Chang-fa Lo

Treaty Interpretation Under the Vienna Convention on the Law of Treaties

A New Round of Codification

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Preface

Treaty interpretation is a very important component in the operation of all treaties. It is governed by a set of rules provided in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT). These rules were actually codified from the customary rules of treaty interpretation. But the current codified rules are relatively short and much simplified. International players and interpreters would not be able to apply them simply based on the wordings if they are not familiar with international practices and jurisprudence. However, the understanding and skill of treaty interpretation should not be the know-how exclusively possessed by those who are extremely familiar with international practices and jurisprudence. There should be a relatively detailed set of interpretation provisions, which are precise enough so that parties to any treaty and all potential interpreters should be able to understand the exact rules and apply them, but also flexible enough so that interpreters are still able to make their overall assessments in the course of interpretation in different cases. In addition, there are new situations (such as the increasing possibilities for different treaties to be in conflict with each other) which need to be addressed in the conduct of treaty interpretation. Certain rules governing the emerging situations should also be needed. The book argues that it is desirable to have a second round of codification so that certain existing international practices and jurisprudence concerning treaty interpretation as well as certain new rules addressing emerging issues can be codified into the VCLT to make treaty interpretation more predictable and transparent. I hope that my argument of a new round of codification will provide an input in the broader discussion of treaty interpretation and that the concrete suggestions in the book about the actual provisions to be incorporated into the new set of codified rules will serve as a useful basis for the ultimate result of codification.

In addition to explaining the purpose of this book, I like to take this opportunity to thank one of my best students at National Taiwan University College of Law, Yi-tzu Chen, who assisted me to edit the book, especially in checking the sources of

citations and their formats. She has greatly helped expedite the publication of the book. I also like to thank the team from Springer. They are extremely efficient and professional. I enjoy very much working and cooperating with them for the publication of academic works.

Taipei, Taiwan Chang-fa Lo
August 2017

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About the Author

Chang-fa Lo has been Justice of the Constitutional Court of the ROC (Taiwan) since October 2011. Prior to his current judicial position, he was the Chair Professor and Lifetime Distinguished Professor at National Taiwan University (NTU); Dean of NTU College of Law; Director of Asian Center for WTO and International Health Law and Policy of NTU College of Law (ACWH); Director of Center for Ethics, Law and Society in Biomedicine and Technology of NTU; Commissioner of Taiwan's Fair Trade Commission; Commissioner of Taiwan's International Trade Commission; and legal advisor for Taiwan's GATT/WTO accession negotiations. In his capacity as the Director of ACWH, Prof. Lo launched two English journals, namely the *Asian Journal of WTO and International Health Law and Policy* and the *Contemporary Asia Arbitration Journal* (CAA) in 2006 and 2008, respectively. In his tenure as Dean of NTU College of Law, he also launched an English journal, the *NTU Law Review*. Prior to his teaching career, he practiced law in Taipei. He received his SJD degree from Harvard University Law School in 1989. He was appointed by the WTO as a panelist for *DS332 Brazil—Measures Affecting Imports of Retreaded Tyre* in 2006, *DS468 Ukraine—Definitive Safeguard Measures on Certain Passenger Cars* in 2014, and as a member of the Permanent Group of Experts under the SCM Agreement of WTO in 2008. He is also the Chairman of the Asia WTO Research Network (AWRN) since 2013. He is the author of 13 books (including the current one) and the editor of 6 books, and has authored about 100 journal papers and book chapters.

Part I
The Setting

Chapter 1
Revisiting the Essence of Treaty Interpretation

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1.1 Legal Interpretation in General

1.1.1 Legal Interpretation as Opposed to Other Daily Interpretations

Interpretation of a writing is basically a hermeneutical task for the explanation, elucidation or understanding of the meanings in the writing. The term "interpretation" can be used in a very broad way. In our social life, we always have to give meanings to the communicated words which we receive from our counterparts so as to properly understand the socially perceivable messages. In linguistics, interpretation is about the analysis of languages in their forms and meanings. For religions, scriptures also need interpretation, but different views exist as to whether Bible scriptures should be interpreted literally. In domestic and international politics, readers of a political document or statement sometimes have to read out the hidden

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messages from it. When interpreting a poem, its readers sometimes have to adopt an imaginative interpretation so as to appreciate the beauty of the expression.

