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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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since 1969 in international courts and tribunals. It is true that cases can be pointed out, where the determining factor for "the ordinary meaning" was clearly historical language.[73] But there are also cases where the determining factor was contemporary language.[74] To illustrate this proposition, I have two particular examples that I would like to present. This is the purpose of Section 4.

4 REGARDING THE PROBLEM CAUSED BY TEMPORAL VARIATION IN LANGUAGE (CONT'D)

My first example is the international award in the case of *La Bretagne Arbitration*.[75] In January of 1985, Canadian authorities had rejected an application for a licence to fish in the St. Lawrence Bay using so-called fish filleting equipment. (A trawler equipped with fish filleting equipment does not need to transport the catch to land to have it cleaned and processed; it can be done at sea. Hence, trawlers that have this kind of equipment greatly increase their fishing capacity.) The application was placed by "La Bretagne", a French trawler registered at St. Pierre et Miquelon, a small group of islands lying just off the Canadian Atlantic coast. France protested. Canada's action, the French government claimed, violated an agreement on fishery matters concluded between the two states in 1972.[76]

One of the provisions to which France called particular attention was article 6 of the Franco-Canadian agreement:

> 1. Canadian fishery regulations shall be applied without discrimination in fact or in law to the French fishing vessels covered by Articles 3 and 4 [i.e., among others, French trawlers registered in S:t Pierre et Miquelon], including regulations concerning the dimensions of vessels authorized to fish less than 12 miles from the Atlantic coast of Canada.
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> 3. Before promulgating new regulations applicable to these vessels, the authorities of each of the parties shall give three months prior notice to the authorities of the other party.[77]

The parties held different views as to the meaning of this text. As a reason for their actions in the matter of La Bretagne, Canadian authorities had cited national policy: for several years, no licences for fishing in the St. Lawrence Bay had been granted to trawlers with fish filleting equipment, not even to trawlers registered in Canada. This policy, according to Canada, was a "fishery regulation", in the sense of article 6 § 1. According to France it was not. In the findings of the tribunal, the respective positions of the parties have been summarised as follows:

> According to the Canadian Party, this expression in Article 6 constitutes a *renvoi* to all the provisions governing fishery management in Canada, and includes not only the laws and regulations as such but also the administrative practices authorized by the law. As it is the

responsibility of the Minister of Fisheries, under Canadian law, to authorize the granting to foreign vessels of licences stipulating the terms and conditions governing their fishing operations, Canada contended that under its domestic law, the fishery licences themselves formed an integral part of the regulation process. Basing itself on the inherent regulatory power it derived from its exclusive jurisdiction over its fishing zone, Canada further argued that its authority extended to all the activities conducted by foreign vessels for the purpose of exploiting the biological resources of the zone and that the regulation of the processing of the catch on board these vessels formed part of its competence as the coastal State.

The French Party, on the contrary, based its position on this point on a restrictive interpretation of the term "fishery regulations" which, in its view, should be taken to mean measures of a general character concerns solely with fishing, i.e. both in the normal acceptance of the term and under Canadian and French legislation, operation designed to catch fish. As the processing of the catch on board fishing vessels does not form part of these operations, France argued that a Canadian regulation on the filleting of fish was not applicable to the French vessels covered by Article 4 of the Agreement.[78]

A first measure taken by the tribunal was to establish the forward-looking character of the expression "fishery regulations". This was done in two steps. First, observes the tribunal, one must not necessarily exclude as part of the extension of "fishery regulations" those norms in Canadian law that were not already in force when the Franco-Canadian fishery agreement was entered into.

[I]n providing for the application of the Canadian fishery regulations to the French vessels allowed to catch fish in Canada's fishing zone, Article 6 clearly does not have the effect of subjecting these vessels only to the regulations in force at the time of the conclusion of the Agreement, especially since paragraph 3 of this article speaks of the promulgation of "new regulations applicable to these vessels".[79]

Secondly, it is necessarily not the case – as France has implicitly argued – that as part of the extension of "fishery regulations", such measures for regulating fishing activities must be excluded that were not already in use on this same occasion.

In stipulating that "Canadian fishery regulations shall be applied without discrimination in fact or in law to the French fishing vessels" and in adding "including the regulations concerning the dimensions of vessels authorized to fish less than 12 miles from the Atlantic coast of Canada", the authors of the 1972 Agreement used the term "fishery regulations" as a generic formula covering all the rules applicable to fishing activities, while the reference to the dimensions of the vessels appears to suggest that a particular purpose was thereby intended, namely the limitation of these vessels' fishing capacity.

However, as this expression was embodied in an agreement concluded for an unlimited duration, it is hardly conceivable that the Parties would have sought to give it an invariable content. Accordingly, in view of the subsequent evolution of international law respecting maritime fisheries, the rules to which the expression refers must not only be taken to be those setting technical standards for the physical conditions in which the fishing is carried on but also those requiring the completion of certain formalities prior to the performance of these activities.

The tribunal observes, for example, that the content of the fishery regulations adopted by a number of coastal States has evolved to some extent since 1972. Whereas at the time of the conclusion of the Agreement, the fishery regulations in force in various States usually confined themselves to specifying forbidden fishing zones or closed seasons, permitted fishing gear and equipment, and the types, age and size of the species that could be caught, the scope of fishery regulations has since been enlarged; this applies to the regulations of both the Parties to the present case. Concern over the more efficient management of fish stocks has led to the introduction of other methods of supervising fishing efforts partly in the form of quotas for individual vessels within the total allowable catch (TAC) and partly in the form of fishing licences or permits for foreign vessels. The system of fishing quotas and licences has in fact become general and was applied by Canada to French fishing vessels through the 1976 Coastal Fisheries Protection Regulations, which formed the first set of regulations applicable to these vessels and laid down the procedures for applying for and issuing the licences. The Tribunal notes, in this connection, that the French Government, by its actions, has accepted the application of this system to the vessels flying its flag and operating in the Canadian fishing zones.

