Chapter 12

Is there a Need for the Principle of Sustainable Development in WTO Dispute Settlement?

12.1 Introduction

The question why sustainable development as a principle of integration is to be employed by WTO dispute settlement can be approached by inquiring whether there is a need for such a principle. This need, if it exists, is closely linked to limitations of interpretative processes and conflict-resolution principles that aim at creating coherence of international legal norms.

Once these limitations of treaty interpretation are identified, it can be considered whether reliance on treaty interpretation alone is an adequate means to determine the settlement of a dispute or whether alternative or additional tools and legal mechanisms ought to be applied in the quest for fairness and legitimacy of the finding. This part is thus meant as a constructive critique of the WTO approach to interpretation and dispute settlement involving non-trade interests.

This is not purely a theoretical exercise. First and foremost, it is part of the argument for the application of the principle of sustainable development in the settlement of disputes. The reason for this exercise is that the argument for sustainable development can only be made if the scope for improvement in the approach to WTO dispute settlement is sufficiently ample. Particular potential for improvement lies in the fact that, so far, the proclaimed and authoritatively recognized commitment of the WTO to sustainable development has not been sufficiently and consistently reflected in existing jurisprudential practice.

In part II the assessment of a conflict between climate measures and WTO norms was based on the general approach adopted by WTO panels and the Appellate Body. As a result, a number of ambiguities remain as to the relationship between climate measures and trade rules. In this part, it will be shown that some of the ambiguities can be linked to inherent systemic limitations of the interpretative process. In course, we shall first focus on some general aspects
of treaty interpretation before turning to the specific context of interpreting WTO agreements.

### 12.2 Interpretation in International Adjudication

Treaty interpretation is often regarded as an instrument of conflict resolution. However, rather than solving conflicts, the process of interpretation seeks to avoid a conflicting reading of treaty texts. In this sense it has been characterized as a ‘conflict-avoidance technique’.\(^1\) Who interprets treaty texts and how the process of interpretation is carried out – which interpretative arguments are applied – are crucial to the determination of a normative conflict. However, despite its important function, treaty interpretation, it has been claimed, remains a ‘deeply obscure and subjective’ process marked by inconsistencies and other shortcomings.\(^2\)

Given the importance of treaty interpretation it is surprising to observe that lawyers in general have been reluctant about formulating specific rules of interpretation. The major argument against formulating comprehensive interpretative rules is that these ‘rules’ may become static instruments instead of the flexible aids.\(^3\) It is thus ‘interpretative arguments’ rather than ‘rules’ that guide the process of treaty interpretation.

*Grotius* was one of the first scholars to deal with the issue of treaty interpretation. From the doctrine of plain meaning he widened his purview to include other circumstances.\(^4\) His starting point is that ‘words are to be understood in their ordinary sense’ but only if, he adds, ‘other implications are lacking’.\(^5\) *Vattel* offers a wider variety of interpretative principles.\(^6\) His suggestions are however considered to lack decisive practical importance by being followed by other, sometimes contrary, principles, and presumptions.\(^7\) As *Lauterpacht* notes observantly, ‘it is doubtful whether any Party to a dispute can fail to derive some advantage from the rich choice of weapons in Vattel’s armoury of rules of interpretation.’\(^8\) While, arguably, the majority of academic writ-

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1. Pauwelyn, 2003, 244.
5. Ibid.
8. Ibid.