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On the Interpretation of Treaties

The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties

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§ 4. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.
§ 5. For the purpose of this rule, saying that an agreement RELATES TO a treaty is tantamount to saying that in the view of the parties, the agreement and the treaty are exceptionally closely connected.

Rule no. 8
§ 1. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that in connection with the conclusion of said treaty, the parties made an agreement, which relates to the treaty, and – in light of the provision interpreted – in one of two possible ordinary meanings can be considered to involve a logical tautology, while the other cannot, then the latter meaning shall be adopted.
§ 2. For the purpose of this rule, AGREEMENT means any agreement governed by international law, whether written or not.
§ 3. For the purpose of this rule, the CONCLUSION of a treaty means the point in time when the treaty was established as definite.
§ 4. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.
§ 5. For the purpose of this rule, saying that an agreement RELATES TO a treaty is tantamount to saying that in the view of the parties, the agreement and the treaty are exceptionally closely connected.

Rule no. 9
§ 1. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that in connection with the conclusion of said treaty, one or more parties made an instrument, which was later accepted by the other parties as related to the treaty, and – viewed in the light of the provision interpreted – in one of two possible ordinary meanings can be considered to involve a logical contradiction, while the other cannot, then the latter meaning shall be adopted.
§ 2. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 10
§ 1. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that in connection with the conclusion of said treaty, one or more parties made an instrument, which was later accepted by the other parties as related to the treaty, and – viewed in the light of the provision interpreted – in one

of two possible ordinary meanings can be considered to involve a logical tautology, while the other cannot, then the latter meaning shall be adopted. **§ 2**. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

NOTES

1. See p. 102 of this work.
2. See e.g. Elias, 1974, p. 75; Castrén, at the eighteenth session, 870th meeting, of the ILC, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 189, § 54. Differently Jiménez de Aréchaga, at the same meeting, ibid., pp. 190–191, § 73.
3. Yasseen, p. 37.
4. Cf. *S.D. Myers*, sep. op. judge Schwartz, *ILR*, Vol. 121, p. 148.
5. Note that in order for an agreement to be counted as part of the context, in the sense of VCLT article 31 § 2(a), it must have been made in connection with the conclusion of the interpreted treaty. According to the terminology used for the Vienna Convention, no state can be a party to a treaty before it enters into force.
6. See Vierdag, 1988, pp. 76–82.
7. Ibid., pp. 82ff.
8. To be exact, 27 times: in articles 2 § 1(a), 3, 4, 6, 7 § 2(a), 30 § 5, 31 § 2(a), 31 § 2(b), 32, 40 § 2(b), 41 § 1, 41 § 2, 46 – in its heading and in § 1 – 48 § 1, 49, 52, 53, 58 § 1, 59 – in its heading and in § 1 – 62 § 1, 74 – in its heading and twice in the text of the article – and in the headings of VCLT Part II and of Section 1.
9. Other obvious examples include articles 2 § 1(a), 3, 4, 40 § 2 and 49.
10. See VCLT article 2 § 1(e).
11. Other obvious examples include articles 6, 46, 52, 59, and the heading of VCLT Part II and of Section 1.
12. See Reuter, 1987, pp. 404–405; Sinclair, 1984, pp. 129–130; Jiménez de Aréchaga, p. 45; Yasseen, pp. 37–38; E. Lauterpacht, p. 444; Haraszti, p. 89; Rest, p. 146, n. 1; Jennings, p. 549; Bernhardt, 1967, p. 498. See also Australia, at the first session of the Vienna Conference, 31st meeting of the Committee of the Whole, *Official Records*, p. 169, § 59; and Yasseen, speaking as Chairman of the Drafting Committee, at the same session, 74th meeting of the Committee of the Whole, ibid., p. 442, § 31.
13. See Aust, p. 787.
14. See Villiger, p. 344; Yasseen, p. 37; E. Lauterpacht, p. 444; Haraszti, p. 146, n. 181, cf. pp. 145–147; Elias, 1974, p. 75; Favre, 1974, p. 253; Müller, p. 13, cf. pp. 104–105; Schwarzenberger, 1969, p. 220; Degan, 1968, p. 17. See also The Federal Republic of Germany, at the Vienna Conference, Second session, 13th plenary meeting, *Official Records*, p. 57, § 64; Romania, at the Vienna Conference, First session, 31st meeting of the Committee of the Whole, ibid., p. 169, §§ 55–57; and Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 221, § 14.
15. Note that nothing in international law says that an agreement drawn up by two states must assume a certain form – from a legal point of view, written agreements are no more binding than non-written ones.
16. In addition to the authorities cited in the text, see Bernhardt, 1999, p. 14; Jiménez de Aréchaga, p. 44; Haraszti, p. 89; Rest, pp. 145–146; Jennings, p. 549.
17. Elias, 1974, pp. 74–75. (My italics.)

18. Sinclair, 1984, p. 129 (My italics; footnote omitted.)
19. In addition to the authorities cited in the text, see Villiger, p. 344; Favre, 1974, p. 253.
20. Yasseen, p. 37.
21. Müller, pp. 131–132. (Footnote omitted.)
22. See Ch. 6, Section 1 of this work.
23. Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 249, § 3. (Footnote omitted.)
24. Ibid., pp. 232–233, § 4.
25. See Ch. 4 of this work.
26. Cf. the Federal Republic of Germany, at the Vienna Conference, Second session, 13th plenary meeting, *Official Records*, p. 57, § 64.
27. See Ch. 6, Section 1, of this work.
28. Cf. interpretation rule no. 15. (See Ch. 7 of this work.)
29. When two states disagree about the meaning of a treaty, and the one claims that when the treaty was concluded the two parties had already orally agreed to a specific interpretation of the treaty, then normally the other state has no interest in confirming this claim.
30. Cf. The Federal Republic of Germany, at the Vienna Conference Second session, 13th plenary meeting, *Official Records*, p. 57, § 64.
31. See further Ch. 10 of this work.
32. Cf. interpretation rule no. 15 (See Ch.7 of this work.)
33. See Section 2 of this chapter.
34. Cf. *Oppenheim's International Law*: "The phrase 'in connection [sic!] with the conclusion of the treaty' is not the same as 'at the time of the conclusion of the treaty': but, on the other hand, too long a lapse of time between the treaty and the additional agreement might prevent it from being regarded as made in connection with 'the conclusion of the treaty" (p. 1274) .Cf. also Yasseen: "L'accord ou l'instrument doit être établi à l'occasion de la conclusion du traité. Il y a ici une certaine notion de contemporanéité, l'un ou l'autre peut être concomitant à cette conclusion, mais il peut la précéder ou la suivre sans s'en éloigner trop" (p. 38).
35. Possibly, see also *Yaung Chi Oo Trading*, *ILR*, Vol. 127, p. 83, § 74.
36. In the Matter of Tariffs Applied by Canada to Certain US-origin Agricultural Products (CDA-95–2008–01), Award of 2 December 1996, *ILR*, Vol. 110, pp. 543ff.
37. *ILR*, Vol. 110, p. 590, §§ 172–173.
38. Ibid., pp. 590–591, §§ 173–177. (Footnote omitted.)
39. The text cited is that provided by the Panel. (See ibid., p. 110, p. 562, § 60. Footnote omitted.)
40. Ibid., p. 591, § 179.
41. *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, *ILR*, Vol. 84, pp. 219ff.
42. See Ch. 4, Section 4, of this work.
43. The text cited is that provided by the Court. (See *ILR*, Vol. 84, p. 233, § 20.)
44. See pp. 117–120 of this work.
45. Ibid., p. 243, § 41.
46. Ibid., p. 239, § 34.
47. Ibid., pp. 239–240, §§ 34–35.
48. Ibid., pp. 240–241, §§ 37–38.
49. Ibid., p. 242, § 40.

