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Law and Philosophy Library 83

On the Interpretation of Treaties

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

Springer

p. 26, § 57; *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, p. 664, §§ 53–54.

32. In addition to the authorities directly cited in the text, see Hummer, p. 115; Gordon, pp. 814–815; Bernhardt, 1963, p. 80; Fitzmaurice, 1957, pp. 211, 223; Schwarzenberger, 1957, p. 503; Grossen, pp. 109–111. See also the judicial opinions expressed by international courts and tribunals, e.g. *Canadian Agricultural Tariffs*, *ILR*, Vol. 110, pp. 581–582, § 140; *AAPL v. Sri Lanka*, *ILR*, Vol. 106, pp. 445–446, § 52; *Quatar v. Bahrain*, *ILR*, Vol. 102, p. 60, § 35; *Namibia*, *ILR*, Vol. 49, p. 25, §§ 66–67.
33. Thirlway, 1991, p. 44.
34. Haraszti, p. 89. The quotation derives from *Anglo-Iranian Oil*, *ICJ Reports*, 1952, p. 105.
35. Hogg (II), p. 11.
36. *Oppenheim's International Law*, p. 1273, n. 12, cit. *Certain Expenses of the United Nations*, *ICJ Reports*, 1962, p. 159.
37. See e.g. La Grand Case, *ICJ Reports*, 2001, pp. 501–502, § 100; *El Salvador/Honduras*, *ILR*, Vol. 97, p. 499, § 374; *E. v. Norway*, *Publ. ECHR*, Ser. A, Vol. 181-A, p. 27, § 64; *Brogan and Others*, *Publ. ECHR*, Ser. A, Vol. 145-B, p. 32, § 59; *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, pp. 663–664, § 52; *Air France v. Saks*, *ILR*, Vol. 96, p. 118; *Sunday Times (No. 1)*, *Publ. ECHR*, Ser. A, Vol. 30, pp. 35–36, § 59; *Handyside*, *Publ. ECHR*, Ser. A, Vol. 24, p. 22, § 48; *Certain Expenses of the United Nations*, *ICJ Reports*, 1962, p. 159.
38. Peczenik, 1995, p. 332; author's translation. In a similar manner, see Wróblewski, 1992, p. 99.
39. See above, in the introduction to this chapter.
40. In addition to the authorities directly cited in the text, see Amerasinghe, pp. 194, 195–196; Akehurst, 1987, p. 203; Bernhardt, 1963, p. 80; De Visscher, 1963, pp. 84–86; Hogg (II), pp. 6–13; Schwarzenberger, 1957, p. 507; Grossen, pp. 109–111.
41. Thirlway, 1991, p. 25, cit. *IMCO*, *ICJ Reports*, 1960, p. 160.
42. Gordon, p. 814. (Footnote omitted; my italics.)
43. Fitzmaurice, 1957, p. 211. (My italics.) As the passage makes clear, a connection exists between *the rule of non-redundancy* on the one hand, and on the other hand what legal authors term as THE PRINCIPLE OF EFFECTIVENESS. We will have reason to return to this fact in subsequent chapters of this work. (See Ch. 7, Sections 4–5, of this work.)
44. See, p. 108 of this work.
45. See e.g. Hogg (II), pp. 6–13 – why else is it called *the surplus* ***words*** *rule* ? – Amerasinghe, pp. 195–196; Berlia, pp. 306–308. Some authors seem aware of the distinction but make no attempt to explain it. (See e.g. Gordon, pp. 814–815; Bernhardt, 1963, p. 80; Fitzmaurice, 1957, pp. 211, 223, and Fitzmaurice, 1951, pp. 19–20; Schwarzenberger, 1957, pp. 503, 507; Grossen, pp. 109–111.)
46. See Thirlway, 1991, pp. 44–48; De Visscher, 1963, pp. 84–85.
47. See e.g. *Raimondo v. Italy*, Publ. ECHR, Ser. A, Vol. 281-A, p. 19, § 39; *Border and Transborder Armed Actions*, *ILR*, Vol. 84, p. 245, § 45; *Guzzardi*, *Publ. ECHR*, Series A, Vol. 39, p. 33, § 92, and diss. op. Fitzmaurice, ibid., pp. 51–52, § 6; *Beagle Channel Arbitration*, *ILR*, Vol. 52, p. 140, § 35; *Namibia*, *ILR*, Vol. 49, p. 43, § 113.
48. See e.g. Lyons, 1977, pp. 230–269.
49. Ibid., pp. 230–238.
50. Loc. cit.
51. Ibid., pp. 250–269.

52. Ibid., p. 254.
53. See Section 2 of this chapter.
54. See p. 108, n. 37 of this work.
55. Case of Brogan and Others, Judgment of 29 November 1988, *Publ. ECHR*, Ser. A, Vol. 145-B.
56. *Publ. ECHR* , Ser. A, Vol. 145-B, p. 32, § 59.
57. Case of De Jong, Baljet and Van den Brink, Judgment of 22 May 1984, *Publ. ECHR*, Ser. A, Vol. 77.
58. Ibid., pp. 325–27, §§ 55–59.
59. Handyside Case, Judgment of 7 December 1976, *Publ. ECHR*, Ser. A, Vol. 24.
60. *Publ. ECHR* , Ser. A, Vol. 24, p. 22, § 48.
61. *Air France v. Saks* , Opinion of 4 March 1985, *ILR*, Vol. 96, pp. 113ff.
62. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Signed at Warsaw, on 12 October 1929.
63. The text cited is that provided by the Court. (See *ILR*, Vol. 96, p. 117.)
64. Ibid., pp. 117–118.
65. Guinea – Guinea-Bissau Maritime Delimitation Case, Award of 14 February 1985, *ILR*, Vol. 77, pp. 636ff.
66. See Ch. 3, Sections 2 and 5, of this work.
67. Note that the text cited is the English translation of the Convention published in *International Law Reports*. The Convention was authenticated in French and Portuguese only. For the authenticated French text, see *Archives Diplomatiques*, Vol. 24 (1887), pp. 5ff.
68. *ILR* , Vol. 77, p. 662, § 49.
69. Ibid., p. 663, § 52.
70. Ibid., p. 662, § 49.
71. Loc. cit.
72. See Section 2 of this chapter.
73. See p. 110, n. 47 of this work.
74. *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* , Judgment of 20 December 1988, *ILR*, Vol. 84, pp. 219ff.
75. The text cited is that provided by the Court. (See *ILR*, Vol. 84, p. 233, § 20.)
76. Ibid., p. 243, § 42.
77. Ibid., p. 245, § 45.
78. Loc. cit.
79. On the interpretation of treaties using the context as a supplementary means of interpretation, see Ch. 8, Section 6, of this work.
80. *Guzzardi Case* , Judgment of 6 November 1980, *Publ. ECHR*, Ser. A, Vol. 39.
81. *Publ. ECHR* , Ser. A, Vol. 39, p. 33, § 92.
82. See e.g. *Abdulaziz, Cabales and Balkandali*, *Publ. ECHR*, Ser. A, Vol. 94, p. 31, § 60; *Kjeldsen, Busk Madsen and Pedersen*, *Publ. ECHR*, Ser. A, Vol. 23, p. 26, § 52; *Belgian Linguistics (Merits)*, *Publ. ECHR*, Ser. A, Vol. 6, p. 30, § 1.
83. Dissenting opinion of Judge Sir Gerald Fitzmaurice, Guzzardi Case, *Publ. ECHR*, Ser. A, Vol. 39, pp. 49–55.
84. Ibid., pp. 51–52, § 6. (Footnote omitted.)
85. See p. 121 of this work.
86. *Beagle Channel Arbitration (Argentina v. Chile)* , Award of 18 February 1977, *ILR*, Vol. 52, pp. 93ff.

