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Demystifying the Art of Interpretation

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Carlos Fernández de Casadevante Romani. ***Sovereignty and Interpretation of International Norms.*** Berlin: Springer, 2007. Pp. 302. €160.45. ISBN: 9783540682066.

Richard Gardiner. ***Treaty Interpretation.*** Oxford: Oxford University Press, 2008. Pp. 407. £89.95. ISBN: 9780199277919.

Robert Kolb. ***Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public.*** Brussels: Bruylant, 2006. Pp. 959. €150. ISBN: 2802722492.

Ulf Linderfalk. ***On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties.*** Dordrecht: Springer, 2007. Pp. 410, €126. ISBN: 9781402063619.

Alexander Orakhelashvili. ***The Interpretation of Acts and Rules in Public International Law.*** Oxford: Oxford University Press, 2008. Pp. 594. £66. ISBN: 9780199546220.

Isabelle Van Damme. ***Treaty Interpretation by the WTO Appellate Body.*** Oxford: Oxford University Press, 2009. Pp. 419. £74.50. ISBN: 9780199562237.

Abstract

Despite its codification by the Vienna Convention more than 40 years ago, treaty interpretation in international law continues to evolve as its function of providing predictability in international relations remains as important as ever. The voluminous recent literature testifies to the continuing scholarly interest in interpretation, even if sometimes at the cost of over-theorizing. This essay reviews six books that seek to demystify the art of treaty interpretation. Written by European scholars, the books take a fresh look at interpretation but

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differ in their approaches and scope of analyses. While all six authors study the interpretive practice of international courts and tribunals, Gardiner, Linderfalk and Van Damme focus on treaty interpretation; Fernández de Casadevante Romani, Kolb and Orakhelashvili also examine the interpretation of decisions by international organizations, unilateral acts and customary international law. Kolb and Orakhelashvili opt for a comprehensive, theoretically-grounded approach, whereas Van Damme focuses on the interpretative practice of the WTO Appellate Body. On the strength of her perceptive and nuanced analysis of WTO jurisprudence, the book is the best guide among the six to interpretation in international law generally. In addition to Van Damme's work, the practitioner will also find Gardiner's book particularly useful.

1 Introduction

Nowhere else do theory and practice interact more closely than in the art of treaty interpretation. International lawyers had grappled with the holy grail of interpretation for decades before the Vienna Convention on the Law of Treaties ('VCLT') was adopted in 1969. Attempts to define appropriate rules for the interpretation of treaties and, to a lesser extent, for the interpretation of other rules and acts in international law are legion. Different methodological approaches and conceptions of the international legal order spilled over into an acrimonious debate on the proper means of interpretation and on who has the power to interpret, exemplified by the battle between the objective (textual) and the subjective (intent) school.

The law of treaty interpretation, despite having been codified more than 40 years ago, has become one of the most dynamic in international law. It continues to evolve, driven in part by new dispute settlement bodies such as the WTO Appellate Body. These developments have prompted international lawyers to take a fresh look at interpretation. The recent voluminous literature on interpretation has responded to the need for analysis of this dynamic evolution.[1]

The best way to learn the art of treaty interpretation is to study the interpretative practice of international courts and tribunals.[2] The six books under review contribute, in various ways, to the 'database of treaty interpretation' (Gardiner, at

[1] Cf. E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011); O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011); O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties* (2011); M. Fitzmaurice, O.A. Elias, and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (2010); Symposium: 'The Interpretation of Treaties – A Re-examination', 21 EJIL 2010 with articles by J.H.H. Weiler, G. Letsas, L. Grover, L. Lixinski, I. Van Damme, R. Pavoni, and L. Crema; Roberts, 'Power and Persuasion in Investment Treaty Arbitration', 104 *AJIL* (2010) 179; M. Villiger, *Commentary on the Vienna Convention on the Law of Treaties* (2009); F. Zarbiev, *Le discours interprétatif en droit international: une approche critique et généalogique* (thesis, 2010); G. Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (2007); A. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (2006); M. Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (2006).

[2] Sir Michael Wood, Foreword to Gardiner, at xiii.

57), and thereby further our understanding of this art.[3] The perspectives of the six authors are diverse, as are the centres of gravity of their respective books. Gardiner, Linderfalk, and Van Damme focus exclusively on treaty interpretation under the VCLT and customary international law, the traditional domain of the literature on interpretation. Fernández de Casadevante Romani, Kolb, and Orakhelashvili also look at other acts in international law, including decisions by international organizations, unilateral acts of states, and customary international law.

The prevalent view among international lawyers is that international law is a force for good, designed to keep arbitrariness by national governments in check, to moderate power struggles in international affairs, and to provide public goods. In this frame of mind, the more international law, the better. This common philosophy animates some approaches to interpretation, including the broad conception of the principle of effectiveness examined in section 4 below. In reality, however, it is no longer possible (if it ever was) to say that the maturing system of international law is invariably a 'progressive' force, necessarily leading to an improvement of the human condition. Like all law, international law too encapsulates competing values and policy judgements. It is rarely neutral. To be sure, international law plays a crucial role in protecting human beings from state arbitrariness and violence, most notably in human rights. International law, in such cases, serves to protect individuals against injustice that may be the result of domestic law (or the absence of law altogether). More generally, however, a particular policy encapsulated in a rule of international law may harm some individuals and benefit others. It very much depends on one's perspective, just like in domestic law.