50. See Ch. 8, Section 6, of this work.
51. Cf. e.g. articles 2 § 1(a), 13, 16, 67, 68 and 77 § 1.
52. VCLT article 2 § 1(g).
53. Note that in order for a document to be counted as part of the context, in the sense of VCLT article 31 § 2(b), it must have been made in connection with the conclusion of the interpreted treaty. According to the terminology used for the Vienna Convention, no state can be a party to a treaty before it enters into force.
54. Judging by the opinions expressed in the literature, the fact that a document is accepted "as an instrument related to the treaty" seems to also imply that the content of the document is to some degree accepted. See Villiger, p. 344; McRae, pp. 169–170; Elias, 1974, p. 75; Bernhardt, 1967, p. 498. See also Jiménez de Aréchaga, at the ILC's 18th session, 870:e meeting, *ILC Yrbk*, 1966, Vol. 1, Part 2, pp. 190–191, § 73; Castrén, on the same occasion, ibid., p. 189, § 54); Rosenne, at the ILC's 16th session, 769:e meeting, *ILC Yrbk*, 1964, Vol. 1, p. 313, § 54.
55. See Villiger, p. 344; McRae, pp. 189–170. See also Waldock, Sixth Report on the Law of Treaties, *ILC Yrbk*, 1966, Vol. 2, p. 98, § 16; and possibly also *Pulau Ligitan and Pulau Sipadan*, § 48. This view is further supported by the fact that, according to most experts, we shall include among the various phenomena typically coming within the scope of subparagraph (b) instruments of ratification, insofar as they contain reservations or *interpretative declarations* (Fr. *déclarations interprétatives*). (See e.g. Villiger, p. 344; Voïcu, p. 189, Waldock, Fourth Report on the Law of Treaties, *ILC Yrbk*, 1965, Vol. 2, p. 49, § 2; El-Erian, at the ILC's Seventeenth session, 797:e meeting, *ILC Yrbk*, 1965, Vol. 1, p. 153, § 60; Bartoš at the ILC's sixteenth session, 769:e meeting, *ILC Yrbk*, 1964, Vol. 1, p. 313, § 50; Ago, speaking as Chairman, on the same occasion, ibid., p. 313, § 51.) As is well known, the acceptance of a reservation does not need to be explicit. (See VCLT article 20 § 5.)
56. See Vierdag, 1988, pp. 76–82.
57. See ibid., pp. 82ff.
58. This is the sense seemingly assumed for the word CONCLUSION, CONCLUSION, and CELEBRACIÓN in VCLT articles 2 § 1(a), 3, 4, 31 § 2(a), 32, 40 § 2 and 49.
59. This is the sense seemingly assumed for the word CONCLUSION, CONCLUSION, and CELEBRACIÓN in VCLT articles 6, 7 § 2(a), 46, 52 and 59, as well as in the headings of VCLT Part II and Section 1.
60. See VCLT article 24.
61. See e.g. Draft Articles With Commentaries (1966): "Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation — Any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly the Commission confines itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties." (*ILC Yrbk*, 1966, Vol. 2, pp. 218–219, § 5.)
62. See p. 148, n. 55 of this work.
63. By an INTERPRETATIVE DECLARATION we shall understand a unilateral statement made by a state, at the conclusion of a treaty, with the purpose of clarifying its position vis-à-vis the meaning of some part of the treaty, in contrast to a reservation, which is

made with the purpose of excluding or modifying the legal effects of the treaty. (Cf. Horn, pp. 236–237; Voïcu, pp. 182–189.)

64. Cf. interpretation rule no. 15. (See Ch. 7 of this work.)
65. See Section 2 of this chapter.
66. One article that more than once mentions the CONCLUSION of a treaty is article 41:
    1. "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if...
    2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

    According to Vierdag, in this article the word CONCLUDE is used inconsistently. In paragraph 1, the word refers to the time interval from when negotiations on the agreement started to when the agreement entered into force; in paragraph 2, it refers to the point in time when the agreement is established as definite. (See Vierdag, 1988, p. 86.) I am not convinced. I can accept the interpretation that in paragraph 2 the word CONCLUDE refers to the point in time when the agreement is established as definite. However, I think there are persuasive arguments against accepting the interpretation suggested by Vierdag as regards paragraph 1. According to the reading I would like to suggest, the expression "conclude the agreement" used for paragraph 2 refers back to the expression "conclude an agreement" used for paragraph 1. If such is the case, in paragraph 1, too, the word CONCLUDE must refer to the point in time when the agreement is established as definite.
67. My italics.
68. See Ch. 6, Sections 1 and 2, of this work.
69. Cf. interpretation rule no. 15. (See Ch. 7 of this work.)
70. See Ch. 4, Section 2, of this work.
71. Loc. cit.
72. See above, in Ch. 4, of this work.
73. Symptomatic of this is the fact that a number of authors speak of CONTEXT IN THE STRICT SENSE and CONTEXT IN THE BROAD SENSE, where CONTEXT IN THE STRICT SENSE refers to "the text" of the interpreted treaty, and CONTEXT IN THE BROAD SENSE refers to the two contextual elements described in VCLT article 31 § 2(a) and (b). (See e.g. Köck, p. 90; Haraszti, p. 88.)
74. See Section 1 of this chapter.
75. See p. 107 and p. 110 of this work, respectively.
76. See e.g. Villiger, p. 344; Yasseen, p. 37; Schwarzenberger, 1969, p. 220; Voïcu, p. 103. See also Australia, at the Vienna Conference First session, 31st meeting of the Committee of the Whole, *Official Records*, p. 169, § 59; and Romania, on the same occasion, ibid., p. 169, § 55.
77. On authentic interpretation in general, see e.g. *Oppenheim's International Law*, pp. 1268–1269; Skubiszewski, 1983, pp. 898–902; Karl, 1983, pp. 40–45, 204–211; Haraszti, pp. 43–51; Voïcu, pp. 73–110, 137–217; Bernhardt, 1963, pp. 44–46.
78. See Ch. 1, Section 1, of this work.
79. A more detailed description of the contextual element set out in article 31 § 3(a) is provided in Ch. 6, Section 1, of this work.
80. See Ch. 6, Section 6 of this work.

CHAPTER 6

USING THE CONTEXT: THE ELEMENTS SET OUT IN VCLT ARTICLE 31 § 3

The purpose of this chapter is to describe what it means to interpret a treaty, using the contextual elements set down in article 31 § 3. Article 31 § 3 provides as follows:

> [When appliers use the context according to the provisions of VCLT article 31 § 1, they shall take] into account together with the context [described in § 2]:
> (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.

Earlier, we established the following shorthand description of how the context is to be used:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that between the provision and the context there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.[1]

Two questions remain to be answered, in order for the task set for this chapter to be considered completed:

(1) What is meant by "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"; "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"; and "any relevant rules of international law applicable in the relations between the parties"?
(2) What communicative standard or standards shall the parties to a treaty be assumed to have followed, when an applier interprets the treaty making use of said "agreement[s]", "practice[s]" and "rules of international law"?

