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On International Law of Treaty Interpretation

SUR LE DROIT INTERNATIONAL DE L'INTERPRÉTATION DES TRAITÉS

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Abstract: Treaty interpretation means that a treaty is interpreted in the course of implementation and application after it has entered into force. The rules of treaty interpretation of 1969 Vienna Convention on the Law of Treaty (VCLT) were expressly applied to dispute settlement by the International Court of Justice (ICJ) in the 1994 case of *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, and then by the Appellate Body of Dispute Settlement of the World Settlement of the World (WTO) in the 1996 case of *United States - Standards for Reformulated and Conventional Gasoline* as “the customary rules of interpretation of public international law”. This article is mainly based on leading cases of the ICJ and the WTO in last decade to offer a systematic analysis of treaty interpretation in the practices of contemporary international laws and to discuss some theoretical issues regarding the rules, methods and approaches of treaty interpretation with some viewpoints of the International Law Commission’s Commentaries on the VCLT and of well-known international lawyers.

Key words: treaty interpretation; international law; practice; theory

Résumé: L'interprétation des traités signifie qu'un traité est interprété dans le cadre de la mise en œuvre et de l'application après son entrée en vigueur. Les règles de l'interprétation de traité de la Convention de Vienne de 1969 sur le droit des traités (CVDT) ont été expressément prévues pour le règlement des différends par la Cour internationale de Justice (CIJ) dans le cas du différend territorial en 1994 (Jamahiriya arabe libyenne c. Tchad), puis par l'Organe d'appel de règlement des différends de l'Organisation mondiale du commerce (OMC) dans le cas des États-Unis en 1996 - les normes concernant l'essence reformulée et conventionnelle comme "les règles coutumières de l'interprétation du droit international public". Cet article est principalement basé sur les cas de la CIJ et de l'OMC dans la dernière décennie afin d'offrir une analyse systématique de l'interprétation des traités dans les pratiques contemporaines du droit international et d'examiner certaines questions théoriques concernant les règles, les méthodes et mes approches de l'interprétation des traités avec des commentaires de la Commission du droit international sur la Convention de Vienne sur le droit des traités et ceux des certains juristes connus internationaux.

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1. INTRODUCTION

The general rules of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT) have already been recognized as the customary international laws in many practices of application to settle international disputes even though a dozens of nations have not ratified or signed the VCLT. This article takes references mainly based on the leading cases made by the International Court of Justice (ICJ) and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) in last decade, and intends to explore practices of treaty interpretation and some theoretical issues of treaty interpretation.

2. TREATY INTERPRETATION IN PRACTICES OF CONTEMPORARY INTERNATIONAL LAW

2.1 The Meaning of Treaty Interpretation

Generally speaking, treaty interpretation or interpretation of treaty² means that a treaty is interpreted in the course of implementation and application after it has entered into force. It is understandable that the part III of the VCLT, following the part II “conclusion and entry into force of treaty”, is the “observation, application and interpretation of treaty” including Article 31 general rule of interpretation, Article 32 supplementary means of interpretation and Article 33 interpretation of treaties authenticated in two or more languages. It seems clear that a valid treaty shall be interpreted by contracting parties or a dispute settlement body. The ILC did not expressly mention it when the commentaries was made on the Articles 27 and 28 of the drafted VCLT (i.e., Articles 31 and 32 of the adopted VCLT). But, it is general view that “the parties to a treaty often foresee many of the difficulties of interpretation likely to arise in its application and in the treaty itself define certain of the terms used. Or they may in some other way and before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretative declaration or protocol or a supplementary treaty. Such authentic interpretation given by the parties overrides general rules of interpretation. An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration. The parties may also make provision for compulsory arbitration or judicial settlement of dispute arising out of the interpretation of the treaty, or may provide that some authority’s interpretation shall be binding.” (Sir Robert Jennings and Sir Arthur Watts. 1992) It is obvious that the authentic interpretation is usually adopted by contracting parties of bilateral treaty, which may not follow the general rule of treaty interpretation. The authoritative interpretation refers the international tribunals’ official interpretation of either bilateral or multilateral treaty for the purpose to settle disputes between or among contracting parties. In addition to the official “authoritative interpretation”, international lawyers occasionally interpret the treaties from theoretical perspective, which influences “authoritative interpretation” in some ways (LI. 2002). This article is only limited to discuss the authoritative interpretation of international tribunals to settle the disputes between or among the contracting parties of either bilateral or multilateral treaty.

2.2 Practices of Treaty Interpretation by the ICJ

In accordance with Article 92 of Charter of the United Nations, the ICJ as “the principle judicial organ of the United Nations” is responsible for peaceful settlement of international disputes. The Article 38 of Statute of ICJ provides that “the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”. Therefore, it is necessary to interpret such

² Treaty interpretation is the term frequently used in literatures of international law. Interpretation of treaty is the term used by the VCLT, but, International Law Commission (ILC) uses both treaty interpretation and interpretation of treaty. See. Draft Article on the Law of Treaties with commentaries 1966, *Yearbook of the International Law Commission*, 1966, Vol. II.

international conventions, i.e., treaties.³ For example, The ICJ interpreted the relevant treaties in the cases of *Corfu Channel*,⁴ *Ambatielos*,⁵ *Sovereignty over Certain Frontier Land*,⁶ *Arbitral Award Made by the King of Spain*,⁷ *Territorial Dispute*,⁸ *Oil Platforms*,⁹ *Kasikili/Sedudu Island*,¹⁰ *Sovereignty over Pulau Ligitan*¹¹ and *Avena and Other Mexican Nationals*.¹² Even though the ICJ made treaty interpretation in the earlier cases such as *Corfu Channel*, it did not expressly refer to any rules of international law until the 1994 case of *Territorial Dispute*, in which, the ICJ expressly regarded the Article 31 of the VCLT as the customary international law.¹³ Since then, the ICJ has frequently interpreted the treaties based on the Article 31 of the VCLT. This article will focus on treaty interpretation by the ICJ in the 1994 case of *Territorial Dispute* and several cases after that.

2.3 Practices of Treaty Interpretation by the WTO/DSB

In accordance with Article 4.3 of the Agreement Establishing the WTO, the General Council of the WTO shall convene as appropriate to discharge the responsibilities of the DSB, but the DSB may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of its responsibility. It is defined that the DSB is not an independent judicial organ in narrow sense and therefore quite different from the ICJ. In particular, any dispute settlement shall be resorted to consultation before requesting establishment of panel under the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU). Only allowed it is to refer the quasi-judicial procedure, i.e., the panel procedure and review of Appellate Body if the consultation is failed. The DSB has adopted 137 panel reports (23 compliance with panel reports included) and 90 Appellate Body reports (including 17 reports to review compliance with panel reports)¹⁴ since the first case with the panel report and Appellate Body report was settled on 20 May 1996.¹⁵ Virtually, all of these reports include treaty interpretation on covered agreements at issue, which provides us with the most interesting practices. Professor John H. Jackson believes that “the [WTO Dispute Settlement System] DSS has been described as the most important and most powerful of any international tribunals, although some observers reserve that primary place to the World Court (International Court of Justice). Even some experienced World Court advocates, however, have been willing to concede that primacy under some criteria to the WTO DSS.” (John H. Jackson. 2006) In fact, it is hard to say which one reserves the primacy because the ICJ and the DSB are very different due to their institutional functions and jurisdictions. This article will not analyze these differences, but focus on development of international law based on practices of the WTO dispute settlement regarding treaty interpretation.