2 Competing Visions of the VCLT's Philosophy of Interpretation

At first sight, the rules on interpretation found in Articles 31–33 VCLT seem to have settled the old debates. However, at another level, the VCLT merely reduced these disagreements to writing,[4] and left substantial leeway for idiosyncratic approaches to interpretation within the bounds staked out by the VCLT's broad interpretive principles. Disagreements on the proper methodology matter in practical terms because of the extensive powers to interpret international law that are delegated to international courts and tribunals, and, increasingly, national courts – a point highlighted by Richard Gardiner, who points to the 'huge range of treaties' that have their principal effect in domestic law (at 21).

The VCLT's principles of interpretation have become deeply ingrained in the interpretive DNA of international lawyers, even though many questions of interpretation remain contentious. Brownlie emphasized that '[m]any of the rules and principles

[3] Gardiner and Orakhelashvili have already been reviewed in this Journal: J. Kammerhofer, 20 *EJIL* (2010) 1282 and M. Fitzmaurice, 20 *EJIL* (2010) 952.

[4] P. Allott, *The Health of Nations* (2002), at 305.

offered are general, question-begging and contradictory'.[5] The codification in the VCLT occurred at the level of principles, and leaves considerable degrees of freedom to interpreters. As is well known, Article 31 VCLT uses mandatory language ('[t]he Treaty shall be interpreted'), but does not shed much light on how much weight each element in Article 31 deserves. By contrast, the formulation in Article 32 that '[r]ecourse may be had to supplementary means' makes it clear that the use of supplementary means is at the interpreter's discretion.

Orakhelashvili takes the view that the methods of interpretation pre- and post- the VCLT differ greatly, with the process of interpretation now being subject to fixed rules. He underscores that it would be mistaken to regard the interpretive principles as mere 'working assumptions'.[6] Rather, 'the rules of treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretative methods' (at 309). Orakhelashvili develops a unified system of interpretation covering all rules and acts in international law. He offers a multi-faceted analysis of interpretation in public international law, mainly through the lens of canonical writings in international law and an extensive analysis of the case law across the field as a whole.

According to Orakhelashvili, the proper goal of interpretation is to 'deduce the meaning exactly of what has been consented to and agreed' (at 286). The author displays an unbounded optimism that this goal can be accomplished using the VCLT principles on treaty interpretation alone. Case-by-case analysis to him is not an acceptable alternative. The influence on the process of interpretation of what he terms non-law should be resisted at all costs: 'the process of interpretation aimed at clarifying the content of law has to be seen as independent of the influence of non-law' (at 85).

Kolb identifies four 'vectors of interpretation' (at 166–170). The first is the text as the classical positive element; the second is a holistic look at context and general principles; the third is meta-positive elements, taking into account judicial, political, or social context; and the fourth is a residual, though important category constituted by a 'heretical' meta-positive element (*Ergebnisorientierung*) – the interpreter's regard to the desirable result. Interpretation is said to be a complex molecule, with a base composed of the technical and positive elements, complemented by three atoms: fundamental values, outcome-orientation (*Ergebnisorientierung*), and the permanent tension between individual and social welfare (at 927).

Gardiner, Fernández de Casadevante Romani, and, implicitly, Van Damme endorse the ILC's 'crucible approach'.[7] Accordingly, the various interpretive elements found in Articles 31 and 32 VCLT are thrown into balance in a 'single combined operation'

[5] I. Brownlie, *Principles of Public International Law* (6th edn, 2003), at 602.

[6] A term coined by French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', 55 *ICLQ* (2006) 281.

[7] UN Conference on the Law of Treaties: Official Records: Documents of the Conference, A/Conf.39/11/Add.2, 39, at para. 8; Gardiner, at 9, n. 16.

(Gardiner, at 9–10; Fernández, at 155).[8] Van Damme takes the view that '[a]ll interpretation is contextual', and emphasizes that 'it is the prerogative of the interpreter to decide how context comes into play' (at 213). Along the same lines, Gardiner explains that the ordinary meaning cannot be divorced from context, because it is 'immediately and intimately linked with context and to be taken in conjunction with all other relevant elements of the Vienna rules' (at 165–176).

Gardiner underscores that the VCLT principles do not provide a 'step-by-step formula for producing an irrebuttable interpretation' (at 9). They are not 'simple precepts that can be applied to produce a scientifically verifiable result'. Judgement by the interpreter is a critical ingredient. They leave 'some issues incompletely resolved' (at 7) and display considerable flexibility. The VCLT accommodates a range of interpretive approaches. The VCLT contains 'principles of logic and order that both constrain and empower the interpreter' (Van Damme, at 38). They are in constant interaction with customary principles of interpretation, mitigating fears that the VCLT may be a 'straitjacket' for the interpreter or inadequate to deal with the challenges that arise in contemporary interpretation.

Linderfalk's position on whether the VCLT closed the debate on interpretation is ambiguous. He puts forward two seemingly contradictory propositions. First, that 'with the existence of Vienna Convention Articles 31–33 many of the major controversies illustrated by the twentieth century international law literature must be considered as finally resolved', and, secondly, that '[o]n the negative side, the textual cast used for Vienna Convention Articles 31–33 has rendered possible a wide variety of opinions as to their normative content' (at 3).

He identifies two extreme positions: first, radical legal scepticism that regards treaty interpretation as an art that cannot be regulated by rules – interpretation is a purely political exercise. The other is the one-right-answer hypothesis (at 4) – the interpreter applies the rules of interpretation to arrive at a determinate result through a value-neutral process. Linderfalk himself adopts an intermediate position. The interpretative process is governed by a system of rules which, to a considerable degree, constrain political judgement (at 4–9). However, on account of the limited number of substantive rules, the interpreters are left with considerable room for manoeuvre.

