HOW THE ADJUDICATORY BODIES WTO COULD READ TRIPS ON A BALANCED WAY

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The purpose of achieving a proper balance in the field of Intellectual Property treaties and International practice pass necessarily by the treatment the pertinent adjudicatory bodies are giving to the legal texts under their consideration. For all practical purposes, the most relevant bodies in this context are those established by WTO.

The issue shall be therefore analyzed here taking in consideration the evolution nature of the specific case law of such bodies, in particular in connection with:

a) Nature of interpretation of international texts
b) Role of recitals and *leitmotiv* provisions
c) Effectiveness of principles versus dispositive norms
d) The Doha interpretation as a subsequent act under art. 31 of the Vienna Convention

Treaty interpretation

The basic instrument to conduct interpretation of treaty norms is, at this moment, art. 31 of the Vienna Convention on the Law of Treaties.
The International Court of Justice displays especial reliance upon such interpretative principles and within the WTO's framework, art. 3.2 of the DSU Agreement has chosen as guideline to interpretation the "customary rules of interpretation of public international law", which has been understood to mean those rules incorporated in the mentioned Vienna Treaty.

In interpreting its own treaty, however, the WTO´s Appelate Body displays a rather restrictive approach. Therefore, the then prevailing approach in the WTO's context (and elsewhere) was to give primary relevance to the textual construction of the segment illuminated by the factual attention, the so-called teleological interpretation being due only when the text under direct scrutiny is not clear as to the purposes of the parties. That approach, which is primary attentive to the direct rules at stake is not especially conducive to a principle-oriented reading.

It is, furthermore, not exactly conformative to mainstream treaty interpretation, which includes in the ordinary meaning the principle of integration, that is, the whole treaty shall be read, and not solely the provision, however clear it may shine in isolation, including, and perhaps, especially, the *stated* objects and purposes of the document. As to the relevancy of external sources, the segment under inspection should be read the whole body of relevant international law, both at the moment of the inception of the treaty and at the moment when the interpretation is done.

It would not seem improper, therefore, to classify the Canada case as a strong but inadequate ground upon which the built a TRIPs reading.
Even though the WTO´s restrictive approach in Canada, a very clear interpretation by

recital trend can be discerned in regard to the Preamble to the Marrakech Treaty. For instance, the Appellate Body report in *Brazil – Desiccated Coconut* invoked the Preamble in the context of the integrated WTO system that replaced the old GATT 1947.
This concept provides for a supra-textual reading of the treaties, which is not extraneous to WTO case law altogether 12, both taking into account the treaty as a whole, including their teleological markings (like preambles) and even other treaties.

Under the standards of ICJ of what should be *the context* (the framework of the entire legal system prevailing at the time of the interpretation), it would seem acceptable even some particular instances of soft law as a relevant rule of international law applicable in the relations between the parties.

The introductory and leitmotiv clauses

A major problem with the balancing concept as an interpretative medium is that some norms are felt as merely *hortatory* and not prescriptive. A third option to the divide prescriptive/hortatory is traditionally the explanatory effect. The norm's rather semiologic reason would be to shed light into the power and will of another norm. However, WTO case law distinguishes at least one possibility that simply explanatory clause turns into a *leading motive* of a segment (or the whole text at stake) on account of its perceived dynamic and recurrence. In one very interesting example 16, WTO case law goes further to recognize to those dynamic particles a more fundamental character, indeed constructing *principles* from what could be taken as explanatory intercurrences.

Taking a clause as to be sounded again and again in such a way as to conduct the meaning of a segment of WTO treaty is held to be a *leitmotiv;* but once the taxonomy of the rules singles out the clause as a separate and distinguished formulation, we would have a *general principle,* to *govern* the ensemble of provisions to which it refers. Constitutional Law construction has similarly developed the notion that there are other normative effects beyond the prescriptive/explanatory/hortatory options. Some norms endowed with effects upon other norms take a dynamic beyond the frontiers of the mere explanation of the "interpreted" norm (to say what the latter *is)* and carry weight upon the actual direction of the subjected norm (where the latter *go).*

This dwornkian perspective is not restricted to Constitutional Law, but is applicable to every circumstance where principles and rules coexist in a legal context. Principles are (as the German jurist Robert Alexy proposes 21) an *optimization mandate* to be carried up to the most ample fashion, "admitting, however, more or less intense application in accordance with the existing legal possibilities, without this compromises its validity"

Within a treaty, principles can be induced (as in the antidumping case mentioned above) or much more easily read from the preambulatory and principle- specific clauses. The first case is illustrated by the long series of principle reading case law concerning the WTO´s 1994 treaty general recitals, as mentioned above, and especially applicable to the TRIPs agreement.

This is specially the case of TRIPs art. 8, labeled "Principles" to dispel any doubts as to its nature. But art. 7, joined by some crucial preambulatory text also thrusts into the ensuing rules a command to *serve a purpose*.

Another important aspect of the dworkian-alexyan approach is that principles are not applied in abstract but in a specific case, in regard to which the choices are to be implemented, upon the chosen value-grounds. In a series of very distinct norms, the WTO case law assumes a much closer principle-fact approach.

