Interim Report of the ILA Study Group on the Content and Evolution of the Rules of Interpretation

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ILA STUDY GROUP ON
THE CONTENT AND EVOLUTION OF THE RULES OF INTERPRETATION

INTERIM REPORT – 19-24 AUGUST 2018, SYDNEY[*] [**]

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Introduction

The ILA Study Group on Content and Evolution of the Rules of Interpretation was established in May 2015, upon approval by the Executive Council of the ILA. The Study Group has held annual meetings since its formation, in Athens (13-14 May 2016), The Hague (21-22 April 2017), and Oslo (14-15 May 2018). These meetings have been made possible by the generous support of the *Athens Public International Law Center* (*AthensPIL*) and *PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order*.

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[*] This Interim Report was prepared by the Chairs (Pazartizs and Ulfstein) and the Rapporteurs (Peat and Merkouris) on the basis of the Preliminary Reports on specific (quasi-) judicial bodies prepared by the members of the Study Group. The Chairs and Rapporteurs would like to thank all the members for their tireless work, invaluable contributions and comments to earlier drafts of this report.

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During the Study Group's inaugural meeting in 2016, the *ILA Study Group Road Map* was presented and discussed. The members present showed particular interest in certain topics, but it was decided that finalisation of the work agenda of the Study Group should occur after the input of all members of the Study Group and other ILA members at Johannesburg, at which the Group presented its preliminary report. It was decided that the work of the Study Group would be divided according to issue areas, with a view to cover the most important courts, tribunals and treaty bodies (ICs) and members being invited to draft a report on the approach to interpretation adopted by the IC in relation to which they had particular expertise. At the second meeting of the Study Group, held in The Hague in 2017, members presented draft reports on the interpretative practice of various ICs, which were structured around the questionnaire that is annexed to this Report. Two members (d'Aspremont & Gardiner) also presented an introductory paper on the nature of interpretation, which is discussed below. The third meeting of the Study Group, which was held in Oslo in 2018, allowed the members of the Group to elaborate their draft reports with a view to submitting interim reports in light of the ILA Biennial Meeting in Sydney. The Study Group aims to finalise its work by the expiration of its mandate in 2020.

The present Report, which was drafted before the Study Group met in May 2018, will outline the main features of the reports on the interpretative approaches of ICs submitted by members. The divergences in the interpretative practice across specialist areas can be looked at from a great variety of perspectives.[1] Due to space constraints, this Report necessarily summarises members' reports in a very selective manner. Readers that are interested in consulting the individual reports in more depth are directed towards the page of the Study Group on the ILA website, where full versions of the reports will be uploaded. The Rapporteurs have decided to focus on several key issues in this Report: namely, the court or tribunal's recognition (or otherwise) of Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) as applicable; the application of any maxims or canons of interpretation outside the framework of the VCLT; and any factors that influence or may explain the interpretative approach of the particular court or tribunal.

The term 'interpretation' is often used to denote processes that have different objects and are governed by different rules.[2] 'What is interpreted in international legal practice and discourses mainly include the legal pedigree of rules (*law-ascertainment formalism*), the content of rules (*content-determination interpretation*),[3] and facts (*facts-determination* or e*videntiary interpretation*)'.[4] For the purposes of this Report, and unless otherwise explicitly indicated, what is examined is 'content-determination interpretation'.

i. PCIJ/ICJ[5]

The jurisprudence of the International Court of Justice (ICJ) at first sight epitomizes the orthodox approach to treaty interpretation, manifesting, in the words of one author, "une symbiose parfaite"[6] with the rules of interpretation that are codified in the Vienna Convention on the Law of Treaties (VCLT).

The link between the practice of the World Court and the development of the rules of interpretation is clear in the work of the International Law Commission, which almost exclusively relied on the jurisprudence of the nascent ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), as the basis upon which to elaborate the rules that later became Articles 31-33 of the VCLT.[7]

Yet, despite this close link between the World Court and the rules of the VCLT, understanding the interpretative practice of the Court is not as straightforward as it seems. The Court adopts a pragmatic approach to interpretation, which rejects a mechanistic approach to the rules of interpretation and admits the existence of interpretative

[1] See Report submitted by Gardiner and d'Aspremont.
[2] A Marmor, 'Textualism in Context', *USC Gould School of Law Legal Studies Research Paper Series* No. 12-13 - July 18, 2012.
[3] GJ Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2001), 390-3: R Dworkin, *Law's Empire* (Harvard University Press 1986); J d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished', in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015).
[4] Facts can also the object of several types of interpretive processes. In that sense, establishing facts can also be understood as an interpretive process (See e.g. J d'Aspremont and MM Mbengue, 'Strategies of Engagement with Scientific Fact-finding in International Adjudication', (2014) 5/2 *Journal of International Dispute Settlement* 240–72. Yet, it remains that the two main facets of interpretation pertains to the determination of the content of rules and the ascertainment of these rules as legal rules)
[5] Based on a report submitted by Panos Merkouris and Daniel Peat.
[6] M Forteau, 'Les techniques interpretatives de la Cour internationale de justice', (2011) 115/2 *RGDIP* 399; H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013) 269.
[7] See for example, *Yearbook of the ILC 1966*, vol II, 217-26.

principles that are not codified in the VCLT, albeit usually in a supplementary fashion. This approach has provided the Court with a great degree of latitude, both in terms of the materials that it takes into account in the interpretative process and the weight that it gives to different elements of interpretation.

The Court attributes great weight to the text and its 'ordinary meaning', and although it recognizes it as a starting point, it does not consider it hierarchically superior to other approaches. 'The rule of interpretation according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 336)'.[8]

The Court's preference towards a 'holistic approach' to interpretation aside, it has generally been reticent to explicitly define particular concepts in the general rule of interpretation and the supplementary means of interpretation available under Articles 31 and 32 of the Vienna Convention. Nevertheless, some judgments provide an insight into the Court's conception of these elements.[9]

Although the Court post-VCLT has eventually settled to a tendency of referring to the VCLT rules, even if simply to assert that they codify customary international law, on occasion it has referred to maxims/canons of interpretation not explicitly mentioned in the VCLT. These include *in dubio mitius*,[10] *effet utile (ut res magis valeat quam pereat)*,[11] *contra proferentem*,[12] *expressio unius est exclusio alterius/ a contrario*,[13] *ejusdem generis*,[14] *per analogiam*,[15] and *a minore ad majus*.[16] This practice was for obvious reasons more prevalent during the pre-VCLT era,[17] and nowadays when referred to the Court tends to stress their supplementary nature, or their subsumption by the VCLT rules.[18]

Although the use of publications to assist in the interpretative process was and remains a common practice in the Separate and Dissenting Opinions of Judges of the PCIJ and ICJ in order to bolster their findings, the Court (and the PCIJ) tend to be much more cautious. However, there have been cases where both the PCIJ and the ICJ have found recourse to material, such as dictionaries[19] and ILC Draft Codes and Articles.[20]

Finally, the Courts when required have also dabbled in interpretation of non-treaty instruments, such as optional clause declarations and Security Council resolutions. Although the interpretation of these instruments bears striking similarities with that of treaties, the Court and academics have cautioned that 'the provisions of [the

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[8] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] *ICJ Rep* 53, [48].
[9] In more detail, and analysis of relevant case-law see Report submitted by Merkouris and Peat.
[10] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (Advisory Opinion), *PCIJ Series B, No 12*, 25; *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, PCIJ Series A, No 23*, 26.
[11] See case-law mentioned in G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Points', (1957) 33 *BYIL* 203; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Supplement 2006, Part Three', (2006) 77 *BYIL* 1, 52-5.
[12] *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (*France v Brazil), PCIJ Series A, No 21*; *Fisheries Jurisdiction Case (Spain v Canada),* [1998] *ICJ Rep* 432, [51].
[13] *The S.S. "Wimbledon", PCIJ Series A, No 1*, 24; *Railway Traffic between Lithuania and Poland* (Advisory Opinion), *PCIJ Series A/B, No 42*, 121; *Corfu Channel (United Kingdom v Albania),* [1949] *ICJ Rep* 15, Dissenting Opinion by Judge Azevedo, [30]; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran),* [1980] *ICJ Rep* 3, [40]; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (Advisory Opinion), [1982] *ICJ Rep* 325, Dissenting Opinion of Judge Schwebel, 488; *Frontier Dispute (Burkina Faso/Republic of Mali),* [1986] *ICJ Rep* 554, [88].
[14] *Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections), [1963] *ICJ Rep* 15, Separate Opinion of Judge Sir Percy Spender, 91.
[15] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), [1949] *ICJ Rep* 174, 182; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility), [1984] *ICJ Rep* 392, [63]; *Fisheries Jurisdiction Case (Spain v Canada),* [1998] *ICJ Rep* 432, [46].
[16] *Corfu Channel (United Kingdom v Albania)* (Merits), [1949] *ICJ Rep* 4, Dissenting Opinion by Judge Azevedo, [22].
[17] See, for instance, *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua),* [2009] *ICJ Rep* 213, [48], where the ICJ refused to apply the *in dubio mitius* principle.
[18] With the *effet utile* being perhaps a notable exception.
[19] *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion), *PCIJ Series B, No 2*, [41-5]; *Oil Platforms (Iran v United States of America)* (Preliminary Objections), [1996] *ICJ Rep* 803, [45].
[20] *Jurisdictional Immunities of the State (Germany v Italy),* [2012] *ICJ Rep* 99, [64]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment), [2007] *ICJ Rep* 43, [186].

