THE PATH TO PURPOSE-DRIVEN TRIPS INTERPRETATION: A HERMENEUTIC OF INTERNATIONAL INTELLECTUAL PROPERTY

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I. INTRODUCTION

Interpretation of international intellectual property law has become highly problematic. The source of the problem may, in part, be the number and differing types of international agreements that are relevant at multilateral, bilateral and also plurilateral level. At the multilateral level the key international intellectual property agreement is the TRIPS Agreement¹, of the World Trade Organization (WTO). At the WTO, interpretation of the TRIPS Agreement occurs both in the TRIPS Council² discussions and the dispute settlement system. The reports of panels and the Appellate Body, of the WTO dispute settlement system, have become the primary source of the meaning of the TRIPS Agreement and more generally of international intellectual property law.³ This is because the WTO is the only


²The TRIPS Council is the branch of the WTO which is made up of its member states and which discusses the TRIPS Agreement and issues in intellectual property of relevance to the WTO.

³Both the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, amended Oct. 2, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention], art. 33 and the Paris Convention for the Protection of Industrial Property (Paris Convention), 14 July 1967 (Stockholm text), 828 U.N.T.S. 305 [hereinafter Paris Convention], art. 33, provide for disputes to be brought before the International Court of Justice. This has never been done. The World Intellectual Property Organization (WIPO) does not have a formal dispute settlement process, but as the administrator of several
international body that deals with intellectual property disputes in way that is officially reported and can be referred to and relied on by third parties.4

The TRIPS Agreement incorporates the substantive parts of several other multilateral intellectual property treaties, the most significant of which are two major conventions that the World Intellectual Property Organization (WIPO) administers; the Berne Convention5 (copyright) and the Paris Convention6 (patents, designs and trademarks). Consequently the interpretation of the TRIPS Agreement often involves interpretation of those incorporated agreements. This feature of WTO dispute settlement interpretation has resulted in panels consulting WIPO about international intellectual property norms.7 At least within dispute settlement reports the WTO has not disagreed with WIPO. However, there is potential for conflicting interpretation between TRIPS and its incorporated agreements. This might arise if, for example, the Berne Convention obligations are interpreted outside of the WTO, where the TRIPS Agreement is not treated as a necessary part of that interpretative process.8

In addition to multilateral interpretations member states of these agreements have differing methods of enacting international obligations in national law9 (this process is a method of interpretation). This very enactment and its practical results are, however, the subject matter of WTO TRIPS Agreement disputes, as the fundamental purpose of WTO dispute settlement is to decide if members comply with their obligations.10

As well as WTO and WIPO multilateral agreements there are a plethora of intellectual property obligations found in intellectual property chapters in free trade agreements (FTAs),

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4 Third parties are not bound by rulings of the WTO dispute settlement system. Other members of the WTO may rely on them for guidance. Reports do not create binding precedent. The Appellate Body has said, “Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO members, and therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.” See Report of the Appellate Body, Japan-Taxes on Alcohol Beverages, October 4, 1996. WT/DS8/R, WT/DS9/R, WT/DS10/R.
5 Berne Convention, supra note 3.
6 Paris Convention, supra note 3.
8 Almost all members of WIPO are also members of the WTO. For membership see http://www.tripsagreement.net/?page_id=384. A member interpreting their obligations is likely to at least wish to interpret them consistently. Institutions may differ in their interpretations and so may commentary which focuses on one agreement rather than overall international consistency. Within the WTO the incorporated agreements are interpreted in a TRIPS compatible way. The potential for conflicting multilateral interpretations is discussed below, see infra Part IV.
9 TRIPS Agreement, supra note 1, art. 1.1 provides that “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”
10 TRIPS Agreement, supra note 1, art. 64 provides that the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (1994) 1869 U.N.T.S. 401 [hereinafter DSU], is applicable to the TRIPS Agreement.
including bilateral and plurilateral trade agreements. Other sources of international intellectual property law include obligations in other multilateral institutions, where intellectual property (or trade law) is not the dominant objective of the agreement or institution, but where there is some overlap with intellectual property, such as the Convention on Biological Diversity, the World Health Organization (WHO) and some human rights instruments.

This multiplicity of sources of international intellectual property law and international law more broadly, that is relevant to intellectual property, is not necessarily in and of itself problematic, although some may be concerned about an inevitable degree of fragmentation that can result from multiple sources and multiple institutions. Another way to consider the multiplicity of sources is that it is illustrative of the multifaceted nature of intellectual property and its wide-ranging purposes and impacts. The sources can also provide a rich resource for interpreting aspects of the TRIPS Agreement and WIPO agreements, particularly where these agreements use terms which are not defined by the TRIPS Agreement (or any other WTO Agreement) and are of broader reach, such as “public health”.

