The interpretation of multilingual tax treaties

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CHAPTER 3 – POSITIVE ANALYSIS OF THE RULES ENSHRINED IN ARTICLES 31 AND 32 VCLT AND THEIR CONTRIBUTION TO THE AUTHOR'S NORMATIVE LEGAL THEORY ON TREATY INTERPRETATION

1. Introduction

This chapter is divided into two main sections.

In section 2 the author carries out a positive analysis aimed at revealing the commonly accepted practices concerning the interpretation of treaties under international law and, more specifically, in the application of Articles 31 and 32 VCLT. In that respect, the author's analysis is mainly based on (i) the case law of international courts and tribunals (and, to a lesser extent, national courts) both preceding and subsequent to the conclusion of the VCLT, (ii) scholarly writings on the interpretation of treaties and (iii) the *travaux préparatoires* of the VCLT.

Section 3 is devoted to the comparison between the principles of interpretation developed by the author in section 1 of Chapter 3 of Part I and the generally accepted rules and principles of treaty interpretation resulting from the positive analysis carried out in section 2 of this chapter.

The inferences drawn from such a comparison will constitute the foundations on which the author will build the answers to the research questions on the interpretation of multilingual (tax) treaties in Chapters 4 and 5 of this part, i.e. his normative legal theory on the interpretation of multilingual tax treaties.

2. Positive analysis of the rules of interpretation enshrined in Articles 31 and 32 VCLT

"Thus logic and intuition have each their necessary role. Each is indispensable. Logic, which alone can give certainty, is the instrument of demonstration; intuition is the instrument of invention." [447]

2.1. The ILC's approach to the codification of the rules on treaty interpretation

[447] See H. Poincaré (translated by G.B. Halstead), *The Foundations of Science: Science and Hypothesis, The Value of Science, Science and Methods* (Lancaster: The Science Press, 1946), p. 219.

From a structural perspective, the task of codifying rules on treaty interpretation required the ILC to answer three interrelated sets of questions.

First, was there any generally accepted rule on interpretation that could be inferred from the case law of international courts and arbitration tribunals and from States' practice? If the preceding question was answered in the affirmative, what was the nature and content of such rules? Were they detailed and strict, or loose enough to leave a certain discretionary power to the interpreter? Were they technical rules applicable only to specific situations, or were they principles of general application?

Second, in the event such customary rules prove to exist, should have they been codified as part of the law of treaties?

Third, where the second question had answered in the affirmative, do these rules have to be organized in any hierarchical order?

The first and second sets of questions are dealt with together in the remainder of this section. The third question is considered in the following section.

At the ILC's 726th meeting, i.e. at the beginning of the ILC's work on the law of treaties, Mr Ago submitted that the interpretation of treaties was an issue of capital importance for the Commission's work and for the law of treaties in general.[448] In this respect, he emphasized that the questions concerning the existence and the content of generally accepted rules on treaty interpretation[449] could not be left aside by the ILC, since such rules were the first and foremost means to secure certainty on the law of treaties.

This position was upheld by other members of the ILC, such as Mr Elias[450] and Mr Paredes,[451] although with diverging opinions on whether general rules on interpretation, or just some detailed rules on specific matters, were to be included in the draft codification. Mr Verdross, however, drew attention to the fact that, before answering the question of whether rules on interpretation had to be included in a report of the law of treaties, the ILC should have clarified whether it recognized the existence of such rules; he further noted that it was highly controversial whether the rules established by the case law of arbitral tribunals and international courts were general rules of international law or merely technical rules.[452]

At the end of its work on the subject matter, the ILC decided to include in the 1966 Draft only the comparatively few general principles that appeared to be largely accepted as compulsory rules for the interpretation of treaties.

The ILC was aware of the customary recourse to other principles and maxims in

[448] YBILC 1964-I, p. 23, para. 34.
[449] Mr Ago put forward the following questions as exemplifications: "what precisely was a technical rule? Was it or was it not mandatory? Was there or was there not a rule under which the terms of a treaty must be construed in the etymological sense or having regard to the context of the treaty? Was there or was there not a rule that in deciding between two possible interpretations of a treaty the preparatory work, the object of the treaty and the practice of the parties concerned must be taken into account?" (YBILC 1964-I, p. 23, para. 34).
[450] YBILC 1964-I, p. 22, para. 24.
[451] YBILC 1964-I, p. 22, para. 28.
[452] YBILC 1964-I, p. 21, para. 15.

international practice.
However, it recognized that they were, for the most part, principles of logic and good sense and that the recourse to many of them was discretionary rather than obligatory. According to the ILC, such principles and maxims were valuable as guides to assist the interpreter in appreciating the meaning that the parties might have intended to attach to the expressions employed in the treaty, but their suitability for use in any given case depended on a variety of considerations that had first to be appreciated by the interpreter himself.

Therefore, the ILC decided not to codify them as law of treaties and to leave the interpreter free to adopt them depending on the particular circumstances of each case.[453]

The draft articles on treaty interpretation submitted by the ILC to the General Assembly (1966 Draft) were then incorporated, with just one relevant change,[454] in the VCLT.

The rules on treaty interpretation included in the VCLT read as follows:

> **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 connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument 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.
>
> **Article 32**
> *Supplementary means of interpretation*
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.
>
> **Article 33**

[453] Commentary on Articles 27-28 of the 1966 Draft, para. 4 (YBILC 1966-II, p. 218).
[454] See Article 33(4) VCLT, on which see *infra*.

Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, 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.

2.2. The hierarchical order of the rules of interpretation encompassed in Articles 31 and 32 VCLT and the metaphor of the "crucible"

With regard to the question whether the few general principles to be included in the draft convention on the Law of Treaties had to be organized in some hierarchical order,[455] the solution adopted by the ILC, and then implemented in the VCLT, is two-sided.

On the one hand, there is hierarchical distinction between the means of interpretation provided for in Article 31 VCLT, which "all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*", and those provided for in Article 32 VCLT, which are supplementary and somewhat subordinated to the former.[456]

This solution has been welcomed by most scholars dealing with the subject matter.[457] Bernhardt, for instance, praised this solution, which he regarded as reflecting the intention of the ILC to give precedence to the text of the treaty, as expression of the intention of the parties, over the subjective intention to be derived from other, less

[455] On such an issue see Institute of International Law, "Observations des membres de la Commission Sur le rapport de M. Lauterpacht. Comments by Sir Eric Beckett", 43-I *Annuaire de L'Institut de Droit International* (1950), 435 *et seq.*, at 439-440.
[456] Commentary on Articles 27-28 of the 1966 Draft, para. 10 (YBILC 1966-II, p. 220)
[457] See, for example, among the first scholars commenting the 1966 Draft and the VCLT, R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 496; M. Hilf, *Die Auslegung mehrsprachiger Verträge. Eine Untersuchung zum Völkerrecht und zum Staatsrecht der Bundesrepublik Deutschland* (Berlin: Springer-Verlag, 1973), pp. 87 and 102 (also quoted in M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 205); M. Schröder, "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq.*, at 131-132. However, others, such as McDougal, strongly criticizes the solution adopted by the ILC, mainly because it would unduly restrict the freedom of the interpreter of choosing the most adequate means of interpretation available in each specific case (see M. S. McDougal *et al*., *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (New Haven: Yale University Press, 1967), pp. 992-1000).

reliable, sources.[458] Similarly, Schröder appreciated the ILC's decision to distinguish between primary (later, Article 31 VCLT) and supplementary (later, Article 32 VCLT) means of interpretation and to put the latter in a subsidiary position as compared to the former, since it removed the uncertainty existing in practice on the relevance of the *travaux préparatoires*.[459]

The above hierarchical distinction between Articles 31 and 31 VCLT, however, should not be intended to be a strict one. In this respect, the commentary to the 1966 Draft made clear that no rigid line is intended to exist between the primary means of (now) Article 31 and the supplementary means of (now) Article 32: the possibility that the latter are used to confirm the meaning resulting from the application of Article 31 constitutes a bridge (a "general link") between the two articles and maintains the unity of the process of interpretation.[460]

On the other hand, there is no hierarchy of means within Article 31 VCLT.[461] The commentary to Articles 27-28 of the 1966 Draft states that the text of Article 31 (then 27), when read as a whole, cannot be properly regarded as laying down a legal hierarchy of norms for the interpretation of treaties.[462] The very same title of Article 31 reads "General *rule* of interpretation", in the singular, and thus puts emphasis on the connection between the different paragraphs and means of interpretation, in order to show that their application involves a single operation.[463] The various means of interpretation have been ordered in Article 31 VCLT on the basis of considerations of logic, rather than of any obligatory legal hierarchy.[464]

This approach has been assessed differently by scholars: some, like Germer, have expressed a positive assessment of the "logical" structure of Article 31,[465] while others

[458] R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 496.

[459] M. Schröder, "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq.*, at 131-132.

[460] See the commentary on Articles 27-28 of the 1966 Draft, para. 10 (YBILC 1966-II, p. 220). On the (uncertain) relationship existing between the means of interpretation encompassed in Article 31 and those of Article 32 see also S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 274-279; for an actual instance thereof, see ICJ, 25 July 1974, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, judgment, separate opinion of Judge de Castro.

[461] The commentary to the 1966 Draft highlights that the way in which the various means of interpretation are organized within Article 31 VCLT is just the result of logical considerations. Logic suggested that the first element to be mentioned was "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Again, logic suggested that the second elements to be mentioned (in paragraph 2 of Article 31) were those comprised in the "context", due to fact that they either form part of the text or are intimately related thereto. Other elements of primary importance for interpretation purposes were included in paragraph 3 of Article 31; their placement after those comprised in the "context" was due to the logical consideration that, since they are extrinsic to the text, they are less connected to paragraph 1 than the elements forming the "context" (see YBILC 1966-II, p. 220, para. 9).

[462] See commentary on Articles 27-28 of the 1966 Draft, para. 9 (YBILC 1966-II, p. 220).

[463] See, similarly M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 203.

[464] See commentary on Articles 27-28 of the 1966 Draft, para. 9 (YBILC 1966-II, p. 220).

[465] See P. Germer, "Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on

have criticized it, saying that it misses the primary object of a rule of interpretation, i.e. establishing a clear order among the means of interpretation to be used. O'Connell, in particular, points out that the VCLT fails to clearly separate and indicate the priority between the textual and the teleological approaches to interpretation. According to that author, the VCLT seems to concede that "whenever a problem of interpretation arises the object of the treaty must be taken into account", without unambiguous "precedence is allotted to literal interpretation".[466]

The rejection, first by the ILC and then by the Vienna Conference, of the possibility of establishing a clear hierarchical order among the primary means of treaty interpretation is not, according to Schröder, due to the inability of the ILC to achieve it, but rather to the combined effect of the following reasons: the fact that international law scholars opposed for the most part to such a hierarchical arrangement; the absence of sufficient material confirming the existence of such a hierarchical order in the case law of arbitral tribunals and international courts; and the difficulty to make States converge on any possible hierarchy.[467]

The most relevant inference that may be drawn from the analysis of Articles 31 and 32 VCLT, in particular regarding their structure, is that the interpretative process consists of a single operation. The metaphor generally used in order to express the unity of the interpretative process is that of the "crucible": the interpreter has to find out all potentially relevant means to construe the specific treaty, in light of the circumstances of the case, and throw them into the crucible of interpretation: a proper construction of the treaty will come out of such a crucible.[468]

In other words, the final interpretation should be reached only after all relevant elements and means of interpretation have been taken into account and duly weighted in light of the whole analysis carried out: such relative weights may be reasonably attributed only on the basis of a careful scrutiny of all such elements and means, their cross-comparison, and their combined assessment.[469] Therefore, the analysis of the possible "vocabulary" meanings that may be attributed to a term, the study of the related context, the investigation of the object and purpose of the treaty, as well as the analysis of the subsequent agreement and the concordant subsequent practice of the parties, of the relevant rules of international law applicable in relations between them and of the supplementary means of interpretation should be carried out without any interruption in the interpretative process and without a rigid order being imposed. In this perspective,

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the Law of Treaties", 11 *Harvard International Law Journal* (1970), 400 *et seq.*, at 415.

[466] See D. P. O'Connell, *International Law* (London: Stevens & Sons, 1970), p. 255.

[467] See M. Schröder, "Gedanken zu einer Hierarchie der Interpretationsregeln im Völkerrecht", 21 *Revue hellénique de droit international* (1968), 122 *et seq.*, at 131-132.

[468] See YBILC 1966-II, p. 95, para. 4 and pp. 219-210, para.8; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 9-10. See also International Centre for Settlement of Investment Disputes, 21 October 2005, *Aguas del Tunari v. Republic of Bolivia*, Case No. ARB/02/3, para. 91.

[469] Such a process is to be followed also for the purpose of concluding that a "special" meaning, in the sense of Article 31(4) VCLT, is to be attributed to a term, since it is only from the contemporary analysis of all elements and items of evidence available that it is possible to establish whether the parties actually intended such a "special" meaning to be attributed to that term.

treaty interpretation is regarded as an art and not an exact science,[470] since such a mandated process of interpretation may lead to different conclusions according to the different factual circumstances of each case and due to the different weights attributed by the interpreter to the various elements and evidence that must be taken into account according to the rules enshrined in Articles 31 and 32 VCLT.

In this respect, the supplementary means of interpretation referred to in Article 32 VCLT should be placed on the same footing as the means encompassed in the general rule of interpretation from a procedural standpoint. It is therefore important to distinguish between:

(i) the interpretative weight to be attributed to the elements and items of evidence resulting from the analysis of such a supplementary means of interpretation and
(ii) the chronological place that such an analysis occupies in the process of interpretation.

With reference to (ii), it appears from the recent case law of international courts and tribunals[471] that the analysis of all the potentially relevant means of interpretation, including the supplementary means, constitutes a single intellectual process. Under this approach the position is rejected whereby the process of finding out the appropriate meaning of a term should be carried out without any investigation of, for example, the *travaux préparatoires* or the circumstances of the conclusion of the treaty and that such means had to be resorted only in a second, logically distinct, moment for the purpose of confirming such a meaning, or determining the appropriate one where the first part of the process did not lead to a satisfactory result. The unity of the entire interpretative process, moreover, is certainly not a creation of the ILC; the very same Vattel pled for an "accumulation"[472] approach, where different rules and means of interpretation had to be taken into account simultaneously.[473]

With reference to (i), the supplementary means of interpretation generally have to be attributed a qualitatively lower weight, as compared to the means of interpretation encompassed in the general rule, for the purpose of attributing the appropriate meaning to treaty terms and sentences. In many cases, they are helpful in directing the interpreter in the choice of the meaning when the elements and items of evidence stemming from the application of the general rule are not in themselves conclusive, i.e. where the meaning of the terms or sentences remain ambiguous or excessively vague. They may play an important role as well in the less common cases where the meaning is obscure, or manifestly absurd or unreasonable. However, according to Article 32 VCLT, they

[470] See ILC Draft Commentary, YBILC 1966-II, p. 218, para.4.
[471] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), Chapter 1, in particular pp. 39 *et seq*.
[472] This term is taken from R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 163.
[473] See E. de Vattel, *Le droit des gens. Ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758), Book II, § 322, where the author, at the end of the paragraphs on treaty interpretation, states that "Toutes les Règles contenuës dans ce Chapitre doivent se combiner ensemble, & l'Interprétation se faire de manière qu'elle s'accommode à toutes, selon qu'elles sont applicables au cas. Lorsque ces Règles paroissent se croiser, elles se balancent & se limitent réciproquement, suivant leur force & leur importance, & selon qu'elles appartiennent plus particulièrement au cas dont il est question".

may be only used for purposes of confirmation whenever the elements and evidence stemming from the application of the general rule lead to a clear, unambiguous and reasonable meaning; that is to say that such a meaning cannot theoretically[474] be overturned by a different meaning clearly pointed to by the supplementary means of interpretation.

With regard to multilingual treaties, some scholars[475] uphold the existence of a compulsory process of interpretation organized in well-defined, subsequent steps to be walked through under the provisions of Article 33 VCLT. The soundness of this thesis will be analysed in Chapter 4. In the remainder of this chapter, as its title suggests, only the rules of interpretation enshrined in Articles 31 and 32 VCLT will be dealt with.

