Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Contents

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A. Purpose and Function

1 No legal text drafted by man can possibly be perfect in a way that it never gives rise to any doubt as to its scope or actual meaning. That is why every legal text, on the international as well as on the national level, needs to be interpreted by those working with it. The application of a legal rule in practice presupposes that the person applying it has got a certain understanding of its scope, contents and relevance, thus **interpretation is indispensable** not only for understanding a rule, but also for the process of applying or implementing it. Since the most important rules of international law are today laid down in treaties, the interpretation of treaties has become of utmost significance for the practice of international law.

2 Interpretation is the process of **establishing the true meaning** of a treaty. The VCLT rules on interpretation, it is rightly said, reflect an attempt to designate the elements to be taken into account in that process, and to assess their relative weight in it, rather than to describe, let alone prescribe, the process of interpretation itself.[1] Art 31 in laying down the so-called general rule of interpretation formulates a couple of generally accepted principles on the elements and means of treaty interpretation. These principles are mostly drawn from international judicial and arbitral practice, as it had developed since the late nineteenth century, and they were adopted by the ILC as a pragmatic compromise avoiding to follow one particular doctrine or theory of treaty interpretation. Also, since it considered the interpretation of documents to be to some extent an art, not an exact science, the Commission disavowed the idea of proposing an elaborate code or canon of interpretation, but deliberately confined itself to **some fundamental rules** recourse to which is, moreover, discretionary rather than obligatory.[2]

3 The task of interpretation is, as *McNair* put it, "giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[3] If thus interpretation is always directed at bringing to bear the intention of the parties, it can only do so to the extent that that intention has found adequate expression in the text of the treaty. Also, the other way round, the wording of a treaty has in the **textual approach** followed by Art 31 para 1 the prime role in interpretation because it is presumed to be an authentic expression of the intention of the parties.[4] This is confirmed in the ICJ practice when the Court points out that interpretation must be based "above all upon

[1] *Sinclair* (1984), p. 117.

[2] *Cf* Final Draft, Introductory Commentary to Arts 27–28, 218, para 4.

[3] *McNair* (1961), p. 365 (emphasis omitted).

[4] Final Draft, Commentary to Art 27, 220, para 11.

the text of the treaty".[5] To be ascertained by interpretation is thus the intention in the sense of the true meaning of the treaty rather than the intention of the parties distinct from it.[6]

On the other hand, the text of a treaty as it stands since the time of its conclusion is not all that matters for an interpretation *lege artis*. Art 31 para 3 requires taking account of subsequent developments, agreements between the parties and practice in applying the treaty, and thus seems to focus on the **current consensus of the parties** in understanding the treaty. That consensus, which exists at the time of interpretation, may in some cases even override the original understanding of the text of the treaty, which prior to the subsequent developments may have appeared perfectly clear. **4**

In order to structure the process of interpretation, Art 31 is designated to contain 'the general rule' of treaty interpretation. The singular mode emphasizes that the provision **contains one single rule**, that contained in para 1, and that its three main elements, wording, context and object and purpose, as well as the guiding principle of good faith, constitute integral parts of that rule and have to be applied in a single combined operation.[7] Art 31 paras 2 and 3 specify what is meant by "context" and are thus closely linked to para 1. Both provisions may appear to draw a distinction between intrinsic and extrinsic means of interpretation: para 2 sets out certain integral elements of the context rule, as it lists what is "comprised" by the context, whereas para 3, rather than designating yet other elements of context, lists interpretative means to be used along with the context. However, despite that different wording, both paragraphs are designed to incorporate the elements of interpretation set out therein into the general rule contained in para 1.[8] Art 31 para 4 contains an exception to para 1 for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term contained in a treaty provision by a special meaning. **5**

It is by now generally recognized that the provisions on treaty interpretation contained in Arts 31 and 32 **reflect pre-existing customary international law**. For many years now, the ICJ has applied the rules of interpretation laid down in the Convention as codified custom to virtually every treaty that came before it.[9] The first explicit endorsement of the customary character by the Court seems to have been in the 1991 judgment on the *Arbitral Award of 31 July 1989* (*Guinea Bissau v Senegal)*, where the Court stated that the pre-existing principles of treaty interpretation **6**

> "are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point."[10]

[5] *Cf eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279, para 100.

[6] *Gardiner* (2015), p. 6.

[7] Thus Final Draft, Commentary to Arts 27–28, 219–220, para 8.

[8] Final Draft, Commentary to Arts 27–28, 220, para 8.

[9] This process of growing acceptance was already aptly described by *Torres Bernárdez* (1998), p. 721 *et seq.*

[10] ICJ *Arbitral Award (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53, para 48.

Affirmations to the same effect can be found throughout the subsequent jurisprudence of the Court, with the words becoming more sweeping in more recent cases.[11] Despite the hesitation seemingly expressed in the quoted phrase of 1991 ("in many respects"), the ICJ never attempted to differentiate between rules contained in Arts 31 and 32 that are and those that are not binding customary law. While in practice, the Court often relied only on the first paragraph of Art 31, it also had the opportunity to confirm the customary law character of para 3[12] and even that of para 3 lit c[13] of that article. Although, at first, it hardly ever mentioned Art 33 in this context, the Court occasionally applied the rules laid down in that provision as equally reflecting customary international law.[14] The view of the ICJ that the Vienna rules of interpretation are without any distinction universally binding as customary international law is **widely shared by other international courts**, such as ITLOS,[15] the ECtHR,[16] the ECJ[17] and the dispute settlement bodies

[11] *See eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 18; *LaGrand* [2001] ICJ Rep 466, para 99; *Avena Case* [2004] ICJ Rep 12, para 83; *Construction of a Wall* [2004] ICJ Rep 136, para 94; *Genocide Case* [2007] ICJ Rep 43, para 160; *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 47; *Pulp Mills* [2010] ICJ Rep 14, para 65; *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, para 57; *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 33; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 63.

[12] *Cf* ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 48; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 37; *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, para 112.

[13] *Cf* ICJ *Oil Platforms* (Merits) [2003] ICJ Rep 161, para 41.

[14] *Cf* ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 25; *LaGrand* [2001] ICJ Rep 466, para 101.

[15] ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, para 57.

[16] For the first time in ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 29 (1975); later *eg* in *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, para 43; *Litwa v Poland* App No 26629/95, ECHR 2000-III, para 57; *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 55; *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, ECHR 2005-I, para 111. In more recent decisions the Court simply, and explicitly, draws on Arts 31 to 33 VCLT in interpreting the European Convention, thereby necessarily implying the customary character of the former, *cf Saadi v United Kingdom* (GC) App No 13229/03, 29 January 2008, paras 61–62; *Demir and Baykara v Turkey* (GC) App No 34503/97, 12 November 2008, para 65; *Al-Saadoon and Mufdhi v United Kingdom* App No 61498/08, 2 March 2010, para 126; *Hirsi Jamaa et al v Italy (GC)* App No 27765/09, ECHR 2012-II, para 170; *Hassan v United Kingdom (GC)* App No 29750/09, ECHR 2014-VI, para 100.

[17] The ECJ usually refers to the rules of Vienna Convention when it interprets agreements of the European Community/Union, *cf* ECJ *Opinion 1/91* [1991] ECR I-6079, para 14; *Metalsa* C-312/91 [1993] ECR I-3751, para 12; *El-Yassini* C-416/96 [1999] ECR I-1209, para 47; *Jany* C-268/99 [2001] ECR I-8615, para 35; *Brita* C-386/08 [2010] ECR I-1289, paras 41–42. Explicitly labelling Art 31 a codification of general international law ECJ *Axel Walz* C-63/09 [2010] ECR I-4239, para 23.

of the WTO,[18] as well as by many arbitral institutions[19] and some national courts.[20] Finally, the customary character of the Vienna rules has by now found expression in treaty practice itself.

> *Eg* in Art 14.16 of the Free Trade Agreement concluded on 16 October 2010 between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, directs the arbitration panel, that is to be established in case of disputes, to interpret the Agreement "in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties".[21] Similarly, with tiny, but significant alterations, Art 317 of the Trade Agreement between the EU and its Member States and Colombia and Peru (26 June 2012) directs the panel to "the customary rules of interpretation of public international law included in the Vienna Convention on the Law of Treaties".[22]

Therefore, if the rules laid down in Arts 31–33 reflect universal custom, they can **7**
in principle be **applied to all treaties outside the scope of the Convention**. This concerns, first, treaties concluded before the Convention entered into force (1980),[23] and, second, treaties between States that are not all parties to the

[18] *Cf* the WTO Appellate Body *eg* in *Japan–Alcoholic Beverages* WT/DS 8, 10–11/AB/R, Part D, 10–12 (1996); *US–Hot-Rolled Steel* WT/DS184/AB/R, para 57 (2001); *US–Gambling* WT/DS 285/AB/R, para 159 (2005); *US–Stainless Steel (Mexico)* WT/DS344/AB/R, para 76 (2008); *China–Auto Parts* WT/DS339, 340, 342/AB/R, para 145 (2008); *China–Publications and Audio-visual Products* WT/DS363/AB/R, para 348 (2009); *US–Clove Cigarettes* WT/DS406/AB/R, para 258 (2012).

[19] *Cf eg* the *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, para 45; *Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v France)* (2004) 25 RIAA 267, paras 58–62; Iran-United States Claims Tribunal *United States, Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 53; *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v Germany)* (1980) 59 ILR 494, para 16.

[20] *Eg* House of Lords (UK) *Fothergill v Monarch Airlines Ltd* [1980] UKHL 6, [1981] AC 251, 282 (Lord Diplock); *R (Adan) v Secretary of State for the Home Department* [2002] UKHL 67, [2001] 2 AC 477, 516 (Lord Steyn); Federal Constitutional Court of Germany (Chamber) [2015] NVwZ 361, para 37; for Australia and New Zealand Federal Court *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] 187 FCR 282, para 11 (Finkelstein J); Court of Appeal *Lena-Jane Punter v Secretary for Justice* [2004] 2 NZLR 28, para 61 (Glazebrook J).

[21] [2011] OJ L 127, 6, at 68.

[22] [2012] OJ L 354, 3, at 93.

[23] *Cf eg* ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 20 (interpretation of treaty of 1890); *LaGrand* [2001] ICJ Rep 466, para 99 (ICJ Statute); *Avena Case* [2004] ICJ Rep 12, para 83 (Vienna Convention on Consular Relations); *Construction of a Wall Opinion* [2004] ICJ Rep 136, para 95 (Geneva Convention IV); *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 47 (treaty of 1885); *Pulp Mills* [2010] ICJ Rep 14, para 65 (treaty of 1975); *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, para 57 (treaty of 1952); ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, para 58 (UNCLOS).

Convention,[24] which is also acknowledged by third States not parties to the Convention, such as the United States or France: the diplomatic practice of the US administration, as well as the overwhelming part of US court practice, reflect the view that the Arts 31–33 VCLT do express binding customary norms.[25] France has acknowledged the same at the occasion of arbitral proceedings.[26] Third, the Convention rules on interpretation can as customary rules be applied to instruments that due to their character fall outside the scope of the Convention, such as unwritten treaties or treaties between States and other entities treated as subjects of international law.

B. Historical Background and Negotiating History

8 Since interpretation is an indispensable operation in applying and implementing treaties, the problem of treaty interpretation has been part of international law for as long as treaties have been concluded between entities as subjects of international law. It is generally said that it was with *Grotius*, *Pufendorf* and *Vattel* in the seventeenth and eighteenth centuries that the **first efforts** were made to identify detailed rules for treaty interpretation and to shape them into codes.[27] Increasing resort to arbitration from the late nineteenth century onwards resulted in a growing repository of decisions interpreting treaties, while interpretative practice on the universal level gained momentum with the **case law of the PCIJ**. Its approach to treaty interpretation foreshadowed several elements of what later became the rules of the VCLT. Those elements included, *eg*, the natural meaning of terms reflecting their ordinary usage,[28] taking into account as context other provisions of the same treaty and provisions of similar treaties,[29] considering the manner in which a treaty has been applied,[30] the historical development of the particular area of law,[31] the nature and purpose of treaty clauses,[32]

[24] *Cf* explicitly ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 37; *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, para 112.

[25] *Cf* the references given by *Criddle* (2004), pp. 443–447.

[26] *Cf Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v France)* (2004) 25 RIAA 267, para 57.

[27] *Gardiner* (2015), p. 58.

[28] *For example,* PCIJ *Exchange of Greek and Turkish Populations* PCIJ Ser B No 10, 20 (1925); *Polish Postal Service in Danzig* PCIJ Ser B No 11, 37 (1925); *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 49 (1933).

[29] *Cf eg* PCIJ *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* PCIJ Ser B No 2, 23 (1922); *SS 'Wimbledon'* PCIJ Ser A No 1, 23 and 25–28 (1923).

[30] *Cf* PCIJ *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)* PCIJ Ser B No 15, 18 (1928).

[31] *Cf* PCIJ *The Factory at Chorzów (Indemnities)* (Jurisdiction) PCIJ Ser A No 9, 24 (1927).

[32] *Ibid* 24–25.

the supplementary value of preparatory work[33] or the harmonization of different language versions of a treaty.[34]

9 One of the first well-known efforts in codifying the law of treaties was undertaken under the auspices of the Harvard Law School and resulted in the **Harvard Draft Convention** on the Law of Treaties published in 1935.[35] It contained not only proposed provisions on interpretation but also detailed commentaries expounding and analyzing legal literature and case law on the subject.[36] Its provision on interpretation (Art 19) was based on a rigorous teleological approach in that it placed major emphasis on achieving the "general purpose which the treaty is tended to serve".[37] In order to determine that purpose, several elements were to be considered, such as the "historical background of the treaty, *travaux préparatoires*", "the circumstances of the parties at the time the treaty was entered into", "the subsequent conduct of the parties" in applying the treaty and "the conditions prevailing at the time interpretation is being made".

10 Under the UN Charter, the **ICJ in its early years** developed its techniques of treaty interpretation mainly by building on the jurisprudence of the PCIJ, but at the same time extending and refining the main principles. In his famous analysis *Fitzmaurice* deduced **six major principles** from the Court's case law during the 1950s[38]: according to the *principle of actuality or textuality,* treaties are to be interpreted as they stand, and on the basis of their actual texts. This maxim is as fundamental as the *principle of the natural and ordinary meaning* which the Court formulated for the first time in the *Competence of Admission* case:

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur."[39]

This preference for the natural and ordinary meaning of the terms of a treaty can be found in several of the Court's early cases.[40] In the quoted passage, the ICJ, by pointing to the context of the treaty, also underlined the *principle of integration*, *ie* that a treaty must always be read as a whole. The *principle of effectiveness* according to which treaties are to be interpreted with reference to their declared or apparent objects and purposes, was applied by the Court at many occasions, among the first being the *Corfu Channel* and the *Reparation for Injuries* cases. While in the former, the Court, referring to the case law of the PCIJ, held quite generally that

[33] *Cf eg* PCIJ *'Lotus'* PCIJ Ser A No 10, 16–17 (1927).

[34] *Cf* PCIJ *Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 19 (1924).

[35] *Cf* Harvard Draft (1935) 29 AJIL Supp, 657 *et seq*.

[36] Harvard Draft 937–977.

[37] Harvard Draft 661.

[38] *Cf Fitzmaurice* (1951), pp. 9–22; *Fitzmaurice* (1957), pp. 210–227.

[39] ICJ *Second Admissions Case* [1950] ICJ Rep 4, 8.

[40] *Cf eg* ICJ *Interpretation of Peace Treaties (Second Phase)* [1950] ICJ Rep 221, 227; *Asylum Case* [1950] ICJ Rep 266, 279.

