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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

The 'cash value' of the rules of treaty interpretation

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Abstract

The rules of treaty interpretation are ordinarily met with scepticism not only by critically-minded international law theorists, but also by mainstream international legal scholars who otherwise believe in international law's normative power. The objective of this article is to inquire whether, despite their much-discussed shortcomings, the rules of treaty interpretation have any 'cash value' in the sense given to this expression by one of the founding fathers of the philosophy of pragmatism William James, in other words, whether they make any practical difference. To do so, this article revisits the traditional understanding of the rules of treaty interpretation and argues that they cannot directly bridge the gap between the signifier and signified, but rather are designed to impose a 'common discipline' with respect to the admissible means that can be used in treaty interpretation.

Keywords: cash value; common discipline; rules; scepticism; treaty interpretation

1. Introduction

In the universe of international law, the rules of treaty interpretation occupy a singular place: the claim that they actually direct behaviour of legal operators is met with scepticism not only by proponents of critical approaches or other variations of rule-scepticism, but also by international legal scholars who otherwise believe in international law's normative power. It might not be a stretch to analogize the rules of treaty interpretation with the month-long weather forecasts that Kenneth Arrow and his team of statisticians were tasked to produce during the Second World War. Having realized that their forecasts were almost consistently inaccurate, the team asked to be relieved of its duty, but was told the following: 'The Commanding General is well aware that the forecasts are no good. However, he needs them for planning purposes.'[1] Paraphrasing this story, one could say that international lawyers know full well that the rules of treaty interpretation do not really guide the process of identifying the meaning of treaty provisions, but they continue to use them for other purposes ranging from post-hoc rationalization of the outcomes generally reached through other means to the strategic occultation of law-making commonly thought to be involved in most interpretive decisions.

This general attitude about the rules of treaty interpretation is well captured by the often-repeated adage that treaty interpretation is more akin to art than to science. Exactly what is meant by this adage may not be fully clear, all the more so because the adage itself has several variations. In the most common formulation simply contrasting art and science, the message sought to be conveyed seems to be that, similarly to art, no general rules can be developed as to the best way in

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[1] R. Abdelal and M. Blyth, 'Just Who Put You in Charge? We Did: Credit Rating Agencies and the Politics of Ratings', in A. Cooley and J. Snyder (eds), *Ranking the World: Grading States as a Tool of Global Governance* (2015), 56.

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which interpretation can be practiced.[2] The version originally formulated by the International Law Commission, i.e., 'the interpretation of documents is *to some extent*, an art not an *exact* science',[3] seems, however, subtly different in that the qualifiers 'to some extent' and 'exact' can be taken to suggest that there is something meaningfully law-like and general that can be said about interpretation even though no full predictability or determinacy can reasonably be expected, unlike what happens with general laws formulated by exact sciences. Such nuances aside, the adage that interpretation is an art rather than a science is generally used to suggest that treaty interpretation cannot be subject to regulation in the same way as other issues of international law. This general sense that there is something special about the rules of treaty interpretation is made clear by the fact that the 'art versus science' comparison is rarely, if ever, used with respect to other rules of international law.

Scepticism about the rules of treaty interpretation is sometimes expressed through another dichotomy, namely the distinction between *esprit de géométrie* and *esprit de finesse* introduced by Blaise Pascal.[4] A closer look at Pascal's discussion of the distinction makes clear that the latter is no different from the 'art versus science' dichotomy. According to Pascal, 'accustomed to the exact and plain principles of mathematics, and not reasoning till they have well inspected and arranged their principles, [mathematicians] are lost in matters of intuition where the principles do not allow of such arrangement'.[5] This is so, argues Pascal, because matters of intuition require judging 'at a single glance', in other words, proceeding 'tacitly, naturally, and without technical rules'.[6] When transposed to the domain of treaty interpretation, the Pascalian dichotomy is meant to suggest that interpretation is a matter of intuitive rather than mathematical mind and that, as such, it cannot be a proper subject of legal regulation, since one cannot design technical rules governing intuitions.

Despite what it implies with respect to rule-like constraints over treaty interpretation, the above-described scepticism rarely prevents international lawyers from formulating rules allegedly governing treaty interpretation and discussing them at length, which reminds one of the following thought experiment Wittgenstein proposes in *Philosophical Investigations*: 'I have locked the man up in the room – there is only one door left open.'[7] As Wittgenstein points out, faced with a statement like this, one is tempted to say that the man was not locked up at all. Isn't '[a]n enclosure with a hole in it ... as good as none?'[8]

The present article asks the latter question about the rules of treaty interpretation: if all those rules can manage to give us is '[a]n enclosure with a hole in it', can we say that they are as good as not having those rules at all? Stated differently, the objective of this article is to inquire whether, despite their much-discussed shortcomings, the rules of treaty interpretation have any 'cash value' in the sense given to this expression by William James, one of the founding fathers of the philosophy of pragmatism. In James' writings, the 'cash value' of a concept designates the practical difference, if any, that it makes in actual experience.[9] Asking what the 'cash value' of the rules of treaty interpretation is amounts to asking what practical impact these rules have and whether a world without these rules would be different in a practically meaningful sense from our world.

[2] J. Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), 17.

[3] Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May – 19 July 1966, Draft Articles on the Law of Treaties with Commentaries, 1966 YILC, Vol. II, at 218 (emphasis added).

[4] P. Dailler, M. Forteau, Q.D. Nguyen and A. Pellet, *Droit International Public* (2009) 289.

[5] B. Pascal, *Pensées and Other Writings* (1995) 150.

[6] Ibid.

