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Preliminary Report on the Interpretative
Practice of the PCIJ/ICJ

by Panos Merkouris & Daniel Peat



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Preliminary Report

The Interpretative Practice of the PCIJ/ICJ

Sydney 19-24 August 2018

Panos Merkouris and Daniel Peat*

General Introduction

The jurisprudence of the International Court of Justice (ICJ) at first sight epitomizes the orthodox approach to treaty interpretation, manifesting, in the words of one author, “une symbiose parfaite”¹ with the rules of interpretation that are codified in the Vienna Convention on the Law of Treaties (VCLT).

The link between the practice of the World Court and the development of the rules of interpretation is clear in the work of the International Law Commission, which almost exclusively relied on the jurisprudence of the nascent ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), as the basis upon which to elaborate the rules that later became Articles 31-33 of the VCLT.² Indeed, in his Third Report, Sir Humphrey Waldock explicitly stated that draft articles on interpretation took inspiration from two sources, one of which was Sir Gerald Fitzmaurice’s 1957 article in the *British Yearbook* on the interpretative practice of the International Court.

Yet, despite this close link between the World Court and the rules of the VCLT, understanding the interpretative practice of the Court is not as straightforward as it seems. The Court adopts a pragmatic approach to interpretation, which rejects a mechanistic approach to the rules of interpretation and admits the existence of interpretative principles that are not codified in the VCLT. This approach has provided the Court with a great degree of latitude, both in terms of the materials that it takes into account in the interpretative process and the weight that it gives to different elements of interpretation.

Three judgments of the Court on preliminary objections that have been issued in the past 12 months – *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Alleged Violations (Nicaragua v. Colombia)*, and *Delimitation of the Continental Shelf (Nicaragua v. Colombia)* – are of particular interest in relation to interpretation. This

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¹ M. Forteau, ‘Les techniques interpretatives de la Cour internationale de justice, (2011) RGDIP 399; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013) 269.

² See for example, *Yearbook of the ILC 1966*, vol. II, pp. 217-26.

preliminary report will draw on the entire jurisprudence of the Court, but lay a particular emphasis on these recent judgments where appropriate.

I. Content-related Issues/Questions

1. Do the courts and tribunals refer to the VCLT rules of interpretation? Do they discuss the content of these rules?

The Court has referred to the VCLT rules of interpretation expressly in its judgments since its judgment in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*.³

2. Preference/Prevalence of a particular approach to interpretation over others (textual, contextual, teleological, intentions of the parties, historical). Has the approach changed over time?

To be analysed in the Final Report.

3. When has the case-law of an international court and tribunal indicated a clear shift in the content of a rule of interpretation? How was this established?

To be analysed in the Final Report on the basis of the analysis in Sections I.4-6, II and III. As a preliminary point, however, we may note that it may be difficult to ascertain when there was a clear shift on the rule contradistinguished from a different solution due to the special characteristics of a case or even from a gradual elaboration of the content of the rule. Some examples have already been provided and analysed in more detail in the Sections below.

4. When, how and what maxims/canons of interpretation (not explicitly referred to in the VCLT) have been used in international case-law? What is their status?

Although the Court, has a tendency to refer back to the VCLT rules, on occasion it has referred to maxims/canons of interpretation not explicitly mentioned in the VCLT. This practice was for obvious reasons more prevalent during the pre-VCLT era.

Examples of such maxims/canons are the following:

In dubio mitius

³ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, para. 48. See also *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment of 2 February 2017, para. 63 and judgments referred to therein.

The *in dubio mitius* principle was identified by the PCIJ in its Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* when dealing with an argument adduced by Turkey in a telegram sent to the Court. More specifically:

This argument appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the present case, however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear.⁴

The *S.S. Wimbledon* set out one of the main limits to the application of the *in dubio mitius principle* :

the Court feels obliged to *stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.*⁵

This was further explicated in the Advisory Opinion concerning the *Polish Postal Service in Danzig* where

[i]n the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied *only in cases where ordinary methods of interpretation have failed.*⁶

The requirement that doubt must exist, and by implication the supplementary fashion of the *in dubio mitius* principle, was underlined in *Territorial Jurisdiction of the International Commission of the River Oder*:

This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it is not sufficient that the purely grammatical analysis of a text should not lead to definitive results; there are many other methods of interpretation, in particular reference is properly had to the principles underlying the matters to which the text refers; 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 favourable to the freedom of States.⁷

⁴ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, P.C.I.J. Series B, No. 12, p. 25.*

⁵ *The S.S. "Wimbledon", P.C.I.J. Series A, No. 1, pp. 24-25 (emphasis added).*

⁶ *Polish Postal Service in Danzig, Advisory Opinion, P.C.I.J. Series B, No. 11, p. 39 (emphasis added).*

⁷ *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J. Series A, No. 23, p. 26.*

In later decisions, relating to the *Free Zones Upper Savoy and the District of Gex*, the PCIJ once again affirmed the supplementary nature of this principle, i.e. that “in case of doubt, a limitation of sovereignty must be construed restrictively.”⁸

In *Phosphates in Morocco* there is a subtle reference to the *in dubio mitius* principle, although it strongly connects it with the intention of the parties rather than as a self-standing principle of interpretation, and further the Court once again underlines its supplementary role, as a tool of resolving doubt when the latter still exists despite the application of the classical elements of interpretation (text, intention, object and purpose etc.).⁹

In the jurisprudence of the ICJ references to the *in dubio mitius* principle / restrictive interpretation can be found in *Nuclear Tests* and *Frontier Dispute*.¹⁰ In the more recent judgment on *Dispute Regarding Navigational and Related Rights* the Court refused to apply this principle *eo ipso* without any further justification:

[T]he Court is not convinced ... that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua.¹¹

From the above it would seem that the *in dubio mitius* principle first of all is used only in a supplementary fashion, when the main elements of treaty interpretation have failed to provide a definitive result; it is strongly connected to both the text and the intention of the parties; and finally especially considering the historical roots of the *in dubio mitius* principle in domestic legal systems¹² it would seem to have a different degree of import depending on the nature of the treaty (bilateral or multilateral) the nature of the act/instrument being interpreted (unilateral statement, optional clause declaration or treaty) as well as the beneficiaries of the relevant obligations (States or other subjects of international law, especially individuals).