³ In regard of defining a treaty, see Lord McNair, *The Law of Treaty*, Oxford: At the Calaredon Press, 1961, p.4.

⁴ *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland. v. Albania). Application instituting proceedings on 22 May 1947 and judgment of 9 April 1949.

⁵ *Ambatielos* (Greece v. United Kingdom). Application instituting proceedings on 9 April 1951 and judgment of 1 July 1952.

⁶ *Sovereignty over Certain Frontier Land* (Belgium v. Netherlands). Application instituting proceedings on 27 November 1957 and judgment of 20 June 1959.

⁷ *Arbitral Award Made by the King Spain* on 23 December 1906 (Honduras v. Nicaragua). Application instituting proceedings on 1 July 1958 and judgment of 18 November 1960.

⁸ *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad). Application instituting proceedings on 31 August 1990 and judgment of 3 February 1994.

⁹ *Oil Platforms* (Islamic Republic of Iran v. United States of America), Application instituting proceedings on 2 November 1992 and judgment of 6 November 2003.

¹⁰ *Kasikili/Sedudu Island* (Botswana v. Namibia). Application instituting proceedings on 29 May 1996 and judgment of 13 December 1999.

¹¹ *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia). Application instituting proceedings on 2 November 1998 and judgment of 17 December 2002.

¹² *Avena and Other Mexican Nationals* (Mexico v. United States of America). Application instituting proceedings on 9 January 2003 and judgment of 31 March 2004.

¹³ *Ibid.* *Territorial Dispute*, para. 41.

¹⁴ See WTO Dispute Settlement updated on 22 August 2010: http://www.wto.org/english/tratop_e/dispu_e/find_dispu_documents_e.htm.

¹⁵ *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R(29 April 1996), WT/DS2/R (29 January 1996).

2.4 Practices of Treaty Interpretation by Other Global Tribunals of Dispute Settlement

In addition to the treaty interpretation by the ICJ and the DSB in their practices of dispute settlement in last decade, the decisions of other global tribunals of dispute settlement also include treaty interpretation in some degree.

2.4.1 International Tribunal for the Law of the Sea (ITLOS)

The ITLOS was established on 16 November 1994 in accordance with Article 287.1 (a) of the United Nations Convention on the Law of Sea (UNCLOS) when the Convention entered into force. The ITLOS began its works on 1 October 1996 and has taken 17 cases.¹⁶ Article 287.1 provides that the ITLOS is responsible to settle disputes “concerning the interpretation or application of this Convention”. In its practices, the ITLOS did interpret the LOS. For example, in the *Saiga (No.2) case*, the ITLOS briefly interpreted Article 111 regarding the right of hot pursuit, saying that “the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention.”¹⁷ But, the ITLOS did not refer the general rule of treaty interpretation of the VCLT.

2.4.2 United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC)

The ICTY and the ICTR were created respectively in 1993 and 1994 under the United Nations Security Council’s Resolutions 827 and 955 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the former Yugoslavia after 1991 and in the territory of Rwanda between 1 January 1994 and 31 December 1994. Both tribunals will finish their missions by the end of 2010.¹⁸ The prosecution of these crimes is closely related to interpretation of international treaties such as Convention on the Prevention and Punishment of the Crime of Genocide, Protocol Additional to the Geneva Conventions of 12 August 1949, and related to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

It is the landmark that the ICC was established under the Rome Statute adopted by diplomatic conference on 7 July 1998 to help end impunity for the perpetrators of the most serious crimes of concern to the international community. Although the ICC has not made any judgment so far, a few cases are being taken in regard of serious crimes committed in Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur of Sudan. In particular, three cases are being heard before Pre-Trial Chamber of the ICC to investigate four Sudan Officials accused of crime against humanity and war crime, which is very interesting how to interpret Rome Statute regarding jurisdiction over Non-States Party.

2.4.3 International Center for Settlement of Investment Dispute (ICSID)

The ICSID is an autonomous international arbitration institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which is different from institutions of international commercial arbitration due to its special function dealing with the arbitration on disputes of private investment between foreign investors and the governments of host countries. The ICSID has ruled 200 cases and 124 cases are waiting for awards.¹⁹ The awards of ICSID include interpretation of ICSID.

In sum, there are many interpretations of treaties in practices of international dispute settlement between states or at least one party as a state by international tribunals such as the ICJ, the DSB and other global tribunals, which is the mirror to reflect the development of contemporary international law. This article will focus on treaty interpretations of the ICJ and the DSB.

¹⁶ See overview of cases brought before the ITLOS updated on 14 May 2010: http://www.itlos.org/start2_en.html.

¹⁷ The *Saiga Case* 1999, ITLOS No.2, para 146.

¹⁸ The United Nations Security Council’ Resolution 1503 (2003).

¹⁹ See ICSID list of cases updated on 9 August 2010: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> .

3. THE TREATY INTERPRETATION BY THE ICJ

It has been mentioned above that the ICJ did not expressly refer the VCLT to interpret the treaties until the 1994 case *Territorial Dispute*. Therefore, it is necessary to explore evolution of practices since then regarding treaty interpretation.

3.1 The Judgment of 1994 Case *Territorial Dispute*

Before the conclusion of the VCLT in 1969, some judgments of the ICJ included treaty interpretations.²⁰ But, it did not refer expressly to any rules of treaty interpretation, which made apparently that no rules of international law governing treaty interpretation even existed.²¹ After adoption of VCLT, the ICJ was still reluctant to refer to the general rule of treaty interpretation of the VCLT because many contesting parties did not ratify the VCLT.²²

On 3 February 1994, the ICJ, in its judgment of *Territorial Dispute*, expressly applied Article 31 of the VCLT. The dispute was focused on Article 3 of 1955 Treaty of Friendship and Good Neighborliness between the French Republic and the United Kingdom of Libya (1955 Treaty). In order to interpret Article 3, the ICJ declared that “the Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.”²³ It was the first time that the ICJ referred to Article 31 of the VCLT as “the customary international law” so that it doesn’t matter whether the contesting parties have ratified the VCLT.²⁴

In accordance with Article 31 of the VCLT, the ICJ interpreted Article 3 of the 1955 Treaty, saying that “the parties ‘recognize that the frontiers...are those that result’ from certain international instruments. The word ‘recognize’ used in the Treaty indicates that a legal obligation is undertaken. To recognize a frontier is essentially to ‘accept’ that frontier, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future.”²⁵ It is obvious that the ICJ preferred the “textual” approach to interpret the key words of the 1955 Treaty. The interpretation of the ICJ made it clear that the words used in the 1955 Treaty demonstrated that two parties had accepted the frontiers delimited by “certain international instruments”, i.e., the Annex 1 to the 1955 Treaty, which left no unresolved frontiers between two parties. It is clear that the word “recognize” used in the 1955 Treaty was critical important.

3.2 The Judgment of 1996 Case *Oil Platform (Preliminary Objection)*

On 12 December 1996, the ICJ made a judgment to reject the United States’ preliminary objection, declaring that the ICJ had jurisdiction on the case *Oil Platform*. Concerning the two parties differ as to the interpretation to be given to several Articles of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (the Treaty of 1955), the ICJ confirmed that “in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in

²⁰ See *ibid.* Corfu Channel, Ambatielos, Sovereignty over Certain Frontier Land, Arbitral Award Made by the King of Spain, etc.