87. Tratado de Limítes, Signed at Buenos Aires, on 23 July 1881.
88. The agreement was authenticated in Spanish. The text cited above is the English translation used by the Court (ibid., pp. 8–9).
89. Ibid., p. 140, § 35.
90. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, *ILR*, Vol. 49, pp. 3ff.
91. See Ch. 3, Section 4 of this work.
92. See GA res. 2145 (XXI) of October 1966, §§ 3–4.
93. Ibid., operative paragraphs 3, 4, and 9, respectively.
94. See SC res. 276 (1970), operative paragraphs 2 and 5, respectively.
95. See SC res. 284 (1970).
96. *ILR* , Vol. 49, p. 43, § 113.
97. Loc. cit.

CHAPTER 5

USING THE CONTEXT: THE ELEMENTS SET OUT IN VCLT ARTICLE 31 § 2(A) AND (B)

The purpose of this chapter to describe what it means to interpret a treaty, using the two contextual elements set out in article 31 § 2, subparagraphs (a) and (b). Article 31 § 2 provides as follows:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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 agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty", and "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"?

(2) What communicative standard or standards shall the parties to a treaty be assumed to have followed, when an applier interprets the treaty using said "agreements" and "instruments"?

I shall now give what I consider to be the correct answers to these questions. In Sections 1–3, I shall begin by answering question (1). In Sections 2–4, I shall then answer question (2).

1 THE MEANING OF SUBPARAGRAPH (A): INTRODUCTION

In addition to "the text" of a treaty, two classes of phenomena shall be counted as part of the context, according to the provisions of VCLT article 31 § 2. The first of these classes is the one described in subparagraph (a), namely "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty".

> [T]out accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité ...

> Todo acuerdo que se refiera al tratado y haya sido concertado entre todas las partes con motivo de la celebración del tratado ...

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) it must be a question of an agreement "relating to the treaty"; (3) the agreement must have been made "between all the parties"; and (4) it must have been made "in connexion with the conclusion of the treaty". Let us examine each of these points one by one. We shall begin with the last three.

In order for an agreement to fit the description set forth in subparagraph (a), it must be a question of an agreement "relating to the treaty" (Fr. *"ayant rapport au traité";* Sp. *"que se refiera al tratado").* It is not entirely clear from the wording of the Vienna Convention what is meant by "relating to". However, all things considered, I find it hard to believe that the qualifications used for subparagraph (a) differ very much from those inserted in subparagraph (b). The word used for subparagraph (a) is the same used for subparagraph (b), namely the verb RELATE (TO), AVOIR RAPPORT (À), REFERIRSE (A). Subparagraph (b) speaks of "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" (Fr. "*en tant qu'instrument ayant rapport au traité*"; Sp. "*como instrumento referente al tratado*"). If a party has accepted an instrument as "relating to" a treaty, clearly she has accepted that the instrument and the treaty – even though they are not parts of a single treaty text – nevertheless are exceptionally closely connected. By the same token, the fact that an agreement can be characterised as "relating to" a treaty, in the sense of subparagraph (a), would imply that the parties have accepted that some close affinity exists between the two.[2] Hence, the following comment made by Yasseen must be viewed as misleading:

> L'accord ou l'instrument doit avoir un rapport avec le traité; il doit concerner la matière sur laquelle porte le traité, clarifier certaines notions prévues ou limiter le champ d'application du traité.[3]

Naturally, if a relationship can be shown to bear between the words and phrases used for an agreement and the text of a treaty, this is a circumstance indicating that we are dealing with an agreement "relating to" the treaty.[4] But it is not an absolute requirement. What ultimately determines the relationship between an agreement and a treaty are the intentions of their parties. To determine these intentions a variety of means may be used, of which the text of the agreement is surely not the only one (even though, of course, it remains a means of very high significance).

In order for an agreement to fit the description set forth in subparagraph (a), it must have been made "between all the parties" (Fr. *"entre toutes les parties";* Sp. *"entre todas 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". What determines whether an agreement shall be considered "made between all the parties" is the state-of-affairs, which prevails when a treaty is interpreted – and not that, which prevailed when the agreement was made.[5] Apparently, in order for an agreement to fit the description set forth in subparagraph (a), each and every one of those states that are bound by the treaty at the time of interpretation must be bound by the agreement.

*In order for an agreement to fit the description set forth in subparagraph (a), it must have been made "in connexion with the conclusion of the treaty" (*Fr. *"à l'occasion de la conclusion du traité";* Sp. *"con motivo de la celebraciòn del tratado").* Considering the language of international law, the "conclusion" of a treaty is an expression that can cause confusion. In one sense, THE CONCLUSION OF THE TREATY (Fr. LA CONCLUSION DU TRAITÉ; Sp. LA CELEBRACIÓN DEL TRATADO) can be used as equivalent to *the point in time when a treaty is established as definite*. In another sense, it can be used to stand for *the time interval from when negotiations on a treaty are started to when a treaty finally enters into force*.[6] This ambiguity is evidenced already by a quick glance at the Vienna Convention,[7] where the term CONCLUSION OF THE TREATY frequently appears.[8] As an instance where CONCLUSION occurs in the sense of *the point in time when a treaty is established as definite*,[9] article 49 may clearly be singled out:

> If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

NEGOTIATING STATE, in the terminology used for the Vienna Convention, means "a State which took part in the drawing up and adoption of the text of the treaty".[10] As an instance where CONCLUSION occurs in the sense of *the time interval from when negotiations on a treaty is started to when a treaty finally enters into force*,[11] we may point to article 7 § 2:

In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) representatives accredited by States to an international conference or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Apparently, the authority assigned to heads of state, heads of government, and ministers for foreign affairs, for "all acts relating to the conclusion of a treaty", is to be distinguished from the authority given to heads of diplomatic missions "for the purpose of adopting the text of a treaty". In principle, I see no obvious reason why in VCLT article 31 § 2(a) the word CONCLUSION could not be understood in the one sense just as well as the other. According to the opinion generally held in the literature, an agreement fits the description set forth in subparagraph (a) only on the condition that the agreement has been made in connection with the establishing of the interpreted treaty as definite.[12] Thus, I shall consider the matter settled.