The multiplicity of sources of international intellectual property law coincides with the advent of the WTO and the effects of a globalized intellectual property regime coming to fruition. Globalized intellectual property rules have caused considerable concern and debate over issues such as access to medicines and the appropriate way to protect copyright in the digital world. More broadly and normatively the purposes, rationales and objectives of intellectual property law and international agreements have been placed under some

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11 The Trans-Pacific partnership negotiations are an example of plurilateral agreement. The negotiating parties are Chile, Singapore, Brunei, New Zealand, Malaysia, Vietnam, Peru, Canada, Mexico, United States, Japan and Australia. The Anti-Counterfeiting Trade Agreement (ACTA), May 2011 final text, available at http://www.ustr.gov/acta, is another plurilateral although it differs from other trade agreements as it was only about intellectual property enforcement rather than all trade topics.


13 The World Health Organization discusses patents as a health topic on its website, see http://www.who.int/topics/en/.

14 The Universal Declaration of Human Rights, U.N. Doc. A/RES/217 (III), Dec. 10, 1948, for example, provides for freedom of expression (art.19), the right to adequate healthcare (art.25), education (art.26), and to participate in cultural life and partake of scientific advancements (art. 27(1)).


16 I refer here to interpretative sources because neither WIPO nor the WTO purports to interpret other institutions agreements in the sense of being deciding of the meaning of those agreements. The WTO in its dispute settlement process uses international sources to interpret provisions within WTO agreements. The leading example is WTO Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (Oct. 12, 1998) where other treaties were used to interpret the meaning of “exhaustible natural resource”, a phrase found in the GATT Agreement, art. XX(g). For a discussion of this process as it relates to the TRIPS Agreement see, Susy Frankel, The WTO’s Application of “the Customary Rules of Interpretation of Public International Law” to Intellectual Property, 46(2) VA. J INT’L L. 365 (2006).
considerable scrutiny. This scrutiny is not exclusively international, but also is evident in domestic lawmaking regimes. The focus of this article is on the international regimes. That said, I do not discount that frequently international obligations are derived from domestic law as well as vice-versa. Consequently the systems overlap with each other.  

Multiplicity of sources is coupled with a potential multiplicity of purposes. The purposes of international intellectual property law are many, even if advocates of both increased and decreased protection sometimes suggest otherwise when harnessing a purpose in support of their cause.  

Some characterize intellectual property issues arising in non-intellectual property institutions as a kind of conflict of norms; that is an intellectual property protection conflicts somehow with another goal frequently framed as competing right; for example intellectual property rights on the one hand and a human right, such as health, on the other hand. First, it is arguable that a conflict of norms analysis of intellectual property law and the areas it connects with is sometimes wrong. Some of the norms that are claimed to be in conflict with intellectual property are not wholly, or even necessarily, external to intellectual property because intellectual property frequently encompasses mechanisms of flexibility and balance which address those norms. Put another way, intellectual property’s structure and rational basis often provide a framework for balancing competing interests. For example, pharmaceutical patents and health are related matters that need to be balanced - they are not inevitably or exclusively in conflict. Copyright also has mechanisms which can be used balance its effects. To be sure, the content of the law may sometimes need changing or adjusting because the internal balancing mechanism is not working. When those mechanisms do not work there is not inevitably a conflict of norms, but there may be a need for

17 The role that national interpretations and policy should play in international interpretation is discussed below, see infra Part IV.
18 Intellectual property rights are, however, more detailed multilaterally than flexibilities or exceptions are. This is in part because exceptions are an area thought to be appropriately left to national autonomy in order to craft exceptions that are appropriate to national and development needs. Recently, however there has been a debate over whether mandatory exceptions are necessary in order to achieve balance in intellectual property, see for example Ruth J. Okediji, “The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries” (UNCTAD - ICTSD Project on IPRs and Sustainable Development, March 2006). In 2013 a treaty for a copyright exception for the access to works for the visually impaired was concluded, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference, 27 June 2013, available at http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_de_8.pdf. [hereinafter WIPO Treaty for VIP].
rebalancing. By this I do not suggest that all areas external to (but related to) intellectual property can be internalized. However, those effects that are directly attributable to intellectual property can be internalized. That does not mean external balancing mechanism cannot be used also.

Second, a conflict of norms analysis does not do much for resolving issues of interpretation. It risks framing the problem in a way that one norm will defeat another, rather than a balancing or even a proportionality analysis. Additionally, a conflict of norms framing can undermine the usefulness of holistic and policy-driven interpretation of intellectual property treaties. It obscures the fact that intellectual property has multiple purposes and objectives. A conflict of norms approach means that intellectual property law is often portrayed as not having multiple objectives, when it does.

