



Institute for International Law
and Justice

IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

Professors Benedict Kingsbury and Joseph Weiler
Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.
Thursdays 4.00pm-5.50pm

Provisional Semester Program - Attached Paper is shown in Bold

- January 17 – Jeremy Waldron, NYU Law School
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*
- January 24 - Catharine MacKinnon, University of Michigan Law School
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department
Topic: *Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School
Topic: *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*
- February 14 - Joseph Weiler, NYU Law School**
Topic: Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century
- February 21 - NO COLLOQUIUM
- February 28 - Derek Jinks, University of Texas Law School
Topic: *Fragmentation of International Law concerning Individuals in Armed Conflict*
- March 6 - Robert Howse, University of Michigan Law School
Topic: *Beyond Compliance: Rethinking Why International Law Really Matters* (paper co-authored with Ruti Teitel)
- March 13 - Martti Koskeniemi, University of Helsinki/NYU Law School
Topic: *Natural Law between Moral History and Raison d'Etat: Understanding the Pre-History of International Law*

Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see iilj.org)

- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School
Topic: *Interpretive Problems in International Investment Law*
- April 3 - Ryan Goodman, Harvard Law School
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute
Topic: *Indicators in Global Governance*
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

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Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century

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I. A Brief Survey of International Legal Discourse of Treaty Interpretation in the last Century

Why Prolegomena – since, obviously, it is not my intention in this paper to set out a full theory of Treaty Interpretation but, instead, to make some critical observations on the state of current theory and indicate some elements that a theory mindful of the present state of the international legal system could profitably include.

Why Meso – since my observations are not to be situated at the macro level general hermeneutics – the ‘what do we mean by interpretation’ type questions – nor at the micro level of construing the precise provisions of, say, the Vienna Convention on the Law of Treaties (VCLT).

Instead the paper is pitched at that intermediate level concerned mostly with the position, function, interaction of Treaty Interpretation in the contemporary international legal system.

Treaties have always been a central, if not the central. component of international legal obligations both ‘contractual’ and ‘legislative’. The 20th Century saw an exponential growth in the number of treaties dictated both by the growth in the number of States and by the expansion of reach of the “international” in public life.¹

Given the usual factors attendant on the interpretation of legal instruments such as the inherent indeterminacy of language and the inability of parties to predict all future eventualities which might fall under the legal regime created by an agreement, one would expect that the theory of treaty interpretation would occupy a central place in international legal discourse. The ideologically cleavaged world which was a feature of the international legal system for most of the last century meant also that often agreement to multilateral treaties was bought with the coinage of textual obfuscation, rendering interpretation even more central and delicate at the same time.²

And yet, with some notable exceptions³, theorizing on Treaty Interpretation in the last century is both scarce and curious.

¹ Statistics

² Cassese, *International Law in a divided world...* at ...

³ Notably, Serge Sur, *L'interprétation En Droit International Public* 1974; Maarten Bos, *Theory and Practice of Treaty Interpretation*, NILR 1980 2-28, 135-70; J. Klabbers, *The Concept of Treaty in International Law* 1996; Betti, *Teoria generale della interpretazione*, (1955). For references to the German literature see MPI Encyclopedia of PIL but that literature like most of the Anglo-American falls into the Rule/Method trap discussed below

A survey of the literature allows the following generalizations:

- The principal interest has not been in theorizing but, at the micro-level reporting/indicating (usually the descriptive and prescriptive have been intertwined) the *rules* and/or the *method(s)* of treaty interpretation as practiced or as should be practiced by the courts and tribunals, domestic and international engaged in treaty interpretation. The positivist and the normative are intertwined in two ways. There is a literature which simply reports how interpretation takes place in various courts and simply assumes that what is done is how it should be done.⁴ A second literature is normative – prescribing appropriate rules and methods of interpretation and then fishing for authority from the practice of States, but typically not systematically critiquing the practice. The weaknesses of both approaches are obvious.
- Interest in, and volume of, writings about treaty interpretation increase as the century progresses as does the voluminousness of the writing. But the content is remarkably constant. The “rules” part consists usually, in one form or another, in a reiteration of Roman Law maxims or a transposition of similar style rules from domestic hermeneutics. And as the principal questions, or rather question (the endlessly discussed best means to ascertain the intention of the parties to a treaty) became defined, there is a shift from rules to method. But even at this micro level most theorizing does not move beyond