> "[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect,"[41]

in the latter, it inferred a certain status and capacity of the United Nations Organization from the fact that without them, it could not discharge the functions it was clearly intended to have.[42] That object and purpose rule was affirmed and applied in several other of those early cases.[43] A further principle clearly applied very early by the ICJ is that of *subsequent practice*, *ie* the Court looked at the way in which a treaty has actually been applied or operated by its parties[44] or by organs authorized to do so.[45] The sixth principle which *Fitzmaurice* proposed to extract from the Court's early case law was that of *contemporaneity*, *ie* that treaty terms must be interpreted according to the meaning which they possessed at the time of its conclusion. It had been applied rather prominently in the *Morocco* case.[46]

11 The formulation of these six principles had considerable influence on the later work of the ILC on the law of treaties, as **SR *Waldock,*** the first and only of the four Special Rapporteurs on the law of treaties who in this function took up the subject of interpretation, considered them as an important source of inspiration and introduced them in his work on the topic.[47] The provisions on treaty interpretation, which he **proposed in 1964,** corresponded to a large extent to the principles formulated by *Fitzmaurice*. *Waldock*'s Draft Art 70 para 1 combined four principles in one rule, those of ordinary meaning, context, contemporaneity and of good faith. As subsidiary means of interpretation, *Waldock* proposed recourse to the object and purpose of the treaty, the preparatory work and the subsequent practice of the parties.[48] Instruments drawn up in connexion with the conclusion of the treaty were to be considered part of the context, rather than mere preparatory work (Draft Art 71 para 1). The rule of effectiveness was laid down in a separate provision (Draft Art 72) as being subject to the ordinary meaning and the object and purpose of a treaty, thus indicating its proper limits, or, as *Waldock* pointed out in his commentary, containing it "within the four corners of the treaty", still leaving room for some legitimate measure of teleological interpretation.[49] Finally, *Waldock* drafted a separate provision (Draft Art 73) to the effect that treaty interpretation must "take

[41] ICJ *Corfu Channel* [1949] ICJ Rep 4, 24.

[42] *Cf* ICJ *Reparation for Injuries* [1949] ICJ Rep 174, 179 *et seq*.

[43] *Cf eg* ICJ *Genocide Convention Opinion* [1951] ICJ Rep 15, 24; *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 196.

[44] *Cf eg* ICJ *South West Africa Opinion* [1950] ICJ Rep 128, 135–136; *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 210–211.

[45] *Cf eg* ICJ *Second Admissions Case* [1950] ICJ Rep 4, 9; *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 160 and 165.

[46] *Cf* ICJ *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 189.

[47] *Cf Waldock* III 55–56, para 12.

[48] *Waldock* III 52 (Draft Art 70, para 2, Draft Art 71, para 2).

[49] *Waldock* III 61, para 30.

account" (not more than that!) of possible alterations in the legal relations between the parties.

Although in the view of SR *Waldock,* the inter-temporal aspect of interpretation (contemporaneity) was simply one of the conditions for determining the natural and ordinary meaning,[50] and indeed a matter of common sense,[51] it was deleted from the draft during the **discussion in the ILC**, as it was thought that the correct application of the temporal element would normally be indicated by the interpretation in good faith.[52] Also, the rule of effectiveness was dropped as a separate article, as the majority in the Commission considered it to be included in the principle of good faith and the object and purpose rule.[53] In reaction to certain comments by governments, the Commission emphasized that it considered the process of interpretation a unity and that laying down various rules on interpretation did not mean establishing any legal hierarchy among them.[54] **12**

The **Vienna Conference** adopted the ILC's proposals on treaty interpretation with only minor changes of drafting and one of substance, which was inserting what is now Art 33 para 4. There was considerable debate in the Committee of the Whole on proposals to amalgamate the general rule of interpretation and that on supplementary means into a single provision, but those proposals gained little support.[55] **13**

C. General Issues of Treaty Interpretation

I. Interpretation Is Always Required

Every treaty needs interpretation and is open to it. Even if its scope and the meaning of its terms may appear evident and clear, this is a result of an interpretative operation. Interpretation is thus **not a secondary process**, which only comes into play when it is impossible to make sense of the plain terms of a treaty,[56] and it is not superfluous only because the relevant words in their natural and ordinary meaning seem to make sense in their context.[57] This argument, even if it goes back to a famous dictum of *Emer de Vattel*,[58] is circular, because to know whether the wording is clear or 'makes sense' presupposes a process of interpretation and **14**

[50] *Waldock* III 56, para 15.

[51] *Waldock* VI 94, 96, para 7.

[52] *Cf Waldock* VI 94, 97, para 13; Final Draft, Commentary to Art 27, 222, para 16.

[53] *Cf* the debate in [1954-I] YbILC 275, 288–291.

[54] *Cf* Final Draft, Commentary Arts 27–28, 219–220, paras 8–9.

[55] UNCLOT I 191–193; *Gardiner* (2015), pp. 78–79.

[56] This was the view of *McNair* (1961), p. 365, n 1.

[57] Referring to the well-known phrase in ICJ *Second Admissions Case* [1950] ICJ Rep 4, 8: "If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter".

[58] *de Vattel* (1758), § 263: "La première maxime générale sur l'interprétation est qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation."

cannot, therefore, preclude that operation. Whenever a subject of international law invokes, applies or goes about implementing a treaty, it can only do so on the basis of a certain understanding of its terms, *ergo* on the basis of an interpretation. As *Schwarzenberger* rightly said:

> "Any application of a treaty, including its execution, presupposes [...] a preceding conscious or subconscious interpretation of the treaty."[59]

II. The Points of Reference for Interpretation

15 The search for the true meaning of a treaty can have very different objects. Considering the questions that can in practice arise with regard to the legal effects of a treaty, we might *grosso modo* distinguish **four points of reference** for the process of treaty interpretation: interpretation can be directed at establishing the treaty-character of a document, the scope and the contents of a treaty and its effects in the internal law of its parties. Since neither the Convention rules nor customary international law appears to contain any distinction in this respect, the same rules and methods apply to all those angles of interpretation.

16 First, it may be established through interpretation whether a document is a treaty in the sense of the VCLT at all, *eg* whether the common will expressed is meant by the parties to be binding (→ Art 2 MN 30–34). Secondly, the scope of a treaty can be ascertained by applying the rules of interpretation, that is to whom, to what situations and from which moment in time are its provisions meant to apply. Thirdly, the normative substance of a treaty, *ie* the rights and obligations of its parties, or the rules of the objective regime set up by the treaty, can be determined through interpretation. Fourthly and finally, we may enquire whether treaty provisions are suited to be directly applicable in the legal order of the parties to the treaty, and whether they demand a certain rank in that internal legal order. If the treaty can in the end develop direct effect, preference must, of course, be determined according to the rules of that internal order itself.

III. Who Is Competent to Interpret a Treaty?

17 The question of who is competent to interpret a treaty is not dealt with by the VCLT, although the issue had been raised in the ILC's discussion on the topic.[60] It had not been taken up by the Commission, probably because the answer is all too obvious: since interpretation is necessarily implied in any act of applying or implementing a treaty (→ MN 14), **every person or organ concerned with a treaty** is by necessity competent to interpret it. Since the international legal order is

[59] *Schwarzenberger* (1968), p. 8. Similarly *Sorel and Boré* (2011), Art 31 MN 3.

[60] *Cf Tsuruoka* [1964-I] YbILC 280, para 72.

in principle still a decentralized system[61] that allows every subject of law to apply the relevant norms of international law pertaining to it, it is also an open system of treaty interpreters. The latter will very often be national courts and authorities, since due to their specific contents, many treaties are likely to be applied—and thus interpreted—chiefly within national legal systems.[62] Treaties concluded as constituent instruments of international organizations or within such organizations will regularly be applied—and thus interpreted—by the competent organs of those organizations.

Quite a few treaties provide that disputes about their interpretation or application may be referred to settlement before an international court or tribunal. Some treaties establish a **permanent body other than a tribunal** with the (explicit or implicit) power to interpret the treaty. **18**

Eg the International Convention on the Harmonized System, adopted within the World Customs Organization in 1983 (as amended in 1986),[63] provides for "Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System" (Art 7) and for "recommendations to secure uniformity in the interpretation and application of the Harmonized System" (Art 8) to be prepared by the Committee and to be approved by the Council. Pursuant to Art 56 of the 1985 Convention Establishing the Multinational Investment Guarantee Agency (MIGA)[64], any question of interpretation of the provisions of the Convention shall be submitted to the Board for its decision and to the Council for final decision. The 1989 European Transfrontier Television Convention empowers in Art 21 lit c the Standing Committee to "examine, at the request of one or more parties, questions concerning the interpretation of the Convention."[65] Art 45 of the Agreement on the New Development Bank, concluded between the BRICS countries on 15 July 2014,[66] provides that "any question of interpretation … shall be submitted to the Board of Directors for decision": any interpretative decision may be submitted to the Board of Governors whose decision shall be final. Art 26.1 of the Comprehensive Economic and Trade Agreement (CETA), concluded between the EU and its Member States and Canada in 2016, establishes a Joint Committee which is supposed to decide on "any issue relating to the interpretation of the agreement".

In much strikter terms Art IX para 2 of the 1994 WTO Agreement[67] provides that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". However, as the Appellate Body held in *US–Clove Cigarettes*, the pervasive legal effect of those multilateral interpretations presupposes that their adoption complies with certain

[61] *Cf Malanczuk* (1997), pp. 3–7.

[62] Obvious examples are private law conventions, but also treaties engaging domestic procedures such as those on extradition, double taxation or State immunity. On treaty interpretation in national legal systems, see *Gardiner* (2015), pp. 143–157.

[63] To be found at www.wcoomd.org. Accessed 22 November 2017.

[64] To be found at www.miga.org. Accessed 22 November 2017.

[65] UNTS 265.

[66] To be found at www.ndb.int. Accessed 22 November 2017.

[67] Agreement Establishing the World Trade Organization 1867 UNTS 154.

> procedural requirements, such as that they must be adopted on the basis of a recommendation from the relevant Council.[68]

Those organs then regularly assume an authoritative role in determining the actual meaning of the treaty provisions, the more so when their decisions concerning the interpretation are given binding force in the treaty itself.[69] The consistent jurisprudence of an authorized tribunal or the practice of other organs in interpreting the treaty may in turn be considered subsequent practice for the purpose of interpretation.[70] In its decision in the *Diallo* case the ICJ explicitly acknowledged the weight which the jurisprudence of independent treaty bodies carries with regard to the interpretation of the treaties under which they are established, when it held:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question."[71]

19 Even if a separate treaty organ is set up with the power to interpret the treaty, it is merely the parties to a treaty themselves which can give an **authoritative or authentic interpretation** to the treaty. As the PCIJ pointed out in its *Jaworzina* opinion of 1923:

> "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body which has the power to modify or suppress it."[72]

Thus, as a consequence of their continuing right to modify the treaty by consent (→ Art 39 MN 1), the parties can always override any interpretation given by a treaty organ established for that purpose. The parties acting in consensus remain the masters of their treaty and can, therefore, determine its meaning with binding force.[73] This is why issues over treaty interpretation are commonly a matter for

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[68] WTO Appellate Body *US–Clove Cigarettes* WT/DS406/AB/R, paras 250–255 (2012), reprinted at 51 ILM 759.

[69] As, for example, does Art 50 para 3 of the 2008 Protocol on the Statute of the African Court of Justice and Human Rights 48 ILM 317. Art 1131 para 2 of the North American Free Trade Agreement declares the interpretation by the Free Trade Commission of a provision of the Agreement to be binding on a tribunal established under its chapter 11.

[70] For the purpose of interpreting the UN Charter the ICJ regularly puts major emphasis on the practice of UN organs under it, → MN 86.

[71] ICJ *Diallo* [2010] ICJ Rep 639, paras 66–67.

[72] PCIJ *Question of Jaworzina (Polish–Czechoslovakian Frontier)* PCIJ Ser B No 8, 37 (1923).

[73] *Villiger* (2009), Art 31 MN 16.

discussion, negotiation and agreement between the parties, and why subsequent practice and subsequent agreements among the latter is of utmost importance in establishing the true (current) meaning of a treaty. In some instances, it may be difficult to distinguish then between an agreed interpretation of a treaty and an (implicit) treaty amendment by agreement among the parties.

Resolutions of the UN Security Council raise particular issues of interpretation, since when adopted pursuant to Chapter VII of the UN Charter, they have a mandatory character and are binding upon all UN Member States (*cf* Arts 25 and 48 UN Charter). Does this mean that the Council is, as part of its function to maintain international peace and security, empowered to interpret the Charter with an authoritative effect, thus binding on the Member States and other UN organs? The text and concept of the Charter do not seem to corroborate such an understanding, since the Security Council is merely authorized to adopt binding 'decisions', *ie* measures in an individual case or situation, and not interpretative guidelines of a binding character. Nor does the mandate of the Security Council cover the authoritative interpretation of other treaties than the UN Charter. However, the interpretation which necessarily underlies every decision adopted under Chapter VII will always carry special weight for understanding the Charter because of the binding force of those decisions. **20**

Apart from their interpretative value, Security Council resolutions themselves are very often **the object of interpretation**. While in legal doctrine, it is usually thought to be convenient to basically interpret them in accordance with the rules of the VCLT,[74] international practice has been quite diverse on this point.[75] The ICJ accepted in its *Kosovo* opinion that Arts 31, 32 VCLT "may provide guidance" in this respect, but at the same time pointed to decisive differences between UNSC resolutions and treaties, which, in the Court's view, mean that the interpretation of those resolutions "require that other factors to be taken into account". In particular, the Court held that the interpretation of UNSC resolutions may require **21**

> "to analyse statements of representatives of SC members made at the time of their adoption, other resolutions of the SC on the same issue, as well as the subsequent practice of relevant UN organs and of States affected by those given resolutions."[76]

Other practical examples of SC resolutions being the object of interpretation are, of course, the **statutes of ICTY and ICTR**, both being contained in annexes to SC resolutions and both being interpreted by the Tribunals with explicit reference to Art 31 VCLT.[77] Also other secondary legal instruments, such as the Regulations

[74] *Gardiner* (2015), p. 128; *Wood* (1998), pp. 85–86; *Orakhelashvili* (2010), pp. 825–826. *Contra Papastravidis* (2007), pp. 89–94.

[75] See *eg* the account by *Brandl* (2015), p. 290 *et seq.*

[76] ICJ *Kosovo Opinion* [2010] ICJ Rep 403, para 94.

[77] *Cf eg* ICTY *Prosecutor v Aleksovski* (Appeals Chamber) IT-95-14/1-A, 24 March 2000, para 98; ICTR *Prosecutor v Bagosora et al* (Appeals Chamber) ICTR-98-37-A, 8 June 1998, paras 28–29.

adopted by the Deep Seabed Authority under UNCLOS, are interpreted by the relevant instances according to the Vienna rules.[78]

IV. The Temporal Element of Interpretation

22 One of the most important general questions of treaty interpretation is to what moment in time the process of interpretation refers, *ie* the meaning of treaty provisions at what time it is trying to establish. Two different approaches can be distinguished in this respect: The **static approach** asks for the meaning of treaty provisions and the circumstances prevailing at the time of the conclusion of the treaty. It is also called the **principle of contemporaneity**, according to which the terms of a treaty are to be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.[79] Opposed to that is the **dynamic approach**, very often also labelled 'evolutionary' interpretation, which seeks to establish the meaning of a treaty at the time of its interpretation. The temporal aspect of interpretation was discussed in the ILC but finally omitted from the adopted text (→ MN 13), so that Arts 31–33 VCLT do not address the issue explicitly.

23 Both temporal concepts can be found in international judicial practice, which, on the whole, seems to follow the **static approach as a basic rule** and as a particular application of the doctrine of inter-temporal law. As such, it has been applied by the ICJ at several occasions, *eg* when the Court looked into linguistic usages at the time when the treaty was concluded[80] or into the intention of the parties at that same moment in time.[81] Moreover, the approach figures very prominently in several arbitration cases.

> Thus, the **Eritrea-Ethiopia Boundary Commission** followed in its decision regarding delimitation of the border between the two countries the 'doctrine of contemporaneity', which it described as requiring "that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time."[82]

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[78] Thus explicitly ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, paras 59–60.

[79] Thus formulated by SR *Fitzmaurice* in his six principles (→ MN 11), reported in *Waldock* III 55, para 12.

[80] ICJ *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 189; *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, paras 55–56.

[81] ICJ *Boundary Between Cameroon and Nigeria* [2002] ICJ Rep 303, para 59. See also *Namibia Opinion* [1971] ICJ Rep 16, para 53 (at the beginning).

[82] Eritrea–Ethiopia Boundary Commission *Delimitation of the Border Between Eritrea and Ethiopia* (*Eritrea v Ethiopia*) (2002) 25 RIAA 83, 110.