Effet Utile/Effective Interpretation/Ut res magis valeat quam pereat

⁸ *Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase)*, P.C.I.J. Series A, No. 24, p. 12; *Case of the Free Zones of Upper Savoy and the District of Gex*, P.C.I.J. Series A/B, No. 46, p. 167.

⁹ *Phosphates in Morocco (Italy v. France)*, Judgment of 14 June 1938, P.C.I.J. Series A/B, No. 74, pp. 23-4.

¹⁰ “when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for”; *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, para. 47. This is even more so in the case where the statement is “not directed to any particular recipient”; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, I.C.J. Reports 1986, para. 39; see also International Law Commission, “Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto - 2006” reproduced in *Yearbook of the International Law Commission 2006, Vol. II(2)*, Guiding Principle 7, Commentary – para. 2 (Guiding Principles).

¹¹ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, I.C.J. Reports 2009, para. 48.

¹² A. Berger, “*In dubiis benigniora*” (1951) 9 Seminar Jurist 36.

The principle of effectiveness can be understood as follows:

where words or terms of an instrument are capable of two meanings the object with which they were inserted, as revealed by the instrument or any other admissible evidence, may be taken into consideration in order to arrive at the sense in which they were used and where one interpretation is consistent with what appears to have been the intention of the parties and another repugnant to it, the Court will give effect to this apparent intention. The Court will always prefer an interpretation which renders an agreement valid and effective to an interpretation which renders it void and ineffective, provided the former can fairly be said not to be inconsistent with the intention of the parties. This principle is stated in the rule *Ut res magis valeat quam pereat*.¹³

The principle of effectiveness by the Court's own admission plays an important law in the interpretation of treaties and in its own jurisprudence.¹⁴ An in-depth analysis the principle and its use by the PCIJ and ICJ was offered by Sir Gerald Fitzmaurice in his seminal series of articles in the *British Yearbook of International Law*.¹⁵ So important was this principle considered that he included it in his list of principles of interpretation.

However, Fitzmaurice also warned that the principle "is all too frequently misunderstood as denoting that agreements should always be given their maximum possible effect, whereas its *real object is merely . . . to prevent them failing altogether*".¹⁶ Along similar lines Judge Cançado Trindade in *Whaling in the Antarctic* expressed the opinion that the principle *ut res magis valeat quam pereat* is meant to "to secure to the conventional provisions their *proper effects*".¹⁷

As to whether the principle lies outside the VCLT or not, Judge Torres Bernardez in *Land, Island and Maritime Frontier Dispute* opined that the principle of effectiveness "in so far as it reflects a true general rule of interpretation, is embodied, as explained by the International Law Commission, in Article 31, paragraph 1, of the Vienna

¹³ *South West Africa (Liberia v. South Africa), Preliminary Objections, I.C.J. Reports 1962*, Dissenting Opinion of Judge van Wyk, p. 583.

¹⁴ *Fisheries Jurisdiction Case (Spain v. Canada), I.C.J. Reports 1998*, para. 52. See for instance, apart from the other cases mentioned in this Section: *Chorzów Factory, P.C.I.J. Series A, No 9*, p. 24; *Corfu Channel (United Kingdom v. Albania), I.C.J. Reports 1949*, p. 24; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 179 and 183. As to the scope of the principle Judge Cançado Trindade has expressed the view that it "applies *not only in relation to substantive norms of human rights treaties* (that is, those which provide for the protected rights), *but also in relation to procedural norms*"; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), I.C.J. Reports 2011*, Dissenting Opinion of Judge Cançado Trindade, para. 79 (emphasis added).

¹⁵ G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Points" (1957) 33 BYIL 203; see also H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989: Supplement 2006, Part Three" (2006) 77 BYIL 1, pp. 52-5.

¹⁶ G. Fitzmaurice, "Vae victis or Woe to the Negotiators: Your Treaty or our 'Interpretation' of it?" (1971) 65 AJIL 373.

¹⁷ *Whaling in the Antarctic (Australia v. Japan), I.C.J. Reports 2013*, Separate Opinion of Judge Cançado Trindade, para. 54 (emphasis added).

Convention”.¹⁸ Judge Cançado Trindade has also and more recently expressed the view that the principle underlies the general rule of Article 31 VCLT.¹⁹

Furthermore and in the context of the present report, however, we need to underline the fact that in a fashion similar to other canons analysed in this Section, this principle also has certain limits. The principle “cannot justify the Court in attributing ... a meaning which ... would be *contrary to [the] letter and spirit [of the provisions]*”.²⁰ In essence, the application of the principle of effectiveness should not amount to revision of the text.²¹

Contra Proferentem

The *contra proferentem* rule, i.e. that when a text is ambiguous it must be construed against the party who drafted it, was referred to in *Brazilian Loans* but the PCIJ focused particularly in order to make its pronouncement on whether there indeed was doubt as to the ordinary meaning the terms being interpreted.²²

The rule was, once again, mentioned in *Fisheries Jurisdiction* where the ICJ concluded that whereas the

contra proferentem rule may have a role to play in the interpretation of contractual provisions ... the rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute.²³

Finally, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* Judge Shahabuddeen was of the view that “the principle of interpretation *contra proferentem* applies to the resolution of any ambiguity” and that although authors caution that this principle must be applied with circumspection,²⁴ nonetheless “a certain irreducible logic in its substance is not altogether banished”.²⁵

¹⁸ *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, I.C.J. Reports 1990, Separate Opinion of Judge Torres Bernardez, para. 205

¹⁹ *Whaling in the Antarctic (Australia v. Japan)*, I.C.J. Reports 2013, Separate Opinion of Judge Cançado Trindade, para. 54.

²⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion, I.C.J. Reports 1950, p 229.

²¹ *South West Africa (Liberia v. South Africa)*, Preliminary Objections, I.C.J. Reports 1962, Dissenting Opinion of Judge van Wyk, p. 584.

²² *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, France v. Brazil, Judgment, 12 July 1929, Permanent Court of International Justice (PCIJ).

²³ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 51.

²⁴ Referring to Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 110-2.

²⁵ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, I.C.J. Reports 1995, Dissenting Opinion of Judge Shahabuddeen, referring back to *Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58*, p. 182, Dissenting Opinion of Judge Anzilotti, final paragraph.