⁴ Oppenheim; MPI; McNair;

taxonomies of the various methods – textual, contextual and systematic, and various forms of the teleological.

- Ascertaining the intention of the parties constitutes the predominant normative objective and yardstick of 20th century hermeneutics.
- Once the World Court is established, writing focuses increasingly on its case law which is varied and rich enough to provide text proofs for a myriad of rule/method approaches.⁵ I deliberately use the term text proof, borrowed from the world of religion, since often the use of the jurisprudence of the World Court consists, as mentioned above, in little more than fishing for authority to propositions of the writers concerned.
- A comparison between early and later 20th century writing reveals another surprising static feature: A relatively unchanging conception of the nature of the international legal system. This or that rule may change, e.g. the relegation (often disregarded in practice) of *Travaux preparatoires* to a subsidiary means of interpretation. But conceptually rules and methods seem simply to play a game of musical chairs.
- The ILC codification project and the eventual adoption of the Vienna Convention on the Law of Treaties enhanced these elements and notably static features of theorizing with its singular decision (at first

⁵ Use of travaux for multilateral treaties with new members

resisted⁶) to amalgamate treaty interpretation into a single rule – Article 31 VCLT. Most writing from that point onwards turns on the correct interpretation of that rule of interpretation and is captive in the most part to the conceptual world of the principal Reporter of the ILC himself captive to intuitive Common Law pragmatism.⁷ Thus, Article 31 has turned into a straightjacket both for conceptual thinking and for a more realistic practice by courts and tribunals.

- Interestingly both before and after the emergence of the Single Rule in the VCLT there has been a remarkable measure of realism as regards the indeterminacy of treaty interpretation.
- Writing in mid century Lauterpacht observes:

As a rule ... [the rules of interpretation] are not the determining cause of of judicial decions, but the form in which the judge cloaks a result arrived at by other means.⁸

Verzijl is equally forthright:

Every judge – this is never more clearly realized until oneself is confronted by difficult decisions – is already prejudiced before he draws up his sentence, in the sense that at that moment – led by an intuitive, uncontrollable and to himself probably obscure

⁶ Waldock

⁷ Eg Waldock, Fitzmaurice (ILC 1957), McNair.

⁸ BYIL 1949 53 Restrictive Interpretation etc.

preference – he has already chosen the starting point decisive to the judgment.⁹

Both statements antedate much huffing and puffing by subsequent critical writing. An examination of many other writers reveals that whilst they might not have the self awareness and boldness of these two writers in acknowledging the indeterminacy, their elaborate elaborations of rules and methods is normally replete with hermeneutic copouts – ‘treaty interpretation is an art not a science etc.’ – which would lead us, the readers, to the same conclusions of Lauterpacht and Verzijl.

From a theory perspective I want to highlight in this paper just three weaknesses of the mainstream literature of the last century:

First, like the hoary distinction between Law Books and Books about the Law, there is an absence of ‘interpretation of interpretation’ in other words an examination ‘from the outside of hermeneutics’ of, say, the place and function of treaty interpretation in the international legal system.

Second, within hermeneutics, the move towards a single rule in the VCLT camouflages the functional and other differentiating factors of treaties meaningful for interpretation, having a chilling effect on a corresponding

⁹ cited in Bos p 33.

hermeneutic differentiation, thus undermining the functionality and/or potentiality of treaty interpretation itself.