[7] L. Wittgenstein, *Philosophical Investigations* (1953), para. 99. This paradox was aptly summarized by Julius Stone, see J. Stone, 'Fictional Elements in Treaty Interpretation-A Study in the International Judicial Process', 1954 *Sidney Law Review* 345 ('The canons of interpretation impugned by such skepticism as anything but the most rebuttable of presumptions in particular context, remain sanctified nevertheless by a vast body of doctrine, and by innumerable apparent applications by tribunals. They maintain their hold even in the modern literature, expressions of doubt being usually followed by an account of the canons as if the doubts scarcely existed.'). See also S. Sur, *L'interprétation en droit international public* (1974), 254.

[8] Ibid., para. 99.

[9] W. James, *Pragmatism* (1975), 41, 47.

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In order to respond to these questions, it is helpful to first consider what international lawyers expect from the rules of treaty interpretation (Section 2). It is the contention of this article that the rules of treaty interpretation cannot deliver what is traditionally expected from them, since there is a mismatch between what they are designed to do and their traditionally expected role (Section 3). The last section of this article will revisit the perennial question of whether treaty interpretation is a constrained activity in light of this article's main contention that the rules of treaty interpretation are not designed to govern meaning-ascertainment as strictly understood (Section 4).

2. What do international lawyers expect from the rules of treaty interpretation?

The scepticism generated by the rules of treaty interpretation has much to do with what international lawyers commonly expect from those rules. A closer look at this scepticism seems, thus, appropriate in order to assess the 'cash value' of the rules of treaty interpretation. Admittedly, it would make little sense to assess the 'experiential worth'[10] of the rules of treaty interpretation in light of the fact that they have disappointed a set of expectations if one has no reason to have such expectations in the first place.

A first, frequently-voiced, criticism is that, given their high level of generality, the rules of treaty interpretation are unlikely to be of much assistance in resolving concrete interpretive disputes.[11] This was the position of the European Commission of Human Rights in *Golder* v. *United Kingdom*. Faced with the issue of whether the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT or Vienna Convention) could be applied even though the Convention was not in force yet, the Commission pointed to 'the rather general' character of those provisions and stated that 'For the limited guidance one may find in these provisions, it is … not material whether the Vienna Convention is in force for the contracting parties.'[12] More recently, Joe Verhoeven expressed the view that Article 31 of the Vienna Convention titled 'General Rule of Interpretation' was largely devoid of practical significance, since it was hard to imagine a rule prescribing that one should ignore the terms of the treaty, interpret them in bad faith or without due regard to what the parties sought to achieve.[13] Even the official discourse has abandoned the pretense that the rules of treaty interpretation lead to one single correct meaning, accepting that there may be 'more than one permissible interpretation'[14] or that 'interpretation … leaves room for discussion'.[15]

A second source of discontent with the rules of treaty interpretation is that they are not of immediate application. This criticism in turn can take several forms.

First, it is often pointed out that the rules of treaty interpretation themselves may need to be interpreted. As was nicely summarized by the Greek delegation at the United Nations Conference on the Law of Treaties:

> If a treaty contained one or more rules as to its interpretation, those rules themselves would need to be interpreted, but at that point no rules of interpretation would be available. Even if a treaty provided rules for the interpretation of clauses regarding interpretation, those

[10] G. Cotkin, 'William James and the Cash-Value Metaphor' (1985) 42 *Etc: A Review of General Semantics* 38.

[11] For a pre-Vienna Convention discussion of similar scholarly positions see 'De l'interprétation des traités', Rapport et projets de Résolutions présentés par M. H. Lauterpacht, *Annuaire de l'Institut du droit international* (1950) t. 43-I, Session de Bath, 372 (referring to the general tendency to consider the rules of treaty interpretation as fundamentally lacking in utility).

[12] *Golder v. United Kingdom*, Report of the Commission, 1 June 1973, 16 Publications of the European Court of Human Rights (Series B) 9, at para. 44.

[13] J. Verhoeven, 'Le Point de Vue des Praticiens', (2006) 2 *Revue Belge de Droit International* 451.

[14] 1994 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6(ii) ('Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.'). See also *Empresas Lucchetti, S.A. and Lucchetti Peru v. The Republic of Peru*, Decision on Annulment, 5 September 2007, para. 112 ('it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several').

[15] *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, para. 80.

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> provisions would require to be interpreted by means not contained in the treaty. There [is] a vicious circle and thus it would be vain to set down rules about interpretation.[16]

This difficulty can easily be illustrated. Consider the interpretive directive that the interpreter shall take into account: 'the relevant rules of international law applicable between the parties'. One cannot apply such a rule before first establishing what is meant by 'relevant', 'rules' or 'the parties'.[17] 'Subsequent agreement and subsequent practice' is another example, as shown by the recent lengthy discussion of their possible definitions by the International Law Commission.[18]

Second, because the rules of treaty interpretation make a plurality of interpretive approaches available for use without establishing a meaningful order of priority among those approaches, it is thought that they leave room for a large amount of discretion unregulated by rule-like constraints.[19] While the interpretive regime under the Vienna Convention is presumptively text-based, the latter also prescribes that the terms of the treaty should be considered in light of the treaty's object and purpose, and that the ordinary meaning should be disregarded when it is established that such was the intention of the parties.[20] This was described as 'a bolting-together of conflicting ideas', arguably making Article 31 of the Vienna Convention 'worthless as a general *rule* of interpretation'.[21]

Lastly, it is argued that the 'means' of interpretation to which the rules of interpretation direct the interpreter can hardly resolve interpretive disputes when those means themselves call for interpretation. For instance, the 'ordinary meaning' rule set forth in Article 31 of the VCLT cannot end an interpretive inquiry when the ordinary meaning of the term being interpreted remains open to interpretation or there is more than one plausible ordinary meaning.[22] Similarly, '[i]t is not normal practice in treaty drafting to spell out the "object and purpose" as if one were defining technical terms'.[23] What this means is that the object and purpose of a treaty need to be interpretively identified just as the meaning of the treaty provision they are supposed to

[16]Official Records of the United Nations Conference on the Law of Treaties, Vienna, Austria, First session, 26 March–24 May 1968, UN Doc. A/CONF.39/C.1/SR.32, 32nd meeting of the Committee of the Whole, 172. This point was already made by H.L.A. Hart. H.L.A. Hart, *The Concept of Law* (1994), 126 ('the canons of interpretation ... are themselves general rules for the use of language, and make use of general terms which themselves require interpretation.'). See also A. D'Amato, 'Can Legislatures Constrain Judicial Interpretation of Statutes', 1989 *Virginia Law Review* 562–3 (stating that rules of interpretation call for a 'meta-theory of interpretation', but 'such a meta-theory would constitute a text, and thus itself be in need of interpretation').