In order for an agreement to fit the description set forth in subparagraph (a), it must be comprised in extension of the expression "any agreement" (Fr. *"tout accord"; Sp. "[t]odo acuerdo"*). The expression "agreement" causes us problems. In subparagraph (a), AGREEMENT means an agreement in the legal-technical sense – this much is clear. Many international transactions come about without the parties involved having an intention to commit themselves other than in a moral or political sense. Such agreements – in the literature denoted as "gentlemen's agreements", "non-binding agreements", "agreements de facto", "non-juridical agreements", and so forth –[13] 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 a law-creating intention – the transaction must have created an agreement with a legal effect.[14] The difficult question is whether "agreement" shall be understood to require a certain form. In conventional language, the word AGREEMENT (Fr. ACCORD; Sp. ACUERDO) is ambiguous. In one sense, AGREEMENT can be used as equivalent to a (written) contract. In another sense, it can be used as synonymous to a mutual understanding; an intention mutually held among two or more legal subjects to create law.[15] Assuming the expression "agreement" to have been used in the former sense, it clearly refers to agreements in written form only. Let us term this interpretation alternative A. Assuming the expression "agreement" to have been used in the latter sense, it refers to any agreement, regardless of form. Let us call this interpretation alternative B.

Both interpretation alternatives A and B find supporters in the literature. According to some authors, it seems the form of an agreement is decisive for its classification under VCLT article 31 § 2(a).[16] Elias, for example, refers to "agreement" as a synonym of "document":

The meaning and scope of the term "context" as used in the several paragraphs of this Article [i.e. VCLT article 31] are defined in paragraph 2 as including the preamble as well as those documents that form annexes to the treaty in question. The other *documents* that should be regarded as comprised in the "context" are of two types: (i) any agreement relating to the treaty which was made in connection with the conclusion of the treaty, and (ii) any instrument which was made in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. In other words, for a *document* to be regarded as forming part of the context of a treaty for the purpose of its interpretation, it must be the result of an agreement by all the parties to the treaty, must have been made in connection with the conclusion of the treaty and must be understood as such by all of them.[17]

Sinclair speaks of agreements, which must "be drawn up" in connection with the conclusion of the treaty:

It is of course essential that the agreement or instrument should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally *be drawn up* on the occasion of the conclusion of the treaty.[18]

According to the opinion of other authors, the form of an agreement is irrelevant.[19] "Ce qui importe ici", writes Yasseen, for example, ...

... c'est l'accord en tant que tel; peu importe sa forme. Cet accord peut être écrit, faire objet d'un instrument, mais peut également être oral.[20]

Müller is equally explicit:

d) Vertragsergänzende Nebenabreden bei oder nach Vetragsabschluß (Art. 31 Ziff. 2(a) und Ziff. 3(a) VRK)

In der allgemeinen Interpretationsregel von Art. 27 ILC-Entwurf (Art. 31 VRK) sind als Mittel authentischer Vertragsinterpretation Vereinbarungen *(agreements*, *accords)* genannt, die unter den Parteien in Zusammenhang mit oder nach dem Vertragsabschluß zustande kamen. Es ist auffallend, daß hier von *agreements (accords)* und nicht von *treaties (traités)* die Rede ist. Dies deutet darauf hin, daß auch mündliche und stillschweigende Vereinbarungen zwischen Vertragsparteien eingeschlossen sind, die in Zusammenhang mit einem förmlichen Vertrag *(treaty*, *traité)* entstanden.[21]

All things considered, legal doctrine cannot be considered a very helpful means for the determination of law.

In my opinion, the latter group of authors – not the former – is the one that correctly describes the prevailing legal state-of-affairs. Hence, I now need to present the arguments that support this opinion. This is the task in Section 2.

2 THE MEANING OF SUBPARAGRAPH (A): "ANY AGREEMENT"

A first argument at odds with the view that "any agreement" refers to agreements in written form only – what we have termed as interpretation alternative A – is that this view appears to be not so easily reconciled with the legally recognised rules for the interpretation of treaties. Rather, these rules seem to support the proposition that by "agreement" we shall understand an agreement, whatever form it assumes – what we have termed as interpretation alternative B.

First of all, consider the context. Agreement (Fr. accord; Sp. acuerdo) is a word much used in the provisions of the Vienna Convention. Beyond article 31 § 2(a), it can be found in article 2 § 1(a), article 3, article 24 § 2, article 31 § 3(a) and (b), article 39, article 40 §§ 2, 4 and 5, article 41 §§ 1 and 2, article 58 §§ 1 and 2, and in article 60 § 2(a). According to article 2 § 1(a), a treaty means "an international agreement concluded between States in written form". Article 3 speaks of international agreements to which the Convention does not apply, *inter alia* "international agreements not in written form". In article 24 § 2 we are told at what point in time a treaty shall enter into force, where this has not been agreed upon by the negotiating states: "Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States". According to article 31 § 3, when an applier interprets a treaty he shall include in the context "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" [subparagraph (a)], as well as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" [subparagraph (b)]. Articles 39–41 tell us when, and under what conditions, a treaty may be amended or modified: an amendment, like a modification, is effected by "agreement". Article 58 provides when, and under what conditions, the parties to a multilateral treaty "may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone". And, finally, according to article 60 § 2, any material breach of a multilateral treaty by one of the parties entitles "the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties".