In the words of SR *Waldock*, the requirement to interpret a treaty basically by reference to the linguistic usage current at the time of its conclusion is one both of common sense and good faith.[83] Similarly, the ICJ in its more recent decision on the *Dispute Regarding Navigational and Related Rights* pointed out that

> "[i]t is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention."[84]

24 As an exception to that rule, the **dynamic approach** is being used **for interpreting generic terms**, *ie* terms in a treaty whose content the Parties expected would change through time and which they, therefore, presumably intended to be given its meaning in light of the circumstances prevailing at the time of interpretation. This approach was for the first time applied by the ICJ in the *Namibia* opinion to the phrase "sacred trust of civilisation"[85] and in the *Aegean Sea Continental Shelf* case to the formula 'territorial status'.[86] Also, judicial practice in the WTO adopted the evolutionary method for interpreting concepts such as 'natural resources'[87] or 'sound recording' and 'distribution'.[88] More recently, the ICJ applied the dynamic method to the Spanish term 'comercio' and in a general statement underlined that

> "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[89]

In such instances, it is indeed in order to respect the common will of the parties that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[90]

25 Viewed in the light of those examples, dynamic or evolutionary treaty interpretation appears in fact to be a **two-tier process**: first, it is to be established whether a term is meant by the parties to be interpreted in a dynamic manner. If no particular intention to this effect has been expressed, this must be taken to be the case if a concept is embodied in the treaty that is, from the outset, evolutive or dynamic. Apart from that, the determination that an evolutive interpretation is called for must

[83] *Waldock* VI 96, para 7.

[84] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 63.

[85] ICJ *Namibia Opinion* [1971] ICJ Rep 16, para 53.

[86] ICJ *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, para 77.

[87] *Cf* WTO Appellate Body *US–Shrimp* WT/DS58/AB/R, para 130 (1998).

[88] WTO Appellate Body *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 369 (2009).

[89] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 66. Confirmed in ICJ *Pulp Mills* [2010] ICJ Rep 14, para 204.

[90] *Ibid* para 64.

result from the ordinary process of treaty interpretation on a case-by-case basis. Second, the term in question must be given the meaning, which it possesses at the time of interpretation, considering the development of linguistic usage, international law and other relevant circumstances up to that moment.

26 A particular application of the dynamic approach lies at the heart of the established jurisprudence of the ECtHR to consider **the ECHR a 'living instrument'** and, as a consequence, to interpret it "in the light of present-day conditions".[91] Here, the dynamic approach to treaty interpretation, rather than being founded on—and confined to—a certain category of terms used in the treaty, follows from the quasi-constitutional character of the ECHR and the need to receive directions from it for effectively implementing human rights guarantees in a modern world.[92] However, the Court also acknowledged that this approach to the Convention and its Protocols has its limits, because it "cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[93]

27 The dynamic approach to the interpretation of treaties must be distinguished from the **use of dynamic means of interpretation**. Some of the methods provided for in Art 31 are *per se* dynamic, such as subsequent agreements (para 3 lit a) or subsequent practice (para 3 lit b), but they do not as such determine to what moment in time the interpretation in question refers. The practice of the ICJ shows that dynamic means of interpretation can also be used for applying the static approach, *ie* to establish the meaning of treaty provisions at the time of their conclusion. For example, in the *Corfu Channel* case, the Court held that:

> "The subsequent attitude of the Parties shows that it was not their intention [. . .]."[94]

Also, in the *Kasikili/Sedudu Island* case, the ICJ applied the static approach by using dynamic means, when it established the historical intentions of the parties to a treaty concluded in 1890 by "taking into account the present-day state of scientific knowledge".[95] Thus, the interpretative means used do not in principle prejudice the temporal point of reference of the process of interpretation.

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[91] *For example,* ECtHR *Tyrer v United Kingdom* App No 5856/72, Ser A 26, para 31 (1978); *Marckx v Belgium* App No 6833/74, Ser A 32, para 41 (1979); *Loizidou v Turkey* (Preliminary Objections) App No 15318/89, Ser A 310, para 71 (1995); *Öcalan v Turkey* App No 46221/99, 12 March 2003, para 193; *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, ECHR 2005-I, para 121; *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, para 68; *Hirsi Jamaa et al v Italy* (GC) App No 27765/09, ECHR 2012-II, para 175; *X et al v Austria* (GC) App No 19010/07, ECHR 2013-II, para 139.

[92] On the dynamic interpretation of the ECHR *cf Cremer* (2013), paras 35–118.

[93] ECtHR *Johnston et al v Ireland* App No 9697/82, Ser A 112, para 53 (1986); *Emonet et al v Switzerland* App No 39051/03, 13 December 2007, para 66.

[94] ICJ *Corfu Channel* [1949] ICJ Rep 4, 25.

[95] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 20.

V. Does One Size Fit All?

Every treaty needs interpretation, but do the same rules of interpretation apply to all types of treaties? Or are there **special rules for certain kinds** of them? Although Arts 31–33 do not contain any hint to this effect, it is often argued that the general rules of interpretation undergo some modifications when they are applied to certain types of treaties.[96] If, for example, States assume obligations in relation to one another, but the beneficiaries, or even the true addressees, of the treaty provisions are individuals (**human rights treaties**), that special feature and the latter's interests must be taken into account in the process of interpretation.[97] However, it is submitted that this does not require different rules, but simply a reasonable understanding of the "object and purpose" of the respective treaty when applying the general rule laid down in Art 31.[98] **28**

Differing rules may be applicable to treaties operating as the **constituent instrument of an international organization** or concluded within such an organization. Art 5 VCLT offers some flexibility in this respect, as it holds the rules of the Convention to be applicable to those kinds of treaties "without prejudice to any relevant rules of the organization". As the ICJ pointed out in its *Nuclear Weapons (WHO)* opinion: **29**

> "Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret constituent treaties."[99]

Nevertheless, as a matter of principle, the general rule of interpretation applies to constituent treaties, subject perhaps to three modifications that have arisen in practice:[100] first, in interpreting the constituent document of an international organization, the effective fulfillment of the organization's functions is of major importance; thus the **object and purpose rule** will in these cases be geared almost exclusively towards the effective performance of the organization and its organs. This became apparent, for example, in the ICJ's jurisprudence with regard to the powers of UN organs,[101] and it also lies at the bottom of the case law of the ECJ **30**

[96] *Gardiner* (2015), p. 22.

[97] The ECtHR regularly points out that, when interpreting the ECHR, "the Court must be mindful of the Convention's special character as a human rights treaty", but so far no real consequences seem to follow from that, *cf eg* ECtHR *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, para 43; *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 55.

[98] In a similar vein *Çali* (2012).

[99] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 19.

[100] See also *Brölmann* (2012).

[101] *Cf* ICJ *Reparation for Injuries* [1949] ICJ Rep 174, 182–183; *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 168.

concerning the functioning of the European Union (*effet utile*).[102] Second, the **subsequent practice of the organization** itself, rather than that of its Member States, in applying the constituent treaties usually proves to be of critical importance for the latter's interpretation. In some cases, the result reached by the interpreting court even seems to be exclusively based on that practice, especially when it tends to deviate from the wording of the treaty. Examples for this can be found in the *Namibia* and the *Construction of a Wall in the Occupied Palestinian Territory* opinions of the ICJ.[103] Thirdly and finally, if an organ has been empowered to interpret the constituent treaty of the organization, it usually tends to emphasize the need for an **autonomous interpretation**, *ie* one that is independent from national legal concepts, traditions and terminologies. A prime example for this approach to treaty interpretation is, of course, the jurisprudence of the ECJ[104] which in recent years seems to regard the autonomous interpretation of the European Union treaties as a constitutional principle of the Union itself.[105]

31 Finally, it is submitted that the general rule of interpretation in principle also applies to the **interpretation of interpretation clauses**, *ie* to treaty provisions that stipulate themselves rules for the interpretation of the treaty they are contained in.

> An example is Art 2 of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)[106] which underlines that in the interpretation of the Convention regard must be had to its international character, to the need of its uniform application and to the observance of good faith in international trade.

Depending upon the exact contents of the provision in question, it may in certain cases be taken to be *lex specialis* vis-à-vis the rules of the VCLT, and thus effectively prevent the latter from applying to the treaty in question. But in order to establish just that, every interpretation clause would need to be interpreted, thus be subjected to the application of the rules laid down in Arts 31–33 VCLT. Also, treaty provisions which explicitly lay down the purpose of their treaty[107] can be

[102] *Cf Brown and Kennedy* (2000), p. 343. *Hartley* (2010), p. 72 calls this approach "decision-making on the basis of judicial policy".

[103] ICJ *Namibia* [1971] ICJ Rep 16, para 22; *Construction of a Wall* [2004] ICJ Rep 136, paras 27–28. With a contrary result, the ICJ based in *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 27 the denial of an extensive interpretation, *inter alia,* on a "consideration of the practice of the WHO".

[104] *Barents* (2004), p. 289.

[105] *Cf eg* ECJ *Linster* C-287/98 [2000] ECR I-6917, para 43; *Jaeger* C-151/02 [2003] ECR I-8389, para 58; *Opinion 1/09 (European Patents Court)* [2011] ECR I-1137 paras 67 and 76; *Opinion 2/13 (Accession to ECHR)* ECLI:EU:C:2014:2454, paras 183-186; CFI *Hosman-Chevalier v Commission* T-72/04 [2005] ECR II-3265, para 40; EU Civil Service Tribunal *Klein v Commission* F-32/08 [2009] FP-I-A-1-5, FP-II-A-1-1320, paras 35–36.

[106] Adopted by UNGA Res 63/122, 11 December 2008, UN Doc A/C.6/63/L.6.

[107] Such as Art II of the 1975 Convention for the Establishment of a European Space Agency 1297 UNTS 186; Art 1 of the 2000 UN Convention Against Transnational Organized Crime 2225 UNTS 209; Art 1 of the 2003 UN Convention Against Corruption 2349 UNTS 41; Art 1 para 1 of the 2006 UN Convention on the Rights of Persons with Disabilities, UNGA Res 61/106, 13 December 2006, UN Doc A/Res/61/106.

interpreted in accordance with the general rules, although in this case, the object and purpose test would probably be rather meaningless. In any case, such a **purpose clause** cannot prevent the treaty interpreter from establishing, by applying the general rule of interpretation, whether the purpose of the treaty has been laid down accurately and what exactly the stipulated purpose means.

VI. Rules of Interpretation Outside the VCLT?

32 There are much more rules of treaty interpretation applied in international practice and diplomacy than are codified in Arts 31–33 VCLT. The Convention's rules of interpretation are **not exclusive** in a way that they prevent the interpreter from applying other principles compatible with the general rule laid down in Art 31. It is thus in his or her discretion to have recourse to established customary interpretation rules or at least to the wealth of material on treaty interpretation, which preceded the Convention.[108] The question seems in many cases to be whether the proposed rule of interpretation is in fact one that lies outside the Convention's system or whether it is encompassed by the latter's provisions.

33 One of the traditional *formulae* of treaty interpretation is the principle ***in dubio mitius***, also called the **principle of restrictive interpretation**, according to which treaties are to be interpreted in favor of State sovereignty: where a treaty's provisions are open to doubt, the interpretation that entails the lesser obligation for sovereign States should be selected, and if an obligation is not clearly expressed, its less onerous extent is to be preferred.[109] The PCIJ applied that principle explicitly in the *'Wimbledon'* and *Free Zone* cases, when it interpreted limitations on sovereignty restrictively, and that only because of their limiting effect.[110] In the *River Oder* case, the Permanent Court was already much more reluctant and applied *in dubio mitius* as a subsidiary principle when it pointed out that

> "it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favorable to the freedom of States."[111]

Traces of that approach can still be found in the case law of the WTO.[112] The ICJ, however, never adopted it, and also the PCIJ in *'Wimbledon'* emphasized clear limits to restrictive interpretation, when it felt "obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the

[108] *Gardiner* (2015), p. 57.

[109] *Cf* the explanation and references given by *Lauterpacht* (1949), p. 48 *et seq*.

[110] *Cf* PCIJ *SS* '*Wimbledon'* PCIJ Ser A No 1, 24 (1923); *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 167 (1932).

[111] PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* PCIJ Ser A No 23, 26 (1929).

[112] *Cf* WTO Appellate Body *EC–Hormones* WT/DS26 and DS48/AB/R, para 165 (1998); much more reluctant *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 411 (2009).

article and would destroy what has been clearly granted". Moreover, in a more recent decision, the ICJ made it very clear that a treaty provision, which has the purpose of limiting the sovereign powers of a State, must be interpreted like any other provision of a treaty,[113] thus there can be no such principle as *in dubio mitius* in treaty interpretation. It is not only of little value for treaty interpretation itself,[114] but, above all, does not constitute a rule of customary international law.

34 Another unwritten *topos* of interpretation that figures rather prominently in international practice is the **rule of effectiveness**, in view of its Latin origin also phrased as *ut res magis valeat quam pereat*. It says that treaty provisions are to be interpreted so as to give them their fullest weight and effect and in such a way that a reason and a meaning can be attributed to every part of the text.[115] The principle was applied already in the early jurisprudence of PCIJ[116] and ICJ[117] and has, according to the latter in *Fisheries Jurisdiction* (1998), "an important role in the law of treaties".[118] In its *CERD* case concerning Georgia and Russia, the ICJ applied the "well-established principle in treaty interpretation that words ought to be given appropriate effect" to the phrase "which is not settled" in Art 22 of the Convention and discarded a reading of that phrase which would render it meaningless and devoid of any effect.[119] In the judicial practice of the WTO, the principle is usually taken to prohibit the adoption of a reading of WTO provisions "that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[120]

> Note, however, that the rule of effectiveness does not carry much weight with regard to **declaratory treaty provisions**, which the parties adopted simply for the avoidance of doubt and not because they thought them to be necessary.[121]

However, effectiveness as an interpretative topos is not an isolated goal or concept, but is closely linked to the object and purpose of the treaty in question[122]:

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[113] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 48.

[114] To this effect, *cf* also *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, para 53; Iran-United States Claims Tribunal *Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 67; *Bernhardt* (1999), p. 14.

[115] Thus described by *Fitzmaurice* in his six principles of interpretation (→ MN 10), reprinted in *Waldock* III 55, para 12.

[116] *Cf* PCIJ *Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 34 (1924); *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A No 22, 13 (1929).

[117] → MN 10. *Cf* also ICJ *Anglo-Iranian Oil* [1952] ICJ Rep 93, 105; *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 160.

[118] ICJ *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, para 52.

[119] ICJ *Racial Discrimination Convention* (Preliminary Objections) [2011] ICJ Rep 70, paras 133–34.

[120] *For example* WTO Appellate Body *US–Gasoline* WT/DS2/AB/R, 21 (1996); Panel *Chile–Price Band System* WT/DS207/R, para 7.71 (2002).

[121] ICJ *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 41.

[122] See *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, para 49.

it is the latter's fulfillment which is to be made possible or effectuated through interpretation. Thus, the principle of effectiveness is in fact but a specific application of the object and purpose test and the good faith rule and, therefore, an **integral part of the general rule of interpretation** laid down in Art 31.[123] As such, the principle has been applied by the ICJ, *eg*, in the *LaGrand* case when the Court determined the object and purpose of Art 41 ICJ Statute to be

> "to prevent the Court from being hampered in the exercise of its functions [. . .]."[124]

The same is true for the alleged rule that **exceptions** to a general rule have, for the reason alone of being an exception, **to be interpreted restrictively**. This interpretative *topos* can already be found in early international jurisprudence,[125] and is still being applied today.[126] Since the principle is meant to enhance the implementation, and thus the effectiveness of the general rule to which exceptions are being made in the treaty, it also constitutes a particular application of the object and purpose rule, relating to the *telos* of the general rule.[127] **35**

The ICJ in the *Fisheries Jurisdiction* case thought it possible that the ***contra proferentem* rule** "may have a role to play in the interpretation of contractual provisions", but denied its application to declarations of acceptance of the Court and reservations made thereto.[128] However, the rule according to which a text that is ambiguous must be construed against the party who drafted it (*verba ambigua accipiuntur contra proferentem)*, has not been very prominent in international practice[129] and in relation to treaties indeed does not appear to be very persuasive: treaties are usually the result of a common effort and the product of negotiations, they do not originate from drafts imposed by one party,[130] so there is no proper reason for holding the ambiguity of one of its elements against the party who introduced it into the negotiation process. **36**

D. Elements of Art 31

I. The General Rule (Para 1)

The general rule of treaty interpretation contained in Art 31 para 1 is **based on the textual approach**, *ie* on the view that the text must be presumed to be the authentic **37**

[123] *Cf* Final Draft, Introductory Commentary to Arts 27–28, 219, para 6.
[124] ICJ *LaGrand* [2001] ICJ Rep 466, para 102.
[125] *Cf* PCIJ *Nationality Decrees Issued in Tunis and Morocco* PCIJ Ser B No 4 25 (1923).
[126] *Cf* ECtHR *Litwa v Poland* App No 26629/95, ECHR 2000-III, para 59.
[127] *Heintschel von Heinegg* (2014), § 12 MN 19.
[128] ICJ *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, para 51.
[129] The PCIJ relied on it once, but with regard to an instrument that was not an international treaty, *cf Payment in Gold of Brazilian Federal Loans Contracted in France* PCIJ Ser A No 21, 114 (1929).
[130] *Lauterpacht* (1949), p. 64.

expression of the intentions of the parties. Consequently, the starting point of every interpretation is the elucidation of the meaning of the text,[131] rather than of any external will of the parties.

