



WTO OMC

TREATY INTERPRETATION

Authoritative interpretations

Article IX:2 of the WTO Agreement

The Ministerial Conference and the General Council shall have the **exclusive authority** to adopt interpretations ...

Three-fourths majority!



Interpretation of the WTO Covered Agreements



Article 3.2 of the DSU

- The dispute settlement system of the WTO is a central element in providing **security and predictability** to the multilateral trading system.
- Serves to **clarify** the existing provisions of the WTO Agreements in accordance with **customary rules of interpretation of public international law**.



Customary rules of interpretation



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Panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties.

India - Patents (US), WT/DS50/AB/R, para. 46

Is the category of “customary rules of interpretation” broader than the principles codified in Arts. 31-33 of the VCLT?



Customary rules of interpretation

“The General Agreement is not to be read in clinical isolation from public international law ...”

US - Gasoline, WT/DS2/AB/R, page 17



Customary rules of interpretation



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- State practice and *opinio juris*
- 1969 Vienna Convention on the Law of Treaties
 - Article 31 – General rule of interpretation
 - Article 32 – Supplementary means of interpretation
 - Article 33 – Interpretation of treaties in two or more authentic languages



General Rule of Interpretation (Art. 31.1)

A treaty shall be interpreted

- in good faith;
- in accordance with the ordinary meaning to be given to the terms of the treaty;
- in their context; and
- in the light of its object and purpose.

General Rule of Interpretation (Art. 31.2)



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The context ... shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

General Rule of Interpretation (Art. 31.3)



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There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

Supplementary Means of Interpretation (Art. 32)



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Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when an interpretation

(a) leaves the meaning ambiguous or obscure;

(b) leads to a result which is manifestly absurd or unreasonable.

Sample Issue of Interpretation

China – Audiovisual Products



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“Sound recording distribution services”

Does this entry in China's GATS Schedule mean only the distribution of sound recordings in physical form (e.g., CDs) or does this entry also encompass the distribution of sound recordings in both physical and electronic form (e.g. through the Internet)?

China – Audiovisual Products



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[T]he purpose of treaty interpretation under Articles 31 and 32 of the *Vienna Convention* is to ascertain the "common intention" of the parties, not China's intention alone. We recall that, in this respect, in *US – Gambling*, the Appellate Body found that "the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members".

ABR, *China – Publications and Audiovisual Products*, para. 405

China – Audiovisual Products



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When is the “common intention” of the parties to be determined?

- At the time the WTO Agreements were first entered into (1995)
- At the time of China’s accession (2001)
- At the time of the dispute (2009)

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- Definitions of “recording” and “distribution”
- Context in China’s GATS Schedule
- Object and purpose of the GATS
- Preparatory work of the treaty and circumstances of its conclusion
- In dubio mitius?

China – Audiovisual Products

Dictionary Definitions?



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We ... do not consider that, in its analysis of the ordinary meaning of "Sound recording distribution services", the Panel disregarded the definitions put forward by China. Neither are we persuaded that the Panel prematurely reached conclusions on the ordinary meaning of "Sound recording distribution services" based only on dictionary meanings before analyzing the relevant context and the object and purpose of the GATS.

ABR, China – Publications and Audiovisual Products, para. 357

China – Audiovisual Products

Use of Context?



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- China's GATS Schedule ("Audiovisual services"; "Videos, including entertainment software and ... distribution services");
- Provisions of the GATS;
- GATS Schedules of Other Members

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Evolutionary Interpretation?



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[T]he terms used in China's GATS Schedule ("sound recording" and "distribution") are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995.

ABR, China – Publications and Audiovisual Products, para. 396

China – Audiovisual Products **Interpretation under Article 32?**



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Although the Panel's application of Article 31 of the *Vienna Convention* to "Sound recording distribution services" led it to a "preliminary conclusion" as to the meaning of that entry, the Panel nonetheless decided to have recourse to supplementary means of interpretation to *confirm* that meaning.

[T]he Panel's recourse to Article 32 of the *Vienna Convention* was not in error, but ... it was also not necessary, given that the application of Article 31 yielded a conclusion on the proper interpretation of this entry in China's GATS Schedule.

ABR, China – Publications and Audiovisual Products, paras. 403, 411

China – Audiovisual Products

In Dubio Mitius?



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We therefore do not accept China's contention that the Panel should have found that the meaning of the entry "Sound recording distribution services" remains inconclusive or ambiguous after its analysis under Articles 31 and 32 of the *Vienna Convention*. Consequently, even if the principle of *in dubio mitius* were relevant in WTO dispute settlement, there is no scope for its application in this dispute.

ABR, China – Publications and Audiovisual Products, para. 411

Questions?



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The End



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THANK YOU!