Third, connected but nonetheless distinct from the previous point, the static nature of 20th Century hermeneutics has camouflaged the development and differentiation of the international legal system itself from an almost exclusively state-centric system concerned primarily with mediating conflicting national interests and ensuring mutual co-existence to a more complex system which displays now communitarian features and is concerned with common systemic values which at times may transcend or be different from the negotiated aggregate of national interests. These too could be meaningful for issues of interpretation.

In what follows I want to illustrate these defects and explore openings towards a more adequate theory of treaty interpretation.

II. Illustrating Theme I – Theory from Outside Hermeneutics: The Indeterminacy paradox

Outside the voice of some American Legal Realists¹⁰ it is hard to find so early in the 20th Century in domestic law such perspicacity as illustrated by the statements of Lauterpacht and Verzijl quoted above. Only in part can this be explained by the possibility that domestic hermeneutics feature less indeterminacy. Interestingly, the spread of ‘hard’ judicial review of

¹⁰ 1931 Llewelyn, *The Bramble Bush*

legislation throughout the legal world in the second half of 20th Century¹¹, occurs more or less at the same time as the blinkers as concern hermeneutic indeterminacy are removed in municipal law. It is not surprising that the ‘counter majoritarian debates and contestation in relation to the case law of supreme courts becomes a constant feature of the legal world at the very same period.¹²The feature of that domestic debate which is of interest to us is the contestation and displeasure of the hermeneutic latitude which judges enjoy allowing decisions to be influenced by extra-legal considerations such as the political ideology of the judge. The problem is perceived as systemic and structural rather than occasional and aberrational.

I would suggest as an empirical proposition that, by and large, and for the most part of the century, one does not find similar contestation in international legal discourse despite the early and radical acknowledgement of indeterminacy by central figures such as Lauterpacht.¹³The South West Africa – Namibia saga are exceptional and it is, in any event, unclear whether one should classify the displeasure, fairly widespread, with the South West African decision under this rubric. There is of course, notably in the United States, much contestation of international law and decisions of international tribunals. But for the most part this is part of a general ‘why should we be bound by international law’ argument, rather than a

¹¹ Cappelletti, *Judicial Review in the Contemporary World*

¹² Cappelletti, *Mighty Problem*

¹³ In the words of former ICJ President Stephen M. Schwebel, Lauterpacht's "attainments are unsurpassed by any international lawyer of this century [...] he taught and wrote with unmatched distinction S.M. Schwebel, *International Arbitration: Three Salient Problems*, xiii (Hersch Lauterpacht Memorial Lectures 1987)

contestation of a systematic and generalized '*gouvernement des juges*' argument.¹⁴

How then to reconcile the open and widespread acknowledgement of hermeneutic indeterminacy in treaty interpretation with the absence of a similar contestation to be found in domestic systems? I would like to suggest some possible explanations and also indicate why this tranquility may not last into the new century.

Explanations

- **Physiognomy and Pathology:** Stewart Macauley's incisive writing on the law of contract from a 'law and society perspective'¹⁵ highlight what may be termed pathological and physiognomic approaches to legal discourse. The focus of much analytical legal writing in general and international law is no exception, is on disputes, court cases and the like. The treaty interpretation literature is no exception. But, as Macauley shows in his studies of domestic contracts, the overwhelming practice of contracts takes place outside the courts with lawyers and clients avoiding or resolving disputes without the need to become a 'hospital case.' This, surely, is the case also in relation to international treaties. Most are negotiated, signed, ratified and applied

¹⁴ Even in the most clamorous instance, the the walk out of the US in the Nicaragua case, the accusation was judicial error in that case rather than a systemic hermeneutic failure.

¹⁵ Macauley, "Elegant models, empirical pictures, and the complexities of contract", 11 *Law & Society Review* (1977), 507-528; see also Macaulay, "An Empirical View of Contract," 1985 *Wisconsin Law Review* 465-482

without every becoming hospital cases. If there are issues of interpretation, and surely there are, most are again resolved without every reaching a court and tribunal by the government and other agents handling such matters.