Expressio unius est exclusion alterius/per argumentum a contrario

This approach to interpretation has been condensely described by the ICJ as “the fact that a provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded”.²⁶ The Court, its predecessor, and the Judges have on occasion been partial to accepting or at least examining the principle of *expressio unius est exclusion alterius* and *a contrario* constructions.²⁷

However, recourse to *a contrario* interpretation is not unlimited. An *a contrario* construction is used in a supplementary fashion when recourse to elements of Article 31 VCLT does not lead to a definite answer.²⁸ Judge M. Hermann-Otavsky, for instance, had rejected an *a contrario* interpretation on the basis that it could not be supported by the context of the provision being interpreted, its object and purpose and simple logic.²⁹

Similar limits to or the complementary role of *a contrario* interpretation have been raised in a number of cases with reference to text,³⁰ context,³¹ intention,³² object and purpose³³ and preparatory work.³⁴ In fact, on two occasions the Court has preemptively excluded any possible *a contrario* construction of its own judgment.³⁵

²⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, para. 37.

²⁷ *The S.S. “Wimbledon”*, P.C.I.J. Series A, No. 1, p. 24; *Railway Traffic between Lithuania and Poland*, Advisory Opinion, P.C.I.J. Series A/B, No. 42, p. 121; *Corfu Channel (United Kingdom v. Albania)*, I.C.J. Reports 1949, Dissenting Opinion by Judge Azevedo, para. 30; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, I.C.J. Reports 1980, para. 40; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1982, Dissenting Opinion of Judge Schwebel, p. 488; *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Rep. 1986, para. 88.

²⁸ *Asylum Case (Colombia v. Peru)*, I.C.J. Reports 1950, Dissenting Opinion of Judge Badawi Pasha.

²⁹ *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State Of Czechoslovakia)*, P.C.I.J Series A/B, No. 61, Dissenting Opinion by M. Hermann-Otavsky, p. 257.

³⁰ *Arrest Warrant of 11 April 2001 (Democratic Republic of Congo v. Belgium)*, I.C.J. Reports 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 38.

³¹ *Continental Shelf (Libya v. Malta)*, I.C.J. Reports 1984, Separate Opinion of Judge Jimenez de Arechaga, para. 10; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, I.C.J. Reports 1973, Joint Separate Opinion by Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, para. 4.

³² *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, P.C.I.J. Series A/B, No. 44, pp. 37-8.

³³ *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, Separate pinion of Judge de Castro, p. 137; *Sovereignty over Pulau Ligitan and Pulau Sapadan (Indonesia v. Malaysia)*, I.C.J. Reports 2002, Dissenting Opinion of Judge Franck, para. 33.

³⁴ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, Dissenting Opinion of Judge Moreno Quintana, pp. 248 and 252; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, I.C.J. Reports 1990, Order of 28 February 1990, Dissenting Opinion of Judge Shahabuddeen, p. 34.

³⁵ *Avena and Other Mexican Nationals (Mexico v. The United States of America)*, I.C.J. Reports 2004, para. 151; *LaGrand Case (Federal Republic of Germany v. The United States of America)*, I.C.J. Reports 2001, Declaration of President Guillaume.

The Court has best summarised the above jurisprudence in just a few lines in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* recourse to an *a contrario* interpretation

is only warranted...when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.³⁶

Ejusdem generis

The *ejusdem generis* rule refers to a rule of interpretation according to which “where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned”.³⁷ The rule has been referred to by Judge Sir Percy Spender in *Northern Cameroons* in order to interpret the terms “if it cannot be settled by negotiations or *other means*”. However, the reliance on an *ejusdem generis* construction is the logical result of reference to circumstances surrounding the Agreement’s conclusion, to other similar Trusteeship Agreements and to the object and purpose.³⁸ So, once again the rule seems to be rather confirmatory of an interpretation arrived at through an ordinary application of the interpretative process of Article 31 VCLT.

Per analogiam

Per analogiam constructions have been brought before the Court on a number of occasions.³⁹ The Court has not elaborated on the relevance of such constructions in the

³⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, I.C.J. Reports 2016*, para. 37.

³⁷ *Black’s Law Dictionary – Free Online Dictionary 2nd edn.*

³⁸ *Northern Cameroons (Cameroon v. United Kingdom), I.C.J. Reports 1963*, Separate Opinion of Judge Sir Percy Spender, p. 91. The Court has also referred to *ejusdem generis* in its *Review of UNAT Judgment No. 158*, however, in that Opinion it simply mentioned that it was the General Assembly that had considered failure to exercise jurisdiction as *ejusdem generis* with exceeding jurisdiction or competence; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, paras. 50-1.

³⁹ Analogy with rules on diplomatic protection in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 182; analogy with previous case-law in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), I.C.J. Reports 1970*, para. 70 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, I.C.J. Reports 2004*, Separate Opinion of Judge Higgins paras. 4-5; analogous application of the “reasonable time” requirement for withdrawal or termination of treaties to optional clause declarations in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, para. 63;

interpretative process⁴⁰ and its acceptance or rejection of these constructions will either be left unexplained or be the logical conclusion of the ordinary application of the VCLT or customary rules on interpretation.

a minore ad majus/ a majore ad minus

This logical rule, which could be considered an more specialised version of the *per analogiam* constructions, has only once been referred to briefly in *Corfu Channel* in the Dissenting Opinion of Judge Azevedo.⁴¹

5. *How do courts and tribunals define key concepts in the interpretative process (e.g. ordinary meaning, context, object and purpose [multiplicity, selection between a variety of objects and purposes]), supplementary means etc.?*

The Court has generally been reticent to explicitly define particular concepts in the general rule of interpretation and the supplementary means of interpretation available under Articles 31 and 32 of the Vienna Convention. Nevertheless, some judgments provide an insight into the Court's conception of these elements.

Ordinary Meaning

Perhaps the most elusive element of interpretation in the Court's jurisprudence is the concept of ordinary meaning, which played an important role in the Court's reasoning well before the advent of the Vienna Convention rules.⁴²

It is clear, however, that the Court only considers ordinary meaning to be the starting point for interpretation. In the words of Richard Gardiner, "only if it is confirmed by investigating the context and object and purpose, and if on examining all other relevant matters (such as whether an absurd result follows from applying a literal interpretation)

analogous application of VCLT rules to optional clause declarations in *Fisheries Jurisdiction Case (Spain v. Canada)*, *I.C.J. Reports 1998*, para. 46; analogy with immunities for diplomatic agents and Heads of State in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *I.C.J. Reports 2002*, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, para. 14. See also: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion*, *I.C.J. Reports 1971*, Separate Opinion of Judge de Castro, para. 3; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *I.C.J. Reports 1982*, Separate Opinion of Judge Jiménez de Aréchaga, para. 115.