When it comes to the interpretation of a term in any legal document, either in a treaty, a constitution, a legislation or a contract, it is not merely a language or linguistic issue, although legal interpretation almost always starts from the textual language of the interpreted document. Also although a legal interpretation is not to specifically identify the socially perceivable message, it still needs to find the meaning which is "ordinary" in its usage. A legal document is not supposed to have a "hidden" message, but an interpreter cannot exclude the possibility that a meaning is not literally reflected from the surface of the interpreted term and hence a basic approach of considering the object-and-purpose of the legal document and the context of the interpreted term must be taken. Although a legal interpretation cannot be based on the interpreter's imagination, he/she still has to take into account a wider range of perspectives and to conduct an overall assessment and should not exclusively stick to the rigid wording in the interpreted document in isolation from the contextual reference. Hence, a legal interpretation is not like the interpretations which people encounter in their daily life. But there are still similarities in their essences.

If a legal interpretation is basically not like other daily interpretations, then what is the essence of legal interpretation? There are a number of necessary features/elements for an interpretation to be considered as legal interpretation. These features include that an interpretation is usually conducted within or under certain legal proceedings (which usually are judicial or quasi-judicial proceedings); that it is usually conducted by the an adjudicator, who usually is a judge, an arbitrator, or other kinds of judicial or quasi-judicial body; that the interpreted subject is a provision or a term in a legal document; that the functions and purposes of interpretation are to clarify the unclear and vague terms so to give a proper meaning to a legal provision to be applied to a dispute or in a legal proceeding, or to remove the incompleteness in the legal documents, especially the incompleteness in a law or a treaty; and that there must be certain pre-established rules provided in law or treaty or developed by jurisprudence to be based upon for conducting legal interpretation.

Among these, the key feature in a legal interpretation which is so vastly different from other interpretations in our daily life is that legal interpretation conducted by the interpreter must be based on certain pre-established rules. For the interpretation of treaties, such pre-established rules are the set of customary rules of treaty interpretation, which are far too "abridged" and need additional elements to be included to make the rules more comprehensive and operable.

1.1.2 Treaty Interpretation Being a Process, a Method and a Mechanism

Legal interpretations basically include treaty interpretation, constitutional interpretation, statutory interpretation and contractual interpretation. There will be some comparisons among these legal interpretations in the next chapter of this book so as to get better ideas of them.

For treaty interpretation, briefly speaking, it is a very important component of judicial or quasi-judicial process[1](hence treaty interpretation is in essence a "process") to clarify and determine the rights and obligations between relevant parties under a treaty through giving a proper meaning to its term or provision (hence treaty interpretation is a part of a dispute settlement "mechanism") based on some interpretation rules (hence it is a "method").

Specifically, treaty interpretation includes the features that the relevant legal process is "usually" conducted in an international legal proceeding (such as an international judicial or quasi-judicial dispute settlement proceeding)[2]; that the interpreter is usually an international judge or arbitrator in such legal proceeding, or, in the context of the World Trade Organization (WTO), a dispute settlement penal or the Appellate Body[3]; that the interpreted subject is a treaty provision or a term in the provision; that the functions/purposes are to clarify the uncertain and possibly disputed term or provision and to give a meaning to such term or provision or to remove the incompleteness of a treaty which is to be applied in an international dispute so as to determine the rights and obligations of the disputing parties and to resolve the dispute; that the rules to be based upon for the interpreter to conduct treaty interpretation are those provided in the Vienna Convention on the Law of Treaties (VCLT)[4] (which are the already codified customary international rules of treaty interpretation)[5] and, possibly, the jurisprudence developed by

[1]Some treaty interpretation activities are conducted by international or regional "courts", such as the International Court of Justice and the European Court of Human Rights. Some others are conducted by "quasi-judicial" bodies, such as the dispute settlement "panels" created for specific cases and the Appellate Body permanently created under the WTO, both of which can only be considered as quasi-judicial bodies because they only issue "reports" and their "reports" are to be adopted by the WTO's Dispute Settlement Body which is composed of all WTO Members.

[2]But it must be noted that sometimes domestic courts also have opportunities to interpret and directly international treaties if the treaties are self-executing to the jurisdictions where the domestic courts locate.

[3]If a treaty is directly interpreted and applied by a domestic court, the domestic court is also the treaty interpreter.