VCLT] may *only apply analogously* to the extent compatible with the *sui generis* character of [these instruments]'.[21]

ii. *Ad hoc* arbitrations[22]

The nature of *ad hoc* tribunals means that awards are less likely to exhibit trends in interpretation that might be evident in the jurisprudence of a permanent court or tribunal. Indeed, the practice is too variegated to draw one predominant approach. Whilst the awards manifest an eclectic approach to interpretation, some offer more thorough accounts of interpretation or specific indications of how relevant principles of interpretation are to be applied, especially the *Rhine Chlorides* and *Iron Rhine* awards.[23]

In the early period (i.e. pre-VCLT) certain tribunals adopted a Vattelian approach according to which it is not allowable to interpret what has no need of interpretation. Thus the Tribunal in *John Hois*, held that: '[i]t is not permissible for the Commissioner to speculate with respect to what the treaty makers might or could have provided when their language is clear'.[24] Historically, the case law of *ad hoc* arbitral tribunals seems to show that tribunals referred frequently to a subjective intention in the context of bilateral treaties.[25] For example, the Tribunal in the *Island of East Timor* case stated that the interpretation of treaties ought 'to be made in conformity with the real mutual intentions of the parties, and also in conformity with what can be presumed between parties acting loyally and with reason, not that which has been promised by one to the other according to the meaning of the words used'.[26] This search for the intention of the Parties has even extended to interpretation of treaties *contra legem.*[27] In the post-VCLT period, however, there appeared to be, eventually, a shift in the interpretative approaches of tribunals. Although acknowledging that the purpose of interpretation is to search for the intentions of the parties, tribunals recognised that this was to be done through the means of interpretation set out in the Vienna Rules.[28]

Few post-VCLT *ad hoc* tribunals have placed reliance on maxims of interpretation that are not explicitly enshrined in the VCLT. Certain instances nevertheless bear mention. The principle of effectiveness was invoked by the tribunals in *Rhine Chlorides* and *Iron Rhine;*[29]the maxim *expressio unius est exclusio alterius* was referred to by the Tribunal in the *Air Services Agreement of 27 March 1946 (United States v France)* arbitration;[30] and the maxim *generalia specialibus non derogant* was considered by the tribunal to be available and of potential use in the *Beagle Channel* arbitration.[31]

iii. ITLOS[32]

[21] *Fisheries Jurisdiction Case (Spain v Canada),* [1998] *ICJ Rep* 432, [46] (emphasis added); see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections), [1998] *ICJ Rep* 275,[30]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility), [1984] *ICJ Rep* 392, [63];; E Papastavridis, 'Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis', (2007) 56/1 *ICLQ* 83; M Wood, 'The interpretation of Security Council Resolutions', (1998) 2 *Max Planck Yearbook of United Nations Law* 73; M Bos, 'The Interpretation of Decisions of International Organisations', (1981) 28 *NILR* 1.

[22] Based on a report submitted by Richard Gardiner and Eirik Bjorge.

[23] *Case Concerning the Auditing of Accounts (Netherlands v France)* (2004) 144 *ILR* 259; *Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands)* (2005) 27 *RIAA* 35.

[24] *Louis John Hois (United States) v Austria and Wiener Bank-Verein* (1928) 6 *RIAA* 265.

[25] See for example *Island of East Timor* case (1914) 11 *RIAA* 497 and *Ambatielos* (1956) 12 *RIAA* 107.

[26] *Island of East Timor,* 497.

[27] *Italy–United States Air Transport,* Arbitration (1965) 45 *ILR* 393, 409–10.

[28] *Dispute concerning Filleting within the Gulf of St. Lawrence ('La Bretagne') (Canada/France)* (1986) 82 *ILR* 591, 659, [67]; *Young Loan Arbitration* (1980) 59 *ILR* 494, 530, [19]; *Decision regarding Delimitation of the Border between Eritrea and Ethiopia* (2002) 25 *RIAA* 83, 110; (2002) 130 *ILR* 1, 34, [3.4]; *Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands/France)* (2004) 25 *RIAA* 267; (2004) 144 *ILR* 259, 293, [62]; *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 *RIAA* 35, 65, [53].

[29] *Rhine Chlorides,* [92]; *Iron Rhine,* [49].

[30] *Air Services Agreement of 27 March 1946 (United States v France),* (1978) 54 *ILR* 303, 316.

[31] *Argentina/Chile (Beagle Channel)* 21 *RIAA* 53, [39].

[32] Based on a report submitted by Valerie Boré Eveno.

In the jurisprudence of ITLOS, express reference to the rules enshrined in Articles 31 and 32 of the VCLT is rare. The Tribunal has mentioned those provisions in only two cases,[33] and in only one instance in its full composition.[34] Nevertheless, the Tribunal has implicitly referred to and regularly borrowed the terminology and methodology enshrined within Articles 31 to 33 VCLT, even if not citing those articles explicitly.[35]

The Tribunal has adopted a flexible, pragmatic approach to interpretation, without necessarily following a strict sequence of interpretative techniques.[36] Despite this flexibility, the general approach of the Tribunal has been to read the provision being interpreted in light of other provisions of the Convention that concern the same subject or using the same terminology, or even in a broader context in light of the object and purpose of these provisions or the Convention. This conforms to the general approach of the rule of interpretation enshrined in Article 31 (1) VCLT. On the other hand, there are few references to the *travaux préparatoires* in the jurisprudence of the Tribunal.

Rarely has the Tribunal drawn expressly on maxims or canons of interpretation that lie outside the scope of the VCLT, with the exception of reference to prior jurisprudence (if, indeed, one considers that to be a "canon" of interpretation). On occasion, however, the Tribunal seems to have implicitly relied on other maxims of interpretation, such as *effet utile*,[37] restrictive or expansive interpretation,[38] *in dubio mitius*,[39] and *expressio unius est exclusion alterius.*[40]

With the exception of its own jurisprudence and that of the ICJ or arbitral tribunals, the Tribunal rarely explicates the materials upon which it draws in order to make an interpretation.[41] It has occasionally relied on certain materials that fit within the rubric of Articles 31 and 32 of the Vienna Convention, such as other international agreements,[42] the work of the International Law Commission (particularly in relation to State responsibility), and the preparatory work of the UNCLOS (i.e. the records of the Third Conference on the Law of the Sea and work of the ILC).

One might surmise that certain factors have led to the Tribunal's particular approach to interpretation. The first element is that the majority of cases with which the Tribunal was seised (15 out of 25) related to emergency procedures, such as prompt release of ships or provisional measures, which explains the relatively summary nature of decisions issued by ITLOS. Second, UNCLOS does not refer to any applicable rule of interpretation, which, in combination with vague provisions in the Convention, leaves a significant discretion to the Tribunal and could explain its pragmatist and constructive approach to interpretation. Third, one might think that the customary origins of certain rules incorporated into UNCLOS lead to a certain reticence on the part of the Tribunal to apply rules of treaty interpretation to those provisions. This impression is supported by the fact that the two times in which the Tribunal has referred to the articles of the VCLT, the provisions at issue did not have customary origins. Fourth, from a systemic point of view, the interpretative approach of ITLOS might be dictated by the desire to assert itself as a specialized court, different from other courts and tribunals that are competent to hear cases related to the law of the sea, such as the ICJ. Fifth, the composition of the 21-member bench, and – in particular – the previous experience that those judges, as well as judges *ad hoc*, bring to the bench may form the approach adopted by the Tribunal. Finally, the fact that international organisations, and even private persons (in relation to activities

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[33] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No 16 (Judgment, 14 March 2012); *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, ITLOS Case No 17 (Advisory Opinion, 1 February 2011).

[34] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No 16 (Judgment, 14 March 2012).

[35] See e.g. *The 'Volga' Case (Russian Federation v Australia)*, ITLOS Case No 11 (Judgment, 23 December 2002), [77]; *The MOX Plant Case (Ireland v United Kingdom)*, ITLOS Case No 10 (Order, 3 December 2001), [51].

[36] See *The M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, ITLOS Case No 19 (Judgment, 14 April 2014) [98]; *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v Kingdom of Spain)*, ITLOS Case No 18 (Judgment, 28 May 2013), [137]; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No 23 (Judgment, 23 September 2017), [624 *et seq*].

[37] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No 16 (Judgment, 14 March 2012), [391].

[38] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS Case No 21 (Advisory Opinion, 2 April 2015), [68].

[39] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No 23 (Judgment, 23 September 2017), [545 *et seq*].

[40] *Ibid*, [549-50].

[41] See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS Case No 21 (Advisory Opinion, 2 April 2015), Separate Opinion of Judge Cot, [32].