There are multiple purposes, which may sometimes appear to be contradictory, but the matter is not so simple. Contradictions or conflicts are inevitable and even sometimes desirable because effective intellectual property law is about balancing competing purposes. The purposes include providing protection for intellectual property, which is recognized as an ingredient of the promotion of innovation and creativity (even when the necessary amounts of intellectual property and other ingredients are disputed). In the TRIPS Agreement, and therefore the WTO, context promoting innovation and creativity can be characterized as part of the overall goal to liberalize trade. Sometimes, however, intellectual property can interfere with innovation and creativity and does not contribute to trade liberalization, but acts more like a trade barrier. But these sorts of competing purposes are far from new to intellectual property. The competition and conflicts arising from multiple purposes and multiple actors may very well have become starker on the international stage; however, international intellectual property law and its manifestations in national intellectual property law are replete with mechanisms to balance competing goals. The problem is that these mechanisms are not functioning well, as things seem to be out of kilter. Part of the international dialogue is now about improving and even retaining those mechanisms for

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20 Human rights jurisprudence speaks of proportionality between rights.
21 Not just any purpose will do. As discussed below the purpose ought to be one that, even if some would contest its dominance or otherwise, is recognized as a purpose of intellectual property law. For example, to provide protection based on utilitarian theory; see Jeanne Fromer, "Expressive Incentives in Intellectual Property," 98 Va. L. R. 1745 (2012) or to provide flexibility such as fair use based on market failure, to allow experimental use of inventions in order to encourage innovation. Some countries would elect these flexibilities others might not, yet both approaches may serve legitimate national policy purposes. Requiring a recognized purpose in intellectual property law might be analogous to the requirement that evidence of SPS measures be based on scientific evidence. The requirement is not that there cannot be competing evidence, but rather that it is based on reasonable evidence, see
22 How much intellectual property law is needed to achieve its goals can be addressed in various ways in; for example “How much copyright is need to support creativity?”; “How long does patent protection need to last in order to return on its investment?”; “Should all patents be of the same duration?”.
23 It is well recognized that intellectual property law can also act as a barrier to creativity and innovation and even to trade.
balance, in the face of some powerful actors negotiating to curb the existence or effectiveness of the balancing mechanisms through bilateral and plurilateral agreements.

Broadly, there are two types of institutions involved in balancing dialogues in international fora. The first is taking place within the institutions of intellectual property; WIPO and the WTO (although more is apparent at WIPO than the WTO). For example WIPO has a detailed ongoing negotiation about the protection of traditional knowledge and has recently concluded a treaty creating copyright exceptions for the visually impaired. Some have suggested, however, that WIPO is imbalanced because it does not do enough for developed countries. The second place that balance is sought is within primarily non-intellectual property multilateral institutions, such as the CBD as mentioned above. Debates over balance even seem to feature in the Trans-Pacific Partnership negotiations (TPP). In the TPP negotiations there was some “leaked” discussion over what version of the 3 step test the test for exceptions to TRIPS exclusive rights- should be included in the text. Mostly, however, FTAs are more of a one-way ratchet for increasing protection rather than balancing protection with other interests.

Just as protection is found in many instruments so are mechanisms to balance protection with other purposes and goals. There is, however, an emerging lack of consistency both in

24 The WIPO Treaty for VIP, supra note 18, is the leading example. Surrounding its negotiation are suggestions for more mandatory copyright exceptions. There is no shortage of suggestions for methods of retaining balance. One example is to put maximums on intellectual property, see Henning Grosse Ruse-Khan and Annette Kur, “Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection” (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01, December 8, 2008). Another is ensuring that policy space or recalibration is maintained and is effective.

25 The Australian United State Free Trade Agreement, available at http://www.dfat.gov.au/fta/ausfta/final-text/, for example in Art. 17:9(4) limits the ability to import patented products. Limitations on copyright exceptions have been proposed in the TPP negotiations, see infra note 32.

26 The Doha Declaration may be the exception where it is almost entirely recognition of developing country interests (except for GIs on wines and spirits).


28 WIPO Treaty for VIP, supra note 18.

29 These intra intellectual property institutional responses to balance are, in the case of traditional knowledge potentially adding new rights and new claimants to the mix, which is a conceptually different framework from the WIPO Treaty for VIP, supra note 18, which is about developing and using flexibilities found in existing agreements.

30 The three step test which has its origins in the Berne Convention, supra note 3, art. 9(2). Variations of which are found in art. 13, 17, 26.2 and 30 of TRIPS Agreement, supra note 1.


32 I borrow this phrase from John Braithwaite and Peter Drahos, see for example John Braithwaite and Peter Drahos, “Ratcheting Up and Driving Down Global Regulatory Standards” (1999) 42(4) Development 109-114.

the design of balancing mechanisms and the ability of countries to make effective use of them. These are not easy problems to solve and finding solutions is not assisted by a lack of formal recognition of the multiple purposes of intellectual property in the interpretation process. This lack of recognition of the multiple purposes of intellectual property is in part attributable to the way in which the international agreements are interpreted. One part of the problem is there has not been an adequate analysis, in the reports of WTO panels and the Appellate Body, of intellectual policy goals at national level and their relationship to the object and purpose of the TRIPS Agreement. The problem that this article addresses is the absence, in practice, of a robust approach to interpretation of international intellectual property agreements. My purpose is not to solve or ignore the problems of intellectual property and balance, rather to show the role that interpretation has in contributing to achieving the policy goals of intellectual property. In particular, this article will analyze how interpretation should and can take account of multiple purposes, many of which are dynamic. Achieving this goal requires, at the very least, a purpose-driven approach to interpretation to international intellectual property agreements. Put another way, interpretation should be fundamentally based on policy goals. Such an approach I argue is an effective path to having interpretation reflect the dynamic nature of intellectual property and its goals of supporting innovation and creativity (not stifling it).