That happens in some antidumping cases, where the adjudication took the facts and in some instances the equities of a particular case and the consequences of choosing one outcome over another is part of the process of adjudication. This setting presumes a case-by-case tactic coupled to a balancing scrutiny, which exceeds a mere positivist interpretation.

Rules versus principle norms

Treaties – like any body of law – are free to adopt a rule-exclusive wording. The fact that the WTO treaty as a whole rejected the fragmentary and positivist approach (as indicated in the case law on the WTO´s general preamble) indicate that a rule-only reading is simply extraneous to the WTO law.

Positivist versus vectorial approaches represent in themselves a tension between the ideas of Justice and legal previsibility. The principle norm approach also assumes some sort of active adjudication, which is not just applying the hypothesis to the fact in point, but also weighing the interests (when there is a balancing command) to inhale the specific issue with an adequate supply of equity. This requires an articulate and strong dispute settlement mechanism, which was one of the major improvements of WTO over the previous trade system.

Principle norms command *vectorial* reading. The ambiance drawn in the preambulatory plus art. 7 and 8 norms indicate that they are recognizably *opposing* interests to be given due respect and the possible conciliation. Onesidedness in a vectorial system means wiping out of the competing interest, which is violation of the system.
Effective vectorial law also assumes that all competing interests are to be given some degree of subjective fungibility (any party may be liable to the same rigors of the law, particularly figured in the Rawlsian dilemma of the community approaching a new planet). When some portion of the parties are probably immune from that fungibility - as TRIPs assumes that the least developed countries for the time being are – a rule of *substantive equality* is a requirement of Justice or (in a rather utilitarian perspective) of long term efficiency.

The question whether a vectorial approach in international trade law is safe or wise is a very serious one; developing and developed country interests are not fully fungible, at least on a synchronic perspective, and the diachronic view is not the province of adjudicatory bodies.
Those are real problems. But fact is that – from a *positivist* standpoint – the WTO Agreements include vectorial norms, and *pacta sunt servanda*.
Doha and the evolutive interpretation principle
Another element that should dismiss the authority of the Canada case as the relevant law to interpret TRIPs is the *authentic* reading of the preamble of TRIPs, as well as the art. 7 and 8, by the Doha Ministerial issue, to which we will return below.

It may illustrate our point here a somewhat extended lesson from ICJ.
The issue here is to employ a constructive device under what the Brazilian International Law jurist Maristela Basso calls the Principle of Evolutive Interpretation, resulting from the combination of art. 7 and 8 plus 71.1 of TRIPs, which led to the Doha improvements and in particular the recent enactment of Par. 6 into non-soft norm.

The Doha Declaration states that work in the TRIPS Council on these reviews or any other implementation issue should also look at the relationship between the TRIPS Agreement and the UN Convention on Biodiversity; the protection of traditional knowledge and folklore; and other relevant new developments that member governments raise in the review of the TRIPS Agreement. It adds that the TRIPS Councils work on these topics is to be guided by the TRIPS Agreements objectives (Article 7) and principles (Article 8), and must take development fully into account.

This Declaration amounts to an *authentic* interpretation of the TRIPs agreement that in every practical way turns the formal authority of the Canada Generics case in regard to the role of preambulatory and principle-specific clauses into smithereens.

The vectorial role of TRIPs Art. 7 and 8

Crucial for the developing countries was also the perceived role of the vectorial provisions of art. 7 and 8 of TRIPs. As it would be developed below, those provisions may have also an important role in limiting the scope of post-TRIPS FTAs.

The aspects to be taken into account, to this author's perspective, are the legitimacy of negotiation, if divertive from the balanced approach that TRIPs can be a model; the eventual contestability of over the balance FTAs provisions as compared to TRIPs model; and the eventual bias that unbalanced FTAs may cause towards future multilateral negotiations. A second set of issues is the effects that unbalanced FTAs may have in the internal law of the major negotiating agents (USA and EU), especially through the MFN clauses of the WTO ambiance; and the intrinsic inequality of the agreements where the major party has in fact lesser Intellectual Property obligations than the other party.

Art. 7 and 8 are, beyond any doubt, an *interpretative* tool of the meaning of the TRIPs agreement, and were thus used in the WTO case law especially in connection with the exceptions provided for its Art. 30.

Art 7 balancing device

Article 7 (Objectives) Article 7 of TRIPS provides:

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 7 should therefore be read as a dynamic *interpretative* tool before everything, in a way conducive to the technology transfer; but it stresses especially the *balanced*

nature of the overall agreement. It should be noticed that Art. 7 does not limits itself to technological IPRs, as the final clause (The protection and enforcement of intellectual property rights should contribute (…) to *a balance of rights and obligations*) encompasses a much broader extent.

The idea of balancing is obviously a vectorial device. The necessary balancing to the constitutionality of the IPRs as it is developed in the Constitutional discourse in many relevant countries appears in TRIPs, preventing the exclusive protection of the interests of the IPRs owners.