2.3. The content of the rules of interpretation enshrined in Articles 31 and 32 VCLT

2.3.1. In general

A quick analysis of the rules encompassed in Articles 31 and 32 VCLT shows that such rules contain elements taken from the three main approaches habitually advocated with regard to treaty interpretation.

Traditionally, scholars used to distinguish among:[476]

> (i) the textual approach, according to which the text of the treaty is considered the authentic expression of the agreed intention of the parties;
> (ii) the subjective approach, whereby the intention of the parties is considered a subjective element, distinct from the text of the treaty, which is to be "discovered" by making recourse to other relevant means of interpretation in addition to the text (e.g. the *travaux préparatoires*);
> (iii) the teleological approach, for which the declared or apparent object and purpose of the treaty is the fundamental guideline for interpretation purposes, even where such object and purpose seem to go beyond, or even diverge from, the intentions of the parties as expressed in the treaty text.

Although the VCLT approach to treaty interpretation is an integrated one, where the above theories appear to be tightly mingled, the ILC appeared willing to attribute a prominent role the text of the treaty,[477] which was considered the starting point of the interpretative process.

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[474] The issue of the relation between the seemingly clear, unambiguous and reasonable meanings based on the means of interpretation provided for in Article 31 VCLT and the different meanings suggested by supplementary means of interpretation is dealt with in section 2.3.5 of this chapter.
[475] The most representative of whom is M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 205.
[476] See commentary on Articles 27-28 of the 1966 Draft, para. 2 (YBILC 1966-II, p. 218).
[477] See commentary on Articles 27-28 of the 1966 Draft, para. 9 (YBILC 1966-II, p. 220).

The prominence of the text was also recognized by the studies previously carried on by the Institute of International Law and the case law of the ICJ and PCIJ. As stated by the ILC, "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. […] Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain." [478]

The prominence of the text, however, is not an absolute one, since it is generally recognized that the treaty terms and the ordinary meaning thereof must be duly weighted against all other relevant elements and items of evidence, which together must be thrown into the crucible.[479]

In this respect, the work of the ILC and, thus, the VCLT appear to have been significantly influenced by both the 1956 Resolution of the Institute of International Law[480] and the principles on interpretation formulated by Sir Gerald Fitzmaurice,[481] which point to the text as a start, but also highlight that the treaty is to be interpreted as a whole, taking into account its object and purpose.[482]

The practical effects of the VCLT approach are thus twofold.

On the one hand, it is now "generally recognized that an interpretation that does not emerge from the text cannot be accepted, however plausible it may be in view of the circumstances, unless failure to do so would lead to an obviously unreasonable result".[483]

On the other hand, the interpretations that may be grounded in and derived from a single text are often so kaleidoscopically different from each other that the text cannot, by itself, suffice in order to solve all the interpretative issues. Moreover, an integration of the text with other elements and items of evidence is generally required also for the purpose of establishing whether an unreasonable result emerges from a "textual" interpretation, since the soundness of an interpretation may be assessed only where a yardstick exists for the purpose of this evaluation; such a yardstick, in turn, must be determined on the basis of all the elements and items of evidence available, the bare text often not sufficing in that respect.

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[478] See commentary on Articles 27-28 of the 1966 Draft, para. 11 (YBILC 1966-II, pp. 220-221).
[479] Similarly R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 144.
[480] Institute of International Law, "Résolution of 19 avril 1956: Interprétation des traités", 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*
[481] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq.*, at 211-212.
[482] See YBILC 1964-II, pp. 55-56.
[483] R. H. Berglin, "Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: the Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal", 21 *Texas International Law Journal* (1986), 39 *et seq.*, at 44; see also R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 145.

In a nutshell, the approach implemented in the VCLT cannot be reduced to a textual interpretation approach, since an accurate reading of Articles 31 and 32 VCLT and an analysis of their application by courts and tribunals clearly show that elements typical of the different approaches coexist therein and interact strictly with one another.[484]

The following subsections analyse in some detail the various elements of interpretation to be taken into account under Articles 31 and 32 VCLT.

2.3.2. Good faith

"Tamerlane, after having engaged the city of Sebastia to capitulate, under his promise of shedding no blood, caused all the soldiers of the garrison to be buried alive"[485]

The origin of the international legal concept associated with the English term "good faith" may be traced back to the concept corresponding to the Latin term "bona fides" used in Roman law, particularly in the law of contracts.[486] Such a concept then evolved in the field of the international relations among Nations up to the point of becoming a well-established principle of international law. In its current international legal meaning the term "good faith" was mentioned as early as at the beginning of the XX century in the *North Atlantic Fisheries* arbitral award.[487]

Its general recognition and relevance as a fundamental principle in international relations is adequately shown by the following three notations:

(i) it is set forth in Article 2(2) of the Charter of the United Nations;

(ii) it is embodied in Articles 26 and 31 VCLT as the leading principle to be followed in the interpretation and application of treaties;

(iii) it has been included by the Institute of International Law, as the cornerstone of the interpretative process, in Article 1 of its resolution on treaty

[484] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 747-748; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 121.

[485] E. de Vattel, *Le droit des gens. Ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* (London, 1758), Book II, § 273, quoting Paffendorf's Law of Nature.

[486] See J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), pp. 5 *et seq*.; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 122 *et seq*. See also PCIJ, 17 March 1934, *Lighthouses case between France and Greece*, judgment, separate opinion by Judge Séfériadès, p. 47.

[487] See Arbitral award of 7 September 1910, *The North Atlantic Coast Fisheries Case (Great Britain, United States),* in 11 *Reports of International Arbitral Awards*, 167 *et seq.,* at 188. For a list of international law cases where the principle of good faith is referred to, see ICJ, 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, judgment, para. 38. See also paragraph 2 of the Commentary to art. 55 of the Third Report on the Law of Treaties prepared by Sir Humphrey Waldock (YBILC 1964-II, p. 8, para. 2).

interpretation.[488]

The foremost aspect to be taken into account, when dealing with good faith in international relations, is that such a principle, just as bona fides in Roman and civil law, "has strong connotations with such moral virtues as honesty, fairness, reasonableness and trustworthiness".[489]

The second aspect to consider is that, notwithstanding its capital importance, the principle of good faith is not itself a source of legal obligations. According to the ICJ, the principle of good faith, although is "one of the basic principles governing the creation and performance of legal obligations […] it is not in itself a source of obligation where none would otherwise exist".[490] Conversely, since it represents the fundamental principle from which legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, it directs the way in which such legal rules must be interpreted and applied. In particular, it amounts to fundamental guidance for the interpretation and application of international agreements. Therefore, quoting Rosenne, it "constitutes a series of conduct-regulating rules" having normative value since their non-observance "may give rise to an instance of international responsibility", while their observance "may justify what is otherwise an international wrongful act".[491]

It should be finally noted that, since honesty, fairness, reasonableness and trustworthiness are mainly moral virtues strictly linked to human culture and customs, the shape and content of the principle of good faith change across the decades according to the development of such values as recognized by and in the international community.[492]

Although being a principle applicable to the whole spectrum of international law, the principle of good faith is particularly important with regard to treaties, which it governs "from the time of their formation to the time of their extinction",[493] since "contracting parties are always assumed to be acting honestly and in good faith".[494]

In this respect, the contextual analysis of the VCLT shows that a legal symbiosis exists between the principle of good faith mentioned in Article 31 and the *pacta sunt*

[488] Institute of International Law, "Résolution of 19 avril 1956: Interprétation des traités", 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*
[489] F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 123.
[490] ICJ, 20 decembre 1988, Border and Transborder Armed Actions (Nicaragua v. Honduras), judgment, para. 94.
[491] S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), p. 135.
[492] J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 124. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 123.
[493] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), p. 106
[494] PCIJ, 17 March 1934, *Lighthouses case between France and Greece*, judgment, separate opinion by Judge Séfériadès, p. 47.

servanda rule established by Article 26:[495] treaties must be interpreted and applied in good faith. Performing a treaty strictly according to its *prima facie* literal meaning it is not sufficient in this respect.[496] Treaty obligations must be carried out honestly and loyally according to the common and real intention of the parties, i.e. according to "the spirit of the treaty and not its mere literal meaning".[497] Performing a treaty in good faith requires that "a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects".[498] According to Rosenne, this is particularly relevant when the circumstances and situations of a concrete case could have been unforeseen by the contracting parties.[499]

For the same reasons, applications of treaties that result in abuses of rights are generally regarded as infringing the fundamental principle of good faith.[500]

As the other side of the coin, respect of a good faith treaty application, a good faith treaty interpretation has been defined as a reasonable,[501] honest and fair[502] interpretation. In this sense, good faith implies the need to elucidate the meaning of the terms used by the parties for the purpose of finding out the agreement reached by them.[503]

Therefore, the reference to good faith, especially where coupled with the mirror reference to the object and purpose of the treaty at the end of Article 31(1) VCLT, leads to an interpretative approach highly focused on finding out the intention of the parties starting from the text and rejects a mere literal approach. In this respect, the requirement to construe the treaty in good faith may lead the interpreter to face two critical questions:

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[495] See the Commentary to Article 27 of the 1966 Draft, according to which the interpretative principle of good faith flows directly from the *pacta sunt servanda* rule (YBILC, 1966-II, p. 221, para. 12).
[496] F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 125.
[497] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), 114. See also G. Schwarzenberger, "Myths and realities of treaty interpretation: Articles 27-29 of the Vienna draft convention on the law of treaties", 9 *Virginia Journal of International Law* (1968), 1 *et seq.*, at 9-10.
[498] Paragraph 2 of Art. 55 (Pacta sunt servanda) of the Third Report on the Law of Treaties prepared by Sir Humphrey Waldock (YBILC 1964-II, p. 7). The paragraph was then dropped since the ILC considered it implicit in the general obligation to perform treaties in good faith (YBILC 1966-II, p. 211, para. 4).
[499] S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), p. 176. As shown in section 4.4 of Chapter 2 of Part I, this is a rather common situation whenever a sentence that covers the future is at stake.
[500] G. Schwarzenberger, "Myths and realities of treaty interpretation: Articles 27-29 of the Vienna draft convention on the law of treaties", 9 *Virginia Journal of International Law* (1968), 1 *et seq.*, at 9-10; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 126-128. On the relation between interpretation in good faith, abuse of rights and need to balance the conflicting rights and obligations dealt with in the treaty, see WTO Appellate Body, 12 October 1998 *United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4 (WT/DS58/AB/R)*, paras. 158-159.
[501] See R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1272, note 7; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 151.
[502] See F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), p. 131. See also B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), pp. 105 *et seq*.
[503] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), 148.

(i) where the treaty appears silent on a certain case, whether the parties have deliberately agreed to leave some gaps in the treaty, i.e. they have forecasted certain possible future scenarios and decided not to include them in the scope of the treaty, or whether the specific case was unforeseen, but the parties would have explicitly brought it within the scope of a certain treaty rule, had they anticipated it;[504]

(ii) whether the interpretation based on the ordinary meaning of the treaty terms in their context and in light of the object and purpose of the treaty conflicts with the otherwise seeming intention of the parties.[505]

In relation to the first question, it is interesting to recall the position expressed by Sir Humphrey Waldock in the Commentary to Article 72 of his Third Report on the Law of Treaties, where he stated that it is justifiable to imply terms in a treaty for the purpose of giving efficacy to an intention of the parties "necessarily" to be inferred from the express provisions of the treaty.[506] Similarly, the possibility of implying terms not expressly included in the text, when interpreting treaties, was also upheld by the ILC in its Commentary to the 1966 Draft, provided that it did not lead to an "extensive" or "liberal" interpretation.[507]

In relation to the second question, good faith is to be seen not only as a standard of behavior that applies to the entire process of interpretation (including the examination of the text, context and subsequent practice), but also as a yardstick to be used in order to assess whether the apparent result of the interpretative process is manifestly absurd or unreasonable in light of the particular circumstances of the case and, therefore, must be rejected.[508]

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[504] See House of Lords (United Kingdom), 9 December 2004, *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, [2004] UKHL 55, in particular para. 43, per Lord Steyn, and para. 63, per Lord Hope. See also ICJ, 18 July 1966, South West Africa (Ethiopia/Liberia v. South Africa), judgment, para. 92.

[505] A good example of the difficulties to be faced when trying to attribute a meaning to the absence of expected terms, or to an omission, is illustrated by the WTO case *Argentina – Safeguard measures on Imports of Footwear*. In that case, the Appellate Body and the Panel (of the WTO Dispute Settlement Body) reached opposite conclusions on the meaning to be attributed to the absence of an explicit reference to the criterion of "unforeseen developments" (included, on the contrary, in Article XIX of the 1947 General Agreement on Tarifs and Trade) in Article 2 of the Agreement on Safeguards (see WTO Appellate Body, 14 December 1999, *Argentina – Safeguard measures on Imports of Footwear,* AB-1999-7 (WT/DS121/AB/R), para. 88).

[506] YBILC 1964-II, p. 61, para. 29. According to the author, the use of the adverb "*necessarily*" (in *italics* in the original) by the Special Rapporteur constitutes a rhetorical expedient employed in order to make clear that the intention of the party should not be determined independently from the reasonable meaning attributable to the express treaty provision; since the inference of the intention of the parties from the treaty text is of an inductive nature, the result thereof can never necessarily descend from the available clues (in this case the express treaty provisions). Therefore, setting aside the rhetorical effect, the sentence contained in the draft commentary should read "it is justifiable to imply terms in a treaty for the purpose of giving efficacy to *the* intention *most probably* to be inferred from the express provisions of the treaty".

[507] YBILC 1966-II, p. 219, para.6.

[508] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 120. See also S. Rosenne, "The Election of Five Members of the International Court of Justice in 1981", 76 *American Journal of International Law* (1982), 364 *et seq.*, at 365-366; J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 109. With regard to the relevance of supplementary means of interpretation for the purpose of avoiding absurd or unreasonable interpretative outcomes, see ICJ, 15

In addition, it may be noted that many rules and maxims of interpretation applied by international courts and tribunals are the result of the application of logic and common sense and, as such, are nothing more than particular manifestations of the principle of good faith.[509]

Probably, the most important of such rules and maxims is the one commonly referred to as the principle of effectiveness (sometimes referred to as *ut res magis valeat quam pereat*).[510] The ILC linked such principle to that of good faith and, to a certain extent, to the object and purpose of the treaty. According to the Commission, "in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in Article 27, paragraph 1,[511] which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose".[512] Consequently, the ILC decided not to explicitly provide for such a principle in the 1966 Draft, notwithstanding the fact that it constituted the subject of a separate article in the original draft prepared by Sir Humphrey Waldock.[513]

At a closer look, the principle of effectiveness appears to encompass two strictly related, but distinguished, rules of interpretation.[514]

On the one hand, there is the principle of effectiveness *strictu senso*, identified with the maxim *ut res magis valeat quam pereat*. According to this maxim, good faith requires that all the terms and expressions included in a treaty are to be given a meaning and that an interpretation of the treaty, or a particular provision thereof, that attributes a meaning to all the terms is to be preferred, *ceteris paribus*, to an interpretation that does not attribute any meaning to certain terms or expressions, as if they were not part of the interpreted sentence.[515]

February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment, paras. 30-41 of Judge Schwebel's dissenting opinion.

[509] In this sense, J. F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 109; H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949), 48 *et seq.*, at 56.

[510] The principle of effectiveness had first been codified by Sir Gerald Fitzmaurice in his formulation of the major principles of interpretation (G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq., at* 211), which, together with the 1956 Resolution of the Institute of International Law, was taken by the Sir Humphrey Waldock as inspiration for its work on treaty interpretation (see YBILC 1964-II, pp. 55-56, paras. 10 *et seq*.).

[511] Now Article 31(1) VCLT.

[512] See para. 6 of the Commentary to Arts. 27 and 28 of the 1966 Draft (YBILC, 1966-II, p. 219, para. 6)

[513] See Article 72 of the Special Rapporteur's Third Report on the Law of Treaty (YBILC 1964-II, p. 53).

[514] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 148. The double nature of the principle of effectiveness may be already seen in the formulation of such a principle elaborated by Sir Gerald Fitzmaurice (see G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: Treaty interpretation and other treaty points", 33 *British Yearbook of International Law* (1957), 203 *et seq.*, at 211). Reference to both rules of interpretation may be found in ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, paras. 47 and 51-52.