[17]Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, circulated 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras. 7.67–7.75; Appellate Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, circulated 18 May 2011, WT/DS316/AB/R, paras. 841–855; 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission', UN Doc. A/CN.4/L.682, 13 April 2006, paras. 424–426, 462–472.

[18]G. Nolte, First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, UN Doc. A/CN.4/660 (2013), paras. 65–118.

[19]On the practical undesirability of this situation see Lauterpacht, *supra* note 11, 376. Official Records of the United Nations Conference on the Law of Treaties, Vienna, Austria, First session, *supra* note 16, 181. See also J.H.W. Verzijl, quoted in J.P. Fockema Andreae, *An Important Chapter from the History of Legal Interpretation: The Jurisdiction of the First Permanent Court of International Justice, 1922-1940* (1948), 75 ('In principle they are all correct, but on concrete application they often abrogate each other and frequently appear worthless.').

[20]Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, *supra* note 18, para. 427 ('it is in fact hard to think of any approach to interpretation that would be excluded from articles 31-32').

[21]P. Allott, 'Interpretation – an Exact Art', in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (2015), 377 (emphasis in original).

[22]A good example is the 'fair and equitable treatment' standard that appears in virtually every investment promotion and protection treaty. It has become common in investment arbitration to point out that finding out the 'ordinary meaning' of the terms 'fair' and 'equitable' would not take the interpretive inquiry very far, since '[they] can only be defined by terms of almost equal vagueness' such as 'just', 'even-handed', 'unbiased', 'legitimate'. See *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 297.

[23]W.A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', (1995) 32 *Canadian Yearbook of International Law* 47.

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help determining. The same is true of *travaux préparatoires*: they cannot be used in support of an interpretation if what they mean is not interpretively determined in the first place.

Although the sceptical charges described above seem to highlight varied concerns, they ultimately stem from one unarticulated expectation, namely the expectation that the rules of treaty interpretation should *directly* establish the meaning of a treaty provision. This expectation in turn rests on the assumption that the point of the rules of treaty interpretation is to bridge the gap between the signifier (the treaty provision being interpreted) and the signified (the meaning of the treaty provision). In other words, it is assumed that when applied to a treaty provision, the rules of treaty interpretation should lead the legal operators to the correct meaning of that provision without the intermediation of anything else.

This assumption is nothing more than the myth of an unmediated access to the signified, and as such, is not specific to the rules of treaty interpretation, or to law for that matter. That no phenomenon is accessible to human mind in an unmediated manner is the primary lesson conveyed by the famous Derridean slogan that 'there is nothing outside of the text'.[24] As Derrida clarified, 'the text' here is not limited to something 'graphic' or a set of signifiers inserted in a book, but refers to 'all possible referents' that are part of what is called 'reality', the point being that the latter cannot be accessed outside 'an interpretive experience'.[25]

But it would be simplistic to believe that the above misapprehensions about treaty interpretation are only due to international lawyers' lack of philosophical sophistication, for they also reflect a structural anxiety about interpretation in general. Law's official image that it reflects governance by rules, not by men who happen to be in charge of administering the latter, can only seem plausible if the domain of interpretation is limited to the minimum. Interpretation represents a danger to the integrity of law, implying as it does a certain level of discretion, which is antithetical to certainty that is seen as an essential part of any legal system worth the name. If the rules of interpretation can justify more than one interpretation without any guidance as to which interpretation is the right one, then the choice of a particular interpretation cannot be said to be imposed by law.[26]

H.L.A. Hart's famous discussion of the separation of law and morals clearly displays this concern. Hart concedes that application of law in 'penumbral cases' is not a mechanical exercise, since it involves consideration of 'aims, purposes, and policies'.[27] But he insists that what is 'centrally important' to law is that it has 'the hard core of settled meaning', which supposedly imposes itself without any interpretive effort.[28] To say that 'all legal questions are fundamentally like those of the penumbra' is, Hart argues, tantamount to saying that 'there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy'.[29] In other words, a legal system would not be a genuine legal system if all of its rules were open to interpretation.

One finds such reluctance vis-à-vis interpretation when international lawyers are confronted with the necessity of interpreting the means of interpretation. For instance, Sir Percy Spender expressed his concerns with the use of *travaux préparatoires* by pointing to 'the danger that, instead of interpreting the relevant treaty or convention, one will find oneself tending to interpret the preparatory work and then transferring that interpretation across to the treaty or convention which is the sole subject of interpretation'.[30] More recently, an arbitral tribunal confronted with Explanatory Notes provided by one of the parties to the treaty as part of its domestic ratification process stated:

[24]J. Derrida, *Of Grammatology* (1976), 158.

[25]J. Derrida, *Limited Inc* (1988), 148.

[26]That is the lesson of Kelsen's theory of interpretation according to which each norm is characterized by a frame of interpretive possibilities, but 'there is no criterion on the basis of which one of the possibilities given within the frame of the norm to be applied could be favored over the other possibilities'. See H. Kelsen, *Introduction to Problems of Legal Theory* (1992), 81.

[27]H. Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 *Harvard Law Review* 614.

[28]Ibid.

[29]Ibid., 615.