Art. 8 teleology device

Concluding the general principles (art. 8), the Agreement foresees that each country can legislate, within the scope of TRIPs, to protect the public health and nutrition and to promote the public interest in sectors of vital importance for its economic and technological development.

The conformation to the Agreement

Important consideration, however, is how the article concludes: provided that these measures are compatible with the provisions of the Agreement. Similar provision can be found at the 1947 GATT art XX (b). However, whereas GATT 1947 allows for such measures as non-violative provided that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on *international trade*, Article 8.1, provides that necessary measures must be "consistent with" the Agreement.

Art. 8 read in conformity with WTO law

Our contention is that Art. 8 must be read as a non-discrimination rule by the application of Art. XX of GATT 1947 **43**. The issue of non-discrimination turns therefore to be relevant, if we were to interpret TRIPs art. 8 in harmony with the whole body of the WTO normative system.

The GATT, in its basic body, contains two rules relative central offices to the discrimination of Article I, relative to the Most favored nation (MFN), and of Art. III, that it regulates the call "national treatment".
Thus, the basic principles of non-discrimination are that no member of the WTO can treat other members differently, nor to establish inequality between national and foreign. On other side, reasons exist that justify the discrimination.

The first hypothesis where this can occur is the foreseen one in Art. XXI, relative to the national security, which are of an unconditional effect. Among such norms they are the measures necessary to assure the application of the laws and regulations that are not incompatible with the provisions of TRIPs, such as, for example, the defense to the public health through limitations to the patents of remedies against the AIDS, or the protection of the patents, trademarks and rights of authorship and reproduction, and the measures proper to hinder passing off.

The exception, in this hypothesis, is not unconditional, as in the case of the national security. It is necessary that if it demonstrates that the pertinent measures do not constitute arbitrary or unjustified discrimination, between the countries where the same conditions exist. Or either, that all the foreign countries are treated without discrimination or, having such thing, that the same one is justified. It is necessary also that the measure in question is not a disguised restriction to the international trade. Or either, that the measure, still that has for effect the restriction to the commerce, if does not come back specifically to such end.

The case law after WTO has affirmed the continuance of Art. XX and XXI exceptions. However, under current WTO case law, also the measures implementing national interest should be subject to a standard of minimum impact on the overall purposes of WTO law.
TRIPs Art. 8 read as a non discrimination rule

There is no doubt that there is a normative context common with the basic body of the GATT-1947 and the new TRIPs Agreement. The TRIPs text also is identified clearly as part of the normative system of the OMC.

Moreover, the Agreement enters in vigor after that to the validity of the Treated one instituting the OMC (TRIPS 65, 1) and is used as essential element of the system of solutions of controversies of Articles XXII and XXIII of the General Agreement (TRIPS 64).
WTO Case law and the non discrimination role of TRIPs art. 7 and 8
However misguided in this context, the role of non-discrimination principle of WTO law seems inevitable consideration wherever dealing with TRIPs art. 7 and 8.

The purposes leading to TRIPs art. 7 and 8

Achieving a standard of balancing of interests was clearly a stated target of the developing countries engaged in the negotiation of TRIPs

The treatment of art. 7 and 8 by Case law

The notion of the balancing role of art. 7 and 8 has not, apparently, received to the moment full support in the WTO case law.

The normative environment set by art. 7 and 8

But a somewhat more vigorous hand is felt in the normative exercises, both as an inspiration and grounds for the Group of 77's proposals and actual Doha implementation.

The same inspiration permeates the position of non-governmental actors of the FTAs negotiating environment.

A rule of reason approach to competitive rules

Other relevant effect of art. 7 and 8 of TRIPs occurs in their joint interpretation with art. 40 of TRIPs.

As a more general measure, TRIPs also provides for the adequate balance between competition and Intellectual Property interests. This TRIPs experience is, so this author believes, a very important precedent for the negotiation of competition themes within WTO. For, as it is remarked in the legal literature, Intellectual property rights are essential, but not sufficient, conditions for competition. Both the excessiveness of scope and misuse need to be balanced by way of the regulation of competition.

Even considering that some balance is inherent to TRIPS art. 8, it could be certainly helped by the establishment of some further discipline on private party conduct and competition in the WTO.

The vectorial promise

Balancing of contrasting interests is a crucial issue in IP law. This balancing was held in Bonito Boats as a constrictive limitation to the state power to go beyond the Federal standard. Balancing, whenever achieved, is a positive legal border no to be violated by well meant however misguided exercises in strengthening IP protection.
This author thinks that TRIPs, even though being a minimum standards treaty, also imposes a balancing of interest standard, indicating which interests are relevant. A FTA provision that unreasonably exceeds the levels provided by TRIPs would thrive in one-sidedness. It might be held therefore, following the reasoning of Bonito Boats, as breaching TRIPs.

It neither is nor advanced the idea that TRIPs would prevent protection beyond its minimum level.

But this may happen in some instances. TRIPs also includes *maximum* protection levels and exceeding them may result in violation of such agreement.

Our understanding, however, is that even in areas not covered by those ceiling standards, unbalancing of interests in a unreasonable manner is a breach to the TRIPS.