In order to demonstrate the importance and greater role that interpretation should play in international intellectual property law this article first explains the interpretation problem. In order to ground that discussion the use of the Vienna Convention on the Interpretation of Treaties (VCLT),34 in disputes about the TRIPS Agreement (and other WTO agreements), and how it has been formalistic rather than purposive is first discussed (Part II). There are hints of less formalism emerging broadly at the WTO and this is also examined (Part II). This discussion is used to provide a detailed framework of what the interpretation problem is and its consequences (Part III) including as referred to above the potential of conflicting multilateral interpretations and the role that national interpretations and policy should play in international interpretation and the consequences of misinterpretation. Part IV (a work in progress) analyses and proposes a hermeneutic of international intellectual property to effectively utilize purpose-driven interpretation.

II. METHODS OF INTERPRETATION AND THE WTO

For all WTO agreements, including the TRIPS Agreement, the central rule of interpretation applicable in disputes is Article 31, of the VCLT, which provides

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 31 then gives details about what amounts to context and other matters that interpretation should take into account. The rules are in one sense certain, yet at the same time flexible. They have been applied in a multitude of ways and there has been much written about the different approaches to interpretation, but there is not a detailed analysis of interpretative approaches in the context of international intellectual property.

Where competing principles and objectives can be found, even if in differing degrees in one treaty, such as the TRIPS Agreement, the question is; what is the best method of interpretation to achieve recognition of and appropriate balance between those goals? In a dispute settlement context this question is heavily influenced by the overarching goal of resolving the dispute at hand. A related question is whether one method of interpretation needs to be chosen over another, or can several methods be used? One possibility is that different approaches to interpretation can be used together or blended in some way. This seems consistent with the VCLT rules and, as discussed below, the emerging holistic approach of the WTO.

Although the VCLT sets the primary rules of interpretation it is evident that international organizations and institutions apply the rules differently and, indeed, the rules are flexible enough and leave discretion for this to occur. Different methods of interpretation include emphasizing one part of the VCLT rules, such as the ordinary meaning of the text, rather than discussing either context or the object and purpose of the treaty in any meaningful way. The ideal interpretative methodology is to effectively balance all of those steps in the interpretation process, but often interpreters have a tendency towards elevating one factor over another.

35 Article 31 (2)-(4) provide:
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with
       the conclusion of the treaty;
   (b) any instrument which was made by one or more of the parties in connection with the conclusion of
       the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of
       its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties
       regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.’
36 Supra, note 34.
Treaty interpreters usually recognize that their role is to give effect to the intentions of the parties, but the methods of recognizing intention can lead to significant differences. One approach is to focus on the ordinary meaning of the text as the best indicator of intention. This textual approach can be contrasted to reliance on object and purpose as a matter of objective intent, which is sometimes called the teleological approach. The teleological approach also stands in contrast to those who consider that intent is discovered through a closer look at the preparatory work of a treaty. This last interpretative approach is not consistent with the VCLT rules. The first two are. There is no reason why the textual and teleological approaches to interpretation need to be mutually exclusive, however. The holistic approach, which the WTO now advocates (discussed below) is in many aspects the equivalent of recognizing and utilizing, within the VCLT framework, both of these approaches.

Methods of interpretation are in part influenced by institutional approaches to interpretation. The literature tends to place institutional approaches to interpretation in one or other group. The WTO, for example, many agree belongs to the approach that is more textual and, thus, more literal and formalistic in its interpretative method. Whereas institutions that address issues such as environmental protections, human rights and even some investment disputes are often in the more teleological, object and purpose school. The role of international intellectual property agreements could be said to transcend these groups. The protection of innovative medicines, for example, is core to patent law, and the availability of medicines is of substantial concern to human rights (the right to health). Another example is the protection of copyright being core to intellectual property, but the rights of indigenous peoples to control their cultural heritage may need to be balanced against copyright rules.

As the TRIPS Agreement falls within the auspices of the WTO it has predominantly been subject of a textual and formalistic approach to interpretation. But the competing goals of intellectual property require a broader and more robust interpretative approach. The starting point for that approach is to analyze how to give fuller effect to the VCLT phrase “object and purpose.” That is the beginning because doing so is not always straightforward.

37 Alexander Fachiri, “Interpretation of Treaties” (1929) 23 American Journal of International Law 745.
38 L. Crema, “Disappearance and New Sightings of Restrictive Interpretations(s)” (2010) 21 European Journal of International Law 681. This approach has found less favor as Article 32 of the VCLT requires that preparatory work is not consulted in the first instance, but only to support interpretation by analysis of the text, context and object and purpose.
41 An example of applying a contextual and object and purpose approach to a specific fact situation see, Susy Frankel and Daniel Gervais, “Plain Packaging and Interpretation of the TRIPS Agreement” (2013) Vanderbilt Journal of Transnational Law (forthcoming).
and for the most part is a process that needs to be developed rather than it being obvious in specific contexts how to do so.