[30]*Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 55, at 129–39 (Separate Opinion of Judge Sir Percy Spender).

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> [The tribunal's] task is to interpret the Agreement, not to interpret the interpretative materials, although it must be obvious that no tribunal could bring into play any of the interpretative materials mentioned in Articles 31 and 32 of the Vienna Convention without forming a view as to what the material in question indicates.[31]

What is remarkable in this passage is the tribunal's attempt to limit its interpretive task to the agreement itself, with the tribunal avoiding the very term 'interpretation' in the description of what it sets out to do with respect to the interpretive material at issue. But the euphemistic substitute 'forming a view as to what the material in question indicates' is, of course, no different from interpreting 'the material in question', since the meaning can only be accessed interpretively. As will be shown in the next section, such attempts to evade interpretation evince a fundamental misunderstanding about what the rules of treaty interpretation are designed for.

3. The proper province of the rules of treaty interpretation

To understand where the 'cash value' of the rules of treaty interpretation lies, it would be helpful to look at another discipline in which interpretation plays a central role, namely, literary studies.[32] Theoretical accounts of meaning offered by literary theorists have traditionally differed over the proper role of the author, the text, and the reader in the production of meaning. For some, interpreting a text is a matter of finding out what its author meant.[33] For others, interpretation is only about identifying the meaning of a text.[34] Still others believe that the source of the meaning lies in the readers.[35] It is, however, widely accepted that the plausibility of a particular reading is a matter of interpretive *modi operandi* shared within the discipline of literature. Steven Mailloux labels those modes of reading 'interpretive conventions', which he defines as 'shared ways of making sense of reality' or 'group-licensed strategies for constructing meaning'.[36] Jonathan Culler talks about 'reading conventions' in light of which literary works are read and recognized as pieces of literature.[37] Following Derrida, Robert Scholes refers to 'protocols of reading', which he describes as 'canons' of interpretation.[38] For Stanley Fish, 'recognized interpretive strategies' act as 'canons of acceptability' of particular interpretations.[39] However called, these constraints have a disciplining effect, marking as they do the boundaries of acceptable readings, and their mastery is an integral part of 'literary competence'.[40] No reading of a literary work can lay claim to legitimacy unless it is produced by a recognized mode of reading.

The rules of treaty interpretation can be seen as performing the same function in international law. A reading of a treaty provision is legally competent only if it can plausibly be derived from means to which a treaty interpreter can admissibly have recourse under the rules of treaty interpretation.[41] In this regard, the ruling of the WTO Appellate Body that 'permissible interpretation' is 'one which is found to be appropriate after application of the pertinent rules of the Vienna

[31] *HICEE B.V. v. Slovak Republic*, UNCITRAL, Case No. 2009-11, Partial Award, 23 May 2011, para. 128.

[32] The reason why literary studies are relevant to legal interpretation is that despite obvious differences between the institutional settings surrounding them, there is no epistemological difference between interpretation in law and interpretation in literature: what both are looking for is the meaning of texts.

[33] See S. Knapp and W.B. Michaels, 'Against Theory' (1982) 8 *Critical Inquiry* 723–42.

[34] W.K. Wimsatt Jr. and M.C. Beardsley, 'The Intentional Fallacy', (1946) 54 *The Sewanee Review* 468–88.

[35] J.P. Tompkins (ed.), *Reader-Response Criticism: From Formalism to Post-Structuralism* (1980).

[36] S. Mailloux, *Interpretive Conventions. The Reader in the Study of American Fiction* (1984), 149.

[37] J.D. Culler, *Structuralist Poetics: Structuralism, Linguistics and the Study of Literature* (2002), 132.

[38] R. Scholes, *Protocols of Reading* (1989), 81.

[39] S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980), 347, 349.

[40] Culler, *supra* note 37, at 131–52.

[41] For an analysis of 'the language of international law' in general and interpretation in particular in terms of competence see I. Venzke, 'Is Interpretation in International Law a Game?', in Bianchi, Peat and Windsor (eds.), *supra* note 21, at 356–9. See also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 563–89.

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Convention' can be said to reflect a systemic reality in modern international law.[42] When a reading can plausibly be said to be derivable from particular means of interpretation cannot be a matter of rule-like constraints, since the response depends on numerous variables such as the power of persuasion and the authority of the interpreter or the nature of the audience. What can be, and is, subject to constraints is how the game of interpretation can be played and what moves the players are allowed to make.[43] In this sense, the rules of interpretation are similar to the rules of evidence that govern the introduction and use of evidence in legal proceedings. While they do not dictate the final outcome by themselves, they frame and channel the proceeding that leads to it by acting as the gate-keeper of legitimate interpretive moves.[44] In other words, they determine what 'sources of interpretive data'[45] are admissible, and as such, are part of the 'legal grammar' of international law defined by Koskenniemi as 'the system of production of good legal arguments'.[46]

What constraints such gate-keeping actually imposes on treaty interpreters can again be illustrated by examples from literature. James Miller famously offered a new reading of Eliot's *The Waste Land* according to which, during his stay in Paris, Eliot had developed a love relationship with a Frenchman named Jean Verdenal who was later killed in the First World War, suggesting that *The Waste Land* and some of Eliot's later poems expressed his grief over the loss of Verdenal.[47] Some scholars disputed this reading[48] but often times they did so not because they thought that personal episodes from Eliot's life cannot illuminate his work, but because they challenged the factual accuracy of Miller's account of Eliot's relationship with Verdenal.[49]

Similarly, the letters written by Gustave Flaubert to his mistress Louise Coulet recording his progress with the writing of *Madame Bovary*, and offering his views on the novel's themes, art, literature, and literary criticism are relied upon to interpret *Madame Bovary* to such an extent that those letters are thought to 'form an inseparable pendant to the Bovary project'.[50] Such sources of interpretation are potentially limitless in literature, ranging from personal life of the author to his broader worldviews, provided that they can plausibly illuminate the meaning of a literary work.