[515] See, for instance, ICJ, 9 April 1949, Corfu Channel (United Kingdom v. Albania), judgment, p. 24; ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, para. 47; ICJ, 22 July 1952, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, judgment, p. 105. In the specific case, however, the ICJ

On the other hand, there is the principle of effectiveness *latu senso*: an interpretation of the treaty that is more in line with the object and purpose thereof is to be preferred to an interpretation that is less in line with it.[516] In this case, the object and purpose of the treaty is not used solely, although it is used primarily, as prescribed by Article 31 VCLT, for the purpose of choosing among the various possible ordinary meanings of a certain term, but, more generally, to ensure that the interpretation of the treaty or a certain provision thereof is apt to realize the aims of the treaty itself.[517] However, as the ICJ affirmed in the *Interpretation of Peace Treaties* case, the duty of the interpreter is to construe and not to revise the relevant treaty and the principle of effectiveness cannot justify the interpreter in attributing to treaty provisions a meaning that would be contrary to their letter and spirit.[518]

A final remark concerns the relation between the application in good faith of the treaty and the protection of the legitimate expectations of the (other) treaty parties, which may take the technical forms of estoppel or acquiescence.

In particular, it is generally recognized that, where the action or inaction of a contracting State has generated the legitimate expectation in the other contracting States that a certain behavior is admissible under the treaty and accepted as such by the first-mentioned State, this State cannot claim that behavior to constitute a breach of the treaty.[519] Similarly, if the other contracting States have for a long period of time accepted, without any complaint, the action or inaction of the first-mentioned State, they may be considered to have created a legitimate expectation in the first-mentioned State of the existence of an agreement on the admissibility of its action or inaction under the treaty; under these circumstances, the other contracting States cannot subsequently claim that the behavior of the first-mentioned State constitutes a breach of the treaty.[520]

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found that such an approach was not to be followed, since the text of the Iranian Declaration (the text at stake) was not a treaty text resulting from negotiations between two or more States, but the result of a unilateral drafting by the Government of Iran, which appeared to have shown a particular degree of caution when drafting the text of the Declaration and appeared to have inserted, *ex abundanti cautela*, words which, strictly speaking, might seem to have been superfluous. See also WTO Appellate Body, 14 December 1999, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8 (WT/DS98/AB/R), para. 80.

[516] See PCIJ, 19 August 1929, Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), order, p. 13; ICJ, 3 February 1994, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), judgment, paras. 51-52. See also para. 6 of the Commentary to Articles 27 and 28 of the 1966 Draft (YBILC, 1966-II, p. 219, para. 6).

[517] This may be the case, for instance, where the interpretation based on the attribution of a special meaning to a treaty term is more in line with the object and purpose of the treaty than the construction based on the attribution of *an* ordinary meaning thereto.

[518] ICJ, 18 July 1950, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, advisory opinion, p. 229. See, in this sense, also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986), p. 357; YBILC 1966-II, p. 219, para. 6.

[519] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London: Stevens & Sons, 1953), 143-144; F. Engelen, Interpretation of Tax Treaties under International Law (Amsterdam: IBFD Publications, 2004), 129 and 136-137.

[520] As instances of the application of the principles of acquiescence and estoppel see PCIJ, 28 June 1937, *Diversion of Water from the Meuse (Netherlands v Belgium)*, judgment, paras. 84-85; ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, pp. 32-35.

2.3.3. Ordinary meaning

Under the general rule of interpretation enshrined in Article 31 VCLT, the treaty text is the starting point of the interpretative process, since it is presumed to be the authentic expression of the intentions of the parties. Such a presumption implies that, in order to find out the intention of the parties, it is necessary to elucidate the meaning of the treaty text by means of interpretation.[521]

More specifically, as the ILC put it, the parties are to be presumed to have the intention that appears from the ordinary meaning of the terms used by them.[522] Therefore, the presumption is not limited to equating the treaty text to the authentic expression of the parties' intention, but extends to assuming that the parties have used all words in that text according to their "ordinary meaning", unless a proof to the contrary is given.

The adjective "ordinary" is qualified by the subsequent specifications encompassed in Article 31 VCLT: the ordinary meaning is the one, among the many that a term may be attributed in a particular language, that better fits within its context[523] in light of the object and purpose of the treaty.[524]

According to Sir Humphrey Waldock, speaking in his capacity of expert consultant to the UN Conference on the Law of Treaties,[525] "nothing could have been further from the Commission's intention than to suggest that words had a 'dictionary' or intrinsic meaning in themselves" and that the "Commission had been very insistent that the ordinary meaning of terms emerged in the context in which they were used, in the context of the treaty as a whole, and in the light of the object and purpose of the treaty".

The position articulated by Sir Humphrey Waldock is semantically supported by the use of the expression "the ordinary meaning *to be given* to the terms" in Article 31(1)

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[521] See the commentary to Articles 27-28 of the 1966 Draft, paras. 2, 11 and 18 (YBILC 1966-II, pp. 218 *et seq*.)

[522] See the commentary to Articles 27-28 of the 1966 Draft, paras. 12 (YBILC 1966-II, p. 221)

[523] Including the means of interpretation referred to in Article 31(3) VCLT.

[524] See commentary to Articles 27-28 of the 1966 Draft, paras. 12 (YBILC 1966-II, p. 221), where it is stated that the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in light of its object and purpose. See also Sir Humphrey Waldock reply to the comments made by the Israeli and United States governments on the draft articles provisionally adopted by the ILC in 1964 (YBILC, 1966-I, para. 5 at p. 95 and para. 8 at p. 96) and the Separate Opinion of Judge Torres Bernárdez in the *Land, Island and Maritime Frontier Dispute* case, where he referred to the concept of "fully qualified" ordinary meaning (ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 190 of the Separate Opinion of Judge Torres Bernárdez). For an historical reconstruction of the ILC discussions on the term "ordinary meaning" in the context of the articles on treaty interpretation, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 142 *et seq*. According to Lindefalk, "it is not unjustified to argue that an ordinary meaning independent of the context and the object and purpose simply does not exist" (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 344).

[525] UNCLT-1st , p. 184, para. 70.

VCLT,[526] which indicates that the ordinary meaning is not intrinsic to the terms, but must be attributed by the interpreter by choosing among the various possible meanings according to the specific circumstances of the case.[527]

A similar conclusion has been reached by international courts and tribunals, which have held that the principle of the ordinary meaning does not entail that words and phrases are always to be interpreted in a purely literal way and that, often, the interpreter must choose among the multiple meanings of a term or expression on the basis of their context and of the object and purpose of the treaty.[528] According to the ICJ, this is particularly true where a purely literal, or grammatical, interpretation of the text leads to a somewhat surprising or absurd result.[529]

In this respect, where a term is used in a technical context (e.g. a specific legal subject matter), its ordinary meaning should be generally considered to coincide with the meaning attributed to that term in the relevant technical jargon (e.g. in the specific legal jargon). This inference is called for by the principle of good faith, since the attribution of whatever meaning different from that customarily used in a certain technical context would deprive the interpretation of any reasonableness in light of the good faith expectations of the parties involved.[530] Such ordinary jargon meaning may be usually determined on the basis of (i) dictionaries,[531] (ii) the analysis of the terms used in similar or related treaties,[532] or (iii) other technical documentary material.[533]

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[526] See Article 27 of the 1966 Draft (YBILC 1966-II, p. 181), which is identical in this respect to Article 31 VCLT.

[527] Similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 164.

[528] See, for instance, PCIJ, 12 August 1922, *Competence of the International Labour Organization in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion, p. 23; ICJ, 26 May 1961, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, pp. 31-32 and case law quoted therein; International Centre for Settlement of Investment Disputes, 21 October 2005, *Aguas del Tunari v. Republic of Bolivia*, Case No. ARB/02/3, para. 91; ICJ, 12 November 1991, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, para. 29.
Among scholars, see *ex multis* G. Fitzmaurice, *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986), p. 52; A. D. McNair, *The Law of Treaties* (Oxford: The Clarendon Press, 1961), p. 367.

[529] ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, para. 52. See also, even if in slightly different terms, ICJ, 18 July 1966, *South West Africa (Ethiopia/Liberia v. South Africa)*, judgment, para. 48, where the Court stated that the rule of interpretation based on the natural and ordinary meaning of the words employed is not an absolute one, since, 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.

[530] See, for instance, PCIJ, 5 September 1933, *Legal Status of Eastern Greenland (Denmark v. Norway)*, judgment, pp. 49-50. With regard to the relevance of the principle of good faith for the purpose of establishing the ordinary meaning of treaty terms, see B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), p. 107.

[531] E.g. ICJ, 12 December 1996, *Oil Platforms, (Islamic Republic of Iran v. United States of America)*, judgment, para. 45. Furthermore, dictionaries are often used as well to elucidate the day-to-day meaning of treaty terms. See, for instance, WTO Appellate Body, 2 August 1999, *Canada – Measures Affecting the Export of Civilian Aircraft*, AB-1999-2 (WT/DS70/AB/R), para. 154, where the possible meanings of the term "confer" are sought.

[532] E.g. ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 380. As Gardiner points out, courts often do not explain whether this practice of referring to

Moreover, the subsequent agreements between the parties, their subsequent practice, the rules of international law applicable in the relations among them, as well as the available supplementary means of interpretation often prove helpful for the interpreter to refine the selection of the ordinary meaning that best fits in the circumstances of the case.[534]

Thus, since the ordinary meaning of any treaty term is a meaning qualified by all interpretative elements referred to in Article 31 (and, to a certain extent, Article 32) VCLT, the following sections deal with the content and usage of such elements.

2.3.3.1. Object and purpose of the treaty

With regard to the object and purpose of the treaty, two preliminary issues need to be tackled.

First, the fact that the term "object and purpose" is expressed in the singular raises the question of whether only the most important aim of a treaty should be taken into account for the purpose of Article 31 VCLT, as it is generally recognized that "most treaties have no single, undiluted object and purpose, but rather a variety of different, and possibly conflicting, objects and purposes".[535] That question should be answered in the negative, the opposite conclusion appearing too simplistic and over-rigid, especially where it is considered that Article 31 VCLT has an enormously wide scope and thus it must be flexible enough to be effectively applied in extremely different circumstances. Thus, the interpreter should always consider which of the various objects and purposes of a treaty are relevant with reference to the provision at stake and, where more of them appear relevant, he should assess how they interact with each other and how the contracting parties decided to balance them, as may appear from the context of the treaty and from the other available elements and items of evidence.[536]

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the use of a certain term in other treaties is (i) in pursuit of its ordinary meaning, (ii) an implementation of rules of international law applicable in relation between the parties, (iii) one of the means of interpretation allowed under Article 32 VCLT, or (iv) simply a standard practice in the application of the VCLT (see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 175-176, citing F. Berman, "Treaty "Interpretation" in a Judicial Context", 29 *Yale Journal of International Law* (2004), 315 *et seq.*, at 317) .

[533] E.g. ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, paras. 20 and 30.

[534] See ECtHR, 4 April 2000, *Witold Litwa v. Poland (Application no. 26629/95)*, paras. 60-63 (and 34-39 with regard to the *travaux préparatoires*), where the Court attributed a significant relevance to (i) the context in which the relevant term was used, (ii) the apparent object and purpose of the relevant article of the treaty and (iii) the *travaux préparatoires* of the ECHR, in order to support an interpretation of the term "alcoholics", as used in Article 5 of the ECHR, which included not only persons addicted to alcohol, but also persons in a temporary state of drunkenness. For a lengthy description and discussion of the case, especially with reference to the role played by the *travaux préparatoires* in the decision, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 39-41.

[535] WTO Appellate Body, 12 October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 (WT/DS58/AB/R), para. 17.

[536] One could reasonably argue that the object and purpose of a specific section or article is not denoted by the expression "*its* object and purpose" contained in Article 31(1) VCLT, since the latter might be seen as referring exclusively to the object and purpose of the treaty as a whole. In that respect, the author is of the opinion that

Second, the object and purpose of the treaty should not be seen as "something that exist[s] *in abstracto*", but as something that "follow[s] from and are closely bound up with the intentions of the parties".[537] To put it differently, the object and purpose of a treaty does not exist independently from the parties' intentions, which represent the sole source of the object and purpose. This conclusion is rooted in the principle of good faith and entails, as one of its corollaries, that under the system of interpretation provided for by the VCLT the extreme forms of teleological approach, which deny any relevance of the intentions of the parties and affirmed the absolute independence from them of the treaty object and purpose,[538] have to be rejected.

With regard to the role played by the object and purpose in the process of treaty interpretation, its main function appears that of a qualifier of the ordinary meaning to be attributed to treaty terms under Article 31(1) VCLT. In fact, as the interpretative process in the VCLT system mainly consists of discovering the meaning that the parties attributed to the treaty text, the object and purpose is primarily used to elucidate the ordinary meaning of the terms used in the text[539] and not to find out a meaning independent from the text on the basis of a purely teleological interpretation of the treaty.[540] In this respect, the object and purpose of the treaty must not be looked at in isolation from the context of the treaty as a whole; on the contrary, it must be regarded as the most important part of such a context and taken into account together with it.[541] Moreover, from this vantage point, the object and purpose of the treaty appears strictly intertwined with the principle of effectiveness *latu senso*, according to which treaty terms should be interpreted so as to give them, as far as possible, an effect consistent with the object and purpose of the treaty.[542]

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the expression "its object and purpose" should not be read too strictly, mainly due to the broad scope of Article 31 VCLT. However, even where that expression was construed strictly, the relevance of the object and purpose of specific sections or articles, in order to interpret provisions encompassed therein, would be preserved by the need to take into account the context of such provisions in order to construe them. In fact, since the treaty context includes the text of the treaty, which in turn includes the titles of the relevant sections and articles, where the reading of the text of such sections and articles (inclusive of their titles) highlights the object and purpose thereof, the latter must be taken into account for interpretative purposes as part of the context (see, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 178-179).

[537] ECtHR, 27 October 1975, *National Union of Belgian Police v. Belgium (Application no. 4464/70)*, para. 9 of Judge Fitzmaurice's Separate Opinion.

[538] For an analysis of such theories and their application by international Courts and Tribunals, see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 131 *et seq*.

[539] See YBILC 1964-I, pp. 281 *et seq.,* for the discussion that took place among the ILC's members at Commission's 765th meeting on this matter, and YBILC 1964-I, p. 309, para. 3 for the consequent redrafted version of Article 70.

[540] See, *inter alia*, the observations submitted by Mr Luna at the 871st session (YBILC 1966-1(part II), p. 193, paras. 7-10).

[541] See the statement of the Uruguayan representative at the Committee of the Whole of the Vienna Conference (UNCLT-1st, p. 170, para. 67).

[542] See ICJ, 12 December 1996, Oil Platforms, (Islamic Republic of Iran v. United States of America), judgment, para. 52; ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 43.

The above-mentioned function, however, is not the only one played by the object and purpose in the process of treaty interpretation. In fact, together with the principle of good faith, the object and purpose of the treaty also draws the dividing line between acceptable and non-acceptable interpretations. Such a function was explicitly attributed to the object and purpose of the treaty in the first draft of the provisions on treaty interpretation prepared by Sir Humphrey Waldock[543] and is now implicitly brought into effect by the requirement that treaties are interpreted in good faith, i.e. reasonably, honestly and fairly.