38 Art 31 para 1 contains **three separate principles** and combines them in one single rule of interpretation. The first, interpretation in good faith, flows directly from the rule *pacta sunt servanda* (Art 26). The second requires every interpretation to have recourse to the ordinary, as opposed to a special, meaning of the terms used in the treaty, and the third principle is that the ordinary meaning is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.[132] The general rule of interpretation does not describe some hierarchical or chronological order in which those principles are to be applied, but sets the stage for a **single combined operation** taking account of all named elements simultaneously (→ MN 5). As *Gardiner* aptly describes it:

> Any treaty provision "is to be read selecting the ordinary meaning for the words used. But finding the ordinary meaning typically requires making a choice from a range of possible meanings. The immediate and more remote context is the next textual guide, with good faith and the treaty's object and purpose as further aids to this phase of an exercise in interpretation."[133]

To the same effect, the WTO Appellate Body described the process of treaty interpretation as

> "an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."[134]

1. Ordinary Meaning of the Terms

39 The first element of the general rule of interpretation requires giving an ordinary meaning to the "**terms of the treaty**". Considering the textual approach underlying the whole operation (→ MN 37), it seems quite natural that the "terms" to which the meaning is to be given refer to what has been written down by the parties, *ie* the words and phrases used in the treaty, rather than the bargain struck by the parties.[135] This is confirmed by Art 31 para 4 and Art 33 para 3 where "term(s)" is clearly being used with reference to the meaning of written language. Therefore, as the ICJ underlines in its jurisprudence, interpretation must be based "above all" upon the text of the treaty.[136]

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[131] Final Draft, Commentary to Art 27, 220, para 11.

[132] *Ibid* 221, para 12.

[133] *Gardiner* (2015), p. 222.

[134] WTO Appellate Body *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 399 (2009).

[135] *Gardiner* (2015), p. 183.

[136] *Cf eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* [2004] ICJ Rep 279, para 100.

The point of departure in the process of interpretation is the linguistic and grammatical analysis of the text of the treaty, looking for the **ordinary meaning**, *ie* the meaning that is "regular, normal or customary".[137] In this respect, account can be taken of the kind of treaty involved, thus the test is not so much any layman's understanding, but what a person reasonably informed on the subject matter of the treaty would make of the terms used. In order to establish that kind of meaning, international judicial bodies quite often turn to **dictionaries**, general or more specialized ones,[138] even though those typically aim to catalogue *all*—and not just the ordinary—meanings of words.[139] **40**

A consideration of the **grammatical form** of a treaty term encompasses the tense in which a specific provision has been phrased. Thus, the WTO Appellate Body has underlined the relevance of the use of present perfect tense: **41**

> "We agree with Chile that Article 4.2 of the Agreement on Agriculture should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision – particularly in the light of the fact the most of the other obligations in the Agreement on Agriculture and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present."[140]

In the *CERD case* (*Georgia v Russia*) the ICJ had to interpret the phrase "which is not settled" and, among others, referred to its grammatical form in the French version:

> "The Court also observes that, in its French version, the above-mentioned expression employs the future perfect sense, whereas the simple present tense is used in the English version. The Court notes that the use of the future perfect tense further reinforces the idea that a previous action (an attempt to settle the dispute) must have taken place before another action (referral to the Court) can be pursued."[141]

In determining the ordinary meaning of terms, two connected aspects, which have been mentioned earlier, must be taken into account: the **temporal aspect** of the ordinary meaning test refers to the question of static or dynamic interpretation (→ MN 22); except where the parties have used a generic term, interpretation must look for the ordinary meaning at the time the treaty was concluded. The **language aspect** follows from Art 33: each authentic treaty language has to be consulted for **42**

[137] *Gardiner* (2015), pp. 183–184.

[138] *Cf eg* ICJ *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 45; *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 30; ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 32 (1975); *Luedicke, Belkacem and Koç v Germany* App No 6210/73, 6877/75, 7132/75, Ser A 29, para 40 (1978); WTO Appellate Body in *Canada–Aircraft* WT/DS70/AB/R, para 153 (1999); *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R para 658 (2011).

[139] Critical, therefore, as to that approach the DS 2O Appellate Body in *US–Gambling* WT/DS285/AB/R, paras 164–167 (2005); *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 348 (2009).

[140] WTO Appellate Body *Chile–Price Band System* WT/DS207/AB/R, para 206 (2002) (footnote omitted).

[141] ICJ *Racial Discrimination Convention* (Preliminary Objections) [2011] ICJ Rep 70, para 135.

the ordinary meaning of the term at issue and each of them is of equal value, since in every authentic language, the term must in principle be considered to have the same meaning.

2. Context

43 The process of treaty interpretation is, of course, not a pure grammatical exercise. The general rule of interpretation laid down in Art 31 para 1 does not allow establishing an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted. Instead, the terms of a treaty have to be interpreted "in their context", which means that the interpreter of any phrase in a treaty has to look at the treaty as a whole and, as Art 31 paras 2 and 3 demonstrate, even beyond that. The systematic structure of a treaty is thus **of equal importance** to the ordinary linguistic meaning of the words used, in order to determine its true meaning, since, as the PCIJ had already pointed out, words obtain their meaning from the context in which they are used.[142]

44 The entire text of the treaty is **to be taken into account** as "context", including title, preamble and annexes (*cf* the chapeau of para 2) and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure or scheme of the treaty.

45 The relevance of the **title of a treaty** is demonstrated, for example, by the ICJ's reasoning in the *Oil Platforms* case:

> "For the meaning of the word 'commerce' in a bilateral treaty concluded by Iran and the US, the Court turned, *inter alia*, to the actual title of treaty which referred rather broadly to 'economic relations' and thereby suggested a wider reading of the term."[143]

46 The importance of **punctuation and syntax** can be seen in the *Aegean Sea Continental Shelf* case, where the ICJ had to deal with the French phrase "et, notamment," and explicitly pointed to the commas used.[144] The **structure of the sentence** was also relevant in *Land, Island and Maritime Frontier Dispute*, when an ICJ Chamber had to decide on its authority to delimit disputed maritime boundaries and, for that purpose, to interpret the phrase "to determine the legal situation". The Chamber held:

> "No doubt the word 'determine' in English (and, as the Chamber is informed, the verb 'determinar' in Spanish) can be used to convey the idea of setting limits, so that, if applied directly to the 'maritime spaces' its 'ordinary meaning' might be taken to include

[142] *Cf* PCIJ *Competence of the ILO* PCIJ Ser B No 2, 23 (1922). Adopted by the ICJ in *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 158.

[143] ICJ *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 47; also used as an example by *Gardiner* (2015), pp. 200–201.

[144] *Cf* ICJ *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, para 53.

> delimitation of those spaces. But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands."[145]

47 The treaty as a whole is considered when the interpreter compares the **use of the same term elsewhere in the treaty** or **different phrases of the same treaty** dealing with the same issue in different wordings. The latter is what the Chamber did in the said decision when it pointed out:

> "The question must be why, if delimitation of the maritime spaces was intended, the Special Agreement used the wording 'to delimit the boundary line [. . .]' ('Que delimite la linea fronteriza [. . .]') regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to 'determine [their] legal situation [. . .]' ('Que determine la situacion juridica [. . .]')."[146]

48 The treaty as a whole is also taken account of when it is established that other provisions of the same treaty have as a **necessary consequence or implication** a certain reading of the disputed term. The ICJ chose that line of argument in *Dispute Regarding Navigational and Related Rights* when it held that Costa Rica's right to the navigational use of the river included a minimal right of navigation in the villages along the river, including the use by official vessels, and concluded that from other provisions of the treaty than those on navigational rights.[147] Similarly, in *Questions of Mutual Assistance* the interpretation of Art 3 of the 1986 Convention on Mutual Assistance in Criminal Matters entailed that the provision be read in conjunction with Arts 1 and 2 of that Convention, which revealed that there may be exceptions in which the requested assistance may legitimately be refused.[148]

49 The **preamble** to a treaty, usually consisting of a set of recitals, may assist in determining the object and purpose of the treaty, for it is the normal place where the parties would embody an explicit statement to that effect. By stating the aims and objectives of a treaty, a preamble can thus be of both contextual and teleological significance. There are many examples in international jurisprudence of reference being made to the preamble of a treaty in order to elucidate the meaning of a particular provision.[149]

50 To take account of the position of a term or phrase in a treaty provisions means also that **considerations of textual logic** apply in establishing the ordinary

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[145] ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 351, para 373.

[146] *Ibidem* para 374.

[147] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, paras 77–79 and 84.

[148] ICJ *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, para 123.

[149] *Cf eg* ICJ *Asylum Case* [1950] ICJ Rep 266, 282*; Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 196; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 51; ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 34 (1975); WTO Appellate Body *US–Shrimp* WT/DS58/AB/R, para 129 (1998); *Chile–Price Band System* WT/DS207/AB/R, paras 196–197 (2002).

meaning: thus, the ICJ considered it decisive in this regard if only one of several proposed readings allows the entire sentence in a treaty provision to be given a coherent meaning.[150] Whether or not a treaty provision can be given an ***a contrario* reading**, may also be determined by the context, for example if only one possible reading of the provision is reconcilable with the terms of another provision.[151]

51 Also, comparing the term in question with the **analogous wording of a related treaty** may assist in the contextual interpretation. The latter is aptly illustrated by the Chamber decision referred to above:

> "The same contrast of wording can be observed in Article 18 of the General Treaty of Peace, which, in paragraph 2, asks the Joint Frontier Commission to 'delimit the frontier line in the areas not described in Article 16 of this Treaty', while providing in paragraph 4, that 'it shall determine the legal situation of the islands and maritime spaces'. Honduras itself recognizes that the islands dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory. It is difficult to accept that the same wording 'to determine the legal situation', used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces."[152]

Also in a recent maritime delimitation case the Court drew conclusions from "the similarity of wording" between the treaty concerned and a related agreement, UNCLOS in that case.[153] By thus extending systematic considerations beyond the frame of the specific treaty in question, the role of extrinsic material in the process of interpretation comes into play, which is effectively governed by Art 31 paras 2 and 3 (→ MN 61 and 69).

3. Object and Purpose

52 The final words of Art 31 para 1 introduce the **teleological or functional element** into the general rule of interpretation and, by doing so, bring the principle of effectiveness into that rule: the terms of a treaty are to be interpreted in a way that advances the latter's aims. Any interpretation that would render parts of the treaty superfluous or diminish their practical effects is to be avoided (→ MN 34).[154]

53 The introduction of the **composite "object and purpose"** into the work of the ILC drafts was apparently influenced by the French version of the ICJ opinion on *Reservations to the Genocide Convention*. There, the Court ruled on the

[150] *Cf* ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 52.

[151] *Cf* ICJ *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, paras 35–38.

[152] ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, para 374.

[153] ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 91.

[154] *Cf eg* ICJ *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 160–161 and 166.

admissibility of reservations to treaties according to "l'objet et le but" of the latter, which appeared in the English version as "object and purpose".[155]

> This incidentally leads to the conclusion that the object and purpose test laid down in Art 19 VCLT for the purpose of determining the compatibility of a reservation and closely modelled after the *Reservations* opinion, is in fact just an application of the teleological approach to interpretation: that compatibility can be decided on only after the object and purpose of the treaty has been determined through interpretation (→ Art 19 MN 75).

Taken literally, "l'objet" would seem to describe the substantive content of a treaty, *ie* the rights and obligations created by it, while "le but" refers to the general result, which the parties want to achieve through the treaty.[156] However, in practice and doctrine, both elements are usually amalgamated into one single test[157] applying the *telos* of the treaty, or of one of its provisions, to a proposed interpretation of its terms.

54 Although many treaties have in fact a variety of different, and possibly conflicting, purposes, Art 31 para 1 uses **the singular form** "object and purpose", as do other provisions of the VCLT. Thus, the general rule of interpretation clearly means to refer as a single overarching notion to the *telos* of the treaty as a whole,[158] as does expressly Art 41 para 1 lit b cl ii. Since, however, in practice, the object of interpretation is always a specific provision, or a part of such, rather than the treaty as a whole, this global view is bound to diminish the value of teleological interpretation. Therefore, in the case of multi-purpose treaties all goals that are expressed in the terms of the treaty are to be taken into account, and in the end that which conforms best with the grammatical and systematic considerations on the term in question will prevail in the process of interpretation.

55 There are various ways of **determining the object and purpose** of a treaty. Some treaties contain general clauses specifically stating their purposes, Art 1 UN Charter being the obvious example.[159] Also, recourse to the title of the treaty may be helpful.[160] Moreover, the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement (→ MN 49). In other cases the type of treaty may itself attract an assumption of a particular object and purpose, such as boundary treaties (final and stable fixing of frontiers).[161] Generally, however, a reading of the whole treaty, *ie* of all its substantive provisions, will be required to establish the object and purpose with some certainty. Also,

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[155] ICJ *Genocide Convention Opinion* [1951] ICJ Rep 15, 24. On the previous page of the opinion, however, the English "objects" is used to translate the French "fins", which could imply that "object" was meant to have a purely teleological meaning.

[156] *Buffard and Zemanek* (1998), p. 326.

[157] *Cf Klabbers* (1997), pp. 144–148.

[158] *Klabbers* (2008), MN 6–7; *Klabbers* (1997), pp. 151–155.

[159] For more examples *cf* n 107.

[160] Explicitly emphasized in ICJ *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 39; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 70.

[161] *Gardiner* (2015), p. 213.

contrasting the treaty in question with relevant treaties of the same kind can assist in establishing the *telos* of the former.

> That is what the ICJ did, for example, in the *Oil Platform* case, when it compared the Treaty of Friendship between Iran and the United States with other types of treaties of friendship and thereby determined the objective of the treaty before it.[162]

In general, intuition and common sense may provide useful indicators in identifying the object and purpose,[163] with the rule of good faith preventing that aims and objectives are introduced through the back door, which the drafters of the treaty rejected to insert into its terms.

56 Considerations of **effectiveness** play a predominant role in interpreting treaties that set up international organs or organizations and empower them with certain functions and powers. Here, the teleological element of interpretation could lead to **unwritten ('implied') powers** being read into the text in order to enable the organ concerned to fulfil its task under the treaty. In the ICJ's case-law examples of different versions of that approach can be found: while in its *Reparation for Injuries* opinion the Court referred for implied competences of the UN to the powers explicitly laid down in the Charter:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication – as being essential for the performance of its duties,"[164]

in the *Certain Expenses* case, only a couple of years later, it derived unwritten powers simply from the purposes of the UN:

> "But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."[165]

Over the years, the concept of implied powers seems to have been very attractive, even seductive to those who wanted to see founding treaties of international bodies to be interpreted according to the principle of *effet utile*. However, it may be that the doctrine has in the meantime lost quite a bit of its appeal and interpretation in practice now favors a stricter approach to the attribution of powers to international organs.[166]

57 The consideration of object and purpose finds its **limits in the ordinary meaning of the text** of the treaty. It may only be used to bring one of the possible

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[162] ICJ *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 27.

[163] *Klabbers* (1997), p. 155.

[164] ICJ *Reparation for Injuries* [1949] ICJ Rep 174, 182. See also the dissenting opinion of *Judge Hackworth* [1949] ICJ Rep 196, 198 who found the Court's approach too wide and wanted to have implied powers limited to "those that are 'necessary' to the exercise of powers expressly granted."

[165] ICJ *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 168.