In all these instances, the word agreement refers to agreements irrespective of form. I articles 24 and 31 § 3(b), this appears already in the wording of the Convention. The same applies to articles 2 and 3: if agreement were to refer only to written agreements, then it would be a

tautology to speak of an "agreement in written form"; to speak of "agreements in non-written form" would be pure nonsense. Of course, the meaning of article 31 § 3(a) is not equally apparent; but, according to a view generally held in the literature, AGREEMENT shall be read in this case in the broader sense.[22] As for articles 39–41, 58 and 60, strong reasons provoke a similar reading. In the Draft Articles adopted by the ILC in 1966, the following short Commentary is appended to the provisions on the termination and suspension of treaties:

> The Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty. It is also considered that the particular form which such an agreement may take is a matter for the parties themselves to decide in each case. The theory has sometimes been advanced that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or at least constitute a treaty form of equal weight. The Commission, however, concluded that this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the *"acte contraire"*. The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty.[23]

The provisions concerning the amendment and modification of treaties are explained in a similar manner:

> [T]he Commission did not consider that the theory of the "*acte contraire"* has any place in international law. An amending agreement may take whatever form the parties to the original treaty may choose.[24]

When it comes to the parties to the Vienna Convention, I see no reason to assume that they have taken a position other than that of the International Law Commission. Considering interpretation rule no. 2 – according to which a treaty shall be interpreted based on the assumption that words and phrases are consistently used – then in article 31 § 2(a), too, AGREEMENT would be used in the sense of a legally binding agreement, regardless of form.[25]

A second circumstance that can be adduced to support interpretation alternative B is the object and purpose of the interpreted treaty. Nothing says that an international agreement between states must assume some certain form. According to international law, the legal effect of a non-written agreement is equal to that of a written one. Clearly, this principle would be contravened if the expression "agreement" in subparagraph (a) were to be interpreted as synonymous with "written agreement". Two states (A and B) may each have concluded a treaty with a third state (C), and the contracting parties may in each case have agreed – states A and C putting down the agreement in writing, states B and C having satisfied themselves with an oral agreement – that a specific expression used for the treaty shall be given a specific meaning. Both agreements are binding

under international law; but, according to the provisions of VCLT article 31 § 2(a), only one can be included in the context, when the two treaties are subsequently interpreted. Such a radical hierarchisation of written and non-written agreements can hardly be what the parties to the Vienna Convention wished to achieve. Certainly, written agreements are normally more easily dealt with than non-written ones, from the point of view of proving the agreement.[26] When two or more states conclude an agreement concerning the interpretation of a treaty, without later confirming it by means of a written contract, then sometimes the agreement can be difficult to establish. However, I cannot see that this alone would be sufficient reason to exclude non-written agreements from the scope of VCLT article 31 § 2(a). After all, non-written agreements come within the scope of article 31 § 3(a).[27] Given that article 31 § 2(a) shall be understood so that by applying the article a result is not achieved, which is not among the objects and purposes of the treaty, the expression "agreement" would then have to be interpreted in accordance with interpretation alternative B – it would have to refer to agreements irrespective of form.[28]

If any circumstance could be seen to support interpretation alternative A, then that would be the strict division applied in the Vienna Convention of primary and supplementary means of interpretation. In order for a non-written agreement to be used as a means of interpretation, it must be established. The problem is that, often, little proof is available other than the documents produced during the drafting of the interpreted treaty – what we would otherwise classify as its preparatory work *(travaux préparatoires)*.[29] Considering this, the argument can be made that the provisions of article 31 § 2(a) should be applied with some caution. If non-written agreements are accepted as part of the context – this is how the argument goes – then we open up for a very far-reaching use of preparatory work, already at one of the earlier stages of the interpretation process.[30] This can hardly be what the parties to the Vienna Convention intended. In VCLT article 32, preparatory work has been listed a supplementary means of interpretation, which an applier may resort to for two purposes only: (i) when the use of primary means of interpretation leads to a meaning in need of confirmation; (ii) when the use of primary means of interpretation "[l]eaves the meaning ambiguous or obscure", or "[l]eads to a result which is manifestly absurd or unreasonable".[31] Given that article 31 § 2(a) shall be understood so that by applying the article a result is not achieved, which is not among the objects and purposes of the treaty, the expression "agreement" would then have to be interpreted in accordance with interpretation alternative A – it would have to refer to agreements in the written form only.[32]

In my opinion, this argument should be met with suspicion. Assuming that the expression "agreement" refers to agreements irrespective of form, a non-written agreement – simply because it happens to be made in connection with the conclusion of a treaty – would not necessarily fit the description set forth in article 31 § 2(a). In order for an agreement to come within the scope of article 31 § 2(a), certain conditions must be met.[33] First, there is the condition that the agreement be binding under international law. In order for a transaction to be categorised as an agreement in the sense of subparagraph (a), it must be the intention of the states involved to create law. This in itself disqualifies most of the agreements that can possibly be established by means of *travaux préparatoires*. Second, there is the condition that the agreement be "relating to the treaty". In order for an agreement to come within the scope of subparagraph (a), the agreement and the treaty, according to their parties, must be exceptionally closely connected. Note that in this case, "treaty" means the treaty adopted as final, and nothing else. Surely, we might study *travaux préparatoires* and find that, at a certain point during the drafting process, the negotiating states reached an agreement regarding the interpretation or application of the treaty text *then at hand*. This does not necessarily mean that the agreement bears a relation to the text of the treaty finally adopted at a later point. Subsequent negotiations may have resulted in the "treaty content" to which the agreement relates being abandoned. In general terms, it can probably be said that the earlier an agreement is made during the drafting process, the greater the risk that the agreement does not bear the relationship to the treaty required by article 31 § 2(a). Third, there is the condition that the agreement be made "in connexion with the conclusion of the treaty" – i.e. at the point in time when the treaty was established as definite. It is not entirely clear what is meant by the requirement that an agreement be made "in connexion with" a treaty's conclusion. Apparently, there is room for some flexibility.[34] However, the following may safely be established: not all agreements made "in connexion with the conclusion" of a treaty can be classified as "relating to the treaty". All things considered, the proposition discussed – the one suggesting that, in the application of article 31 § 2(a), non-written agreements cannot possibly be accepted, without also forcing us to accept a *very far-reaching* use of *travaux préparatoires* – is one, which I personally find difficult to endorse. I can agree that non-written agreements cannot be accepted without also forcing us to accept a certain use of *travaux préparatoires*. Yet, I cannot see how this use of *travaux préparatoires* could be anything but limited.

Further support for interpretation alternative B can be found in the fact that interpretation alternative A is not in accord with international judicial

opinions. International courts and tribunals appear to view "agreement" as a reference to agreements, irrespective of form. I have two examples of this.[35]

My first example is the international award of the NAFTA Panel of Arbitration in the case of *Canadian Agricultural Tariffs*.[36] On 1 January 1995, Canada had begun applying a new customs tariff, the result being that imports of American agricultural products above a certain quota were now charged with increased duty. The United States Government objected, claiming that the tariff was in excess of those that had earlier been decided upon in the North American Free Trade Agreement (NAFTA). Canada defended its actions, citing article 4 § 2 of the 1994 *WTO Agreement on Agriculture*. Under this agreement, Canada argued, she was under the obligation to convert into tariff form all existing non-tariff barriers applicable to American agricultural products. The question arose as to whether this claim was justified, or whether the only obligation incumbent on Canada was to eliminate non-tariff barriers – the conversion of non-tariff barriers into tariff form being merely an option.