3 Contextual Interpretation

Kolb's book pursues dual goals, and accomplishes both admirably well. First, he develops a general theory of interpretation in international law which examines how treaty and customary international law, general principles, unilateral acts, and resolutions of international organizations are applied and interpreted. His analysis is not divorced

[8] Report of the ILC on the second part of its seventeenth and on its eighteenth session, in *Yrbk Int'l Law Comm* (1966), ii, 219. Cf. also Abi-Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (2006), at 459.

from interpretation in national law, as is commonplace in the literature, but related to the traditions of interpretation in various national laws (France, Germany, South Africa, and the common law world).

Secondly, he seeks to debunk the myth that interpretation without law creation is a possibility and calls for a 'Copernican revolution' towards a modern theory of interpretation in international law (at 124): '[i]t is striking to discover that this [strictly positive view of interpretation] is flatly contradicted by the most elementary realities of international legal life. . . . [E]verywhere, and especially in international law, the application of law always involves an important creative part' (at 3).[9] Interpretation and development of the law operate as a 'joint venture' (at 931).

International law, according to Kolb, is 'law in action' (at 3). It develops constantly and, thus, there is no set '*corps de règles*'. Any attempt to come up with a definite statement of the law would be futile. Kolb proposes 'an extension of the concept of law . . . to end the silence of those areas in which law, in all of its "purity", cannot move on its own. Rational analysis opens up the possibility for a progressive penetration of the legal concept beyond these new frontiers and thus for a larger concept of the interpretative process' (at 6).[10] One of Kolb's aims is to take greater account of the political in international law. Interpretation in international law is a legislative function (at 163), counterbalanced by the need for positivism to provide a measure of legal certainty in an international legal order often characterized by a lack of consistency, clarity, and completeness. He identifies five structural features of the international legal order that explain particularities of interpretation internationally: (i) a legal system of horizontal coordination, (ii) the greater role of standards and adaptable rules, (iii) its fragmented and uncertain character, (iv) its malleability and openness to ethical and political influences, and (v) its nature as a law of co-existence and cooperation (at 133–153).

Kolb explains why the role of interpretation in most legal systems, including international law, varies across time. It oscillates between the low tide represented by the codifiers who regard interpretation as a threat to the intent of the legislator and the high tide advocating a broader concept of interpretation. The second school regards interpretation as hinging on the distribution of power, the law's structure, and the type of law that dominates in a given society. By contrast, the French L'Ecole de l'Exégèse, an emanation of the low tide, espoused the dogma that the 'text is everything' (at 36). This textual obsession was motivated by rationalism and a strong desire to provide a stable legal framework for commerce. In the second half of the 19th century, the heyday of the counter-reaction to positivism, social and economic progress had accelerated. Societies were in flux. Change was the order of the day, and the social question

[9] '*[I]l est frappant de constater que cette conception classique est en contradiction criante avec les faits les plus élémentaires de la vie juridique internationale . . . nulle part, d'avantage qu'en droit international, tout acte d'application comporte une grande part créative*' (my translation).

[10] '*[U]ne extension du concept du droit . . . de rompre le mutisme des espaces dans lesquels le droit a cette particularité de ne pas se mouvoir seul, dans toute sa «pureté». L'analyse rationnelle peut permettre une pénétration progressive du concept juridique au-delà de ces nouvelles frontières et donc une constitutionnalisation plus large du processus interprétatif au sens large*' (my translation).

loomed large. The result was a backlash against formalism. Law had to fit (or be made to fit) a new reality. Accordingly, the role of interpreters, foremost of judges, grew.

Chapter IV examines positivist and non-positivist hermeneutics. Positivist hermeneutics are characterized by eight factors: (1) judges are called upon to look for legislative intent, (2) the syllogism formalizes interpretive methods, (3) law and facts are separate, (4) law is complete, (5) the only real law is written law, (6) every law has a single, clear meaning, (7) the legislature has a monopoly on the creation of law, and (8) separation of powers, legal equality, and judicial security.

Non-positivist doctrines, by contrast, focus on the '*contextualité de l'interprétation*' (at 80), including the personality of interpreters, their ideology, approach (*Vorverständnis*), and the socio-political context. The doctrines assembled under the banner of non-positivism recognize explicitly that interpretation is not just about the correct reading of a text, but also about values (at 88). Ultimately, the interpreter plays a creative role (at 103). Van Damme finds evidence of sustained contextualism in the jurisprudence of the WTO's AB, and not just as the WTO system of dispute settlement matured, but from the very beginning (Chapter 6). On the surface, 'excessive' formalism by frequent references to the VCLT was the norm in the early days of the AB. Gradually, however, a shift towards more flexible methods of interpretation took place.

Part II of Kolb's book, in juxtaposing 'interpretation' and 'development', showcases Kolb's own interpretative posture. He progresses from the text – which he says often lacks a *sens clair* (at 416) – over an extensive discussion of the *sens ordinaire* (*sens naturel*) and its relation to the *sens special* (at 431–442) to context which informs how a text fits together (at 474), culminating in the axiomatic statement that there is 'no text without context, no norm without context (normative environment)'[11] (at 457). Context is the most creative element of interpretation (at 458), leading him to the conclusion that 'context is interpretation's Jupiter as well as its Lucifer'[12] (at 459). Within the category of contextual interpretation, there are several concentric circles: first, within the text (context *stricto sensu*) – the interpreter can only understand and interpret a word, sentence, or paragraph having read the whole, because the whole is more than its parts (at 459), secondly, outside the text (context *latior sensu*) (at 463) – that is text on the same issue by other actors, and, thirdly, quasi-context (context *latissimo sensu*) (at 467), chiefly subsequent practice and agreements after a treaty has been concluded and other rules of international law applicable in the relationship between the parties (Article 31(3) VCLT).