[42] *The M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, ITLOS Case No 19 (Judgment, 14 April 2014) [216].

carried out in the Zone), may appear before the Tribunal is without doubt a factor favouring the teleo-systemic and constructive interpretation adopted by the Tribunal.

iv. WTO[43]

The interpretative approach of the panels and Appellate Body (AB) of the WTO has been guided by Article 3.2 of the Dispute Settlement Understanding (DSU), which provides that the purpose of the dispute settlement system is 'to clarify the existing provisions [of the covered agreements] in accordance with customary rules of interpretation of public international law.' The AB referred to the VCLT rules of interpretation in its first decision (*U.S.—Gasoline* 1996), and has affirmed that Articles 31, 32, and 33 of the VCLT reflect the customary rules of interpretation of public international law,[44] and thus are applicable by virtue of Article 3.2 DSU. It has, however, frequently applied other rules or principles of interpretation.

At the time that the WTO was formed, the member states determined to modify the interpretative style followed previously in GATT dispute settlement. The GATT period was characterized by frequent and early resort to *travaux préparatoires*. Article 3.2 of the WTO Dispute Settlement Understanding was formulated to refer explicitly to the rules of interpretation of customary international law, and implicitly to the VCLT, which was thought to prioritize text and context over *travaux préparatoires*. The case law of the AB is equivocal about the relationship between Articles 31 and 32 VCLT, emphasizing in some cases a sequential relationship between the two provisions,[45] whilst also recognizing in other cases that '[t]he principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion.'[46]

The AB has adopted certain canons of interpretation that lay outside the framework of Articles 31 and 32 of the VCLT, in particular *effet utile*, which has been influential in countless cases.[47] Another interpretative principle used is that of cumulative application, whereby each restrictive provision generally applies, regardless of whether another provision applies, and regardless of whether another provision seems to permit the relevant conduct.[48] Other canons of interpretation that lay outside the VCLT have also been applied by the AB, including *ejusdem generis*,[49] *a contrario* interpretation,[50] and *in dubio mitius*.[51]

Whilst, in early WTO jurisprudence, the AB emphasized dictionary definitions as indicative of ordinary meaning, the AB has criticized the extent to which panels rely on dictionary definitions: 'to the extent that the Panel's reasoning simply equates the 'ordinary meaning' with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach.'[52] In *EC—Chicken Classification*, the AB clarified its approach to 'ordinary meaning.' First, dictionaries are a useful starting point, but 'must be seen in the light of the intention of

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[43] Based on a report submitted by Hélène Ruiz Fabri & Joel Trachtman.

[44] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Appellate Body Report, adopted 20 May 1996), 16-7; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/ AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report, adopted 1 November 1996), 104, note 17; *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (Appellate Body Report, adopted 17 February 2004), [59].

[45] *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (Appellate Body Report, adopted 22 June 1998), [85].

[46] *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (Appellate Body Report, adopted 19 February 2009), [268].

[47] *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Appellate Body Report, adopted 20 May 1996), 23.

[48] *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Appellate Body Report, adopted 12 January 2000), [81].

[49] *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R (Appellate Body Report, adopted 23 July 2012), [444].

[50] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report, adopted 1 November 1996), 18. Although cf. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Appellate Body Report, adopted 25 March 2011), [567]. See also [581].

[51] *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report, adopted 13 February 1998), note 154. Although cf. *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Appellate Body Report, adopted 19 January 2010), [411].

[52] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Appellate Body Report, adopted 20 April 2005), [166 and 175-6]. 'We do not accept, as the Panel appears to have done, that, simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty. Indeed, there are indications to the contrary' [176]. For a history and analysis of the Appellate Body's use of dictionaries, see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford 2009), 221-35.

the parties "as expressed in the words used by them against the light of surrounding circumstances".'[53] Second, 'interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.'[54] The Appellate Body has cautioned against equating 'ordinary meaning' with dictionary definition.[55]

In relation to context, the AB has often interpreted specific provisions of WTO law by reference to other provisions of WTO law, utilizing the other provisions as context, and seeking to provide an integrated and coherent approach to the overall treaty.[56] The AB has also adopted a broader conception of context in certain cases. In its *Computers* decision, for example, the AB found that the Harmonized System and its Explanatory Notes, including decisions by the Harmonized System Committee of the World Customs Organization, were part of the context required to be considered.[57]

In relation to object and purpose, the AB has stated that the object and purpose to be referenced is that of the treaty as a whole, rather than that of a specific provision, although it is also possible to take into account the object and purpose of specific treaty terms or specific agreements. Thus, 'to the extent that we can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.'[58]

The AB has been forthcoming in explicating the stages in its interpretative reasoning, most clearly when operating under the VCLT. According to some views[59], sticking to a rather dominantly textualist approach[60] was a way for the Appellate Body to be rid of the teleological approach ('embedded liberalism') in force during the GATT.

v. The UN Human Rights Committee, other UN Human Rights Treaty Bodies and Treaty Interpretation[61]

The Human Rights Committee (HRCttee) and the other UN Human Rights Treaty Bodies (hereinafter collectively referred to as UN-HRTBs) are treaty-monitoring bodies, which perform three main functions: i) they conduct periodic state reporting procedures; ii) they develop/adopt General Comments and iii) they hear 'communications', i.e. complaints by individuals under the human rights treaties. It is this multifariousness of the roles that the UN-HRTBs are called to play, the synthesis of the various Committees, the 'pragmatic' structure of the Views, and their 'audience' that are some of the factors that influence the interpretative approaches and solutions adopted by the UN-HRTBs.

The UN-HRTBs jurisprudence (views) contain only sporadic and limited *explicit* references to the VCLT rules.[62] Such references were encountered more often in the early stages of evolution of the UN-HRTBs' body of work,

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[53] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005), [175], citing Lord McNair, *The Law of Treaties* (Clarendon Press 1961), 365.

[54] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005), [176].

[55] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Appellate Body Report, adopted 19 January 2010), [348].

[56] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Appellate Body Report, adopted 12 January 2000), [81] (citations omitted).

[57] *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (Appellate Body Report, adopted 22 June 1998), [92]. See also *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005), [199].

[58] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005), [238] (citation omitted).

[59] R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', (2016) 27/1 *EJIL* 9-77.

[60] G Distefano and P Mavroidis, 'L'interprétation systémique : le liant de l'ordre international', in O Guillod and Ch Müller (eds), *Pour un droit équitable, engagé et chaleureux, Mélanges en l'honneur de Pierre Wessner* (Helbing Lichtenhahn 2011), 743-59.

[61] Based on a report submitted by Photini Pazartzis and Panos Merkouris.

[62] *SWM Brocks v The Netherlands*, Communication No 172/1984 (Views adopted on 9 April 1987), [12.2-3]; *LG Danning v The Netherlands*, Communication No 180/1984 and *FH Zwaan-de Vries v The Netherlands*, Communication No 182/1984 (Views adopted on 9 April 1987), [12.2-3]; *Errol Johnson v Jamaica*, Communication No 588/1994 (Views adopted on 22 March 1996), [8.2]; *Robinson LaVende v Trinidad and Tobago*, Communication No 554/1993 (Views adopted on 29 October 1997), [5.3]; *Ramcharan Bickaroo v Trinidad and Tobago*, Communication No 555/1993 (Views adopted on 29 October 1997), [5.3].

but gradually have been making increasingly rarer appearances,[63] possibly in an attempt to make the views more accessible and palatable to a wider audience. Nonetheless, that is not to say that the UN-HRTBs do not adhere to the VCLT rules, far from it. Despite the fact that the UN-HRTBs often announce the interpretative result without much in the direction of an exegesis, there are frequent references to the wording and denominations of interpretative norms and methods as stipulated under the VCLT,[64] and the structure of Arts. 31-33 VCLT is often used as inspiration.[65]

The UN-HRTBs, of course, seek the 'ordinary meaning' of the terms to be interpreted[66] in 'good faith',[67] and refer to 'context' 'subsequent practice' and other 'relevant rules',[68] as well as 'other supplementary means'.[69] However, consistent with their special roles as bodies supervising the application of international human rights treaties, the UN-HRTBs (and particularly the HRCttee) have progressively favored a broader and more liberal interpretation of the Covenant's provisions,[70] although it is difficult to 'identify a *consistent* trend of liberalism or conservatism, and this has been attributed mainly to the changes in composition of the HRC over time'.[71]

They have done so mainly by referring to the 'living instrument' doctrine and holding that 'the rights protected under [the core UN human rights treaties] should be applied in context and in the light of present–day conditions'.[72] Other interpretative principles, maxims or techniques, not explicitly mentioned in the VCLT, that have been used by the UN-HRTBs include the *ut res magis valeat quam pereat* principle,[73] and *a contrario* interpretation.[74] and 'margin of appreciation'[75] although this last one is rather better characterized as 'application' than 'interpretation'.

