Book Review

A BOOK REVIEW OF CHANG-FA LO'S "TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION"

Mitsuo Matsushita*

ABSTRACT

Chang-fa Lo's "Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification" analyzes the issues of treaty interpretation under Vienna Convention on the Law of Treaties (hereinafter "VCLT"). It suggests that, although VCLT concluded in 1969 was a monumental work, it reveals ambiguity and inadequacy in light of the current jurisprudence in WTO law and practices as well as in some other areas such as International Court of Justice (ICJ) decisions. It suggests that VCLT needs to be reviewed closely with the purport of incorporating recent developments in treaty law and it should be amplified by adding new provisions and explanations.

KEYWORDS: *interpretation of treaties, customary international law, VCLT, ordinary meaning of words, preparatory works, WTO law, ICSID, CISG, WTO Appellate Body, panels*

---

* Professor Emeritus of Tokyo University, former member of the WTO Appellate Body, Ph.D (Tulane University), D. Jur. (Tokyo University). The author can be reached at: mtm@dd.iij4u.or.jp.

臺灣大學學術期刊資料庫

Treaty interpretation is one of the most important subject matters of international law. It is not just a mechanical process of following the wording of a treaty. It requires an imaginative and creative thinking on the part of an interpreter.

There are two major sources in international law: treaties and the customary international law. Treaty is a contract entered into between states. Customary international law is a body of customs and practices among nation-states which has acquired the status of legal norms and rules of conducts among states through the long standing usages among them. There are thousands of treaties in the world today which operate in their respective areas. Treaties may be bilateral, regional, plurilateral or multilateral. Strictly speaking, treaty is an agreement among the contracting parties which has been agreed upon and ratified by their domestic legislatures. However, there are less formal agreements among nation-states. Such informal agreements include executive agreements and understandings among the states. These are less formal agreements but still are part of international agreement in broad sense of the terms.

Treaty is a written document that incorporates the contracting parties' terms of agreement and binds on the parties. There had been a long history and development of customary international law on the rules and principles of interpreting treaties and such rules and principles were incorporated in the Vienna Convention of on the Law of Treaties (hereinafter "the VCLT") adopted in 1969. The VCLT rules are binding on the contracting parties as rights and obligations of a treaty and also on non-contracting parties as norms of customary rules of international law. The VCLT covers almost all fields of international treaties. Articles 30-32, especially Articles 31 and 32 of the VCLT are often cited. Article 31 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. Article 32 declares that the recourse may be had to supplementary means of interpretation including the preparatory work of the treaty if the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

The establishment of the VCLT was a monumental accomplishment of the international community, but fifty years later ambiguity and incompleteness still persist in treaty interpretations. Further clarifications and amplifications are needed in order to make the VCLT a more useful and workable instrument for the international community. A recent book by Judge Chang-fa Lo of the Constitutional Court of Taiwan: "Treaty Interpretation Under the Vienna Convention on the Law of Treaties" undertakes a daunting task of reviewing the issues of interpretation of treaties under the VCLT and recommends possible improvements of

臺灣大學學術期刊資料庫

Articles 30-32.

The book is divided into three parts: Part I (The Setting), Part II (Existing Issues to Be Subject to Codified Rules) and Part III (New Issues and Perspective).

Part I is titled "The Setting". This part serves as an introduction to the issues of treaty interpretation and explains general subject matters relating to how treaties should be interpreted. It discusses, among others, such matters as the difference between statutory, constitutional and contractual interpretations. For example, in contractual interpretation, the intention of drafters of the contract as expressed in the preparatory works plays an important role; however, in treaty interpretation, preparatory works are only the secondary source of law. The book points out that there are areas in treaty interpretation where the VCLT is uncertain and requires further codification so that it would better reflect the current state of developments of rulings, practices and theories of treaty interpretation.