[4]The text of the Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, 1155 U.N.T.S. 331, can be found at https://treaties.un.org/doc/publication/unts/volume%20115 5/volume-1155-i-18232-english.pdf.

[5]The contents of the VCLT concerning treaty interpretation being of the nature of customary rules of treaty interpretation will be explained in Chap. 3 of this book.

international dispute settlement mechanisms (which are uncodified interpretation rules).[6] So the "key difference" of treaty interpretation from other legal interpretations is that the rules of interpretation are those provided in the VCLT and those developed by international jurisprudence.

As shown in the title of this book, the main purpose of this writing is to argue the desirability of further codifying certain treaty interpretation rules. But a discussion on the need of possible codification of certain new rules for treaty interpretation would require a comprehensive understanding of the nature and features of treaty interpretation. Hence, in the next part of this chapter, discussions will be focused on these features of treaty interpretation.

1.1.3 Treaty Interpretation Being an Important Component of Treaty Operation

International legal instruments can be negotiated and drafted in a binding and non-binding manner. VCLT Article 2.1(a) defines "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". In other words, it is not part of the requirements for the purpose of being considered as a treaty under the VCLT concerning whether a written international instrument between States is binding or not. But the practice has been that basically only those international instruments which impose at least "some" binding obligations on the parties are concluded as treaties and treated as such. A purely non-binding international instrument is basically not considered as a treaty or is usually not concluded or adopted in the form of a treaty.

However, it must be borne in mind that within a treaty, there could still be many non-binding rules in addition to the binding provisions. For instance, in the WHO Framework Convention on Tobacco Control (FCTC), there are many mandatory provisions imposing legal obligations on its Parties. Article 5 of the FCTC is an example. It states: "Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party." The FCTC also has many non-binding provisions. An example is in Article 16.7, which provides: "Each Party should, as appropriate, adopt and implement effective legislative, executive, administrative or other measures to prohibit the sales of tobacco products by persons under the age set by domestic law, national law or eighteen."

[6]For instance, the "holistic interpretation" has been recognized by the jurisprudence of international tribunals and has achieved the status of customary rules of treaty interpretation. See the discussion in Chap. 17 of this book.

Hence, there could be purely non-binding international instruments, such as most "declarations" issued and most "guidelines" and "principles" adopted by members of international organizations or by the relevant parties. There could also be non-binding provisions under and within international treaties. Concerning such non-binding international instruments or those non-binding provisions under international treaties, the parties do not have a strict international obligation to implement them. The operation of such non-binding international instruments and non-binding provisions as well as the achievement of their goals could rely very much on consensus-building, peer pressure, periodic review and other mechanisms. For these non-binding instruments and non-binding rules, the "legal interpretation" of them is not an essential component for their operation.

However, for the binding provisions in international treaties, it is important that the parties' rights are preserved and their obligations are fulfilled so that the treaties will be able to properly function. To ensure the preservation of rights and the fulfilment of obligations as well as the compliance of treaty rules, the vast majority of treaties have either strict or "soft" dispute settlement procedures. Treaty interpretation is a very important component in the dispute settlement procedures (especially for the stricter dispute settlement procedures). Hence, it can be said that treaty interpretation is an important component for the overall operation of international treaties, especially for their binding provisions.

1.2 Features of Treaty Interpretation

1.2.1 As an Essential Component of International Judicial/ Quasi-judicial Legal Proceedings

As indicated above, the first important feature for treaty interpretation is that it is an essential component of international judicial and quasi-judicial legal proceedings. In this regard, it must be noted that international treaties or organizations do not always have the separation of powers into three branches (namely the executive, the legislative and the judiciary) similar to the domestic constitutional systems in many jurisdictions. However, it is very common for treaties to include dispute settlement mechanisms (DSMs) so as to resolve dispute arising from the application and implementation of the respective treaties. If a DSM is strictly rule-based conducted by a separate body which is to issue a binding decision, it can be seen as an international judicial proceeding. The essence of international judicial proceeding should be that the decisions of disputes are based on certain substantive and procedural rules and the decisions are legally binding and are supposed to be followed/ implemented by the disputing parties. In international judicial proceeding, the adjudicator usually has to find the facts, to interpret and apply the procedural and substantive applicable rules and to make a decision on the dispute. Interpreting an applicable provision or its term in the relevant treaty is an essential component of the international judicial process.