The UN-HRTBs have also predominantly favored a self-referential approach of invoking their own Concluding Observations, General Comments and jurisprudence.[76] On occasion, they have even referred to General

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[63] Appearing mostly either in individual opinions of members or more likely in the arguments of the parties; *TM v Sweden*, Communication No 228/2003 (Views adopted on 18 November 2003), CAT/C/31/D/228/2003, Individual opinion by Committee member, Mr Fernando Mariño Menéndez.

[64] E.g references to 'object and purpose', 'travaux préparatoires' etc. See *inter alia*: *Robinson LaVende v Trinidad and Tobago*, Communication No 554/1993 (Views adopted on 29 October 1997), [5.3-4]; *Lauri Peltonen v Finland*, Communication No 492/1992 (Views adopted on 21 July 1994), [8.3]; *Hugo van Alphen v The Netherlands*, Communication No 305/1988 (Views adopted on 23 July 1990), [5.8].

[65] *Antti Vuolanne v Finland*, Communication No 265/1987 (Views adopted on 7 April 1989), [9.3]; *Roger Judge v Canada*, Communication No 829/1998 (Views adopted on 5 August 2002), [10.4-5].

[66] *Charles Stewart v Canada*, Communication No 538/1993 (Views adopted on 1 November 1996), [12.4]; *Darmon Sultanova v Uzbekistan*, Communication No 915/2000 (Views adopted on 30 March 2006), [7.3]. Sometimes the 'ordinary meaning' is determined by reference to other international instruments, although this blurs somewhat the lines between Art. 31(1) and 31(3)(c) of the VCLT; *Grioua v Algeria*, Communication No 1327/2004 (Views adopted on 10 July 2007), [7.2].

[67] *Glen Ashby v Trinidad and Tobago*, Communication No 580/1994 (Views adopted on 21 March 2002) [10.8-9].

[68] *Keith Cox v Canada*, Communication No 539/1993 (Views adopted on 31 October 1994), [16.2]; *Marie-Hélène Gillot et al v France*, Communication No 932/2000 (Views adopted on 15 July 2002), [13.4]; *DR v Australia*, Communication No 42/2008 (Opinion adopted on 14 August 2009), CERD/C/75/D/42/2008, [6.3]; *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, Communications Nos 1321/2004 and 1322/2004 (Views adopted on 23 January 2007), [8-9]; *S Jegatheeswara Sarma v Sri Lanka*, Communication No 950/2000 (Views adopted on 16 July 2003), [9.2-3]; *Franz Wallmann et al v Austria*, Communication No 1002/2001 (Views adopted on 1 April 2004), [8.4]; *Klaus Dieter Baumgarten v Germany*, Communication No 960/2000 (Views adopted on 31 July 2003), [9.4].

[69] *SWM Brocks v The Netherlands*, Communication No 172/1984 (Views adopted on 9 April 1987), [12.2].

[70] Using teleological interpretation, either be referring simply to the 'object and purpose' of the treaty, or by referring to the nature of the treaty as a 'living instrument'.

[71] Report submitted by Fay Pazartis and Panso Merkouris, 7.

[72] *Roger Judge v Canada*, Communication No 829/1998 (Views adopted on 5 August 2002), [10.3-7]; *Joseph Kindler v Canada*, Communication No 470/1991 (Views adopted on 30 July 1993), [14.2].
For the other Committees see: *Stephen Hagan v Australia*, Communication No 26/2002 (Opinion adopted on 20 March 2003), CERD/C/62/D/26/2002, [7.3]; *Elizabeth de Blok et al v the Netherlands*, Communication No 36/2012 (Views adopted on 17 February 2014), CEDAW/C/57/D/36/2012, [5.5].

[73] *Kennedy v Trinidad and Tobago*, Communication No 845/1999 (Views adopted 2 November 1999), [6.6-7]; *Oleg Grishkovtsov v Belarus*, Communication No 2013/2010 (Views adopted on 1 April 2015), [6.4-5]; *Peter Chiiko Bwalya v Zambia*, Communication No 314/1988 (Views adopted on 14 July 1993), [6.4]; *The Jewish Community of Oslo et al v Norway*, Communication No 30/2003 (Opinion adopted on 15 August 2005), CERD/C/67/D/30/2003, [7.4]; *RS et al v Switzerland*, Communication No 482/2011 (Views adopted on 21 November 2014), CAT/C/53/D/482/2011, [7].

[74] *Charles Stewart v Canada*, Communication No 538/1993 (Views adopted on 1 November 1996), [12.7].

[75] *Ilmari Länsman et al v Finland*, Communication No 511/1992 (Views adopted on 26 October 1994), [9.4]; *Leo R Hertzberg et al v Finland*, Communication No 61/1979 (Views adopted on 2 April 1982), [10.3].

[76] *TPF v Peru*, Communication No 22/2009 (Views adopted on 17 October 2011), CEDAW/C/50/D/22/2009, [8.11]; *DR v Australia*, Communication No 42/2008 (Opinion adopted on 14 August 2009), CERD/C/75/D/42/2008, [6.4]; *Sahli v Algeria*,

Comments of *other* human rights treaties.[77] Despite the importance of General Comments in their jurisprudence, the Views of the UN-HRTBs do not shed any substantial light as to where exactly in the Article 31-32 VCLT framework they consider such reference to fall. The most that has been said has been that such Comments/Recommendations are '*an authoritative interpretation tool*'.[78]

Finally, on occasion, the HRCttee has also followed a more subjective line of interpretation motivated by its concern to convey the 'proper' message to States parties,[79] although this has also been criticized as being extremely subjective and tantamount to hypothetical reasoning.[80]

vi. Inter-American Commission/Court of Human Rights[81]

Generally, the IACtHR refers, in passing, to the VCLT asserting that such question must be analyzed in conformity with the customary rules of interpretation enshrined in the VCLT. This mention appears in a very formal way, as a sort of necessary and obliged international classical mantra. When a very specific rule of the VCLT is cited, it is only to point it out within the framework of its general demonstration. It has to be pointed out that an 'explicit mention to the way of interpreting (a kind of pedagogical development addressed in a special section or paragraph … is quite common trend in the advisory function of the IACtHR, although not in the contentious cases, unless the Court is dealing with a 'hard case'.[82] However, the IACtHR does not make any *substantial considerations* about interpretation in general and about VCLT's rules of interpretation in particular.[83] Even where Advisory opinions are concerned, where in some instances a "discussion" of the VCLT rules was required, this did not trigger a real reflection on its "interpretation rules".[84] Because of this, it is quite challenging to find a clear shift in the apprehension of the content of a rule of interpretation, since the Court does not clearly detail the meaning of VLCT rules, nor does it explain any shifts in its approach to them.

During the first years of its functioning, the IACtHR used to point out quite regularly the rules of the VCLT. After a while, during A. Cançado Trindade tenure, Article 29(b) of the ACHR was its main focal point, and in fact the Court has interpreted its own standard of interpretation enshrined in that article.[85] Nowadays, we could affirm that both "rules" (VCLT rules and American convention rules of interpretation) are used, mixed with all the other kinds of "techniques of interpretation".

Needless to say that such preference and prevalence of interpretation developed by the IACtHR is a clearly teleological one. This approach has been pointed out since the very beginning of its activity,[86] and holds strong until today.[87] Textual, contextual, intention of the parties, and historical interpretation have also been resorted to, with different weight being given to them,[88] yet the teleological remains the dominant one. Revealing is the latest

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Communication No 341/2008 (Views adopted on 3 June 2011), CAT/C/46/D/341/2008, [9.9]; *Abramova v Belarus*, Communication No 23/2009 (Views adopted on 25 July 2011), CEDAW/C/49/D/23/2009, [7.3].

[77] *Abramova v Belarus*, Communication No 23/2009 (Views adopted on 25 July 2011), CEDAW/C/49/D/23/2009, [7.6]; *Muñoz-Vargas y Sainz de Vicuña v Spain*, Communication No 7/2005 (Decision adopted on 9 August 2007), CEDAW/C/39/D/7/2005, Individual Opinion by Committee member Mary Shanthi Dairiam (dissenting), [13.9].

[78] *TPF v Peru*, Communication No 22/2009 (Views adopted on 17 October 2011), CEDAW/C/50/D/22/2009, [8.11] (emphasis added).

[79] *Errol Johnson v Jamaica*, Communication No 588/1994 (Views adopted on 22 March 1996), [8.4].

[80] *Errol Johnson v Jamaica*, Communication No 588/1994 (Views adopted on 22 March 1996), Individual Opinions of Christine Chanet and Francisco José Aguilar Urbina.

[81] Based on a report submitted by Laurence Burgorgue-Larsen.

[82] See Report submitted by Laurence Burgorgue-Larsen, 22-5.

[83] *Viviana Gallardo and al*, IACtHR (Order of the President of the Court, 15 July 1981), Series A, No 101, OC-21/14.

[84] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75*), IACtHR (24 September 1982), OC-2/82; *Restrictions to the Death Penalty (Arts. 4§2 and 4§4) American Convention on Human Rights)*, IACtHR (8 September 1983), OC-3/83, [45].

