The (Non)Use of Treaty Object and Purpose in IP Disputes in the WTO

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Outline

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WTO Dispute Settlement & Treaty Interpretation

- In Int. IP law, **diverging treaty interpretations & implementations** cause significant controversy.

- Under the **Berne- & Paris Conventions**, theoretical option to bring a dispute over the interpretation to the **ICJ**.

- Countries in favour of a strong global IP system purposely shifted to the **GATT/trade forum (inter alia)** because of its perceived **‘teeth’ in enforcement** of treaty obligations.

- The **WTO/DSU adjudication system** hence is viewed as a key achievement, especially for IP disputes.
WTO Dispute Settlement & Treaty Interpretation

DSU – Importance beyond IP:

„By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over temptations of unilateralism and the law of the jungle”

Speech of King Hassan II of Morocco for the host government of the April 1994 Marrakech Ministerial Meeting to conclude the Uruguay Round and establish the WTO
WTO Dispute Settlement & Treaty Interpretation

→ DSU serves the need for common reliable rules, not only on substantive level but also for settlement of disputes

→ **Rule Based System of Dispute Settlement** as key achievement of Uruguay Round

→ DSU establishes **obligation to remove inconsistencies with WTO Law** and to comply with DSB rulings (Art.3.7, 19.1, 21.1, 22.1 DSU)

→ As a last resort, DSU allows retaliation in form of **trade sanctions to induce compliance**! (however, **without a guarantee for compliance**)
WTO Dispute Settlement & Treaty Interpretation

Concerns of Preserving National Autonomy

• WTO Negotiators wanted to ensure that the new WTO, its rules and its enforcement mechanism do not unduly interfere with national (non-trade) policies

• Fear of **judicial activism** in the Panel, AB practice: EC-Hormones, **US-Shrimp** as examples for allegedly creating new rules...

• ‘**Three strikes and we are out**’ (USA)
WTO Dispute Settlement & Treaty Interpretation

Balancing sovereignty and international rule of law

“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.” (Art.3:2 DSU)
WTO Dispute Settlement & Treaty Interpretation

**Art.31 VCLT – General Rule of Interpretation**

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**.
WTO Dispute Settlement & Treaty Interpretation

A Textual Approach to Treaty Interpretation

• Panels (and to some extent the Appellate Body) have been accused of an overly textual approach to interpretation.
  …this has lead some commentators to suggest that the Shorter Oxford Dictionary is part of the covered WTO Agreements…
• However, there are also examples of the Appellate Body of becoming more assertive in shaping WTO Law: dynamically interpreting the term ‘exhaustible natural resources’ to cover living species, like sea turtles…
WTO Dispute Settlement & Treaty Interpretation

An enhanced Role for Treaty Objectives?

“where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought” (…)

The sustainable development objective in the Preamble to the WTO Agreement “must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement” (WTO AB in US – Shrimp, 1998)
WTO Dispute Settlement & Treaty Interpretation

An enhanced Role for Treaty Objectives?

→ Taking ordinary meaning as a starting point, the object and purpose of a treaty will be decisive for **provisions incorporating broad and open concepts** and those with an ambiguous or multi-faceted ordinary meaning – such as:

- **like products** (Art.III:2, 4 GATT)
- fair and equitable treatment (investment treaties)
- no **unreasonable prejudice to legitimate interests of right holders** (Art.13 TRIPS)
Treaty Objectives in WTO Agreements

Marrakesh Agreement Establishing the World Trade Organization

The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development;

(Preamble, para.1)
Treaty Objectives in WTO Agreements

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

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.
Treaty Objectives in WTO Agreements

Doha Declaration on the TRIPS Agreement and Public Health

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

a) 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.
Integrating Social, Environmental & Economic Concerns

The Role of the Sustainable Development Objective

“We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994.”

Integrating Social, Environmental & Economic Concerns

SD as Principle of Reconciliation and Integration

The “need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development” (ICJ, Gabcikovo – Nagymaros case, 1997)

SD “has been generally accepted as integrating economic and social development and environmental protection” (WTO AB in US-Shrimp, 1998)

Principle of Integration and Interrelationship, in particular in relation to human rights, and social, economic and environmental objectives (ILA Delhi Declaration on the Principles of Int. Law related to SD, 2002)
Integrating Social, Environmental & Economic Concerns

• “States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population” (Human Development & Environment Conference, Stockholm Declaration, 1972)

• “Peace, development and environmental protection are interdependent and indivisible” (Earth Summit, Rio Declaration, 1992)

• “We, the representatives of the peoples of the world, (...) assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels” (WSSD, Johannesburg Declaration, 2002)
Integrating Social, Environmental & Economic Concerns

The (international) protection of IP **coincides** with societal concerns like:

- **public health** (patent protection for pharmaceutical products and access to medicines);
- **climate change** (IP as incentive for R&D in new, innovative ‘green’ technologies or as barrier for transfer and dissemination of green technology?);
- **free trade** (IP protection as securing trade in protected goods or as barrier to international trade & transit?);
- **access to knowledge** (copyright protection affecting access to educational materials and plain facts/information?);
- **food security** (plant variety rights vs. farmer’s informal seed exchange systems)

→ A significant potential for operating **Art.7, 8 TRIPS** as **specific expressions of the integration principle!**
IP Related Jurisprudence in the WTO

Main Legal Argument:
→ In case of TRIPS, integration of other societal concerns functions primarily via treaty interpretation, based on Art.31 VCLT, and with an important role for TRIPS’ object and purpose, as embodied in Art.7, 8 TRIPS!
→ Against this background, Panels have a legal obligation to interpret TRIPS in light of Art.7, 8 TRIPS.

Hypothesis:
→ Panels give insufficient, if any, role to the integration provisions of Art.7, 8 TRIPS in interpreting TRIPS.
IP Related Jurisprudence in the WTO

TRIPS Cases in WTO Dispute Settlement:
• As of 1 June 2011, 424 complaints have been filed under the DSU
• Of those, 29 cases concern (inter alia) the TRIPS Agreement
• Which led to DSB decisions: 9 Panel-, 3 Appellate Body Reports

Methodology for Analysing the Use of Integration Principle:
→ All 12 IP related decisions (including main arguments of the parties) are scanned (full-text search) for passages addressing the following issues:
  • Art.7 and/or 8 TRIPS (objectives and principles)
  • WTO preamble (especially sustainable development objective)

→ To contrast this result with reliance on other factors affecting treaty interpretation, further searches look for:
  • Role of ‘object and purpose’ for treaty interpretation in general
  • Other elements of treaty interpretation (ordinary meaning, context)
IP Related Jurisprudence in the WTO

Main (Preliminary) **Findings:**
→ Use of Art.7, 8 TRIPS as treaty objective in comparison to other objectives relied upon in the interpretation exercise:

1. **Application of Art.7, 8 TRIPS:** → 3 instances
   a. Canada – *Patents*, para.7.92 (but overridden by Art.27 TRIPS);
   b. US – *Havanna Club*, para.8.57 (understood as good faith principle);
   c. EC – *GIs*, para.7.245-46 (reflecting principle of negative rights)

2. **Mere acknowledgement** of Art.7, 8 TRIPS as object & purpose (but without use/application): → 3 instances (*Canada – Patents; US – Havanna Club; Canada – Patent Term*)

3. **Application / use of other objectives:**
   a. of *TRIPS* (effective IP protection; non-discrimination, minimum standards): → 7 instances
   b. of **individual provisions** of TRIPS: → 3 instances

4. **Mere acknowledgements** of treaty object & purpose: 6 instances
IP Related Jurisprudence in the WTO

Main (Preliminary) Findings:

→ Example for applying Art.7, 8 TRIPS – the Canada – Patents case

• At issue is the consistency of a ‘bolar’ exception in Canada’s patent law which allows generic producers to use a patented drug in order to apply for regulatory approval.

• The EC argued that Art.30 TRIPS is infringed – it provides:
  “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

→ While acknowledging the general role of Art.7, 8:1 for the interpretation of Art.30, the Panel did not actually apply Art.7, 8:1 to define the ambiguous terms of Art.30!

→ As to the interpretation of another obligation (Art.27:1), the Panel views the latter overriding the goals of Art.7 TRIPS…
IP Related Jurisprudence in the WTO

Main (Preliminary) **Findings:**

→ **Example** for not applying Art.7, 8 TRIPS – the China - IPRs case

- At issue is the consistency of Chinese criminal sanctions against counterfeiting and piracy where business operators are liable if they hold more than 500 infringing copies on their premises.
- The US argued that **Art.61 TRIPS** is infringed – it provides:
  - “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.”

→ While acknowledging the general role of treaty object and purpose in the interpretation exercise, the **Panel did not actually apply Art.7 or other objectives to define the meaning of ‘commercial scale’**
Conclusions

• Strong legal arguments support an **important role of Art.7, 8:1 TRIPS in the interpretation of TRIPS provisions** – especially those which are ambiguous and open-textured

• In the Doha Declaration, all WTO Members emphasized this role as a **crucial element for** balancing IP and access to medicines – i.e. **integrating economic and social concerns**

• WTO IP jurisprudence so far has given an **insufficient role** to the integration provisions of Art.7, 8 TRIPS in interpreting TRIPS

• To improve this, **WTO Members should consistently raise Art.7, 8 arguments** in their claims & rebuttals
Thank you for your attention!

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