Even if it does not always appear easy to distinguish between this and the previous function, they are to be kept logically distinguished since there might be occasions where the meaning to be attributed to a specific term could appear *prima facie* unambiguous and clear, independently from any reference to the treaty object and purpose, but the interpretation based on such a meaning could prove absurd or unreasonable in light of the object and purpose and the context of the treaty as a whole. In this case, the interpretative process is not yet at its end, since all the elements and means of interpretation put in the "crucible" must be assessed together and balanced against each other for the purpose of finding out the proper interpretation of the treaty. The fact that the *prima facie* construction, obtained by attributing to the relevant terms of the treaty their seeming ordinary meaning, is unreasonable or absurd against the background of the object and purpose of the treaty compels the interpreter to again analyse all the interpretative elements and items of evidence at his disposal for the purpose of assessing whether it is possible to give the relevant treaty terms an ordinary meaning leading to an interpretation that does not contrast with the object and purpose of the treaty. Where this is not possible, the interpreter must decide whether the object and purpose requires the treaty to be given an interpretation going beyond that based on the ordinary meaning of the treaty text, for instance by attaching a special meaning to the relevant undefined treaty terms.[544]

While the principle of good faith represents the reason for the existence of a dividing line between acceptable and non-acceptable interpretations, the object and purpose of the treaty constitute, together with the context of the treaty as a whole, the major yardstick to test the acceptability of the result of the interpretative process: a

[543] See Article 70(2) of the Third Report on the Law of Treaties submitted by the Special Rapporteur to the ILC (YBILC 1964-II, p. 52). See also the explanation given by the Special Rapporteur on the meaning of "the context of the treaty as a whole" and its relation with the object and purposed of the treaty (the latter being the most important element of the former – see also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 168) at the ILC's 765th meeting, held on 14 June 1964 (YBILC 1964-I, p. 281, para. 87).

[544] This double function in the use of the objective and purpose of the treaty for interpretative purposes appears to be perceived also by Sinclair (see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 130). In this respect, Hummer points out that, if one looks at Articles 31-33 VCLT as a whole, the impression is that the principles of interpretation put forward therein are closer to the teleological method than is generally perceived (see W. Hummer, "Problemas jurídico-lingüísticos de la dicotomía entre el sentido 'ordinario' y el 'especial' de conceptos convencionales según la Convención de Viena sobre el Derecho de los Tratados de 1969", 28 *Revista Española de Derecho Internacional* (1975), 97 *et seq.*, at 119-120).

construction that leads to absurd or unreasonable results, having regard to the object and purpose of the treaty (and the context of the treaty as a whole), should generally be rejected.[545]

This prominence given to the object and purpose of the treaty for interpretative purposes, however, does not entail that teleological interpretations going beyond the text of the treaty are unconditionally allowed under the system of the VCLT.[546] Even where the object and purpose of the treaty functions as yardstick to draw the borderline between acceptable and unacceptable interpretations, it is only where the meaning attributable the treaty text appears absurd or unreasonable in light of the object and purpose and the context of the treaty as a whole that an interpretation that departs from the meaning of the text is acceptable (e.g. an interpretation that clearly results from the *travaux préparatoires*).

A third function played by the object and purpose in this context concerns the interpretation of multilingual treaties. An analysis thereof is carried out in section 3.4 and the following ones of Chapter 4.

A conceptually different issue concerns where the interpreter should be supposed to look in order to find out the object and purpose of the treaty.

The intention of the parties and, as a result thereof, the object and purpose of the treaty may be established on the basis of all elements and items of evidence at the disposal of the interpreter. However, under the system of the VCLT, the sources referred to in Article 31 VCLT[547] should be generally regarded as bearing more weight than the supplementary means of Article 32 VCLT for the purpose of determining the treaty object and purpose.[548]

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[545] This reflects, in substance, the conclusion reached by Mr Jimenez de Aréchaga and Mr Luna at the ILC's 870th and 871st meetings (YBILC 1966-1(part II), p. 190, para. 69 and p. 193, paras. 4, 7 and, especially, 8). For a judicial application, see the decision of the ICJ in the *Territorial Dispute (Libya v Chad)* case, where the Court used the object and purpose of the treaty, largely determined on the basis of the treaty preamble, to verify the acceptability of an interpretation already reached through the other means provided for in the VCLT and not (only) to determine the ordinary meaning to be attributed to the relevant terms (see ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 52). See also the approach taken by the International Centre for Settlement of Investment Disputes in the *Plama v. Bulgaria* case, where the Tribunal, after having concluded that the language of the treaty was unambiguous, that the clear meaning of the text was confirmed by the title of the relevant article and that it would have required a gross manipulation of the language to reach a different conclusion, stated that it had, however, considered whether any such manipulation was permissible in light of the treaty object and purpose (see International Centre for Settlement of Investment Disputes, 8 February 2005, *Plama Consortium Limited v. Republic of Bulgaria*, Case No ARB/03/24, para. 147.

[546] See, among scholars, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 172 and 174 and F. G. Jacobs, "Varieties of Approach to Treaty Interpretation: With Special reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference", 18 *International and comparative law quarterly* (1969), 318 *et seq.*, at 338 (also cited by the former author).

[547] On the relevance of the whole text of a treaty, and not only of its preamble, for the purpose of finding out the object and purpose see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 196-197 and the case law cited in footnote 171 at p. 197.

[548] See the opinion expressed by Mr Verdross at the ILC's 870th meeting, held on 15 June 1966 (YBILC 1966-I

In particular, while the object and purpose of the treaty as a whole is often stated in the treaty preamble,[549] the object and purpose of the specific sections or articles must be generally determined on the basis of their text.

2.3.3.2. Context

"[W]ords are chameleons, which reflect the color of their environment"[550]

The first issue to be considered, with regard to the context, concerns the role that it plays within the VCLT system of interpretation.

Indubitably, the main interpretative function of the context is that of qualifier of the treaty terms for the purpose of attributing them their ordinary (or special) meaning.[551] In this respect, Sir Humphrey Waldock, referring to the Principle of Integration included by Sir Gerald Fitzmaurice in his Major Principles of Interpretation, affirmed that "the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur".[552] This constitutes a further proof of of the fact that an over-literal approach was rejected in the system of the VCLT.

In addition, as noted in the previous section, the context helps the interpreter, together with the object and purpose of the treaty, to draw the borders of what may be considered an acceptable interpretation according to the canon of good faith.

The second issue to be tackled regards the elements that should be regarded as part of the context.

In this respect, within the context referred to in Article 31(1) VCLT a distinction may be drawn between two concepts: the "narrow" context[553] and the "wide" context.[554]

(part II), p. 186, para. 14). See also ECtHR, 27 October 1975, *National Union of Belgian Police v. Belgium (Application no. 4464/70)*, para. 9 of Judge Fitzmaurice's Separate Opinion, where Judge Fitzmaurice mentioned that the intentions of the parties and, therefore, the object and purpose of the treaty are supposed to be expressed or embodied in - or derivable from - the text finally draw up and may not therefore legitimately be sought elsewhere, save in special circumstances.

[549] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 176, G. Fitzmaurice, *The Law and Procedure of the International Court of Justice. Volume I* (Cambridge: Grotious Publications Limited, 1986), p. 362. See also the reference to the ICJ's practice of looking for the object and purpose of a treaty in its preamble contained in the Commentary to Article 27 of the 1966 Draft (YBILC 1966-II, p. 221, para. 12).
With regard to judicial decisions, see ICJ, 27 August 1952, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, judgment, p. 197; ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 52.

[550] Hand J. in Court of Appeals (United States), 31 March 1948, *Commissioner of Internal Revenue v. National Carbide Corporation*, 167 F.2d 304, at 306, also quoted in R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 178.

[551] See YBILC 1966-II, p. 221, para.13.

[552] YBILC 1964-II, p. 56, para. 14.

[553] On the necessity not to limit the context to the sole text of the provision (or article) to be interpreted (i.e. the narrow context), see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester

The former is constituted by the sentence in which the term is located and the other closest sentences, the title of the article where the above sentences are located,[555] the structure or scheme of the provision at stake,[556] as well as the specific agreements reached by the parties for the purpose of clarifying the meaning to be attributed to such a term and embodied in the treaty. In the "narrow" context, the grammar of the paragraphs, sentences and phrases in which the terms are located is a relevant, although not decisive,[557] element that must be carefully analysed, although not determinative.

The "wide" context includes the other means of interpretation that are classified as context under Article 31(1) VCLT, which are discussed in the rest of this section.

Article 31(2) VCLT provides for a definition of the term "context", which should be read into Article 31(1) for the purpose of its interpretation.[558] According to that definition, the context encompasses:

(i) the text of the treaty, including its title,[559] preamble and annexes;

(ii) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and

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

These three elements present a common characteristic that constitutes their distinctive feature: they reflect the agreement of the parties *at the time of the treaty conclusion*.[560]

University Press, 1984), p. 127; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 146. The issue was discussed at the ILC's 893rd meeting, held on 18 July 1966, where Mr Yasseen (Chairman) and Sir Humphrey Waldock, both replying to an issue raised by Mr Jiménez de Aréchaga concerning the wording of (now) Article 31(1) VCLT, stated that "the terms of a treaty should be interpreted in the light of the treaty as a whole and not of a single article" and that such a conclusion was made fully clear by the definition of context provided for in (now) Article 31(2) VCLT (YBILC 1966-I (part II), p. 329, para. 32 and pp. 328-329, para. 25).

[554] A good illustration of the difference existing between the "narrow" and the "wide" context, as well as of the role played by the context in treaty interpretation is represented by ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, paras. 373 and 374.

[555] The relevance of the titles is well illustrated by the VCLT itself, for example in the use of the singular in the title of Article 31 "General rule of interpretation", purported to convey the idea of the unity of the interpretative process, where all the elements have to be thrown together in the crucible. However, in certain instances, the role of the titles of articles may be limited by the very same treaty. A clear example is that, given by Gardiner (see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p.181, footnote 124), of the 1992 United Nations Framework Convention on Climate Change, where it is expressly provided that the titles of articles "are included solely to assist the reader".

[556] See, for example, WTO Appellate Body, 2 August 1999, *Canada – Measures Affecting the Export of Civilian Aircraft*, AB-1999-2 (WT/DS70/AB/R), paras. 152-156.

[557] See, for example, ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, paras. 53-55.

[558] See YBILC 1966-II, p. 220, para.8.

[559] See, for example, ICJ, 12 December 1996, *Oil Platforms, (Islamic Republic of Iran v. United States of America)*, judgment, para. 47: "It should also be noted that, in the original English version, the actual title of the Treaty of 1955 — contrary to that of most similar treaties concluded by the United States at that time, such as the Treaty of 1956 between the United States and Nicaragua — refers, besides "Amity" and "Consular Rights", not to "Commerce" but, more broadly, to "Economic Relations"."

[560] See the French authentic text of Article 31 VCLT, where the expression "à l'occasion de la conclusion du

This usually excludes the possibility that such elements do not reflect the final agreement reached by the parties with reference to the actual content of the treaty. In this respect, that characteristic distinguishes them from the *travaux préparatoires*, whose words might refer to provisionary agreements between the parties that did no longer held at the time of the treaty conclusion.[561]

It is common practice in international affairs to consider a treaty concluded when it is authenticated, i.e. at the date generally indicated in the *testimonium* of the treaty as the date of signature.[562] However, an analysis of the various provisions of the VCLT that refer to the treaty conclusion shows that the term "conclusion" may assume different meanings according to the object and purpose of the provision where it is used, the meaning being either the process leading the contracting States to be bound by the treaty, or the point in time when the treaty text is authenticated (generally the moment when the treaty is signed).[563] In that respect, for the purpose of Article 31 VCLT, the term "conclusion" is probably to be seen as denoting the process starting from the adoption of the text[564] and ending at the moment when the contracting States become bound by the treaty (e.g. the moment of the ratification, exchange of instruments, accession), or, if subsequent, the moment when the contracting States have to take some agreed action for the purpose of bringing the treaty into force (e.g. an amendment to the original treaty necessary for this purpose).[565]

However, the requirement provided for by Article 31(2) VCLT that the agreement between the parties is to occur at the time of the conclusion of the treaty should not be read too strictly. This requirement, in fact, must be assessed in light of its own object and purpose, that is to distinguish agreements and instruments that almost certainly reflect the final intention of the contracting States as to the actual content of the treaty, on the one hand, and instruments (such as the *travaux préparatoires*) that probably do not, on the other hand. Under this perspective, where evidence exists that an agreement made between the parties during the negotiation process, i.e. before the signature of the treaty, was still valid at the time of the conclusion of the treaty, it is reasonable to conclude that such an agreement should be taken into account as a primary means of interpretation under Article 31(2) VCLT.[566]

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traité" is used. See also YBILC 1964-I, p. 313, para. 53.

[561] It is, in fact, possible that subsequent changes in the agreement could have been not properly registered in the *travaux préparatoires*, due to the fact that they are usually incomplete.

[562] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 209.

[563] See the provisions included in Section I of Part II of the VCLT, in particular Articles 10 and 11 (read in combination with Articles 2(1)(a), 2(1)(f), 2(1)(g)). In that respect, see also YBILC 1962-II, p. 30, para.9.

[564] See Article 9 VCLT.

[565] See, similarly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 211 and E. W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", 59 *British Yearbook of International Law* (1988), 75 *et seq.*, at pp. 83-84.

[566] See YBILC 1966-II, p. 221, para. 14; YBILC 1964-I, p. 311, para. 18. See also the reply to the Australian representative given by the Chairman of the Drafting Committee of the Vienna Conference (UNCLT-1st, p. 442, para. 31) and the position expressed in R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 341-342.

With regard to the first of the three elements constituting the context for the purpose of Article 31 VCLT, i.e. the text of the treaty, this must be considered to include the preamble and annexes of the treaty,[567] as well as any other instrument that the parties intended to be part of the treaty.[568]

Where a separate instrument is not, because of the explicit or implied agreement between the parties, to be characterized as an integral part of the treaty, it is nonetheless treated, in most cases, as part of the treaty context under Article 31(2)(a) VCLT.[569]

With regard to the second element of the context, i.e. any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty, the following points can be made.

First, the term "agreement" should be construed as denoting both written and unwritten (i.e. verbal and tacit) agreements.[570] This conclusion is supported by manifold arguments, the most important being that:[571]

(i) the term "agreement" is also used in Article 31(3)(a) VCLT and, in connection with the latter provision, it is widely recognized that it encompasses non-written agreements;[572]

(ii) the means of interpretation referred to in Article 31 VCLT are all of a juridical binding nature as between the parties, while the supplementary means of interpretation are not; since written and unwritten agreements are, under customary international law, of an equal status, both being binding on the parties according to the *pacta sunt servanda* rule,[573] an interpretation of the term

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[567] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 187. With reference to preambles, not all of them seem bear the same interpretative value, especially as a consequence of the broad range of carefulness spent by the contracting parties in their negotiation. As Gardiner rightly points out, the *travaux préparatoires* may shed light on whether or not the parties have paid attention to the drafting of the treaty preamble (R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 186).

[568] See the combined reading of Article 31(2) and 2(1)(a) VCLT. See also ICJ, 1 July 1952, *Ambatielos Case (Greece v. United Kingdom)*, judgment, pp. 42-44.
Typical examples of this kind of instrument are the Protocols of Signature (see the definition of Protocol of Signature on the Treaty Reference Guide of the United Nations defines available at the following url: http://untreaty.un.org/ola-internet/assistance/guide.htm) and the Protocols to bilateral tax treaties concluded at the time of signature of the relevant treaty, which are often considered to constitute integral part of the treaty text because of their ancillary and subsidiary nature.

[569] For instance, agreements not in written form cannot constitute an integral part of the treaty, due to the specific provision of Article 2(1)(a) VCLT. That notwithstanding, they constitute part of the context whenever they relate to the treaty and are made between all the parties in connection with the conclusion thereof.

[570] See YBILC 1964-I, p. 310, para. 15; YBILC 1964-I, p. 313, para. 51.

[571] For a more extensive analysis of the possible arguments in support of the wide construction of the term "agreement", as used in Article 31(2) VCLT, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 196-199.

[572] See the position expressed by the German representative at the plenary session of the Vienna Convention (UNCLT-2nd, p. 57, para. 65), who, somewhat inconsistently, also maintained that the very same term "agreement" should be interpreted as referring solely to written agreements where used in Article (now) 31(2) VCLT (UNCLT-2nd, p. 57, para. 64).

[573] See Article 3 VCLT; among scholars see, for instance, R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), p. 1201.

"agreement" used in Article 31(2) VCLT leading to the inclusion of unwritten binding agreements among the supplementary means of interpretation for the purpose of treaty interpretations appears unsatisfactory;

(iii) a narrow interpretation of the term "agreement" would disregard the above-mentioned rule of customary international law and, therefore, might be seen as infringing Article 31(3)(c) VCLT, which prescribes customary international law to be taken into account for the purpose of treaty interpretation;

(iv) the fact the term "agreement", and not terms such as "treaty" or "instrument", is employed in Article 31(2)(b) VCLT appears relevant, since the use of the latter terms would have made it clear that the agreement had to be in written form.