I shall now give what I consider to be the correct answers to these questions. In Sections 1–5, I shall begin by answering question (1). In Section 6, I shall then proceed to answering question (2).

1 SUBPARAGRAPH (A)

According to Vienna Convention article 31 § 3, three different classes of phenomena shall be seen to come within the scope of this paragraph. One such class is the one described in subparagraph (a), namely "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

[T]out accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions ...

Todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones ...

Four conditions must be met in order for a phenomenon to fit this description: (1) the phenomenon must be included in the extension of the expression "agreement"; (2) the agreement must be one made "between the parties"; (3) the agreement must be "subsequent"; and (4) it must be "regarding the interpretation of the treaty or the application of its provisions". Let us examine each of these points one by one.

In order for a phenomenon to fit the description in subparagraph (a), it must fall within the extension of the expression "agreement" (Fr. *"accord"*; Sp. *"acuerdo")*. In subparagraph (a), AGREEMENT means an agreement in the legal-technical sense; that is to say, an act performed with the purpose of establishing a legal relationship.[2] Many international transactions occur without the parties involved having an intention to commit themselves other than politically or morally. Such agreements – denoted in the literature as gentlemen's agreements, non-binding agreements, agreements *de facto*, non-legal agreements, and so on[3] – are not included in the extension of the expression "agreement". In order for an international transaction to be categorised as an agreement in the sense of subparagraph (a), the states involved must have had the intention to create law – the intention must have been to conclude a legally binding agreement governed by international law. On the other hand, there seems to be no requirement with regard to the form of the agreement. It is a generally held view among legal authorities that the expression "agreement" refers to any international agreement, whether written or not.[4]

In order for an agreement to fit the description in subparagraph (a), it must be one made "between the parties" (Fr. *"entre les parties"*; Sp. *"entre las partes")*. PARTY, according to the definition given in VCLT article 2 § 1(g), means "a State which has consented to be bound by the treaty and for which the treaty is in force". By "the parties" all parties are meant.[5] In the legal regime established by articles 31–33 of the Vienna Convention, a recurring theme is that normally, a phenomenon cannot be

included in the context for the interpretation of a treaty, if all parties have not accepted it. Whether or not a state shall be considered a party in the sense of subparagraph (a) is determined based on the state-of-affairs that prevails when a treaty is interpreted, not on the state-of-affairs that once prevailed when the agreement was made.[6] Apparently, in order for an agreement to fit the description set forth in article 31 § 3(a), each and every one of those states bound by the treaty at the time of interpretation, must be bound by the agreement.

In order for an agreement to fit the description in subparagraph (a), it must be "subsequent" (Fr. *"ultérieur";* Sp. *"ulterior").* The expression "subsequent" refers back to the content of article 31 § 2: both subparagraph (a) and subparagraph (b) use the expression "the conclusion of the treaty".[7] "[T]he conclusion of the treaty", in the sense of article 31 § 2(a), means the point in time when the interpreted treaty was established as definite.[8] The meaning of the identical expression used for article 31 § 2(b) is (as yet) not entirely clear. Arguably, it refers either to the point in time when the interpreted treaty was established as definite, or to the time interval from when negotiations on the interpreted treaty started to when the treaty finally entered into force for the state that last became a party.[9] Given that the provisions of article 31 § 3(a) shall be understood so that the content of article 31 § 2 is not pragmatically contradicted, we arrive at the following conclusion: a "subsequent agreement" means an agreement made either after the point in time when the interpreted treaty was established as definite, or after the point when the treaty finally entered into force for the state that last became a party. Of these two alternatives, the latter must at once be dismissed; it is simply unreasonable. Assuming that a "subsequent agreement" is one concluded after the point when the interpreted treaty finally entered into force for the state that last became a party, then for many agreements the quality of being subsequent would be temporary indeed. An agreement concluded between two states, both of which have been parties to the interpreted treaty since it first entered into force, would only be subsequent as long as no other state expresses its consent to be bound – and this regardless of whether the new party also becomes a party to the agreement – since the agreement is no longer subsequent for all parties. A state-of-affairs such as this cannot possibly be what the parties to the Vienna Convention wished to achieve. Consequently, a "subsequent" agreement shall be understood as one whose earliest existence cannot be traced further back than to the point in time when the interpreted treaty was established as definite.

Another question is at what point, at the very earliest, an agreement can be said to exist, in the sense of subparagraph (a). Obviously, if it is a requirement that in each particular case it must be established whether an

agreement is "subsequent" or not, then it is not sufficient if the conclusion of the treaty can be determined, but not that of the agreement. In order for an agreement to be considered "subsequent", to my mind, the contents of said agreement must have been accepted at a point later than that which marks the interpreted treaty's conclusion. If a "subsequent agreement" means a transaction, which occurs after the point in time which marks the conclusion of the interpreted treaty, and the conclusion of the treaty is determined to be the point when the treaty was established as definite, then arguably the existence of the agreement must be tied to that same point. Further support for this understanding can be found in the provisions of Vienna Convention article 30. Article 30 brings into focus the situation where two treaties are found to be in conflict, and the one treaty is "earlier" while the other is "later"; in the heading of article 30 it is spoken of as "successive treaties relating to the same subject-matter". In the legal literature, different opinions have been expressed as to the implications of a treaty being termed as "earlier" or "later" than another. According to some authors, the decisive criterion is the point in time when a treaty was established as definite.[10] According to others, the determining factor is the point in time when a treaty entered into force.[11] Differences aside, no one author seems to have doubts that the criterion applied to the one treaty shall also be applied to the other. Two treaties (A and B) are "successive" with regard to each other, either because A was authenticated at a point later than B, or because A entered into force at a point later than B. Similarly, it seems a reasonable assumption that an agreement can be considered "subsequent" to a treaty, in the sense of VCLT article 31 § 3(a), either because it was authenticated at a point later than the authentication of the treaty, or because the agreement entered into force for the parties at a point later than the entry into force of the treaty.

In order for an agreement to fit the description in subparagraph (a), it must be "regarding the interpretation of the treaty or the application of its provisions" (Fr. *"au sujet de l'interpré tation du traité ou de l'application de ses dispositions"*; Sp. *"acerca de la interpretación del tratado o de la aplicación de sus disposiciones")*. Of course, an agreement "regarding" the interpretation of a treaty or the application of its provisions means an agreement, *the purpose of which* is to clarify the meaning of a treaty or to serve in some other manner as a guide for application.[12] An agreement cannot be said to be REGARDING the interpretation of a treaty or the application of its provisions, in the sense of subparagraph (a), merely because it includes a passage that could be of use for the interpretation or the application of the treaty. Less clear is the meaning of the expression "application". In article 31 § 3(b), the APPLICATION of a treaty refers to any action taken

by an applier on the basis of the interpreted treaty.[13] It seems a reasonable assumption that in subparagraph (a), the word APPLICATION should be given this meaning too. Consequently, an agreement regarding the "application" of a treaty does not necessarily need to amount to a set of rules for the APPLICATION of the treaty in the legal-technical sense of the word. It can also be equivalent to an instruction concerning the use of the treaty in the more general sense. A typical example is when arrangements are made for the implementation of the treaty. Even if we concur in the opinion of some authors,[14] that it is not completely practicable to distinguish between the *interpretation* and the *application* of a rule of law,[15] it is nevertheless clear that in the particular context examined, the concepts only partially overlap with each other. It might be that an agreement regarding the "interpretation of the treaty" also has regard to "the application of its provisions", and vice versa. However, it need not necessarily be the case. It seems as if the parties to the Vienna Convention have anticipated the possibility that an agreement, even if it has not been made to clarify the meaning of a treaty, can nevertheless be of use when the treaty is interpreted.