There are also other bodies or panels under certain international DSMs which perform similar functions in handling disputes, but do not issue binding decisions. For instance, the DSM under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) of the WTO includes a panel proceeding and the Appellate Body proceeding. Both the panel and the Appellate Body are to issue their "reports" to be adopted by the Dispute Settlement Body (DSB)[7] (which is composed of representatives from WTO Members). The adoption mechanism makes the panel and Appellate Body reports of legally non-binding nature before the completion of the adoption process, although "practically" their reports are 100% adopted because of the "negative consensus" provision in the DSU.[8] Hence, strictly speaking, the DSM under the WTO cannot be legally considered as a purely international judicial proceeding, neither can the panel or the Appellate Body be considered as judicial branch of the WTO. At the most, the DSM is a quasi-judicial proceeding. However, the panel (created for each WTO dispute) and the standing Appellate Body still conduct treaty interpretation. This will be further explained in Chap. 8 of this book.

Also, as will be discussed in Chap. 8 of this book, not only the international judicial and quasi-judicial proceedings (conducted by international adjudicating and quasi-adjudicating bodies) include treaty interpretation as an important part of their activities, domestic judicial proceedings (conducted by domestic courts) sometimes could also involve treaty interpretation activities if a dispute in a domestic court concerns the direct application of a treaty. In other words, treaty interpretation sometimes can also be a component of domestic judicial process.

It has been mentioned above that treaty interpretation is a very important component in the rule-based international dispute settlement procedures. This is

[7]See the following provisions in the DSU concerning the issuance and adoption of panel and Appellate Body reports: Article 2.1: "… the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements." Article 12.7: "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB …" Article 16.4: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report …" Article 17.14: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members …".

[8]The negative consensus requirement for the adoption of a panel or Appellate Body report is provided in Articles 16.4 and 17.14 of the DSU. Concerning the adoption of a panel report, Article 16.4 provides in part that: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. …" Concerning the adoption of an Appellate Body report, Article 17.14 provides in part that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. …".

because the ultimate purpose of such procedures is to have a proper understanding or meaning of the norm to be given to the interpreted provision for the interpreter to apply it so as to resolve a dispute. However, in a friendlier or "soft" dispute settlement procedure, such as mediation or conciliation, its purpose is to find their mutually acceptable solution and to amicably resolve the dispute. The focus of the proceeding of such kind is on finding or formulating a mutually agreeable solution. Hence the application and interpretation of a relevant treaty provision becomes far less important.

However, this does not mean that in a mediation or conciliation proceeding, treaty interpretation is never relevant. Sometimes in the mediation or conciliation proceeding, proper interpretation of the relevant treaty provisions could facilitate a successful conclusion of the proceeding. But in some other times, deliberately resorting to treaty interpretation could lead to extensive legalistic arguments in the mediation proceeding and could hamper the conclusion of a settlement agreement.

1.2.2 Treaty Interpreters Mostly Being International Adjudicators

It was mentioned above that treaty interpreters include international judges or arbitrators, and, in the context of the WTO, a dispute settlement penal and the Appellate Body. It is because these individuals or bodies are adjudicators or quasi-adjudicators to decide or help decide the dispute. This is different from the interpretation of constitutional provision or legal provision in domestic context, which is normally conducted by domestic courts.

However, there is an overlap between treaty interpretation and domestic legal interpretation (including constitutional and statutory interpretation) regarding the interpreters. As mentioned above, sometimes domestic courts have to directly interpret and apply international treaties to resolve disputes if such international treaties are directly governing and applicable to a legal relations to be decided by domestic courts. When domestic courts conduct treaty interpretation, they usually have to be bound by the VCLT as well, unless the applicable treaty is of such nature of handling/governing private matters. This will be further discussed in Chap. 8 of this book.

1.2.3 The Interpreted Subjects Being Treaty Provisions/ Terms Plus Certain Codified Customary Rules

Treaty interpretation is about the interpretation of treaties. According to the VCLT Articles 1 and 2.1(a), the VCLT (including its treaty interpretation part of Articles

31 to 33) applies to treaties between States in written form. Hence, treaty interpretation conducted under the VCLT is basically to interpret written treaties, including multilateral, regional and bilateral treaties. Other forms of international law, including customary international law and the general principles of law recognized by civilized nations, are "generally" not subject to treaty interpretation rules for their understanding.

