International Law

Academic year 2019-2020

The Theory and Practice of Treaty Interpretation

DI103 - Printemps - 6 ECTS

Tuesday 10h15 - 12h00

Course Description

Long relegated to the narrow boundaries of legal technique by a purportedly rule-based, mechanical approach, the process of treaty interpretation has recently gained prominence as a matter of great importance, both as a form of practice and as an object of intellectual investigation. After exploring the historical development of treaty interpretation from the early days of international law to the 1969 Vienna Convention on the Law of Treaties, the course will broach the main approaches (textualism, intentionalism, purposeful interpretation, systemic integration etc.) and will critically reflect on the reasons that account for the treaty interpretation regime prevailing in the international legal discourse today. It will also examine the politics of treaty interpretation in various areas of international practice, ranging from constitutive treaties of international organizations to human rights and investment arbitration. Ultimately, this interactive course aims at spurring a critical understanding of the interpretive processes in the various contexts in which they arise.

Syllabus

Format:
Interactive course - 25 students maximum.

Teaching Methodology:
The instructors will jointly teach each session using the Socratic method. Students are expected to read the class materials in advance in order to be able to participate in class discussion. Attendance of the course is compulsory.

Tutorials (Optional):

The TA of this course will hold a total of 3 optional tutorial sessions for this course. The purpose of these sessions is to help students review the basic concepts mentioned in the course, as well as address any questions that the students may have in their learning process. The specific timing for these tutorials will be disclosed later in the semester.

Evaluation:

Evaluation is exclusively based on the final exam. The final (twenty-four hour take-home) exam will consist of two questions (one essay question plus one text to comment upon). The date of the final exam will be advised in the first class.
Class Schedule

Tuesday 18 February 10h15 (Salle S5)

1. Setting the Stage: Interpretation and its Stakes

Questions:

- What is the act of interpreting a treaty really about?
- What interests are involved in the process of treaty interpretation?
- Who is entitled to interpret treaties? Does it make a difference who interprets them?
- What are the implications of taking a rule-based approach to treaty interpretation?

Readings:

- Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3.2.
Tuesday 25 February 10h15 (Salle S5)

2. A Genealogy of the Contemporary Regime of Treaty Interpretation

Questions:

- What has been the intellectual history of treaty interpretation? Does it matter?
- How did the codification process before the International Law Commission go? Was the codification of interpretive rules uncontroversial?
- What place does the Vienna Convention have in the contemporary treaty interpretation regime?

Readings:

- First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the two Republics (1896) 28 RIAA 215, 216.
Tuesday, 3 March 10h15 (Salle S5)

3. Textualism’s Unfulfilled Promises

Questions:

- Does a text have a meaning in and of itself?
- Is text autonomy a myth?
- What kind of interests does textualism foster? What functions does it perform?

Readings:

- Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Judgment) (1994) ICJ Rep 6, para. 41.
Tuesday 10 March 10h15 (Salle S5)

4. Intentionalism: A Lost Cause?

Questions:
- Why does intentionalism play a marginal role in treaty interpretation?
- Is intentionalism about ‘reading’ States’ minds?
- Is there such a thing as an intention-free interpretation?

Readings:

Tuesday 17 March 10h15 (Salle S5)

5. What’s the Purpose of ‘Object and Purpose’?

Questions:
- How does one determine what the object and purpose of a treaty are? Can there be different objects and different purposes in the very same treaty?
• What use has been made of the ‘object and purpose’ test in the practice of treaty interpretation?
• How does the ‘object and purpose’ criterion relate to other criteria of treaty interpretation?

Readings:
- International Law Commission, ‘Reservations to treaties: Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011’ (A/CN.4/L.779), 19 May 2011, Section 3.1.5.1.
- *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction) (2002) ICSID Case No ARB/02/6, paras. 113-135.
- *RSM Production Corporation v Grenada* (Award) (2009) ICSID Case No ARB/05/14, para. 383.