2 SUBPARAGRAPH (B): INTRODUCTION

The second class of phenomena that shall be counted as part of the context, according to VCLT article 31 § 3, is the one described in subparagraph (b), namely "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[T]oute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité ...

Toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de la interpretación del tratado ...

In order for a phenomenon to fit the description set out in subparagraph (b), four conditions must be met: (1) the phenomenon must be such, that it can be considered a "practice"; (2) it must be a question of a practice "in the application of the treaty"; (3) the practice must be "subsequent"; and (4) it must be a practice "which establishes the agreement of the parties regarding its interpretation". Let us examine these points one by one, in numerical order.

In order for a phenomenon to fit the description in subparagraph (b), it must be such that it can be considered a "practice" (Fr. *"pratique"*; Sp. *"práctica").* By "practice" we mean the output of a treaty – admittedly, not a very potent definition, but a better description hardly seems possible. In the text of VCLT article 31 § 3(b), the emphasis is not on the word practice; instead, it lies on the qualifications attached to this word.[16] "[P]ractice" is

simply the sum total of a number of applications – any applications – as long as they "establish the agreement of the parties regarding its interpretation". According to this definition, "practice" does not necessarily emanate only from the parties themselves. All appliers of a treaty are potential creators of "practice", whether it be the state parties themselves, or the non-state organ – possibly an international organisation – with which the application might have been entrusted.[17] Nor can "practice" be limited to the positive aspects of a treaty's use. "[P]ractice" can be the sum total of a number of (positive) actions; but it can also be the result of omissions, manifesting itself in the absence of (positive) actions arguably expected.[18]

A question that has garnered attention in the literature is whether a single, one-time application of a treaty in itself can be considered sufficient for us to speak of a "practice", or whether additional applications are required.[19] In my view there is something laboured about this discussion. Of course, considering the realities of life, it is often required that "practice" takes the form of a series of applications. A single application is normally not capable of establishing an agreement held among the parties to an interpreted treaty. However, from a principle point of view, I find it difficult to see why *one* application cannot constitute a "practice" if *two* can. The emphasis in the Vienna Convention – I repeat – is not on the word PRACTICE. Considering this, it seems to be the only reasonable interpretation that a "practice" can consist of any number of applications, one or two or many – just as long as they "establish the agreement of the parties regarding its interpretation".

In order for a practice to fit the description in subparagraph (b), it must be a practice "in the application of the treaty" (Fr. *"suivie dans l'application du traité"*; Sp. *"seguida en la aplicación del tratado")*. Generally speaking, THE APPLICATION of a treaty is defined as action taken in accordance with the provisions of that treaty. "L'application", Yasseen writes, ...

> ... est l'opération qui assure le passage de l'abstrait au concret, elle détermine les conséquences de la règle dont le sens est dégagé par l'interprétation dans une situation concrète.[20]

In subparagraph (b), "application" stands for a broader concept.[21] Accordingly, it can be considered an "application" when the provisions of a treaty are invoked to support a decision or an action of a state in a specific situation;[22] when the provisions of a treaty are invoked to support the pleadings of a state in a legal dispute;[23] when the provisions of a treaty are invoked to support the position of a state at a diplomatic conference;[24] when the provisions of a treaty are invoked to support the position of a state at a meeting of an international organisation;[25] when the provisions of a treaty are the cause for an official communication, for example a protest or an expression of appreciation;[26] when the provisions of a treaty, for a

parliament, are the cause for introducing new law;[27] when the provisions of a treaty are the cause for concluding a new international agreement or the cause for the way the new agreement is drafted;[28] and so forth. Just as with the expression "practice", it seems that we should not read too much into the expression "in the application of the treaty". By "the application of the treaty" paragraph (b) quite simply refers to each and every measure taken *on the basis of the interpreted treaty*.[29]

In order for a practice to fit the description in subparagraph (b), it must be "subsequent" (Fr. *"ulté rieurement suivie";* Sp. *"ulteriormente seguida")*. The expression "subsequent" refers back to expression "the conclusion of the treaty" used in VCLT article 31 § 2.[30] I see no reason to doubt that the *conclusion* assumed in the text of subparagraph (b) is also the one assumed in the text of subparagraph (a).[31] Hence, "subsequent practice" should be understood to mean a practice, only if originated after the point in time when the interpreted treaty was established as definite.

In order for a practice to fit the description in subparagraph (b), it must be a practice "which establishes the agreement of the parties regarding its interpretation" (Fr. *"par laquelle est é tabli l'accord des parties à l'égard de l'interprétation du traité";* Sp. *"por la cual conste el acuerdo de las partes acerca de la interpretación del tratado")*. In the terminology of the Vienna Convention, PARTY means "a State which has consented to be bound by the treaty and for which the treaty is in force".[32] By "the parties" all parties are meant.[33] In the legal regime established by articles 31–33 of the Vienna Convention, it is a recurring theme that, normally, a phenomenon cannot be included in the context for the interpretation of a treaty, if all parties have not accepted it. Whether or not a state shall be considered a party, in the sense of subparagraph (b), is determined based on the state-of-affairs that prevails when a treaty is interpreted.[34] It seems that in order for a practice to fit the description set forth in subparagraph (b), the agreement established by the practice must be all-inclusive: each and every one of those states, which are bound by the interpreted treaty at the time of interpretation, must embrace the agreement. A practice "which establishes the agreement" means a practice, on the basis of which the assumption can arguably be made that an agreement exists.[35] Thus, a practice "which establishes the agreement of the parties regarding its [i.e. the treaty's] interpretation" will not necessarily be a practice, to which all parties themselves have contributed. All parties must have acquiesced in the interpretation. However, if the circumstances allow for the assumption that a party has consented, even though the party itself did not contribute to the practice, then this shall be sufficient.[36]

A distinction must be made between a practice "which establishes the agreement between the parties regarding its [i.e. the treaty's] interpretation",

and a practice which establishes an agreement of the parties concerning a *modification* of the treaty. If two or more states enter into a treaty, but then decide that for one reason or another, the content of the treaty is no longer satisfactory, then, of course, they are free to agree on a modification of the treaty. Such an agreement can be realised in different ways. First of all, it can be realised in the way perceived by the Vienna Convention – through negotiation and adoption of yet another treaty.[37] However, a modification of a treaty can also be effected in more informal ways – by a subsequent practice in the application of the treaty, which establishes an agreement of the parties to a modification of said treaty.[38] Clearly, there is a very close kinship between a subsequent practice in the application of a treaty, which establishes an agreement of the parties to a modification of the treaty on the one hand, and on the other a "subsequent practice which establishes agreement between the parties regarding its interpretation". Formally, however, we are talking about two completely different things. When a practice establishes an agreement to a modification of a treaty, then the agreement is considered an integral part of the treaty (or, rather, the agreement which the treaty expresses). The agreement *shall* have legal effect; and that effect extends to all cases, to which the treaty could conceivably be applied. When a practice establishes an agreement concerning the interpretation of a treaty, then the agreement is merely a means of interpretation. The agreement *may* have a legal effect, depending upon the possible conflicts with other means of interpretation; but when the agreement has a legal effect, the effect is limited to the particular case at hand.[39]