Fernández de Casdadevante Romani offers a more traditional account of interpretation in international law. He demonstrates that interpretation plays a crucial role in many corners of international law, and that the agents of interpretation are increasingly heterogeneous: international organizations, states, and international courts and tribunals. In 300 pages, Fernández covers the interpretation not just of treaties, but of international norms more generally. Even though a noble ambition, the resulting text falls short. He tends to over-theorize and over-categorize, which does

[11] '*[P]as de texte sans context, pas de norme sans context (environment normative)*' (my translation).

[12] '*Context est le Jupiter de l'interpretation; mais il en est aussi le Lucifer*' (my translation).

not make for easy reading. In many ways, it stands for an approach that is antithetical to Gardiner's and Van Damme's practical approach. The institutionalization and fragmentation of international law affect the process of interpretation and the outcomes of that process. He sees a shift to the use of more general language in international law. Treaties sometimes capture only the minimum common denominator between increasingly heterogeneous parties. However, the interpretation of international law by domestic courts – the fastest growing locus of interpretation – receives no attention.

Fernández explains that the creative element is more prominent in the interpretation of unilateral declarations and customary international law, as compared to the interpretation of treaties. Part I of his monograph is devoted to spelling out the implications of sovereignty for interpretation, including the issue of auto-interpretation by states (which Fernández views less critically than Orakhelashvili). Language is said to be an instrument of sovereignty: '[s]tate sovereignty is expressed through language', which in turn is 'a fertile field' for disagreement about competing interpretations (at 1). Good faith bounds state discretion in interpretation, and moderates state arbitrariness in interpretation (at 14). However, Fernández fails to explain how and why language assumes this role, and what the concrete implications are. Language, as an *a priori* neutral instrument, may just as likely chip away at sovereignty.

In Part II Fernández turns to the VCLT's canon of interpretive principles, and examines their application by the ICJ and various arbitral tribunals. Fernández faults the ICJ for giving too much weight to the text (at 156). By contrast, arbitral jurisprudence – through the lens of a limited number of awards – is said to accord fully with the interpretive principles set out in the VCLT, even though these arbitral awards are not rendered by a single judicial organ as is the case with the ICJ (at 177). The treatment of the cases in both chapters in this part is standard. As a result, the reader is unlikely to gain much additional knowledge.

Finally, Part III, the part most likely to contribute to the literature, broadens the scope beyond treaty interpretation. Fernández examines the interpretation of a broad range of institutional norms and instruments, including the UN Charter, UN Security Council and General Assembly resolutions, and unilateral declarations. Finally, Chapter XII addresses in what circumstances the ICJ may exercise its advisory jurisdiction and how the court construes the instruments that provide consent to its jurisdiction.

For Linderfalk, the starting point is that we 'live in the age of treaties' (at 1). He prefers treaty over customary law because custom cannot adequately respond to the challenges facing the international community. The rules of interpretation 'authoris[e] a set of communicative assumptions' (at 50). Interpreters invariably work with communicative assumptions – premises on how to interpret a text. One common second-order rule is that the parties drafted the treaty rationally. Linderfalk proposes 44 rules on treaty interpretation, which he establishes and supports with varying degrees of success. An example is rule No. 31 which encapsulates the well-known interpretive maxim of effectiveness according to which every treaty provision should be interpreted so as to give it some meaning, and which Linderfalk formulates as follows: '[i]f it can be shown that according to linguistics a meaning can be implicitly read into a

treaty provision, and that such an implication is necessary to avoid a situation where, by applying the provision, another part of the treaty will be normatively useless, then this meaning shall be adopted' (at 393).

Linderfalk deploys the tools of linguistics to shed greater light on treaty interpretation in international law. He distinguishes first-order from secondary rules of interpretation. The first-order rule tells the interpreter how to interpret, whereas the second is a conflict rule should two first-order rules lead to a conflicting result. On his journey into rather uncharted terrain he discusses a broad range of cases. He reminds international lawyers that the art of interpretation does not just call for a focus on the specialist legal language used in a legal instrument and the VCLT's standard toolkit for interpretation, but underscores that modern linguistics may offer assistance. An example is the sentence 'Anders ran after the dog with false teeth in his mouth' (at 35). There are two possible meanings: either the dog or Anders has false teeth. Linguistics sheds light on which choice is more probable.

However, Linderfalk's methodological cocktail is never sufficiently and clearly spelled out. Rather than developing an analytical structure of its own, the book simply tracks the sequential order of the VCLT. In contrast, Van Damme adopts an analytically much more valuable approach, structuring her argument around key patterns of the AB's interpretive practice. It would also have been useful, for example, if Linderfalk had broken down the 44 rules into categories and grouped them systematically. Moreover, there are too many rules for them to constitute a useful practical guide for treaty interpreters – contradicting the practitioner's demand for simplicity. When preparing the drafts that became the VCLT, the ILC attempted to limit the number of interpretive rules. Linderfalk adopts the opposite approach.

The most innovative part of Linderfalk's book is an examination of how modern linguistics may impact on treaty interpretation. Treaties are an expression of multiple utterances (at 30). He explains that under the code model, which posits that ascertaining the meaning of a text simply requires the decoding of a message transmitted by a signal using a common code, the result of interpretation invariably has a 'truth value' (at 44). The code model is the cousin of the one-right-answer hypothesis. Linderfalk's preferred model is the inferential model, under which a message is interpreted against its context, because it better accounts for the choice between conflicting interpretive results and the dependence of meaning on context (at 43).[13] The inferential model is thus related to the more extreme position of radical legal scepticism.