Imagine now a treaty interpreter offering an interpretation based on a private letter of a negotiator or an episode of the personal life of the chairperson of a drafting committee that produced the text of the treaty. Such interpretive moves would unlikely be recognized as a competent reading, precisely because they do not fit the repertory of admissible modes of treaty interpretation consecrated by the rules of treaty interpretation.

To appreciate this difference, we can try to imagine a world with a different regime of treaty interpretation. As recognized in practice, there is, in theory, no cogent reason why treaties cannot be interpreted in a manner departing from the rules set forth in the Vienna Convention on the

[42]Appellate Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, adopted 24 July 2001, WT/DS184/AB, para. 60.

[43]A. Bianchi, 'The Game of Interpretation in International Law: The Players, The Cards, and why the Game is Worth the Candle', in Bianchi, Peat and Windsor (eds.), *supra* note 21; M. Waibel, 'Uniformity versus Specialization (2): A Uniform Regime of Treaty Interpretation?', in C.J. Tams, A. Tzanakopoulos and A. Zimmermann (eds), *Research Handbook on the Law of Treaties* (2014), 381–2.

[44]The International Law Commission's reference to 'the means of interpretation *admissible* for ascertaining the intention of the parties' suggests that this is how the Commission itself conceived of the rules of treaty interpretation. See Report of the International Law Commission, *supra* note 3, 219 (emphasis added).

[45]See F. Cioffi, 'Intention and Interpretation in Criticism' (1963-1964) 64 *Proceedings of the Aristotelian Society* 91.

[46]Koskenniemi, *supra* note 41, 568. On the concept of 'legal grammar' see P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1984), 6.

[47]J.E. Miller Jr., *T. S. Eliot's Personal Waste Land: Exorcism of the Demons* (1977), 17–32, 59–77.

[48]I. Ehrenpreis, 'Mr. Eliot's Martyrdom', *The New York Review of Books*, 9 February 1978.

[49]Ibid. For instance, according to Ehrenpreis, the fact that Eliot returned to Harvard in 1911, developed a relationship with Emily Hale and did not go back to Europe until 1914 makes it unlikely that Eliot was then in love with Verdenal.

[50]J.M. Coetzee, *Late Essays 2006-2017* (2017), 106.

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Law of Treaties.[51] One need look no further than the pre-Vienna Convention debates on treaty interpretation in scholarly writings, at the Institut de droit international and in the International Law Commission to realize that such a scenario is not speculative. For instance, writing at the beginning of the twentieth century, John Westlake stated:

> The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilised world.[52]

Charles Cheney Hyde later expressed a similar view:

> As no principle of law deters contracting States from employing the terms of their agreement in any sense they choose, or prevents those charged with the task of interpretation from giving heed to all circumstances probative of the choice actually made, it may be doubted whether the enunciation of technical rules of construction serves a useful purpose. It is the freedom of such States, and likewise of tribunals interpreting their acts, which rather deserves emphasis; and there must be intolerance of whatever serves to obscure perception of it.[53]

In his report to the Institut de Droit International, Lauterpacht defended a similar conception of treaty interpretation, labelling the common intention of the parties 'a predominant factor that must not be sacrificed to presumptions or technical rules of interpretation'.[54] This conception was shared by some members of the International Law Commission during the codification of the law of treaties.[55] The theory that there should be no restriction on the means of identification of the common intention of the parties was also supported by some governments. For instance, the Greek government pointed out that, 'since a treaty is an expression of the common intention of the parties, the only basic rule of interpretation is to ascertain that intention by every possible means in every possible way'.[56]

However, this interpretive philosophy based on the common intention of the parties unrestrained by any rigid rule-like framework did not prevail. The Vienna Convention introduced a double constraint drastically limiting the place of intention in treaty interpretation. First, interpretation under the Vienna Convention is not supposed to start with an autonomous search for the intention of the parties; the interpretive enterprise under the Vienna Convention rests instead on 'the elucidation of the meaning of the text'.[57] This is so not because the common intention of the parties has no relevance under the Vienna Convention but because of the assumption that the

[51]Summary records of the sixteenth session of the ILC, 11 May–24 July 1964, 1964, YILC, Vol. I, 279, para. 61 (statement by A. Verdross: 'States . . . would not be bound by the rules in question because they could agree to use other means of interpretation.') and 280, para. 78 (statement by R. Ago: '[T]he Commission was not creating *jus cogens*. If the parties agreed to interpret the treaty in another way, there was nothing to prevent them from doing so.'); Appellate Report, United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, *supra* note 42, footnote 40 ('It might be possible for the parties to a treaty expressly to agree that the rules of treaty interpretation in articles 31 and 32 of the Vienna Convention do not apply, either in whole or in part, to the interpretation of a particular treaty. Likewise, the parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from the rules of interpretation in articles 31 and 32 of the Vienna Convention.').

[52]J. Westlake, *International Law: Part I Peace* (1904), 282.

[53]C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. II (1922), 69–70.

[54]Lauterpacht, *supra* note 11, 424.

[55]See the statement by Mr. Tabibi, 1964, YILC, *supra* note 51, 276, para. 25 (qualifying 'the intention of the parties' as 'the most important element of any general rule') and the statement by Mr. Bartos, ibid., 279, para. 64 (pointing out that in treaty interpretation, 'the autonomy of the will of the parties was paramount' and that '[w]hat the parties had intended was more important than what they had actually said in the treaty').

[56]1966 YILC, *supra* note 3, 93.

[57]Ibid., at 220. The question whether intention-free interpretation is possible is not taken up here. What matters for the purposes of this article is the officially consecrated mission statement for interpretation under the Vienna Convention.