Now, the question naturally arises how we are to distinguish between a subsequent practice which establishes an agreement of the parties to a modification of a treaty, and a practice "which establishes the agreement between the parties regarding its interpretation". Some authors seem to have resigned to the problem altogether. For example, Sinclair writes:

> It will be apparent that the subsequent practice of the parties may operate as a tacit or implicit modification of the terms of the treaty. It is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effected under the pretext of interpretation. There is therefore a close link between the concept that subsequent practice is an element to be taken into account in the interpretation of a treaty and the concept that a treaty may be modified by subsequent practice of the parties.[40]

In my view, this is a position grounded in some degree of confusion. Generally speaking, it is of course true that in the terminology of the Vienna Convention, the word INTERPRETATION cannot be defined in more precise terms than the following: INTERPRETATION of a treaty means the application of a legally accepted rule of interpretation.[41] According to this definition, as long as a practice can be justified by reference to a legally accepted rule

of interpretation, irrespective of the rule referred to, it would be considered a practice which establishes an agreement regarding the "interpretation" of a treaty – without a doubt a very daunting criterion. However, the issue at hand is not a usage of the word INTERPRETATION in general, but rather the specific usage of that word in the context of VCLT article 31 § 3(b). In this provision, the word INTERPRETATION bears a very specific meaning. As we observed earlier, when appliers use a subsequent practice to interpret a treaty, this is always in relation to conventional language.[42] A subsequent practice is used, either – in the case where the ordinary meaning of a treaty provision is vague – to make the ordinary meaning appear more precise, or – in the case where the ordinary meaning of a treaty provision remains ambiguous – to determine which one of the two possible ordinary meanings is correct and which one is not. In order to serve in this capacity, a subsequent practice needs no further justification apart from the obvious – that it is consistent with conventional language. Hence, a subsequent practice in the application of a treaty can be said to establish an agreement between the parties regarding the treaty's "interpretation" insofar as practice is consistent with "the ordinary meaning to be given to the terms of the treaty".[43]

In the text of VCLT article 31 § 3(b), a problematic choice of words is the expression "agreement" (Fr. *"accord"*; Sp. *"acuerdo").* Clearly, "agreement" means a concordance held among the parties to the interpreted treaty with regard to its meaning. Less clear is the *type of concordance* assumed. In the older literature, practice is described as an aid for the determination of THE HISTORICAL INTENTION – the concordance upon which the interpreted treaty was originally concluded.[44] In the contemporary literature, authors are less categorical: the historical intention is still considered to be an "agreement"; but so are certain SUBSEQUENT CONCORDANCES, that is to say concordances arrived at after the conclusion of the interpreted treaty.[45] By THE HISTORICAL INTENTION, authors refer to a concordance held with the intention to create law. THE HISTORICAL INTENTION is a concordance among the parties to the interpreted treaty with regard to what meaning the treaty *shall* be given. Less clear is what authors refer to when they speak of a SUBSEQUENT CONCORDANCE. According to the meaning ascribed to the term in conventional language, SUBSEQUENT CONCORDANCE can be used to stand for different things. It can be used to stand for a concordance among the parties to the interpreted treaty with regard to what meaning the treaty *shall* be given; and it be used to stand for a concordance among the parties to the interpreted treaty with regard to what meaning the treaty *may* be given. Just like the historical intention, a SUBSEQUENT CONCORDANCE can be held with the intention to create law; but not necessarily so.[46]

According to some authors, a subsequent concordance is to be considered an "agreement" solely in those cases where it is the intention of the parties to create law.[47] For other authors, a subsequent concordance is to be considered an "agreement", regardless of whether or not it is the intention of the parties to create law.[48] Few authors consider a subsequent concordance to be an "agreement" solely in those cases where it is *not* the intention of the parties to create law.[49] In my judgment, a subsequent concordance is *in any event not* an "agreement" when it is held with the intention to create law. When a subsequent practice establishes an agreement between the parties to a treaty regarding its interpretation, and the agreement is a subsequent concordance held with a law-creating intention, then we are faced with a legally binding interpretative agreement (Fr. UN ACCORD INTERPRÉTATIF). When such an agreement is used for the interpretation of a treaty, it can be done on the basis of two different communicative assumptions.[50] In the first of these two assumptions, the parties have expressed themselves in such a way that, considering the context, the interpreted provision does not give rise to a logical tautology. On the second assumption, the parties have expressed themselves so that, considering the context, the interpreted provision does not give rise to a logical contradiction. In the former case, the act performed amounts to an interpretation in the sense of the Vienna Convention. In the latter case, the act performed amounts to something else – it amounts to what is commonly called an authentic interpretation (Fr. UN INTERPRÉTATION AUTHENTIQUE).[51] An authentic interpretation does not compete on equal terms with an interpretation arrived at through an application of the rules laid down in the Vienna Convention (or the identical rules of customary international law); it always takes precedence. After all, the rules laid down in the Vienna Convention are *jus dispositivum* – they apply only on the condition, and to the extent, that the parties to a treaty have not agreed among themselves on something else.[52] When an applier uses a "subsequent practice" for the interpretation of a treaty, it is only on the basis of the assumption that the treaty and the practice – or, rather the agreement that practice establishes – do not logically contradict one another.[53] Considering this, a subsequent concordance cannot possibly be seen an "agreement", in the sense of VCLT article 31 § 3(b), when it is held with the intention to create law.

Now, the difficult question is what all this says about the credibility of the international law literature. Contemporary authors agree that in the extension of the expression "agreement" we shall include not only the meaning originally intended, but also certain SUBSEQUENT CONCORDANCES. However, authors do little to help us understand what, according to them, a SUBSEQUENT CONCORDANCE actually is. Taken *en masse*, authors can be

said to be of the opinion, either that a subsequent concordance is to be considered an "agreement" only in those cases where it is held with a law-creating intention. Or, they contend that a subsequent concordance is to be considered an "agreement", in those cases where it is held with a law-creating intention, as well as in those cases where such an intention is absent. The correct position, according to how I perceive things, is that a subsequent concordance *in any event* is *not* to be considered an "agreement", in those cases where it is held with a law-creating intention. This would imply that a majority of authors have misjudged the issue completely. Assuming this to be the case, the decisive question is whether we should give the literature the benefit of the doubt and assume that authors are right, at least regarding the claim that a subsequent concordance would be considered an "agreement" where it is *not* held with a law-creating intention. Or should we assume that authors have erred completely, and that subsequent practice – as claimed in the earlier literature – is merely an aid for the determination of the historical intention? This is a delicate question. In my opinion, the extension of the expression "agreement" includes subsequent concordances. However, I am also of the firm opinion that the literature alone does not adequately support this conclusion. Sufficient support can be found in international judicial opinions. The practice of international courts and tribunals convincingly shows that a subsequent concordance is to be considered an "agreement", in those cases where it is not held with a law-creating intention.[54] This is a proposition I will now try to establish.

