In this chapter, the principles for the interpretation under international law will be presented and analyzed, with a particular emphasis on interpretation of treaties. These principles will then be used to identify relevant interpretative material from human right treaties and TRIPS, and to a lesser extent one other treaty (UPOV), which is relevant to this study due to a particular reference in the TRIPS Agreement. While provisions from the CDB and the ITPGRFA and their implementing bodies will be included in the analysis in Part IV of this study, interpretative material arising from these treaties will not be analyzed in a systematic manner here.

3.1 Interpreting Treaties

A comparison of treaties belonging to different realms of international law poses challenges. On the one hand, international human rights law is understood to be fundamentally different from international economic law, to which TRIPS belongs. On the other hand, both the Covenant and TRIPS establish obligations on the States parties with regard to individual rights, based on the relationship between certain products and the enjoyment of rights. Moreover, authors’ rights are recognized as human rights, in accordance with Article 15.1(c) of the Covenant. Therefore, the two treaties might be more similar than they appear at a first glance.

After presenting a non-exhaustive list of interpretative material under international law, principles for comparing treaties will be outlined. An explanation of the distinctions between interpretation and application of treaties, and between a treaty’s object and its purpose will be offered, as these distinctions are of importance for the analysis in Part IV.

3.3.1 International Law in Interpretative Material

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereafter: VCLT) and Article 38 of the Statute of the International Court of Justice (SICJ) identify certain interpretation principles under international law. Together, they make up a list which cannot be considered to be exhaustive.
The following interpretative material is listed in Articles 31 and 32 of the Vienna Convention (VCLT) and Article 38 of the Statute of the ICJ (SICJ):

– the wording of the treaty (VCLT Article 31.1 and SICJ Article 38.1(a));
– the preamble and annexes to the treaty (VCLT Article 31.1);
– any agreement relating to the treaty which was made between all its parties in connection with the conclusion of the treaty (VCLT Article 31.2(a));
– any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty (VCLT Article 31.2(b));
– any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (VCLT Article 31.3(a));
– any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (VCLT Article 31.3(b));
– international custom (SICJ Article 38.1(b));
– any relevant rules or principles of international law (VCLT Article 31.3(c) and SICJ Article 38.1(c));
– judicial decisions (supplementary means of interpretation) (SICJ Article 38.1(d));
– preparatory work (supplementary means of interpretation) (VCLT Article 32);
– the teachings of the most highly-qualified publicists of the various nations (supplementary means of interpretation) (SICJ Article 38.1(d));
– reasonableness, to confirm or determine the meaning of terms (supplementary means of interpretation) (VCLT Article 32).

There is a distinction between primary and supplementary means of interpretation. Agreed subsequent practice in the application of a treaty or subsequent agreement regarding the interpretation of a treaty thus have a higher status than judicial decisions, which are merely considered as a supplementary means of interpretation. In practice, however, judicial decisions are emphasized, while it is not evident what qualifies for being considered subsequent practice in the application of, or subsequent agreement regarding the interpretation of, a treaty. These issues will be further addressed later in this chapter, analyzing judicial decisions by the WTO dispute settlement system and human rights declarations, resolutions and general comments.

### 3.3.1 Interpretation and Application of Treaties

Two different, but related concepts will be clarified: the principle of intertemporal law, and the principle of effectiveness in treaty interpretation, emphasizing the former. A clear understanding of the application and limitation of these concepts is important in the interpretation of treaties. The Covenant was adopted 40 years ago, and as with other

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1 Note that these are interpretative materials under international law, or rather materials containing interpretative arguments or statements. A different list would emerge if the intention were to make a list of sources of international law; see Pauwelyn 2003c, p. 89, see also pp. 40-52, who identifies as sources: treaties, custom, general principles of law, unilateral acts of States and acts of international organizations. On the distinction between the latter two, see ibid, pp. 143-147.