While the Parties' subsequent practice in applying the Agreement has thus enlarged the scope of fishery regulations, this extension has nevertheless occurred without affecting the original meaning of the expression, which must therefore be taken to be that given it in common usage.[80]

The pronouncement speaks for itself. According to the tribunal, the decisive factor for determining "the ordinary meaning" of the expression "fishery regulations" is clearly contemporary language.

My second example is the advisory opinion delivered by the International Court of Justice in the *Namibia Case*.[81] The case originated in the so-called mandate system created by the League of Nations after the First World War. In 1920, the League of Nations had decided to entrust to South Africa the mandate, which the League, up to that point, had itself exercised over the former German colony of South-West Africa. In question was a so-called C-mandate. It meant that South-West Africa was to be administrated under the same laws as those of South Africa itself …

... as integral portions of its territory [...].[82]

Twenty-five years later, the United Nations was founded. As part of the global order that was now to be created, the organisation decided to bring to a close the League of Nations mandate system. Instead, through agreements concluded with the different mandatory states, a trusteeship system was to be established. With South Africa, however, no such agreement was reached, and the legal status of the territory of South-West Africa remained unsettled. In 1950 came the ICJ advisory opinion in the *International Status of South-West Africa Case*. Certainly, the Court observes, there is no obligation on South Africa to relinquish the administration of South-West Africa to the UN trusteeship; but as long as South Africa chooses to retain the mandate, it is still to fulfil all obligations associated with

the mandate.[83] In 1966 the UN General Assembly adopted resolution 2145 (XXI). As the resolution plainly declares, since South Africa has failed to fulfil its obligations with regard to the administration of South-West Africa, the mandate is terminated; henceforth, South-West Africa comes under the direct responsibility of the UN.[84] Once again, however, South Africa was to refuse all co-operation. In 1970, after numerous promptings and censure, the UN Security Council turned to the International Court in request for an advisory opinion. The Court was asked to decide on the legal consequences of South Africa's continued presence in South-West Africa, now known as Namibia.[85]

A basic factor in the reasoning of the Security Council was of course that South Africa's presence in Namibia was a breach of the obligations held by that state under international law. Against this assumption several counter-arguments were raised. *Inter alia*, South Africa claimed that a C-mandate was more or less tantamount to an annexation; this appeared clearly from the various statements contained in the preparatory work of the League Covenant.[86] The Court showed no understanding for this line of reasoning. As a mandatory, the Court observed, South Africa had assumed as "a sacred trust" to provide for the "well-being and development" of the South-West African population; this is confirmed in article 22 § 1 of the Covenant:

> To those colonies and territories which as a consequence of the late war has ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.[87]

In order to live up to this commitment, South Africa must act, not for the annexation of the mandated territory, but rather for its independence and self-determination. Below follows the reasoning adduced by the Court in support of this proposition:

> [T]he subsequent development of international law in regard to non-self governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously, the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraced all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of

fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

53. All these considerations are germane to the Court's evaluation of the present case. 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 interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[88]

The focus of the whole exercise is the expression "a sacred trust". The Court concludes that, for the understanding of this expression, one must take into consideration the developments in international law since 1919, when the Covenant was concluded. We must note that the Court itself does not expressly pronounce on the means of interpretation exploited. In the literature this has provoked a variety of interpretations. Some authors see a use of the context. Stated more specifically, they see a use of the contextual element described in VCLT article 31 § 3(c); that is, "any relevant rules of international law applicable in the relations between the parties".[89] This is a reading of the decision that does not convince. Based on the wordings used by the Court, the assumption can be made that the means of interpretation referred to at the end of paragraph 53 – in the passage beginning with "Moreover …" – is not the same as that referred to in the remainder of the paragraph. The means of interpretation referred to in the passage beginning with "Moreover ..." is clearly the contextual element described in VCLT article 31 § 3(c). Therefore, it stands to reason that the means referred to in the remainder of the passage is a different one. In my judgment, this other means of interpretation is conventional language – stated more specifically, conventional language as expressed in article 73 of the UN Charter, and in the *Declaration on the Granting of Independence to Colonial Countries and Peoples*; I cannot see what else it could possibly be.[90] Hence, as I understand the decision, the decisive factor for determining "the ordinary meaning" of "a sacred trust" is contemporary language.

In support of the interpretation of VCLT article 31 earlier referred to as alternative (b), authors have often cited the judgment of the ICJ in the *Aegean Sea Continental Shelf Case*.[91] This practice appears to be based on a misunderstanding – a fact, which I think should be expressly set forth. (Let it be stressed, however, that I remain convinced that alternative (b) is the only correct description of the present legal state-of-affairs – but, of course, I remain so for other reasons than the decision of the ICJ in the *Aegean Sea Continental Shelf Case*.)