3 SUBPARAGRAPH (B): THE EXPRESSION "AGREEMENT"

Three examples can be used to illustrate the proposition that, according to the opinion of international courts and tribunals, a subsequent concordance is to be considered an "agreement" in those cases where it is not held with a law-creating intention. A first example is the international award in the case of *Heathrow Airport User Charges*.[55] In 1977, the USA and the United Kingdom had concluded an air services agreement, commonly referred to as Bermuda 2. In this agreement, provisions had been included regarding airport charges. In 1979 and 1980, on two occasions, the United Kingdom had decided to increase charges for the use of state-owned Heathrow Airport. For the American airlines TWA and Pan-American this resulted in a combined increase in charges of 70 to 80 percent. The airlines found this to be unacceptable, and a civil process was initiated. A settlement was reached in February 1983. As a result of this settlement, on 6 April 1983 the governments of the United States and the United Kingdom signed a *Memorandum of Understanding ("MoU")*. In this document, the two states acknowledge that the

earlier dispute between them has been set aside, and that no future legal action will be taken with respect to the period up to and including 31 March 1983. In addition, they express their viewpoints regarding future pricing policies. In paragraph 5 we find the following passage:

> The [US Government] USG has expressed a number of concerns about the [British Airports Authority] BAA's peak pricing practices. In particular, the USG believes that (1) all traffic should bear at least some capital costs; (2) all traffic should bear its share of operating costs; (3) peak periods, where established at any airport, should encompass all periods of comparable activity at that airport; and (4) no peak charge should be assessed with respect to any service or facility unless a charge is also assessed for such service or facility during off-peak periods. [Her Majesty's Government] HMG sees force in the last three of these views and will commend them to the BAA, as well as drawing all the USG concerns to the attention of the BAA so that they may be taken into account in their collaborative review of peak pricing.[56]

One would believe the issue to be settled; but it was not. In April 1984, the US Deputy Assistant Secretary for Transportation and Telecommunications sent a letter to the UK Department of Transport, observing that the obligations assumed by the United Kingdom through the conclusion of Bermuda 2 and the MoU of 1983 had not yet been fulfilled. Four years later, in December 1988, the states agreed to initiate international arbitration proceedings. No sooner had the arbitration tribunal been constituted than the first problem arose. The parties disagreed on how to put the question, which the tribunal would then be requested to answer. In particular, there was disagreement concerning the importance that the arbitration tribunal should assign to the 1983 MoU. The American government maintained that the instrument was legally binding, arguing that it be given the same kind of respect as the provisions of Bermuda 2. The United Kingdom declared a contrary opinion:

> [T]he MoU is not the source of independent obligations - - - [It] no more deserves specific mention in the Terms of Reference than anything else relevant to the interpretation of Bermuda 2, such as, for example, subsequent practice.[57]

In this situation, the task of the tribunal was to formulate its own mandate, and the tribunal did so in the following manner:

> 1. The Tribunal is requested to decide whether, in relation to the charges imposed for the use of Heathrow Airport upon airlines designated by the Government of the United States of America under Article 3 of the Air Services Agreement, done at Bermuda on 23 July 1977, the Government of the United Kingdom have failed to fulfil their obligations under Article 10 of the said Air Services Agreement, interpreted having regard to *inter alia* the Memorandum of Understanding between the two Governments on Airport User Charges of April 6, 1983, in any of the charging periods beginning on or after 1 April 1983.
>
> 2. If the answer to the foregoing question is in the affirmative, the Tribunal is further requested to decide what, if any, remedy or relief should be awarded.[58]

However, the last word regarding the importance of the MoU had not been uttered. As one might expect the question was raised again in connection

with the interpretation of Bermuda 2. According to the USA, the MoU was to be considered a subsequent agreement, to be used for the interpretation of Bermuda 2 under the provisions of Vienna Convention article 31 § 3(a). According to the United Kingdom, the instrument was to be considered a subsequent practice to be used under the provisions of Vienna Convention article 31 § 3(b). The tribunal concurred in the latter opinion:

> In the judgment of the Tribunal, the MoU constitutes consensual subsequent practice of the Parties and, certainly as such, is available to the Tribunal as an aid to the interpretation of Bermuda 2 and, in particular, to clarify the meaning to be attributed to expressions used in the Treaty and to resolve any ambiguities.
>
> 6.8 The Tribunal notes that, even in respect of the second, third and fourth of the views of USG as recorded in paragraph 5 of the MoU, although HMG said that it saw force in those views, it clearly stopped short of accepting any duty to use its best efforts to ensure that the views were respected. However even if, contrary to the Tribunal's impression, the MoU were intended in the respects here under consideration to create independent legally enforceable obligations as opposed to merely recording the understandings of the Parties, the Tribunal would lack jurisdiction in respect of those obligations, as such, since its jurisdiction is derived from Article 17 of the Treaty which refers only to disputes "arising under this Treaty". The MoU is therefore available to the Tribunal as a potentially important aid to interpretation but is not a source of independent legal rights and duties capable of enforcement in the present Arbitration.[59]

The statement speaks for itself. Obviously, according to the tribunal, a subsequent concordance is to be considered an "agreement", in the sense of VCLT article 31 § 3(b), even though it is not held with a law-creating intention.

My second example is the international award in the *Young Loan* case.[60] The facts of this case have already been brought into discussion,[61] and I will not unnecessarily repeat myself. As we observed earlier, the parties were in dispute as to the meaning of the 1953 London Debt Agreement (LDA) and the following expression: "least depreciated currency" (Ger. *"Währung mit der geringsten Abwärtung"*; Fr. "*devise la moins dépréciée")*. The arbitration tribunal begins by declaring itself true to the rules of interpretation laid down in VCLT articles 31–33. Hence, in order to determine the meaning of the expression "least depreciated currency" (Ger. *"Währung mit der geringsten Abwärtung"*; Fr. *"devise la moins dépréciée")*, the tribunal first resorts to conventional language,[62] then to the contextual elements set out in VCLT article 31 § 2,[63] and to the object and purpose of the treaty.[64] Then the tribunal proceeds to examine the contextual elements set out in VCLT article 31 § 3(a) and (b).[65] The reasoning of the tribunal opens as follows:

> According to Article 31 (3) (a) and (b) of the VC[L]T, interpretation of a treaty must take account both of subsequent agreements between the contracting parties on interpreting the treaty and of subsequent practice in the application of the treaty from which a consensus

between the parties regarding the interpretation of specific parts of the treaty might be deduced.

First, it is undisputed that the parties to the LDA were unable to agree on a particular interpretation of the clause in question after the LDA had been concluded. An attempt to do so in October 1953 in Basel proved fruitless. The continuing differences of opinion are most clearly evidenced by the fact that after a few further vain attempts, the dispute was eventually brought before the Arbitral Tribunal.