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text of the treaty is the primary vehicle through which the parties express their intention.[58] Second, under the Vienna Convention, the meaning of a treaty text cannot be elucidated 'by every possible means in every possible way' but by resorting to a limitative set of means, which imposes 'certain common disciplines on treaty interpreters'.[59]

The 'cash value' of these disciplines is clear to every practitioner who has argued a treaty interpretation issue before international adjudicatory bodies. No competent member of the international legal community could believe that an interpretive argument can be made 'by every possible means in every possible way'. On the contrary, it is well understood that an interpretive argument has little chance to succeed if it is not based on a means recognized by the rules of treaty interpretation.

This function of the rules of treaty interpretation is crucial to a successful communication between treaty makers and treaty interpreters. Treaty making is, among other things, an instance of communication between treaty makers and the actors called upon to apply the treaty. As influentially argued by Donald Davidson, a speaker who wants to be understood knows that he must speak 'in such a way that he will be interpreted in a certain way'.[60] But the speaker cannot appreciate how the interpreter will interpret his utterances without forming 'a picture of the interpreter's readiness to interpret along certain lines'.[61] This picture is based on what Davidson calls 'the prior theory' of the interpreter, which reflects how the interpreter is disposed 'in advance' to interpret the speaker's utterances.[62] The success of the communication in this Davidsonian model is, however, a matter of convergence between the respective 'passing theories' of the speaker and the interpreter, namely, 'the theory the speaker intends the interpreter to use' and 'the one the interpreter actually uses to interpret [the speaker's] utterance'.[63] The prior theories and the passing theories may or may not coincide. If there is evidence that the speaker intended the interpreter to use a passing theory different from his prior theory, the interpreter is expected to adjust his prior theory based on such evidence. With more 'speech transaction' and more familiarity between the speaker and the interpreter, their respective prior and passing theories become more aligned with each other and, as a consequence, the success of their communication becomes more likely.[64]

The rules of treaty interpretation form the basis of the theory of interpretation that the international legal operators use in the sense of the Davidsonian model.[65] They, indeed, enable the treaty makers to appreciate how their utterances will likely be interpreted, since they know what 'interpretive data' the interpreters will likely use. To put it in Davidson's terms, the widespread use in practice of the rules of interpretation of the Vienna Convention has given rise to a convergence of the prior and passing theories of the treaty makers and treaty interpreters. This alone would be significant enough, but there is more, since by so doing, the rules of treaty interpretation have made what can be called 'authorial control' over treaty interpretation possible. Treaty drafting would be a meaningless exercise if the treaty drafters had no way to constrain the future treaty interpreters. How treaties are read have an influence on how they are drafted because '[t]o intend a meaning is to postulate reactions of an imagined reader who has assimilated the relevant conventions'.[66] This connection between the rules of interpretation and treaty

[58]Ibid.

[59]Appellate Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, *supra* note 42, para. 60.

[60]D. Davidson, *The Essential Davidson* (2006), 260.

[61]Ibid.

[62]Ibid.

[63]Ibid., at 261.

[64]Ibid., at 260–1. For a recent application of the Davidsonian model to literary works see J. Farrell, *The Varieties of Authorial Intention: Literary Theory Beyond the Intentional Fallacy* (2017), 47–50.

[65]One can fruitfully theorize the difference between the 'ordinary meaning' rule and the 'special meaning' rule set forth in Art. 31 of the Vienna Convention in terms of the difference between the prior theory and the passing theory.

[66]Culler, *supra* note 37, at 34. See also Mailloux, *supra* note 36, 103 ('[S]hared conventions of literary communication determine the range of intended reader response in that they enable the author to predict what his project reader will infer about his intentions.').

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drafting was noted by the International Law Commission.[67] As pointed out by Allott, '[t]he drafters, knowing that the text will be interpreted by others, are seeking to influence their interpretation in advance, to programme it so far as possible'.[68] It is well-known that by varying the level of precision of treaty provisions, the drafters can control the level of discretion enjoyed by treaty interpreters.[69] A treaty provision prescribing that a maritime space between two states with opposite coasts should be delimited by agreement 'in order to achieve an equitable solution' leaves more freedom to the interpreter than the rule stating that a monitoring body is composed of X number of members. But no such control can be exercised if the treaty drafters cannot anticipate what means treaty interpreters will use when interpreting the treaty. An important part of the 'cash value' of the rules of treaty interpretation is that they make such anticipation possible. For instance, the premium placed on textual precision as a way of controlling interpretation has much to do with the prominent status of text-based interpretive moves under the current regime of treaty interpretation in international law. The impact of textualism in this regard was highlighted during the Vienna Conference on the Law of Treaties by the representative of Sweden:

> Whereas the textual approach [does] not entail [the dangers of the subjective approach], it [has] the drawback, or hardship, that it [requires] representatives of States drafting the text of a treaty to consider all the implications of a subsequent textual approach to interpretation in the event of a dispute; it [calls] for energetic efforts to achieve the utmost clarity and completeness in formulating the text of a treaty.[70]

It is also reasonable to assume that, if a particular means of interpretation makes one interpretation look more plausible than another in a specific instance, the fact that it is available to be resorted to would make a difference. A recent empirical study showed, for instance, that whether and under what circumstances *travaux préparatoires* can be used can have a significant impact on interpretive outcomes.[71] A similar point was made by a WTO Panel with respect to the mandate of Article 31(3)(c) of the Vienna Convention that 'any relevant rules of international law applicable in the relations between the parties' be taken into account.[72] In other words, the rules of interpretation matter because 'they mobilize some categories for interpretive duty and leave others uncalled',[73] and in so doing, they impact the outcome of interpretive disputes.[74]

[67]1966 YILC, *supra* note 3, 219 ('the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties').

[68]Allott, *supra* note 21, 380–1.

[69]For a discussion of this phenomenon in the context of investment treaties see C. Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP', 19 *Journal of International Economic Law* (2016) 27–50.