[85] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29) (requested by Costa Rica)*, IACtHR (13 November 1985), OC-5/85, [44]; see also Report submitted by Laurence Burgorgue-Larsen, 32-4 on 'the conventionality control'.

[86] *Viviana Gallardo and al*, IACtHR (Order of the President of the Court, 15 July 1981), Series A, No 101, [15-6]; *'Other Treaties' Subjected to the Consultative Jurisdiction of the Court (Art 64 American Convention on Human Rights)*, IACtHR (24 September 1982), OC-1/82.

[87] *Mapiripán Massacre v Colombia*, IACtHR (Judgment, 15 November2005), Series C No134, [104]; *Baena Ricardo v Peru*, IACtHR (Judgment, 28 November 2003), Series C No 104, [96].

[88] In more detail see Report submitted by Burgorgue-Larsen, 9-11. Of note is the original dismissal by the Court of the 'subjective criteria' (e.g. the intention of the parties) in *Restrictions to the Death Penalty (Arts. 4§2 and 4§4) American Convention on Human Rights)*, IACtHR (8 September 1983), OC-3/82, [50], which was a few years later tempered by the search for the 'intention of all the American States'.

advisory opinion where the Court asserted that the textual approach and good faith could not be "a rule in itself". For the Court, "the interpretation exercise must integrate the context, and more especially, the object and purpose".[89]

What are called other "maxims/canons" of interpretation cannot be said to have been clearly used by Inter-American bodies. However, other "interpretation techniques", such as the *pro homine* (or *pro persona*) principle, the international *corpus juris, effet utile,* the *'integration technique'* and *the 'combinaison normative'* techinque,[90] are strongly employed in Inter-American case-law.

The interpretative approach does not change when unilateral acts of States or of international organizations are concerned, e.g. waivers;[91] reservations,[92] or declarations.[93] As the IACtHR has pointed out, a textual interpretation mixed with the teleological one ensures that the realm of the discretionary power of the States is diminished.[94]

Finally, a wide array of factors, both internal and external have and continue to shape the Court's bold approach to interpretation. These include: i) legal internal factors (the features of the American Declaration and Convention; the *ratione materiae* jurisdiction of the IACtHR; the Court's Statute); ii) sociological internal factors (e.g. the composition of the Court – background and profile of the legal staff); iii) external factors (e.g. the political context during the first steps of the Inter-American Human Rights System).[95]

vii. European Court of Human Rights[96]

The interpretation of the European Court of Human Rights (ECHR) raises certain questions that are specific to that regime: for example, whether human rights conventions should be interpreted in a special way; the extent to which judgments of the European Court of Human Rights (ECtHR) incur on the sovereignty of the contracting parties; and the relationship between interpretation and deference.

At the outset, it should be noted that the Court has addressed the VCLT's application to ECHR in several cases. In the *Demir and Baykara* (2008), the Court stated that it is 'guided mainly by the rules of interpretation provided for in articles 31 to 33 of the Vienna Convention on the Law of Treaties'. The Court has in its subsequent practice constantly confirmed the relevance of the Vienna Convention for the interpretation of the ECHR. But, as in the *Demir and Baykara*, the significance of the VCLT has been subject to qualifications. For example, in *Rantsev* (2010) the Court stated that the ECHR must be interpreted *in the light of* the VCLT.[97] Similarly, in *Cyprus v. Turkey* (2014), the Court said that '[d]espite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties'.[98]

Three interpretative approaches of the Court are particularly noteworthy: effective interpretation, evolutive interpretation, and systemic interpretation. In relation to effective interpretation, an early example is the *Golder* [Plenary] case (1975) where the Court without explicit basis in ECHR article 6 on fair trial read in a right of access to a court. Similarly, in the *Soering* case [Plenary] (1989) the Court noted that ECHR article 5 (1) (f) allowed detention with a view to extradition. It held, however, that in interpreting article 3 on the prohibition on torture and degrading and inhuman treatment or punishment the Court had to interpret the ECHR 'so as to make its safeguards practical end effective' and that the interpretation is 'consistent with the general spirit of the

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[89] *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, IACtHR (26 February 2016), OC-22/16, [39] (this is the Report author's translation). The original text goes "*una regla por si misma ... el ejercicio de interpretación debe involucrar el contexto y, en especial, dentro de su objeto y fin*".

[90] For an analysis of the relevant case-law, see Report submitted by Burgorgue-Larsen, 13-9. The last two methods lead to such an enlargement of the scope of certain rights that they could be qualified as 'creating' new rights.

[91] *Viviana Gallardo* case.

[92] *'Other Treaties' Subjected to the Consultative Jurisdiction of the Court (Art 64 American Convention on Human Rights)*, IACtHR (24 September 1982), OC-1/82; *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75*), IACtHR (24 September 1982), OC-2/82; *Restrictions to the Death Penalty (Arts. 4§2 and 4§4) American Convention on Human Rights)*, IACtHR (8 September 1983), OC-3/83.

[93] *Interpretation of the American Declaration of the Rights and Duties*, IACtHR (14 July 1989), OC-10/89, [42].

[94] *Restrictions to the Death Penalty (Arts. 4§2 and 4§4) American Convention on Human Rights)*, IACtHR (8 September 1983), OC-3/83.

[95] For a detailed analysis, see Report submitted by Burgorgue-Larsen, 25-32.

[96] Based on a report submitted by Geir Ulfstein.

[97] *Rantsev v Cyprus and Russia* (2010), Application No 25965/04, [273].

[98] *Cyprus v Turkey* [GC] (2014), Application No 25781/94, [23] (emphasis added)

Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.[99] Extradition to US death row was therefore prohibited. This was cited with support in the *Mamatkulov and Askarov* (2005) where the Court, without explicit basis in the ECHR, held that its interim measures were binding on the states parties

The jurisprudence of the Court also manifests a tendency to interpret the Convention in an evolutive manner. The *Tyrer* case (1978) introduced the doctrine of the European Convention as a 'living instrument',[100] which has been followed in subsequent cases. The Court has based its evolutive interpretation on what it deems a European consensus in domestic law among member states as well as practice in the form of international instruments.[101] As stated in the *Demir and Baykara*: 'The consensus emerging from specialized international instruments *and* from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases'.[102] In this respect, it can be concluded that subsequent state practice plays a far more extensive role than what is envisaged in article 31 (3) (b) in the Court's evolutive interpretation. But the Court does not make it clear whether the requirements set out in article 31 (3) (b) are fulfilled – or whether subsequent state practice is used in the Court's evolutive interpretation, beyond article 31 (3 (b), based on the original evolutive intention of the parties according to article 31 (1).[103]

The ECtHR has generally expressed its commitment to interpreting the ECHR consistent with other rules of international law, in accordance with Article 31(3)(c) of the VCLT. In *Demir and Baykara* (2008) the Court devoted a full section to '[t]he practice of interpreting Convention provisions in the light of other international texts and instruments'.[104] The relationship between the ECHR and other rules of international law may concern general international law or its relationship to other treaties. For example, the *Behrami and Saramati* (2007) case is based on the general rules on attribution of responsibility between the United Nations and member states contributing with military forces.[105] In a similar vein, the *Stichting Mothers of Srebrenica and others* case (2013) concerned the immunity of the United Nations – which partly is based on general international law and partly on treaty.[106]

In addition to the abovementioned approaches, the Court has adopted certain interpretative practices that are deferential to Member States. First, the margin of appreciation, as part of the principle of subsidiarity, has been developed by the Court since the classic *Handyside* case in 1976.[107] It is now reflected in the Brighton Declaration (2012) as well as in the new Protocol 15 to the ECHR. Subsidiarity aims at the protection of national freedom by leaving decision-making to states, unless it is more effectively or efficiently performed at the international level.[108]

In a similar, but slightly different vein, the *Bosphorus* standard has been applied by the Court since 2005 regarding national implementation of EU law.[109] This standard means that the ECtHR will not review states' implementation of EU law since the EU is considered to protect human rights 'in manner which can be considered *at least equivalent* to that for which the Convention provides'. Therefore, the Court applies a presumption that a member state respects the Convention obligations when it 'does no more than implement legal obligations flowing from its membership of the organisation'. However, this *presumption* 'can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was *manifestly deficient*. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "*constitutional*

[99] *Soering v the United Kingdom* [Plenary] (1989), Application No 14038/88, [87].
[100] *Tyrer v the United Kingdom* (1978), Application No 5856/72, [31].
[101] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015), 45-9.
[102] *Demir and Baykara v Turkey* [GC] (2008), Application No 34503/97, [85] (emphasis added).
[103] See also WA Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015), 37.
[104] *Demir and Baykara v Turkey* [GC] (2008), Application No 34503/97, [65-86].
[105] *Behrami and Behrami v France* and *Saramati v. France, Germany and Norway* [GC] (2007), Application Nos 71412/01 and 78166/01.
[106] *Stichting Mothers of Srebrenica and others v the Netherlands* (2013), Application No 65542/12.
[107] *Handyside v United Kingdom*¸ Application No 5493/72 (1976), [48].
[108] See A Føllesdal, 'Survey Article: Subsidiarity', (1998) 6/2 *The Journal of Political Philosophy* 190-218; PG Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', (2003) 97/1 *American Journal of International Law* 38-79; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', (2004) 15/5 *European Journal of International Law* 907, 920-4; I Feichtner, 'Subsidiarity', in *Max Planck Encyclopedia of Public International Law* (2009); A Føllesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law', (2013) 2/1 *Global Constitutionalism* 37-62.
[109] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC] (2005), Application No 45036/98.

instrument of European public order" in the field of human rights'.[110] This standard has been followed in subsequent case law, including the *Michaud* case (2012)[111] and the recent *Avotiņš* case (2016).[112]

viii. European Charter of Fundamental Rights[113]

Interpretation of the EuFRCH (in force since 1/12/2007) follows the general "rules of interpretation" of human rights treaties insofar as the Charter does not provide special references or methods to be respected.