If these observations are correct several tentative conclusions may be drawn. First, it qualifies the view about the centrality of interpretation following inevitably from the uncontested centrality of treaties. It qualifies it by marginalizing the importance of judicial treaty interpretation and centralizing the importance of treaty interpretation at the hands of States and their agents. There must exist a rich state practice in relation to such interpretation in the discourse among states, though I have been unable to find any systematic study as such. This marginality is accentuated given the growing attention to the case law of the World Court (it is convenient for researchers) coupled with the paucity and infrequency of its decisions compared to other jurisdictions. This marginality may be part of the explanation of the paradox. At the same time, the increase in the incidence of judicial regimes outside the ambit of the World Court (e.g. BITs, WTO, FTAs) might portend a change in this area.

- **Binding Third Party Dispute Settlement:** Throughout most of the 20th Century binding third party dispute settlement was voluntary: States had to give their consent to the very process of ‘judicial’ dispute settlement. The rich literature on compliance is inconclusive, but there is evidence to suggest that part of the factors which induce states to accept third party binding dispute settlement (in which the issue of

hermeneutic indeterminacy will be present) is their determination that they can ‘afford’ to lose. Put differently, the issues are not so important and hence the cases are not important – another nuance of marginality.¹⁶ Maybe one can go so far as to suggest a theorem which would connect the voluntary nature of third party dispute settlement and a tolerance towards hermeneutic lassitude. There are some indicators that this might already be the case.¹⁷ If this is so, then here too, with the increasing number of compulsory regimes for ‘judicial’ dispute settlement (e.g. BITs, WTO, FTAs such as NAFTA) one might expect the tolerance to evaporate. The turn of the WTO Appellate Body towards a more textual approach might be an expression of sensitivity – misguided or otherwise – to this concern.

- The Rule of Lawyers: If there is merit that for the most part of the Century marginal disputes reached binding dispute settlement, there may be another reasons why the indeterminacy paradox presents itself. Once the political decision is taken to ‘legalize’ a dispute, it moves into the hands of the lawyers. Within this interpretative community even if there was an acceptance of hermeneutic lassitude,

¹⁶ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1996); Guzman *How International law Works* 2008.

¹⁷ The WTO is a regime in which binding ‘judicial’ third party dispute settlement is binding. In a series of high visibility cases the losing parties, the EC and the USA respectively, announced displeasure with the hermeneutics of the decision (cite). In *Hormones and Bananas* the EU failed to follow the decision of the Appellate Body and DSB. In *Gambling* the USA proceeded to withdraw its commitments under the GATS and in this way emasculated the decision. See Discussion in Chayes on Beagle.

it would be accepted as part of the rules of the game, indeed, as the arena in which lawyers can demonstrate their prowess. After all, a very strict approach to interpretation should, in theory, lead to ‘the correct’ result independently of lawyering skills. Here too, one may expect a backlash. With the increase in non voluntary dispute settlement cases, the ability of lawyers to predict outcomes and advise on the utility of settlement becomes more crucial. Hermeneutic lassitude threatens the skill set and reputation of the players.

III. Illustration of Theme two: Inside Hermeneutics – Differentiating Treaties

In 1989 Aharon Barak published the first volume of his Multi Volume treatise on interpretation. He ordered his analysis – descriptive and normative – on the nature of the legal instrument to be interpreted – positing at one pole the Constitution of the State and at the other an individual will written by a single testator. In between were contracts – in a variety of forms, notably a special place for standard form contracts as distinct from arms lengths contracts -- administrative acts, legislation etc. Critically for our purposes, to each instrument was molded its own specific hermeneutics. It would be laughable to imagine that one would interpret at the probate court the last will of a testator in the same manner one was interpreting the Constitution.

