

Gabrielle Marceau
Bibliography and more detailed outline

The second part of the week will consist of lectures, exercises and games relating to the application of principles of treaty interpretation - with a special focus on WTO disputes.

On Wednesday afternoon and Thursday morning, we will discuss the application of the general principle of interpretation explored with professor Hann and Nolte, in the context of the WTO disputes. On Thursday late afternoon, participants will be grouped into 3 or 4 teams for an *interpretation game exercise*: Each team will prepare the relevant argumentations to support their position as to whether certain treaty provisions are (or not) applicable to different pre-identified situations in the different international legal systems such as human right, investment law and environmental law. The results of those exercises will be discussed collectively on the Friday morning/afternoon. The last hour on Friday afternoon will be devoted to debriefings and suggestions.

General lecture on interpretation in WTO Law

1) DSU Article 3.2

Meaning of "customary rules of interpretation of public international law"

Extent to which recourse may be had to principles and concepts of general international law other than "customary rules of interpretation"

Meaning of "clarify the existing provisions",

Textual approach

Teleological approach

2) Is there a distinction between "interpretation" and "application" of treaty provision

Panels and AB limited jurisdiction

Panel's terms of reference

The panel's standard of review and the AB standards of review

The panels and AB standard and limited conclusions and recommendations and

3) Specific principles of interpretation of the WTO/DSU

Security and predictability

Principles for the management of disputes under the GATT (3.1)

The importance of GATT decisions, procedures and customary practices (XVI:4)

The WTO is a Single Undertaking

Exceptions are not to be interpreted narrowly

Necessary implication

4) Principles of interpretation codified in the Vienna Convention and used in WTO jurisprudence

31(1)

Good faith, Reasonableness and abus de droit

Ordinary meaning

-Text as the foundation of interpretation

-Dictionaries

- Special meaning

Context 31(1)

-Harmonious interpretation

-Different words, different meanings

Object and purpose of the treaty

Context - 31(2)

-Generally

-Agreements under Article 31(2)(a)

-Instruments under Article 31(2)(b)

Together with context 31 (3)

-Subsequent agreements 31 (3)(a)

-Subsequent practice 31 (3)(b)

-silence of the treaty parties 31(3)(a)(b)

-Relevant rules of international law 31 (3)c

Supplementary means of interpretation 32

-Generally

-Preparatory work

-Circumstances of the treaty's conclusion

5) Other interpretation principles, not codified in the VCLT used in the WTO jurisprudence

Petitio principii

Principle of effectiveness

In dubio mitius

Lex specialis derogat legi generali

Lex posterior derogat legi priori

Successive treaties (art 30 VCLT)

Non-retroactivity

Contra proferentem

Ejusdem generis

Expressio unius est exclusio alterius

6) Bibliography

R. Gardiner, *Treaty Interpretation, 2nd edition* (Oxford University Press, 2015), pp. 197-210 ("Context"), and pp. 232-241 ("Agreements and Instruments Made in Connection with Conclusion of a Treaty")

L McNair, *The Law of Treaties*, Oxford 1961

I. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford, 2009

L. E Popa, *Patterns of treaty Interpretation as Anti-Fragmentation Tools*, Springer 2018

A. H. Qureshi, *Interpreting WTO Agreements*, 2nd edition, Cambridge, 2015

A. D. Mitchell, *Legal Principles in WTO Disputes*, Cambridge, 2008

G. Abi-Saab, "The Appellate Body And Treaty Interpretation" in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* [Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris eds.], Martinus Nijhoff, 97-110.

G. Marceau, *Evolutionary interpretation by the WTO Adjudicator: Sophism or necessity?*, forthcoming 2018, available on request from the author.

G. Marceau , L'interprétation évolutive par le juge OMC: Sophisme ou nécessité, in Revue Générale de Droit International, 1/2018, p. 24-54.

G. Marceau , "Balance and Coherence by the WTO Appellate Body: Who could do better?" in The WTO at 10: The Role of the Dispute Settlement System, G. Sacerdoti, A. Yanovich and J. Bohanes (Ed.), pp. 326-347, Cambridge/WTO publication, 2006.

G Cook, "The Use of 'Object and Purpose' by Trade and Investment Adjudicators: Convergence without Interaction" (forthcoming, 2018) (reviewing WTO and ISDS case law on issues relating to "object and purpose")

D. Pavot, "The Use of Dictionary by the WTO Appellate Body at the WTO: Beyond the Search of Ordinary Meaning" in *4:1 Journal of International Dispute Settlement*, 2013, 29-46

D. McRae, "Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body" in *The WTO at Ten: The Contribution of the WTO Dispute Settlement System* [Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes eds.], Cambridge, 2006, 360-371

L. Crema, "Disappearance and New Sightings of Restrictive Interpretation(s)" in *21:3 European Journal of International Law*, 2010, 681-700