The *systematic-contextual interpretation* finds its counterpart in the principle of 'unity of Community law', i.e. the synoptical evaluation of all parts of primary law of the EU including the protocols and the EuCHFR with its Protocol No. 30 concerning the application of the Charter for Poland and UK. The ECJ underlined in its first sentences this overall contextual approach: In *Chatzi*[114] the Court refers to its constant case law where a norm has to be interpreted not only according to its wording but in the context and the aims pursued by the norm.[115] Similarly, in *Donagh v. Ryan Ltd*[116] the Court interpreted Arts. 16, 17 EuCHRF and the principle of proportionality in accordance with the entire primary law of the Union.

A special case of contextual interpretation is illustrated by Protocol No. 30 for Poland and the UK. The preliminary ruling by the Irish High Court in *N.S./Secretary of State for the Home Department* concerned the potential opting out of the UK[117] from the EuCHFR. The Court confirmed that Art. 1 par. 1 Protocol No. 30 did not intend to exempt the UK nor Poland from the obligations of the Charter nor from providing to observe the obligations committed therewith.

The special relevance of the explanations of the Presidency of the Convent however play an additional role in the process of interpretation and reflect the relevance of the historical-genetic concretization. As these are not directly binding upon the parties they may play an auxiliary part in the process of interpretation. The ECJ in its cases *Akerberg Fransson* and *DEB* referred to the explanations as additional source of interpretation and thus strengthens its argumentative basis already gained by teleological interpretation.[118]

ix. International Criminal Law Tribunals[119]

International criminal tribunals, share a unique property, which to some degree affects their interpretative approach. Whereas for other courts and tribunals, a clear line can theoretically be drawn between the applicable law on the one hand, and the law regulating matters of the administration of justice on the other, '[b]y contrast, in international criminal law, the applicable law is, by default, derived from the tribunals' constituent instruments'.[120] Furthermore, 'the statutes of international criminal tribunals will generally prevail over other sources of law, '[thus, i]t follows that the bulk of interpretation relates to the tribunals' statutes and that there is, comparatively speaking, less (extraneous) treaty interpretation than in other fields of international law.[121]

Generally, the tribunals have held that the interpretative rules enshrined in the VCLT apply to their respective statutes (irrespective of whether they are a treaty or other instrument – in the latter case, of course, we are talking about a *mutatis mutandis* application).[122]

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[110] *Ibid*, [155-6] (emphasis added).
[111] *Michaud v France* (2012), Application No 12323/11.
[112] *Avotiņš v Latvia* [GC] (2016), Application No 17502/07.
[113] Based on a report submitted by Albrecht Weber.
[114] *C-149/10 – Chatzi*, CJEU (Judgment, 16 September 2010).
[115] In this case the principle of equal treatment was relevant for parental leave; *ibid*, [43].
[116] *C-12/11 – Denise McDonagh v Ryanair Ltd*, CJEU (Judgment, 31 January 2013), [44].
[117] *C-411/10 – NS and others*, CJEU (Judgment [GC], 21 December 2011).
[118] *C-617/10 – Åklagaren v Hans Åkerberg Fransson*, CJEU (Judgment [GC], 26 February 2013); *C-279/09 – DEB*, CJEU (Judgment, 22 December 2010), [32].
[119] Based on a report submitted by Olufemi Elias and Anneliese Quast-Mertsch.
[120] Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 1; see also D Akande, 'Sources of International Criminal Law', in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009), 44.
[121] Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 1.
[122] *Prosecutor v Tadić*, ICTY, Case No IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), [18]; *Prosecutor v Kanyabashi*, ICTR, Case No ICTR-96-15-A, Joint Separate and Concurring Opinion of Judges Wang and Nieto-Navia (3 June 1999), [10]; *Ayyash et al*, STL, Case No STL-11-01 (16 February 2011), [26]. For a contrary view, that holds that the VCLT is and should not be applicable, or at least not unless in a modified manner see: D Jacobs, 'Why the Vienna Convention Should Not Be Applied to the ICC Rome Statute' (*Spreading the Jam*, 2013) https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute-

Arts. 31-32 of the VCLT are frequently quoted by international criminal tribunals either as such,[123] or by reference to their constitutive elements,[124] and applied in a holistic manner,[125] albeit not all elements being given equal weight. 'Ordinary meaning',[126] 'object and purpose', 'subsequent practice',[127] and 'supplementary means'[128] have all featured prominently in the jurisprudence of international criminal tribunals. That is not to say that the usual debates regarding, for instance the multiplicity of objects and purposes[129] or the supplementary or not nature of Article 32, [130]do not plague these courts as well. Art. 33 also poses issues, as in the majority of instances the tribunals' reasoning is based on concepts foreign to the procedure envisaged by that article, for instance the adoption of the interpretation that is more 'favourable to the accused'.[131]

In this context, of particular note, is the widely diverging approaches of international criminal tribunals on the question of whether a teleological interpretation may be used to override the wording of the text, considering also that a positive response to the above question may imply a direct conflict with the principle of legality, exemplified by, among other, the *nullum crimen nulla poena sine lege* scripta principle. In a string of ICTY cases, where this issue arose only in one was the text preferred.[132] In all others, a teleological interpretation, both in its static and dynamic/evolutive manifestation was resorted to override the meaning of the text.[133]

While some academics have suggested that the VCLT rules could/should be modified to accommodate criminal law principles, this does not seem to be reflected, yet, in practice. 'Thus far, it would appear that an all-or-nothing approach is chosen, where the result is based exclusively on either the VCLT rules or criminal law principles, at the exclusion of the other. In some instances, this may be a deliberate choice aimed at achieving a desired interpretative result; in others, it may be that the combined application of the VCLT rules and criminal law principles may still be novel'.[134]

x. Regional Courts in Africa[135]

Due to the special nature of certain operative African courts, the observations to follow are based on the jurisprudence of five (quasi)-judicial bodies: the *Court of Justice of the East African Community* (EACJ), the *Tribunal of the Southern African Development Corporation* (SADC-T), the *Court of Justice of the Economic Community of West African States* (CCJ), the *African Court on Human and People's Rights* (ACtHR), and the *African Commission on Human and People's Rights* (ACmHR).

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a-plea-for-respecting-the-principle-of-legality/ (accessed 31 March 2017); D Akande, 'Sources of International Criminal Law', in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009), 48.

[123] WA Schabas, *The UN International Criminal Tribunals* (CUP 2006) 80.

[124] *Ibid*, 80; *Prosecutor v Tadić*, ICTY, Case No IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), [71-93].

[125] *Prosecutor v Germain Katanga*, ICC, Case No ICC-01/04-01/07, Jugement rendu en application de l'article 74 du Statut (7 March 2014), [45]; *Prosecutor v Kordić & Čerkez*, ICTY, Case No.IT-95-14/2-A, Judgment (17 February 2004), [59, 62].

[126] *Prosecutor v Mucić et al,* ICTY, Case No IT-96-21-T, Judgment (16 November 1998), [506-10]; *Prosecutor v Sikirica et al*, ICTY, Case No.IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001), [60]; *Prosecutor v Jelisić*, Case No IT-95-10-T, Judgment (14 December 1999), [71, 82].

[127] See cases mentioned in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 230.

[128] *Prosecutor v Krstić*, ICTY, Case No IT-98-33-T, Judgment (2 August 2001), [584]; *Prosecutor v Stakić*, ICTY, Case No.IT-97-24-T, Judgment (31 July 2003), [517-9]; *Prosecutor v Mucić et al*, ICTY, Case No.IT-96-21-T, Judgment (16 November 1998), [391-2].

[129] *Situation in the Democratic Republic of the Congo*, ICC, ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (13 July 2006), [33]; *Prosecutor v Blagojević & Jokić*, ICTY, Case No IT-02-60-A, Jugdment (09 May 2007), [281].

[130] *Prosecutor v Krstić*, ICTY, Case No IT-98-33-T, Judgment (2 August 2001); [584]; *Prosecutor v Stakić*, ICTY, Case No.IT-97-24-T, Judgment (31 July 2003) [517-9]; *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-T, Judgment (16 November 1998) [391-2].