According to the Panel, no answer to this question could be given merely by consulting the wording of the 1994 Agreement:

> [I]t becomes necessary to look beyond the text of the provision to its context, to any subsequent agreement or practice of the parties and, if necessary, to supplementary means of interpretation such as the *travaux préparatoires* of the WTO *Agreement on Agriculture* and the circumstances of its conclusion more generally. This approach is expressly contemplated by Vienna Convention Articles 31 and 32.
>
> 173. The starting point of this analysis must be the negotiations constituting the Uruguay Round [ending with the adoption and signature of, among other instruments, the WTO Agreement on Agriculture].[37]

This gave the Panel cause for the following historical survey:

> The objective of the negotiations in relation to agricultural trade as set out in the *Punta del Este Declaration* was to:
>
> "... achieve greater liberalization of trade in agriculture ... by
> (i) improving market access through, *inter alia*, the reduction of import barriers; ..."
>
> 174. The mechanisms for achieving this, as first proposed by the United States in 1988, was the conversion of non-tariff barriers to "tariff equivalents", a process known as "tariffication". The essence of tariffication was that States were required to eliminate their agricultural non-tariff barriers and were permitted to establish tariff-rate quotas in their place.
>
> 175. The United States tariffication proposal formed the basis of subsequent discussion in the Negotiating Group on Agriculture. Thus, the Chairman of this Group circulated a draft text of a *Framework Agreement on Agricultural Reform Programme* on 11 July 1990 which provided, *inter alia*, for the "conversion of all border measures other than normal customs duties into tariff equivalents".
>
> 176. This formulation was later reflected in the Dunkel Draft submitted to the Uruguay Round participants on 20 December 1991. This contained, in Part B of the draft "Text on

Agriculture", a section entitled "Agreement on Modalities for the Establishment of Specific Binding Commitments under the Reform Programme" which set out the modalities to be adopted for tariffication. Annex 3 of this draft, in paragraph 3, provided that "[t]ariff equivalents *shall* be established for all agricultural products subject to border measures other than ordinary customs duties ..." (emphasis added).

177. These tariffication modalities were subsequently issued separately by the Chairman of the Market Access Group on 20 December 1993 – under the heading "Modalities for the Establishment of Specific Binding Commitments under the Reform Programme" – as a guide to States in the preparation of their tariff schedules. Annex 3 of the Modalities Document reproduced, in paragraph 3, the provision first set out in the Dunkel Draft, *viz.* "[t]ariff equivalents *shall* be established for all agricultural products subject to border measures other than ordinary customs duties ..." (emphasis added).[38]

Clearly, the Modalities Document provided clues to the interpretation of the 1994 Agreement. In the oral pleadings before the panel, Canada had noted:

[T]he Modalities Document was the foundation for the final conclusion of the *Agreement on Agriculture* --- [While the] Modalities Document may not itself have treaty status, ... it is an essential part of the context and background without which Article 4.2 [*of the Agreement on Agriculture*] cannot be understood.[39]

The Panel could do nothing but agree:

In the Panel's view, the Dunkel Draft, the Modalities Document, and the documents on which they were based, may properly be taken into account when interpreting the WTO *Agreement on Agriculture*. They form part of the *travaux préparatoires* and circumstances of the conclusion of the WTO *Agreement on Agriculture* to which reference may be made according to the Vienna Convention Article 32. In this regard, the Panel observes that the obscurity of meaning of Article 4.2 of the WTO *Agreement on Agriculture* justifies recourse to such supplementary material for purposes of interpretation. The Panel also considers that the Modalities Document may be regarded as part of the context of the WTO *Agreement on Agriculture* for the purposes of interpretation pursuant to Vienna Convention Article 31(2) [...].[40]

According to the Panel, the Modalities Document should be seen to come within the scope of VCLT article 31 § 2. Of course, is not clearly said that the Document should be seen to come specifically within the scope of subparagraph (a); but this actually seems to be the only possibility. The Panel also seems eager to show that the view held by Canada is indeed a correct description of history: the 1994 Agreement *was* concluded against the background of the Modalities Document. The Modalities Document is not a treaty. If, nevertheless, it is to be considered the expression of a legally binding agreement, then this agreement can only be non-written.

My second example is the judgment of the International Court of Justice in the case concerning *Border and Transborder Armed Actions*.[41] The facts of the case have already been touched upon in earlier chapters,[42] and I will not unnecessarily repeat myself. As we know, Nicaragua and the Honduras were of different opinions as to the interpretation of article XXXI in the 1948 American Treaty on Pacific Settlement ("the Pact of Bogotá"):

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.[43]

The Honduras had advanced the argument that article XXXI of the Pact of Bogotá could only be read correctly if placed in relation to the subsequent article XXXII. However, this was not the only argument the Honduras had presented to support its position. In May 1986, the Honduras had deposited a document with the General Secretary of the UN, declaring its wish to modify the effect of an earlier declaration made according to the provisions of article 36 § 2 of the ICJ Statute. This reservation, the Honduras contended, had a double effect. First, the dispute between Nicaragua and the Honduras was excluded from the jurisdiction that would otherwise be had by the Hague Court according to article 36 § 2 of the ICJ Statute. Secondly, the dispute was excluded from the jurisdiction that would otherwise be had by the Court according to article XXXI of the Pact of Bogotá. Like the first argument advanced by the Honduras, which – as we know – the Court considered unfounded,[44] this argument was rejected as well:

The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact ... cannot be accepted.[45]

Let us put to scrutiny the various arguments set forth by the Court to justify its conclusion.

The first is a reference to the wording of the interpreted treaty provision:

Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect.[46]

After this, the Court turns its attention to the other provisions of the Pact:

The fact that the Pact defines with precision the obligations of the parties lends particular significance to the absence of any indication of that kind. The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States.

35. Moreover, some provisions of the Treaty restrict the scope of the parties' commitment. Article V specifies that procedures under the Pact "may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State". Article VI provides that they will likewise not apply

"to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty".

Similarly, Article VII lays down specific rules relating to diplomatic protection.

Finally, Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which "shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity". In the absence of special procedural provisions those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the Pact or at the time of adhesion to that instrument.[47]

The Court uses what it calls the "*travaux préparatoires*":

Further confirmation of the Court's reading of Article XXXI is to be found in the *travaux préparatoires*. In this case these must of course be resorted to only with caution, as not all the stages of the drafting of the texts at the Bogotá Conference were the subject of detailed records. The proceedings of the Conference were however published, in accordance with Article 47 of the Regulations of the Conference, in Spanish, and certain recorded discussions of Committee III of the Conference throw light particularly upon the contemporary conception of the relationship between Article XXXI and declarations under Article 36 of the Statute.