International law has as rich a differentiation:

- In some respects the Charter of the United Nations may be thought of as a Constitutional treaty in both its subject matter and its universality.
- Treaties establishing International Organizations may also, for the purposes of interpretation belong in a class of their own;
- Legislative treaties and ‘administrative treaties’ are general in nature and as such different from;
- Multilateral contractual treaties.
- Bilateral treaties, the contracts of international law, are variegated in nature. Some, as indicated above, like BITs or FTAs are not unlike domestic Standard Term Contracts. The EC has FTAs with about half the countries of the world, but most follow one of very few templates and there is very little wriggle room for negotiation by the EC partners. BITs too, for the most part, follow a standard form and leave very little room for negotiations. These treaties resemble standard terms contracts also in the manner in which they typically pit a very strong player against weak (consumer) players.
- Others are more specific and negotiated at arms length.

- Unilateral declarations have been held to¹⁸ be capable of binding in certain circumstances their makers. These two call for interpretation.

One may have many more divisions by reference to content.¹⁹

Treaties differ in other ways too which may affect their hermeneutics.

Multiparty treaties may have a small or large number of parties. The number of parties may be fixed or may grow. They may belong to a cultural homogeneous group or be multicultural in composition and even content.

As I shall argue below, all these differentiations may be relevant to question of hermeneutics, not only in the sense of articulating different rules and different methods which will make outcomes more “appropriate” and more predictable, but also in helping to cast the very role of interpretation differently.

The single rule of Article 31 does not preclude differentiated hermeneutics and there is a rich case law which already follows such a path.²⁰ The *Reparation for Injuries* case²¹ is usually cited as an example of a public law or constitutional law approach whereas for bilateral treaties a “contractual approach is discerned and indicated. After all the object & purpose clause within Article 31 would allow some differentiation: the object of purpose of an IO treaty *as such* is different from the object and purpose of a general

¹⁸ Nuclear Test Case

¹⁹ see Bos,

²⁰ See e.g. discussion in Boss, pp 155 et seq

²¹ cite

legislative treaty or a bilateral treaty. Nonetheless it may have a chilling effect even on the desirability of developing a more differentiated hermeneutics to match the differentiated treaties and it has a chilling effect on theorizing since any prescriptive analysis would seem to deviate from “real” international law. Of course, one subtext of this paper, the Article 31 is both descriptively and prescriptively an “unreal” signpost of contemporary treaty interpretation.

How these differences may impact treaty interpretation will be discussed below.

IV. Illustration of Theme III – the Evolving International System

Changing nature of the International Legal System

The thesis advanced here follows on my early work on the ‘geology’ of 20th Century international law. The geological metaphor tries to emphasize the process of accretion rather than of wholesale change. In relation to treaties, there is a new type of treaty which represents for example the emergence of a ‘Global Administrative Law.’²² But at the same time old style bilateral, arms length treaties continue to play an important role. And so it is with most of the changes I will now briefly discuss. The result is a complexification of the international legal system, a geological cross section which is more multilayered and differently multilayered than, say, 100 years ago.

²² see Stewart ...

The following are the principal changes which, in my view, have an impact on the way we should theorize treaty interpretation:

- The Emergence of the Communitarian Paradigm.²³ It would be wrong to argue that the communitarian paradigm is a creature of the second half of the 20th Century. One can find strands of it in earlier theory and practice. But it is not wrong to claim that as international law emerges from the 19th Century and the era of the modern Nation-State it is conceived in a classically liberal sense: Equally sovereign actors, legitimately pursuing their national interest where the principal function of international law is to mediate these competing national interest and to ensure mutual co-existence. That still remains a powerful and ever present feature in today international system and international law. But along side it, one can observe the emergence of a complementary/competing conception of the ‘international community as a whole’²⁴ which vindicates values and pursues interests which cannot be said to be strictly an aggregation of distinct national interests. Its manifestation can be seen in certain areas such as international criminal law,²⁵ international environmental law²⁶ (including certain aspects of the Law of the Sea²⁷), the international law of human rights²⁸ and even in some systemic areas in the law of