²¹ The first two of the commission’s Special Reporters on the law of treaties in their private writings expressed doubts as to the existence in international law of any general rules for the interpretation of treaties. See *ibid.* Draft Article on the Law of Treaties with commentaries 1966, 218.

²² Under Article 38.1 (a) of the ICJ Statute, the ICJ shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting parties.

²³ *Ibid.* Territorial Dispute, para. 41.

²⁴ Under the Article 38.1 (b) of the ICJ Statute, the ICJ shall apply international custom, as evidence of a general practice accepted as law. The ICJ did not explain how it was developed to be “a general practice as accepted as law” in this regard, in stead of simply referring the VCLT, which seems that the VCLT codified the customary international law.

²⁵ *Ibid.* Territorial Dispute, para. 42.

their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.”²⁶ It is the same statement as in the case *Territorial Dispute*, which makes it much more significant in respect of treaty interpretation.

Among many interpretations of the Treaty of 1955, it is typical to apply the general rule of Article 31 of the VCLT that the ICJ interprets the key word “commerce” of Article 10.1., which provides that “between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.” “The question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the potential to affect ‘freedom of commerce’ as guaranteed by the provision quoted above”²⁷ Based on several authoritative dictionaries such as *Oxford English Dictionary*, *Black’s Law Dictionary* and *Dictionnaire de la terminologie du droit international*, the ICJ interprets the word “commerce” with a broader meaning than the mere reference to purchase and sale. The ICJ also notes that, in the decision in the *Oscar Chinn* case, the Permanent Court of International Justice (PCIJ) had occasion to interpret the concept of “freedom of trade” which is not only the purchase and sale of goods, but also activities integrally related to commerce. “The Court concludes from all of the foregoing that it would be a natural interpretation of the word ‘commerce’ in Article 10.1 of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce.”²⁸ “The natural interpretation” means that ordinary meanings of words used by the relevant treaty must be interpreted.

3.3 The Judgment of 1999 Case *Kasikili/Sedudu Island*

In its judgment of case *Kasikili/Sedudu Island* on 13 December 1999, the ICJ declared that the dispute would be settled, in accordance with the Special Agreement between Namibia and Botswana, on the basis of the Anglo-German Treaty of 1 July 1890 (the 1890 Treaty) and the rules and principles of international law. Regarding the interpretation of the 1890 Treaty, the ICJ noted “that neither Botswana nor Namibia is parties to the Vienna Convention on the Law of Treaty of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law.”²⁹ The ICJ emphasized that the Court itself has already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention. It demonstrates that the ICJ wants to follow its practices of treaty interpretation in the cases of *Territorial Dispute* and of *Oil Platforms*.

The key issue of this dispute is that the Parties have expressed differing opinions regarding the method to be applied for the purpose of interpreting “the centre of the main channel” (*Thalweg des Hauptlaufes* in Germany) used in the 1890 Treaty, which defines the boundary around *Kasikili/Sedudu Island* between parties. How to interpret the precise meanings of the term “centre” (*Thalweg*)? The ICJ doesn’t depend on the authoritative dictionaries to interpret the term firstly, but refer to the practices, saying that “treaties or conventions which define boundaries in watercourses nowadays usually refer to the *thalweg* as the boundary when watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.”³⁰ Regarding the words “main channel”, the ICJ said that “it will seek to determine the ordinary meaning of the words ‘main channel’ by reference to the most commonly used criteria in international law and practice, to which the Parties have referred.”³¹ In the viewpoint of the ICJ, the criteria is not one single, but a combination of various criteria such as depth and width of river, flow of water, visibility of channel, water baseline, navigability of watercourses. With the combination of criteria to interpret the ordinary meaning of the words “main channel” used by the 1890 Treaty, the ICJ concludes that “the northern channel of the River Chobe around *Kasikili/Sedudu Island* must be regarded as its main channel”.³² In comparison with the case of *Territorial Dispute* and of *Oil Platforms*. This case takes very different, but reasonable approach to interpret the ordinary meaning of the

²⁶ *Ibid.* *Oil Platforms*, para.23.

²⁷ *Ibid.* *Oil Platforms*, para.38.

²⁸ *Ibid.* *Oil Platforms*, para.49.

²⁹ *Ibid.* *Kasikili/Sedudu Island*, para.18.

³⁰ *Ibid.* *Kasikili/Sedudu Island*, para.25.

³¹ *Ibid.* *Kasikili/Sedudu Island*, para.28.

³² *Ibid.* *Kasikili/Sedudu Island*, para.41.

term or words used by the relevant treaty. Sometime, the context is not lateral, but physical. The textual approach dose not means only referring the lateral text. It shall be depended on case by case.

3.4 The Judgment of 2002 Case *Sovereignty over Pulau Ligitan and Pulau Sipadan*

In its judgment of this case on 17 December 2002, the ICJ developed the practices of treaty interpretation. The ICJ makes it clear that both Article 31 and 32 of the VCLT are customary international laws. The ICJ notes that one of the parties, Indonesia, is not a party to the VCLT, but the ICJ recalls its standing on treaty interpretation, which was reflected in its judgments on *Territorial Dispute, Oil Platforms and Kasikili/Sedudu Island (Preliminary Objection)*, saying that “moreover, with respect to Article 31, paragraph 3, the Court has had occasion to state that this provision also reflects customary law”.³³ The ICJ notes that Indonesia dose not dispute that these are the applicable rules. In fact, not only Articles of 31 and 32, but also Article 33 of the VCLT was applied into this case. It is very confirmed that all of these Articles have been regarded as the customary rules of public international law.

The ICJ interpreted Article 4 of the 1891 Treaty at issue of this case by textual approach. Firstly, the ICJ notes that, in respect to the difference in punctuation between the Dutch and English texts of Article 4 of the 1891 Convention, it “dose not as such help elucidate the meaning of the text with respect to a possible extension of the line out to sea, to the east of Sebatik Island.”³⁴

Secondly, in respect of context of the 1891 Treaty, the ICJ summarizes the different claims of the Parties, pointing out that “the Explanatory Memorandum appended to the Draft Law submitted to the Netherlands States-General with a view to ratification of the 1891 Convention, the only document relating to the Convention to have been published during the period when the latter was concluded, provides useful information on a certain number of points.”³⁵ Based on some useful information for interpretation of treaty, the ICJ does not accept Indonesia’s argument regarding the legal value of the map appended to the Explanatory Memorandum of the Dutch Government. “The Court observes that the Explanatory Memorandum and map were never transmitted by the Dutch Government to the British Government, but were simply forwarded to the latter by its diplomatic agent in the Hague, Sir Horace Rumbold. ... The British Government did not react to this internal transmission. In these circumstances, such a lack of reaction to this line on the map appended to the Memorandum cannot be deemed to constitute acquiescence in this line. It follows from the foregoing that the map cannot be considered either an ‘agreement relating to a treaty which was made between all the parties in connection with the conclusion of the treaty’, within the meaning of Article 31, paragraph 2 (a), of the Vienna Convention, or an ‘instrument which was made by a party in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty’ within the meaning of Article 31, paragraph 2 (b), of the Vienna Convention”³⁶

Thirdly, the ICJ considers that the object and purpose of the 1891 Convention was the delimitation of boundaries between the parties’ possessions within the island of Borneo itself, as shown by the preamble to the Convention, which provides that the parties were “desirous of defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which are under British protection”. “This interpretation is, in the Court’s view, supported by the very scheme of the 1891 Convention....The Court accordingly concludes that the text of Article 4 of the 1891 Convention, when read in context and in the light of the Convention’s object and purpose, cannot be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of the island of Sebatik”³⁷

Finally, the ICJ believes that, in regarding supplementary means of interpretation such as the *travaux preparatoires* of the 1891 Convention and the circumstances of its conclusion, the subsequent practice of the parties to the 1891 Convention including the 1915 and 1928 Agreements between Great British and the Netherlands, the conclusion already made “is confirmed both by the *travaux preparatoires* and by the subsequent conduct of the parties to the 1891 Convention.”³⁸

³³ *Ibid.* Sovereignty over Pulau Ligitan and Pulau Sipadan, para.37.