WTO panels and the Appellate Body in their approach to interpretation operate under certain rules which, while they are important, have arguably pointed their interpretative approach in a particularly formalistic direction. Those rules include that the role of panels and the Appellate Body is to interpret the Agreements not to add to them. As a new international institution, which has been establishing its legitimacy, the WTO dispute settlement body has been very conscious of this feature of its role as interpreter not negotiator. In the TRIPS context, in one of the earliest disputes, the Appellate Body said that a legitimate expectation of the parties was not an appropriate analysis of TRIPS obligations because it risked adding to the Agreement.

Outside of the TRIPS context early reports of both panels and the Appellate Body overtly take a formalistic approach to VCLT interpretation in the name of the text being paramount or not adding to the agreements. In *Japan Alcoholic*, for example, the Appellate Body said:

> Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty". The provisions of the treaty are to be given their ordinary meaning in their context. Immediately following this was a statement that the object and purpose “are also to be taken into account”.

43 WTO Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (Sep., 5 1997). This was particularly so where non-violations disputes, which can sometimes include a discussion of legitimate expectations, and which are not available for disputes about the TRIPS Agreement. For discussion of non-violation and TRIPS, see Susy Frankel “Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes” 12(4) Journal of International Economic Law (2009), 1023-1065. See Cottier and Schefer, “Good Faith and the Protection of Legitimate Expectations in the WTO”, in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law* (2000), at 60, who mention that Appellate Body has rejected the use of legitimate expectations’ other than in non-violation cases.

44 The text should be paramount but not to the exclusion of other considerations about how to interpret that text.


47 Id.
or importance than ordinary meaning, rather than being an integrated part of the ordinary meaning analysis. In other words, the Japan Alcohol summary falls short of recognizing that VCLT interpretation should be holistic. Statements about a holistic approach are found in EC - Chicken Cuts. There the Appellate Body emphasized that the VCLT rules “should not be mechanically subdivided into rigid components”. It therefore said that “considering particular surrounding circumstances under the rubric of ‘ordinary meaning’ or ‘in the light of its context’ would not, in our view, change the outcome of treaty interpretation.”

Although the Appellate Body (and the panel) did not rely on the dictionary alone for ordinary meaning, the actual approach of the panel and the Appellate Body were arguably not very holistic despite its flexibility over what was relevant to each step.

Subsequently the Appellate Body has more completely embraced the notion of a holistic interpretation. It has recognized that there are many elements to VCLT interpretation and that they need to be addressed in some order, but that there are to be holistically interpreted rather than as a hierarchy.

The principles of interpretation that are set out in Articles 31 and 32 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.

In the TRIPS context an unbalanced emphasis on the ordinary meaning part of the VCLT rules, which tends to create a literal and formalistic approach, is evident in panel decisions in particular. Two examples are apposite. The first EU-Canada Pharmaceuticals.

49 Id., at [176]. On the facts of the case this statement was applied to conclude, “It is clear from these provisions that the context of the term "salted" in heading 02.10 consists of the immediate, as well as the broader, context of that term. The immediate context is the other terms of the product description contained in heading 02.10 of the EC Schedule”, at [193].
50 Id., at 175.
concerned two exceptions in Canada’s patent law; the regulatory review and stockpiling exceptions. In essence these exceptions allowed generic pharmaceutical makers to obtain regulatory approval for their products prior to the patented pharmaceutical expiring. The stockpiling exception enabled generics to be made so they were ready to go to market as soon as the patent expired. Without these exceptions a patentee has a de facto longer term of patent.\(^{54}\) The panel upheld the regulatory review exception as compliant with the TRIPS Agreement framework for exceptions; known as the three-step test,\(^{55}\) but found that the stockpiling exception did not comply.\(^{56}\) In sum, its reasons were that the exception was too broad, “not limited” enough and too commercially orientated. This panel decision has been criticized for many reasons.\(^{57}\) One critique is the conspicuous failure of the panel to deal with object and purpose part of the analysis.\(^{58}\) Canada submitted that articles 7 and 8 which embody objectives and principles of TRIPS should be used to interpret both exceptions as being TRIPS compliant.\(^{59}\) The panel said that the articles should not be used to add to the agreement or to rebalance the agreement.\(^{60}\) That principle may be correct, but that does not prevent the use of the objectives and principles in interpretation and the panel did not really analyze how those objectives practically affected the interpretation exercise. Subsequent to this decision the Doha Declaration provided that object and purpose should be part of the

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\(^{54}\) The panel’s analysis included whether this de facto period of exclusivity after expiration of the patent was a legitimate interest of the patent holder, as part of the analysis of the article 30 framework for exceptions. It concluded it was not see.

\(^{55}\) The relevant test is TRIPS Agreement, supra note 1, art. 23.

\(^{56}\) See supra note 53, para ___.


\(^{58}\) See supra note 16.