Van Damme's book is the narrowest book under review, in a positive sense. She engages closely with 'one of the most intense interpretative practices in history' (at lxvi) by the WTO Appellate Body, based on a complex and highly detailed set of multilateral treaties. The book reflects the author's deep understanding of the reality of WTO dispute settlement and fills a real gap in the literature. She spins a masterful analytical web over the sea of WTO jurisprudence. Van Damme finds a trend in WTO

[13] Cf. also Bianchi, 'Textual Interpretation and (International) Law Reading: the Myth of (In)determinacy and the Genealogy of Meaning', in P. H. Bekker, R. Dolzer, and M. Waibel, *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (2010), at 34.

jurisprudence towards non-formalism. Her central argument is that the AB, while adhering to the interpretive principles in the VCLT to build its legitimacy, partly for reasons of 'judicial marketing' (at 54), refrains from 'excessive methodological justification by reference to the VCLT' (at 292) or the 'synthetic application' (at 382) of VCLR principles. Van Damme shows that the interpretive practice of the WTO is firmly grounded in general international law, even though Article 3(2) of the Dispute Settlement Understanding has prompted claims that WTO law may be a self-contained regime.[14]

She finds that the AB has 'neither endorsed nor applied WTO-specific principles of interpretation' (at 60). In its interpretive process, the AB relied most prominently on effective and contextual interpretation (Part II). Van Damme finds very little evidence of a 'plain meaning doctrine' in WTO law. She explains that the AB hesitated to give too much weight to grammar and syntax (at 224). On the surface, early AB reports rely heavily on dictionary definitions, leading some to the erroneous conclusion that the task of interpretation starts and ends with the text (at 225). One reason for the widespread use of dictionaries is that they 'introduce an element of predictability and counteract the impression of arbitrariness' (at 273), thereby fostering legitimacy for the judicial function and the law-creating role of the WTO. She shows that in almost all cases these dictionary definitions were immediately contextualized. The AB adopted a liberal position on admissible context in Article 31 VCLT, taking into account the 'factual context'. She also finds that the AB has played a major role in developing the systemic values and objectives of the WTO, such as policy space to respond to new global problems, free from the constraints of WTO law, effective enforcement, future progressive trade liberalization, and the prompt and proper functioning of the dispute settlement system (at 298 ff). On the whole, she views the AB's jurisprudence as striking the right balance.

The AB's interpretive techniques are firmly anchored in general (customary) international law, despite the existence of a sub-system of WTO law and the formal adherence of many decisions to Articles 31–33 VCLT. Van Damme did not write her monograph in 'clinical isolation' from research on interpretation in international law more generally, but in constant interaction with it. Van Damme's book is grounded in a subtle appreciation of how treaty interpretation by the WTO Appellate Body operates at the frontier of interpretation in international law and radiates out from international trade to international law in general. Her book strengthens the centripetal forces in international law, countering the trends towards fragmentation. Indeed, she suggests that the reason WTO jurisprudence has become so influential beyond the

[14] Art. 3(2) provides: 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of 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. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

confines of international trade is the AB's principled, contextualist approach to treaty interpretation. Its rich interpretive practice added 'colour, texture and shading' to the general international law on treaty interpretation (at 237, 380).[15]

Van Damme highlights a new principle of interpretation that the AB developed – the principle of harmonious interpretation (at 285–292; 357–374). Accordingly, the interpreter needs to keep in mind the aggregate result of interpretation and its implications for the future of the treaty regime (at 292) and to safeguard the bargain of rights and obligations contained in the WTO covered agreements. Inter-treaty effectiveness could play a centripetal role, counteracting fragmentation, by functioning as 'a force for comity between sub-systems of international law and international courts and tribunals' (at 285). She identifies the 'inside-out' approach, which evaluates a fact pattern from within a particular regime, and the 'outside-in' approach, where a fact pattern is simultaneously evaluated under the applicable law of a regime and general international law. Article 31(3)(c) plays only a residual role in anchoring WTO law firmly in general international law (at 375), and is rarely explicitly invoked with the aim of achieving harmonious interpretation. The workhorse for systemic integration is the general interpretive techniques. Contextual interpretation, subsequent practice, special meaning, effectiveness, and even silence play an equally if not more important role.

4 Restrictive vs. Effective Interpretation

An important theme underlying Orakhelashvili's book is the principle of effective interpretation.[16] The basis for all interpretation in international law is said to lie with the treaty text and an overarching principle of effectiveness.[17] In his words, 'the principle of effectiveness is aimed at construing the original consent and agreement of States-parties effectively and not as unreal and illusory' (at 394). The purpose of the principle is to render the agreement effective as agreed between the parties, 'to construe effectively what the parties actually agreed on' (at 397). He posits that it is 'definitionally impossible for the parties to have agreed on rendering the treaty not fully effective' (*ibid.*). Restrictive interpretation (*in dubio mitius*), an uncodified principle, is the alter ego of effective interpretation and often associated with 'extreme deference to the sovereignty of states' (Gardiner, at 53; Orakhelashvili, at 413; Van Damme, at 61). In *dubio mitius* cannot simply be equated with a treaty's object and purpose, because it pursues a larger aim (Gardiner, at 200).

Schreuer identified two versions of effective interpretation, the first calling on the interpreter to avoid an interpretation that deprives a provision of its meaning. The

[15] AB Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 Nov. 1998, at para. 153.

[16] Cf. Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)', 21 *EJIL* (2010) 681, at 694.