³⁴ *Ibid.* Sovereignty over Pulau Ligitan and Pulau Sipadan, para.41.

³⁵ *Ibid.* Sovereignty over Pulau Ligitan and Pulau Sipadan, para.46.

³⁶ *Ibid.* Sovereignty over Pulau Ligitan and Pulau Sipadan, para.48.

³⁷ *Ibid.* Sovereignty over Pulau Ligitan and Pulau Sipadan, paras.48-52.

³⁸ *Ibid.* Sovereignty over Pulau Ligitan and Pulau Sipadan, para. 92.

It demonstrates that even though the ICJ prefers the textual approach under the VCLT, it does not mean the ICJ depends on too much on authoritative dictionary, sometime simply does not mention any dictionaries, but more focus on the context of the relevant treaty as well as its object and purpose.

3.5 The Judgment of 2004 Case concerning *Avena and other Mexican nationals*

It was a very significant case between the United States and Mexico on the dispute of implementation of the Vienna Convention on Consular Relations (VCCR), which is different from the cases discussed above because the VCCR is the multilateral treaty. It is no doubt that the general rule of treaty interpretation of the VCLT would be applied not only for bilateral treaty, but also for multilateral treaty. On 31 March 2004, the ICJ made a judgment that the United States violated its obligations under Article 36.1 of the VCCR.³⁹ On 19 January 2009, the ICJ made a decision on dispute between two parties regarding the interpretation of its judgment.⁴⁰ This article is limited on treaty interpretation of this case, not judicial interpretation of the ICJ judgment.

The key issue of this case is the interpretation of Article 36.1(b) of the VCCR, which provides that “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.” The critical phrase is “without delay” because Mexico alleged that the United States failed to inform the Mexican Consular “without delay” after 52 Mexican nationals including Avena were arrested or on custody for criminal proceeding in 9 different States of the United States, therefore deprived the rights of these Mexican nationals to obtain the diplomatic protection.

The ICJ notes that the precise meaning of “without delay” of Article 36.1(b) of the VCCR is not defined. “This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Article 31 and 32 of the Vienna Convention on the Law of Treaty.”⁴¹

At First, the ICJ wants to seek the meaning of “without delay” from the Article 1 of the VCCR, which offers the definitions of phrases used in the VCCR, but unfortunately, no definition of “without delay” in Article 1. It is a little bit of different in the different language versions of the VCCR regarding the phrase “without delay” of Article 36 and the word “immediately” of Article 14 respectively. Therefore, the ICJ believes that it is necessary to look elsewhere for an understanding of the phrase “without delay”. As for the object and purpose of the VCCR, the phrase “without delay” is not necessarily to be interpreted as “immediately” upon arrest. Furthermore, during the debate of Conference drafting the VCCR, no delegate made any connection between the phrase “without delay” and the issue of interrogation. The ICJ concludes that “although, by application of the usual rules of interpretation, ‘without delay’ as regards the duty to inform an individual under Article 36, paragraph 1(b), is not to be understood as necessarily meaning ‘immediately upon arrest’, there is nonetheless duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.”⁴² Accordingly, the United States has violated its obligation under Article 36, paragraph 1 (b) due to its failure to provide information at all or at periods very significantly removed from the time of arrest.

Once again, the ICJ, by its interpretation of treaty in this case, confirmed the status of Article 31 and 32 of the VCLT as the customary rules of public international law. In the case of unsatisfied interpretation by checking dictionary, the ICJ usually seeks the meaning of words or phrases by objective and purpose of a treaty or drafting history.

It may reach a preliminary conclusion based on the ICJ practices of treaty interpretation in last decade that Article 31 and 32 of the VCLT have been expressly applied for its judgments as the customary rules of public international law no matter whether contesting parties have joined the VCLT. Although the ICJ prefers the textual approach, but it does not focus too much on meanings of dictionary instead of seeking the best understanding of meanings of words and phrases of a treaty by its objective and purpose as well as

³⁹ *Ibid.* Avena and Other Mexican Nationals.

⁴⁰ The judicial interpretation of judgment is not treaty interpretation.

⁴¹ *Ibid.* Avena and Other Mexican Nationals. para. 83.

⁴² *Ibid.* Avena and Other Mexican Nationals. para. 88.

drafting history. In comparison with the WTO/DSB, the practices of treaty interpretation by the ICJ are limited in the term of number of cases, but it has touched wider coverage.

4. THE TREATY INTERPRETATION BY THE WTO/DSB

Virtually all of adopted reports by the WTO/DSB include treaty interpretation, which has created relevant practices with very significant results for contemporary international law. Article 3.2 of the DSU provides that the function of WTO dispute settlement system “serves to preserve the rights and obligations of the 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”. It is the duty of WTO panel and the Appellate Body to make necessary interpretation of treaty if the dispute involves the covered agreement. This article will analyze several leading cases regarding treaty interpretation in the practices of dispute settlement since establishment of the WTO in 1995, and focus on treaty interpretation of panel report on Sino-US dispute of intellectual property.⁴³

4.1 The Leading Cases of WTO Dispute Settlement in Respect of Treaty Interpretation

4.1.1 the 1996 *Gasoline* case

It was the first case settled under the DSU to refer Article 31 of the VCLT as the general rule of customary international law for treaty interpretation, which has been regarded as the guideline for any WTO dispute settlement.

While reversing the Panel Report for its neglecting the general rule of treaty interpretation, the Appellate Body pointed out that “this rule has received its most authoritative and succinct expression in the Vienna Convention on Law of Treaties.... That the general rule of interpretation has attained the status of a rule of customary or general international law”.⁴⁴ It was made referring two judgments of international tribunals including the ICJ judgment on the case of *Territorial Dispute* in 1994. Furthermore, the Appellate Body interpreted Article 3.2 in respect of customary rule of interpretation of public international law, saying that “Appellate Body has been directed, by Article 3.2 of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other ‘covered agreements’ of the WTO Agreement. That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”⁴⁵ It was the first and very significant interpretation of treaty, i.e. the DSU, in the history of the WTO. Accordingly, in the view of the Appellate Body, the customary rule of interpretation of public international law would be a provision of convention or treaty which can be interpreted in the context of judicial practices of international tribunal such as the ICJ. Although the contesting Members of this case, the United States, Venezuela and Brazil, are not the contracting parties of the VCLT, it is not legal obstacle for the Appellate Body to interpret Article 31 of the VCLT as the customary rule of public international law in the sense of Article 3.2 of the DSU. No official objection was taken in this regard by any WTO Member so far.