²³ See e.g. Simma

²⁴ Ago, Report on State Responsibility

²⁵

²⁶

²⁷

²⁸

State Responsibility such as the notions of obligations erga omnes and jus cogens.²⁹

- Expansion of Actors and Non State Actors and Expansion of Interested Parties.³⁰ The international legal system displays a systemic asymmetry. States, or rather governments of States remain the principal international law makers, but the law they make impacts in direct and indirect ways a broad variety of interests and actors which are non governmental. To make it abundantly clear in this group I include national parliaments and other non-executive branch national actors, as well as other groups and individuals in a variety of identities.

The WTO provides as good an example as any:

7.71 What are the objects and purposes of the DSU, and the WTO more generally ...? The most relevant in our view are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system.

7.72 Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals.

Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.⁶⁶¹ Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.

7.73 However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO

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³⁰ See generally, Hertogh, What is Non State Law etc.

as a whole, is to produce certain market conditions which would allow this individual activity to flourish.

7.74 The very first Preamble to the WTO Agreement states that Members recognize "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".⁶⁶²

7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in

the DSU itself. Article 3.2 of the DSU 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 ...".

7.76 The security and predictability in question are of "the multilateral trading system". The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

7.77 Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it. Sections 301-310 themselves recognize this nexus. One of the principal triggers for US action to vindicate US rights under covered agreements is the impact alleged breaches have had on, and the complaint emanating from, individual economic operators.³¹

- Shift in Subject Matters and the Penetration of Domestic Orders.

Tightly connected to the previous point is the horizontal expansion of the reach of international obligations – notably through treaties – and the vertical penetration of such obligations into municipal legal systems with a greater readiness of national courts to base their decisions on international obligations. The consequence of this

³¹ S 301

horizontal and vertical expansion is a more profound impact of international obligations on value laden domestic policy choices both as regards subject matter and as regards the effect of the international legal obligation. It will often trump, or modify the domestic preference.

If we now aggregate all these factors we may identify two relatively novel features of the international legal system: The so-called “fragmentation” of international law³² and the phenomenon of international governance.³³ The first is the emergence of overlapping and equally binding, and at times conflicting international regimes, such as trade and environment, or human rights and intellectual property, with differing institutional set-ups, different dispute settlement mechanisms, and little horizontal coordination.

The second – governance – connotes at worst a heuristic device at best a tangible phenomenon, whereby it is no longer illuminating or no longer possible to explain both the function and process of international obligation creation with the classical tools of state ‘negotiation’ and mediation of national interests.

V. The Impact on Treaty Interpretation Theory

My argument is that both the ‘outside hermeneutic’ analysis and the two ‘within hermeneutic’ themes discussed above, the differentiation of treaties

³² Martti ILC Report.

³³ Governance Lit.

and the new features of the international legal system, call for a rethinking of the meso-theory of treaty interpretation.

First, as already indicated, there are signs that the factors which allowed for the indeterminacy paradox are dissipating, and that with the growth of compulsory third party 'judicial' dispute settlement, treaty interpretation at the hands of judicial bodies will come under greater scrutiny as will its hermeneutic legitimacy. Thus I will focus now on the classical role of the interpreting court or tribunal not only as a way of engaging most directly previous theorizing but also because of the expected de-marginalization of such.

Second, it is obvious that not only do the different types of treaty regime call for differing hermeneutics, but these hermeneutics need to be more sharply and above all explicitly defined so as to increased predictability and hermeneutic legitimacy. (As shall be explained below, a dialogical approach to interpretation will be an essential part of the legitimacy building).