The text which was to become Article XXXI was discussed at the meeting of Committee III held on 27 April 1948. The representative of the United States reminded the meeting that his country had previously, under Article 36, paragraph 2, of the Statute, made a declaration of acceptance of compulsory jurisdiction that included reservations; he made it clear that the United States intended to maintain those reservations in relation to the Pact of Bogotá. The representative of Mexico replied that States which wished to maintain such reservations in their relations with the other parties to the Pact would have to reformulate them as reservations to the Pact, under Article LV. The representatives of Columbia and Ecuador, members of the drafting group, confirmed that interpretation. The representative of Peru asked whether an additional Article should not be added to the draft in order to specify that adhesion to the treaty would imply, as between the parties to it, the automatic removal of any reservations to declarations of acceptance of compulsory jurisdiction. The majority of Committee III considered, however, that such an Article was not necessary and the representative of Peru went on to say, after the vote, that "we should place on record what has been said here, to the effect that it is understood that adhesion is unconditional and that reservations are automatically removed" *(translation by the Registry)*.

38. This solution was not contested in the plenary session, and Article XXXI was adopted by the Conference without any amendments on that point.

As a consequence the United States, when signing the Pact, made a reservation to the effect that:

"The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the

United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case."

It is common ground between the Parties that if the Honduran interpretation of Article XXXI of the Pact be correct, this reservation would not modify the legal situation created by that Article, and therefore would not be necessary […].[48]

After which the Court concludes by noting the practice of the treaty parties since 1948:

They [the Parties to the Pact, that is] have not, at any time, linked together Article XXXI and the declarations of acceptance of compulsory jurisdiction made under Article 36, paragraphs 2 and 4, of the Statute. Thus, no State, when adhering to or ratifying the Pact, has deposited with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under the conditions laid down by the Statute. Moreover, no State party to the Pact (other than Honduras in 1986) saw any need, when renewing or amending its declaration of acceptance of compulsory jurisdiction, to notify the text to the Secretary-General of the OAS, the depository of the Pact, for transmission to the other parties.

Also, in November 1973 El Salvador denounced the Pact of Bogotá and modified its declaration of acceptance of compulsory jurisdiction with a view to restricting its scope. If the new declaration would have been applicable as between the parties to the Pact, no such denunciation would have been required to limit similarly the jurisdiction of the Court under Article XXXI.[49]

The interesting thing about this line of reasoning is the way the Court uses "*travaux préparatoires*". The question arises: What means of interpretation is the Court resorting to here? Two readings can be considered plausible. According to a first reading, the Court resorts to the preparatory work of the Pact of Bogotá as a supplementary means of interpretation, in the sense of VCLT article 32. According to a second reading, the Court resorts to the preparatory work of the Pact of Bogotá, not as a means of interpretation in the sense of the VCLT, but as a way of establishing an agreement of the kind described in VCLT article 31 § 2(a) – the agreement then, naturally, not being a written but a non-written one. Personally, I opt for the second of the two readings. Two sets of circumstances prove me right. The first is the way the United States' reservation is used by the Court. That reservation is not part of the PREPARATORY WORK of the Pact of Bogotá, in the sense of the Vienna Convention. Assuming that the Court's argument does not exceed the framework represented by the rules of interpretation laid down in international law, the more likely conclusion is that when the reservation is turned to, it is only a way of confirming an agreement already indicated in the proceedings.

The second set of circumstances that show I am right is the order in which the preparatory work of the Pact of Bogotá appears in the findings. It cannot be doubted that the correct meaning of the interpreted provision is determined already, by the use of conventional language. The means subsequently used – the other provisions of the Pact, "*travaux préparatoires*",

and the subsequent practice of the parties – serve only as confirmation. There is nothing strange about this. According to international law, the context may be used not only as a primary means of interpretation in the sense of VCLT article 31. It can also be used as a supplementary means in the sense of VCLT article 32.[50] If an applier interprets a treaty – whether in order to determine a meaning, or to confirm a meaning already determined – and she has already made use of "the text" of said treaty, then it is hardly a natural progression if, in a second step, she proceeds to use *travaux préparatoires*, and then subsequent practice. A natural progression would be one where the applier has instead used the context – more specifically, the contextual elements set out in VCLT article 31 § 2. All things considered, I arrive at the following conclusion: according to a view held by the International Court of Justice, the expression "agreement" refers to agreements irrespective of form.

3 THE MEANING OF SUBPARAGRAPH (B)

The second class of phenomena that shall be counted as part of the context, according to VCLT article 31 § 2, in addition to "the text" of a treaty, is the one described in subparagraph (b), namely "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

[T]out instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité.

Todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado.

Three conditions must be met for a phenomenon to fit this description: (1) the phenomenon must be included in the extension of the expression "instrument"; (2) it must be a question of an instrument "which was made by one or more parties ... and accepted by the other parties as an instrument related to the treaty"; and (3) the instrument must have been made "in connexion with the conclusion of the treaty". Let us examine each of these points one by one. We shall take them in the order in which they have been listed.

In order for a phenomenon to fit the description in subparagraph (b), it must be included in the extension of the expression "instrument" (Fr. *"instrument";* Sp. *"instrumento"*). According to the terminology used for the Vienna Convention, INSTRUMENT, INSTRUMENT, INSTRUMENTO means a legally relevant document of some sort.[51] In contrast to the provisions of subparagraph (a), where – as we observed in Section 2 – it does not matter whether an agreement is written or non-written, the requirements

of subparagraph (b) would accordingly be more exacting. In order for a phenomenon to fit the description in subparagraph (b), it must bear the form of a written document.

In order for an instrument to fit the description in subparagraph (b), it must be a question of a document "which was made by one or more parties ... and accepted by the other parties as an instrument related to the treaty" (Fr. *"établi par une ou plusieurs parties ... et accepté par les autres parties en tant qu'instrument ayant rapport au traité";* Sp. *"formulado por una o más partes ... y aceptado por las demás como instrumento referente al tratado").* According to the definition given in VCLT article 2 § 1(g), PARTY means "a State which has consented to be bound by the treaty and for which the treaty is in force".[52] What determines whether a document shall be considered "made by one or more of the parties...and accepted by the other parties" is the state-of-affairs prevailing when a treaty is interpreted – and not that which prevailed when the document was drawn up.[53] Apparently, in order for a document to be considered part of the context, according to subparagraph (b), each and every one of those states that are bound by the treaty at the time of interpretation shall either themselves be authors of the instrument, or they shall subsequently have accepted it as being "an instrument related to the treaty".[54] If a party has accepted an instrument to be "an instrument related to" a treaty, clearly he has accepted that the instrument and the treaty, even if they are not parts of a single treaty text, nevertheless are exceptionally closely connected. Such an acceptance – and this is the view generally held – can be either express or implicit.[55] Clearly, to establish whether the connection between a treaty and an instrument has been accepted or not, a separate process of interpretation might be needed on occasion.