How to interpret a treaty? The Appellate Body prefers a textual approach applying the basic principle of interpretation that the words of a treaty, like the General Agreement on Tariff and Trade (GATT), are to be given their meaning, in their context and in the light of the treaty’s object and purpose. Referring the particular problem of treaty interpretation made by the Panel of this case, the Appellate Body believes that the Panel Report failed to take adequate account of the words actually used by Article 20 of the GATT in its several paragraphs. In accordance with the Appellate Body, Article 20 (g) of the GATT and its phrase, “relating to the conservation of exhaustible natural resources” need to be read in context and in such a manner as to give effect to the purposes and objects of the GATT. The context of Article 20 (g) includes the

⁴³ China- Measures Affecting the Protection and Enforcement of Intellectual Property Rights. WT/DS362/R (26 January 2009).

⁴⁴ United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R(29 April 1996).

⁴⁵ *Ibid.* United States—Standards for Reformulated and Conventional Gasoline.

provisions of the rest of the GATT, including in particular Articles 1 [general most-favor-nation treatment], 3 [national treatment and internal taxation and regulation] and 10 [general elimination of quantitative restrictions]; conversely, the context of Article 1, 3 and 11 includes Article 20. Accordingly, the phrase “relating to the conservation of exhaustible natural resources” may not be read so expansively as seriously to subvert the purpose and object of Article 3.4. Nor may Article 3.4 be given so broad a reach as effectively to emasculate Article 20 (g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Article 1, 3 and 11 and the policies and interests embodied in the framework of the GATT and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members to express their intent and purpose. It is obvious that the Appellate Body takes a very cautious and narrow way to interpret the words of a treaty so as to satisfy the requirements of Articles 3.2 of the DSU, i.e., “[the] recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

Why does the Appellate Body take such cautious and strict position to interpret the WTO agreements? It seems that the Appellate Body had to take this position in order to avoid any unnecessary challenge of Members of WTO (and also of the DSB). Professor Bossche, the former Acting Director of WTO Appellate Body Secretariat and new appointed Member of Appellate Body, explained that “Appellate Body reports must be adopted by the DSB; they are not legally binding on the parties to the dispute without such adoption. Although the DSB adopts Appellate Body reports by reverse consensus, and the adoption is thus quasi-automatic, this adoption is still a formal requirement. The legal power of decisions of international courts, such as the ICJ, the ICC and ITLOS, is never subject to the approval of a political body.” (Peter Van den Bossche. 2005)

4.1.2 1996 Alcoholic Beverages case

The Appellate Body report of “Japan-Taxes on Alcoholic Beverages” is also very important as the guideline for dispute settlement of WTO in aspect of treaty interpretation. It emphasizes that “there can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status”,⁴⁶ i.e., the customary rule of interpretation of public international law. Therefore, both Article 31 and 32 of the VCLT shall be directed to interpret the WTO Agreement and the covered agreements.

This report made an interpretation on Article 31.3 (b) of the VCLT regarding the subsequent practice: “[g]enerally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practices.”⁴⁷ The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report. Officially, this interpretation remains unchanged since then, but the adopted reports, in particular, the Appellate Body reports including the treaty interpretation, have been recited by later reports as quasi-precedents in a “concordant, common and consistent” way. As Professor John H. Jackson observed, “The Appellate Body of the WTO has consistently made reference to its own prior cases. In *Shrimp-Turtle*, for example, it chastised the first-level panel for not paying close enough attention to the Appellate Body’s logical approach in the prior case of *US-Gasoline* import measures. Likewise, the Appellate Body has recently quite explicitly that prior Appellate Body reports have a precedent effect, at least upon panels.”⁴⁸

Furthermore, this report supports the interpretation on *Gasoline case*, which believes that “a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness. In accordance with the comments of International Law Commission, the

⁴⁶ Japan-Taxes on Alcoholic Beverages, WT/DS8, 10, 11/AB/R (4 October 1996).

⁴⁷ *Ibid.* Japan-Taxes on Alcoholic Beverages.

⁴⁸ *Ibid.* John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, p.161.

principle of effectiveness means that “[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted”.⁴⁹

This report followed the *Gasoline case* to interpret treaty by textual approach. For example, the Appellate Body interpreted Article 3.1 of the GATT, pointing out that the terms of Article 3 must be given their ordinary meaning – in their context and in the light of the overall object and purpose of the WTO Agreement. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. The textual approach is taken also to interpret Article 3.2, first sentence, regarding “like product”. The Appellate Body agreed with the Panel that the definition of “like product” should be construed narrowly. How narrowly is a matter that should be determined separately for each tax measure in each case. In the case that the imported product and local product are not “like” if Article 3.2, first sentence, is interpreted narrowly (in physical sense), the “like product” shall be interpreted broadly from legal sense of “directly competitive or substitutable products” in accordance with Annex 1 of GATT 1947, Notes and Supplementary Provisions, on Article 3.2, which has the equal status of GATT.

4.1.3 1998 *Shrimp case*⁵⁰

Professor John H. Jackson believes that this case is still, in this author’s opinion, the most important “constitutional” case in all of the WTO jurisprudence so far. This is a very complex, intricately worded, and carefully nuanced case that essentially established a series of principles, some of major or even heroic importance.⁵¹ It includes the continued importance of the text of the treaty, an evolutionary approach to some interpretation, the use of international documents and activities from sources other than the WTO to assist in interpreting WTO covered agreements texts, and the suggestion of a “good faith” generic international law requirement as part of treaty interpretation.

In regard of “good faith”, while interpreting the chapeau of Article 20 of GATT, the Appellate Body pointed out that the chapeau of Article 20 is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercises of rights by states. One application of this general principle of the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say, reasonably.’ An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty right of other Members and, as well, a violation of the treaty obligation of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law. In accordance with the footnote explaining “general principles of international law”, “the additional interpretative guidance” is Article 31 (3) (c) of the VCLT, which is used to seek “context” of treaty interpretation other than Article 31.2. Therefore, it is the part of general rule of treaty interpretation under Article 31 of the VCLT, but the general rule includes the principle of “good faith”, even though it is different from the principle of good faith to implement treaty.

Under Article 31 (3) (c) of the VCLT, the Appellate Body listed several international documents or treaties as the “relevant rules of international law applicable in the relations between the parties” for this case. The first is the Principle 12 of the Rio Declaration on Environment and Development, which provides that “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus”. The second is the paragraph 2.22 (i) of Agenda 21, which is almost identified with the Principle 12 of the Rio Declaration on Environment and Development. The third is Article 5 of the Convention on Biological Diversity, which provides that “[e]ach contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity”. The fourth is the Annex 1 of the Convention on the Conservation of Migratory

⁴⁹ See *Yearbook of the International Law Commission* (1966), Vol. II. 219.

⁵⁰ United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998).

⁵¹ *Ibid.* John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, p.135.

Species of Wild Animals, which classifies the relevant species of sea turtles as “endangered migratory species” and calls for the concerted action of all States within national boundaries of which such species spend any of their life cycles. It has been widely acknowledged that rules of international law require international cooperation and avoidance of unilateral actions in the area of transboundary or global environmental protection. The rules should be applied to interpret the chapeau of GATT 20 which intends to prohibit any “arbitrary” means, i.e., unilateral actions with the reason of general exception. Therefore, the United States violated the chapeau of GATT 20 due to its unilateral action of restriction of importation with the reason of protection for sea turtle.

It is a model of application of Article 31 (3) (c) of the VCLT to interpret the words of a treaty in the context of the “relevant rules of international law applicable in the relations between the parties” and by the reference of purpose of a treaty in accordance with the principle of good faith.