In relation to the means that may be used in order to prove the existence and the content of unwritten agreements, it is admitted that both acquiescence and estoppel, on the one hand, and the subsequent practice of the contracting States, on the other hand, may be taken into account in that respect.[574]

Second, Article 31(2)(a) VCLT does not require the agreement to relate only, or mainly, to the interpretation of the treaty (or a part thereof). It is enough that the agreement is somewhat connected to the treaty, so that it may directly or indirectly shed some light on the proper meaning to be attributed to certain terms or expressions.[575] According to Sinclair (citing Yasseen), the agreements referred to by Article 31(2)(a) must be "concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application".[576] Moreover, Article 31(2)(a) VCLT is relevant only where an express reference to the agreement is missing in the text of the treaty. In contrast, where such a reference is included in the treaty, the agreement becomes part of the context because incorporated in the text by means of an express *renvoi*.[577]

Third, the expression "all the parties" should not be intended as entailing that, in cases of bilateral treaties based on a common model (like the OECD Model), all the States that participated directly or indirectly in the development of the model must have agreed on the interpretation of a specific term or clause of the model given in the commentary thereto, in order for that interpretation to be relevant for the bilateral treaty actually at stake. In fact, under Article 31(2)(a) VCLT, the expression "all the parties" denotes just the States party to the actual treaty and, therefore, once the proof is given (even by inference) that such States have agreed on the relevance of the interpretation provided for in the commentary to the model for the purpose of construing the actual treaty, that commentary must be regarded as included in the treaty context.

Finally, where the agreement between the parties provides for an interpretation

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[574] See, for instance, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 209.

[575] See similarly F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 201.

[576] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 129.

[577] Examples of such express *renvoi* have been examined in ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment (see in particular the dissenting opinion of Judge Torres Bernárdez, paras. 195-196) and ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, in particular, para. 53. For a similar, even though not identical, conclusion, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 180.

that apparently contradicts the *prima facie* "ordinary meaning" of the treaty terms, it seems reasonable to conclude that such an interpretation must prevail and that the meaning of the treaty terms resulting from it must be seen as a "special meaning" according to Article 31(4) VCLT.

With regard to the third element of the context, i.e. any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as instruments related to the treaty, the following points can be made.

First, the term "instrument" seems to require the existence of a written document: since the other parties to the treaty have to accept it, it would appear difficult to imagine some parties accepting statements of other parties, unless such statements have been recorded in a written document.[578]

Second, although Article 31(2)(b) VCLT seems intended to cover cases where instruments such as ratifications, reservations and policy declarations are at stake,[579] where interpretative instruments come into play, the acceptance by the other parties of the instrument as related to the treaty often extends to the acceptance of the substance of the interpretation provided for in the instrument. This may lead to the creation of an agreement between the parties on the interpretation of the treaty that, as such, falls within the scope of Articles 31(2)(a) or 31(3)(a) VCLT.

Third, the instrument is to be made by one or more parties, i.e. it is not required that the instrument is made by all the parties.[580]

Fourth, it seems reasonable that the instrument must be accepted by all other parties to the treaty: an instrument accepted only by some parties may be relevant for the purpose of applying and interpreting the treaty among those parties, but cannot be considered to form part of the context.[581]

Fifth, the acceptance of the instrument by the other parties may be either explicit or tacit.[582] On the one hand, the text of Article 31(2)(b) VCLT is broad enough to allow tacit acceptance.[583] On the other hand, the VCLT generally adopts more explicit expressions whenever a written acceptance is required.[584]

Finally, VCLT requires the parties that did not make the instrument only to

[578] See, for a similar conclusion, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 205-206, where the author also briefly describes the history of the term "instrument" as used in Article 31 VCLT.
[579] See the similar statement by Sir Humphrey Waldock at the ILC 769th meeting (YBILC 1964-I, p. 311, para. 23).
[580] The latter instrument would probably fit within Article 31(2)(a) VCLT, if relating to the treaty.
[581] See the statement made in this respect by Mr Ago (Chairman) at the ILC's 766th meeting (YBILC 1964-I, p. 287, para. 63). See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 212. A fortiori a unilateral instrument not accepted by the other parties to the treaty cannot be considered to be covered by the provision at stake.
[582] This conclusion may be of particular relevance with reference to reservations (i) permitted by the treaty itself and (ii) for which an express acceptance by the other parties is not required (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 213-214).
[583] See YBILC 1966-II, p. 98, para. 16.
[584] See, for instance, the expression "formulated in writing" in Article 23 VCLT.

accept it as "related to the treaty".[585] Thus, since it is not required that the all the parties agree on the content of such an instrument, its value as evidence of the meaning to be attributed to a term of the treaty may vary substantially according to the level of agreement reached between the parties in that respect. An instrument made by some parties whose content has been explicitly agreed upon by the other parties will have a much greater interpretative value than an instrument produced by the former parties and just accepted as related to the treaty by the latter parties without any additional clarification on the agreement reached with reference to its content.[586]

2.3.3.3. Subsequent agreements and practice

Under Article 31(3) VCLT, the following must 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.

According to the commentary to the 1966 Draft, subsequent agreements and practice, as well as relevant rules of international law, are "all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which" are part of the context.[587] This statement is further supported by the following arguments:

> (i) the title of Article 31 VCLT makes reference to a single, general rule of interpretation, thus putting the various elements referred to in that article on the same footing for hermeneutical purposes;
> (ii) the phrase "There shall be taken into account, together with the context" is apt to incorporate these means of interpretation into Article 31(1) VCLT.[588]

The main difference between the elements referred to in Article 31(3)(a) and (b) VCLT, as compared to those mentioned in Article 31(2) VCLT, is represented by their temporal aspect. In particular, while the latter are always contemporary to the conclusion of the treaty, the former are subsequent thereto. This temporal aspect serves also to distinguish these means of interpretation from the *travaux préparatoires* since the former, being subsequent to the conclusion of the treaty, may be said to most probably reflect an agreement between the parties on the interpretation of the treaty that is still valid at the moment of its application (unless a different agreement is reached later on), while the latter might record provisional agreements between the parties that no longer held true at

[585] See YBILC 1966-II, p. 221, para.13.
[586] See, accordingly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 204.
[587] YBILC 1966-II, p. 220, para. 9. See, with specific reference to subsequent agreements, YBILC 1966-II, p. 221, para. 14. See also R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 206-207.
[588] See also, in this respect, YBILC 1966-II, p. 220, para.8.

the time of the conclusion of the treaty (and, a *fortiori*, at the later time of its application).[589]

In addition, the two elements mentioned in Article 31(3)(a) and (b) VCLT have in common that they both require an agreement between the contracting States on the interpretation of the treaty to exist.

Since the agreement between the parties is, in this case, subsequent to the conclusion of the treaty, two issues arise concerning (i) where the dividing line between interpretation and amendment of the treaty must be drawn and (ii) whether special rules and formalities apply where the agreement amounts to an amendment of the treaty.

With regard to the first issue, Sir Humphrey Waldock, speaking in his capacity of Expert Consultant to the Vienna Conference, clarified that the ILC, in distinguishing between subsequent practice[590] modifying a previous agreement and that merely interpreting it, focused on whether "a subsequent practice departed so far from any reasonable interpretation of the terms as to constitute a modification".[591] Similarly, according to Engelen, where a subsequent agreement or practice between the parties cannot reasonably be reconciled with the text of the treaty, it has the effect of modifying the treaty and, therefore, has no role to play in the application of the general rule of interpretation, but rather comes under the general rule regarding the amendment of treaties (Article 39 VCLT), which requires that the amendment complies with the rules laid down in Part II of the VCLT (Conclusion and Entry into Force of Treaties), unless the treaty itself otherwise provides.[592]

In that respect, however, it must be kept in mind that the rules of interpretation laid down by Articles 31 and 32 VCLT do not provide for a literal approach and establish that the ordinary meaning of a treaty term may be displaced in some occasions, recognizing that:

(i) a special meaning may be given to a term where the parties so intended and
(ii) decisive recourse to supplementary means of interpretation is allowed in order to determine the treaty meaning when the latter appears ambiguous, obscure, manifestly absurd or unreasonable.

Therefore, it seems that the range of situations where it may be reasonably concluded that the agreement between the parties is of an interpretative character (i.e. reaffirming the original intention of the parties) or, in any case, does not contradict such an intention (e.g. where the specific case had not been forecasted at the moment of the treaty conclusion) and, therefore, it is not of an amending character, is remarkably broad.

Moreover, the possibility of an evolutive interpretation is also to be taken into

[589] See the previous section in this respect.
[590] But the same holds true with reference to subsequent agreements.
[591] See UNCLT-1st, p. 214, para. 55. An illustration of the possible distinction between amendments and interpretations resulting from the subsequent practice followed by the parties (taken together with other relevant elements for interpretation), is given in ECtHR, 12 March 2003, *Öcalan v. Turkey (Application no. 46221/99)*, paras. 193-198.
[592] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 220 and 240.

account in this regard. As the HCHR expressly stated, an "evolutive interpretation allows variable and changing concepts *already contained in the Convention* to be construed in the light of modern-day conditions".[593] Evolutive interpretation is generally accepted in two cases (although the dividing line between them is sometimes indistinct):

(i) in cases of treaties that use general legal terms whose meaning might be expected by the parties to change over time according to the development of the law from which they derive;[594] and

(ii) in cases of treaties that are, by their nature, designed to allow for their progressive development and elaboration.[595]

Under this perspective, for instance, changes in the commentaries to Model Conventions might be considered, in some cases, to be evidence of the agreement of the parties to refine their interpretation of previously concluded treaties.

With regard to the second issue, under Article 39 VCLT treaty amendments must comply with the rules laid down in Part II of the VCLT (Conclusion and Entry into Force of Treaties). That, however, does not mean that amendments to treaties must be in written form. It is in fact generally recognized that amendments to treaties may be agreed upon orally, or even tacitly.[596]

This conclusion is confirmed by the commentary to the 1966 Draft, where it is stated that an "amending agreement may take whatever form the parties to the original treaty may choose. Indeed, the Commission recognized that a treaty may sometimes be modified even by an oral agreement or by a tacit agreement evidenced by the conduct of the parties in the application of the treaty. Accordingly, in stating that the rules of part II regarding the conclusion and entry into force of treaties apply to amending agreements, the Commission did not mean to imply that the modification of a treaty by an oral or tacit agreement is inadmissible."[597]

In any case, amendments may be subject to specific requirements, with regard to their form and procedure of acceptance, under the constitutional law of the contracting States.

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[593] HCtHR, 29 May 1986, *Feldbrugge v. the Netherlands (Application no. 8562/79)*, para. 24 of the Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing, where the following case law of the ECtHR is cited: ECtHR, 25 April 1978, *Tyrer v. the United Kingdom (Application no. 5856/72)*, para. 31; ECtHR, 13 June 1979, *Marckx v. Belgium (Application no. 6833/74)*, para. 41; ECtHR, 22 October 1981, *Dudgeon v. the United Kingdom (Application no. 7525/76)*, para. 60.

[594] E.g. ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, para. 77 of the decision. See also the reference to the concept of "known legal term" in Judge Higgins' Separate Opinion in the case *Kasikili/Sedudu Island* (ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 2 of Judge Higgins' Separate Opinion).

[595] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 242-243.

[596] See for instance, before the conclusion of the VCLT, Arbitral Tribunal, 17 July 1965, *Italy-USA Air Transport Arbitration*, 45 *International Law Reports* (1972), 393 *et seq.* and, after the conclusion of the VCLT, Arbitration Tribunal, 29 September 1988, *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 20 *Reports of International Arbitral Awards*, 1 *et seq.* See also R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1254-1255.

[597] YBILC 1966-II, pp. 232-233, para. 4.

As concern the scope of Article 31(3)(a) VCLT, the following points can be made.

First, the term "agreement", as previously noted in the context of Article 31(2) VCLT, should be construed as denoting both written and unwritten agreements.[598] However, as a matter of fact, where no written document exists, evidence of the existence and content of the agreement may be mostly given by reference to subsequent practice.[599] In such a case, the agreement appears to be substantially subsumed under the following provision of the VCLT.

Second, Article 31(3)(a) VCLT defines the subsequent agreement as "between the parties". The different wording, as compared to that used in Article 31(2)(a) VCLT, raises the question whether, in the case of a multilateral treaty, a subsequent agreement reached between solely some of the parties to the treaty would fit in the provision of Article 31(3)(a) VCLT. In this respect, both the French and English authentic texts of Article 31(3)(a) employ terms that seem to denote the parties as a whole ("les parties"; "the parties")[600] and the Commentary to the 1966 Draft, although with reference to (now) Article 31(3)(b) VCLT, states that the reference to "the parties" must be intended as being to "the parties as a whole".[601]

Third, although unilateral interpretative statements do not fall, as such, under the general rule of interpretation provided for in Article 31 VCLT, where they are coupled with concordant practice by the other parties or any evidence confirming that the other parties endorsed such unilateral statements, their content may assume the status of an agreed interpretation of the treaties and fall within the scope of Article 31(3)(a).

Finally, the agreement must be one regarding the interpretation or the application of the treaty; however, in addition, it may also concern other issues among the parties.

With regard to Article 31(3)(b) VCLT, the following observations can be made.

First, the practice referred to therein is only that establishing an agreement reached between the parties in respect of the interpretation of the treaty. Where the practice does not establish the tacit agreement of the parties on the treaty construction, such a practice is still relevant for the purpose of interpreting the treaty, but just as a supplementary means of interpretation.[602]

Second, the relevant practice must be carried out by bodies revealing the State's position and commitment with reference to the treaty.[603] In general terms, the relevant

[598] See Arbitral Tribunal, 3 August 2005, *Methanex Corporation v. the United States of America*, final award on jurisdiction and merits, para. 20 of Part II - Chapter B. The text of the award is available on the website of the United States government at the following url: http://www.state.gov/documents/organization/51052.pdf.
[599] According to Gardiner, the less formal the agreement, the greater the significance of subsequent practice confirming such less formal agreements or understandings (see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 222).
[600] See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 220-221.
[601] See YBILC, p. 222, para.15.
[602] See, although with regard to Third Report of the Law of Treaties submitted by Sir Humphrey Waldock to the ILC, YBILC 1964-II, p. 60, paras. 23-25. See also YBILC 1964-I, p. 298, paras. 56 and 59.
[603] See, accordingly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 228.

practice, at least in modern western countries, encompasses (i) that of the States' legislative power (usually the parliaments); (ii) that of the executive power (typically the government and any other public body charged with the authority of the State); and that of the jurisdictional power (usually the judiciary). In this respect, the evidence of such a practice may be obtained from a wide number of sources, e.g. policy statements from representatives of the legislative or executive power, statements from the representatives of the executive before the legislative body, domestic legislation, other treaties concluded, decisions of the judiciary, decisions by international courts and tribunals, press releases, opinions and declarations of official legal advisors, practice within international organizations, diplomatic correspondence, official manuals on legal issues, comments by governments on drafts produced by the ILC.[604] Since practice must be under the authority of the States party to the treaty, it is potentially admissible to take into account the practice of international organizations, this being indirectly a practice of its member States, and international tribunals.[605]

Third, it seems that where reputable studies have been carried out by international organizations, research institutes and others, the treaty interpretation provided for in such studies, coupled with the conduct, or even absence of conduct of the parties may amount to a practice establishing the agreements of those parties for the purpose of Article 31(3)(b) VCLT.[606]

Fourth, it does not seem that Article 31(3)(b) VCLT requires active practice by all contracting States.[607] The relevant practice may result from the active practice of some parties, coupled with the explicit (rare), or implicit acceptance of such a practice by the other parties. Implicit acceptance may be constituted by the absence of any reaction to the conduct of the other States; in this case, acquiescence and (to certain extent) estoppel may be relevant.[608] However, the tacit acceptance by the other parties cannot be lightly assumed. Parties that are not engaged in the practice might abstain from protest for reasons different from acquiescence, e.g. because the practice or issue at hand is not relevant for them: according to the majority of authors,[609] in these cases the silence of the parties is not conclusive.[610] Thus, the silence or inaction of a State may be interpreted

[604] For a quite comprehensive list of material sources of international customary law, see I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), p. 6.
[605] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 229, 235 and 246; I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), p. 6.
[606] See, accordingly, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 239. For a judicial application, see Court of Appeal of England and Wales (United Kingdom), 23 July 1999, *Regina v. Secretary of State for the Home Department, ex parte Adan*, [1999] 3 WLR 1274, at 1296.
[607] See YBILC 1966-II, p. 99, para. 18.
[608] See ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, p. 32; ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 74. On the relevance of estoppel before the VCLT rules received widespread application, see R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 220 *et seq*.
[609] See, *ex multis*, I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), pp. 7 *et seq*.; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 234.
[610] See also the conclusion reached by the ICJ in the *Kasikili/Sedudu Island* case with reference to the fact that the conduct of one party and the absence of reaction by the other party of a bilateral treaty did not amount to a subsequent practice in the sense of Article 31(3)(b) VCLT in the particular circumstances of the case (see ICJ,

as consent only where the circumstances were such as to call for some reaction, on the part of that State, if it wished not to consent.[611]

Fifth, the practice should be sufficiently repeated and consistent.[612] In this sense, practice establishing an agreement on the interpretation of a treaty appears conceptually similar to the *diuturnitas* required for having customary law, i.e. "evidence of a general practice accepted as law",[613] although the period for which the practice must endure (repeated action) does not have to be as long as in the case of customary law.[614]

Finally, in some cases the evidence from practice required in order to establish the existence of an agreement on the interpretation of the treaty may be less than usually needed, for instance where (i) evidence exists of an informal agreement reached between the parties in connection with the conclusion of the treaty and relevant for its interpretation and (ii) the practice seems to conform to such an agreement.[615] This may also be the case where (i) a common model and a commentary thereon exist, on which the actual treaty is widely based[616] and (ii) there is a substantial number of other treaties concluded by the contracting parties following that model and, in respect of such other treaties, evidence of consistent practice is available.[617] This means that, although with due caution, practice in the application of similar or related treaties may be useful in order to attribute to the undefined terms of the relevant treaty their ordinary or special meanings, particularly where a common model convention is used as basis for their drafting.[618]

2.3.3.4. Relevant rules of international law

"A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used"[619]

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13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, paras. 74-75).

