

CONTEXTUALISM IN WTO CASE LAW ON MINERAL EXPORT RESTRICTIONS: PUZZLES AND IMPLICATIONS

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ABSTRACT

Against the dysfunctional crisis of the World Trade Organization (hereinafter "WTO") Appellate Body, this article aims to reflect upon the puzzles arising from the techniques that the WTO Dispute Settlement Body (hereinafter "DSB") has employed to interpret WTO law: contextual interpretation in particular and formalistic interpretative approach in general. We argue that the conventional notions of "contextual interpretation", "objective analytic methodology" and "stability and predictability", which frequently recur in the recent discourse on the interpretation of WTO agreements, are too much of an illusion. Several recent Panel Reports and Appellate Body Reports have demonstrated that contextualism, alongside many other formalistic interpretive techniques, is far less objective and predictable than assumed.

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Rather, context, like many other formal factors, is itself a notion of numerous versions, but it is difficult to establish a superior rule governing the very process of selecting and construing contextual references. WTO adjudicators need to apply its textually based approach in a new manner to deliver legitimate and satisfactory settlements for WTO members. Meanwhile, the legislative body needs to find a way to strike a more delicate power balance between adjudicative control and political management, and redefine the role that the DSB can play in facilitating the functioning of the WTO system.

KEYWORDS: *contextualism, formalistic interpretation, WTO case law, mineral export restrictions*