So, let us take a closer look at the ICJ judgment in *Aegean Sea Continental Shelf*.[92] During the early 1970s, a dispute had arisen between Greece and Turkey concerning the extent of the two states' continental shelf areas in the Aegean Sea. In August 1976, Greece had turned to the International Court of Justice asking the Court to pronounce on the correct line to be applied for delimiting those areas. As a basis for the jurisdiction of the Court, Greece had cited article 17 of the 1928 *General Act for the Pacific Settlement of International Disputes* – according to which a legal dispute that arises between two parties to the General Act shall be submitted for decision to the Permanent Court of International Justice – together with article 37 of the ICJ Statute – stating that whenever a treaty in force provides for reference of a dispute to the Permanent Court of International Justice, it shall instead be referred to the International Court of Justice. Article 17 of the General Act provides:

> All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

Greece had accessed the General Act in 1931, and Turkey in 1934; both states were still bound by their undertakings. However, upon accession, Greece had made this reservation:

> The following disputes are excluded from the procedures described in the General Act … :
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> (b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication.[93]

The question was whether the reservation made by Greece was to be read as to exclude the jurisdiction of the Court in this particular dispute. Greece naturally denied that this was the case, and did so for several reasons.

One argument put forward by the Greek government was that the Greek reservation was made at a time when the concept of a continental shelf was entirely unknown. Given that a reservation shall be interpreted in accordance with the intentions of its authors, the Greco-Turkish dispute could then not

possibly be part of the extension of the expression "disputes relating to the territorial status of Greece". This was an argument the Court refused to accept. What we are confronting here, the Court observed, is a generic term – by "the territorial status of Greece" any matter is referred to, the only condition being that according to international law it can be taken as included in the concept *the territorial status of Greece*.

> [T]he presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like "domestic jurisdiction" and "territorial status" were intended to have a fixed content regardless of the subsequent evolution of international law.[94]

The fact was that through its actions, Greece itself had already paved the way for this reasoning. The Court explains:

> The Greek Government invokes as a basis for the Court's jurisdiction in the present case Article 17 of the General Act under which the parties agreed to submit to judicial settlement all disputes with regard to which they "are in conflict as to their respective rights". Yet the rights that are the subject of the claims upon which Greece requests the Court in the Application to exercise its jurisdiction under Article 17 are the very rights over the continental shelf of which, as Greece insists, the authors of the General Act could have had no idea whatever in 1928. If the Greek Government is correct, as it undoubtedly is, in assuming that the meaning of the generic term "rights" in Article 17 follows the evolution of the law, so as to be capable of embracing rights over the continental shelf, it is not clear why the similar term "territorial status" should not likewise be liable to evolve in meaning in accordance with "the development of international relations" (*P.C.I.J*, *Series B*, *No. 4*, p. 24). It may also be observed that the claims which are the subject-matter of the Application relate more particularly to continental shelf rights claimed to appertain to Greece in virtue of its sovereignty over certain islands in the Aegean Sea, including the islands of the "Dodecanese group" (para. 29 of the Application). But the "Dodecanese group" was not in Greece's possession when it acceded to the General Act in 1931; for those islands were ceded to Greece by Italy only in the Peace Treaty of 1947. In consequence, it seems clear that, in the view of the Greek Government, the term "rights" in Article 17 of the General Act has to be interpreted in the light of the geographical extent of the Greek State today, not of its extent in 1931. It would then be a little surprising if the meaning of Greece's reservation of disputes relating to its "*territorial* status" was not also to evolve in the light of the change in the territorial extent of the Greek State brought about by "the development of international relations".[95]

The Court's conclusion is unmistakable: "rights", in the sense of the 1928 General Act, are those rights that can be invoked by reference to the rules and principles of international law applicable whenever the General Act is interpreted. The decisive issue is whether this conclusion is support for alternative (b), according to which, in a situation where contemporary and historical language differ, a treaty shall sometimes be interpreted using the

former.[96] The answer must be in the negative. The problem confronted in the *Aegean Sea Continental Shelf Case* is the fact that law has altered. Clearly, the rights of coastal states over the continental shelf are not the same in 1978, when the judgment of the Court is delivered, as they were in 1928, when the General Act was concluded. But this is not necessarily to say that conventional language has changed. On the contrary; if we were to compare the meanings of RIGHTS, according to conventional language in 1978 and 1928 respectively, I would dare to assert that we would find no difference at all. Nevertheless, for the sake of argument, let us follow in the line of some commentators and assume the opposite. Let us assume that the language used by the Court for determining the meaning of "rights" is that of 1978.

The lexical definition of RIGHT is "that which a person [whether legal or not] has a just claim to".[97] The term RIGHTS, according to grammar, denotes an object in the plural. By applying the rules of pragmatics, we can also conclude that the expression "rights" in the 1928 General Act deictically refers back to international law. However, this in itself cannot possibly answer the question why, by the expression "rights", we are to understand those rights that can be invoked by reference to the international laws applicable in 1978. According to conventional language, "rights" can be used in three different ways: (1) as a general referring expression; (2) as a generic referring expression with an unalterable referent; (3) as a generic referring expression with an alterable referent.[98] Thus, even if we were to limit the use of conventional language to that of 1978, the ordinary meaning of "rights" would clearly be ambiguous. To determine which one of the linguistically possible meanings is correct and which one is not, one has to proceed as usual, using other means of interpretation. What the International Court of Justice seems to rely upon for its conclusion is the object and purpose of the treaty. "[I]t is [to be] recalled", the Court observes …

> ... that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration [...].[99]

Hence, what the case involves is not – as some authors seem to have taken for granted – a conflict between two linguistic systems valid at two different points in time. The case involves a collision between language habits internal to one single system. The problem *is not* that the expression "rights" takes on different meanings, depending on whether it is understood in accordance with the language employed in 1928 or that employed in 1978. The problem is that the expression takes on different meanings, even though it is understood in accordance with only one of these languages.