[131] *Prosecutor v Akayesu*, ICTR, Case No ICTR-96-4-A, Judgment (1 June 2001), [501]; *Prosecutor v Bagilishema*, ICTR, Case No ICTR-95-1A, Judgment (07 June 2001), [57]; *Prosecutor v Musema*, ICTR, Case No ICTR-96-13, Judgment (27 January 2000), [155]; *Prosecutor v Rutaganda*, ICTR, Case No. ICTR-96-3, Judgment (6 December 1999), [50]; *Prosecutor v Kayishema & Ruzindana*, ICTR, Case No ICTR 95-1-T, Judgment (21 May 1999), [139].

[132] *Prosecutor v Tadić*, ICTY, Case No IT-94-1-T, Opinion and Judgment (7 May 1997), [587-607].

[133] *Prosecutor v Mucić et al*, ICTY, Case No.IT-96-21-T, Judgment (16 November 1998), [263]; *Prosecutor v Tadić*, ICTY, Case No IT-94-1-A, Judgment (15 July 1999), [163-9]; *Prosecutor v Blaškić*, ICTY, Case No IT-95-14-T, Judgment (3 March 2000), [125-7]; *Prosecutor v Aleksovski*, ICTY, Case No.IT-95-14/1-A, Judgment (24 March 2000), [152]; *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-A, Judgment (20 February 2001), [73].

[134] Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 8.

[135] Based on a report submitted by Kirsten Schmalenbach.

'Regional African courts are well aware of the political sensitivity of some African states which appear as respondents before the courts; all institutions have had to decide on politically sensitive issues. Famously, the SADC tribunal with its controversial Campbell judgment against Zimbabwe walked right into repressive measures. It cannot be said though that the tribunal's fate had an impact on the interpretive work of other African courts.'[136]

Most of these courts do not refer explicitly to the VCLT, and are apodictic and concise with respect to their interpretative exercise. The EACJ is a notable exception on both counts.[137] The ECOWAS CCJ is also unique in the sense that it applies rules of statutory interpretation, that it calls 'general principles of the construction of documents'.[138] Although textual interpretation features prominently in the jurisprudence of these bodies (especially in the case of the CCJ, where the court has refused, more than once, to use any other interpretative method if the ordinary meaning is clear),[139] it is tempered by references to 'good faith',[140] 'effet utile',[141] and the *corpus juriprudentiae* of human rights.[142] On occasion, these courts have shown extreme diligence in defining key concepts of the interpretative process, such as 'ordinary meaning',[143] 'good faith',[144] and 'subsequent practice'[145]

Although well-known extra-VCLT maxims of interpretation (such as *expression unius est exclusion alterius, exception est strictissimae applicationis, in dubio mitiu*s etc.) have not been used by the courts themselves, they are resorted to in the pleadings of the Applicants and the Defendants, drawing inspiration from their common law background.[146]

Some other interesting examples, of various (alleged) interpretative techniques, include: i) ECOWAS CCJ's reliance on a common law interpretation maxim (the "*Mischief Rule*", which allows a departure from the literal rule, also called "the Golden Rule");[147] ii) ACmHR's demand that the African Charter should be interpreted in '*a culturally sensitive way'*, taking into full account the different legal traditions of Africa's diversity;[148] iii) ACmHR's acceptance that the *principle of subsidiarity* shapes the African Charter like all other human rights treaties, but refusal to accept a restrictive effect of the doctrine on the Commission's work.[149] the principle of subsidiarity. In *Prince v South Africa*, that the African Charter should be interpreted by applying the method of subsidiarity.

xi. Iran-US Claims Tribunal[150]

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[136] Report submitted by Kirsten Schmalenbach, 5.
[137] *Attorney General of the Republic of Uganda v Tom Kyahurwenda – Case Stated No 1 of 2014*, EACJ (Preliminary Ruling, 31 July 2015), 12; *Nyong'o v Kenya Attorney General – Reference No 1 of 2006*, EACJ (Decision, 30 March 2007), 26.
[138] *Akpo v G77 South South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [83].
[139] *Olajide Afolabi v Nigeria*, ECOWAS CCJ, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004), [53]; *Akpo v G77 South South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [42]; *Folami v Community Parliament (ECOWAS)*, ECOWAS CCJ, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008), [57].
[140] Which the EACJ called the 'golden rule of treaty interpretation'; *Henry Kyarimpa v The Attorney General of Uganda – Appeal No 6 of 2014*, EACJ (Judgment, 19 February 2016), 44 *et seq*, [91].
[141] *Campbell v Zimbabwe*, SADC-T, Case No 02/2007 (Judgment, 28 November 2008), 25 *et seq*; *Akpo v G77 South South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [84, 87]; *Legal Resources Foundations v Zambia*, ACmHR, Communication No 211/98 (Decision, 7 May 2001), [70]; *Social and Economic Rights Action Centre et al v Nigeria*, ACmHR, Communication No 155/96 (Decision, 27 October 2001), [68].
[142] *Scanlen and Holderness v Zimbabwe*, ACmHR, Communication No 297/2005 (Decision, 3 April 2009), [93-7].
[143] *Akpo v G77 South South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [83], citing R Cross, *Statutory Interpretation* (3rd edn, OUP 1995).
[144] *Timothy Alvin Kahoho v The Secretary General Of The East African Community –Appeal No 2 of 2013*, EACJ (Judgment, 28 November 2014), 29 *et seq*.
[145] *Request for an Advisory Opinion No 1 of 2015*, EACJ (Advisory Opinion, 19 November 2015), 31 *et seq*.
[146] See e.g the invocation of *ejusdem generis* in ECOWAS CCJ in a staff dispute; *Folami v Community Parliament (ECOWAS)*, ECOWAS CCJ, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008), [19, 30, 32]
[147] *Olajide Afolabi v Nigeria*, ECOWAS CCJ, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004), [37].
[148] *Constitutional Rights Project et al v Nigeria*, ACmHR, Communication Nos 143/95 and 150/96 (Decision, 15 November 1999), [26].
[149] *Garreth Anver Prince v South Africa*, ACmHR, Communication No 255/2002 (Decision, 7 December 2004), [37, 50, 53]. Interesting is also the fact that the Respondent had argued that the margin of appreciation was a method of interpretation.
[150] Based on a report submitted by Malgosia Fitzmaurice and Daniel Peat.

The Iran-U.S. Claims Tribunal (IUSCT) is in a unique position insofar as the negotiation of the agreements took place solely through an intermediary, the Government of Algeria. This means that the proposals, counter-proposals and comments that led to the final Declarations were sent between the three parties in writing, and are thus well-documented. As a result, the Tribunal has readily referred to the *travaux preparatoires*, as well as occasionally giving weight to affidavits from negotiators related to the meaning of a particular provision.

With the exception of the first decision it issued,[151] the IUSCT has consistently referred to the provisions of the VCLT when interpreting the agreements.[152] The Tribunal generally follows the 'orthodox' application of the VCLT provisions, considering that the intention of the Parties as embodied in the text of the Declarations is the starting point for interpretation, then moving to the context, object and purpose of the agreements, subsequent practice, and the preparatory work/circumstances of conclusion of the agreements, if necessary.[153] Although it generally follows this progression through the elements of Articles 31 and 32, it does not necessarily refer to each and every element.

The structure of the Tribunal's analysis in Award No. 597 provides an illustrative example.[154] The Tribunal first looked to the ordinary meaning of the text, referring approvingly to the jurisprudence of the International Court of Justice, according to which 'interpretation must be based above all upon the text of the treaty.'[155] After finding that the text of the relevant provision was 'clear',[156] it nevertheless moved to examine the context of the provision, which it defined as 'primarily the text of the treaty itself – in other words, the remaining provisions of the same treaty.'[157] Having found that the ordinary meaning in its context was clear, the Tribunal moved to find confirmation for this view in the negotiating history of the Algiers Declarations.[158]

The Tribunal has occasionally referred to canons of interpretation outside the VCLT, such as *effet utile,*[159] *expressio unius est exclusio alterius,*[160] *ejusdem generis,*[161] and, in four early awards, restrictive interpretation.[162]

Unlike certain other tribunals, the IUSCT has rarely defined the key concepts in the interpretative process. In Award A11, it defined context as 'primarily the text of the treaty itself – in other words, the remaining provisions of the same treaty.'[163] The Tribunal identified the object and purpose of the Algiers Declarations as being to 'to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in a normal sense,'[164] and has stressed that the object and purpose 'do not form any independent basis for interpretation, but rather are factors to be taken into account' in determining the meaning of the terms of the treaty'.[165] The Tribunal seems to take a relatively strict approach to subsequent practice, stating that it 'may be relevant in shedding light on the original intentions of the Parties and is compelling evidence of the parties' understanding as to the meaning of the treaty's provisions', which is demonstrated by 'a concordant, common and consistent practice'.[166]

The Tribunal's approach to materials admissible in the interpretative process is notable. Whilst referring most commonly to the preparatory work of the Algiers Declaration, the Tribunal seems in principle to accept that affidavits by negotiators could be instructive in shedding light on the intended meaning of a particular term.