4.1.4 2000 Appropriations Act case

In this case, the Appellate Body reversed the Panel report on treaty interpretation of Article 1.2 of TRIPS Agreement because the Panel was too limited on text of treaty to consider the Paris Convention (1967) incorporated into the TRIPS Agreement. It is very important guidance for application of Article 31 of the VCLT to the WTO dispute settlement.

It seems that the Panel exactly follows Article 31 of the VCLT to interpret Article 1.2 of TRIPS Agreement: “[w]e interpret the terms ‘intellectual property’ and ‘intellectual property rights’ with reference to the definition of ‘intellectual property’ in Article 1.2 of the TRIPS Agreement. The textual reading of Article 1.2 is that it establishes an inclusive definition and this is confirmed by the words ‘all categories’; the word ‘all’ indicates that this is an exhaustive list.”⁵² Therefore, the Panel found that the definition of “intellectual property” of Article 1.2 would not include “trade name”.

The Appellate Body disagreed with the Panel’s interpretation which “would be to deprive Article 8 of the Paris Convention (1967), as incorporated into the TRIPS Agreement by virtue of Article 2.1 of that Agreement, of any and all meanings and effect”,⁵³ because Article 8 of the Paris Convention only provides protection for trade name. The Appellate Body reiterated the principle of effectiveness taken by Gasoline case and Alcoholic Beverage case, which means that “[o]ne of the corollaries of the ‘general rule of interpretation’ in the VCLT is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”⁵⁴ If the Panel’s interpretation is followed, Article 8 of the Paris Convention incorporated into the TRIPS Agreement by its Article 2.1 will be meaningless and no effect. Therefore, it appears that the Panel respected the text of the TRIPS Agreement, but actually, the Panel overlooked the obligation under Article 8 of the Paris Convention incorporated into the TRIPS Agreement. It is critical important that the interpreter shall avoid any interpretation which results in some articles of incorporated treaties meaningless. This incorporation shall be regarded as the context of interpretation. The principle of effectiveness requires that the context of words of treaty as well as its purpose shall be taken to interpret the ordinary meaning with “good faith”. Article 2.1 of the TRIPS Agreement would exclude expressly Article 8 of the Paris Convention as Article 9.1 of the TRIPS Agreement excludes Article 6bis of Berne Convention regarding the moral rights if the negotiators of TRIPS Agreement intend to exclude the protection for trade name.

Accordingly, the Appellate Body decided that [f] or all these reasons, we reverse the Panel’s findings..., and find that WTO Members do have an obligation under the TRIPS Agreement to provide protection to trade name.”⁵⁵

Based on treaty interpretations of above cases, it would be concluded that the Appellate Body made it very clear at beginning of its working that Articles 31 and 32 of the VCLT shall be regarded as the customary rules of interpretation of public international law, and have applied these rules into virtually all of appealed cases. The Appellate Body has taken the textual approach to interpret treaties under Article 31

⁵² United States-Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R, (6 August 2001), para. 8.26.

⁵³ United States-Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R, (2 January 2002), para.338.

⁵⁴ United States-Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R, (2 January 2002), para.338.

⁵⁵ United States-Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R, (2 January 2002), para.341.

and 32 of the VCLT, but it also emphasized the principles of good faith and effectiveness to avoid the negative effect of textual approach. Anyway, the WTO dispute settlement has resulted in the most significant practice of treaty interpretation for contemporary international law.

4.2 The Treaty Interpretation of Sino-US Dispute on Enforcement of Intellectual Property

The DSB adopted the Panel's report of this case on 20 March 2009.⁵⁶ It is the dispute concerning several articles of TRIPS Agreement, i.e. Article 61 on criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, Article 59 on customs actions to destruct or dispose the infringing goods in accordance with the principles set out in Article 46, and Article 9.1 regarding the relation to the Berne Convention. The report reflects the recent practice of treaty interpretation of the WTO dispute settlement.

It is very interesting that the Panel does not mention "the customary rules of interpretation of public international law" until addressing the issue of Article 61 even though it is the last issue of the report and two issues before that also need treaty interpretation, which seems that Panel considers more on treaty interpretation for Article 61. The Panel pointed out that: "[i]n accordance with Article 3.2 of the DSU, the Panel applies 'the customary rules of interpretation of public international law' to this task of interpreting the TRIPS Agreement in this dispute. The general rules of interpretation, expressed in Article 31 of the VCLT, and the rules on supplementary means of interpretation in Article 32 of the VCLT, have attained the status of rules of customary or general international law. The Panel will apply the general rule of interpretation and, to the extent warranted, supplementary means of interpretation. The Panel is mindful that Article 3.2 of the DSU also provides that 'recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'"⁵⁷. It looks like a standard statement about guideline of treaty interpretation in the WTO dispute settlement, which has been regarded as "precedent" since the *Gasoline case* and *Alcoholic Beverage case* in 1996.⁵⁸

How does the Panel interpret the first sentence of Article 61 of TRIPS Agreement? It provides that: "[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale."

First, the Panel interprets the word "shall" used in the first sentence of this Article from perspective of context, i.e. the other sentences of this Article. "The first sentence of this Article uses the word 'shall', indicating that it is mandatory. This stands in contrast to the fourth sentence, which addresses the same issue with respect to other cases of infringement of intellectual property rights but uses the word 'may', indicating that it is permissive. Unlike the third sentence, the first sentence contains no language such as 'in appropriate cases' which might expressly introduce some margin of discretion. The terms of the first sentence of Article 61, read in context, impose an obligation."⁵⁹ There is no dispute between China and the United States on the meaning of word 'shall' which indicating a mandatory obligation imposed on each Member of the WTO, but it is dispute on requirements of the obligation.

Secondly, the Panel points out that "in China, acts of trademark and copyright infringement failing below the applicable thresholds are not subject to criminal procedures and penalties. The issue that arises is whether any of those acts of infringement constitute 'willful trademark counterfeiting or copyright piracy on a commercial scale' within the meaning of the first sentence of Article 61. This requires the Panel to consider the interpretation of that phrase."⁶⁰ The first sentence of Article 61 contains no fewer than four limitations on the obligation. The first limitation is that the obligation applies to trademarks and copyright rather than to all intellectual property rights covered by the TRIPS Agreement. The second is that it applies to counterfeiting and piracy rather than to all infringements of trademark and copyright. The third is indicated by the word "willful" that precedes the words "trademark counterfeiting or copyright piracy",

⁵⁶ China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, (26 January 2009)

⁵⁷ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.502.

⁵⁸ The Panel recited the reports of two cases as "precedent", see *ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, footnote 487.

⁵⁹ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.503.

⁶⁰ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.517.

focusing on the infringer's intent. The fourth is indicated by the phrase "on a commercial scale" that follows the words "trademark counterfeiting or copyright piracy".

It is obvious that these limitations of obligation are cumulative in the way of step by step, which means that the first step is limited to "trademark and copyright", excluding other intellectual property rights; the second step is further limited to "trademark counterfeiting or copyright piracy", excluding other infringements of intellectual property; the third step is limited to "willful trademark counterfeiting or copyright piracy", excluding any infringements of trademark and copyright with no willful intent, and finally, the fourth limitation excludes the willful trademark counterfeiting or copyright piracy with no commercial scale. Therefore, the mandatory obligation of the first sentence of Article 61 is only limited to the criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. It is the focus of dispute between China and the United States on interpretation of the words of "commercial scale".