⁴⁰ Or even further whether they are closer to gap-filling rather than interpretation.

⁴¹ The relevant passage goes as follows: "It is of small importance that this is a case of a quasi-delict; for the argument *majus ad minus* would fully justify a conclusion (quite in conformity with the *litis contestatio*, or rather special agreement) in which the purpose of the claim is compensation; this becomes even clearer when we compare it with the counterclaim"; *Corfu Channel (United Kingdom v. Albania)*, *Dissenting Opinion by Judge Azevedo*, *1949 I.C.J. Reports*, para. 22.

⁴² See e.g. *Competence of the General Assembly for the Admission of a State to the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1950*, 8;

no contra-indication is found, is the ordinary meaning determinative.”⁴³ In *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, for example, the Court stated that:

“An arbitration agreement (*compromis d'arbitrage*) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. In that respect

"the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words." (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, P 8.*)

The rule of interpretation according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 336.*)

These principles 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.”⁴⁴

In terms of methodology, the Court has rarely explicated how it determines the ordinary meaning of a particular term. In *Aegean Sea Continental Shelf*, the Court referred exceptionally to a dictionary - the *Robert's Dictionnaire* - to support its conclusion that the ordinary meaning of the term ‘*notamment*’ was not the narrow understanding of the term proposed by Greece.⁴⁵

The Court’s flexible approach to the determination of ‘ordinary meaning’ can be seen in its definition of the term ‘main channel’ in *Kasikili/Sedudu Island*. In that case, the Court stated that it would “seek to determine the meaning of the words ‘main channel’ by reference to the most commonly used criteria in international law and practice, to

⁴³ R. Gardiner, *Treaty Interpretation* (OUP 2008) 166.

⁴⁴ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports 1991, para. 48.

⁴⁵ *Aegean Sea Continental Shelf*, para. 54. The Court also referred to a dictionary definition in *Oil Platforms, Preliminary Objections, 1996 I.C.J. Reports 803*, para. 45.

which the Parties have referred.”⁴⁶ The Court cited various scientific dictionaries’ definitions of the ‘main channel’, as well as the approach of an arbitral tribunal to an analogous interpretative issue, to demonstrate that various criteria had been used to determine the ‘main channel’ of a river:

“The Court finds that it cannot rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another. The scientific works which define the concept of "main channel" frequently refer to various criteria: thus, in the *Dictionnaire français d'hydrologie de surface avec équivalents en anglais, espagnol, allemand* (Masson, 1986), the "main channel" is "the widest, deepest channel, in particular the one which carries the greatest flow of water" (p. 66); according to the Water and Wastewater Control Engineering Glossary (Joint Editorial Board Representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association and Water Pollution Control Federation, 1969), the "main channel" is "the middle, deepest or most navigable channel" (p. 197). Similarly, in the *Rio Palena* Arbitration, the arbitral tribunal appointed by the Queen of England applied several criteria in determining the major channel of a boundary river (Argentina-Chile Frontier Case (1966), United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVI, pp. 177-1 80; International Law Reports (ILR), Vol. 38, pp. 94-98).”⁴⁷

The Court did not follow one of these definitions, but instead determined the ‘main channel’ on the basis of the criteria that the Parties suggested, all of which it purported to take into account.⁴⁸ This approach was criticized by Judge Higgins, who was of the view that:

“although there are commonly used international law criteria for understanding, for example, the term "thalweg", the same is not true for the term "main channel". And it seems that no "ordinary meaning" of this term exists, either in international law or in hydrology, which allows the Court to suppose that it is engaging in such an exercise. The analysis on which the Court has embarked is in reality far from an interpretation of words by reference to their "ordinary meaning". The Court is really doing something rather different.”⁴⁹

Despite citing dictionary definitions in *Aegean Sea Continental Shelf* and *Kasikili/Sedudu*, the Court has generally shown reticence to rely on dictionary definitions, recognizing that they often provide multiple meanings of a word that are context-dependent. This is stated particularly clearly in *Avena*, in which the Court stated

⁴⁶ *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1045, para. 27.

⁴⁷ *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1045, para. 30.

⁴⁸ *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1045, para. 30.

⁴⁹ *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1113, para. 1.

that “The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term ‘without delay’ (and also of ‘immediately’). It is therefore necessary to look elsewhere for an understanding of this term.”⁵⁰

Finally, the ordinary meaning of a term seemingly bears some relationship to what the Court has labelled the ‘generic’ nature of a term. The concept of a ‘generic term’ first appeared in the *Aegean Sea Continental Shelf* case, in which the interpretation of a Greek reservation to the 1928 General Act for Pacific Settlement of International Disputes – which excepted disputes that related to “the territorial status of Greece” – was at issue. The Court considered that:

“the nature of the word "status" itself indicates, it was a generic term which in the practice of the time was understood as embracing the integrity and frontiers, as well as the legal régime, of the territory in question... Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.”⁵¹

The concept of a ‘generic term’ was recently used in the *Navigational Rights* case between Costa Rica and Nicaragua, in which the Court was called upon to interpret the term *commercio*. The Court reasoned that: “there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.”⁵² Indeed, it is notable that the Court based its reasoning on the ‘generic character’ of the term, rather than finding such confirmation in the manifest intentions of the Parties:

“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.”⁵³

Context

⁵⁰ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 2004 I.C.J. Reports 12, para. 48.

⁵¹ *Aegean Sea Continental Shelf*, paras. 75, 77.

⁵² *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 64.

⁵³ *Navigational Rights*, para. 66.