[611] See ICJ, 15 June 1962, *Temple of Preah Vihear (Cambodia v. Thailand)*, judgment, p. 23. On the role played by acquiescence to other parties' conduct in treaty law and, in particular, with regard its relevance for the purpose of determining the legal status of the OECD Commentary, see H. Thirlway, "The Role of International Law Concepts of Acquiescence and Estoppel", in S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam: IBFD Publications, 2008), 29 *et seq.*

[612] See, for instance, WTO Appellate Body, 4 October 1996, *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, (WT/DS8-10-11/AB/R), pp. 12-13.

[613] See Article 38(1)(b) of the Statute of the International Court of Justice.

[614] See Arbitral Tribunal, 17 July 1965, *Italy-USA Air Transport Arbitration*, 45 *International Law Reports* (1972), 393 *et seq*., at 419.

[615] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 241-242 and the case-law cited therein.

[616] That holds especially true where the parties contributed to the development of the model.

[617] E.g. Court of Appeal of England and Wales (United Kingdom), 23 July 1999, *Regina v. Secretary of State for the Home Department, ex parte Adan*, [1999] 3 WLR 1274, at 1296; Arbitral Tribunal, 10 April 2001, *Pope & Talbot Inc v. Canada*, award on merit s of phase 2, paras. 110 *et seq*. and Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 62 (available on the NAFTA website).

[618] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 235, 282-284.

[619] United States Supreme Court, 7 January 1918, *Towne v. Eisner*, 245 U.S. 418 (1918), p. 425 per Justice

Treaties are agreements concluded in a given international legal environment. For the purpose of interpreting treaties it is therefore important to understand such legal environment, which constitutes the background against which the treaties must be read.

The relevance for treaty interpretation of such an international legal environment was already recognized before the conclusion of the VCLT.[620] Article 1(1) of the 1956 Resolution of the Institute of International Law read: "[…] Les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et *à la lumière des principes du droit international*."[621] Similarly, in the case *Right of Passage over Indian Territory (Portugal v. India)*, the ICJ stated that 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."[622]

Such a principle has been incorporated in the VCLT as a part of the general rule of interpretation. According to Article 31(3)(c) VCLT, in fact, the interpreter must take into account "any relevant rules of international law applicable in the relations between the parties". This provision presents two fundamental issues that require discussion:[623]

(i) which are the relevant rules of international law to be taken into account under Article 31(3)(c);

(ii) whether such rules are those in force at the time of the conclusion of the treaties, or those at the time of the application thereof.

With reference to the first issue, the following should be noted.

In light of the history of the provision,[624] its wording and context, it seems that the following types of rules of international law are to be considered covered by Article 31(3)(c) VCLT:[625]

(i) general rules and principles of international law, including customary international law;[626]

Holmes.

[620] See also the position expressed by Lauterpacht on this issue in H. Lauterpacht, *The development of International law by the International Court* (London: Stevens & Sons Limited, 1958), pp. 27-29.

[621] Institute of International Law, 46 *Annuaire de l'Institut de Droit International* (1956), 364 *et seq.*, at 364.

[622] ICJ, 26 November 1957, Right of Passage over Indian Territory (Portugal v. India), judgment, p. 142.

[623] On such issues see, in general, D. French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", 55 *International and comparative law quarterly* (2006), 281 *et seq.*

[624] See, in particular, YBILC 1964-I, p. 319, paras. 10, 11 and 13; YBILC 1966-I (part II), p. 267, para. 90.

[625] These rules substantially coincide with the sources of interpretation that the ICJ has to apply according to Article 38(1)(a), (b) and (c) of its Statute.

[626] See WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R), Chapter VII, para. 7.67. Note that customary international law may be formed according to the practice of States in concluding similar treaties or treaties based on a common model. See, for example, Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 64. With reference to the relation between tax treaties and customary international law, see R. S. Avi-Yonah, "Tax Competition, Tax Arbitrage and the International Tax Regime", 61 *Bulletin for international taxation* (2007), 130 *et seq.*

(ii) general principles of law recognized by civilized nations;[627]
(iii) regional or local rules of international law applicable in the relations between the parties (e.g. European law principles between two States member of the European Union);
(iv) other treaties in force between all the parties (both earlier and later treaties).

In general, it does not seem that treaties (a) between only some of the parties, (b) between some of the parties and third States and (c) just between third States may fit in the provision of Article 31(3)(c), since such treaties are not "applicable in the relations between the parties".[628] A contextual interpretation of the term "the parties", in fact, leads to the conclusion that its ordinary meaning is "the parties as a whole", since that is the meaning that such a term assumes in the other provisions of Article 31 VCLT.[629]

That conclusion, of course, does not hold true where such treaties express customary international law, or general rules of international law, which are in any case applicable between the parties. Moreover, that conclusion does not mean that such treaties are not at any rate available means of interpretation. On the one hand, where the compatibility of the provision of the treaty to be interpreted with another treaty is at stake, the existence of an obligation under the latter treaty may be clearly taken into

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[627] See Article 38(1)(c) of the Statute of the ICJ. Such general principles include both general principles of law derived from municipal jurisprudence (mainly relating to jurisdiction, burden of proof, procedure, etc.) and general principles of international law (such as the rules of consensus, good faith, reciprocity, etc.). See I. Brownlie, *Principles of public international law* (Oxford: Oxford University Press, 2003), p. 18. Article 38 of the ICJ Statute was cited in relation to Article 31(3)(c) VCLT by the Arbitral Tribunal in the *Pope & Talbot* case (Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 46).

[628] On the issue of the scope of Article 31(3)(c) VCLT see the recent study of C. McLachlan, "The Principle of Systematic Integration and Art. 31(3)(c) of the Vienna Convention", 54 *International and comparative law quarterly* (2005), 279 *et seq.* See also U. Linderfalk, "Who Are 'The Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited", 55 *Netherlands International Law Review* (2008), 343 *et seq.*; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), pp. 368 *et seq*.; D. French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", 55 *International and comparative law quarterly* (2006), 281 *et seq.*, at 307.
Contra this conclusion, see, however, the 2006 Report of the Study Group of the ILC finalized by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, available at the following URL: http://untreaty.un.org/ilc/texts/1_9.htm, in particular, para. 472 thereof.

[629] See previous sections with regard to the evidence supporting this conclusion. See, accordingly, the position expressed by the German representative at the Committee of the Whole of the Vienna Conference (UNCLT-1st, pp. 172-173, paras. 10-12). See also WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R), Chapter VII, para. 7.68 and footnote 242 thereto; GATT panel, 16 June 1994, *United States – Restrictions on Imports of Tuna* (DS29/R), para. 5.19 (available on-line at the following url: http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf). Among scholars, see, for instance, U. Linderfalk, "Who Are 'The Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited", 55 *Netherlands International Law Review* (2008), 343 *et seq.;* F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 253.
However, the recent Report of the ILC *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (para. 472) seems to also permit reference to treaties concluded among only some of the parties, "provided that the parties in dispute are also parties to that other treaty".

account as a supplementary means of interpretation, even where the latter treaty is not in force between all the parties to the former treaty.[630] On the other hand, where the issue at stake is the attribution to a treaty term of its ordinary (or special) meaning, such other treaties represent a primary means of interpretation so far as they may shed light on such an ordinary (or special) meaning, e.g. where they concern the same subject matter or deal with a related topic and are of a widespread application, as well as where they are based on a common model.[631]

A related issue concerns whether non-binding international instruments are within the rules of international law referred to in Article 31(3)(c) VCLT.[632] In that respect, the use of the term "rules" seems to suggest a negative answer.[633] However, in some of its decisions, the ECtHR has referred to instruments not binding as such, though they may appear to have become part of customary international law or otherwise relevant for interpretative purposes under other provision of the VCLT.[634]

Finally, the rules of international law must be "relevant", i.e. significant in order to interpret the treaty. This condition should be regarded as a loose one: it is not necessary that the treaty to be interpreted incorporates a term or concept that is clarified by the rule of international law to be applied, or is directly linked to such a rule; whenever a rule of international law may have a bearing on the treaty and is potentially relevant for its interpretation, its use is allowed by Article 31(3)(c).[635]

With regard to the second issue, which is generally referred to as the "inter-temporal law" issue, the following observations can be made.

The modifications (or additions) over time of the relevant rules of international law may affect the interpretation and the application of treaties: on the one hand, they may affect the meaning to be attributed to a treaty term, since the treaty to be interpreted may include a term that is a state-of-the-art term in public international law, or in a specific branch thereof; on the other hand, they may affect the scope of the treaty,

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[630] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 253.

[631] See the Conclusions of the work of the Study Group on the *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, adopted by the ILC at its Fifty- eighth session (ILC 2006 Report, pp. 414-415, para. 21). See also R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 281 *et seq*. For a similar conclusion, see ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 380; WTO Appellate Body, 14 January 2002, *United States – Tax Treatment for "Foreign Sales Corporations"*, AB-2001-8 (WT/DS108/AB/RW), paras. 141-145 (including the footnotes to such paragraphs) and 185; Arbitral Tribunal, 10 April 2001, *Pope & Talbot Inc v. Canada*, award on merits of phase 2, paras. 110 *et seq*. and Arbitral Tribunal, 31 May 2002, *Pope & Talbot Inc v. Canada*, award in respect of damages, para. 62 (available on-line on the Nafta web site - www.naftaclaims.com).

[632] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 268 *et seq*.

[633] See, in the same sense, WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products, (WT/DS291-292-293/R)*, Chapter VII, para. 7.67.

[634] See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 269. For some examples of the instruments referred to by the ECtHR, see House of Lords (United Kingdom), 16 December 2004, *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56, para. 29.

[635] See, accordingly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 254.

especially where later treaties or customary international law embody rules that conflict with those of the treaty.

From a historical perspective,[636] the inter-temporal law issue was comprehensively dealt with for the first time in the arbitral decision delivered in the case *Island of Palmas*, where Judge Huber (the sole arbitrator) stated that, as regards the question of which of different legal systems prevailing at successive periods is to be applied in a particular case, a distinction must be drawn between the creation of rights and the existence of rights.[637] According to Judge Huber, (i) a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled,[638] while (ii) the existence of the right, in other words its continued manifestation, has to follow the conditions required by the evolution of law.[639] Propositions (i) and (ii) are commonly referred to as the "first branch" and "second branch", respectively, of the inter-temporal law principle.

The ILC, after a long and acute debate[640] on whether subsequent developments of international law could be taken into account for the purpose of interpreting previously concluded treaties, upheld the position expressed by Sir Humphrey Waldock that, in the circumstances of the case, the only reasonable conclusion was for the ILC to abandon the idea of solving the issue of inter-temporal law in the draft convention and to confine the text thereof to a limited reference to "rules of international law".[641] ILC's Drafting Committee consequently inserted a reference to "any relevant rule of international law applicable in the relations between the parties" in the draft of (then) Article 69(3)(c),[642] which was then adopted without amendments by the ILC and included in the 1966 Draft as Article 27(3)(c). It later became Article 31(3)(c) VCLT.

According to the commentary to the 1966 Draft, the relevance of rules of international law for the interpretation of treaties in any given case is dependent on the intentions of the parties and the correct application of the temporal element is normally indicated by interpretation of the treaty terms in good faith.[643]

This position has been substantially restated in the conclusions reached by the

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[636] For an exhaustive analysis of the history of Article 31(3)(c) VCLT, see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 257-285.

[637] See Arbitral Tribunal, 4 April 1928, Island of Palmas (Netherlands v. USA), 2 Reports of International Arbitral Awards, 829 *et seq*., at 845 *et seq*.

[638] See with the similar position taken by the ICJ, with regard to the validity of a treaty concluded in accordance with the conditions and practice at that time prevailing, in ICJ, 12 April 1960, *Right of Passage over Indian Territory (Portugal v. India)*, judgment, p. 37.

[639] For instance, with reference to treaties, the issue arises where certain provisions of a treaty conflict with later *ius cogens*.

[640] See the Third Report on the Law of Treaties prepared by Sir Humphrey Waldock (YBILC 1964-II, pp. 8-10); the discussion that took place in the course of the 728th and 729th ILC's meetings (in particular, YBILC 1964-I, p. 33, para. 6; p. 34, para. 10-13) and the revised draft articles subsequently prepared by the Special Rapporteur (in particular, YBILC 1964-II, pp. 52-53; p. 56, para. 12; p. 61, para. 32); the debate that took place in the course of the 765th, 769th and 770th ILC's meetings and the outcome thereof (in particular, YBILC 1964-I, p. 297, para. 46; YBILC 1964-II, pp. 202-203, para. 11); the Sixth Report on the Law of Treaties prepared by Sir Humphrey Waldock (in particular, YBILC 1966-II, p. 96, para. 7; p. 97, paras. 12-13; p. 101, para. 25).

[641] See YBILC 1966-I (vol. II), p. 199, para. 10.

[642] YBILC 1966-I (vol. II), p. 267, para. 90.

[643] See YBILC 1966-II, p. 222, para. 16.

ILC in its recent work on the fragmentation of international law, which has also touched upon the issue of inter-temporal law. In that respect, the Summary included in the 2006 ILC's Report to the General Assembly states the following: "International law is a dynamic legal system. A treaty may convey whether in applying Article 31(3)(c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law."[644]

The conclusion reached by the ILC appears in line with the position taken by the ICJ in its case law, where the Court seems to attribute paramount relevance to the original intention of the parties, as emerging from the analysis of the text, nature and structure of the treaty, as well as from its object and purpose, in order to solve the issues of inter-temporal law at stake in the specific cases. In this sense, the ICJ appears to solve the question of the impact of subsequent rules of international law on the interpretation of previous treaties by applying the general principle of good faith.[645]

Moreover, the analysis of international case law has shown that other courts and tribunals also tend to follow such an approach, especially where the treaties to be interpreted deal with human rights and fundamental freedoms.[646]

The same conclusions appear to be shared as well among scholars. For instance, Article 4 of the 1975 Resolution of the Institute of International Law concerning the Intertemporal Problem in Public International Law states that, "[l]orsqu'une disposition conventionnelle se réfère à une notion juridique ou autre sans la définir, il convient de recourir aux méthodes habituelles d'interprétation pour déterminer si cette notion doit être comprise dans son acception au moment de l'établissement de la disposition ou dans son acception au moment de l'application."[647] Similarly, Higgins states that, even with regard to the inter-temporal law issue, in "the law of treaties […] the intention of the parties is really the key" and that there is a "wider principle – intention of the parties,

[644] See ILC 2006 Report, p. 415, para. 22.