[17] Cf. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *BYBIL* (1949) 284.

second is said to be a 'purported principle of extensive or expansive interpretation' designed to give 'maximum effect', an approach which he concludes 'is of doubtful value and has not been widely adopted in practice'.[18] Such concerns about an overly broad concept of effective interpretation are old. Already when the VCLT was drafted, Special Rapporteur Waldock was concerned that a codified principle of effectiveness would open the door to expansive interpretation.[19]

Orakhelashvili leans towards the second version as identified by Schreuer, and his view of how effectiveness should be applied to specific cases is vulnerable to the charge of inconsistency. When it comes to decisions by international courts and tribunals he approves of, Orakhelashvili frames the outcome as the triumph of effectiveness, such as in the narrow interpretation of fair and equitable treatment that ties the standard to customary international law (at 569). By contrast, when it comes to decisions he dislikes, such as *Jones v. Saudi Arabia,* where the House of Lords held that under the Torture Convention effective remedies against torture were only needed if the act of torture was committed within the forum state, he criticizes the court for neglecting the principle of effectiveness. The author seems to oscillate between benign visions of principled interpretation relying on effectiveness (in human rights) and interpretation run askew driven by policy interests (in investment arbitration). It appears that whether, and how, the principle of effectiveness should be applied is often in the eye of the beholder.[20] Despite Orakhelashvili's forceful plea for a broad scope of effectiveness, the inconsistency sheds doubt on whether such a principle commends itself as a general rule with the kind of scope that he has in mind.

Orakhelashvili's book is also curiously backward-looking. The focus is on classic contributions to international law on interpretation, especially Sir Hersch Lauterpacht's *The Function of Law in the International Community* and his article on restrictive interpretation.[21] Alfred Verdross' classic work on customary law dating back to 1969 is said to be the 'latest' work on the emergence of customary international law.[22] However, newer academic work would also have deserved some attention. It would have been beneficial, for example, to refer to Christian Tams' major work on *erga omnes*, to Nikolas Stürchler's acclaimed book on the threat of force, or to Anne-Marie Slaughter's *tour de force* on regulatory networks.[23]

[18] Cf. Schreuer, 'Comments', in R. Hoffman and C. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (forthcoming 2011), at 2.

[19] Third Report of the Special Rapporteur, Sir Humphrey Waldock (Sixteenth Session of the ILC (1964)), Doc. A/CN.4/167 and Add.1-3, ILC Yb. 1964, II, 5, at 60–61; cf. also Fitzmaurice, 'Vae Victis or Woe to the Negotiators: Your Treaty or Our "Interpretation" of It?', 65 *AJIL* (1971) 358, at 373.

[20] Van Damme, at 281 ('the evaluation of an interpretation as restrictive or liberal is subjective') and 294.

[21] H. Lauterpacht, *The Function of Law in the International Community* (1933); Lauterpacht, *supra* note 17, at 48.

[22] Verdross, 'Entstehungsweise und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', ZaöRV (1969), 635; but see Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757 as an example of influential scholarship with which Orakhelashvili does not engage.

[23] C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); N. Stürchler, *The Threat of Force in International Law* (2007); and A.-M. Slaughter, *A New World Order* (2005).

Even though no author could reasonably be expected to engage with every recent work, on the whole the reader is nonetheless left with the impression that the book is somewhat divorced from modern scholarship. Thankfully, the same does not apply to the cases, which are included up to 2007. Partly as a result of this selective approach, the book sheds little light on how to interpret newer phenomena of international rule-making, such as standards and codes in international finance and other regulatory standards developed by transnational networks – going somewhat against the book's ambitious aim to cover international rules in their entirety.

The principle of effectiveness has limits, even more today than when Sir Hersch Lauterpacht was writing his seminal article in 1949. Often, the highly developed international law of our time, for instance the law of the WTO, trades off different interests. For instance, the WTO's regime on countervailing duties is bound to hurt some economic operators and benefit others. Most legal rules encapsulate trade-offs, and are almost invariably costly to implement. No doubt, the limited version of effectiveness is a useful tool in the interpretive armoury of international lawyers. The expansive version, however, risks a drift into a treacherous slippery slope of double standards and inconsistency. Resurrecting effectiveness as a central interpretive tenet is backward-looking. The supposed need for a broad principle of effectiveness would signal the underdevelopment of the international legal system, whereas a limited role indicates the system's maturity and a *rapprochement* with national law.

Effectiveness, no doubt, has a role to play in interpretation – but it is not a magic wand that resolves all, or even most, of the debates on the proper role of interpretation in international law, and the methods that should be used. Van Damme acknowledges the risks that inhere in effectiveness unbound (at 281 ff). Effectiveness may obviate the need for actual consent to a particular rule, and thereby allows the interpreter to act as a 'progressive developer of WTO law, or as a judicial legislator' (at 297). She explains that the limited conception of effectiveness performs several functions in interpretation and permeates the interpretive process in the WTO.

On occasion, it acts as an independent ground for interpretation, as a confirming or corrective device (including for the intention of the parties), as a benchmark against which to evaluate other interpretive results, as a legitimizing instrument, to ensure continuity among a complex network of treaties, as a vehicle to emphasize or downplay values or to rationalize a particular interpretation *post hoc*. It is the 'ultimate justification for the eventual meaning of the treaty' (at 284). She also finds that it is difficult to speak of a uniform principle of effectiveness in WTO law, as the AB's jurisprudence draws a distinction between procedural and substantive obligations of WTO members. Moreover, the application of effectiveness is sometimes ill-understood, giving rise to distrust. Effectiveness is a relative concept, elusive to definition. Effectiveness and evolutionary interpretation at times overlap (at 284).