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[151] *Decision No DEC 1–A2–FT*, Iran-USCT (26 January 1982), 4, reprinted in 1 *Iran-USCTR* 104.
[152] The first decision in which it did so was *Decision No DEC 12-A1-FT*, Iran-USCT (3 August 1982), 3-5, reprinted in 1 *Iran-USCTR* 189, 190-2.
[153] See *Case ITL 83-B1-FT*, Iran-USCT (9 September 2004), [106-33].
[154] See also *Award No 590-A15(IV)/24-FT*, Iran-USCT (28 December 1998), [91-103].
[155] *Award No 597-A11-FT*, Iran-USCT (7 April 2000), [4].
[156] *Ibid*, [192].
[157] *Ibid*, [195].
[158] *Ibid*, [200-4].
[159] *Award No ITL 63–A15(I:G)–FT*, Iran-USCT (20 August 1986), [17], reprinted in 12 *Iran-USCTR* 40,46–7.
[160] *Case ITL 83-B1-FT*, Iran-USCT (9 September 2004),[80-7].
[161] *Award No 25–71–1*, Iran-USCT (22 February 1983), reprinted in 2 *Iran-USCTR* 78-9.
[162] *Lillian Byrdine Grimm v The Government of the Islamic Republic of Iran, Award No 25–71–1*, Iran-USCT (22 February 1983), 4, reprinted in 2 *Iran-USCTR* 78, 80; *Alexander Lyons Lianosoff v The Government of the Islamic Republic of Iran, Award No 104–183–1*, Iran-USCT (20 January 1984), 5, reprinted in 5 *Iran-USCTR* 90, 93; *Iranian Customs Administration v United States of America, Award No 105–B16–1*, Iran-USCT (24 January 1984), 3, reprinted in 5 *Iran-USCTR* 94, 95; and *The United States of America v The Islamic Republic of Iran, Award No 106–B24–1*, Iran-USCT (24 Jan. 1984), 4, reprinted in 5 *Iran-USCTR* 97, 99.
[163] *Award No 597-A11-FT*, Iran-USCT (7 April 2000), [195].
[164] *Decision No DEC 32-A18-FT*, Iran-USCT (6 April 1984), 9.
[165] *The United States of America v The Islamic Republic of Iran, Decision No DEC 37–A17–FT*, Iran-USCT (18 June 1985), [9], reprinted in 8 *Iran-USCTR* 189, 200–1.
[166] *Case ITL 83-B1-FT*, Iran-USCT (9 September 2004), [116].

However, it seems in practice to rarely have given affidavits weight.[167] More broadly, the Tribunal has drawn on the jurisprudence of the ICJ in order to inform its interpretative approach.[168]

xii. International Investment Tribunals[169]

The interpretative approach of international investment tribunals is shaped by three groups of considerations. First, the procedural-institutional setting of tribunals, which permit individuals or corporate entities to make claims against States, rely on domestic courts for enforcement, and are constituted on an *ad hoc* basis, provides a notably different backdrop to the interpretative practice of investment tribunals than permanent courts or tribunals. Second, from a substantive point of view, the vast majority of international investment agreements are bilateral, relatively short, and contain vague and broadly worded provisions. Finally, issues of policy and legitimacy have featured more prominently in investment arbitration over the years, including issues related to environment, health, and financial crises. Other issues, such as controversy over the size of awards issued and the composition of arbitral tribunals also constitute the backdrop against which the interpretative approach of investment tribunals should be viewed.

The overwhelming majority of investment tribunals make reference to, and accept, the VCLT rules in relation to interpretation, including frequent acknowledgement of the customary nature of those rules. Many tribunals have explicitly recognized Article 31 as a 'single',[170] 'integral',[171] 'all-encompassing'[172] rule that takes a 'holistic approach'[173] without creating a hierarchy between different elements of the provision.

In relation to ordinary meaning, many tribunals have closely adhered to the 'objective' approach enshrined in the VCLT. For example, the Tribunal in *Methanex v. U.S.* consider that ordinary meaning was not coextensive with literal meaning, and that such interpretation could not 'be decided on a purely semantic basis'.[174] In relation to context, however, tribunals have not adhered as closely to the approach of the Vienna Convention. In particular, certain tribunals have analysed the investment treaty practice of one or both parties to a case with third States for the purpose of interpretation. In *ADC v. Hungary*, for example, the Tribunal looked into other treaties that Hungary had concluded with third States in order to determine which entities qualified as an 'investor' under the relevant treaty.[175] It is not clear whether tribunals considered this reasoning to be relevant context under Article 31(2) of the VCLT, or an additional means of determining the ordinary meaning of the treaty. In relation to the object and purpose of a treaty, and in contrast to some earlier arbitral decisions, tribunals have recently emphasized that the preamble of a treaty may be used to discern the object and purpose of that treaty, but that it cannot in and of itself 'add substantive requirements to the provisions of the Treaty'.[176]

Given the fragmented nature of the regime, one cannot speak of a consistent approach to treaty interpretation over time. Nevertheless, certain commonalities may be discerned. First, when addressing the issue whether an underlying treaty is capable of evolving over time, tribunals have regularly based their reasoning on Articles 31(3)(a), (b), or (c) of the VCLT. Only in a handful of instances have tribunals considered evolutive interpretation as a separate doctrine dissociated from the Vienna Convention. Second, whilst some tribunals have adopted a more expansive understanding of these rules, overall the picture is one of restraint.

Despite the *ad hoc* nature by which tribunals are constituted, many tribunals have been careful to support their interpretative approach by reference to the Vienna Convention rules and/or by recourse to the practice of the ICJ. Divergence from the Vienna rules in the practice of tribunals can be explained by, on the one hand, the vagueness of the provisions of many international investment agreements, and, on the other, concerns regarding the legitimacy of tribunals. In relation to the former, the elements of Article 31(1) VCLT are of little help in

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[167] *Award No ITL 11-39-2*, Iran-USCT (30 December 1982), 4-5; *Award No ITL 2–51–FT*, Iran-USCT (5 November 1982), 5–6.
[168] *Award No 597-A11-FT*, Iran-USCT (7 April 2000), [4]; *Decision No DEC 1-A2-FT* (26 January 1982), 4.
[169] Based on a report submitted by Julian Arato and Andreas Kulick.
[170] *Pošštová banka, as and Istrokapital SE v Hellenic Republic*, ICSID Case No ARB/13/8 (Award, 9 April 2015) [282-3].
[171] *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20 (Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013) [11].
[172] *HICEE BV v The Slovak Republic* (Partial Award. 23 May 2011) [135].
[173] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1 (Award, 22 August 2012) [254].
[174] *Methanex Corporation v United States of America* (Partial Award, 7 August 2002) [136]. See also *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14 (Award, 8 December 2008) [88].
[175] *DC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No. ARB/03/16 (Award, 2 October 2006) [359].
[176] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic*, LCIA Case No UN 7927 (Award on Preliminary Objections to Jurisdiction, 19 September 2008) [31-2].

substantiating broad treaty standards; as such, tribunals have moved to search for more concrete guidance from, for example, case law. In relation to the latter, tribunals have frequently drawn on the jurisprudence of the ICJ in order to ground their reasoning in the jurisprudence of a reputed court.

Annex: Questionnaire sent to Members

I. Content-related Issues/Questions

1. Do the courts and tribunals refer to the VCLT rules of interpretation? Do they discuss the content of these rules?
2. Preference/Prevalence of a particular approach to interpretation over others (textual, contextual, teleological, intentions of the parties, historical). Has the approach changed over time?
3. When has the case-law of an international court and tribunal indicated a clear shift in the content of a rule of interpretation? How was this established?
4. When, how and what maxims/canons of interpretation (not explicitly referred to in the VCLT) have been used in international case-law? What is their status?
5. How do courts and tribunals define key concepts in the interpretative process (e.g. ordinary meaning, context, object and purpose [multiplicity, selection between a variety of objects and purposes]), supplementary means etc.?
6. Is there a difference between the interpretative approach to treaties and that to unilateral acts of States and/or acts of international organizations?
7. How do courts and tribunals respond to multiple authentic and conflicting texts of a treaty (or any other instrument)? How has Art. 33 VCLT been employed in practice? Does the procedure followed by courts and tribunals differ from that of Art. 33 VCLT?

II. Process-related Issues/Questions

1. The variety of materials used during the interpretative process and their probative value (e.g. dictionaries, commentaries, books, statements etc.)
2. Do international courts and tribunals have a tendency to explain the process and stages of their interpretative reasoning? If yes, what is the form that this usually takes?
3. What internal or external factors (e.g. contract incompleteness, statute of the court, the background of judges, the subject area, political constellations or situations, concerns about the court's legitimacy, or about implementation of the judgment) affect the interpretative choices of international courts and tribunals, or changes in such choices, and in what manner?

III. Systemic Issues/Questions

1. What are the defining characteristics that differentiate interpretation from gap-filling and normative conflict? How do courts and tribunals address these processes?
2. When have international courts and tribunals interpreted (not identified) the rules of interpretation? How do they distinguish between interpretation and identification?