With that, it is time to summarise. As we observed above, there are questions for which we cannot find answers in the text of the Vienna

Convention. One question is whether it is the language employed at the time of a treaty's conclusion (i.e. historical language), or the language employed at the time of interpretation (i.e. contemporary language), that an applier shall employ when he interprets a treaty using the "ordinary meaning". Two views are held in the literature. One is that expressed by authors such as Harazsti, Dupuy and Rousseau – what we have termed as alternative (a) – namely that the determining factor for "the ordinary meaning" is historical language, and this language only. As I have attempted to show, strong arguments can be made against this view. First, it seems to run counter to the object and purpose of the Vienna Convention. Second, it appears to be in conflict with the practice of international courts and tribunals. My conclusion is that alternative (a) should be discarded. A more accurate picture of the current legal state-of-affairs is that expressed by commentators such as Villiger and the Institute for International Law.

That is not to say that I can fully accept what this last group of commentators have to offer. What Villiger and the Institute for International Law imply is that an applier – depending on the circumstances – has the possibility of taking into account both historical and contemporary language. Neither commentator, however, can tell us exactly the circumstances under which the applier shall employ the one language or the other. In my view this position is all too cautious. This is a proposition I will now try to establish.

5 REGARDING THE PROBLEM CAUSED BY TEMPORAL VARIATION IN LANGUAGE (CONT'D)

Quite a few things have already been said about the different types of references and their various uses. We have noted that of pure necessity an utterer's possibilities for singular and general references, but not for generic ones, are limited by the linguistic conventions adhered to on the occasion of utterance. The possibilities for generic reference are limited by the conventions adhered to on the occasion of utterance, on the condition that the referent is one the utterer assumes is unalterable. If the referent is one assumed to be alterable, the referring possibilities are limited by the conventions adhered to at any given moment. Already on this basis it is possible, at least, to assume the content of international law:

> If it can be shown, that the thing interpreted is a generic referring expression with a referent assumed to be alterable, then the decisive factor for determining "the ordinary meaning" of the expression shall be contemporary language. In all other cases, the decisive factor shall be historical language.

The judicial opinions expressed in the *La Bretagne Arbitration* and *Namibia* cases seem to amount to a confirmation of my hypothesis. According to the arbitration tribunal in *La Bretagne*, the expression "fishery regulations" is a generic referring expression.

> In stipulating that "Canadian fishery regulations shall be applied without discrimination in fact or in law to the French fishing vessels" ... the authors of the 1972 Agreement used the term "fishery regulations" as a generic formula covering all the rules applicable to fishing activities [...].[100]

And not only that – it is a generic referring expression with a referent assumed by France and Canada to be dynamic.

> [A]s this expression was embodied in an agreement concluded for an unlimited duration, it is hardly conceivable that the Parties would have sought to give it an invariable content.[101]

So, the expression must be assumed to refer to rules for the application and granting of fishing licences, irrespective of the fact that when the agreement was concluded, the term FISHERY REGULATIONS, according to conventional language, referred only to those regulations applicable to the enterprise of fishery as such.

> Accordingly, in view of the subsequent evolution of international law respecting maritime fisheries, the rules to which the expression refers must not only be taken to be those setting technical standards for the physical conditions in which the fishing is carried on but also those requiring the completion of certain formalities prior to the performance of these activities — [although] at the time of the conclusion of the Agreement, the fishery regulations in force in various States usually confined themselves to specifying forbidden fishing zones or closed seasons, permitted fishing gear and equipment, and the types, age and size of the species that could be caught, the scope of fishery regulations has since been enlarged [...].[102]

Less clear is the opinion delivered by the International Court of Justice in *Namibia*. What the Court says, first of all, is that it is aware that the ultimate purpose of interpreting a treaty is to establish its utterance meaning; second, that the terms contained in the League Covenant, at the conclusion of the Covenant – according to the language employed at that point – stood for something, which is by definition evolutionary; and third, that this is accordingly the manner, in which the parties to the Covenant, too, must be assumed to have used these terms.

> 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.[103]

On the whole, however, this seems to amount to the very same thing as saying that the expressions in question are generic referring expressions whose referents the Covenant parties – at the conclusion of the Covenant – assumed would come to alter. After all, only generic referring expressions can be said to stand for something which is "by definition evolutionary". Hence, the following conclusion: for the interpretation of the expression "a sacred trust", the court must take as its starting-point the language of international law, considering the law applicable at the time of interpretation, and not the law applicable in 1919, when the League Covenant was concluded.

> 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.[104]

Now, the decisive question is whether the judicial opinions expressed in *La Bretagne* and *Namibia* are in themselves sufficient to conclusively substantiate my working hypothesis. On the positive side, at least with regard to the decision in *La Bretagne*, the reasoning expressed is unusually detailed and clear – a fact that makes the decision a particularly weighty argument. On the negative side, two decisions hardly constitute a very persuasive body of evidence. In my opinion, the opinions expressed in the *La Bretagne* and *Namibia cases* do allow for certain conclusions; but the conclusions are not very strong, and it would be beneficial if we could find further evidence to support what we have come up with. The problem is that few international decisions even address the problem caused by temporal variation in language. In the period from 1969 to the present, I have found only five such decisions, of which two have already been cited. The other three are the ICJ judgment in the *Case Concerning Kasikili/Sedudu Island*, and the international awards in the *Young Loan* and *Guinea – Guinea-Bissau Maritime Delimitation* cases, respectively. These latter decisions, however, differ from the former insofar as the language used is historical and not contemporary language. Therefore, these cases could be cited as support for the proposition that the decisive factor for determining "the ordinary meaning" is historical language, and this language only.[105] As I explained earlier, it is my conclusion that this proposition is not tenable. Hence, it appears it is up to me to show that the norm I have adopted can be reconciled with the judgment in the *Case Concerning Kasikili/Sedudu Island*, and the two international awards in the *Young Loan* and *Guinea – Guinea-Bissau Maritime Delimitation* cases.