Part II is titled a "Existing Issues to Be Subject to Codified Rules" and is the main body of the book. Here, the author engages in detailed analysis of the major issues of treaty interpretation such as the question of law as distinguished from the questions of fact, methods of searching for the ordinary meaning, ways of taking into consideration of the object-and-purpose, means of taking into consideration of the context, special meaning, supplementary means and different languages, sequence, hierarchy, good faith, holistic interpretation and so forth. In analyzing those subject matters, the author heavily draws on rulings made by WTO panels and the Appellate Body. However, WTO panel and appellate reports are not the only sources that the author relies upon. He uses other sources such as International Court of Justice (hereinafter "ICJ") decisions, the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") awards and provisions of the Convention on Contracts for the International Sale of Goods (hereinafter "CISG"). After closely examining the interpretation and application of such legal instruments, the author points out that there is uncertainty and insufficiency in the meaning of some provisions of the VCLT because those provisions do not reflect the current legal rules and principles that have developed since the VCLT was established. He therefore recommends that some provisions of the VCLT should be further codified by adding more provisions and explanations to them.

In Part III, "New Issues and Perspectives", the author suggests new approaches to treaty interpretation and tackles the difficult task coordinating treaties that are in tension. The author suggests that treaty interpretation is not a mechanical process but an art in which creativity and the interpreters' values play important roles. He argues that there are certain human values that are so fundamental that they are universally accepted.

臺灣大學學術期刊資料庫

For example, the protection of human life and health, civil and political rights and due process of law belong to this category. Both domestic and international legal system cannot ignore them. He suggests that such fundamental values should be reflected in interpreting treaties and this can be done through reading the ordinary meaning of the treaty in question and taking into account the purpose and objective of it.

Another issue that is discussed in this part is coordinating different treaties through treaty interpretation. Sometimes a provision in a treaty comes into tension or disharmony with a provision in another treaty. For example, a provision of and decision under the Framework Convention on Tobacco Control (FCTC) which is designed to control tobacco products to protect human health and provisions in the TRIPS Agreement whose aim is to protect intellectual property may conflict with each other. He suggests that it is useful to codify a set of treaty interpretation rules that when an interpreter has to choose one from two or more ordinary meanings, he or she should select the one which is more in line with the object-and-purpose of the interpreted treaty in protecting fundamental human values, taking into consideration the context of protecting human values for the interpreted provision.

In the last chapter (Chapter 20), the author presents draft provisions of Articles 30-32 of the VCLT which reflect his detailed analysis and recommendations for further codification in order to improve and elaborate the contents of those provisions.

This book offers an unprecedented depth and width of analysis and thoroughness with which the research is conducted. Recommendations and suggestions made in the book for additions and revisions of the VCLT are comprehensive and persuasive. Practically all of the issues in interpreting Articles 30-32 are taken up and closely discussed. After detailed analysis of each provision of the VCLT, the author suggests that additional provisions and explanations should be made to enrich the current provisions of the VCLT.

Another feature of the book is its wide coverage of topics. Although the main emphasis of the book is to analyze the contents of the present provisions of the VCLT as its provisions are applied on WTO agreements and to review whether such applications have been effective, the author's perspective is not limited to them. In analyzing the current operations of the VCLT and recommending further improvements, the author utilizes not only WTO panel and appellate reports but also ICJ decisions, ICSID awards and CISG provisions and his perspective includes treaties for private matters also. In this way, the book is also a comparative study of the law of WTO and the law of other related areas.

The reviewer of the book would like to highly recommend this book to people working in international organizations, international lawyers,

臺灣大學學術期刊資料庫

legislators, academics and students who are engaged in the works of WTO agreements as well as of other international agreements. This book will also be a good guide for students and practitioners of the comparative treaty law.

The author of the book, Chang-fa Lo, has a distinguished professional background. He is currently a Justice of the Constitutional Court of the R.O.C. (Taiwan). Prior to this position, his positions included, among others, the Chair Professor and Lifetime Distinguished Professor at National Taiwan University (hereinafter "NTU"), Dean of NTU College of Law, Commissioner of Taiwan's Fair Trade Commission, Commissioner of Taiwan's International Trade Commission and legal advisor for Taiwan's GATT/WTO accession negotiations.

The book will be a fine contribution to the world of treaty law and WTO law as well as to practices and studies of comparative treaties. The reviewer would like to congratulate the author for publishing a book of high quality and practicality.

臺灣大學學術期刊資料庫