The Court's recent judgment on preliminary objections in *Somalia v. Kenya* is notable for the clarity with which it sets out the Court's understanding of the interaction between the three elements of the general rule of interpretation (ordinary meaning, context, and object and purpose), as well as its conception of context. In that judgment, the Court stated that the three elements of the general rule "are to be considered as a whole",⁵⁴ reflecting the ILC's 'crucible' approach to interpretation.⁵⁵ However, perhaps more interestingly, it continued to state that it could not determine the meaning of the provision at issue without first analysing its context and the object and purpose of the Memorandum of Understanding (MOU).⁵⁶ In this context, it stated that the "text of the MOU as a whole...provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose" of the treaty.⁵⁷

Indeed, context has played a pivotal role in the Court's interpretation in some cases. One illustrative example is the *IMCO* Advisory Opinion, in which the Court gave weight to the context in which a particular word was used within the provision itself. In that case, the Court was called upon to interpret a provision which provided that "the Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members...of which not less shall be the largest ship-owning nations." Some States contended that the word "elected" implied free-choice amongst any member States. The Court disagreed, stating that:

"The meaning of the word "elected" in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires."⁵⁸

The Court thus concluded that 'elected' was to be understood as qualified by reference to the phrase "largest ship-owning nations".

Object and Purpose

As noted above, the Court has recently stated that the object and purpose of a treaty may be discerned from the surrounding text of the agreement,⁵⁹ including, but not limited to, the title of the treaty and the preamble.⁶⁰ This approach reflects the Court's

⁵⁴ *Somalia v. Kenya*, para. 64.

⁵⁵ Waldock, Sixth Report, 95, para 4.

⁵⁶ *Somalia v. Kenya*, para. 65.

⁵⁷ *Somalia v. Kenya*, para. 65. The Court arguably took a broader approach to context in the *South West Africa* cases (*I.C.J. Reports 1962*, p. 336); see Thirlway, *The Law and Procedure of the International Court of Justice*, p. 283.

⁵⁸ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, p. 158.

⁵⁹ *Somalia v. Kenya*, para. 65.

⁶⁰ *Somalia v. Kenya*, para. 70.

reasoning in its prior judgments. The *Oil Platforms* case provides an illustrative example. In that case, the Court determined that the object and purpose of the 1955 Treaty of Amity, Economic Relations and Consular Relations between the U.S. and Iran was “not to regulate peaceful and friendly relations between the two States in a general sense [as Iran contended]” but rather by providing specific obligations for the effective implementation of such relations.⁶¹ This object and purpose was induced from both the Preamble and the substantive articles of the Treaty.⁶²

Again, the Court’s recent judgment in *Somalia v. Kenya* also provides an interesting case study. In that case, the Court had to determine whether the purpose of the MOU was to provide a binding settlement of dispute resolution for the two States’ maritime boundary dispute. In order to support its conclusion that the MOU did not include such a mechanism, the Court drew on a wide range of interpretative materials including the subsequent practice of the Parties, the similarity between the text of the MOU and Article 83 of UNCLOS, and the *travaux préparatoires* in order to conclude that the MOU could not have been intended to establish a binding method of dispute settlement. This illustrates the fluidity with which the different elements of interpretation are treated by the Court.

Subsequent agreement/practice

The Court has frequently had recourse to the subsequent agreement and subsequent practice of the Parties under Article 31(3)(a) and (b) of the Vienna Convention, although it has not explicitly defined those terms.⁶³ In *Kasikili/Sedudu Island*, the Court seemed to adhere to the definitions of subsequent agreement and practice outlined by the ILC in its commentary on the draft Convention on the Law of Treaties:

“In relation to “subsequent agreement” as referred to in subparagraph (a) of this provision, the International Law Commission, in its commentary on what was then Article 27 of the draft Convention, stated the following: “an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation” (Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 14). As regards the “subsequent practice” referred to in subparagraph (b) of the above provision, the Commission, in that same commentary, indicated its particular importance in the following terms: “The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning

⁶¹ *Oil Platforms, Preliminary Objections*, 1996 I.C.J. Reports 803, para. 27.

⁶² See also *Sovereignty over Pulau Litigan and Pulau Sipidan (Indonesia/Malaysia)*, I.C.J. Reports 2002, p. 62, para. 51 (stating that the object and purpose can be determined by reference to the preamble and the “very structure” of the treaty).

⁶³ See further *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1113, para. 50, and the cases cited therein.

of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals." (Op. cit., p. 241, para. 15.)”⁶⁴

The Court’s analysis of the facts in that case reiterated this interpretation of subsequent practice, highlighting that it would only be considered relevant insofar as it manifested an agreement on the part of the Parties.⁶⁵ Interestingly, however, the Court also held that three surveys carried out by the Parties, which identified the ‘main channel’ of the river, confirmed its own conclusion regarding the main channel:

“The Court finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms.”⁶⁶

A slightly different use of subsequent practice arose in *Somalia v. Kenya*, where the Court held that that Kenya’s own conduct of engaging in negotiations prior to the issuance of recommendations by the Commission on the Limits of the Continental Shelf demonstrated that “Kenya did not consider itself bound to wait for those recommendations before engaging in negotiations on maritime delimitation”, as Kenya had argued it was obliged to do under the terms of the MOU.⁶⁷ The Court neither cited Article 31(3)(b) of the VCLT, nor did it enquire whether an agreement of the Parties underpinned this subsequent practice. Rather, Kenya’s actions were used to estop it from advancing a particular claim.

Relevant Rules of International Law

Although the Court has not defined what it considers to be the “relevant rules of international law applicable in the relations between the parties”, the *Somalia v. Kenya* judgment again provides an interesting case study.⁶⁸ In the relevant treaty, the paragraph that was at issue was virtually identical to Article 83 of UNCLOS. The Court reasoned that:

“Pursuant to Article 31, paragraph 3 (c) of the Vienna Convention, “[a]ny relevant rules of international law applicable in the relations between the parties” should be taken into account, together with the context. In this case, both Somalia and Kenya are parties to UNCLOS, which is expressly

⁶⁴ *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1113, para. 49.

⁶⁵ See in particular *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1113, para. 63 (“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)).”)

⁶⁶ *Kasikili/Sedudu Island (Botswana/Namibia)*, 1999 I.C.J. Reports 1113, para. 80.

⁶⁷ *Somalia v. Kenya*, para. 92.

⁶⁸ See also *Oil Platforms, Merits*, I.C.J. Reports 2003, p. 161, para. 41.

mentioned in the MOU. UNCLOS therefore contains such relevant rules.”⁶⁹

This passage suggests that other rules of international law might be particularly relevant if express reference is made to them in the treaty being interpreted. Furthermore, the Court continued to state that: “In line with Article 31, paragraph 3 (c), of the Vienna Convention, *and particularly given the similarity in wording between the sixth paragraph of the MOU and Article 83, paragraph 1, of UNCLOS*, the Court considers that it is reasonable to read the former in light of the latter.”⁷⁰ This sentence suggests that a similarity in wording might also constitute a reason why the Court may look to another rule of international law when interpreting a particular provision.