\(^{59}\) TRIPS Agreement, arts 7 and 8 provide:

**Article 7: Objectives**

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

**Article 8: Principles**

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

\(^{60}\) See supra note 53, para ___.
interpretation process. In this way the Declaration underscored the role of object and purpose but it does not give detailed guidance on how that might be achieved.

In US Copyright Act s110(5) the panel’s approach also exhibited a lack of discussion about the object and purpose of the TRIPS Agreement. There was some engagement with international norms of copyright law, but no analysis of how those norms interacted with the relevant national policy or any recognition of domestic balance concerned in the case at hand. The case concerned whether two related copyright exceptions complied with the relevant copyright exceptions test.

The fundamental reason to have exceptions and flexibilities in copyright law and patent law is to make the law suitable to domestic needs, the relevant TRIPS Agreement tests provide a framework to make sure that exceptions do not eviscerate the relevant right. There may be problems with the test. As far as interpretation is concerned, it seems particularly difficult that in exceptions cases the domestic policy of the exception is not directly part of the interpretation process. It may not be determinative but as exceptions are about domestic policy goals it surely has direct relevance.

In the report of US-China Enforcement a less formalistic approach is apparent and points positively towards holistic and perhaps purposive interpretation. The dispute concerned a number of issues including interpretation of the TRIPS Agreements requirements that members have “effective”65 criminal procedures and penalties. This obligation, which takes the form of a broad minimum standard, is read in conjunction with the TRIPS Agreement requirement that “Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice”. In other words TRIPS does not prescribe the exact form or modality of implementation, but rather that is a matter of national autonomy. Members still have to

61 WTO Ministerial Conference, ‘Declaration on the TRIPS Agreement and Public Health’, Fourth Session, Doha (WTO Doc. WT/MIN(01)/DEC/2, 2001), at para. 5(a) provides “In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles”.
62 WIPO was consulted on these and the WIPO Copyright Treaty was referred to. This was somewhat of a peculiarity as the treaty was not at the time yet in force.
63 The particular problem as described by Dinwoodie and Dreyfuss, supra note 57, is that the decision failed to take account that the relevant copyright exception was a flexibility introduced into United States’ law to, at least in part, mitigate the against the effects of the extension of term of copyright, see Additionally the EU and US resolution is also bad for the international intellectual property system. In the end the EU pays compensation to the US rather than the law being reformed. The law seems not to have been reformed because there is no political will or ability to do so. But this compensation is problematic not least of all because compensation as a way to resolve disputes is under the WTO DSU supposed to be temporary.
64 TRIPS Agreement, supra note 1, art.13.
65 TRIPS Agreement, supra note 1, art.41.1.
66 TRIPS Agreement, supra note 1, art. 61.
67 TRIPS Agreement, supra note 1, art. 1.1.
68 Some provisions of TRIPS are more prescriptive than others and come closer to prescribing the form of domestic law. Contrast, for example, art. 15, about the subject matter of trademarks, with the enforcement provision of art.41.
give effect to the provisions of the agreement.69 This is an important aspect of the structure of a minimum standards agreement, which as a framework for intellectual property precedes TRIPS and is found in the Berne Convention and Paris Convention, in particular.70 This very nature of the provision in question in China Enforcement dispute meant the panel was engaged in an exercise of looking at the mode of adoption of and also the policy underlying China’s law. The panel noted that even though members have autonomy over how to implement the TRIPS Agreement they must do so. This framework of minimum standards and autonomy over mode of implementation (and to an extent if more extensive protection is provided71) is connected to the interpretation process because this structure and the flexibility it entails is part of the context of individual articles in the TRIPS Agreement and is key to understanding the object and purpose of the TRIPS Agreement.72 I have elsewhere referred to this as one of the structural features of TRIPS, which are central to its object and purpose.73

The above shows how some of the problems that have evolved in the dispute settlement interpretation process. These problems do not give a full picture of what is needed for an effective interpretative process. Accordingly, the next section fleshes out the interpretation problem in order to drive toward a hermeneutic of the TRIPS Agreement.

III. THE CONSEQUENCES OF INADEQUATE INTERPRETATION

As the above discussion shows a fundamental problem with interpretation is that engagement with the object and purposes of the TRIPS Agreement and the purposes and rationales of domestic implementation of TRIPS has not been fully utilized and is not systematic in the interpretation process. At best it has not been substantively articulated and at worst the substantive detail of object and purpose has not been adequately addressed by panels and the Appellate Body in favor of a formalistic approach to ordinary meaning. Why there has been this leaning towards a formalistic approach to interpretation is, even if