[166] See *Klabbers* (2009), pp. 59–73. A telling example seems to be ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 25, where the Court upheld the "principle of speciality" *vis-à-vis* alleged implied powers of the Organization.

ordinary meanings of the terms to prevail and cannot establish a reading that clearly cannot be expressed with the words used in the text.[167] As the Iran-US Claims Tribunal once pointed out:

> "Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text."[168]

58 Furthermore, determining the object and purpose of a treaty, or of one of its provisions, must, for practical as well as theoretical reasons, **be distinguished from** having recourse to the "**circumstances of the conclusion**" of the treaty. The latter may only be taken into account under the conditions of Art 32, *ie* as a supplementary means of interpretation. As the decision in *Land, Island and Maritime Frontier Dispute* demonstrates, to point to certain behavior of a State Party in order to develop views on the treaty's purpose from it may end up as being taken merely as part of those "circumstances", and thus being given a much lesser importance in the process of interpretation.[169] The result is, again, that object and purpose of a treaty must primarily be established by reading the latter as a whole, and not so much by recurring to external factors.

4. In Good Faith

59 Art 31 para 1 requires every treaty to be interpreted "in good faith" and thereby establishes the general idea embodied in that well-known phrase as some kind of umbrella covering the whole process of interpretation. Embodied in the opening words of the general rule of interpretation, that idea sets the tone and directs the undertaking as a whole. According to the most fundamental rule of the law of treaties, every treaty must be performed "in good faith" (Art 26). Since interpreting a treaty is a necessary element of its performance, logic requires that good faith be applied to the interpretation of treaties. Good faith must be used **during the entire process of interpretation**, *ie* when examining the ordinary meaning of the text, the context, object and purpose, the subsequent practice of the parties, *etc*. In addition, the result of the interpretative operation must be appreciated in good faith as well.[170]

60 Although it is difficult to give precise content to the concept in general, the bottom line of it appears to be a **fundamental requirement of reasonableness** qualifying the dogmatism that can result from purely verbal or, for that purpose,

[167] Concurring *Villiger* (2009), Art 31 MN 14.

[168] Iran-United States Claims Tribunal *Federal Reserve Bank of New York v Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 58.

[169] *Cf* ICJ *Land, Island and Maritime Frontier (El Salvador v Honduras)* [1992] ICJ Rep 351, para 376.

[170] *Sinclair* (1984), p. 120.

excessively teleological analysis.[171] This is also the understanding in which the concept of good faith is at least hinted at in the rules of interpretation themselves, albeit only as an obligation of result: what is to be avoided by applying the principle of good faith is set out in Art 32 lit b, *ie* that interpretation of a treaty should lead to a result, which is manifestly absurd or unreasonable. Thus, the ordinary meaning, if established in its context, must always be submitted to the test of reasonableness. If applying the words of a treaty in their ordinary meaning would seem to lead to a result, which would be manifestly absurd or unreasonable, another interpretation must be sought.

Thus, to adopt the example given by *Aust*, the reference in Art 23 para 1 of the UN Charter to the "Republic of China" and the "Union of Soviet Socialist Republics" must today reasonably be taken to refer to the People's Republic of China and to the Russian Federation, respectively.[172] Any other approach, which might be in accordance with the ordinary meaning of those names, would be contrary to good faith.

II. Certain Elements of 'Context' (Para 2)

61 Art 31 para 2 designates two types of documents that are regarded as forming part of the "context" within the meaning of para 1 and, thus, to be used for the purpose of arriving at the ordinary meaning of the terms of the treaty. The provision is based on the principle that a unilateral document cannot as such be regarded as part of the "context" but has, in order to attain that status, to receive some kind of acceptance on part of the other parties.[173]

62 The documents referred to in para 2 are **extrinsic to the treaty**, they are not integral parts of it. Whether a document set up with regard to the conclusion of a treaty constitutes an actual part of that treaty depends on the intention of the parties in each individual case.[174]

If the parties adopt certain 'understandings' and formally annex them to their treaty, they obviously want them to form part of their treaty consensus, and not material external to it.[175] This also applies to treaties which contain explicit clauses with regard to their own interpretation or which refer to attached documents dealing with their interpretation, such as, *eg*, Art 9 of the Rome Statute on the ICC introducing "Elements of Crimes" that "shall

[171] *Cf Gardiner* (2015), pp. 171 and 176. See also *Jennings and Watts* (1992), p. 1272.

[172] *Aust* (2013), p. 209.

[173] Final Draft, Commentary to Art 27, 221, para 13.

[174] *Cf* ICJ *Ambatielos Case* [1952] ICJ Rep 28, 42–43; taken up by the ILC in Final Draft Commentary to Art 27, 221, para 13.

[175] *Eg* the 1961 Appendix to the European Social Charter ETS 35, and the 1996 Revised European Social Charter ETS163; the "Understandings with respect to certain provisions of the Convention" annexed to the UN Convention on the Jurisdictional Immunities of States and Their Property (2004), Text annexed to UNGA Res 59/38, 16 December 2004, UN Doc A/RES/59/38.

assist the Court in the interpretation and application" of Arts 6–8 *bis* of the Statute. Those "elements", which can be, and indeed are, amended by decisions of the States Parties, may not be an integral part of the original document of the Statute, but they are certainly part of the treaty consensus of the parties and not extrinsic material within the meaning of para 2.

Interpretation clauses may become part of the treaty consensus only at later date, for example through a subsequent accession or amendment treaty. Such was envisaged, *eg,* in Art 5 of the negotiated Agreement of the Accession of the European Union to the ECHR[176], which the ECJ thwarted through its Opinion 2/13 in late 2014[177]: The provision was meant to include into the treaty consensus explicit understandings on certain terms used in Arts 35 para 2 and 55 of the Convention.

If a document is part of the actual treaty consensus, it is an object and not, as part of the treaty "context", an instrument of interpretation. The provision in para 2 makes documents outside the treaty consensus, but related to its development, fully-fledged interpretative instruments.

63 On the other hand, documents within the meaning of para 2 are to be **distinguished from mere *travaux préparatoires***, since they form part of the "context" and are thus to be treated as an element of the general rule of interpretation, and not as supplementary means according to Art 32. However, it is left unclear in both norms, how the distinction between extrinsic context (Art 31 para 2) and the preparatory works of a treaty (Art 32) can be drawn in a given case. It is submitted that the distinction hangs in the phrase "in connexion with the conclusion of the treaty" contained in both alternatives of para 2. Documents that are connected with the act of concluding the treaty, not so much with the treaty itself, leave the preparatory stage behind them and refer to the actual existence of the treaty consensus. The distinction between "preparation" and "connexion" can be best drawn by taking objective factors (*eg* the time taken in making the document) and the intention of the actors into account. Treaty-related material that does not fulfill the conditions for being "context" according to Art 31 para 2 may still be considered as *travaux* within the meaning of Art 32.

In *Maritime Dispute (Peru v Chile)*, the ICJ distinguished material falling under para 2 (a) from *travaux préparatoires* by pointing out that the material in question, the minutes of a conference of the parties, "summarize the discussions leading to the adoption of the 1952 Santiago Declaration (the treaty in question, O.D.), rather than record an agreement of the negotiating States", which is why the Court characterized them as preparatory works.[178]

A good example for material within the meaning of Art 31 para 2 is to be found in the declarations adopted by the EU Member States as **part of the final act** which is drawn up at Member State conferences amending the basic treaties of the EU, *eg* the Final Act attached to the Treaty of Lisbon.[179]

[176] As published in the Final report of the negotiating parties to the Comité directeur pour les Droits de l'Homme, Doc 47+1(2013)008rev2 (10 June 2013).

[177] ECJ *Opinion 2/13 (Accession to ECHR)* ECLI:EU:2014:2454.

[178] ICJ *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, para 65.

[179] [2007] OJ C 306/231, 249 *et seq*.

64 Since the extrinsic context recognized in para 2 is an expression of the consensus of the parties and since the latter, acting in consensus, are the 'masters' of their treaty, para 2 provides **a method of authentic interpretation** (→ MN 19) of the treaty. In this case, all parties to a treaty agree on interpretative instruments relating to the treaty and thereby on its interpretation by means extrinsic to the treaty itself. The material accepted as relating to the conclusion of the treaty may help to determine which of the various ordinary meanings of its terms shall prevail.

65 Art 31 para 2 sets out **four conditions** for related material to become extrinsic context of a treaty:

- The document in question must be drawn up either by all parties together or, if drawn up only by one or several parties, must be accepted by the other parties. In order to be considered extrinsic context, it must be the object of a **general consensus** of all parties.
- That consensus must be borne by all "**parties**", which are, in accordance with Art 1 para 1 lit g, only those States that have consented to be bound by the treaty and for which the treaty is in force. Taken literally, this would mean (a) that there can be no extrinsic context in this sense before the treaty has actually entered into force, and (b) that acts, views and instruments of States that may have participated in the negotiations but in the end are not party to the treaty must not be considered.
- The material must **"relate**" to the substance of the treaty, *eg* by specifying or clarifying certain concepts used therein or limiting its field of application. That relation must be one of substance, but it must also be encompassed by the parties' consensus.
- The provision does not say **at what moment in time** the consensus, either in the form of "agreement" or of "acceptance", must have been established. In lit a, Art 31 para 2 requires that the agreement was made "in connexion with" the conclusion of the treaty, which does not necessarily require a temporal coincidence, since "connexion" implies a nexus in purpose and substance, not necessarily in time. Lit b does not give any hint as to a temporal requirement. However, the general design of Art 31, which deals with acts and agreements subsequent to the conclusion of the treaty in para 3, would seem to imply that "agreement" and "acceptance" within the meaning of para 2 refer to a consensus established **in a certain temporal proximity** to the process of conclusion. Usually, agreements of this sort are made at the occasion of adopting the text of the treaty, while unilateral documents may very well be presented by individual parties when signing or ratifying a treaty and, therefore, require a reaction by the other parties at that later date.

But also agreements on interpretation are in practice made **subsequent to the adoption** of the text: For example, the common interpretative declaration of the parties to the ESM-Treaty, which itself had been signed on 2 February 2012, was adopted by them on 27 September 2012, the date of the entry into force of the Treaty.[180] With that kind of timing the common declaration may be considered having the required temporal proximity to the conclusion of the treaty, thus being an "agreement" under para 2a), rather than a "subsequent agreement" under para 3a). Moreover, the parties explicitly pointed out in the declaration that its elements "constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty", thus underlining the close connexion with the conclusion of the treaty.

Art 31 para 2 lit a defines "**agreements relating to the treaty**" as "context", provided they were made between all parties in connexion with the conclusion of the treaty. Since the term "agreement" is obviously wider than the notion of "treaty", as defined in Art 2 para 1 lit a, it also covers an unwritten consensus.[181] However, in common treaty practice, those "agreements" regularly take on the form of final acts, protocols of signature, understandings, commentaries or explanatory reports, which are agreed upon by the governmental experts drawing up the text of the treaty and adopted simultaneously with that text. **66**

Eg the "Understandings" agreed upon together with the text of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)[182]; the "Commentaries" on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997;[183] or the Explanatory Report adopted by the Committee of Ministers of the Council of Europe when it agreed on the text of the Criminal Law Convention on Corruption.[184]

The latter example demonstrates that "agreements" between the parties to the treaty may also come in the form of resolutions of an international organization, if the treaty has been drafted under the auspices of that organization. Rather unusual, but, of course, also relevant for lit a are agreements **explicitly** setting out guidance on the interpretation of the treaty.

See *eg* the 1973 Protocol on the Interpretation of Art 69 of the European Patent Convention (revised in 2000), adopted simultaneously with the Convention itself,[185] and the mentioned interpretative declaration to the ESM-Treaty of 2012 (→ MN 65 *in fine*).

[180] For the German version *cf* [2012-II] BGBl 1086. In English in Irish Treaty Series 2013, No 14, *in fine*.

[181] *Villiger* (2009), Art 31 MN 18.

[182] Understandings not printed in 1108 UNTS 151, but included in the Report of the Conference of the Committee on Disarmament Vol I, GAOR, 31st Session, Supp No 27 (1976) UN Doc A/31/27, 91–92.

[183] See *OECD* (ed) (2010) Convention on combating bribery of foreign public officials in international business transactions and related documents, pp. 13–18.

[184] ETS 173.

[185] UNTS 199, 509.

Probably the most prominent example in this respect is the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS[186] which in its Art 2 para 1 expressly sets out that its provisions and Part XI of the Convention "shall be interpreted and applied together as a single instrument".

In case of bilateral treaties the parties often include details on interpretation or application of the treaty in agreed minutes or an exchange of letters.

See *eg* the exchange of interpretative letters accompanying the 1977 UK-US Air Services Agreement.[187]

67 Art 31 para 2 lit b refers to unilateral or plurilateral "**instruments related to the treaty**" that are accepted as such by all the other parties. These can be statements made by individual parties before the conclusion of the treaty or accompanying their expression of consent to be bound, but encompassed are also unilateral interpretative declarations which a State presents at the time of agreeing to the treaty and which regularly share the outer characteristics of reservations to the treaty.[188] Unlike a reservation, an interpretative declaration simply states that the declarant considers or understands provision X to mean Y. By making such a declaration a State is taking the opportunity to influence in advance the subsequent interpretation of the treaty, the extent of that influence being dependent on the reaction of the other parties to the declaration.[189]

It is, for example, common practice in the European Union, as it was in the European Community, to add declarations of one or more Member States to the final acts drawn up at Member States conferences amending the basic treaties of the EU, the texts of those declarations having been taken note of by the other Member States at the end of the negotiations.[190]

68 As Art 31 para 2 lit b does not stipulate any formal requirement, the "**acceptance**" by the other parties can also be given informally or tacitly. Because, however, there is no provision in Art 31 para 2, as there is for objections to reservations in Art 20 para 5, to the effect that non-objection amounts to acceptance, a party advocating a certain interpretation on the basis of extrinsic context under lit b will always have to show that the other parties actually accepted the interpretation advanced.

III. Interpretative Means Additional to the Context (Para 3)

69 Art 31 para 3 introduces two rather different things as means of interpretation, the common feature of which seems to be that they relate to **the practice of the parties**

[186] UNTS 41; 33 ILM 1309.

[187] UNTS 21, cited by *Aust* (2013), p. 211 in n 28.

[188] *Cf McRae* (1978), p. 155 *et seq; Cameron* (2008). See also → Art 19 MN 3.

[189] *McRae* (1978), p. 170.

[190] *Cf eg* the declarations contained in the Final Act attached to the Treaty of Lisbon (2007), [2007] OJ C 306, 231, 267 *et seq*.

to the treaty in question, either with regard to the specific treaty or in their international legal relations in general: lit a and b allow material to be used that relates to the implementation of the treaty by its parties, while lit c directs the view of the interpreter to other rules of international law, independent of the specific treaty, and thereby introduces the systemic approach into treaty interpretation.

Despite an obvious difference in the wording, the material mentioned in para 3 is meant to have the same interpretative value as that listed in para 2 (→ MN 5), the essential difference being that para 2 refers to the process of conclusion of the treaty, while para 3 deals with evidence that arises independently from that process. However, both kinds of material are supposed to be used in order to establish the true meaning of the relevant terms of the treaty by applying the general rule of interpretation. **70**

The issues addressed in Art 31 para 3 are currently **under consideration by the International Law Commission**. After first having established a Study Group on the topic of "Treaties over time" in 2009, the Commission decided in 2012 to appoint a Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (*Georg Nolte*) and to include the re-formulated topic in its programme of work. In 2016, the Commission adopted a set of 13 draft conclusions on the topic on first reading and the respective commentaries.[191] The draft conclusions were transmitted to Governments for comments and observations until the beginning of 2018. **71**

1. Subsequent Agreements (lit a)

The "subsequent agreements" referred to in para 3 lit a bear a **close resemblance to the agreements mentioned in para 2 lit a**, the only two apparent differences being that the agreements here are made "subsequently", *ie* with a certain time lag after the conclusion of the treaty, and that they relate specifically to "the interpretation of the treaty or the application of its provisions", and not simply to the treaty. However, there does not seem to be any practical difference between both types of agreement: if they are sufficiently clear, they will have a comparable effect on establishing the meaning of the terms of the treaty; as *Gardiner* points out, whether elucidation of the treaty provisions is provided by the parties at the time of conclusion of the treaty or later seems of little importance.[192] What has been said with regard to "agreements" under para 2 (→ MN 66) is, thus, equally applicable here. **72**

However, it appears from judicial practice in the WTO that one important qualification has to be made: a subsequent agreement cannot be one "regarding the interpretation or application" of the treaty, if the agreement itself is, in the case of a conflict with the treaty, supposed to follow the latter or to adjust to it, thus if the agreement is considered by its parties to be **of lower rank than the treaty** under **73**

[191] ILC Report, 68th Session (2016) UN Doc A/71/10, ch VI.