One particularly interesting approach to Article 31(3)(c) is the Court’s judgment on the merits in *Oil Platforms*. In that case, the Parties disagreed about the relationship between self-defence and Article XX(1)(d) of the Treaty of Amity of 1955, which provided that the Treaty did not “preclude the application of measures...necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.” The question before the Court was whether this provision simply enshrined the rules of international law on the use of force, or instead provided that the Parties may use force in different circumstances (as the U.S. contended). The Court stated that it was obliged to take account of any relevant rules of international law under Article 31(3)(c) VCLT and thus that:

“The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. 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 by Article XXI, paragraph 2, of the 1955 Treaty...The Court is therefore satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty...extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.”⁷¹

This approach was criticised by Judge Higgins, who was of the view that:

⁶⁹ *Somalia v. Kenya*, para. 89.

⁷⁰ *Somalia v. Kenya*, para. 91.

⁷¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, para. 41.

“The Court has...not interpreted Article XX, paragraph 1 (d) by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1 (d), with those of international law on the use of force and all sight of the text of Article XX, paragraph 1 (d), is lost. Emphasizing that "originally" and "in front of the Security Council" (paras. 62, 67, 71 and 72 of the Judgment) the United States had stated that it had acted in self-defence, the Court essentially finds that "the real case" is about the law of armed attack and self-defence. This is said to be the law by reference to which Article XX, paragraph 1 (d), is to be interpreted, and the actual provisions of Article XX, paragraph 1 (d), are put to one side and not in fact interpreted at all.”⁷²

Supplementary Means of Interpretation

The Court has taken a relatively flexible approach in relation to the supplementary means of interpretation that are permissible under Article 32 of the VCLT. *Somalia v. Kenya* again provides an illustrative example of this flexibility. The MOU in that case was drafted by Ambassador Longva of Norway in the context of assistance provided by Norway to a number of African coastal States related to their submissions to the Commission on the Limits of the Continental Shelf before the deadline established by States Parties to UNCLOS. Only minor changes were made to the agreement by the Parties themselves. The Court was of the view that the fact that the MOU was drafted and concluded just before the deadline for submission of information to the CLCS “tend[ed] to confirm that the MOU was concerned with the CLCS process.”⁷³ Moreover, the Court placed importance on the fact that neither Ambassador Longva (in a presentation given by at the Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf), nor Norway (in a Note Verbale to the Secretariat of the UN) noted that the MOU specified a particular method of settlement for the Parties’ maritime dispute (as Kenya had contended).⁷⁴

Two elements of this reasoning are notable. First, the supplementary means of interpretation drawn on by the Court did not emanate from one of the Parties to the MOU. Instead, the Court reasoned that as Norway had drafted the MOU, it was Norway’s understanding of the MOU more broadly that was relevant. This was particularly important given the absence of any *travaux* from the adoption of the MOU by the Parties. Second, the Court relied on the *absence* of support for Kenya’s argument

⁷² Oil Platforms (Islamic Republic of Iran v. United States of America), Separate Opinion of Judge Higgins, I.C.J. Reports 2003, para. 49.

⁷³ *Somalia v. Kenya*, para. 102.

⁷⁴ *Somalia v. Kenya*, paras. 103-04.

in the *travaux* to confirm its interpretation.⁷⁵ In this context, the Court stated that “were [the sixth] paragraph [of the MOU] to have the potentially far-reaching consequences asserted by Kenya, it would in all likelihood have been the subject of some discussion.”⁷⁶ This demonstrates that the purpose for which the *travaux* are used – and the elements of the *travaux* on which that the Court places importance – depend on the particular circumstances of the case at hand.

6. *Is there a difference between the interpretative approach to treaties and that to unilateral acts of States and/or acts of international organizations?*

Unilateral Acts and Optional Clause Declarations

The Court has occasionally dealt with interpretation of unilateral acts of States. The vast majority of these instances revolves around the interpretation of the declarations made under Article 36(2) of the ICJ Statute.

Although the interpretation of treaties bears striking similarities with that of unilateral acts of States, the Court has in no unclear terms explicated its position on the matter:

*The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties ... the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court’s jurisdiction*⁷⁷

The Court has further elaborated its approach to interpretation of optional clause declarations in a number of decisions. Firstly, regarding the interpretative process as whole it has noted that: “[a]ll elements... are to be interpreted as a unity, applying the same legal principles of interpretation throughout”.⁷⁸

Furthermore, and affirming a textual approach to interpretation, such declarations “must be interpreted as [they stand], having regard to the words actually used”.⁷⁹ Despite this,

⁷⁵ See also *Oil Platforms (Preliminary Objections)*, paras. 28-29; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, I.C.J. Reports 1995 6, para. 41.

⁷⁶ *Somalia v. Kenya*, para. 103

⁷⁷ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 46 (emphasis added); see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, I.C.J. Reports 1998, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, I.C.J. Reports 1984, para. 63.

⁷⁸ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment of 2 February 2017, para. 118, referring to *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 44.

⁷⁹ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 105; similarly *Certain Norwegian Loans*, Judgment, I.C.J. Reports 1957, p. 27; *Temple of Preah*

the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.⁸⁰

In *Right of Passage over Indian Territory* the Court supplemented the requirement to refer to the actual wording with the need to refer also to applicable principles of law.⁸¹

Furthermore, and since it is unilateral acts that we are dealing with, text is not the only element to be considered. In fact, the Court by its own admission “has not hesitated to place a certain emphasis on the intention of the depositing State”.⁸² This intention can be deduced from the text of the declaration, its context and any relevant evidence surrounding the “circumstances of its preparation and the purposes intended to be served”.⁸³ In the *Fisheries Jurisdiction* case such evidence examined were ministerial statements, parliamentary debates, legislative proposals and press communiqués.