Let us begin with the judgment of the ICJ in the *Kasikili/Sedudu Island*. This case has already been discussed in this chapter,[106] and I see no need for unnecessary repetition. As we know, the dispute involved the meaning

of a written agreement, concluded in the year 1890 by the former colonial powers Germany and the United Kingdom. In article 3, paragraph 2, of the Anglo-German agreement, we find the following provision:

> In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded:
>
> 2. To the east be a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude; it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18 parallel of south latitude; it runs eastward along that parallel till it reaches the river Chobe, and descends the centre of the main channel [in the German agreement text: *"im Thalweg des Hauptlaufes*"] of that river to its junction with the Zambesi, where it terminates.[107]

The question arose whether the two expressions "*Thalweg des Hauptlaufes*" and "centre of the main channel" could be understood to refer to one single referent or not. The first measure taken by the Court was to interpret the provision "in accordance with the ordinary meaning to be given to the terms of the treaty". To this end, the Court brings attention to what appears to be the language of international law employed at the time of interpretation:

> The Court notes that various definitions of the term "Thalweg" are found in treaties delimiting boundaries and that the concepts of the Thalweg of watercourse and the centre of a watercourse are not equivalent. The word "Thalweg" has variously been taken to mean "the most suitable channel for navigation" on the river, the line "determined by the line of deepest soundings", or "the median line of the main channel followed by boatmen travelling downstream". Treaties or conventions which define boundaries in watercourses nowadays usually refer to the Thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.[108]

The Court proceeds with an analysis based on historical language:

> The Court further notes that at the time of the conclusion of the 1890 Treaty, it may be that the terms "centre of the [main] channel" and *"Thalweg des Hauptlaufes"* were used interchangeably. In this respect, it is of interest to note that, some three years before the conclusion of the 1890 Treaty, the Institut de droit international stated the following in Article 3, paragraph 2, of the "Draft concerning the international regulation of fluvial navigation", adopted at Heidelberg on 9 September 1887: "The boundary of States separated by a river is indicated by the thalweg, that is to say, the median line of the channel" (*Annuaire de l'Institut de droit international*, 1887–1888, p. 182), the term "channel" being understood to refer to the passage open to navigation in the bed of the river, as is clear from the title of the draft.[109]

After which the Court presents its conclusion:

> The Court will accordingly treat the words "centre of the main channel" in Article III, paragraph 2, of the 1890 Treaty as having the same meaning as the words "Thalweg des Hauptlaufes" [...].[110]

Apparently, the factor considered by the Court as decisive for determining "the ordinary meaning" of the expression *"Thalweg des Hauptlaufes"* is historical language. In order for this view to be reconciled with the conclusion I have drawn earlier, certain conditions must be met. More specifically, it must be established that *"Thalweg des Hauptlaufes"* is either a singular or general referring expression, or a generic referring expression with a referent assumed to be unalterable. As it appears, these conditions are indeed fulfilled. *"Thalweg des Hauptlaufes"* in the sense of the Anglo-German treaty seems to be a singular referring expression. The phrase is articulated in the definite singular, and it is used to express a time-bound proposition – the existence of the referent is located to a specific point in time, namely the occasion at which the Anglo-German treaty was concluded. After all, the whole point of entering into a boundary agreement is to establish once and for all the location of a common boundary. Hence, it is all in due order if an applier uses the language of 1890, and not that of 1998, in determining what is to be "the ordinary meaning" of the expression *"Thalweg des Hauptlaufes"*.

Another case already touched upon in this chapter is *the Guinea – Guinea-Bissau Maritime Delimitation*.[111] As we know, the dispute in this case centred on the meaning of a boundary treaty, concluded in 1886 by the two colonial powers France and Portugal. Article 1 of the treaty provides:

> In Guinea, the *boundary* separating the Portuguese possessions from the French possessions will follow, in accordance with the course indicated on Map number 1 attached to the present Convention:
>
> To the north, a line which, starting from Cape Roxo, will remain as much as possible, according to the lay of the land at equal distance from the Cazamance (Casamansa) and San Domingo de Cacheu (Sao Domingos de Cacheu) rivers, up to the intersection of the meridian of 17° 30' longitude west of Paris with parallel of 12° 40' north latitude. Between this point and the meridian of 16° longitude west of Paris, the *boundary* will conform to parallel of 12° 40' north latitude.
>
> To the east, the *boundary* will follow the meridian of 16° west, from parallel 12° 40' north latitude to the parallel of 11° 40' north latitude.
>
> To the south, the *boundary* will follow a line starting from the estuary of the Cajet River, located between Catack Island (which will belong to Portugal) and Tristao Island (which will belong to France), and following the lay of the land, it will remain, as much as possible, at equal distance from the Rio Componi (Tabati) and the Rio Cassini, then from the northern branch of the Rio Componi (Tabati) and the southern branch of the Rio Cassini (Marigot de Kakondo) first and the Rio Grande afterwards. It will end at the intersection of the meridian of 16° west longitude and the parallel of 11° 40' north latitude.
>
> Shall belong to Portugal all islands located between the Cape Roxo meridian, the coast and the southern *limit* represented by a line which will follow the thalweg of the Cajet River, and go in a southwesterly direction through the Pilots' Pass to reach 10° 40' north latitude, which it will follow up to the Cape Roxo meridian.[112]