Illustrating the different hermeneutics is easy enough by reference to the mainstay of classical hermeneutics – the 'intention of the parties.' If one keeps in mind the Barak vector from the Unilateral to the Constitutional it is clear that the closer one is to the unilateral state declaration, to the bilateral at arms length contractual treaty etc. it is both legitimate and imperative for the interpreter to try and ascertain the intention of the parties, real or constructed in relation to the issue at dispute. It is, I would submit, equally clear that the more one approaches the 'Constitutional' treaty, the functions of which are not tied to the direct national interest of any one state and the membership in which is both universal and dominated by states which did

not participate in the making of such treaties, the search for the intention of the parties as an aggregate of, say, negotiating parties is artificial and even illegitimate. Objective objectives and the intention of the regime created would become the hermeneutic lighthouse. One can give more examples of this kind.

Third, under the communitarian paradigm there is an international public space, there is an international public policy – there is a Public within public international law as there is a Private within Public international Law.³⁴ States may under this conception be the “masters of the treaty” but they are not masters without normative limits. Jus cogens, but not only jus cogens, may act as limiting factors: Jus Cogens may actually trump a negotiated obligation in a treaty. International public policy (such as sustainability in the field of international environmental law) may play an international “Charming Betsy” role in tie breaking, or swaying judicial discretion when the norms allow such.

Fourth, the context on treaty interpretation must expand to recognize the fragmentation issue and to understand that interpretation in one treaty regimes may have unintended and undesirable impact on overlapping and other treaty regimes.³⁵ International judicial interpreters can no longer shut their eyes to the different international legal context in which “their” treaty is situated.

³⁴ Kingsbury; Doreen Lustig

³⁵ Sardines – Codex etc.

Fifth, the advent of international governance and the expansion of subject matter calls for a reassessment of the role of an 'international judiciary.' The 'clients' of international interpreters are no longer only the Governments of the States which signed the treaties. It is not simply that the treaties affect, directly or indirectly, a myriad of interests, statal and international that differ from the governments themselves, governments whose power is enhanced by the lingering and perhaps inevitable asymmetry of international obligation creation. But also the decision of the interpreter will have such an impact. The decisor must thus be concerned both that in considering the arguments before him or her a broader range of interest should be directly or indirectly represented³⁶ as well as taken into account in the interpretation itself.

Finally, there must come to the act of international judicial interpretation a more dynamic and dialogical self-understanding. The greater ubiquity of third party dispute settlement means that the act of the interpretation is much less, as was the case in the past, a one time, unique event produced by a discrete (marginal) dispute. It is now not only more frequent but more systemic. Interpretation must be seen more as a dialog with an interpretative community in which the decisions of judicial decisors 'dialogue' with other actors within the interpretative community be they governments of the States, courts and legislators within the States, and other non statal and non governmental actors. Within a domestic system this process was described

³⁶ by indirect representation, either as part of governmental briefs, or by opening the process to the public, greater pressure is brought on government agents. See recent practice in NAFTA; BITs and WTO.

decades ago by Calabresi.³⁷ Something similar – tailored to the specificities of the international legal order – could and should emerge.³⁸

Conclusions

Taking these illustrative suggestions together what is ultimately at stake is the bedrock of most theorizing on treaty interpretation by international judicial bodies, namely their role of discerning and giving expression to the intentions of States as Masters of the Treaty.³⁹ This, in my view, is no longer a viable basis given the differentiation of treaties and the complexification of the international legal system as described above. It is true, that when two states find themselves locked in dispute before an adjudicator, the stratum of international law comes most aggressively to the fore. But it is only one stratum.

It should also be understood that what is being considered here is not a call for necessarily aggressive or any form of judicial activism (whatever that may mean) or for an aggressive form of teleological interpretation. What is called for is a differentiated approach to hermeneutics which fits a differentiated international legal order.

³⁷ Common Law in the age of statutes

³⁸ Cf. Cartabia on Taking Dialog Seriously JMWP 12/07

³⁹ Make no mistake: most of the times, even those theories which reject a direct appeal to the intention of the parties and prefer the text of the treaty, base that choice on the bases that the words of the treaty itself are best suited to give expression to the intention of the parties.