In order for an instrument to fit the description in subparagraph (b), the instrument must have been made "in connexion with the conclusion of the treaty" (Fr. *"à l'occasion de la conclusion du traité";* Sp. *"con motivo de la celebración del tratado").* This requirement, in contrast to the other two given above, causes certain problems. In the language of international law, CONCLUSION (Fr. CONCLUSION; Sp. CELEBRACIÓN) remains an ambiguous term;[56] the same applies, even if we were to restrict ourselves to the terminology used for the Vienna Convention.[57] CONCLUSION, in one sense of the word, can be used as equivalent to the point in time when a treaty is established as definite.[58] In another sense it can be used to stand for the time interval from when negotiations on a treaty are started to when a treaty finally enters into force.[59] Further complexity is added by the fact that the entry into force of a treaty is in turn not a unanimous concept. THE ENTRY INTO FORCE OF A TREATY, in one sense of the term, stands for the entry into force of a treaty as such. In another sense, it stands for the entry into force

of the treaty for a state.[60] All in all, this provides us with the following interpretation alternatives:

(1) The "conclusion of the treaty" means the point in time when the interpreted treaty was established as definite.
(2) The "conclusion of the treaty" means the time interval from when negotiations on the interpreted treaty started to when the treaty entered into force for the very first time.
(3) The "conclusion of the treaty" means the time interval from when negotiations on the interpreted treaty started to when the treaty entered into force for its parties.

Interpretation alternative (3) – let it be clear – is in turn open for two different interpretations. According to the one alternative, an instrument made "in connexion with the conclusion of a treaty" is something mutually shared by all parties to the treaty: an instrument will, *for all parties*, fit the description in subparagraph (b), as long as it was made in connection with the entry into force of the interpreted treaty for the state that last became a party. According to the other alternative, whether an instrument is made "in connexion with the conclusion of a treaty" is a relative matter: an instrument may, for different parties, both fit and not fit the description of subparagraph (b), depending on whether the instrument was made or not made in connection with the entry into force of the interpreted treaty for the respective parties. The latter of these two alternatives is clearly absurd, and hence may be immediately dismissed. For it was indeed one of the most clearly expressed purposes of the interpretation regime created by the Vienna Convention to reach an agreement on a set of *generally applicable* rules.[61] Accordingly, interpretation alternative (3), as hitherto stated, could then be given a more precise definition:

(3) The "conclusion of the treaty" means the time interval from when negotiations on the interpreted treaty started to when the treaty entered into force for the state that last became a party.

The decisive question, then, is whether the meaning of subparagraph (b) is that represented by alternative (1), (2) or (3). In support of interpretation alternative (3) we may cite the object and purpose of the interpreted treaty. Generally held to be among the phenomena typically falling within the provisions of article 31 § 2(b),[62] are the reservations and *interpretative declarations* made to a treaty.[63] If we take this view to be correct, but still opt for interpretation alternative (1) or (2), the application of VCLT article 31 § 2(b) will have clearly discriminatory effects. Two states may have expressed their consent to be bound by a treaty – the one prior to the "conclusion of the treaty", the other after – and both would be parties to the treaty, the one not more so than the other. However, assuming both states

to have formulated, concomitantly with their consent, either reservations to the treaty or interpretative declarations, only the one state's reservation or declaration will come under the provisions of VCLT article 31 § 2(b). This can hardly be what the parties to the Vienna Convention intended. Given that the provisions of article 31 § 2(b) shall be understood so that by applying the article a result is not achieved, which is not among the objects and purposes of the treaty, the "conclusion of the treaty" would then have to be synonymous with the time interval from when negotiations on the interpreted treaty started to when the treaty entered into force for the state that last became a party.[64]

On the other hand, the object and purpose of the interpreted treaty can also be seen to support interpretation alternative (1). As we observed earlier, in article 31 § 2(a), the "conclusion of the treaty" means the point in time when the treaty was established as definite.[65] If, in article 31 § 2(b), the "conclusion of the treaty" would be interpreted along the lines of interpretation alternative (2) or (3), then the undoubted effect would be that the "conclusion of the treaty" in subparagraph (a) referred to one thing, while in subparagraph (b) it referred to quite another. This can hardly be what the parties to the Vienna Convention intended. It is true that in the terminology of the Vienna Convention, the word CONCLUSION is not an unambiguous one – the word is not consistently used throughout the Convention. However, in none of the 27 instances where the word CONCLUSION is used can it be said to bear an inconsistent meaning *within a single article*.[66] That the word would bear an inconsistent meaning *within a single paragraph* appears even less likely. For further confirmation of this view, I would like to draw the reader's attention to the pragmatic relationship that holds between paragraphs 2 and 3 of VCLT article 31. In article 31 § 3(a) and (b) mention is made of "any *subsequent* agreement between the parties regarding the interpretation of the treaty or the application of its provisions", and "any *subsequent* practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[67] Clearly, in both cases "subsequent" refers back to the expression used for article 31 § 2: "the conclusion of the treaty".[68] If indeed it is our position that in subparagraph (a), the "conclusion of the treaty" refers to one thing, while in subparagraph (b) the expression refers to quite another, then this fine picture would be seriously flawed. It strikes me as reasonable that the parties to the Vienna Convention under such premises would have indicated, in some way or another, which one "conclusion" "subsequent" refers to – that of subparagraph (a) or that of subparagraph (b). This has not been done. Given that the text of article 31 § 2(b) shall be understood so that by applying the article a result is not achieved, which is not among the objects and purposes of the treaty, the "conclusion of the

treaty" would then have to be synonymous with the point in time when the interpreted treaty was established as definite.[69]

Based on this survey, what should be our conclusions? It seems we can immediately dismiss interpretation alternative (2). As noted, interpretation alternatives (1), (2) and (3) are all in harmony with the text of VCLT article 31 § 2(b) interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty". But only interpretation alternatives (1) and (3) can be considered to agree with that text, considering also the context and the object and purpose of the interpreted treaty. The more difficult task is to exclude, in the same manner, any one of interpretation alternatives (1) and (3). To my knowledge, no support for either alternative can be drawn from the preparatory work of the Convention. Nor does it appear that the expression at issue has yet been seriously brought into focus by international courts and tribunals. My conclusion is that at this moment, the prevailing legal state-of-affairs cannot be convincingly determined. There are reasons for adopting interpretation alternative (1), but there are also reasons for adopting interpretation alternative (3); and, to my mind, none of these reasons so obviously outweigh the others that only one of the alternatives can possibly be considered correct.