[70]Records of the United Nations Conference on the Law of Treaties, First session, 33rd meeting, *supra* note 16, 179. John Westlake raised similar concerns with regard to textualism, in Westlake, *supra* note 52, 282–3 ('A style of drafting accommodated to the expectation of a very literal interpretation would necessitate the suggestion and discussion of so many possible contingencies, as would be likely to cause needless friction between the representatives of countries not always very amicable.')

[71]Y. Shereshevsky and T. Noah, 'Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts', (2018) 28 *European Journal of International Law* 1287–1316.

[72]Panel Report, European Communities - Measures Affecting the Approval and Marketing of Biotech Products, *supra* note 17, para. 7.70 (stating that consideration of 'other applicable rules of international law [mandated by article 31 (3)(c)] may prompt a treaty interpreter to adopt one interpretation rather than another').

[73]J. Stout, 'What is the Meaning of a Text', (1982) 14 *New Literary History* 7–8 (The term 'they' in Stout's text refers to the interests and purposes of the reader).

[74]J. Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?', (2003) 50 *Netherlands International Law Review* 271.

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4. Is treaty interpretation a constrained activity?

This article has so far attempted to establish that the rules of treaty interpretation do not, by themselves, determine the meaning of treaty provisions, since they only specify what means can be used in the course of that exercise.[75] If one accepts this contention, which basically means that the dedicated rules of treaty interpretation do not control the interpretive process entirely, the question arises whether treaty interpretation can still be characterized as a constrained exercise. Stated differently, what would be the point of knowing which means can be legitimately used in treaty interpretation if the actual use of those means and what can be made of them remains outside the reach of legal rules?

A possible response inspired by Wittgenstein's philosophy of rules could be that the very assumption that treaty interpretation can be meaningfully subject to rule-like constraints only if it is a practice regulated by rules in every aspect is misguided. To use Wittgenstein's game analogy, the game of interpretation is never a game 'everywhere bounded by rules', one 'whose rules never let a doubt creep in, but stop up all the gaps where it might'.[76] But the fact that a game is not bound by rules in every aspect does not necessarily mean that it is not properly rule-bound. As Wittgenstein observes, 'there are [no] rules for how high one may throw the ball in tennis, or how hard, yet tennis is a game for all that, and has rules too'.[77]

This response may, however, not look fully satisfactory. After all, what is left unregulated in the game of tennis is not as consequential as what is left untouched by the rules of treaty interpretation in the overall schemes of these two enterprises. To respond to the question above, we need to revisit our very understanding of the phenomenology of rules. A fundamental point to bear in mind in this regard is that no rule can determine the conditions of its own applications. Even such a simple and arguably universal sign such as showing direction with a finger cannot determine what the proper way of interpreting it is. As Wittgenstein points out, there is nothing in the gesture itself telling us which way we have to go: 'whether in the direction of [the] finger or (for example) in the opposite one'.[78]

Considered in isolation, rules also cannot tell us anything about the identity, object, and purpose of the practice they regulate. As stressed by Hubert Schwyzer, if we were to meet a tribe whose members move the chess pieces around on a chessboard in perfect accordance with the rules of chess, but perform those moves not to win or lose like in the game of chess, but only as an integral part of a sacred rite in order to find out what fate the gods have reserved for the tribe, it would be meaningless to say that they play chess. This is so because 'the rules of a practice do not tell us *what* the practice is of which they are the rules'.[79] The rule that an activity should be treated as a game or a sacred rite is not itself part of the rules governing that activity.[80] What this means is that the 'grammar' of a practice[81] can never be exhausted by its rules, as it is also a function of the attitude of the relevant community towards that practice, the latter's place in the life of the community or what the members of the community consider to be appropriate things to do when they engage in such practice. For instance, it is the grammar of the game of chess, not its rules, that tells us that it is appropriate to ask who won, praise the player because of a particular move or, more generally, see the activity of playing chess as involving a recreational contest and not a sacred rite.[82]

[75]Some rules, such as those set forth in Art. 32 of the VCLT, specify not only what means can be used, but also under what conditions they can be used. But the broader point that they do not, by themselves, determine the meaning of treaty provisions remains valid.

[76]Wittgenstein, *supra* note 7, para. 84.

[77]Ibid., para. 68.

[78]Ibid., para. 85.

[79]H. Schwyzer, 'Rules and Practices', (1969) 78 *Philosophical Review* 464 (emphasis in original).

[80]Ibid., at 463.

[81]The word 'grammar' here is used in the sense discussed by Wittgenstein, see Wittgenstein, *supra* note 7, para. 373 ('Grammar tells what kind of object anything is.').

[82]Schwyzer, *supra* note 79, 455.

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The rules governing treaty interpretation are not an exception in this regard[83] but this does not mean that treaty interpretation is not a regulated activity. The lesson of the Wittgensteinian insights above simply is that the gap between a signifier and a signified is not bridged by a rule-dictated interpretation but by the practice into which the members of the relevant community have been socialized.[84] That the means of treaty interpretation listed in the Vienna Convention have themselves to be interpreted because one cannot determine what a sign means without referring to other signs is not a reason to think that interpretation actually involves an endless process of 'deferral' in the universe of signs.[85] As Roland Barthes observed, a dictionary is 'a vertiginous object', since each word in a dictionary is defined by reference to other words, which in turn, are defined by reference to still other words, with no possibility to put an end to this process in theory.[86] However, when we use a dictionary, we never go through an endless process, since the practice of consulting a dictionary is always informed and shaped by the specific context in which we are involved whose purposes and constraints put an end to a potentially endless regression. The parameters of every interpretive practice are 'always already' known by the competent members of the international legal community, who know that there are only a limited number of options that are plausibly available in the game of persuasion that law largely is about.