But this does not mean that other forms of international law never need interpretation. Sometimes a customary international law rule can be codified. But a codified customary international law rule is still of the nature of customary law. A codified customary international law rule could sometimes be unclear and need clarification and interpretation. Although the interpretation rules provided in the VCLT do not directly apply to the interpretation of such codified customary international law rule, "similar interpretation rules" should still be there for the purpose of identifying or clarifying the meaning of the codified provision.

Example of the codified international rules which need interpretation is the VCLT itself. As will be explained in Chap. 3 of the book, the VCLT is a set of codified rules reflecting customary international law. For those States which have ratified the VCLT, it is of the nature of treaty as defined by VCLT Articles 1 and 2.1 (a). For those other States which have not ratified the VCLT, the rules provided in it is still of the nature of the customary international rules to them. But even the rules provided in the VCLT are merely of the nature of customary international law to such States, the provisions of the VCLT could still need further interpretation so as to understand their meanings. The need of interpretation also applies to VCLT Articles 31 to 33 which govern treaty interpretation. Hence, when we discuss the meanings and applications of VCLT Articles 31 to 33, actually we are engaging in the proper interpretation of these provisions.

The above mentioned "similar interpretation rules" for the interpretation of codified customary international law rules should mean that the interpretation would still start from looking for the "ordinary meaning" of the codified provision of the customary rule. The "context" within the codified rules should also be taken into consideration. There could be the "object-and-purpose" of "codification", but there might not be an "object-and-purpose" of "having certain substantive provisions drafted in certain way". Hence, the object-and-purpose element as provided in VCLT Article 31.1 might not be useful in clarifying a codified customary rule. But the preparatory work (which serves as the supplementary means for ordinary treaty interpretation purpose as provided in VCLT Article 32) could be very useful in understanding the proper meaning of a provision in the codified customary rules.

1.2.4 Clarifying Vagueness and Giving Meanings to the Term so as to Determine Rights and Obligations and to Resolve Dispute

"Law reading" and "treaty reading" basically includes two processes, namely identifying the proper provision to be applied (i.e. law and treaty *application*) and having the proper understanding for or giving a proper meaning to the applied provision (i.e. statutory and treaty *interpretation*). The distinction of these two processes will be further elaborated in Chap. 7 of this book. Here it must be noted that, concerning the interpretation aspect, treaty or statutory interpretation is about the interpretation of *codified norms*. If a norm is uncodified, it is not within the meaning of "interpretation" here. For an uncodified customary rule, there is no "textual language" to be based on for interpretation.

Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT) also states that: "*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." (Emphasis added) Article 2.1(a) of the VCLT refers a treaty to "an international agreement concluded between States in written form". Hence, it is the written international instruments which need to be interpreted based on certain interpretation rules, not the uncodified customary international law to be interpreted.

For the uncodified customary rules, conceptually their "clarification" should not be considered as an "interpretation". When we use some terms to describe the proper understanding of the meaning, content, nature or scope of an uncodified customary rule, we are actually engaging in "defining", "explaining" and "discussing" its meaning, content, nature and scope. This activity does not fall within the contour of an "interpretation" activity.

Although many international disputes arise exclusively from the unclear fact, a large number of international disputes arise from the unclear or vague provision or term in the treaty, from its incompleteness, or even from its conflicting provisions. For an unclear or vague treaty provision or term, the adjudicator will have to properly understand its meaning before applying the provision. Even if a treaty provision or term is clear to one of the disputing parties, the other party could still suggest different understanding of the provision. The disputed provision still requires interpretation.

Sometimes, treaty provisions are incomplete and fail to address certain specific situations which fall within the scope of the treaty. The adjudicator still has to make decision for the dispute of such kind. So treaty interpretation is not merely to "read out" and to give appropriate meaning to a treaty term or provision so that it can be applied by an international adjudicator. Treaty interpretation is also to address the incompleteness.

In some other situations, there could even be conflicting provisions, both of which could be applicable to the same issue. Such conflicts include internal conflict (i.e. the conflict between different provisions in the same treaty) or external conflict

(i.e. the conflict of a provision in one treaty with a provision in another treaty). Treaty interpretation is also to address such conflicts.