4 THE "AGREEMENT" AND THE "INSTRUMENT" PUT TO USE

What communicative standard or standards shall the parties to a treaty be assumed to have followed, when an applier interprets the treaty using the two classes of phenomena described in VCLT article 31 § 2(a) and (b)? With regard to using the context, there is reason to repeat part of what we have already noted. In Chapter 4, we observed that in the legal literature, the act of interpretation using context is often termed as SYSTEMATIC INTERPRETATION.[70] When an applier uses the context – this is the assumption – the interpreted treaty provision and the context together form a larger whole, a system. I also noted that the system assumed in the legal literature is not a uniform concept.[71] The term SYSTEMATIC INTERPRETATION is used to refer to not one type of system but two, depending on whether authors envision the interpreted treaty provision and its context authors as the body of text constituted by the text and its context, or the set of norms expressed. In the former case, SYSTEMATIC INTERPRETATION is based on the existence of a system of a linguistic character; in the latter case it is based on the existence of a system in the logical sense. On the basis of these observations, I then put into words the five communicative standards assumed by an applier when he interprets a provision using "the text" of the treaty interpreted; these standards have been designated by the letters A to E. They are of

two types. Standards A, C, and D govern the linguistic relationship that shall be assumed to hold between the expressions used for an interpreted treaty provision and the expressions forming the context. Standards B and E govern the logical relationship that shall be assumed to hold between the norm content of an interpreted treaty provision and the norms forming the context.

Now, the decisive question is whether these same communicative standards shall be applied when, instead of using "the text" of a treaty, the applier uses the two contextual elements set out in VCLT article 31 § 2(a) and (b). For me, the answer is clearly in the negative. When an applier interprets a treaty using the contextual elements described in article 31 § 2(a) and (b), this is on the assumption that the interpreted treaty provision and the context form a system *only in the logical sense*. Several reasons can be adduced to support this conclusion. First, very high expectations are placed on a treaty provision when it is considered as part of a linguistic system, compared to when it is considered as part of a system in the logical sense. The provision is expected to be drawn up in such a way that the usage of those words and phrases included in the provision, viewed in the light of the words and phrases included in the context, can be considered consistent; the provision is expected to be drawn up in such a way that nowhere in the context does it give rise to a pleonasm; and the provision is expected to be drawn up in such a way that those words and phrases included in the provision do not take on a meaning equal to the meaning of words and phrases included in other parts of the context, insofar as these words and phrases can be considered to be parts of the same lexical field.[72] If a treaty is to be considered part of two systems, of which one is linguistic and the other logical, then it seems only reasonable that the extension of the former be limited to include only part of that of the latter. An inherent line of limitation would then seem to be formed by the text of the interpreted treaty.[73] Even if we admit that, for interpretation purposes, there is an exceptionally close connection between the text of a treaty and the contextual elements described in VCLT article 31 § 2(a) and (b), common sense tells us that they should still be seen as separate linguistic units. Second, article 31 § 2(a) defines as part of the context "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty". "Agreement" – as we earlier observed – refers to any legally binding agreement to be applied within the framework of international law, whether it is written or not.[74] If a communicative standard governs the relationship between an interpreted treaty provision and an agreement relating to the treaty, whatever form it assumes, then obviously this relationship cannot

be the one that holds between the various *expressions* used for those two accords.

Among the five communicative standards I have found to be applicable, when an applier interprets a treaty provision using "the text" of said treaty, only standards B and E govern the logical relationship that shall be assumed to hold between the norm content of an interpreted treaty provision and the norms forming the context. These standards have been stated earlier along the following lines:

Standard B
If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that it does not logically contradict the context.

Standard E
If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that in the context there will be no instance of a logical tautology.[75]

Of course, we should not take for granted that both standards B and E are applicable for an interpretation of a treaty using the contextual elements set out in VCLT article 31 § 2(a) and (b), simply because they are both applicable for an interpretation using "the text". That standard B is applicable is plain enough. One of the most basic requirements placed on a logical system is that it be free of logical contradictions. However, strong reasons demonstrate that standard E, too, shall apply. According to several commentators, we shall count as an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty", among other things, certain legally binding agreements of interpretation.[76] When such an agreement is used for the interpretation of a treaty, and this is done based on the communicative assumption that the treaty and the agreement do not logically contradict one another, the interpretation arrived at is an AUTHENTIC INTERPRETATION (Fr. INTERPRÉTATION AUTHENTIQUE).[77] 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 identically similar rules of customary international law); the authentic interpretation always takes precedence. After all, the rules laid down in the Vienna Convention remain *jus dispositivum* – they apply only on the condition, and to the extent, that the parties to a treaty have not come to agree between themselves on something else.[78] Accepting the suggestion that a legally binding interpretation agreement can be used according to the provisions of VCLT article 31 § 2(a), then, as a result, this must be on the basis of some other communicative standard than B.

Further confirmation for this view is provided, if we consider the obvious relationship that holds (at least on paper) between the contextual element described in VCLT article 31 § 2(a) and that described in article 31 § 3(a).

Article 31 § 3(a) speaks of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". As it appears, the phrase "any agreement relating to the treaty" used for § 2(a) is a shortened form of "any … agreement between the parties regarding the interpretation of the treaty or the application of its provisions" used for § 3(a).[79] Two communicative standards are assumed when an applier interprets a treaty using a "subsequent agreement" according to § 3(a): standard B and standard E.[80] Arguably, given the obvious relationship that holds between the contextual element described in § 2(a) and that described in article § 3(a), those two standards should also be assumed when the applier interprets a treaty using an "agreement relating to the treaty" according to § 2(a). All things considered, the conclusion I draw is the following: when an applier interprets a treaty using the contextual elements described in VCLT article 31 § 2(a) and (b), it is on the basis of not only standard B but also standard E.

5 CONCLUSIONS

According to VCLT article 31 § 1, a treaty shall be interpreted in good faith "in agreement with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose". For a means of interpretation, the context comprises an exceptionally wide range of data. Therefore, to facilitate presentation, I have chosen to divide the concept into three parts, each part made the subject of a separate chapter of this work. The purpose of this current chapter is to describe what it means to interpret a treaty using the contextual elements set out in VCLT article 31 § 2(a) and (b). Based on the observations made in this chapter, the following four rules of interpretation can be established:

Rule no. 7

§ 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 contradiction, while in the other it 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.