The question was whether France and Portugal, by adopting this text, could be assumed to have established a general maritime boundary delimiting their respective possessions in West Africa at the time. The Court observes:

> The disagreement stems first of all from the meaning to be given to the word *limit*: Guinea holds that it is synonymous with *boundary* and remarks that it is generally used in this sense in maritime affairs, whereas Guinea-Bissau gives it a less precise meaning in this case. The Tribunal observes that the two expressions must be taken here in their spatial sense, with due regard to their legal connotations. In French as in Portuguese, and according to the definitions provided by linguistic or legal dictionaries, mentioned or not mentioned by the Parties, they are slightly ambiguous. First of all, they can mean either a zone, especially in the plural, or a line, which is of course the case here. Secondly, the word *limit* can have two meanings, a general one and a more specific one. This appears in particular in a French dictionary contemporaneous with the signature of the 1886 Convention, the *Dictionnaire général de la langue française du commencement du XVIIe siècle jusqu'à nos jours* (the General Dictionary of the French language from the beginning of the 17th century to today), by Hatzfeld and Darmesteter, which defines *limit* as the "extreme part where a territory, a domain ends", and *boundary* as the "limit which separates the territory of a State from that of a neighboring State".[113]

It is not stated expressly, but the implication is clear enough: the factor considered by the Court as decisive for determining "the ordinary meaning" of the expressions "boundary" and "limit" is the language adhered to in 1886. Neither "boundary" nor "limit" is a generic referring expression with a referent assumed to be alterable. "[B]oundary" and "limit", in the sense of the Franco-Portuguese treaty, both appear to be definite singular referring expressions. The words are articulated in the definite singular; they are used to express time-bound propositions – the existence of the referent is located to a specific point in time, namely the occasion on which the treaty is concluded. Hence, it is all in due order if an applier uses the language of 1886, and not that of 1985, in determining what is to be "the ordinary meaning" of the two expressions "boundary" and "limit".

The *Young Loan Case* was dealt with in Section 2 of this chapter.[114] As we know, an issue of dispute in this case was the meaning of the 1953 *London Debt Agreement* (LDA) and the expression therein: "the least depreciated currency" – *"la devise la moins dépréciée"* – "*der Währung mit der geringsten Abwertung"*. I quote from annex 1(A), article 2(e), of the agreement:

> Should the rates of exchange ruling any of the currencies of issue on 1 August 1952, alter thereafter by 5 *per cent*. or more, the instalments due after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of *the least depreciated currency* (in relation to the rate of exchange current on 1 August 1952) reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.
>
> Au cas où les taux de change en vigeur le 1er août 1952 entre deux ou plusieurs monnaies d'émission subiraient par la suite une modification égale ou supérieure à 5% les versements

exigibles après cette date, tout en continuant à être effectués dans la monnaie du pays d'émission, seront calculés sur la base de *la devise la moins dépréciée* par rapport au taux de change en vigeur au 1er août 1952, puis reconvertis dans la monnaie d'émission sur la base du taux de change en vigeur lors de l'échéance du paiement.

Sollte sich der am 1. August 1952 für eine der Emissionswährungen massgebende Wechselkurs später um 5. v. H. oder mehr ändern, so sind die nach diesem Zeitpunkt fälligen Raten zwar nach wie vor in der Währung des Emissionslandes zu leisten; sie sind jedoch auf der Grundlage *der Währung mit der geringsten Abwertung* (im Verhältnis zu dem Wechselkurs vom 1. August 1952) zu berechnen und zu dem im Zeitpunkt der Fälligkeit der betreffenden Zahlung massgebenden Wechselkurs wieder in die Emissionswährung umzurechnen.[115]

The question arose as to whether a comparison of the three authenticated language versions of the treaty revealed a difference in meaning that could not be removed by applying Vienna Convention articles 31–32. The tribunal starts its attempt to pin down the meaning of the treaty by first resorting to conventional language. To establish conventional language, the tribunal takes assistance from a number of texts, including Gabler's *Banklexikon*, published 1979; Carreau's *Souveraineté et Cooperation Monétaire Internationale*, published 1970; Carreau, Juillard and Flory's *Droit International Economique*, published 1978; Hirschberg's *The Impact of Inflation and Devaluation on Obligations*, published 1976; and *The International Monetary Fund*, published in 1969 by Horsefield.[116] The conclusion is that in all three languages the words DEPRECIATION, DÉPRÉCIATION, ABWERTUNG are ambiguous.

The possibility of the German and English or French texts of the disputed clause having different meanings cannot therefore be ruled out.[117]

After this, the tribunal apparently finds it necessary to further reinforce its conclusion:

In the Tribunal's view, the uncertainty arising from a – possible – discrepancy between the texts is not removed if, for interpretation purposes, reference is made to the meaning generally attached to the terms "depreciation" and *dépréciation* at the time the LDA was concluded, *i.e*. in 1952.

Despite the wording of Article 31 (1) of VC[L]T, its intentions might still be met if even today an attempt to determine the "objectified" will of the parties, as expressed in the text of the treaty, were based on the normal significance of the terms used at the time the treaty was concluded. (*Cf. e.g. Case Concerning Rights of U.S. Nationals in Morocco*, *I.C.J. Reports* 1952, p. 189; McNair, *The Law of Treaties*, Oxford 1961, p. 467; Rousseau, *Droit International Public*, Vol. 1, Paris 1970, p. 281.)