[645] See ICJ, 19 December 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment, para. 77 (where the Court also distinguished between the case under review and that decided in Arbitral Tribunal, *Petroleum Development Ltd. v. Sheikh of Abu Dhabi*, 18 *International Law Reports* (1951), 144 *et seq*., at 152); ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 2 of Judge Higgins' Separate Opinion; ICJ, 25 September 1997, *Gabčikovo–Nagymaros Project (Hungary v. Slovakia)*, judgment, para. 140; ICJ, 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, para. 53; ICJ, 18 July 1966, *South West Africa (Ethiopia/Liberia v. South Africa)*, judgment, para. 235 of Judge Tanaka's dissenting opinion. See also the similar reasoning followed by the ECJ, dealing with the inter-temporal law issue in relation to the temporary fishing limits under Council Regulation 170/83 EEC (see ECJ, 9 July 1991, Case C-146/89, *Commission v. United Kingdom*, paras. 21-25).

[646] See R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.* See, for instance, ECtHR, 25 April 1978, *Tyrer v. United Kingdom (Application no. 5856/72)*, para. 31.

[647] Institute of International Law, "Résolution of 11 août 1975: Le problème intertemporel en droit international public", 55 *Annuaire de l'Institut de Droit International* (1975), 536 *et seq.*, at 538.

reflected by reference to object and purpose – that guides the law of treaties."[648] Sinclair, after having pointed out that the interpreter has to take into account the historical context in which treaty provisions have been negotiated, which necessarily embraces the status of international law at that time, admits that "there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation. […] this must always be on condition that such an evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty."[649]

Finally, tackling the issue from a broader perspective, the general question that the interpreter must answer is how later changes in circumstances (such as changes in linguistic usage, technological progress, development of new fields of law, evolution of rules of international law, changes in the domestic law of the parties, changes in policy and practice) should be assessed for the purpose of interpreting and applying previous treaties. In that respect, the following conclusions may be drawn:

(i) where the changes determine the formation of a new rule of *ius cogens* in conflict with the treaty, the latter must be considered become void or implicitly modified;[650]

(ii) where an unforeseen fundamental change of circumstances takes place, it is (also) possible to invoke it as a ground for terminating, suspending or withdrawing from the treaty;[651]

(iii) in all other cases, the impact of the changes will depend on the language used in the treaty,[652] the context in which such language is used, the object and purpose

[648] R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 173 *et seq.*, at 181. See, similarly, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 290-291. See also the substantially similar conclusions reached by Linderfalk, although supported by (partially different) arguments based on a semantic analysis, in U. Linderfalk, "Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties", 10 *International Community Law Review* (2008), 109 *et seq.*, in particular at 134 *et seq*.
For an analysis of how the inter-temporal law issue may impact tax treaty interpretation and the reasons why certain tax treaty terms could (and should) be interpreted in light of the relevant evolutions subsequent to the treaty conclusion, especially where those terms concern areas that are themselves likely to evolve (such as entertaining, athletics, technology and finance), see M. Edwardes-Ker, *Tax Treaty Interpretation. The International Tax Treaties Service* (Dublin: In-Depth, 1994 – loose-leaf), at 9.03 and 9.06-9.09, who refers to the "evolutionary approach to the meaning of tax treaty terms".

[649] I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 140.

[650] See Article 64 VCLT and the Commentary to Article 61 of the 1966 Draft (YBILC 1966-II, p. 261, para. 3)

[651] However, according to Article 62 VCLT, this is possible only in so far as (i) the existence of the original circumstances constituted an essential basis of the consent to be bound by the treaty and (ii) the effect of the change is to radically modify the extent of the obligations still to be performed under the treaty.

[652] For instance, the fact that general legal terms apt to change their meaning over time have been used rather than specific terms not apt to evolutionary interpretation.

of the treaty and the circumstances of its conclusion: all these elements will be taken into account, reciprocally weighted and assessed in good faith.[653]

2.3.4. Special meaning

It is generally recognized that the expression "special meaning", in the context of Article 31(4) VCLT, should be construed as denoting any meaning that could not be ordinarily attributed to the relevant treaty term, but in favor of which there is strong evidence of the intention of the parties.[654] Thus, the term "special meaning" should not normally include the meaning(s) attributed to the interpreted terms in the jargon of the field of knowledge dealt with in the treaty, such technical meaning(s) being normally regarded as the ordinary meaning(s) in the treaty context.

As a matter of fact, however, the borderline between ordinary and special meanings proves to be blurred in the vast majority of cases. While this does not create problems from a substantive standpoint (the task of the interpreter remaining that of establishing the meaning agreed upon by the parties), it may lead to procedural uncertainties, since the burden of proving that some unusual or exceptional meaning is to be attributed to the interpreted term should theoretically rest with the person alleging it.[655] In this respect, the complexity of ascertaining the dividing line between ordinary and special meanings may render meaningless the proposition that the burden of proof lies on the party supporting the special meaning.[656]

The main issue that the ILC and scholars have debated, with regard to Article 31(4) VCLT, concerns the means of interpretation that the interpreter should use in order

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[653] A classic example, in this respect, is represented by the decision of the Arbitral Tribunal in the *Iron Rhine* case, where it was stated that new scientific insights, new norms and standards with respect to the protection of the environment had to be taken into account for the purpose of interpreting and applying a 1839 Treaty between Belgium and the Netherlands (see Arbitral Tribunal, 24 May 2005, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 *Reports of International Arbitral Awards*, 35 *et seq.*, para. 140. See also WTO Panel, 29 September 2006, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, (WT/DS291-292-293/R), Chapter VII, para. 7.68.

[654] According to Gardiner, Article 31(4) VCLT is mainly apt to cover cases of "a particular meaning given by someone using a term that differs from the more common meaning or meanings" (R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 291). Sinclair defines it as the "converse of the 'ordinary meaning'" (see I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 126).

[655] See commentary to Article 27 of the 1966 Draft (YBILC 1966-II, p. 222, para. 17). See also PCIJ, 5 September 1933, Legal Status of Eastern Greenland (Denmark v. Norway), judgment, pp. 49-50.

[656] See, for example, the difficulties faced by the ICJ in determining the ordinary meaning of the expression "to determine the legal situation of the (…) maritime spaces" used in Article 2 of the 1986 Special Agreement Between El Salvador and Honduras to Submit to the Decision of the International Court of Justice the Land, Island ad Maritime Boundary Dispute Existing Between the Two States in the course of the case *Land, Island and Maritime Frontier Dispute* (see ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, paras. 377 of the decision and 193 of Judge Torres Bernárdez's separate opinion).

establish and argue for the "special meaning" that the parties intended to attach to the relevant treaty term.

For instance, even during the ILC's eighteenth session, the members of the Commission did not agree on whether recourse to supplementary means of interpretation was allowed for the purpose of determining the special meaning to be attributed to the treaty terms.[657] Similarly, in the course of the Vienna Conference, some comments put forward by the delegations focused on the relation between the parties' intention to attach a special meaning to a treaty terms and the *travaux préparatoires*.[658] In this respect, Sir Humphrey Waldock, in his capacity of Expert Consultant, replied to such comments by pointing out that he could not share the view of those representatives who considered that in most cases the special meaning could be found only by recourse to the *travaux préparatoires*, since the comparatively few cases where a "special meaning" had been pleaded did not support that view, but, on the contrary, mainly pointed to the text and context of the treaty.[659]

Similarly, certain scholars have submitted that the analysis of the *travaux préparatoires* of the VCLT seems to indicate that evidence of the parties' intention to attach a special meaning to a treaty term should be derived mainly through the means of interpretation provided for in Article 31 VCLT, reliance on supplementary means of interpretation being permissible only in the cases specifically provided for in Article 32 VCLT.[660] This conclusion does not do more than restate the subordinate relevance of the supplementary means of interpretation within the system of interpretation designed by the VCLT and implicitly affirms the procedural nature of Article 31(4) VCLT.[661] The meaning of any treaty term must always be established on the basis of all elements and items of evidence that may be reasonably regarded as reflecting the common intention of the parties, no special derogation being provided for in cases where the parties might have intended to attach a "special meaning" to the relevant treaty term. In the described process of interpretation, *travaux préparatoires* are generally regarded as supplementary means of interpretation because of their uncertain reliability. However, where evidence exists that an agreement reached during the *travaux préparatoires* was still valid at the time of the treaty conclusion, that agreement is part of the context and counts as such for the purpose of interpretation, notwithstanding whether the agreed meaning is labeled ordinary or special.[662]

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[657] See, for instance, YBILC 1966-I (vol. II), p. 205, para. 24.

[658] See the written statement of the International Bank for Reconstruction and Development (UNdoc. A/Conf. 39.7/Add. 1, pp. 14-15); the comments from the United States delegation (UNCLT-1st, p. 168, para. 47). See also the comments from the Austrian delegation (UNCLT-1st, p. 178, para. 14); the comments from the Ghanian delegation (UNCLT-1st, p. 171, para. 70); the comments from the Vietnamese delegation (UNCLT-1st, p. 168, para. 51).

[659] See UNCLT-1st, p. 184, paras. 70-71.

[660] See, for instance, R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 294.

[661] Apparently in agreement Engelen, who highlights that Article 31(4) VCLT does not provide for an alternative, more subjective, process of treaty interpretation (see F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 164).

[662] See R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties", 27 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1967), 491 *et seq.*, at 501 and F. G. Jacobs, "Varieties of Approach to

For instance, a case where the "special meaning" may be established on the basis of the sole textual analysis is represented by the inclusion of a term expressed in one (authentic) language within a sentence written in a different (authentic) language.[663] Such a practice is often adopted where the "foreign language" term used is a technical one, which is associated with a concept that cannot be expressed at any rate by terms of the language used in the reminder of the sentence to be interpreted, or where the "foreign language" term better expresses the meaning that the parties decided to attach to the corresponding term of the language used in the sentence to be interpreted.[664]

2.3.5. Supplementary means of interpretation

"[I]n no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself. Nothing is absolutely clear in itself" [665]

According to Sinclair, the use of supplementary means of interpretation (such as the *travaux préparatoires*, the circumstances of the conclusion of the treaty and the like) has "often been regarded as the touchstone which serves to distinguish the adherents of the 'textual' approach from the adherents of the 'intentions' approach".[666] The distinction is not so much one of whether using or not such means of interpretation, but how to use them and what the object and purpose of treaty interpretation is.

In the VCLT, *the travaux préparatoires* and the means of interpretation other than those referred to in Article 31 VCLT have been classified as supplementary means of interpretation. As such, under Article 32 VCLT, their use is limited to (i) confirming the meaning resulting from the application of Article 31 VCLT and (ii) determining the

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Treaty Interpretation: With Special reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference", 18 *International and comparative law quarterly* (1969), 318 *et seq.*, at 327. Contra, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 164-166.

[663] That practice consists of inserting a term expressed in the "foreign" language (i.e. the language other than that used in the remainder of the sentence to be interpreted) instead of a term expressed in the language used in the remainder of the sentence to be interpreted, or adding the term in the "foreign" language in brackets (or similar) after the corresponding term expressed in the language used in the remainder of the sentence to be interpreted.

[664] E.g. the English authentic text of Article 33 of the 1951 Geneva Convention relating to the Status of Refugees provides that "[n]o contracting state shall expel or return ("refouler") a refugee". Surprisingly, in interpreting such a provision, Lord Bingham of the United Kingdom House of Lords found that the verb "refouler" was the subject of a stipulative definition and, therefore, it had to be understood as having a meaning corresponding to that of the English verb "return" (House of Lords (United Kingdom), 9 December 2004, *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, [2004] UKHL 55, para. 15). See, however, the different opinion expressed by D. Shelton, "Reconcilable Differences? The Interpretation of Multilingual Treaties", 20 *Hastings International and Comparative Law Review* (2007), 611 *et seq.*, at 623.

[665] H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*, at 571.

[666] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116.

meaning of an otherwise ambiguous, obscure, manifestly absurd or unreasonable provision.

In the Commentary to the 1966 Draft, however, it was made clear that, notwithstanding that the various means of interpretation had been divided into two separate articles and could be used to a different extent and purpose, the ILC did not intend to preclude recourse to a supplementary means of interpretation, such as *travaux préparatoires*, until after the application of the other means has disclosed no clear or reasonable meaning.[667] The process of treaty interpretation, in fact, was to be seen as a single process.

As Mr Rosenne noted in the course of the ILC's debate, in fact, "[i]t was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case-law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction. It was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so. At all events, it could be supposed that all practitioners of international law were free in their use of *travaux préparatoires*."[668]

Such a discrepancy between the principle affirmed and the approach actually followed also characterizes the case law of the World Court. On the one hand, the Court maintained "that 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."[669] On the other hand, however, the Court has often referred to the *travaux*

[667] See YBILC 1966-II, p. 223, para.18.
[668] YBILC 1964-I, p. 283, para. 17.
[669] ICJ, 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion, p. 8. See, similarly among many other cases, PCIJ, 16 May 1925, *Polish Postal Service in Danzig*, advisory opinion, p. 39; PCIJ, 7 September 1927, *S.S. Lotus (France v. Turkey)*, judgment, p. 16; PCIJ, 8 December 1927, *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, advisory opinion, p. 28; See ICJ, 28 May 1948, *Conditions of Admission of a State to Membership In the United Nations (Article 4 of the Charter)*, advisory opinion, p. 63. See also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*. *Volume I* (Cambridge: Grotious Publications Limited, 1986),

préparatoires or other extraneous means of interpretation even when the meaning of the treaty text appeared to be (in the Court's words) clear and reasonable. Both the PCIJ and the ICJ referred to such means of interpretation both as a background and in order to confirm the meaning based on the ordinary meaning of its terms.[670]

In this regard, the analysis of the case law of international courts and tribunals, as well as of scholarly writings, suggests the following observations.

First, treaty interpretation is a whole, single process. The interpreter may have recourse to the supplementary means of interpretation from the outset of the interpretative process, since there is no temporal limitation on the use of such means.[671]

Second, the difference between the means of interpretation included in Article 31 VCLT and those provided for in Article 32 VCLT is:

(i) one of evidence and reliability: the former generally give a clear and definite proof of the agreement reached by the parties, while the latter, often being incomplete and partial, may generally just shed some light on the possible agreement;

(ii) one of scope: the former are to be used in order to determine the meaning of the treaty, while the latter only to confirm such a meaning, or determine it in certain specific situations.

Third, where the result arrived at by applying Article 31 VCLT leaves the meaning ambiguous or obscure, the meaning determined by applying the supplementary means of interpretation is generally one of the possible alternative meanings under Article 31 VCLT, or, at least, one that does not conflict with (some of) such meanings.[672]

Fourth, where the result arrived at by applying Article 31 VCLT, although clear, is manifestly unreasonable or absurd, the meaning determined on the basis on the supplementary means of interpretation is generally different from all the possible alternative meanings determined by applying the general rule of interpretation.[673]

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p. 48.

[670] See, among other cases, PCIJ, 15 November 1932, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, advisory opinion, pp. 378 *et seq*.; ICJ, 27 August 1952, *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), judgment, pp. 209 *et seq*.

[671] See ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 191 of Judge Torres Bernárdez's separate opinion.

[672] This is the case, for instance, where there are no actual alternative meanings emerging as result of the application of the interpretative rule put forward in Article 31 VCLT, i.e. whenever the meaning of the treaty provision is obscure.