Regarding maxims/canons not explicitly mentioned in the VCLT, these also feature to varying degrees in the interpretation of optional clause declarations. As stated in *Fisheries Jurisdiction*

[the principle of effectiveness] has an important role in the law of treaties and in the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is *that it should be interpreted in a manner compatible with the effect sought by the reserving State*.⁸⁴

This was reaffirmed most recently in *Maritime Delimitation in the Indian Ocean*.⁸⁵ It suggests that the principle of effectiveness, or at least the version which is inextricably

Vihear (Cambodia v. Thailand), Preliminary Objections, I.C.J. Reports 1961, pp. 32-3; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction, I.C.J. Reports 2000, para. 42.

⁸⁰ *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objections, I.C.J. Reports 1952, p. 104.

⁸¹ *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, I.C.J. Reports 1957, p. 142; an echo perhaps of Article 31(3)(c) VCLT; this should be distinguished with the suggestion made by Spain in *Fisheries Jurisdiction*, that declarations should be interpreted taking into account “the legality under international law of the matters exempted from the jurisdiction of the Court”. The Court explicitly denied the affirmation of any such interpretative rule in its jurisprudence. *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 54; also referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, I. C. J. Reports 1984, para. 59.

⁸² *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 48; similarly *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objections, I.C.J. Reports 1952, p. 107.

⁸³ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 49; similarly see *Frontier Dispute (Burkina Faso v. Republic of Mali)*, I.C.J. Reports 1986, para. 40; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, I.C.J. Reports 2006, para. 53, and *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, paras. 51 and 53.

⁸⁴ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 52.

⁸⁵ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment of 2 February 2017, para. 118.

linked to the intention of the State,⁸⁶ forms also part of the interpretative tools that the judge can use when interpreting optional clause declarations.

In *Phosphates in Morocco* there is a subtle reference to the *in dubio mitius* principle, although it strongly connects it with the intention of the parties rather than as a self-standing principle of interpretation, and further the Court relegates it to a supplementary role, as a tool of resolving doubt when the latter still exists despite the application of the classical elements of interpretation (text, intention, object and purpose etc.).⁸⁷ Similar references to a restrictive interpretation can be found in *Nuclear Tests* and *Frontier Dispute*.⁸⁸

In *Fisheries Jurisdiction*, in relation to the *contra proferentem* rule, the Court distinguished between interpretation of contractual provisions and that of unilateral declarations. Whereas in the former the rule could have a role to play the Court was of the opinion that due to the particular character of unilateral declarations that the “rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada”.⁸⁹

Resolutions of International Organizations

Regarding interpretation of acts of international organizations, the prime example is that of interpretation of Security Council Resolutions. The PCIJ in the *Jaworzina Advisory Opinion* held that “it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it”.⁹⁰ However, both the PCIJ and the ICJ have on occasion given a glimpse into what they consider to be the elements to be taken into account during the interpretation of such Resolutions.

In this context the main judicial authority is a short passage taken from the *Namibia Advisory Opinion*.

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have

⁸⁶ See in more detail above Section I.4.

⁸⁷ *Phosphates in Morocco (Italy v. France)*, Judgment of 14 June 1938, P.C.I.J. Series A/B, No. 74, pp. 23-4.

⁸⁸ “when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for”; *Nuclear Tests (Australia v. France; New Zealand v. France)*, I.C.J. Reports 1974, para. 47. This is even more so in the case where the statement is “not directed to any particular recipient”; *Frontier Dispute (Burkina Faso v. Republic of Mali)*, I.C.J. Reports 1986, para. 39; see also International Law Commission, “Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto - 2006” reproduced in *Yearbook of the International Law Commission 2006, Vol. II(2)*, Guiding Principle 7, Commentary – para. 2 (Guiding Principles).

⁸⁹ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Reports 1998, para. 51.

⁹⁰ *Jaworzina Advisory Opinion*, P.C.I.J. Series B, No. 8, p. 37.

been in fact exercised is to be determined in each case, *having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences* of the resolution of the Security Council.⁹¹

This passage although not making reference to rules of interpretation *eo ipso*, nonetheless draws attention to four elements in particular that are in the Court's view of extreme import for the interpretative process. These elements are also reflected in the VCLT.

We can supplement the above passage, by reversing the arrow of time and looking back at the jurisprudence of the PCIJ where in 1931 the Court in its Advisory Opinion on *Access to German Minority Schools in Upper Silesia*, in interpreting a Council of the League of Nations Resolution of 12 March 1927, attempted to reveal the Council's intention by referring to a subsequent relevant Resolution.⁹² This could be considered as a corollary of the 'subsequent practice' to be found in Article 31 of the VCLT.

Building on these passages, various authors have suggested a number of approaches to the interpretation of decisions of international organizations, the common denominator being a *mutatis mutandis* application of the VCLT rules, albeit with varying degrees of gravitas on its main elements.⁹³

7. How do courts and tribunals respond to multiple authentic and conflicting texts of a treaty (or any other instrument)? How has Art. 33 VCLT been employed in practice? Does the procedure followed by courts and tribunals differ from that of Art. 33 VCLT?

The leading judgment on the application of Article 33 is the judgment of the Court in the merits phase of the *LaGrand* case. In that case, the Court had issued provisional measures, ordering the U.S. to stay the execution of a German national pending the outcome of the final decision on the merits. This national was executed prior to the merits phase of the case in contravention of the Court's Order of provisional measures.

⁹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 53 (Namibia Advisory Opinion) (emphasis added); of interest is also the analysis in: R. Higgins, "The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?" (1972) 21 ICLQ 270.

⁹² Advisory Opinion of 15 May 1931 *Access to German Minority Schools in Upper Silesia* PCIJ Series A/B, No 40, p 18.

⁹³ For instance, whether intention should be regarded as of higher import than textual interpretation; in more detail on the various constructions put forward, see: E. Papastavridis, "Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis" (2007) 56/1 ICLQ 83; M. Wood, "The interpretation of Security Council Resolutions" (1998) 2 *Max Planck Yearbook of United Nations Law* 73; M. Bos, "The Interpretation of Decisions of International Organisations" (1981) 28 NILR 1;

Germany claimed that such an order created international legal obligations for the U.S. and as such a breach of the provisional measures entailed the latter's responsibility. The question therefore before the Court was whether provisional measures created binding obligations, a question that in its view "essentially concern[ed] the interpretation of Article 41" of the Court's Statute.⁹⁴ The Court analysed the English and French versions of the Court's Statute,⁹⁵ finding that the two versions differed in relation to the imperative character of provisional measures. As a result of this divergence, it invoked Article 33(4) VCLT, according to which "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." The Court reasoned that the object and purpose of the Statute was to enable the Court to fulfil "the basis function of judicial settlement of international disputes" and that the 'object and purpose' of Article 41 was "to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court."⁹⁶

II. Process-related Issues/Questions

1. *The variety of materials used during the interpretative process and their probative value (e.g. dictionaries, commentaries, books, statements etc.)*

Although the use of publications to assist in the interpretative process was and remains a common practice in the Separate and Dissenting Opinions of Judges of the PCIJ and ICJ in order to bolster their findings, the Courts were much more cautious. However, there have been cases where both the PCIJ and the ICJ have found recourse to such material useful. One example of such material is dictionaries, which the Court resorts to in order to establish the 'ordinary meaning' of the terms under interpretation.