[192] *Gardiner* (2015), p. 230.

interpretation. The external means of interpretation must therefore be of equal rank as the object of interpretation.

> Thus, in *Chile–Price Band System* the WTO Panel, which had to interpret the WTO Agreement on Agriculture, did not accept an Economic Complementarity Agreement between Chile and MERCOSUR as a "subsequent agreement" within the meaning of Art 31 para 2 lit a, because in its preamble it explicitly stated that its provisions "shall adjust" to the WTO Agreements.[193]

74 Since authors of the agreements referred to in para 3 lit a can only be the "parties" to the treaty, acting in consensus, these agreements are also a **means of an authentic interpretation** of the treaty concerned (→ MN 19) and must therefore be read into the latter for purposes of its interpretation.[194] Being the masters of their treaty, the parties are, in principle, not limited in making subsequent understandings or agreements. If the latter's content would not come within the bounds of an ordinary meaning of the terms, they would amount to an amendment of the treaty by implicit agreement.

> This is why in *Territorial Dispute (Libya v Chad)* the ICJ considered it irrelevant to categorize an Anglo-French Convention of 1919, which was supposedly concluded to interpret a declaration between the two States of 1899, either as a confirmation or modification of the declaration. In any case, because the parties dealt with their own treaty consensus, the later agreement constituted the correct and binding interpretation of the earlier declaration.[195]

75 Again, since para 3 lit a does not contain any formal requirement, it would seem that the "agreements" can very well be made informally. They **do not have to be in treaty form** but must be such as to show that the parties intended their understanding to be the basis for an agreed interpretation.[196] The proven fact, not the form, of an agreement is what counts under lit a.

> This also seems to be the position of the ICJ in the *Kasikili/Sedudu Island* case, when the Court reviewed the various dealings between the local authorities involved in the border dispute and concluded that there had been no agreement between them, so that para 3 lit a could not apply.[197]

If informal agreements or understandings fall under lit a, this would also mean that there is a **potential overlap with the concept of "subsequent practice** establishing agreement of the parties" within the meaning of lit b. One might even say that the less formal the subsequent agreement, the greater is the significance of subsequent practice confirming it for the purpose of establishing the meaning of a treaty provision.

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[193] WTO Panel *Chile–Price Band System* WT/DS207/R, paras 7.83–84 (2002).

[194] Final Draft, Commentary to Art 27, 221, para 14. Draft conclusion 3 para 2 of the ILC in 2016 (n 191); in its commentary the Commission pointed out that this interpretation, although being authentic, is not necessarily conclusive or legally binding (para 4).

[195] *Cf* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 60.

[196] *Gardiner* (2015), p. 245.

[197] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 63.

Since the external appearances of the "agreement" under lit a are irrelevant, it might also take on the form of a **decision of a treaty organ**, provided that it was taken unanimously by all States parties to the treaty or that parties that did not vote can at last be taken to have implicitly accepted the decision made. **76**

This was explicitly held by the WTO Appellate Body with regard to the Doha Ministerial Decision, a decision on the interpretation of the WTO Agreements adopted by all WTO Members meeting in the form of the Ministerial Conference.[198]

Moreover, the regime of navigation on the river Rhine under the Convention of 1868 ("Acte de Mannheim")[199] contains various Principles of Interpretation of the Convention which were adopted unanimously by the Central Commission, where all five Member States are represented and have one vote each.[200]

With regard to the Convention for the Regulation of Whaling the ICJ referred to non-binding recommendations by the International Whaling Commission, an organ established by that Convention, and held that, when those recommendations are adopted by consensus or unanimous vote, "they may be relevant for the interpretation of the Convention or its Schedule".[201] However, the Court also pointed out that resolutions adopted by the Commission "without the support of all States parties to the Convention and, in particular, without the concurrence of Japan", cannot be regarded as falling under Art 31 para 3 VCLT.[202]

2. Subsequent Practice (lit b)

The subsequent practice of the parties in implementing the treaty constitutes objective evidence of their understanding as to the meaning of the latter and is, therefore, of utmost importance for its interpretation. This particular value of subsequent practice had already been pointed out by the arbitral tribunal in the *Russian Indemnity* case of 1912 when it held that: **77**

"l'exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements."[203]

From there, it is only a small step to recognize that, because the parties are the masters of their treaty, a meaning derived from subsequent practice, which is consistent and embraces all parties of a treaty, constitutes an **authentic interpretation** established by agreement, not only overlapping with agreements under lit a (→ MN 74), but also blurring the line between interpretation and amendment of a

[198] *US–Clove Cigarettes* WT/DS406/AB/R, paras 258–268 (2012), reprinted at 51 ILM 759.

[199] Documented at www.ccr-zkr.org. Accessed on 22 November 2017.

[200] *Eg* the decision 2003-II-10 on Principles of Interpretation of the Mannheim Act, or the decision on the common interpretation of Additional Protocol No 6 of 21 October 1999.

[201] ICJ *Whaling in the Antarctic* [2014] ICJ Rep 226, para 46.

[202] *Ibid* para 83.

[203] *Russian Claim for Interest on Indemnities (Russia v Turkey)* (1912) 11 RIAA 421, 433.

treaty.[204] Since the parties, acting collectively through their concordant practice, are the masters of their treaty, they cannot only take interpretation further than could a body charged with the role of independent interpretation, but also bring about an implicit treaty amendment by practice.[205]

> This was probably what the ECJ had in mind when, mis-interpreting the ICJ's dictum in *Temple of Preah Vihear*, it held: "In that regard, as is clear from the case-law of the International Court of Justice, the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties' agreement (ICJ, Case concerning the Temple of Preah Vihear (Cambodia v Thailand), judgment of 15 June 1962, ICJ Reports 1962, p. 6)".[206] Critical as to that approach, but in a similar vein as to the general point was recently Advocate General *Wathelet* in the *Polisario* case, who would only accept as treaty amendment "practice, which is known to and accepted by the parties and is sufficiently widespread and sufficiently long-term to constitute a new agreement in itself".[207]

78 Subsequent practice as an element of treaty interpretation is nowadays **well-established in the practice** of international courts and tribunals,[208] and it was an important element of it even in the early days of international jurisprudence: Already in 1922, the PCIJ pointed out in its second advisory opinion:

> "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the treaty."[209]

The limits of referring to subsequent practice were also fairly clearly set by the Court when it held in *Land, Island and Maritime Frontier Dispute* that consideration of that element cannot make it read into the text of a treaty a competence that is not specifically mentioned there.[210]

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[204] This was already pointed out by *Waldock* III 60, para 25.

[205] *Gardiner* (2015), pp. 274–278. This was also the view of the ILC which in Art 38 of its Final Draft had explicitly provided for the possibility that a treaty "may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions" (Final Draft 236). The fact that this article was the only one that was not adopted, but discarded altogether at the Vienna Conference, was mostly based on its specific drafting or on grounds of legal policy and cannot be taken to mean that the concept of implicit modification of a treaty by its parties, acting in agreement, was rejected by the States, *cf Karl* (1983), pp. 288–295.

[206] ECJ *Oberto and O'Leary* Joint C-464/13, C-465/13 ECLI:EU:C:2015:163, para 61.

[207] In ECJ *Council v Front Polisario* C-104/16 P (Opinion AG *Wathelet)* ECLI:EU:C:2016:677, para 96.

[208] For the jurisprudence of the ICJ, *cf* the references given by the Court itself in *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 50. For the ECJ see the recent decision of its Grand Chamber in ECJ *Council v Front Polisario* C-104/16 P ECLI:EU:C:2016:973, para 120.

[209] PCIJ *Competence of the ILO* PCIJ Ser B No 2, 39 (1922). *Cf* also *Payment in Gold of Brazilian Federal Loans Contracted in France* PCIJ Ser A No 21, 93, 119 (1929); ICJ *Corfu Channel* [1949] ICJ Rep 4, 25: "The subsequent attitude of the Parties shows [. . .]."

[210] ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, para 380.

Which **elements of practice** are to be taken into account under lit b will vary according to the subject matter of the treaty concerned. In principle, any action, or even inaction, of parties with a view to implementing the treaty will have to be considered. Just as in the process of developing customary law (Art 38 para 1 lit b ICJ Statute), the notion of "practice" comprises any external behavior of a subject of international law, here insofar as it is potentially revealing of what the party accepts as the meaning of a particular treaty provision. **No particular form** is required, so that official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations are just as relevant as national acts of legislation or judicial decisions. In fact, "practice" in this respect is not limited to the central government authorities of States, rather any public body acting in an official capacity can contribute to demonstrating the state's position towards its treaty commitments. **79**

The **relevance of national legislation** in this respect is, *eg*, emphasized in the jurisprudence of the ECtHR on the question if capital punishment was as such compatible with Art 3 of the ECHR. In its *Soering* judgment of 1989, the Court pointed out that Art 3 must be construed in harmony with Art 2 and could not, therefore, be taken to include a general prohibition of the death penalty, but continued: "Subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Art 2 § 1 and hence to remove a textual limit on the scope for evolutive interpretation of Art 3."[211] Many years later, in its first *Öcalan* judgment of 2003, the ECtHR reiterated that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Art 3 "it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field", and it observed that "the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided", in that forty-three contracting States had by then *de jure* abolished that penalty.[212] The Court concluded that though their practice the States had agreed to modify Art 2 § 1 of the Convention and that against this background it could be argued "that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Art 3."[213] Again some years later, this interpretation of Art 3 of the Convention has become generally accepted case-law of the ECtHR, as the Court confirmed in *Al-Saadoon and Mufdhi*.[214]

The ECtHR adopted a similar approach with regard to the applicability of Art 9 ECHR (freedom of conscience and religion) to conscientious objectors in the *Bayatyan* case: While the ECommHR still had denied that the conscientious objection to military service was covered by the Convention, the Court discovered "an obvious trend among

[211] ECtHR *Soering v United Kingdom* App No 14038/88, Ser A 161, para 103 (1989).

[212] ECtHR *Öcalan v Turkey* App No 46221/99, 12 March 2003, paras 194–195.

[213] *Ibid* para 198.

[214] ECtHR *Al-Saadoon and Mufdhi v United Kingdom* (GC) App No 61498/08, 2 March 2010, para 120.

> European countries to recognize the right to conscientious objection" and established that "the domestic law of the overwhelming majority of Council of Europe Member States, along with relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the question in Europe and beyond". Consequently it held, that the matter today falls under Art 9 ECHR.[215]

80 In order to become relevant under lit b, State conduct must constitute **a sequence of acts or pronouncements**, since "practice" cannot be established by one isolated incident. The interpretative value of that practice will always depend on the extent to which it is concordant, common and consistent and thus sufficient to establish a discernable pattern of behaviour.[216]

81 Practice of the parties is only relevant under lit b if it occurs "**in the application**" of the treaty, which plainly indicates that, just as for the development of international customary law, a subjective link is required under lit b: the parties whose practice is under consideration must regard their conduct to fall within the scope of application of the treaty concerned and in principle to be required under that treaty. They must act the way they do for the purpose of fulfilling their treaty obligations, *ie* their subsequent conduct must be motivated by the treaty obligation. Or, as the ILC recently put it:

> "The identification of subsequent agreements or subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or practice, have taken a position regarding the interpretation of the treaty."[217]

On the other hand, the conduct of the parties does not have to bear a special reference to a particular provision of the treaty, but can relate to the treaty as a whole or to other parts of it than the one under scrutiny.

82 Subsequent practice may also serve as a means to determine the scope of application of a treaty, and then even to establish that the latter does not apply. Thus, under lit b the interpreter may just as well consider the practice of parties in the "**non-application of the treaty**", *ie* draw conclusions from the fact that the parties did not apply their treaty when treaty provisions might have been thought to be applicable.[218] This was the approach, for example, of the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, when the Court referred to State practice in order to determine whether various treaties applied to the use of nuclear weapons:

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[215] ECtHR *Bayatyan v Armenia* (GC) App No 23459/03, 7 July 2011, paras 101–109.

[216] *Sinclair* (1984), p. 137. Adopted by the WTO Appellate Body in *Japan–Alcoholic Beverages* WT/DS 8, 10–11/AB/R, 13 (1996); and the Panel in *Chile–Price Band System* WT/DS207/R, para 7.78–79 (2002).

[217] ILC Draft conclusion 6 para 1, first sentence, in Report 2016 (n 191).

[218] *Gardiner* (2015), pp. 262–264.

> "The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by 'poison or poisoned weapons' and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term 'analogous materials or devices'. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol [. . .]."[219]

83 Although the wording of lit b does not say so explicitly, the subsequent practice considered relevant for the purpose of interpretation must be practice of the parties, *ie* **attributable to parties** to the treaty concerned.[220] Thus, acts or pronouncements of non-parties or non-State actors, that are not attributable to the States Parties according to the general rules of attribution, can in principle not be taken into account. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.[221] Again, "parties" refers, in accordance with Art 1 para 1 lit g, only to those States that have consented to be bound by the treaty and for which the treaty is in force.

84 Even though lit b requires the practice to establish the agreement of "the parties", meaning all the parties, that does **not mean that every party** must have individually engaged in practice. The ILC omitted the word "all", which had been contained in an earlier draft, from this phrase precisely in order to avoid the misconception that the practice must be actively performed by all the parties.[222] It suffices, therefore, that inactive parties should have accepted the practice set by other parties. Although it is, thus, possible that only some of the parties participate in the subsequent practice, lit b does not allow a certain interpretation to be established only among those participating States with binding force '*inter se*', as opposed to the other parties to the treaty: if some of the parties wanted to modify the treaty only between themselves, they would have to pursue the means provided for in Art 41 VCLT, *ie* to conclude an agreement to that effect and notify the other parties of it.[223] As the ILC summarized recently:

> "The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of

[219] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, paras 55–56.

[220] *Gardiner* (2015), p. 266. ILC Draft conclusion 5 para 1 in Report 2016 (n 191).

[221] ILC Draft conclusion 5 para 2 in Report 2016 (n 191). As examples for "assessing", the ILC commentary refers to initiating, identifying and reflecting subsequent practice of the parties.

[222] *Cf* Final Draft, Commentary to Art 27, 222, para 15.

[223] Concurring *Gardiner* (2015), pp. 267–268.

> one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[224]

85 As lit b does not explicitly say whose practice is to be considered, there is room for other actors that have been given a role in the implementation of a treaty to set relevant practice. Thus, where States by treaty entrust performance of activities under that treaty to an **international organ or organization**, the fulfillment of those functions is not only attributable to the parties (→ MN 83), but can also in itself constitute "subsequent practice" under the treaty. This is of particular relevance with regard to constituent treaties of international organizations, and here especially for interpreting the provisions dealing with the competences and procedures of the organs created. While the ILC Special Rapporteur has explicitly declined to deal with the practice of organs,[225] the ICJ underlined its importance with great emphasis:

> "the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, *as well as its own practice*, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[226]

In its recent conclusions, the ILC distinguished subsequent practice of States parties to a treaty under Art 31 para 3 which "may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument", from practice of an international organization itself in the application of its constituent instrument which "may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".[227] Since the pronouncements of **expert treaty bodies**, *ie* those consisting of persons serving in their personal capacity, are, in the view of the ILC, not attributable to the States parties to the respective treaty, they cannot as such constitute subsequent practice under Art 31 para 3b.[228]

86 That "subsequent practice" can also be **practice of the organization** concerned has for a long time been a permanent feature of international jurisprudence. Above all, the ICJ refers to practice of the UN organs in almost every case where it has to interpret one of its constituent treaties.

> Thus, in its *Namibia* opinion the Court acknowledged that in view of the longstanding practice in the UN Security Council the phrase "concurring votes" in Art 27 para 3 UN Charter does not actually require, as the wording might suggest, that all permanent members must vote in favor of a resolution, but that the requirement is also fulfilled by abstention or absence. To reach that conclusion, it referred to "the proceedings of the

[224] ILC Draft conclusion 10 (9) para 2 in Report 2016 (n 191).

[225] *Waldock* III 52, 59–60, para 24a.

[226] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 19 (emphasis added).

[227] ILC Draft conclusion 12 (11) paras 2 and 3, in Report 2016 (n 191).

[228] *Cf* ILC Draft conclusion 13 (12), para 3, in Report 2016 (n 191), and the respective commentary, in particular para 10.