Hence, the functions and purposes of treaty interpretation are multiple: When an adjudicator encounters the objectively or subjectively uncertain and vague disputed terms or provisions, his/her role is to remove the unclear and vague aspect of the treaty so that the disputing parties can follow clear rules. When the adjudicator encounters incompleteness which create a gap between the rules and the regulated subject matters, his/her role is to interpret the rules so as to remove the gap or loophole. When he/she encounters internal conflict, the most constantly resorted means is to rely on contextual interpretation (which will be discussed in Chap. 12 of the book) so as to make the conflicting provisions consistent with each other. When he/she encounters external conflict, it is more complicated. Various interpretation methods might need to be combined so as to remove or coordinate the external conflict. The latter issue will be discussed in Chap. 19 of the book.

After having given the meaning to the terms or provisions or having removed the incompleteness of treaty provisions, the adjudicator will know how to apply relevant provisions to the case so as to determine the rights and obligations of the disputing parties and to resolve the dispute. Hence, the immediate functions and purposes of treaty interpretation are to remove the unclearness, vagueness and incompleteness in the treaty, but the ultimate function is to resolve dispute arising from the treaty.

In any event, a treaty interpreter must assume the role of addressing these incompleteness, vagueness and conflict issues. This is to maintain the proper operation of a treaty. Hence, it can be said that treaty interpretation is a necessary "operational mechanism" so as to ensure the proper operation of the interpreted treaty.

1.2.5 Interpretation Being Conducted Based on Certain Rules

As mention above, the fundamental difference between the interpretation that we encounter in our daily life and the legal interpretation is that legal interpretation must be based on certain rules. And the fundamental difference between treaty interpretation and other legal interpretations is that treaty interpretation is based on certain pre-established international rules of interpretation, whereas other legal interpretations (including statutory interpretation, constitutional interpretation and contractual interpretation) could be based on domestic legislations or local jurisprudence.

In order to have a proper understanding of an interpreted norm, an international adjudicator will have to carefully examine the text of the interpreted treaty and follow the explicit or implied instruction provided thereof so that the interpretation will not deviate from the legislative instruction. Hence the text of the legislation or

treaty is the starting point for its interpretation. Also the international adjudicator will have to identify and look into some possible meanings of the interpreted provisions so that their interpretation will not be affected by their own preconceived notion. The adjudicator will further use other methods of interpretation (such as contextual, teleological and holistic approaches) to decide the most appropriate meaning for the interpreted term or provision so as to assist the application of a treaty. Hence in addition to the premise that the treaty interpretation is an important component of the judicial or quasi-judicial proceeding, it is also about the "method" to be developed or adopted so that an interpreter can properly discharge the duties vested to him/her under the treaty. These methods and rules are basically provided in VCLT Articles 31 to 33.

Treaty interpretation is similar to other legal interpretations in that their functions are both to secure a proper meaning being provided to an interpreted term or provision. But, as will be discussed, treaty interpretation and other legal interpretations are subject to different methods. Their focuses and results could also be quite different. The comparison of treaty interpretation on the one hand and statutory interpretation as well as contract and constitutional interpretations on the other hand will be further discussed in Chap. 2.

1.3 Treaty Interpretation Is not a Political or Legislative Process

1.3.1 Not a Political Process

It was explained above that treaty interpretation is a very important part of judicial or quasi-judicial proceeding. The distinctiveness of a judicial or quasi-judicial proceeding from other proceedings is that the former requires the adjudicators to be independent from political or other external influences, whereas the latter could still be subject to political or other influences. The levels of independence between a judicial and a quasi-judicial proceeding could still be different. Legally speaking, a judicial proceeding requires the adjudicator to be completely independent from any external influence. Whereas for a quasi-judicial proceeding, the adjudicator could still be subject to certain kind of influence. For instance, the dispute settlement panel and the Appellate Body of the WTO can only issue their reports to be adopted by the DSB, which is composed of representatives of WTO Members. Hence, theoretically WTO Members can collectively decide not to adopt a report. In this way, they can affect the result of the dispute settlement proceeding. This design follows the idea of Member-driven approach of the WTO's operation. But since DSU Articles 16.4 and 17.14 have similar provisions that their report shall be adopted by the DSB "unless the DSB decides by consensus not to adopt" the report (the consensus being considered as negative consensus or the "negative consenus"), the adoption of the report becomes semi-automatic. Therefore, WTO members do