69 TRIPS Agreement, supra note 1, art. 1.1.
70 Berne Convention, supra note 3 and Paris Convention, supra note 3.
71 TRIPS Agreement, supra note1, art. 1.1 also permits members to have more extensive protection. I have reasoned that there must be a limit to how much more extensive protection should be in keeping with the object and purpose of the TRIPS agreement. For example, more extensive protection should not create trade barriers, see ___.
72 As Robert Howse discusses this structural feature of TRIPS is also a reason why the TRIPS Agreement should not be seen as an incomplete contract, see Robert Howse, “China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights” World T.R. 2011, 10(1), 87 at 89. I would add that the incomplete contract theory is contestable in the TRIPS context because it suggests the possibility of completion, whereas the intentions of the parties maybe that it is complete enough and that exact harmonization (completion) is undesirable. This is particularly so where intellectual property is designed to be calibrated to stages of development. On “calibration”, see Daniel J. Gervais, ‘TRIPS and Development’, in: Daniel J. Gervais (ed.), Intellectual Property, Trade and Development, (Oxford University Press, 2007).
arguably not difficult to diagnose, hard to fix. A non-exhaustive list of causes would include that the marriage of intellectual property and trade (WTO style) being relatively new. A related reason, that seems likely, is that there is some perceived value of formalism because of its relationship to certainty and consequently institutional legitimacy. As a new institution the WTO has been conscious of cementing its legitimacy. The problem with an over-emphasis on ordinary meaning as a mechanism of certainty is that it seems to have manifested into a regime that misses overall purpose and policy. As discussed above there are multiple objectives of intellectual property law and an important balance between international and domestic goals, which is part of the objectives of the TRIPS Agreement. National policy objectives and international policies are not necessarily the same, but they ought to be compatible if it is recognized that one of the objectives of international intellectual property is to enable countries to achieve appropriate calibration of their laws to meet domestic levels of need and development. This domestic balancing process should be recognized and utilized not as a conflict or a contradiction, but as part of the objectives and purposes which are central to the interpretation of TRIPS.

At an international level apparent or perceived conflicts can be discussed as norm conflicts, but where disputes arise they have been treated as interpretative conflicts. The latter is generally an easier and also a more effective resolution process. An approach to interpretation that has a detailed discussion of object and purpose should provide a mechanism to deal effectively with competing concerns in a way that is consistent both with objectives and rationales of intellectual property, as well as the wording of the TRIPS Agreement. This is mandated not only through the use of object and purpose in interpretation, but also through a good faith interpretation, which requires interpretation not to reach an unreasonable result. An unreasonable result might be one that does not fully engage with object and purpose.

One of the consequences of inadequate or non-sufficiently purpose-driven interpretation is that it adds to the elusiveness of how to balance intellectual property. Before turning to how to achieve purpose-driven interpretation, through the full use of object and purpose analysis, I discuss the consequences of using an inadequate, incomplete interpretation process.

74 I have said elsewhere that the consequences of the WTO’s misinterpretation of the object and purpose of the TRIPS Agreement are observable at the international and domestic levels. See Susy Frankel “Some Consequences of Misinterpreting the TRIPS Agreement” The WIPO Journal, (2009) 1, p 35. A key consequence in the international forum is that the TRIPS Agreement’s overarching balancing principles have really become statements without much practical effect. The balance is not treated as a dynamic concern; rather it is treated as already reflected in the minimum standards of the Agreement and, in a practical sense, is passive. This passivity does not accord with the wording of the Agreement which ultimately is where the intentions of the parties.

75 For a discussion of the “calibration narrative” see Gervais, supra note 72.

76 This is particularly evident in case that have discussed other international sources, see supra note 16.

77 Sinclair supra note 35, at 120.
Paradoxically the WTO dispute settlement body approach to compliance of domestic law with the TRIPS Agreement, ostensibly at least does not treat domestic policy of that law as directly relevant to interpretation. The reaching into domestic policy, in the sense of limiting regulatory autonomy to the extent that domestic law complies with international standards is broadly in the nature of international agreements. This international involvement in behind the border regulation underlies some of the initial objection to including intellectual property in the WTO. Subsequently, these arguments have intensified around some aspects of FTAs.

An approach which does not adequately take account of domestic policy goals goes to the heart of the problem with interpretation. The objectives and purposes of international intellectual property was added to when the WTO was formed, but the goals and rationales behind individual types of intellectual property rights (copyright, patents, trademarks) both under treaties such as Berne and Paris and domestic enactments of those rights was not replaced by TRIPS; it was added to.

Graeme Dinwoodie and Rochelle Dreyfuss have proposed that international intellectual property should draw on its acquis to utilize the depth of international understanding about intellectual property law and to provide a legal framework for international intellectual property lawmaking. They point out interpretation can only go so far as it essentially looks backward. It is true that interpretation is not a complete answer but there is more to it than looking backward. The interpretation exercise if looking at object and purpose does not look at object and purpose statically. If an international acquis can be located that acquis would be directly relevant to object and purpose both as a matter of dispute settlement and as a matter of policy planning. The two should also be consistent.

In the case of the international agreements the US- Copyright 110(5) decision makes use of the Berne acquis as part of its interpretation of the TRIPS Agreement. Interpretation of TRIPS compliance should also deal with the domestic policy goals and aspirations behind a particular provision. Such goals may not be dispositive but they should be part of the analysis. To leave them out is to leave out a significant factor of object and purpose. In this way the relationship between national law and international interpretation is most obvious.