Security Council extending over a long period", especially presidential rulings and the positions taken by members of the Council, and it held that this procedure "has been generally accepted by Members of the United Nations and evidences a general practice of that Organization".[229]

In its opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ pointed to a change in the practice of the General Assembly for the purpose of interpreting Art 12 UN Charter to the effect that it precludes recommendations of the Assembly only when the Security Council is actually exercising its functions at that moment.[230]

In the IMCO case the Court, in order to interpret Art 28 lit a IMCO Convention, took into account the actual practice followed by the organization's Assembly in giving effect to the provision, such as the electoral practice and the apportionment of the expenses of the Organization, as well as a working paper prepared by the Secretary-General. Moreover, the interpretation was chosen which was "most consonant with international practice and with maritime usage".[231]

In its *Nuclear Weapons (WHO)* opinion the ICJ considered "the practice of the WHO", in order to establish whether the legality of the use of nuclear weapons belongs to the scope of activities of that Organization. In particular, the Court referred to reports and resolutions adopted by the WHO organs and held that a single resolution, "adopted not without opposition, could not be taken to [...] amount on its own to a practice establishing an agreement between the members of the Organization" which would be relevant for the interpretation of its constituent treaty.[232]

For the purpose of interpretation, the Court considered as relevant practice, *inter alia*, the rules of procedure of UN organs[233] and the Organization's budgetary practice.[234]

87 Subsequent practice of parties is only relevant for treaty interpretation if it "**establishes the agreement of the parties**". In setting up this second subjective requirement, lit b underlines the value of subsequent practice as an instrument of authentic interpretation: the practice, even if only some parties participated in it, must be accepted by all the parties, *ie* the parties as a whole.[235] Again, if not every party has participated in the practice, there must be at least good evidence that the other, inactive parties have endorsed it. If the subsequent practice consists of the

[229] ICJ *Namibia* [1971] ICJ Rep 16, para 22.

[230] ICJ *Construction of a Wall* [2004] ICJ Rep 136, paras 27–28.

[231] ICJ *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 168–170.

[232] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 27.

[233] ICJ *Second Admissions Case* [1950] ICJ Rep 4, 9.

[234] ICJ *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 160.

[235] *Cf* Final Draft, Commentary to Art 27, 222, para 15.

conduct of organs of an international organization, it is only relevant if it is not counteracted by acts or representations of the parties to the treaty in question.

88 What exactly "**agreement**" within the meaning of lit b means is not clear. In the *Kasikili/Sedudu Island* case, the ICJ seems to have considered the concept to mean less than "agreement" in lit a, since it concluded *a fortiori* from the latter when it held:

> "From all of the foregoing, the Court concludes that the abovementioned events [. . .] demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna Convention on the Law of Treaties, Art 31, para 3 (b)). *A fortiori*, they cannot have given rise to an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (*ibid*, Art 31, para 3 (a))."[236]

Thus, agreement in lit b would in essence seem to mean **acceptance**, even tacit, and is at the very minimum evidenced by the absence of any disagreement.[237] Such acceptance cannot be taken to exist if the parties concluded a separate treaty whose provisions take up the problem that was supposed to be addressed by the meaning established by way of interpretation under para 3 lit b.

> Thus, in its *Soering* judgment (→ MN 79) the ECtHR refused to interpret Art 3 ECHR, because of the development in national policies, in a way as to prohibit the death penalty *per se*, because the contracting States to the Convention had concluded Protocol No 6 to the Convention which provided for the abolition of the death penalty in time of peace. According to the Court "Protocol 6, as a subsequent written agreement, shows that the intention of the Contracting Parties [. . .] was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions [. . .] Art 3 cannot be interpreted as generally prohibiting the death penalty."[238]

When the "agreement" of the States parties is supposed to be expressed through instruments adopted by a treaty organ (→ MN 76), recent ICJ jurisprudence would seem to require that those instruments have been adopted by consensus or unanimous vote, at least it must be made sure that they had the support of all States parties.[239]

89 What is more, "agreement" presupposes, as the ICJ has also pointed out, the **knowledge or awareness** of other parties of a certain practice: internal documents or

[236] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 63.

[237] Concurring *Villiger* (2009), Art 31 MN 22. However, in *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 44, the ICJ was unable to read into the absence of any objection on the part of the other parties to the treaty in question an "agreement" within the meaning of para 3 lit b.

[238] ECtHR *Soering v United Kingdom* App No 14038/88, Ser A 161, para 103 (1989).

[239] ICJ *Whaling in the Antarctic* [2014] ICJ Rep 226, paras 46 and 83.

acts that have never been made known to the other parties cannot qualify under lit b.[240] Rather, the subjective element contained in that provision requires that a party acts under a treaty in the belief of a certain meaning of its terms and that the other parties were aware of that understanding and accepted it as what the treaty stipulates.[241]

Subsequent practice by the parties that does not establish an agreement between them, may be **relevant as a supplementary means** of interpretation under Art 32, since that provision does not list those means in an exhaustive manner (→ Art 32 MN 25). This has been recognized by international practice[242] and in legal doctrine[243], and was recently taken up by the ILC in its work on subsequent practice[244]. To be relevant under Art 32, however, conduct by one or more parties must occur in the application of the treaty.[245] **90**

From its wording and systematic position within para 3, it would follow that "subsequent practice" under lit b refers to an empirical exercise (was there objective practice by the parties or not?), which requires a normative interpretation only when it comes to establishing "agreement" among the parties. Especially the position of lit b right before lit c would seem to suggest that the former does **not require the subsequent practice**, in order to be material relevant for interpretation, **to be in conformity with other rules of international law**. In this perspective, those other rules only come into play under lit c. **91**

> "However, in the *Polisario* case the ECJ seems, on the contrary, to have combined the two approaches, by refusing to accept a purported subsequent practice for treaty interpretation, because it "would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties … Such implementation would necessarily be incompatible with the principle that Treaty obligations must be performed in good faith, which nevertheless constitutes a binding principle of general international law …"[246]

3. Relevant Rules of International Law: The Systemic Approach (lit c)

Art 31 para 3 lit c includes yet other material extrinsic to the treaty in question into the process of its interpretation. It refers to **the international legal system as a whole as part of the context** of every treaty concluded under international law and thereby lays the foundation for the systemic approach to treaty interpretation: **92**

[240] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 55.

[241] *Ibid* para 74.

[242] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, paras 79–80; ECtHR *Loizidou v Turkey* (Preliminary Objections) App No 15318/89, Ser A 310, paras 79–82 (1995); WTO Appellate Body *EC–Computer Equipment* WT/DS 62, 67 and 68/AB/R, para 90 (1998). More references given in the ILC commentary (n 191), Conclusion 4 paras 26–35.

[243] *Sinclair* (1984), p. 138; *Torres Bernardez* (1998), pp. 726, 727; *Villiger* (2009), Art 31 MN 22.

[244] Draft conclusion 2 (1) para 4 in Report 2016 (n 191).

[245] ILC Draft conclusion 6 para 3 in Report 2016 (n 191).

[246] ECJ (GC) *Council v Front Polisario* C-104/16 P ECLI:EU:C:2016:973, paras 123–124.

whatever their subject matter, treaties are a creation of the international legal system and their operation is based upon that fact. In a much more restricted form the rule had already been applied in early international jurisprudence, for example when the PCIJ looked at treaties and other documents having the same object as the treaty under consideration.[247] Later the ICJ formulated it in its *Namibia* opinion, under the impression of the debate in the ILC and the adoption of the VCLT, in a rather broad and general manner:

> "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[248]

93 Moreover, the rule laid down in lit c has a firm **basis in the principle of good faith**, since according to that principle, every party to a treaty must in principle be presumed to intend to keep its treaty obligation in conformity with its other obligations under international law. As the ICJ pointed out in the *Right of Passage* case:

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[249]

The French-Mexican Claims Commission, through Professor *Verzijl*, had produced the same thought much earlier in its *Georges Pinson* decision of 1928:

> "Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente."[250]

94 The interpretative approach laid down in lit c views the international legal order as one single system and allows drawing conclusions from that perspective. It has, therefore, great potential to be one of the means to mitigate the effects of the much-described **fragmentation of international law**, since treaty interpretation can on the basis of this rule transgress the borders of specialized subregimes of international law, such as environmental law, trade law, law of the sea, international criminal or human rights law, and try to find a meaning for the terms in question that reflects the common basis of legal rules in an integrated system of international law. Thus, lit c highlights systemic integration as a function of treaty interpretation.[251]

95 The provision refers to "**relevant rules of international law**" as a means to interpret treaty provisions. Since no restrictions are contained in that phrase,[252] and

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[247] PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 25–28 (1923).

[248] ICJ *Namibia Opinion* [1971] ICJ Rep 16, para 53.

[249] ICJ *Right of Passage* (Preliminary Objections) [1957] ICJ Rep 125, 142.

[250] *Georges Pinson (France v Mexico)* (1928) 5 RIAA 327, para 50 subpara 4.

[251] *Cf* the report of the ILC Study Group on "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006), UN Doc A/CN.4/L.702, in its conclusions 17–21. In the same context also *Thiele* (2008), pp. 24–28.

[252] In an earlier draft the word "general" had been included as qualifying "international law", but it was deleted during the discussion in the ILC, in order to allow specific and regional rules to be used, *cf Gardiner* (2015), pp. 300–301.

its meaning is even widened by the word "any", it must be taken to refer to all recognized sources of international law the emanations of which can in principle be of assistance in the process of interpretation. The implicit reference is, of course, to Art 38 para 1 ICJ Statute.

Thus, the terms of a treaty can, first, be interpreted in the light of those of **another treaty**, especially where the latter deals with a similar object or addresses the same legal situation. **96**

For example, the **ECtHR** uses, for the purpose of interpreting provisions of the ECHR, to take into account other human rights treaties, such as the International Covenant on Civil and Political Rights, the UN Convention Against Torture, the UN Convention on the Rights of the Child, the European Social Charter or conventions concluded under the auspices of ILO,[253] as well as the interpretation of those instruments by competent organs. In the *Rantsev* case the Court, after explicitly referring to Art 31 para 3 VCLT, turned to a UN Protocol and to the Anti-Trafficking Convention of the Council of Europe, in order to establish that trafficking in persons falls within the scope of Art 4 ECHR.[254] In *Hassan v United Kingdom* the grounds of permitted deprivation of liberty under Art 5 ECHR were interpreted in the light of the Third and Fourth Geneva Convention on the laws of war relating to internment, with the Court pointing out that the former "should be accommodated, as far as possible" with the taking of prisoners of war and the detention of civilians under the latter.[255]

Also the **Inter-American Court of Human Rights** refers to other human rights treaties, in order to establish the meaning of provisions of the American Convention on Human Rights. Thus, in the *Street Children* case the Court pointed out that "[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Art 19 of the American Convention".[256]

In a recent maritime delimitation case the **ICJ** explicitly referred to UNCLOS as containing "relevant rules" within the meaning of lit c.[257]

[253] *Eg,* ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 60; *Pini et al v Romania* ECHR 2004-V, para 139; *Sidabras and Džiautas v Lithuania* App Nos 55480/00, 59330/00, ECHR 2004-VIII, para 47; *Siliadin v France* App No 73316/01, ECHR 2005-VII, paras 85–87; *Sørensen and Rasmussen v Denmark* (GC) App Nos 52562/99 and 52620/99, ECHR 2006-I, para 72; *ASLEF v United Kingdom* App No 11002/05, 27 February 2007, para 38; *Emonet et al v Switzerland* App No 39051/03, 13 December 2007, para 65; *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, paras 69–73.

[254] ECtHR *Rantsev v Cyprus and Russia* App No 25965/04, 7 January 2010, paras 273–282.

[255] ECtHR *Hassan v United Kingdom* (GC) App No 29750/09, ECHR 2014-VI, paras 102–111.

[256] IACtHR *'Street Children' (Villagran-Morales et al) v Guatemala*, 19 November 1999, para 194.

[257] ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 89.

Lit c also applies to **bilateral treaties** in force between two parties to a dispute on the interpretation of a multilateral treaty.

Thus, in *Questions of Mutual Assistance* the ICJ pointed out that the general clauses contained in the earlier Treaty of Friendship and Co-operation between Djibouti and France "does have a certain bearing on the interpretation and application" of the 1986 Convention on Mutual Assistance in Criminal Matters between them.[258]

97 Since they are derived from the provisions of the UN Charter, basically a multilateral treaty, binding **resolutions of the UN Security Council** may also play an important role in the process of treaty interpretation.

Thus, the ECtHR in its *Loizidou* case referred to Security Council resolutions relating to the situation in Northern Cyprus when it interpreted the ECHR with regard to the taking of property there.[259]

98 Secondly, the general rules of **customary international law** may serve to set the background of a treaty provision and, thus, contain important guidance as to its interpretation.

This is, for example, what the **ICJ** did in the *Oil Platforms* case when it interpreted a clause contained in the bilateral treaty of friendship between Iran and the United States, which allowed for measures "necessary to protect the essential security interests" of either party, in the light of the general rules of international law on the use of force and the right to self-defence. The Court underlined that "the application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court [. . .]."[260]

Also the **ECtHR** referred to international customary law in its well-known *Al-Adsani* case: "The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity." The Court interpreted the right of access to court granted in Art 6 para 1 ECHR in the light of the inherent restrictions arising from the customary rules of State immunity.[261] In a subsequent case, the Court referred to the 2004 UN Convention on State immunity, which had not yet entered into force and was, thus, not binding on the State in question, as enshrining customary international law and, in that capacity, took it into account in interpreting the right of access to a court.[262] In the *Banković* case, when the ECtHR had to interpret the phrase "within its jurisdiction" in Art 1 ECHR, the Court found that that "must also take into account any relevant rules of international law when

[258] ICJ *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, paras 112–114.

[259] ECtHR *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, paras 42–47.

[260] ICJ *Oil Platforms* (Merits) [2003] ICJ Rep 161, paras 40–41.

[261] ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, paras 55–56. To the same effect ECtHR *Cudak v Lithuania* (GC) App No 15869/02, ECHR 2010-III, para 56; *Sabeh El Leil v France* (GC) App No 34869/05, 29 June 2011, para 48.

[262] ECtHR *Sabeh El Leil v France* (GC) App No 34869/05, 29 June 2011, paras 48–67.

examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law",[263] but in the end did not derive any assistance from external material. In *Marguš v Croatia* the Court, referring to Art 31 para 3 lit c) VCLT, turned to the "general principles of international law" for the purpose of interpreting Art 4 Protocol No 7 (*ne bis in idem*), and, since it discovered "a growing tendency in international law to see such amnesties as unacceptable because they are incompatible with the unanimously recognized obligation of States to prosecute and punish grave breaches of fundamental human rights", held that the *ne bis in idem* rule did not apply to such breaches.[264]

The **ECJ** in the *Brita* case, where it was to interpret the EC-Israel Association Agreement, applied "the general international law principle of the relative effect of treaties [. . .] ('*pacta tertiis nec nocent nec prosunt*')" and referred in that respect explicitly to the 'relevant rules' clause of Art 31 VCLT.[265] In *Axel Walz* the Court, for the purpose of interpreting the Montreal Convention on the International Carriage in Air, referred to the ILC Articles on State Responsibility[266] as endorsing "a concept of damage which [. . .] is common to all the international law sub-systems".[267] In the *Polisario* case, the Grand Chamber of the ECJ referred under Art 31 para 3 c) VCT, among others, to the customary principle of self-determination and used it to interpret the scope of the Association Agreement between the EU and Morocco.[268]

The **Iran-US Claims Tribunal**, when it had to interpret the word "national" contained in the bilateral Claims Settlement Declaration, considered relevant the customary rule of effective nationality which it saw as having been developed in precedents and legal doctrine.[269] Similarly, in the *Iron Rhine* **arbitration** the tribunal took into consideration the general rules of international environmental law, in order to interpret the treaty before it.[270] In the arbitration concerning plain tobacco packaging (*Philip Morris v Uruguay*) the tribunal, when interpreting the specific investment treaty, turned to the development of the customary "fair and equitable treatment" standard.[271]

[263] ECtHR *Banković et al v Belgium et al* (GC) App No 52207/99, ECHR 2001-XII, para 57.

[264] ECtHR *Marguš v Croatia* (GC) App No 4455/10, ECHR 2014-III, paras 129–141.

[265] ECJ (CJ) *Brita* C-386/08 [2010] ECR I-1289, paras 43–44; confirmed in ECJ (GC) *Council v Front Polisario* Case C-104/16 P, 21 December 2016, ECLI:EU:C:2016:973, para 100.