The Panel interprets the phrase "commercial scale" by its ordinary meaning based on the well-known English dictionary.⁶¹ "The ordinary meaning of the word 'scale' is uncontroversial. It may be defined as 'relative magnitude or extent, degree, proportion'... The ordinary meaning of the word includes both the concept of quantity, in terms of magnitude or extent, as well as the concept of relativity."⁶² But, the ordinary meaning of "commercial" may be defined in various ways, which is either defined as "[e]ngaged in commerce; of pertaining to, or bearing on commerce", or "[i]nteresting in financial return rather than artistry, likely to make a profit; regard as a mere matter of business."⁶³ The Panel adopted the first definition in accordance with the dictionary meaning "buying and selling, the exchange of merchandise or services, esp. on a large scale",⁶⁴ emphasizing that this draws a link to the commercial marketplace.

In order to clarify the meaning of "commercial scale", the Panel referred the history of TRIPS Agreement, which demonstrated that "the negotiators agreed in Article 61 to use the distinct phrase 'on commercial scale'. This indicates that the word 'scale' was deliberate choice and must be given due interpretation weight. 'Scale' denotes a relative size, and reflects the intention of the negotiators that the limitation on the obligation in the first sentence of the Article depended on the size of acts of counterfeiting and piracy. Therefore, whilst 'commercial' is a qualitative term, it would be an error to read it solely in those terms. In context it must indicate a quantity."⁶⁵ The Panel believes that "the combination of the primary definition of 'commercial' and the definition of 'scale' can reconciled with context of Article 61 if it assessed not solely according to the nature of an activity but also in terms of relative size, as a market benchmark."⁶⁶

It is no doubt that the Panel follows the practices of WTO dispute settlement as guideline which has been described as "very 'textual' approach to its interpretation" since the *Gasoline case*. In accordance with the Panel's interpretation in this case, the meaning of "commercial scale" of the first sentence of Article 61 shall be clarified as commercial activities in commercial marketplace with commercial purpose and market benchmark, i.e. quantity, valuation and size, etc. depending on different businesses. Therefore, the WTO Members' obligation under the first sentence of Article 61 to provide criminal procedures and penalties shall be limited for the case of willful trademark counterfeiting or copyright piracy with commercial scale. The criminal thresholds set by Chinese laws do provide such kind "commercial scale". The United States accused Chinese thresholds too low to punish criminal activities of willful trademark counterfeiting or copyright piracy on a commercial scale, but it was rejected by the Panel due to the United States' failure to make a *prima facie* case, which means that "the United States has not established that the criminal

⁶¹ *New Shorter Oxford English Dictionary* (1993). See *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, footnote 500.

⁶² *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para.533.

⁶³ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.534.

⁶⁴ *New Shorter Oxford English Dictionary* (1993). See *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, footnote 502.

⁶⁵ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.543. In the early stage of drafting TRIPS Agreement, the United States suggested that the first sentence of Article 61 would be applied to trademark counterfeiting or copyright infringement that were "willful and commercial" (no "scale" as limitation), but it was not adopted. It seems that the United States wants to get its suggestion into Article 61 by proceeding of dispute settlement.

⁶⁶ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.545.

thresholds are inconsistent with China's obligation under the first sentence of Article 61 of the TRIPS Agreement".⁶⁷

5. THEORETICAL REFLECTION ON TREATY INTERPRETATION

5.1 The Rules of Treaty Interpretation: Discussion on Textual Approach

It has been mentioned that there were no expressly codified rules of treaty interpretation in practices of international law before conclusion of the VCLT in 1969. The ICJ did not apply the general rule of treaty interpretation until the 1994 case *Territorial Dispute*. Accordingly, some international lawyers believed that there were no rules of treaty interpretation at all in practices. For example, *Akehurst's Modern Introduction to International Law* (7th edition) did not say anything about treaty interpretation in its Chapter 9 on treaties, concluding that "[i]nterpretation is an art, not a science. In a sense, there are no rules of interpretation, only presumptions; and the presumptions very often conflict with one another."⁶⁸ Why dose such well-known international lawyer take this way regarding rules of treaty interpretation? The possible answer to this question is that they did not get chance to observe the development of international law regarding treaty interpretation in last decade. If anyone now doubts existing rules of treaty interpretation, he might have lost his sighting to practices of treaty interpretation.

It is necessary to review comments of the ILC on Article 31 and 32 of the VCLT (the drafting Article 27 and 28), which includes many academic discussions on how to codify the rules of treaty interpretation. The ILC commented that although there were no expressed rules of treaty interpretation at time to begin its mission of drafting the VCLT, some international lawyers had showed less hesitation in recognizing the existence of some rules of treaty interpretation. In 1956, the Institute of International Law codified a few of basic principles for treaty interpretation such as "the text of the treaty as the authentic expression of the intention of the parties", "the intentions of the parties as a subjective element distinct from the text", and "the declined or apparent objects and purposes of the treaty". The ILC believed that there were practices of treaty interpretation in the judgments of international tribunals even in the everyday work of national foreign ministries. Therefore it would be possible for the ILC to codify the general rules of treaty interpretation.

The purpose of the ILC codification is to have a general rule of treaty interpretation with binding force. The reason is that "[f]irst, the interpretation of treaties in good faith and to law is essential if the *pacta sunt servanda* rule is to have any real meaning. Secondly, having regard to the divergent opinions concerning methods of interpretation, it seemed desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles adopted by the Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined for ascertaining the intention of the parties."⁶⁹ It was indispensable for the ILC to take these considerations as the guideline for codification of a general rule of treaty interpretation.

The ILC emphasized that "the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their intention would give the legally relevant interpretation. Thus, article 27 is entitled 'General Rule of Interpretation' in the singular, not 'General Rules' in plural, because the Commission desired to emphasize that the purpose of interpretation is a unity and that the provisions of the article from a single, closely integrated rule".⁷⁰ It is critical important to understand the textual approach of the ILC regarding the application of the general rule of treaty interpretation, because "the word 'context' in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this

⁶⁷ *Ibid.* China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.669

⁶⁸ *Akehurst's Modern Introduction to International Law*, 7th edition, London: Routledge, 1997. p.365.

⁶⁹ *Ibid.* Draft Article on the Law of Treaties with commentaries 1966. p.219.

⁷⁰ *Ibid.* Draft Article on the Law of Treaties with commentaries 1966, p.220.

paragraph to the word 'context' in the first paragraph and thereby incorporate them in the provision contained in that paragraph."⁷¹

The key word of Article 31 of the VCLT is "context". It is the key to get all elements of treaty interpretation for application. That is the textual approach. In the cases of the ICJ or the WTO/DSB discussed above, it is very clear that the interpretation of treaty needs consideration of particular context of the words used by the relevant treaties. It might be strict textual approach if the "context" is only referred to the relevant articles of interpreted treaty itself. It would be loose one if it needs "contexts" other than the relevant articles of interpreted treaty itself. It may be regarded as objective textual approach if the "context" might be objective criteria. Anyway, the textual approach is the basis of the general rule of treaty interpretation under the VCLT. It will be deviated from that general rule if interpretation of treaty is departure of textual approach. It is understandable why the first paragraph of Article 31 of the VCLT provides the words "in their context and in the light...", and then, the second paragraph with the sentence "[t]he context for the purpose of the interpretation of a treaty shall comprise in addition to the text...", following the third paragraph "[t]here shall be taken into, together with the context...". There will be no general rule of treaty interpretation without the key word "context". The textual approach is to interpret treaty based on "context". It is not dogmatism and stiffness. In practices of the ICJ and the WTO/DSB, it is flexible, because the context itself is various and flexible.

