CANONS OF TREATY INTERPRETATION: SELECTED CASE STUDIES FROM THE WORLD TRADE ORGANIZATION AND THE NORTH AMERICAN FREE TRADE AGREEMENT

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I. Introductory Remarks

Treaty interpretation is a notoriously difficult subject. As Lord McNair observed “[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation.”

The main purpose of this article is to analyse certain new developments in treaty interpretation as contained in the jurisprudence of such organisations as the World Trade Organisation (WTO) and the North American Free Trade Agreement (NAFTA), organisations that have not been traditionally linked to the application, development or crystallisation of the rules of general (classical) international law.

The jurisprudence of the WTO and NAFTA relating to treaty interpretation will be assessed to determine whether it complies with the canons of interpretation set out in the 1969 Vienna Convention on the Law of Treaties (1969 VCLT) and their crystallisation through the judgments of the World Court. The study will not limit itself to particular aspects of the canons of interpretation (as included in the 1969 VCLT) but will examine them in their entirety.

It may be observed that the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986 VCLT), that is not yet in force, follows the same canons of interpretation as the 1969 VCLT.

There is no doubt that the canons of interpretation as enshrined in the 1969 VCLT form part and parcel of customary international law. This has been

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* The present article is an updated and more extensive version of the same-titled article that appeared in ARIEL 10 (2005): 41–94.
confirmed in several judgments of the International Court of Justice (ICJ), the latest being the Kasikili/Sedudu Island case. The Court observed:

[a]s regards interpretation of that Treaty [1890 Anglo-German Treaty], the Court notes that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 32 of the Vienna Convention is applicable inasmuch as it reflects customary international law. The Court itself had already had occasions in the past to hold that customary international law found expression in Article 31 of the Vienna Convention...

II. The 1969 VCLT Canons of Interpretation-General Considerations

The purpose of interpreting a treaty is to establish the meaning of the text that the parties intended it to have “in relation to circumstances with reference to which the question of interpretation has arisen.” The approach adopted by the International Law Commission (ILC) to the interpretation of treaties was based on the jurisprudence of the World Court. The Commission stated in its Commentary during its work on the codification of the law of treaties that “the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded as established by law”.

On the basis of the Court's practice, Fitzmaurice drew up the following principles of treaty interpretation: I. Principle of actuality or textuality, means that treaties are to be interpreted as they stand, on the basis of their actual words; II. Principle of the natural and ordinary meaning, means that, subject to the principle of contemporaneity, where applicable, particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This principle can only be replaced by direct evidence that the terms used are to be understood in a different manner than the natural and ordinary one and if interpretation would lead to an unreasonable or absurd result. Principle III, integration, is of fundamental importance since

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6 Kasikili/Sedudu Island case, supra note 5, at para. 18. In the following judgments, the Court stated that Art. 31 of the 1969 VCLT reflects international customary law: Libya/Chad case, supra note 5, at 21; Oil Platforms case, supra note 5, 812, at para. 23.