[266] Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[267] ECJ (CJ) *Axel Walz* C-63/09 [2010] ECR I-4239, para 27.

[268] ECJ (GC) *Council v Front Polisario* C-104/16 P ECLI:EU:C:2016:973, paras 86–92.

[269] Iran-United States Claims Tribunal *Iran v United States* Case A/18 (1984) 75 ILR 175, 188–194.

[270] *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, paras 58–59.

[271] ICSID *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* ARB/10/7, 8 July 2016, paras 317–324.

99 Although of minor practical relevance, para 3 lit c would even allow reference to **general principles of law** within the meaning of Art 38 para 1 lit c ICJ Statute in the context of interpreting a treaty provision.

A famous example is the decision of the ECtHR in the *Golder* case where the Court held: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para 1 must be read in the light of these principles."[272]

In its decision *US–Shrimp* the WTO Appellate Body referred to the principle of good faith as being, at once, a general principle of law and a general principle of international law and, under explicit reference to Art 31 para 3 lit c, sought guidance from it for the interpretation of Art XX GATT.[273] In the *EC–Biotech* case the WTO Panel was prepared to take into account the precautionary principle of international environmental law, if it were established that it had achieved the status of a general principle of law (which, it found, it had not).[274] In *EC–Large Civil Aircraft* the WTO Appellate Body considered the principle of non-retroactivity reflected in Art 28 VCLT a general principle of law, which is relevant to the interpretation of the WTO covered agreements.[275]

100 Notwithstanding the fact that "rules" would imply that only legally binding instruments can play a role under lit c, parts of international judicial practice seem to apply this condition somewhat less restrictively and also consider **non-binding documents** as material relevant for interpretation.

For example, the **ECtHR** turns, for the purpose of interpreting the ECHR, to non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly or reports by various independent commissions,[276] the UN General Assembly's Universal Declaration on Human Rights,[277] Guidelines and "Conclusions" published by the UN High Commissioner on Refugees,[278] and even the (then) non-binding EU Charter of Fundamental Rights.[279] The **ECJ** referred in the context of interpreting the Montreal Convention to the ILC Articles on State Responsibility.[280]

[272] ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 35 (1975).

[273] WTO Appellate Body *US–Shrimp* WT/DS58/AB/R, para 158 and n 157 (1998).

[274] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, paras 7.76–7.89 (2006).

[275] WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, para 672 (2011).

[276] *Cf* ECtHR *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, paras 74–75; *Bayatyan v Armenia (GC)* App No 23459/03, 7 July 2011, para 107.

[277] *Eg* ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 60.

[278] ECtHR *Saadi v United Kingdom* (GC) App No 13229/03, 29 January 2008, para 65.

[279] ECtHR *Goodwin v United Kingdom* (GC) App No 28957/95, ECHR 2002-VI, para 100; *Sørensen and Rasmussen v Denmark* (GC) App Nos 52562/99 and 52620/99, ECHR 2006-I, para 72; *Eskelinen et al v Finland* (GC) App No 63235/00, 19 April 2007, para 60 *in fine*.

[280] ECJ *Axel Walz* C-63/09 [2010] ECR I-4239, para 27.

Even broader is apparently the approach taken by the **Inter-American Commission on Human Rights** which considers that "in interpreting and applying the American Declaration [on Human Rights], it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the instrument was first adopted and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the American Declaration are properly lodged."[281]

101 In cases where the provision to be interpreted relates to the competences or procedures of international organs, the interpretation might seek guidance in similar provisions in other treaty regimes and, above all, in their **application by competent organs**. In such cases, it is not so much the external (parallel) "rules", but the practice under them which is being used as a means of interpretation.

This can be aptly shown in the *Mamatkulov and Askarov* case of the ECtHR where the Court had to decide on the binding character of interim measures adopted under Art 34 ECHR. In the process of interpreting the Convention norm and after explicitly referring to Art 31 para 3 lit c it basically reviewed the practice under other individual petition procedures, *eg* in the UN and the Inter-American system, and concluded from that: "The Court observes that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law."[282]

In the *Bayatyan* case, the ECtHR interpreted Art 9 ECHR to cover conscientious objection to military service and, as one of the reasons beside a trend in national legislation of European States, referred to "the equally important developments concerning recognition of the right to conscientious objection in various international fora", the most notable being the interpretation by the UN Human Rights Committee of the corresponding provisions of the ICCPR.[283]

The ICJ in its *CERD case* (*Georgia v Russia*) referred, for the purpose of interpreting the compromissory clause in the Convention, to its own jurisprudence concerning comparable clauses in other treaties.[284]

102 Art 31 para 3 lit c requires the rules of international law, which are supposed to be looked at for the purpose of interpretation, to be "**relevant**". This, of course, is a rather vague condition, which leaves the interpreter much room in the selection of

[281] IACHR *Mossville Environmental Action Now v United States,* Report No 43/10, 17 March 2010, para 43.

[282] ECtHR *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, ECHR 2005-I, para 124.

[283] ECtHR *Bayatyan v Armenia (*GC) App No 23459/03, 7 July 2011, para 105.

[284] ICJ *Racial Discrimination Convention* (Preliminary Objections) [2011] ICJ Rep 70, paras 136–140.

pertinent extrinsic material. It seems that the "relevance" of other treaties or customary rules can be seen to follow from various grounds: it is fairly obvious when those rules relate to the same subject matter as the treaty provision under interpretation.[285]

> For example, the exact scope of privileges of family members of diplomatic agents, which is described in Art 37 para 1 of the Vienna Convention on Diplomatic Relations with the words "forming part of his household", may be determined by looking at the provision addressing the same issue in the Vienna Convention on Consular Relations (Art 49 para 1). Even if in this case the English texts of both provisions do not reveal any significant differences in wording that would assist in the interpretation, the other authentic language versions in fact do.

Moreover, external rules, regardless of their subject matter, can be relevant when they are created to solve the same or similar factual, legal or technical problems. Again, another treaty cannot be "relevant" in this sense, if it is intended by its parties to be **of lower rank** than the treaty under interpretation (→ MN 73). An agreement that "shall adjust" to the latter or shall leave its provisions unaffected (*etc*) does not, therefore, qualify as a means of interpretation under para 3 lit c.[286]

103 Finally, para 3 lit c only allows those rules to be used for the purpose of interpretation that are "**applicable in the relations between the parties**". Since the word "parties" is defined in Art 2 para 1 lit g, its meaning seems, on the face of it, clear, *ie* States for whom the treaty under interpretation is in force. However, this does not settle the question, of whether the norm requires *all* the parties of that treaty to be bound by the "rules" in question, or whether it suffices that the latter apply only to some of the parties, *eg* those having an immediate interest in the interpretation or being involved in a dispute over it. While the comparison with para 2 lit a, where "all" is included before "the parties", might point to the latter, less restrictive reading, the definite wording "the" parties strongly suggests the former, restrictive reading.[287] This is confirmed by the immediate context of the norm, that is by para 3 lit b: it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law that are not applicable between all parties to the treaty, but not by a subsequent practice, which does not establish the agreement of all parties regarding the meaning of that treaty (→ MN 86).[288]

104 It is admitted that this restrictive approach severely limits the relevance of para 3 lit c for the interpretation of multilateral treaties with a wide, even universal participation.[289] However, on proper construction, it may allow for an exception,

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[285] The WTO Appellate Body confined the concept of "relevant" to this meaning in *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R para 846 (2011). Similarly, ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections),* 2 February 2017, para 89.

[286] Thus, the WTO Panel in *Chile–Price Band System* WT/DS207/R, para 7.85 (2002).

[287] In favor of the restrictive reading, also *Villiger* (2009), Art 31 MN 25; *Thiele* (2008), pp. 26–27.

[288] This was held by the WTO Panel in *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, para 7.68, n 243 *in fine* (2006).

[289] Favoring a less restrictive reading for practical reasons *French* (2006), p. 307.

and that is if the treaty obligation in question, even if contained in a multilateral treaty, is in fact owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes*: in those **cases of a bilateral implementation structure,** the treaty obligation may very well be considered in the light of other obligations applying bilaterally between those two parties only.[290]

> The restrictive approach was applied by the WTO Panel in the *EC–Biotech* case when it held that other rules of international law, in that case the Convention on Biological Diversity and the Biosafety Protocol, cannot be taken into account for the interpretation of the WTO agreements, unless all WTO Members are bound by them.[291] The fact that the United States had signed, but not ratified the former Convention meant that it was not "applicable" to them and that Art 31 para 3 lit c did not apply.[292] The WTO Appellate Body was confronted with the issue in another case, but avoided to give an opinion on it.[293]
>
> The less restrictive approach, which allows external rules to be used even if they are not binding on all the parties to the treaty, receives considerable support from the **practice of the ECtHR**: while in some cases it emphasized the fact that the other treaties referred to for the purpose of interpretation were at least binding upon the respondent State, the Court admitted itself in *Demir and Baykara v Turkey* that in searching for common ground among the European Convention and other norms of international law it had not always distinguished between sources of law according to whether or not they had been ratified by all States Parties to the Convention, or even by the respondent State.[294]

That the external rules are "**applicable**" in the relations between the parties presupposes that the latter are legally bound by those rules, either because they have given their consent to them as treaty rules, or because they are addressed by them as binding customary rules or general principles, or because they are bound for other reasons, such as acquiescence or unilateral declaration. Secondly, even if the external rules may have in principle binding effect on "the parties", their applicability between them must not be excluded for reasons of estoppel or through admissible reservations to a treaty. **105**

In practice, it is sometimes considered possible that rules extrinsic to the treaty under interpretation which do not qualify for consideration under lit c, either because they are not binding on all parties to the treaty, or because they face restrictions of application, may under certain circumstances nevertheless become relevant for the interpretation of the same treaty. **106**

[290] *McLachlan* (2005), p. 315.

[291] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, paras 7.68–7.71 (2006).

[292] *Ibid* para 7.74.

[293] *Cf* WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, paras 844–846 (2011).

[294] ECtHR *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, para 78, with examples given in paras 79–84.

For example, the WTO Panel in the *EC–Biotech* case, after having followed the restrictive approach mentioned above (→ MN 103), thought it possible to consider the external rules, excluded under that approach, "because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character."[295] The Appellate Body skirted the issue in *EC Large Civil Aircraft*, but was in the further course of its reasoning apparently prepared to consider the external agreement referred to as "part of the facts".[296]

Although the difference is, of course, that a treaty interpreter would this way be free to rely on the external rules, while under para 3 lit c he or she is bound to take them into account, the argument appears very much like a sleight-of-hand, since it reintroduces interpretative material through the backdoor that has been excluded following a strict reading of the rule of interpretation. It seems hardly compatible with the overall structure of Art 31. However the fact that this 'backdoor approach' has been thought necessary in practice, may be considered a practical argument against the restrictive approach to the phrase "applicable in the relations between the parties".

107 Even though it is not recognizable in the text of para 3 lit c, the provision has an important **temporal element**: to the state of the law **at what moment in time** does the rule relate, the time of the conclusion of the treaty or that of interpretation? The (inter) temporal aspect was contained in earlier drafts of the provision, it had even been the reason for designing it in the first place, but was later omitted[297]: the provisional ILC draft of 1964 had referred to the general rules of international law "in force at the time of its conclusion"; after re-considering the article, the ILC deleted the time element because it thought it was "unsatisfactory". The Commission considered that "the correct application of the temporal element would normally be indicated by interpretation of the term in good faith",[298] thus, it left the issue decidedly undecided.

108 Since the consideration of external rules for the purpose of interpretation is not *per se* either static or dynamic, *ie* it can be used both ways, it is submitted that the correct use of the rule contained in para 3 lit c **depends on whether the static or the dynamic approach applies** to the term in question. As has been shown earlier (→ MN 22–27), this depends upon the intentions of the parties, but if they have used generic terms in their treaty, the meaning of which necessarily evolves over time, they usually must be presumed to have intended a dynamic interpretation. In that case, the "relevant rules" to be considered under para 3 lit c must be those applicable at the time of interpretation.

This is also how the ICJ applied the rule in its *Namibia* opinion, when it introduced the dynamic approach of treaty interpretation and added: "an international instrument has to be interpreted and applied within the framework of the entire legal system *prevailing at the time of the interpretation*".[299]

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[295] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, para 7.92 (2006). Similarly, *McLachlan* (2005), p. 315.

[296] WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, paras 852–853 (2011).

[297] *Cf Sinclair* (1984), pp. 138–139; *Gardiner* (2015), pp. 295–298.

[298] Final Draft, Commentary to Art 27, 222, para 16.

[299] ICJ *Namibia Opinion* [1971] ICJ Rep 16, (emphasis added).

> Similarly, in the *Iron Rhine Railway* arbitration the tribunal considered modern principles of international environmental law relevant for the interpretation of bilateral treaties concluded by Belgium and the Netherlands in 1839 and 1873.[300]

IV. Special Instead of Ordinary Meaning (Para 4)

Art 31 para 4 contains an **exception to para 1** for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term contained in a treaty provision by a special meaning. However, the notion of "special meaning" refers to two different kinds of cases, which are both covered by para 4. **109**

First, it may be that the terms of a treaty have a technical or "special meaning" due to the particular field the treaty covers. In this case, the particular meaning may already appear from the context and object and purpose of the treaty, it is essentially the **ordinary meaning in the particular context**.[301] It is this reading of the concept of "special meaning" which lends itself to explaining the practice of autonomous interpretation applied in particular legal regimes, such as the ECHR or the European Union: the autonomous meaning given by the European Courts to the European Convention and the EU treaties, respectively, represents their ordinary meaning in the particular setting of their legal regime.[302]

In the second case, the meaning of terms of a treaty is "special" because the parties are using it in a way **different from the more common meaning**. It is this category which para 4 is especially aiming at, and in this understanding, the provision entails the only element in the process of treaty interpretation which explicitly looks to the intention of the parties, rather than to its emanation in the text, in order to establish their very own understanding of a term which they used.

The main reason why the ILC decided to include an express provision on the point into its draft was to emphasize that the **burden of proof** lies on the party invoking the special meaning of the term, and the strictness of the proof required.[303] That point had already been made by the PCIJ in the *Eastern Greenland* case, when it held: **110**

> "The geographical meaning of the word 'Greenland', *ie* the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."[304]

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[300] *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, paras 57–60.

[301] *Gardiner* (2015), p. 334.

[302] Art 31 para 4 is applied to both regimes by *Sorel and Boré* (2011), Art 31 MN 50.

[303] *Cf* Final Draft, Commentary to Art 27, 222, para 17.

[304] PCIJ *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 49 (1933). Confirmed by the ICJ in *Western Sahara Opinion* [1975] ICJ Rep 12, para 116.

Also, in *Conditions of Admission,* the ICJ pointed out that "a decisive reason would be required" in order to displace the natural meaning of the terms used,[305] and the arbitral tribunal in the *Rhine Chlorides* arbitration of 2004 applied a very similar standard when it required the party invoking a particular meaning "to make a convincing case for it".[306] In view of the general design of Art 31, the **standard of proof** required to establish a "special meaning" is, thus, fairly high: it is not enough that one party simply uses the particular term in a particular way, but it must show that such a usage reflects the common intention of the parties.

111 However, Art 31 para 4 does not say **what kind of evidence** may be used to establish that intention. Since Art 31 contains no restriction in this respect, it seems plausible that all the evidence available to the proponent of a "special meaning" may play a role in showing that a "special meaning" was intended and what that meaning is. The most common way in which the parties could indicate a particular meaning would be, of course, to include an explicit definition article in the treaty. If a definition is lacking, the *travaux préparatoires* and the actual, and consented, practice of the parties may in most cases be useful. Moreover, para 4 does not exclude that the parties could agree on special interpretative principles, which differ from the general rule laid down in Art 31, or which place a different weight on some of the elements of interpretation.[307]

E. Treaties of International Organizations (VCLT II)[308]

112 The provisions on treaty interpretation in the 1986 Vienna Convention are **identical** to those in the 1969 Convention, as in the ILC and at the 1986 Conference the established rules were simply replicated and inserted into the text of the VCLT II without debate.[309]

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[306] *Convention on the Protection of the Rhine* (n 19) para 67.

[307] *Gardiner* (2015), p. 341.

[308] For the treaty text see p. 1486 *et seq*.

[309] *Cf* [1982-I] YbILC 22 and 260; UNCLOTIO I 15–16.

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