The PCIJ in its 1922 Advisory Opinion on *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* in order to identify the content of the terms 'industry' and 'industrial' had recourse to the *French dictionary by Littré* and the *Oxford Dictionary*.⁹⁷

More recently, in *Oil Platforms*, the Court resorted to the *Oxford English Dictionary* in order to demonstrate that

[t]he word 'commerce' is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and

⁹⁴ *LaGrand (Germany v USA)*, I.C.J. Reports 2001 466, para. 99.

⁹⁵ It should be noted that the Court did not refer to the equally authentic versions of the Court's Statute in the other official languages of the United Nations (in particular, the Chinese, Russian, and Spanish versions were cited by Germany).

⁹⁶ *LaGrand*, para. 102.

⁹⁷ *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, P.C.I.J. Series B No. 2, paras. 41-5.

sale to include ‘the whole of the transactions, arrangements, etc., therein involved’ (The Oxford English Dictionary, 1989, Vol. 3, p. 552).⁹⁸

Furthermore and in order to demonstrate that the legal ‘ordinary meaning’ flowed along the same lines it also made reference to legal dictionaries, namely *Black’s Law Dictionary*, and the *Dictionnaire de la terminologie du droit international*, the latter having been produced under the authority of a former president of the ICJ (Basdevant).⁹⁹

However, recourse to dictionaries does not always clarify the situation as was the case in *Avena and other Mexican Nationals* where the Court observed “that *dictionary definitions*, in the various languages of the Vienna Convention, *offer diverse meanings* of the term ‘without delay’ (and also of ‘immediately’). It is therefore necessary to look elsewhere for an understanding of this term”.¹⁰⁰ An example of such a different direction of drawing inferences regarding the ordinary meaning of a term is international reports. In *Oil Platforms*, for instance, the Court referred to the UN Secretary General’s Report entitled “*Progressive Development of the Law of International Trade*”.¹⁰¹

Another set of documents that features in the interpretative process of the Court is the Yearbooks of the International Law Commission (ILC), particularly references to Commentaries of Draft Codes and Articles prepared by the ILC, which sometimes formed the basis of binding treaties. For instance, the Court has referred to the *Draft Articles on Jurisdictional Immunities of States and their Property*^{102 103} the *Draft Code of Crimes against the Peace and Security of Mankind*,^{104 105} and the *Draft Articles on the Law of Treaties*.¹⁰⁶ Where exactly within the rubric of Articles 31 and 32 of the VCLT these documents fall is not clarified by the Court, however, in a somewhat ‘meta’ fashion, we can look at how the members of the ILC qualified their own discussions and commentaries.¹⁰⁷

⁹⁸ *Oil Platforms (Iran v. United States of America)*, I.C.J. Reports 1996, p. 803, para. 45.

⁹⁹ *Ibid.*

¹⁰⁰ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 12, para. 84

¹⁰¹ *Oil Platforms (Iran v. United States of America)*, I.C.J. Reports 1996, p. 803, para. 46.

¹⁰² Specifically what became Article 12 of the Convention; *Yearbook of the International Law Commission, 1991, Vol. II (2)*, p. 45, para. 8.

¹⁰³ *Jurisdictional Immunities of the State (Germany v. Italy)*, I.C.J. Reports 2012, para. 64.

¹⁰⁴ *Yearbook of the International Law Commission, 1996, Vol. II, Part Two*, p. 44, para. 5.

¹⁰⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, para. 186.

¹⁰⁶ Which were used as a template for the text of the 1969 Vienna Convention on the Law of Treaties; *Yearbook of the International Law Commission, 1966, Vol. II*, p. 251.

¹⁰⁷ After some debate they felt that they could be considered as preparatory work of a second order; Comments by Rosenne in: ILC, “Summary Record of the 872nd Meeting”, 17 June 1966 (A/CN.4/SR.872), para. 35; Comments by Yasseen, Tunkin, Rosenne and El-Erian in: ILC, “Summary Record of the 873rd Meeting”, 20 June 1966 (A/CN.4/SR.873), paras. 25, 27-8 and 34.

2. *Do international courts and tribunals have a tendency to explain the process and stages of their interpretative reasoning? If yes, what is the form that this usually takes?*

The Court explains the process and stages of its interpretative reasoning in reference to the elements of interpretation in the VCLT articles, and generally explains how it considers the various elements of interpretation to interact in any particular case.¹⁰⁸ It does not, however, take a formulaic approach to these elements. If its interpretative approach differs from this (for example, when it takes into account an argument made *a contrario*), it explicitly states the principle that it relies on.¹⁰⁹

3. *What internal or external factors (e.g. contract incompleteness, statute of the court, the background of judges, the subject area, political constellations or situations, concerns about the court's legitimacy, or about implementation of the judgment) affect the interpretative choices of international courts and tribunals, or changes in such choices, and in what manner? (In this context the framework suggested by Pauwelyn and Elsig could be useful).¹¹⁰*

To be analysed in the Final Report.

III. Systemic Issues/Questions

1. *What are the defining characteristics that differentiate interpretation from gap-filling and normative conflict? How do courts and tribunals address these processes?*

To be analysed in the Final Report.

2. *When have international courts and tribunals interpreted (not identified) the rules of interpretation? How do they distinguish between interpretation and identification?*

To be analysed in the Final Report.

¹⁰⁸ See e.g. *Somalia v. Kenya*, para. 65; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, p. 158.

¹⁰⁹ *Alleged Violations (Nicaragua v. Colombia)*, para. 39; *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, para. 37.

¹¹⁰ J Pauwelyn and M Elsig, 'The Politics of Treaty Interpretation' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013), 445-473

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