There should not be any doubt that when the LDA was concluded, *i.e*. at a time when the international monetary order was generally characterized by a system of fixed parities agreed with the IMF, and not, as now, by a network of floating, continuously changing exchange rates, the terms "depreciation", "devaluation", *dépréciation* and *dévaluation* usually described the same situation, since any depreciation of a currency in its external relations,

in accordance with the system, constitutes a devaluation. How closely these concepts drew together can even be seen from the original wording of the Articles of Agreement of the IMF itself. When Article I (iii) speaks of " 'competitive' exchange depreciation", in view of the fixed, the agreed parities, all that could be referred to here is devaluation by act of government.

However, the Tribunal is convinced that the circumstances mentioned are an insufficient reason for having to reduce at the time of the conclusion of the treaty the terms "depreciation" and *dépréciation* to the meaning of the German word *Abwertung*. Even at that time, there was some uncertainty in the use of the terms both in English and in French.[118]

It is not expressly stated, but the implication is clear enough: the factor considered by the tribunal as decisive for determining "the ordinary meaning" of the expressions "the least depreciated currency", *"la devise la moins dé préciée", "der Währung mit der geringsten Abwertung"* is the language used in 1952. None of the expressions are generic referring expressions with a referent assumed to be alterable. The expressions "the least depreciated currency", *"la devise la moins dé préciée",* and *"der Wä hrung mit der geringsten Abwertung",* in the sense of the LDA, appear to be indefinite, singular referring expressions. The phrases are articulated in the definite singular, but they do not refer to a particular currency; rather, they refer to any currency from a given set of currencies. The propositions they express are time-bound – the existence of the referent is located to specific occasions, i.e. those occasions on which interest is to be paid.[119] Hence, it would stand to reason if an applier used the language of 1952, and not that of 1980, in determining what is to be "the ordinary meaning" of the expressions "the least depreciated currency", *"la devise la moins dé préciée",* and "*der Währung mit der geringsten Abwertung".*

These three decisions – *Kasikili/Sedudu Island*, *Young Loan* and *Guinea/Guinea-Bissau Maritime Delimitation* – can of course be read in different ways; this is a fact from which we must not shy away. According to a first reading, "the ordinary meaning", in the opinion held by the tribunals, refers to historical language, since the thing interpreted is a singular referring expression. According to a second reading, "the ordinary meaning", in the opinion of the tribunals, refers to historical language, since other languages can *never* be used for determining that meaning. Taken out of context, therefore, the decisions must be seen as arguments carrying very little weight. Nevertheless is it my judgment that through these three decisions, we find further support for the conclusion I wish to confirm. As I have explained, few international decisions even broach the problem caused by temporal variation in language. From 1969 and onward, I have found only five such decisions: *La Bretagne*, *Namibia*, *Kasikili/Sedudu Island*, *Guinea/Guinea-Bissau Maritime Delimitation* and *Young Loan*. The first two provide us with arguments that clearly support my conclusion. The

remaining three are ambiguous. Hence, we can say that from 1969 onward, not a single judicial opinion has been expressed that clearly contradicts our conclusion. Certainly, this is a fact of considerable argumentative value.

6 CONCLUSIONS

According to VCLT article 31 § 1, a treaty shall be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty". The purpose of this chapter, as earlier stated, in to describe what this means. Based on the observations made above, the following rule of interpretation can be established:

Rule no. 1
§ 1. If it can be shown that in a treaty provision, there is an expression whose form corresponds to an expression of conventional language, then the provision shall be understood in accordance with the rules of that language.
§ 2. For the purpose of this rule, CONVENTIONAL LANGUAGE means the language employed at the time of the treaty's conclusion, except for those cases where § 3 applies.
§ 3. For the purpose of this rule, CONVENTIONAL LANGUAGE means the language employed at the time of interpretation, on the condition that it can be shown that the thing interpreted is a generic referring expression with a referent assumed by the parties to be alterable.
§ 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.

NOTES

1. See e.g. Amerasinghe, p. 191; *Oppenheim's International Law*, pp. 1272–1275; Ost, pp. 288ff.; Sinclair, 1984, pp. 121ff.; Bernhardt, 1984, p. 322; Bos, 1984, p. 147; Yasseen, pp. 19ff.; Rest, p. 144; Lang, pp. 155ff.; Köck, pp. 86ff.; Jacobs, passim; Briggs, p. 708.
2. In older literature, applying principles of etymology is sometimes referred to as a legitimate method of interpretation. (See e.g. Sørensen, 1946, pp. 222–223; Ehrlich, pp. 105–106.)
3. In the language of linguistics, a LEXICON is the total number of words and lexicalised phrases in a language. An important distinction to be made is that between "words" and "word forms". A word often has several different forms of inflection. Among these different inflectional forms of a word, normally one is conventionally used and regarded as its "citation-form", representing the word as a composite whole. In a lexicon the "citation-form" of a word is usually the only inflectional form addressed; LEXEMES is the technical term used for these units. A "lexicalised phrase" is a standard phrase, such as THE UNITED NATIONS.