5. 2 The Method of Treaty Interpretation: Different Approaches

Professor LI Haopei sums up that the modern approaches of treaty interpretation would include subjective approach, objective approach and purpose approach. "The subjective approach is focused on common intention of contracting parties when they concluded the treaty. In history, this method of interpretation could be casted back Cicero, the great politician of ancient Roman, who said that 'it shall be concerned about the intention of contracting parties when they made the contract'."⁷² The objective approach prefers the method of textual interpretation, i.e. "the priority of arbitration or judicial organ is to define the natural or ordinary meaning of words used in a treaty in its context."⁷³ The purpose approach emphasizes that "the interpretation of a treaty shall be consistent with its purpose. The best statement of this approach is represented by the Harvard Draft Convention on the Law of Treaties (1935)."⁷⁴ It is obvious that the VCLT prefers the objective approach, i.e., textual approach.

Professor LI concludes the different approaches of treaty interpretation as the methods of interpretation, which clues on that, in sense, the interpretation is not separated from method of interpretation. *Oppenheim's International Law* (9th edition) explains the general rule of the VCLT as "approach", pointing out that "the general rule of interpretation laid down in Article 31 of Vienna Convention adopted the textual approach", "such a textual approach – on which the International Law Commission was unanimous – is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice". Article 32 of the VCLT is entitled as "supplemental means of interpretation".⁷⁵ The interpreter shall adopt these means while interpreting the meaning of words used in a treaty under the general rule of Article 31 or in the case of failure to make the meaning clear under that general rule. "The supplementary means of interpretation which are permitted in these circumstances are not rigidly separated from nor are they an alternative to, the means which form part of the general rule."⁷⁶

The sense of method of treaty interpretation is how the interpreter takes the way to interpret the words used in the treaties. In accordance with Professor LI's classification of approaches of treaty interpretation, which is widely recognized by majority of international lawyers, the subjective approach, objective approach and purpose approach are respectively taken by the way focused on the common intention of contracting parties, the words used in context of treaty and purpose of treaty. A treaty as written document is same with any written law composed of relevant words. The common intention or purpose of a treaty is not separated from its text. The intention or purpose is expressed or implied by the words used by a treaty.

⁷¹ *Ibid.* Draft Article on the Law of Treaties with commentaries 1966, p.220.

⁷² See *ibid.* LI Haopei, *An Introduction to Law of Treaty*, p.339.

⁷³ *Ibid.* LI Haopei, *An Introduction to Law of Treaty*, p.342.

⁷⁴ *Ibid.* LI Haopei, *An Introduction to Law of Treaty*, p.346.

⁷⁵ *Ibid.* *Oppenheim's International Law*, 9th edition, Vol. Peace, Part 2 to 4, p.1271.

⁷⁶ *Ibid.* *Oppenheim's International Law*, 9th edition, Vol. Peace, Part 2 to 4, p.1276.

Any intention or purpose will be abstract concept if it is separated from its words. In this sense, the method of textual approach is objective because the words used in a treaty are objective. It will be the best understanding of the expressed or implied intention or purpose of a treaty by approaching the words used in a treaty. The general rule of interpretation under Article 31 of the VCLT requires that “a treaty shall be interpreted...in accordance with the ordinary meaning” (the way of approach), and “to be given to the terms of the treaty in their context” (relevant contexts of a treaty or any forms of context), and “in good faith...and in the light of its object and purpose” (expressed or implied).

The method using textual approach or flexible way of textual approach will resort the well-known dictionaries to seek the appropriate meaning of a word if it is necessary, because the function of a dictionary is to provide people with ordinary meaning of a word, which is very helpful to define the most appropriate meaning in its context. In comparison with the ICJ, the WTO/DSB prefers more dictionary definitions by checking the ordinary meaning in its context. It is still followed by panels and the Appellate Body even though it is criticized by some leading international lawyers.

5.3 Comment on Professor John Jackson’s Idea about Treaty Interpretation

Professor John H. Jackson criticized the practices of WTO dispute settlement regarding the application of the general rule of the VCLT, in particular, the way used to take the dictionary. He said that “[t]he Appellate Body, at least in its first six or eight years, seemed to be taking a very ‘textual’ approach to its interpretation, albeit in some particular cases manifesting departures from that. This textual approach was clearly motivated by the language of the VCLT.”⁷⁷ As mentioned above, the Harvard Draft Convention on the Law of Treaty is classified as the purpose approach. The VCLT did not adopt this approach, which might be the one of reasons for the United States’ unwilling to join the VCLT so far. Professor Jackson cited the words of Mr. Claus-Dieter Ehlermann, a former member of the Appellate Body, who commented that the stronger textual approach of the Appellate Body is taken to establish its creditability as the new tribunal. “This commentary raises the question whether the strong textualism of the Appellate Body needs to continue.”⁷⁸ In Professor Jackson’s viewpoint, it is not necessary for the Appellate Body to continue such strong textualism because its creditability has been already beyond doubt.

Professor Jackson believes that there are several treaty interpretation concepts, however that do not necessarily square completely with the VCLT traditional approach, particular in the context of an ongoing, permanent, and very important international institution with a large and growing membership. This may be particularly true in the case of economic organization to predictability and stability (which can, in turn, reduce the so-called ‘risk premium’ described by economists. One of these principles that does not so easily square with the VCLT is the idea of “evolutionary” interpretation. It is similar with the legal construction of the Supreme Court of the United States in constitutional cases, which prefers the constitutional interpretation that can be demonstrated from the contemporary evidence of the drafting of the constitution, and on the other hand, those who view the constitution as a “living” document, which must evolve with the times and with changes in world and societal circumstances and mores. Another concept that relates to treaty interpretation is the idea of “teleological” interpretation. The notion here seems to be to emphasize much more the basic goals of the organization, and to try to interpret its provisions in such a way as to enhance the long-term efficiency or ability to carry out those goals. It is no doubt that Professor Jackson wants to take the approach of “teleological interpretation”. In consideration of the status of the United States in the WTO as well as the DSB adopted reports of dispute settlement have been developing to be quasi-“precedents”, it will be possible to change current the approach from textualism to teleological interpretation if professor Jackson’s idea is prevail. Of course, it is not easy to be changed.

Professor Jackson’s idea shows a fundamental disagreement on application of the general rule of Article 31 of the VCLT. This general rule as customary rule of interpretation of public international law has very confirmed legal basis in practices of the WTO dispute settlement. First, Article 3.2 of the DSU provides that interpretation of treaty of the WTO dispute settlement shall be made “in accordance with customary rules of interpretation of public international law”. The Appellate Body from very beginning of its rulings made it very clear that Article 31 and 32 shall be regarded as these customary rules, which has already been taken as guideline for any dispute settlement. Secondly, the textual approach of the VCLT has already been

⁷⁷ *Ibid* John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, p.187

⁷⁸ *Ibid*. John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, p.188.

followed by many international tribunals including the ICJ. It appears that the United States intends to have a different approach with the hope that international community will follow American way. But, the hope is the hope, at least at moment.

6. CONCLUSION

As a concluding word, it is very important to peacefully settle international disputes by exploring how to apply the customary rules of treaty interpretation under the VCLT, in particular, by learning experiences of the ICJ and the WTO/DSB in their practices of dispute settlement, which is the subject for international lawyers to conduct more researches in coming days.

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