of their ratification status of the VCLT.

The general rule in Article 31 of the VCLT is structured with several components in aiding the interpreter to clarify the meaning of the treaty provisions. The essential rules on the treaty interpretation in Article 31 of the VCLT can be more clearly understood by breaking out the components of the Article as follows: a treaty shall be interpreted in accordance with (i) the *ordinary meaning of its term* (ii) in their *context*, by taking into consideration (iii) the *object* and the *purpose* of the treaty, (iv) *any related agreement or instrument* between the parties before or after the conclusion

¹ The customary international rules of treaty interpretation has been applied by the international Courts and tribunals as can be exemplified in the cases *The Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996] ICJ Rep 803; *The Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, para 41; *The Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] ICJ Rep 1045; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* [1995] ICJ Rep 6, para 33; *LaGrand Case (Germany v. United States of America)* [2001] ICJ Rep 466, para 99; *Case Concerning Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, para 37; *Golder v The United Kingdom* (1975) (Judgment), Application No. 4451/70; *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/AB/R; *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R.

of the treaty, (v) *any subsequent practice* of the parties, and (vi) *any relevant rules of public international law applicable in the relations between the parties*.

It follows with Article 32 of the VCLT which provides the rule when the *supplementary means* of treaty interpretation may be referred in order to confirm the meaning of the treaty text that resultant from the application of Article 31 of the VCLT. Besides that, recourse may be made to the supplementary means of interpretation in the situation when the meaning of the treaty text is remain ambiguous or obscure eventhough the rule in Article 31 has been applied, or the outcome of the interpretation process leads to an absurd or unreasonable result.

Furthermore, Article 33 of the VCLT specifically provides the rule for the interpretation of the treaty that has been authenticated in more than a language. The terms of the treaty in each of the authenticated version are presumed to have the same or identical meaning. However, if the parties are in disagreement on the meaning of the interpreted terms after a comparison of the authentic texts has been made; Article 33 provides that “*the meaning which best reconciles the treaty text, having regard to the object and purpose of the treaty, shall be adopted*”.

In international dispute settlement, treaties are generally interpreted in different methods or approach depends on the fact of the dispute as well as the legal issues or legal interpretation involved in that particular dispute. In the context of the WTO dispute settlement, precise and or correct interpretation of the WTO Agreement by the WTO Dispute Settlement Body influences the development of the multilateral trading system. Indeed, the reliance on a body of rules in interpreting the WTO Agreement provides rooms for efficient, consistent, reliable as well as speedier dispute resolution process.

1.2 STATEMENT OF THE PROBLEM

Certainly, the customary rule in general international law is a wide subject of discussion among the scholars and legal practitioners. Since Article 3.2 of the DSU is the nucleus of the discussion in this research, therefore, the application of customary rules of public international law in interpreting or clarifying the provision in the WTO Agreement in extracting its actual meaning with the aim to preserve the rights and obligations of the WTO Members is the central of this research. Because of the reason, it is expedient to analyze the appraisal of Article 3.2 of the DSU by the WTO Dispute Settlement Body by finding appropriate answer to the following questions:

- I. What are the international customary rules on the interpretation of treaty as expressly provided in Article 3.2 of the DSU?
- II. What are the roles of Articles 31 – 33 of the VCLT in the interpretation of treaty and how the Articles are recognized as reflecting the international customary rules on the interpretation of treaty?
- III. How the codified rules in international customary rules on the interpretation of treaty as provided in Articles 31 – 33 of the VCLT are applied by the WTO Dispute Settlement Body in ascertaining the true meaning of the terms uses in the WTO Agreement?
- IV. Does the rules and principles provided in Articles 31 – 33 of the VCLT are sufficient and compatible to accommodate any issue or dispute brought before the WTO Dispute Settlement Body?

1.3 HYPOTHESIS

1. A set of basic principles or general rules as the ‘guidelines’ for the interpretation of the WTO Agreement are needed in order to determine the rights and obligations of the WTO Members under the multilateral trading system due to the voluminous and complex nature of the WTO Agreement.
2. As the WTO law is part of general international law, Articles 31 – 33 of the VCLT which provide for the rule of interpretation of treaty in public international law plays important function in facilitating the WTO Panel and Appellate Body throughout the WTO dispute settlement process.
3. Due to the increasing number of WTO Members and the increasing number of trade dispute, as well as due to the complexity of the facts, the mechanism of interpretation may be varied and different as it depends on the material facts and legal issues in each dispute.

1.4 OBJECTIVES OF THE RESEARCH

1. To understand the application of the customary international rules on the interpretation of treaty by the WTO Dispute Settlement Body as generally sets out in Article 3.2 of the DSU.
2. To understand the importance of Articles 31 – 33 of the VCLT in interpreting the WTO Agreement.
3. To analyze and discuss how the customary rules and principles on the interpretation of treaties codified in Articles 31 – 33 of the VCLT are applied by the Dispute Settlement Body in clarifying the provisions of the WTO Agreement.

4. To examine the sufficiency and compatibility of the rules on treaty interpretation in Articles 31 – 33 of the VCLT in facilitating the interpretation of the WTO Agreement by the WTO Dispute Settlement Body.

1.5 SCOPE AND LIMITATIONS OF THE STUDY

This research attempts to assess the extent of the application of the customary international rules in the interpretation of the WTO Agreement by the WTO Dispute Settlement Body. Therefore, the ambit of the discussion is limited into the customary rules and general principles of the treaty interpretation as codified in Articles 31 – 33 of the VCLT and as widely recognized or practiced by the Dispute Settlement Body in clarifying the terms of the WTO Agreement in the dispute between the WTO Members. Therefore, other international customary rules on the interpretation of treaty outside the scope of Articles 31 – 33 of the VCLT are not thoroughly discussed in this research.

The discussion in this research is primarily related with the function of the WTO Dispute Settlement Body in clarifying the rights and obligations of the WTO Members through the interpretation of the WTO Agreement. Therefore, other functions of the WTO Dispute Settlement Body in term of providing security and predictability to the multilateral trading system² does not necessarily fall within the scope of this research. Similarly, the issues related to the legal transparency and other formalities or procedures involved in the dispute settlement process are irrelevant to be discussed since this research focuses on the application of the customary

² World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, (Cambridge: Cambridge University Press, 2004): 2-6