An indication of at least a tacit subsequent understanding between the contracting parties on a particular rendering of the term "depreciated" in the clause in dispute might, therefore, at best be found in the relevant practice of the parties concerned.[66]

Already this passage indicates that in the view of the tribunal, a subsequent concordance can indeed be considered an "agreement", in the sense of VCLT article 31 § 3(b), even though it is not a legally binding agreement governed by international law. First of all, the tribunal notes the non-existence of a subsequent agreement in the sense of § 3(a). However, according to how things are obviously viewed by the tribunal, this does not rule out the existence of an agreement in the sense of § 3(b). Second, the word used in the reasoning of the tribunal to denote a concordance in the sense of § 3(a) is not the same as that used to denote a concordance in the sense of § 3(b). In § 3(a) the concordance referred to is denoted by the word AGREEMENT; in § 3(b) the concordance referred to is denoted first by the word CONSENSUS, and then by the word UNDERSTANDING. This same opinion is manifested in the manner in which the tribunal describes the relevant official documents, *inter alia* a communication from the President of the United States to the American Senate, and a letter from the Bank of England to the German *Federal Debt Administration* (FDA):

The communication from the President of the United States to the Senate of 10 April 1953 points out that the gold clause should no longer be applied in cases of "further depreciation" and that, instead of the gold clause, the clause in dispute *should* now be applied in those cases where one of the currencies concerned "has depreciated by 5 *per cent*. or more" --- [T]he letter from the Bank of England to the Federal Debt Administration [sic!] of 2 April 1953 stated, in connection with the calculation method under the disputed clause, that such calculations *should* be based on "the currency most favourable to bondholders".[67]

When the tribunal says that a treaty provision *should* be applied in a certain way – "the clause in dispute should now be applied", "under the disputed clause ... calculation should be based on" – it obviously carries a meaning different from when it says that a provision *shall* be applied. All in all, I have difficulty coming to a conclusion other than this: in the view of the tribunal, a subsequent concordance is to be considered an "agreement", in the sense of VCLT article 31 § 3(b), even though it is not held with an intention to create law.

My third example is the international award in the *Beagle Channel Arbitration*.[68] The facts of the case have already been introduced,[69] and I see

no reason for unnecessary repetition. As we know, the parties were in dispute as to the meaning of articles II and III of the 1881 Argentine-Chilean Boundary Treaty. To support its interpretation of the two articles, Chile had cited the behaviour of the parties in the period immediately following the conclusion of the 1881 agreement:

> Thus in 1892 a decree fostering colonization was published in the Official Gazette of the Republic, and a sub-delegation was established on Lennox Island; in 1894 a system of land leases through public auction was inaugurated as a consequence of a law of 1893, also published in the Official Gazette; in 1896 a concession on Picton was granted to a British settler of distinction, Thomas Bridges; in 1905 a postal service was established. Indeed, in the period extending from 1892 through 1905, numerous official documents dealt with acts of jurisdiction in the three islands and many of them described the islands as lying south of the Beagle Channel - - -
>
> (c) Chile contends, and the evidence appears to support the contention, that most of these activities (which were openly carried out) were well known to the Argentine authorities. Thus in the period between 1892–1898 the Argentine Governor at Ushuaia specifically and on several occasions drew the attention of the authorities in Buenos Aires to various Chilean acts on the islands, but without eliciting any positive reaction. According to Chile, at no time did Argentina register any reservation of rights, or initiate any protest, until 1915, and even this protest was limited to two of the three islands.[70]

"The subsequent conduct of the two Governments", claimed Chile, ...

> ... confirms the Chilean interpretation of the Treaty, if it be the case that the textual approach is not considered to be conclusive.[71]

Argentina protested, contending that practice could not be assigned the importance that Chile would want it to have. These opinions of the parties soon proved to differ not so much as to the content of practice, but as to the content of the rules of interpretation as such.

Argentina and Chile were in agreement insofar as they both considered a subsequent practice to be a means of interpretation open to use, even though the agreement established is not the historical intention, but rather a subsequent concordance. The differences concerned the more precise nature of such a subsequent concordance. According to Argentina, a subsequent concordance was not to be considered an "agreement", in the sense of VCLT article 31 § 3(b), if it was not held by the parties with the intention to create law. According to Chile, the case was the opposite. The arguments are cited by the court as follows:

> First and foremost Argentina invokes the express terms of the Vienna Convention, Article 31, paragraph 3(b), which specifies that in interpreting a treaty
>
> "There shall be taken into account, together with the context:
>
> (b) Any subsequent practice in the application of the Treaty [sic!] which establishes the agreement of the Parties [sic!] regarding its interpretation."

The key word in this article, according to Argentina, is "agreement", and the Protocol of 1893 (see *supra*, paragraphs 73–78) is cited as a typical illustration of what was intended. She interprets the Convention as requiring a manifestation of the "common will" of the Parties and denies that the "unilateral acts" of Chile can be said to manifest any kind of agreed interpretation or common will. This being so, she asserts that the entire Chilean argument lacks relevance. Chile's answer to this line of reasoning takes the form of a simple denial of the meaning of the Vienna Convention advanced by Argentina. The concept of "agreement" in the clause cited does not require a formal "synallagmatic" transaction. It means consensus, and can be satisfied if "evidenced by the subsequent practice of the Parties which can only involve the acts, the conduct, of the Parties duly evaluated" (Oral Proceedings, VR/19, p. 184). The agreement, so Chile maintains, stems *from conduct* – in this instance from the open, persistent and undisturbed exercise of sovereignty by Chile over the islands, coupled with knowledge by Argentina and the latter's silence.[72]

After this, the reasoning of the court makes an interesting reading:

[T]he Court cannot accept the contention that no subsequent conduct, including acts of jurisdiction, can have probative value as a subsidiary method of interpretation unless representing a formally stated or acknowledged "agreement" between the Parties. The terms of the Vienna Convention do not specify the ways in which "agreement" may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the Treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.[73]

It seems reasonably clear that the court agrees with Chile, not just with respect to the interpretation of the 1881 Boundary Treaty, but also with respect to the interpretation of VCLT article 31 § 3(b).[74] However, it must be admitted that nowhere in the court's statement is this expressly stated. According to what the court says, subsequent practice may be a valuable means of interpretation, although it does not amount to an agreement in the formal sense of the word; that is, it does not amount to an agreement that two or more parties bring into being by declaring their intentions expressly. A tacit agreement may amount to a legally binding agreement, just as it may amount to a concordance not held with a law-creating intention. However, considering that the court concurs with the interpretation of Chile of the 1881 Boundary Treaty, it is hard to believe that in the opinion of the court, a subsequent practice would be a valuable means of interpretation, only when it amounts to a legally binding agreement, whether tacit or express; for this was exactly the interpretation that Argentina had supported. If the court agrees with Chile with respect to the interpretation of the 1881 Boundary Treaty, but does so based upon what Argentina, and not Chile, claims to be the correct interpretation of the Vienna Convention, then an explanation

of this rather odd way of reasoning would have been expected. No such explanation is given. On the whole, then, the only reasonable assumption is that in the view of the court, a subsequent concordance would have to be considered an "agreement", in the sense of VCLT article 31 § 3(b), even though it is not held with the intention to create law.

4 SUBPARAGRAPH (C): INTRODUCTION

The third and final class of phenomena coming within the scope of VCLT article 31 § 3, is the one described in subparagraph (c), namely "any relevant rules of international law applicable in the relations between the parties".

[T]oute règle pertinente de droit international applicable dans les relations entre les parties.

Toda norma pertinente de derecho internacional aplicable en las relaciones entre las partes.

Two conditions must be met in order for a phenomenon to fit this description: (1) the phenomenon must be included in the extension of the expression "relevant rules of international law"; and (2) it must be a question of a rule that is "applicable in the relations between the parties". Let us examine these points one by one.