Tuesday 24 March 10h15 (Salle S5)

6. Supplementary Means and their Scope

Questions:
• Is the notion of ‘supplementary means’ limited to ‘travaux préparatoires’ and ‘circumstances of conclusion’?
• What criteria of interpretation other than those codified in the Vienna Convention are ordinarily used in treaty interpretation?
• Are ‘supplementary means’ really ‘supplementary’ in the process of treaty interpretation?

Readings:


Methanex Corp. v United States of America (Final Award of the Tribunal on Jurisdiction and Merits) (2005) NAFTA/UNCITRAL Tribunal, Part II, Chap. H, para. 25.


HICEE B.V. v The Slovak Republic (Partial Award) (2011) PCA/UNCITRAL Tribunal, para. 128.


Tuesday 31 March 10h15 (Salle S5)

7. The Magic of Systemic Integration

Questions:

- In what context did the principle of systemic integration originate? What are the presuppositions behind the principle?
- What function can it perform? How did the ILC use it?
- How can the principle of systemic integration be reconciled with the limited jurisdiction of international tribunals?

Readings:


Tuesday 7 April 10h15 (Salle S5)

8. The Implied Powers Doctrine

Questions:

- What powers can be deemed to be ‘implied’?
- How has the doctrine been used in international case law?
- What purposes does the doctrine serve? Are there limits to its potential application?

Readings:

Tuesday 21 April 10h15 (Salle S5)

9. Regime-Specific Issues

Questions:

- Do some treaties in particular areas of international law warrant specific rules of interpretation? If so, what would these be?
- Is there a danger in conceiving of treaty interpretation as regime-specific?
- Can one identify a ‘politics of treaty interpretation’ in different areas of international law?

Readings:


Tuesday 28 April 10h15 (Salle S5)

10. Time and Treaty Interpretation

Questions:

- Is evolutionary interpretation limited to specific categories of treaties, and can it be used strategically?
- Are treaties unaffected by the passage of time?
- How does ‘subsequent practice’ impact on treaty interpretation? Can it produce effects that are tantamount to treaty amendments?
- Can practice affect treaty interpretation? If so, how?
Readings:

- Aegean Sea Continental Shelf (Greece v. Turkey) (Judgment) (1978) ICJ Rep 3, paras. 77-79.


Copenhagen Declaration 2018 to the European Convention on Human Rights

Tuesday, 5 May 10h15 (Salle S5)

11. Text, Author and Control

Questions:

- Can a treaty text be orphan?
- How can States exercise control on treaty interpretation?
- What is the value of authentic interpretation? How does it compare to other types of interpretation?

Readings:

- ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1 (Award), 9 January 2003, paras. 175-192.
- Submission of the Australian Government, Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to Life.
Japan’s Comments on the Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights.


Statement by Honourable Given Lubinda, Minister of Justice, at the 18th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 2 December 2019, The Hague.

Tuesday, 12 May 10h15 (Salle S5)

12. Interpretation as a Game

Questions:

- What are the pros and cons of thinking of treaty interpretation as a game?
- Who are the players and how do they play? Can there be strategies at play?
- Why is it that everybody seems to be convinced that the game is worth playing?

Readings:

Andrea Bianchi, ‘The Game of Interpretation in International Law: the Players, the Cards, and why the Game is Worth the Candle’, in Andrea Bianchi and others (eds), Interpreta
tion in International Law (Oxford 2015) 34-57.


Tuesday, 19 May 10h15 (Salle S5)

13. ‘The Interpreter's Self': freedom and constraints in treaty interpretation

Questions:
- What may one mean by ‘interpretation is a process’?
- What are ‘cognitive frames’ and how are they supposed to operate?
- What other insights drawn from other disciplines can be used in thinking about treaty interpretation?

Readings:


Tuesday 28 May 10h15 (Salle S5)

14. Conclusions

Questions:

• Does it make a difference to do interpretation and to think about interpretation?
• What is the interplay between power and persuasion in treaty interpretation?
• Is law interpretation?