[673] In fact, where (at least) a reasonable and logical interpretation of the treaty text was possible, such an interpretation would overrule any manifestly absurd or unreasonable interpretation of the very same text; any other solution would contradict the postulate that the interpretation of the treaty text must be performed in good faith and in light of the object and purpose of the treaty. If such a reasonable and logical interpretation existed, the interpreter would face a situation in which either such interpretation, if unambiguous, might just be confirmed by using supplementary means of interpretation, or such means might be used in order to choose among alternative sound interpretations. See, for a seemingly different opinion, F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), p. 330.
In this regard, it may be recalled that Sir Humphrey Waldock, in replying to the criticisms raised on such a matter by some of the ILC's members, gave as an example of a case in which the result of the interpretation

Fifth, *travaux préparatoires*, as well as subsequent practice, do not have an absolute value. Their relevance for interpretative purposes varies according to their aptitude to prove the agreement of the parties on the interpretation of the treaty. In this respect, subsequent unilateral practice and *travaux préparatoires* are considered, in most cases, to be supplementary means of interpretation. However, (i) concordant and consistent subsequent practice, (ii) consistent subsequent practice of some parties only, coupled with the tacit agreement (acquiescence) of the other parties and (iii) *travaux préparatoires* recording the final interpretative agreement of the parties must be considered authentic means of interpretation.

Sixth, a difficult issue arises where, though the meaning of a treaty provision appears to be clearly and reasonably identified as a result of the application of the means of interpretation provided for in Article 31 VCLT, the supplementary means of interpretation point towards a different meaning.[674] In such a case, good faith requires the interpreter to carefully review once again all available elements and items of evidence. Where the supplementary means of interpretation means appear (i) clear and reliable in the specific case and (ii) pointing to a meaning that seems to be one of those acceptable according to the wording of the treaty, as re-interpreted in accordance with the general rule of interpretation laid down in Article 31 VCLT, the meaning arrived at through the supplementary means of interpretation should be adopted.[675] On the contrary, where a review of the interpretation previously made in accordance with Article 31 VCLT shows that the original result of the interpretive process is the only one that may be reasonably arrived at on the basis of the text and the other primary means of interpretation and that such a meaning is not manifestly absurd or unreasonable, that meaning should prevail over the one resulting from the supplementary means of interpretation.[676] The latter type of conflict, however, hardly occurs in practice since

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could be absurd or unreasonable that of a drafting error (YBILC 1966-I (vol. II), p. 206, para. 39).

[674] See instance, the point made by the Portuguese delegation at the Vienna Conference (UNCLT-1st, p. 183, para. 56).

[675] In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, Judge Schwebel (dissenting) pointed out that the interpretation of the treaty at stake (the Doha Minutes) given by the majority of the ICJ was hard to reconcile with the interpretation of a treaty in good faith, which he considered to be the "cardinal injunction" of the VCLT rules of interpretation. In his view, the decision of the majority of the Court did not give the required weight to the clear evidence of the intention of the parties stemming from the *travaux préparatoires*, resulting, "if not in an unreasonable interpretation of the treaty itself, in an interpretation of the preparatory work" which was "manifestly … unreasonable." In addition, Judge Schwebel opined that the interpretation put forward by the Court could not be regarded as an acceptable interpretation under the rules established by the VCLT, since the meaning of the actual terms used in the Doha Minutes was not "clear" at all. In particular, the expression "al-tarafan", however translated, was "quintessentially unclear" and, as the Court itself acknowledged, was capable of being construed in different ways. The term was therefore "inherently ambiguous" and should have been interpreted through the decisive aid of the clearer *travaux préparatoires* (see ICJ, 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment, paras. 30-41 of Judge Schwebel's dissenting opinion). See also, S. M. Schwebel, "May Preparatory Work be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision?", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), 541 *et seq*.

[676] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998),

Article 31 VCLT is a very flexible tool, which generally allows for more than one meaning to be reasonably attributed to a certain treaty provision.

Seventh, the absurdity or unreasonableness of the interpretation arrived at by applying the rule provided for in Article 31 VCLT must be manifest. The commentary to the 1966 Draft highlights that cases where international tribunals have reached such a conclusion are comparatively rare and that, therefore, the application of this exception should be strictly limited, to not unduly weaken the authority of the ordinary meaning of the treaty terms.[677] Not every clear interpretation that might appear in contrast with the object and purpose of the treaty or that does not perfectly fit in the context of the treaty as a whole is to be regarded as "manifestly absurd or unreasonable": this would be the case only where, in the particular context, it appears obvious that the resulting meaning cannot be what the parties intended to agree upon.[678]

Last, all means of interpretation not included in Article 31 VCLT should be considered to be covered by the provision of Article 32 VCLT, as long as they (may) help to shed some light on the meaning of the treaty.[679] In this sense, also unilateral documents and positions are potentially relevant, since they may give a hint of the practice followed by a party, or of the treaty meaning according to a party; where the other parties were informed about such documents and positions and did not object thereto, they might even be considered to have been tacitly agreed upon. Such a broad definition of the supplementary means of interpretation is in line with the position taken by the ILC with regard to the *travaux préparatoires*, in relation to which the commentary to the 1966 Draft maintains that the "Commission did not think that anything would be gained by trying to define *travaux préparatoires*; indeed, to do so might only lead to the possible exclusion of relevant evidence."[680] This conclusion is also upheld by the vast majority of scholars.[681]

3. Assessment of the rules enshrined in Articles 31 and 32 VCLT in light of the author's normative theory of treaty interpretation

In section 1 of Chapter 3 of Part I the author concluded that (i) treaty provisions are inherently characterized by ambiguity and vagueness and (ii) their effectiveness largely depends on how the parties take into account the *overall context* when drafting them. In turn, point (ii) presupposes that the addressees (interpreters) of the treaty integrate its underspecified provisions, in order to reduce their vagueness and ambiguity, by using the overall context. The fact that both the parties and the interpreters heavily rely on the

721 *et seq.*, at 739.

[677] See YBILC 1966-II, p. 223, para. 19.

[678] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 331-332.

[679] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 116.

[680] See YBILC 1966-II, p. 223, para. 20.

[681] See F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 334-339 and the references included there.

overall context constitutes a praxis of the international community (one of its underlying *cooperative principles*). This allows for the possibility of *implicatures*, i.e. meanings that are not explicitly conveyed by the treaty provisions, but that are nonetheless inferred from the overall context.

On such a basis, the author further concluded that the treaty interpretative process has as its only possible goal the *utterance meaning*, i.e. the meaning(s) that any reasonable interpreter would assign to the treaty text, as expression of the intention of the parties, given:

(a) the various meanings that the grammar and the semantic specifications of the terms used in the treaty allow it to have and
(b) the interpreter's analysis of and inferences from the overall context.

That excludes the relevance of any meaning other than the utterance meaning for interpretative purposes. Such "other" meanings, not being utterance meanings, are indeed not "meanings" of the treaty.

The author considered the overall context to include all those elements and items of evidence that are helpful for the purpose of determining and arguing for the utterance meaning of the relevant treaty provision. In particular, it incorporates:

(a) the subject matter of the treaty and its object and purpose [*world spoken of*];
(b) the international legal context of which the treaty is part, the legal systems of the States concluding the treaty, the encyclopedic (legal) knowledge of the persons involved in its drafting, the expected encyclopedic (legal) knowledge of the addressees of the treaty, the commonly accepted principles of behavior in the international community (including any cooperative principle of communication), every reasonable inference that the drafters and the addresses might be expected to derive from the above [*common ground*];
(c) the text that precedes and succeeds the provision to be interpreted [*co-text*].

Furthermore, the author elucidated a few other principles of treaty interpretation derived as corollaries from the above fundamental principles.

The positive analysis carried out in section 2 of this chapter shows that the rules and principles of treaty interpretation enshrined in Articles 31 and 32 VCLT, as generally construed by international law scholars and applied by (international) courts and tribunals, do not significantly depart from the principles of interpretation established by the author on the basis of his semantics-based normative analysis.[682] On the contrary,

[682] See U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), pp. 48-49, who maintains that, according to modern linguistic theories (in particular the "inferential model"), "in order to distinguish between correct and incorrect interpretation results, we would have to single out some contextual assumptions as being acceptable and some as unacceptable. If we examine Articles 31-33 of the Vienna Convention on the Law of Treaties, the idea is expressed somehow differently. The provisions of the convention do not address so much the idea of acceptable and unacceptable contextual assumption; rather, they address the idea of acceptable and unacceptable means of interpretation. However, on closer inspection, this must be seen to amount to very much the same thing. […] All things considered, it is apparent that when the Vienna Convention categorises means of interpretation as either acceptable or unacceptable, this can be seen indirectly to imply a corresponding categorization of contextual assumptions. Of all those contextual assumptions that

the latter principles may be usefully employed by the interpreter as a compass in order to choose among the various (sometimes conflicting) solutions that scholars, courts and tribunals have arrived at in the application of Articles 31 and 32 VCLT.

In particular, Articles 31 and 32 VCLT appear to spell out the most significant part of the overall context that the cooperative principle of the international community requires the community members to take into account when drafting and interpreting treaty provisions. Certainly, the overall context is not limited to the means and rules of interpretation enshrined in Articles 31 and 32 VCLT, the former including, for instance, generally accepted principles of logic and good sense.[683] However, Articles 31 and 32 VCLT specify the most relevant part of what has to be taken into account in order to make the treaty effective by means of interpretation.

This implies that no utterance meaning, i.e. no meaning of a specific treaty provision, may be said to exist before the interpreter has gone through the unitary process of construing the relevant text in light of the overall context and, in particular, of the rules and means of interpretation enshrined in Articles 31 and 32 VCLT (as illustrated by the metaphor of the crucible).[684] Any "meaning" arrived at without going through such a process is not a meaning; it is just an illusion of a meaning, a mere guess. It is, thus, the formal process of reasonably arguing and supporting the interpretation of a treaty provision on the basis of its overall context that divides (utterance) meanings from mere guesses of the speaker's meaning. Since no single "true" meaning exists, which is inherently due to the fact that the meaning we look for is the utterance meaning, what really matters is not the result of the enquiry, but the process followed to support it. That is a matter of epistemology.[685]

If the focus of the comparison between those two sets of principles (the principles stemming from the author's normative analysis and those resulting from the positive analysis carried out in section 2 of this chapter) is moved to a major level of detail, the following comments can be made.

The author's principle (i), i.e. the interpretation is an *a posteriori* analytical argument, is implicit in Articles 31 and 32 VCLT, in the sense that under those articles any interpretation put forward by the interpreter must appear fair and reasonable (in good faith) where assessed in light of all arguments that may be built up on the elements

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can possibly be made by appliers with regard to the relationship held between an interpreted treaty provision and the world in general, the only ones that *may* be used, according to the convention, are those regarding the relationship held between the provision and the means of interpretation recognized as acceptable".

[683] Such as, for instance, (i) the logical principles of inference and (ii) the principles and maxims of treaty interpretation not codified in the VCLT, since considered by the ILC as principles of logic and good sense of non-binding character (see commentary on Articles 27-28 of the 1966 Draft - YBILC 1966-II, p. 218, para. 4).

[684] As Lauterpacht put it, "The controversial expression becomes scientifically clear only after we have caused to pass through it the "galvanic current" – to use Mr Justice Holmes' phrase – not only of the whole document but of all the evidence available" (see H. Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 *Harvard Law Review* (1935), 549 *et seq.*, at 572).

[685] The author finds relevant, in that respect, to draw a parallelism with epistemological approach (in "pure" science) professed by Popper, as mainly depicted in K. Popper, *The logic of scientific discovery* (London: Routledhe, 2002) and K. Popper, *Conjectures and refutations: the growth of scientific knowledge* (London: Routledhe, 1991).

and items of evidence provided for by the same articles.

The author's principles (ii) and (iii), i.e. the quest of the interpreter is directed at establishing the intention of the parties by determining the *utterance meaning* of the treaty text, overlap with the rule of interpretation provided for by Articles 31 and 32 VCLT, according to which the primary duty of the interpreter is to reasonably elucidate the meaning of the treaty text, which is presumed to represent the authentic expression of the parties' intention, by construing it on the basis of all elements and items of evidence provided for by those articles.

With reference to author's principle (iv), it has been already mentioned that Articles 31 and 32 VCLT appear to spell out the most significant part of the overall context.

The author's principle (v), i.e. none of the elements of the overall context is inherently superior to the others and the weight that any of such elements should be given for the purpose of establishing the utterance meaning depends on the circumstances of the case, corresponds to the principle stemming from the hierarchical structure of Articles 31 and 32 VCLT. Under the latter, the various means of interpretation encompassed in Article 31 VCLT are all of an equal status, while those referred to in Article 32 VCLT play a subsidiary role because experience shows that they are generally less reliable and more ambiguous and vague hints of the intention of the parties. Nonetheless, where the supplementary means of interpretation contribute to reasonably establish the agreement of the parties with regard to the interpretation of the treaty, such an agreement must be taken into account as a primary means of interpretation under Article 31 VCLT.

The author's principle (vi), i.e. the treaty text should be construed on the basis of all *implicatures* that may be derived from the text and the overall context, is implicit in the principle of good faith referred to in Article 31 VCLT, which rejects a mere literal approach and requires the treaty to be construed reasonably, honestly and fairly, thus allowing the interpreter to read terms into the treaty for the purpose of giving efficacy to the intention of the parties that may be inferred from the express provisions of the treaty.

The author's principle (vii), i.e. the relevance of the treaty text must not be overestimated since such text is inherently characterized by ambiguity and vagueness and is made of underspecified clauses that need to be expanded by semantic and pragmatic inferences, underlies both Articles 31 and 32 VCLT. This is evidenced by:

(a) the preeminent role played by the extra-textual and co-textual (broad context) means of interpretation, provided for in Articles 31 and 32 VCLT, for the purpose of establishing the ordinary meaning of the treaty terms;
(b) the express recognition of the possibility that the parties intended to attribute an unusual meaning to some of the treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge those meanings that appear manifestly absurd or unreasonable in light of the particular circumstances of the case.

The same holds true with regard to the author's principle (viii), i.e. the relevance of grammatical constraints must not be overestimated.

The author's principle (ix), i.e. there is a plausible presumption that the parties

intended to attribute to the treaty terms their jargon meanings whenever a particular jargon has been used in drafting the treaty, is implicit in the concept of ordinary meaning referred to in Article 31 VCLT, according to which, where a term is used in a technical context, its ordinary meaning should be generally considered to coincide with the meaning attributed to that term in the relevant technical jargon.

The author's principle (x), i.e. the interpreter should consider that the contracting States' representatives in most cases choose the terms to be employed in the treaty on the basis of the approximate overlapping between the prototypical items denoted by those terms and the items that they intended to be covered by those terms, may be seen as underlying Articles 31 and 32 VCLT, in particular as underlying:

(a) the requirement that the treaty terms must be given the ordinary meaning that best fits in their context and suits the object and purpose of the treaty;
(b) the possibility that, in certain cases, a special meaning should be attributed to treaty terms;
(c) the fact that good faith rejects a mere literal approach and requires the interpreter to discharge the meanings that appear manifestly absurd or unreasonable in light of the context and the treaty object and purpose.

The author's principle (xi), in particular the need to assess whether the parties intended treaty terms to be attributed a uniform meaning by all contracting States, or whether they intended each State to interpret those terms on the basis of its own (legal) concepts, is not explicitly dealt with in Articles 31 and 32 VCLT. It is however obvious that:

(a) both the ordinary and the special meanings to be determined under Article 31 VCLT may be either uniform (and autonomous) international meanings, or specific national meanings; and that
(b) it is for the interpreter to establish, on the basis of the means of interpretation provided for in Articles 31 and 32 VCLT, whether the parties intended a uniform international meaning or a specific national meaning to be attributed to the treaty terms.

The author's principle (xii), i.e. the interpreter should take into account any subsequent act of the parties that directly or indirectly may shed light on the meaning that they attribute to the treaty, is explicitly recognized by Article 31(3) VCLT.

Since the above principles of interpretation have proved not to conflict with the rules and principles of interpretation enshrined in Articles 31 and 32 VCLT, on the basis of the former, read in conjunction with the latter, the author will endeavor to answer the research questions concerning the interpretation of multilingual (tax) treaties in the next two chapters. To put it differently, based on the combined reading of those rules and principles, the author will set up his normative legal theory on the interpretation of multilingual tax treaties.