

International IP Instruments and National, Regional and International Tribunals

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Treaty Interpretation Rules

- Vienna Convention on the Law of Treaties, art 31.1
A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
- customary rules of interpretation of public international law
- the ILC envisaged ‘a single combined operation’
- WTO has called this a holistic approach

WTO and the VCLT

- **The principles of interpretation ... are to be followed in a holistic fashion.** The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning but the identification of such meaning in isolation only commences the process of interpretation, it does not conclude it. ...Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. **At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise**
- Appellate Body Report, *United States - Continued Existence and Application of Zeroing Methodology*, 4 February 2009, WT/DS350/AB/R, at 269

WTO dispute settlement

- Interpret but fill no gaps
- DSU 3.2. “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.**”
- 19.2. “In accordance with paragraph 2 of Article 3, in their findings and recommendations, **the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.**”

WTO, TRIPS and VCLT

- Has focussed much on ordinary meaning and been limited in effective discussion of object and purpose, see S. Frankel, "The WTO's Application of 'the Customary Rules of Interpretation of Public International Law' to Intellectual Property", *Virg. J. Int'l L.*, 46 (2006),365.
- More effective use of VCLT in later reports such as *US-China Enforcement*
- Post Doha Declaration's emphasis on interpretation using TRIPS articles 7 and 8
- Full usage and "holistic approach" remains to be demonstrated

The actors in interpretation

- “The meaning of a treaty is not carved in stone at the moment of its conclusion instead, debates continue, albeit no longer on what words to use in the treaty, but how to give meaning to the words that are used. Whoever controls this process controls the meaning of the treaty, and therewith controls whether or not the obligations ...are bearable or onerous, and controls whether the acts if States are faithful implementations of a text, or amount to breaches of that same text.”
- J. Klabbers, ‘On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization’, *Nordic Journal of International Law*, 74 (2005), 405-28, at 406-7

Investment Tribunals and the VCLT

- Investment commentators suggest VCLT not always effectively used
- The inclusion of IP in investment invites a kind of interpretative boundary-crossing between investment and IP. The boundary-crossing, however, cannot be one that results in the destruction of IP policy and norms agreed internationally on one side of the boundary.
- Investment dispute interpretation using the full ambit of object and purpose to recognise not only the rights granting role of IP, but also the calibration role of its flexibilities and exceptions can create the kind of boundary-crossing that is desirable.

- Why did ILC and ICJ create VCLT interpretation rules?
- Isn't interpretation what national courts do?
- Consider the general relationship between national and international IP law
- National laws and state practice used to explain international norms and vice versa

HOWEVER

- One national law cannot be a interpretation of an internationally agreed norm if VCLT rules are used
- International, regional and national IP norms are in a constant cycle of informing each other

VCLT rules matter because...

- “The rules of international treaty interpretation are important. They provide a degree of consistency so that those who are part of that rules-based system can use interpretation to predict outcomes not only of potential and existing disputes but also as a guide to the boundaries that international agreements place on the formulation and interpretation of WTO members’ laws. The principles of interpretation are thus important for the integrity of the international intellectual property regime.”
- Susy Frankel and Daniel J Gervais, "Plain Packaging and the Interpretation of the TRIPS Agreement" *Vand. J. of Tran'l L.*, 46 (2013), 1149, 1151-52

VCLT not just for international tribunals

- national and regional courts are not bound in the same way as international tribunals to use the VCLT
- but courts and quasi-judicial bodies do use them both explicitly and implicitly
- substitutes include canons for statutory or contractual interpretation
- issues of autonomy
- explicit usage of VCLT would be advantageous for coherency of international IP

What if national and regional tribunals used VCLT rules to interpret international IP instruments...

- Integrating effect through procedural rules
- Not harmonised prescriptive detail, but...
- Better and more consistent interpretation of IP international norms and minimum standards
- Still leaves room for appropriate approaches at national and regional level for tribunals to make law