5 Shared Interpretative Authority

Orakhelashvili is highly sceptical of the vagaries of auto-interpretation, said to undermine the international rule of law and legal certainty. On this point, one is also

bound to differ at least slightly with him. He fails to properly acknowledge that auto-interpretation, from the beginnings of the discipline to the present day, has been a structural feature of the international legal order – the natural implication of the absence of a '*juge régulier*' in international law (Kolb, at 3). In a legal system characterized by the absence of general compulsory jurisdiction, states do have a legitimate and proper role to play in the interpretation of international law. The default position remains that states retain some legitimate role in this respect. They are, at least in part, the masters of their legal obligations.

The orthodox view is that the creation of international law belongs to states, whereas the interpretation and application thereof is the task of international courts and tribunals. Sir Hersch Lauterpacht stated in *The Function of Law in the International Community,* 'The imperceptible process in which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to pry . . . It is of little import whether the pronouncement of the Court are in the nature of evidence or of a source of international law they are largely identical with it.'[24]

Such *de facto* precedential value may conflict with the traditional rule that decisions have no effect outside a particular dispute which is designed to safeguard the foundational role of consent in international law. Article 59 of the ICJ Statute is a case in point, stating that '[t]he decision of the court has no binding force except as between the parties and in respect of that particular dispute'. States, for that reason, are traditionally very averse to any suggestion that engagements other than those they have expressly consented to may be invoked against them, and oppose the development of international law by a doctrine of precedent.

Against the background of this convenient fiction,[25] an important current question in treaty interpretation is how interpretative and law-creating authority is shared between third-party adjudicators and states. Anthea Robert recently argued with respect to investment arbitration that too generous a reliance on *de facto* precedent may lead to a 'house of cards' being built on the basis of references to other investment awards, divorced from the interpretations given by states parties,[26] leading to a 'closed-circuit feedback loop between tribunals and academics, unconstrained by the discipline of the treaty parties' practice or expectations'.[27] She advocates a rebalancing of the power sharing between states and international tribunals, through the channels of subsequent agreements and practice in particular. Another underexplored dimension is the role, if any, that non-state actors play in interpretation. Van Damme shows that business and trade practice of private participants in the world trading system, a state-based system, are irrelevant for interpreting state commitments under the WTO covered agreements (at 268). The question is whether the same holds true for human

[24] Lauterpacht, supra note 21, at 21.

[25] A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 268; Roberts, 'Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States', 104 *AJIL* (2010) 179, at 188.

[26] *Ibid.*, at 179.

[27] *Ibid.*, at 190.

rights and investment arbitration where the individual plays a central role, even if only indirectly through legitimate expectations or through human rights advocacy.

Gardiner in particular sheds light on subsequent agreements and practice as a vehicle for interpretive dialogue.[28] Subsequent agreements assume a variety of forms. The substance matters, rather than the form (Gardiner, at 216–219). The boundary with subsequent practice is fluid, especially in so far as informal agreements are concerned (Gardiner, at 222). As a primary source of interpretation, the interpreters are obliged to take subsequent agreements and practice into account (Gardiner, at 204–208). Van Damme uses the *EC – Chicken Cuts* case as an illustration of the treatment of subsequent practice in WTO dispute settlement. In a dispute concerning the proper tariff classification of salted chicken, the question was whether practice just by the EC to classify salted chicken cuts could qualify as relevant subsequent practice. The panel regarded practice by one WTO member as sufficient provided it was the only country with such practice. The AB, however, refused to endorse such a broad scope for subsequent practice. Classification practice with respect to salted chicken cuts from more than one WTO member state was needed.[29]

Gardiner has no qualms that 'the agreement of the parties on an interpretation trumps other possible meanings . . ., given the nature of a treaty as an international agreement between its parties' (at 32). In the part of his book on case analysis, he devotes considerable attention to subsequent practice and agreements (at 216–243), examining the difference in effect between subsequent agreements and those reached at the time of the treaty's conclusion, and under which circumstances less formal understandings may be used. He notes that the function of amending is not always clearly distinguished from the function of clarifying, amplifying, or supplementing an earlier treaty.

6 The Separate Universe of International Law

On the whole, the reviewed books fail to accord a proper role to social sciences in international law and the important role interpreters themselves, primarily judges and arbitrators, play in interpretation. Attempts to incorporate social sciences, such as economics, are tentative, and often these amount to no more than lip-service (e.g., Gardiner, at 7). Aside from linguistics in the case of Linderfalk, social science perspectives are largely absent in the other works. Kolb's contextual approach is open to social science perspectives at an abstract level. He notes that interpretation lacks a definition because it is an '*activité plurielle*', including textual and extra-textual interpretation (Kolb, at 11). He traces masterfully how the interpretation of law, across time, has always been a function of the reigning conception of law and its place in society. Hence, he concludes, 'interpretation cannot be conceived isolated from

[28] *Ibid.*, at 198; Treaties over Time In Particular: Subsequent Agreement and Practice, in ILC, Report of the Work of the Sixtieth Session, Annex A. UN GAOR, 63d Sess., UN DOC A/63/10 (2008).

[29] AB Report, *EC – Chicken Cuts*, adopted 27 Sept. 2005,WT/DS286/AB/R, at para. 259.

other factors, as it only is the function of something else. This "something else" really is something essential, yes, enormous: it's the conception one has about law in general, about its place in society, and about its functions. There is no theory of interpretation which is purely technical'[30] (at 16).

According to Kolb, international law, like all law, is not *l'art pour l'art.* Law, including international law, is not simply a self-contained doctrinal science. It lives in the universe of the larger social sciences and of national legal systems, and should draw on and, in reverse, contribute to that universe. To lead a life of isolation would be international law's downfall.[31] Orakhelashvili, by contrast, is adamant that no cross-fertilization by domestic law, on the one hand, and social sciences, on the other hand, can be admitted. Symptomatic of this approach is the following statement: 'the non-law in treaty frameworks is allowed to operate under careful and multilevel scrutiny which prevents it from undermining the rationale of the relevant legal rules' (at 207).