This does not mean that interpretive questions leave no room for doubts, but part of being a competent member of a professional community means that one does not experience every theoretically imaginable doubt as an actual doubt.[87] Wittgenstein invites us to imagine 'someone always doubting before he opened his front door whether an abyss did not yawn behind it, and making sure about it before he went through the door'[88] but the fact that we can imagine such a doubt does not trigger actual doubts in our mind each time we attempt to open a door. The legal self does not operate with an empty mind open to any conceivable doubt because it is constituted by the very conventions governing the legal field that 'define and delimit the universe of the thinkable and the unthinkable'.[89] For instance, it internalizes the practical knowledge that 'a text cannot be "legal" if it is open to all meanings'[90] or that the rule of 'ordinary meaning' does not mean that one can 'arbitrarily select dictionary meanings when construing treaty texts'.[91] It knows

[83]The International Law Commission made clear that what it attempted to codify was 'general rules for the interpretation of treaties', but not their conditions of application. Documents of the sixteenth session including the report of the Commission to the General Assembly, 1964, YILC, Vol. II, 200. The Commission explained that '[a]ny attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable'.

[84]Quoted from an unpublished manuscript of Wittgenstein by G.P. Baker and P.M.S. Hacker, *Wittgenstein: Rules, Grammar and Necessity* (1988), 136. See also L. Wittgenstein, *Remarks on the Foundations of Mathematics* (1978), VII-3, 357 ('A rule qua rule is detached, it stands as it were alone in its glory; although what gives it importance is the facts of daily experience.').

[85]As Derrida famously pointed out, the functioning of a sign always implies a deferral of meaning. Because a sign can only be what it is due to its differences from other signs, 'the signified concept is never present in and of itself, in a sufficient presence that would refer only to itself'. But if 'each element appearing on the scene of presence is related to something other than itself', no immediately and presently available meaning is possible, because each element 'keep[s] within itself the mark of the past element, and already let[s] itself be vitiated by the mark of its relation to the future element'. See J. Derrida (translated by A. Bass), 'Différance', in *Margins of Philosophy* (1982), 11, 13.

[86]R. Barthes, *Une problématique du sens, Œuvres complètes* (2002), vol. 3, at 518.

[87]Wittgenstein, *supra* note 7, para. 84.

[88]Ibid.

[89]P. Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (1995), 236. See also C.S. Peirce, *Collected Papers of Charles Sanders Peirce* (1960), 5375 ('The mere putting of a proposition into the interrogative form does not stimulate the mind to any struggle after belief. There must be a real and living doubt.').

[90]O. Schachter, 'Metaphor and Realism in International Law', in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (2004), 213.

[91]Official Records of the United Nations Conference on the Law of Treaties, First Session, *supra* note 16, 177. See also *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, para. 270 ('The standard set out in article 31(1) of the Vienna Convention, that a treaty is to be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty", can by no stretch of the imagination be read as imposing a sort of lexicographical literalism.').

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what is appropriate and what is not appropriate to argue in view of the history and structure of the discipline. What this means is that the fact that interpretive decisions remain 'choices'[92] does not make them arbitrary because the legal operators do not see all the choices as 'equally choiceful' as a result of their socialization into such 'para-legal' conventions.[93]

5. Conclusion

The main question raised in this article is whether the rules of treaty interpretation have any 'cash value' despite the virtually universal scepticism expressed about their constraining power over interpretation. This article has attempted to unpack this scepticism by showing that it is based on a misguided assumption about what we can expect from the rules of treaty interpretation. Because the rules of treaty interpretation are not designed to directly bridge the gap between the signifier and the signified, the standard scepticism with respect to those rules largely misses the point. The function of the rules of treaty interpretation is not to directly determine the meaning of treaty provisions but to impose a 'common discipline' as to the legitimate means that can be used in the process of determining that meaning. This explains why the rules of treaty interpretation of the Vienna Convention can be said to apply to '*any* treaty, in *any* field of public international law ... irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned'.[94]

Does this make enough of a difference to justify the existence of the rules of treaty interpretation, bearing in mind that those rules say nothing else about how the meaning of treaty provisions is determined? As this article has attempted to show, there are two reasons why the response to this question is a resounding 'yes'. First, even if we were to see the rules of treaty interpretation as establishing a regulatory regime that gives us an enclosure with a hole in it, this does not mean that such an enclosure is as useful as none at all. As pointed out by Baker and Hacker, '[i]f there is only one hole in an enclosure, then there is only one way out, and we need to keep an eye on one point only'.[95] If all the rules of treaty interpretation could do is specify a limited set of means that can be used in the process of meaning-ascertainment then they at the very least exclude the means that have not received the imprimatur of those rules.

Second, the fact that the province of the rules of treaty interpretation is limited does not mean that 'anything goes' in treaty interpretation. A practice can never be determined or exhausted by the formalized rules designed to regulate it; it is also defined by a series of informal conventions governing the relevant actors' attitudes towards it and determining what they consider to be permissible or appropriate things to do when they engage in such a practice. Those conventions limit the freedom of treaty interpreters, making sure that even though in theory, interpretive decisions involve choices, in practice, treaty interpretation is a constrained activity.

[92]Koskenniemi, *supra* note 41, 585.

[93]A. Rasulov, 'Book Review of "From Apology to Utopia: the Structure of the International Legal Argument" by Martti Koskenniemi', (2006) 16 *Law & Politics Book Review* 590.

[94]Appellate Report, United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, *supra* note 42, para. 60. The traditional explanation for the widespread use of the Vienna Convention's rules of treaty interpretation is their 'generality' and 'flexibility'. See, e.g., C. McLachlan, 'The principle of systemic integration and Article 31 (3)(c) of the Vienna Convention', (2005) 54 ICLQ 293; Waibel, *supra* note 43, 380.

[95]G.P. Baker and P.M.S. Hacker, *Wittgenstein: Understanding and Meaning Part II* (2009), 222.

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