In order for a phenomenon to fit the description in subparagraph (c), it must be included in the extension of the expression "any relevant rules of international law" (Fr. *"toute rè gle pertinente de droit international";* Sp. *"[t]oda norma pertinente de derecho internacional")*. "[R]ules of international law", according to most authors, include all rules which spring from any of the formal sources of international law, that is to say, from international agreements, from customary international law, or from "the general principles of law recognized by civilized nations".[75] Some authors wish to give the expression a more limited meaning. According to Schwarzenberger, the extension of the "rules of international law" is limited to those rules deriving from customary international law and from the general principles of law, and it does not include those which derive from international agreements.[76] According to Sinclair, the extension is limited to those rules deriving from international agreements and from customary international law, and it does not include those which derive from the general principles of law.[77] Neither of these views, however, appears to be well founded. The reason given by Schwarzenberger for the proposition that rules deriving from international agreements should not be included in the extension of the expression "rules of international law" is that relevant international agreements are already covered by the provisions of subparagraph (a), which of course is an erroneous conclusion. All international agreements that are "relevant" when a treaty is interpreted do not necessarily come along as "subsequent"; nor do they necessarily "[regard] the interpretation of the treaty or the application of its provisions".[78] The reason Sinclair might have

had for the suggestion that the general principles of law should be excluded is not openly expressed; but in any case the suggestion seems difficult to reconcile with the text of the Vienna Convention. The text speaks of "*any* relevant rules of international law" (Fr. "*toute* règle pertinente de droit international"; Sp. "*[t]oda* norma pertinente de derecho internacional").[79] Arguably, this can only be understood as a reference to any rule of international law, whatever the source.

The use of the expression "relevant" strikes me as a bit odd. It is commented on by Uibopuu:

> [T]he reference to "relevant rules" in Art. 31 para 3(c) in the Convention can be taken as an indication that analogy to rules of International Law other than directly applicable to the subject-matter of the case were to be excluded.[80]

I am inclined to concur. When appliers use the "relevant rules of international law", they always base their action on a very specific communicative assumption. According to this assumption, the parties to the interpreted treaty have expressed themselves in such a way that the treaty does not logically contradict any of the "relevant rules of international law applicable in the relations between the parties".[81] The point is that appliers, faced with two conflicting conventional meanings, shall be able to dismiss the one as logically incompatible with "relevant rules of international law". So, the only sensible interpretation of subparagraph (c) must be this: a rule of international law is to be considered "relevant", if (and only if) it governs the state of affairs, in relation to which the interpreted treaty is examined. How else would it be possible to dismiss an interpretation alternative as logically incompatible with "relevant rules of international law"?

In order for a rule of law to fit the description in subparagraph (c), the rule must be "applicable in the relations between the parties" (Fr. *"applicable dans les relations entre les parties"*; Sp. *"aplicable en las relaciones entre las partes")* . The expression "applicable in the relations between the parties" appears to be problematic. The meaning of "the parties" can easily be established. PARTY, in the terminology of the Vienna Convention, means "a State which has consented to be bound by the treaty and for which the treaty is in force".[82] By "the parties" all parties are meant.[83] Whether a rule of international law shall be considered "applicable in the relations between the parties" is determined based on the state-of-affairs, which prevails when a treaty is interpreted, and not on the state-of-affairs, which prevailed when the relevant rule of law entered into force.[84] In order for a rule of law to fit the description in subparagraph (c), each and every one of those states, which are bound by the interpreted treaty at the time of interpretation, must also be bound by the relevant rule of law. More difficult to understand is the expression "applicable". An "applicable" rule is one that can be applied to

the relationship held between the parties to the interpreted treaty on a certain assumed occasion. This occasion can either be the point in time when the treaty was concluded; or it can be the very moment of interpretation. The former alternative is the one that best conforms to the earlier legal doctrine. In his influential article of 1953, Fitzmaurice states as follows:

> In a considerable number of cases, the rights of States (and more particularly of parties to an international dispute) depend or derive from rights, or a legal situation, existing at some time in the past, or on a treaty concluded at some comparatively remote date ... It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today.[85]

In the contemporary literature authors are less categorical. Today, the general opinion is that an applier – depending on the circumstances – has the possibility of using not only those rules which were applicable at the time when the interpreted treaty was concluded, but also those applicable at the time of interpretation.[86] The decisive question then appears to be the following: Under what particular circumstances shall the two respective categories of rules be used? When, exactly, shall the expression "relevant international rules of law" be considered a reference to those rules, which were applicable at the time when the interpreted treaty was concluded? And when shall it be considered a reference to those rules, which are applicable at the time of interpretation?

In my judgment, this issue of variations in law over time is to be resolved in the very same manner we used previously to resolve the issue of temporal variation in language.[87]

> If it can be shown, that the thing interpreted is a generic referring expression with a referent assumed by the parties to be alterable, then the decisive factor for determining the meaning of the "relevant rules of international law" shall be the law applicable at the time of interpretation. In all other cases, the decisive factor shall be the law applicable at the time when the interpreted treaty was concluded.

Some support for this conclusion can be found in the literature. Sinclair writes for example:

> The International Court of Justice has lent its support to this concept that certain provisions of a treaty may be interpreted and applied in the light of international law as it has evolved and developed since the time when the treaty was concluded. It has however done so within carefully circumscribed limits. In its advisory opinion on the *Legal Consequences for States of the continued presence of South Africa in Namibia*, the Court stated:
>
> "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account

the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."

- - - [T]here 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. But 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.[88]

Elias expresses something similar:

While it may be useful to refer to the state of the law at the time of conclusion of the treaty as governing its interpretation, it is necessary to take into account as well the so-called intertemporal law in its application to the interpretation of treaties; that is to say, to have regard to the problem of the effect of the evolution of the law on the interpretation of the legal terms used in a treaty. Of course, the intention of the parties is a relevant consideration in the application of international law to the interpretation of the treaty. In the *Namibia Case*, the International Court has summarised the legal position as follows: [here follows the passage from the ICJ advisory opinion already found in the quotation of Sinclair].[89]

Yasseen observes in more detail:

C'est le traité lui-même qui indique si ses dispositions pourraient subir l'effet du l'évolution du droit international.

Tout ici est affaire d'espèce, tout dépend de ce que le traité prévoit, de ce que les parties veulent. Certaines catégories de traités dont le but est d'établir une solution stable sont réfractaires à tout changement. Même si les parties à ces traités ne le disent pas expressément, il est raissonable de présumer que leur intention est en harmonie avec le but qu'elles poursuivent et, par conséquent, inconciliable avec la remise en question d'un règlement qu'elles veulent définitif. Nous citerons l'example des traités établissant des frontières. Mais d'autres catégories peuvent de par leur nature se prêter à une interprétation évolutive, notamment les traités normatifs qui énoncent des règles de droit et surtout les traités de codification et de développement progressif de droit international. Même écrites, les règles de droit ne sont pas à l'abri de l'èvolution subsèquente de l'ordre juridique dont elles font partie. Il est donc aisé de présumer que les parties à ces traités ne s'opposent pas à ce que ces traités ou certaines de leurs dispositions soient interprétés à la lumière du droit international en vigueur à l'époque de cette interprétation.[90]

The most precise commentary is perhaps the one given by Jiménez de Aréchaga:

During the discussion of [VCLT article 31] paragraph 3 (c) in the International Law Commission, it was proposed to insert the qualifying words "in force at the time of conclusion