All six works were written by authors with a distinctively European outlook and legal training. The great preponderance of the secondary material on which the authors draw is from authors writing in the European tradition. There is no sustained attempt to build bridges to American legal thinking on interpretation, such as legal realism or the New Haven School.[32] To engage with such schools of thought in a serious way would have been a major benefit for the works under review, even if, ultimately, the authors were to reach the same results.

Orakhelashvili is too glib about the proper role of policy considerations in legal interpretation. There simply is no bright line rule to distinguish 'law' from 'non-law', as he defines them. The boundary is diffuse. Nor is it clear, at the outset, that value judgements ought to play no role whatsoever in the process of interpretation. As a factual matter, it appears that value judgements often are an invariable feature of international adjudication, mirroring domestic legal systems, though they may be disguised in formalist, positivist language, as Van Damme shows for the early jurisprudence of the WTO's AB.

The role of epistemic communities and the agents of interpretation also does not receive the attention it deserves. According to Detlev Vagts, treaty interpretation emerges from the interplay of the various actors, both domestic and international, that make up the interpretive community.[33] This approach shifts the focus from the text itself to the actors concerned with its interpretation. Vagts defined interpretive communities by reference to the following features: '(1) generic or background consensus – sharing of a language and concerns and participation in the same "form of

[30] '*[L]'interprétation ne peut se concevoir isolément. Elle n'est en définitive qu'une fonction d'autre chose. Cet autre chose est vraiment quelque chose d'essentiel, oui d'énorme: c'est la conception qu'on se fait du droit tout entier, de sa place dans la société et de ses fonctions propres. Il n'y a pas de théorie de l'interprétation purement technique*' (my translation).

[31] Cf. J. von Kirchmann, *Von der Wertlosigkeit der Jurisprudenz als Wissenschaft* (1848).

[32] E.g., M.S. McCougal, H.D. Laswell, and J.C. Miller, *The Interpretation of International Agreements and World Public Order – Principles of Content and Procedure* (1967).

[33] Vagts, 'Treaty Interpretation and the New American Ways of Law Reading', 4 *EJIL* (1993) 480.

life"; (2) agreement as to the boundaries of the practice community members share; (3) common recognition of propositions as to what the practice requires as "truth" within the practice; (4) minimal consensus as to the existence of a text and a reading of it that is needed to provide a working distinction between interpretation and invention'.[34] One looks in vain for any considered engagement with this and similar views.

7 Conclusion

The practical function of interpretation to provide stability and predictability in international relations to states and other international actors is as important as ever.[35] The study of interpretation, despite the rich recent literature, follows an increasingly well-trodden path. As a result, original insight is becoming rare. In academic writing about interpretation, one runs into the danger of simply adding to the existing mountain of 'abstract theorizing' on treaty interpretation.[36] In this vein, Van Damme remarks that the 'cataloguing of schools or methodologies of interpretation may help to understand debates historically but is of little practical value' (at 379) and notes that 'some issues of interpretation may be wonderfully irresolvable in theory' (at 382). Some of the books under review, such as Gardiner and Van Damme, were able to resist this temptation entirely, whereas others were less successful.

Gardiner is an excellent starting point for those wishing to get quickly to the state of play in treaty interpretation. Gardiner's book may, on occasion, fall short of its stated goal of giving practitioners a quick overview. It may be too detailed for that purpose, and not offer enough step-by-step guidance. Nonetheless, it is an excellent handbook of treaty interpretation in the laboratory of international interpretation. Gardiner is also agnostic about his preferred approach, often listing several approaches to interpretation without deciding between them. This is both a strength and a weakness. As Arato notes, Gardiner may not offer that much guidance to adjudicators on how to operationalize the art of interpretation, but does provide ample material for counsel engaged in treaty interpretation.[37] Orakhelashvili (Parts IV and V), Van Damme, and Gardiner are the most useful works for practitioners, though they similarly appeal to scholars seeking to gain a thorough understanding of interpretation in international law. One reason these books will be particularly useful is the wealth of primary material studied. The user is bound to admire the technical craftsmanship deployed in order to present such a wealth of material in an accessible fashion.

[34] *Ibid.*, 480.

[35] Arsanjani and Reisman, 'Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties', 104 *AJIL* (2010) 597, at 597.

[36] V. Lowe, *International Law* (2007), at 74, cited by Gardiner, at xv; Crawford, 'Foreword' to Van Damme, at ix ('if interpretation describes what the DSU does all the time, then the schools can be left to their distinctions').

[37] Arato, 'Book review of Treaty Interpretation by Richard Gardiner', 43 *NYU J Int'l L & Politics* (2011) 101 ('a truly greater reference work for the advocate, and a great start for the interpreter': at 106).

Linderfalk, Fernández, and Kolb are works for the more theoretically-minded. The books by Linderfalk and Fernández are likely to be considerably more short-lived and to remain largely of specialist interest. Kolb should be applauded for rigorously shining the law on background factors of interpretation. Another strength of Kolb's masterful *esquisse* of interpretation is the parallels and differences he draws out between interpretation in international law and interpretation in domestic law more generally. Kolb's book towers above the other two contributions and deserves careful reading.

Van Damme's nuanced précis of WTO jurisprudence involving questions of treaty interpretation is not only of interest to international trade lawyers, but will become a standard reference on treaty interpretation more generally. For those without significant previous exposure to international trade law, it also serves as an introduction at an advanced level. What better way to study a new field than to be guided by an expert through the maze of WTO jurisprudence. With this book at hand, there is no risk that the novice, much less the cognoscenti, will miss the forest for the trees.