Additionally, the VCLT says that interpretation should take into account “any subsequent practice in the application of the treaty which establishes the agreement of the

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79 The TPP, for example includes a regulatory coherence chapter.


81 Id, at 176.

82 See infra ___.
parties regarding its interpretation." What that means is that one practice is not likely to be determinative, but if it establishes agreement it will be relevant. The agreement that may be relevant is that countries can calibrate their laws to meet their domestic needs as part of their TRIPS Agreement implementation.

This aspect of interpretation was part of the panel report in *EC-Canada Pharmaceuticals* where questions of whether term extension and regulatory review exceptions has to go hand-in-hand were considered. The panel without saying so was effectively discussing an aspect of state practice of the exception at issue. The VCLT indicates that state practice is a matter of context. Where, however, as with TRIPS the object and purpose of the treaty is to embed minimum standards about intellectual property as a matter of state practice to the extent that those minimums reflect state practice that is part of the object and purpose of the treaty. To not treat it as such would bisect international intellectual property norms from domestic intellectual property laws — which is not only unjustified but also has undesirable consequences.

A consequence of interpretation not fully engaging with object and purpose is that it provides limited guidance for going forward, particularly at national level where the resolution of international disputes can be looked at to find the parameters of legitimate lawmaking. It is difficult to prove (after all correlation is not causation) but uncertainty (coupled with lack of expertise) seems to have resulted in some countries either have not introduced flexibilities into their intellectual property law or being slow to do so. Uncertainty over interpretation of flexibilities seems to have contributed to the lack of use of those flexibilities particularly in developing countries. Although, there seems to be more use of flexibilities occurring in developing countries and as mentioned above pushes at multilateral level to develop a mandatory exceptions and also pushes in FTAs to limit and redefine TRIPS exceptions. These sorts of activities will undoubtedly continue. Changes to intellectual property norms can make interpretation seem an ever moving feast of untamable possibilities. Perhaps more optimistically it shows how a policy-driven approach to interpretation becomes even more critical because interpretation can also play a critical role in the negotiation process, both within the WTO TRIPS Council and more broadly.

IV. A HERMENEUTIC OF INTERNATIONAL INTELLECTUAL PROPERTY

Policy goals, purposes and objectives are relevant to all interpretation. The TRIPS Agreement embodies a multiplicity of purposes and objectives and should not be interpreted in a formalistic way that in some jurisdictions a piece of national law may be interpreted. It

83 VCLT, *supra* note 34, art.31(3)(b).
84 See *Canada- Pharmaceuticals*, *supra* note 53, para ___.
requires holistic interpretation. This part discusses the various levels and ways that object and purpose (and its sources) is relevant to TRIPS interpretation.

The VCLT refers to “its” object and purpose. It is widely accepted that “its” refers to the treaty’s object and purpose as a whole. As discussed, in relation to the TRIPS Agreement that will include multiple objectives and purposes. When a particular treaty article is interpreted context will include some of the immediate surrounding articles, particularly where they relate to the same subject matter. Put differently, when context and object and purpose are viewed holistically then the object and purpose of a particular treaty provision is also relevant. The Appellate Body in \textit{EC-Chicken Cuts} said this must not, however, be a substitute for the object and purpose of the treaty as a whole.

It is well accepted that the use of the singular word "its" preceding the term "object and purpose" in Article 31(1) of the Vienna Convention indicates that the term refers to the treaty as a whole; had the term "object and purpose" been preceded by the word "their", the use of the plural would have indicated a reference to particular "treaty terms". Thus, the term "its object and purpose" makes it clear that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety. At the same time, we do not believe that Article 31(1) excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa. To the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.

Having said this, we caution against interpreting WTO law in the light of the purported "object and purpose" of specific provisions, paragraphs or subparagraphs of the WTO agreements, … "one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis" for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the Vienna Convention must focus on ascertaining the common intentions of the parties.\textsuperscript{85}

This principle is particularly important for TRIPS interpretation because TRIPS embraces many different subject matters. The object and purpose of a particular trademark provision, for example, is going to be different from that which lies behind particular patent provisions. Importantly, those objectives and purposes are not detailed in the TRIPS Agreement (or any other international agreement) but sometimes have to be found by looking at how the areas of law operate at domestic law. How to deal with domestic law being relevant, but one domestic law not being determinative of agreed practice is complex.

Further issues, arising from the above, which I am researching to develop this hermeneutic include:

\textsuperscript{85} \textit{EC-Chicken Cuts}, supra note 48, at 238-239.
- The role of the TRIPS Council in interpretation.
- Objectives and purposes of intellectual property are not just any policy or goal, but should be consistent with the overall purpose of the treaty and arguably recognized (perhaps as part of an international acquis). How to determine and evaluate what’s recognized and by whom will be important.
- Through use of examples what happens when the objectives appear to conflict. In particular, what factors should be used to weigh them properly through interpretation, rather than rank them?
- In many ways combining object and purpose and recognizing domestic policy in the process involves combining similar subject matter from different models/frameworks. How do you deal with the different frameworks in the analysis?