4. The underlying system of rules for a language is normally divided into morphological, syntactical, pragmatic, and *phonological* rules. Phonological rules describe how sounds in a language are formed and combined. In this work, attention is focused on those rules that apply only to written language. Hence, phonology can be disregarded here.
5. Article 5 § 2.
6. See e.g. *Starke's International Law*, p. 435; Bos, 1984, p. 147; Haraszti, p. 83.
7. Another commonly used term is LITERAL INTERPRETATION. (See Bernhardt, 1984, p. 322; Davidson, p. 135; Ost, p. 288; O'Connell, p. 255.) I am not completely certain how to understand this term. In one sense, LITERAL INTERPRETATION can be taken as synonymous with a reading of a text word-for-word; but this is certainly not an adequate way of characterising the interpretation of a treaty "in accordance with the ordinary meaning to be given to the terms of the treaty". In another sense, LITERAL INTERPRETATION can be taken as synonymous to a reading of a text based on its *literal, and not figurative or symbolic*, meaning; what this might mean in the context of treaty interpretation is beyond me. If a single all-encompassing term shall be used to describe the task performed by an applier when interpreting a treaty provision "in accordance with the ordinary meaning to be given to the terms of the treaty", the most appropriate is LINGUISTIC INTERPRETATION. (Cf. e.g. Voïcu, pp. 41–43; Bernhardt, 1967, p. 497.)
8. Usually, the grammar of a language is defined also to include phonology. In this work, our attention is focused on the written aspects of a language. This allows us to disregard phonology.
9. See, for example, R.A. Hudson, passim; Trudgill, passim.
10. Obviously, it is a simplification to speak of *everyday language* as a unified concept. Even in everyday language, people express themselves in different ways, depending on such factors as region of residence, social status, gender, age, and ethnicity. (See e.g. Hudson, passim; Trudgill, passim.) When used here, the term EVERYDAY LANGUAGE shall be understood as the language normally taught in schools, used in daily newspapers, and applied in similar public contexts. This language, whose character – let it be realised – is rather formal, is what most people consider as some sort of standard. In reality, it is merely one variety among many, though of course it is still of special significance.
11. In the language of sociolinguistics, these varieties are often referred to as REGISTERS. (See e.g. Holmes, pp. 276–283.)
12. See Trudgill, p. 123; Holmes, p. 276.
13. See Trudgill, passim.
14. See e.g. Sinclair, 1984, p. 126; Rest, p. 150. In the early drafts of the current article 31 § 4, this relationship was brought out more clearly. See Draft Articles With Commentaries (1964): "Notwithstanding the provisions of paragraph 1 of article 69, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning." (*ILC Yrbk*, 1964, Vol. 2, p. 199, draft article 71.) The fact that the provision eventually came to have a different wording is said to have been the result of nothing else than the authors' desire to simplify earlier versions. (See Yasseen, speaking as Chairman of the ILC Drafting Committee, at the Eighteenth Session, 883rd meeting of the International Law Commission, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 267, § 94 cf. § 90.) Waldock's drafts from both 1964 and 1966 contain a corresponding clarification. (See Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 52, draft article 70

§ 3; Sixth Report on the Law of Treaties, *ILC Yrbk*, 1966, Vol. 2, pp. 100–101, draft article 69 § 2.)
15. Haraszti, p. 86. (My italics.)
16. Yasseen, pp. 27–28. (Footnotes omitted.)
17. Ruda, at the Sixteenth Session of the International Law Commission, 766th meeting, *ILC Yrbk*, 1964, Vol. 1, p. 283, §§ 9, 11. (My italics.)
18. Rest, p. 144, n. 2.
19. Gottlieb, p. 131.
20. See Ch.10 of this work.
21. Draft Articles with Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 222, § 17.
22. In addition to the decisions directly cited in the body text, see also *Bosnia Genocide*, § 162; *Bankovic*, §§ 59–62; *La Bretagne Arbitration*, *ILR*, Vol. 82, p. 613; *Lithgow and Others*, *Publ. ECHR*, Ser. A, Vol. 102, pp. 47–48, §§ 113–114; *James and Others*, *Publ. ECHR*, Ser. A, Vol. 98, p. 38, §§ 60–61; *Schiesser*, *Publ. ECHR*, Ser. A, Vol. 34, p. 12, § 28. See also diss. op. Pharand, *La Bretagne Arbitration*, *ILR*, Vol. 82, pp. 659–660, § 70; joint sep. op. Aldrich, Holzmann and Mosk, and joint sep. op. Kashani and Shafeiei, on the Issue of the Disposition of Interest Earned on the Security Account, *Iran-United States*, *A/1*, *ILR*, Vol. 68, pp. 546 resp. 550–552.
23. Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), Judgment of 13 December 1999, ICJ Reports, 1999(II), p. 1045 et seq.
24. In the judgment of the Court, this agreement is referred to simply as "the Anglo-German Agreement of 1 July 1890".
25. The text provided here is that cited by the court. (See § 21 of the judgment.)
26. Ibid., §§ 22–23.
27. Ibid., § 20. (The quoted text originates from the judgment delivered by the ICJ in *Territorial Dispute (Libya/Chad)*, *ICJ Reports*, 1994, pp. 21–22, § 41.)
28. Ibid., §§ 24–25.
29. My emphasis.
30. *Asian Agricultural Products Ltd v. Republic of Sri Lanka* , Award of 27 June 1990, *ILR*, Vol. 106, pp. 417ff.
31. Agreement for the Promotion and Protection of Investments, signed on 13 February 1980.
32. The text cited is that provided by the arbitration tribunal. (See *ILR*, Vol. 106, pp. 478–479.)
33. Ibid., p. 443, § 46 cf. m. § 38.
34. Ibid., p. 443, §§ 47–48.
35. Ibid., p. 444, § 49. (My italics.)
36. Guinea – Guinea-Bissau Maritime Delimitation Case, Award of 14 February 1985, *ILR*, Vol. 77, pp. 636ff.
37. Convention on the Delimitation of French and Portuguese Possessions in West Africa, Signed on 12 May 1886. 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.
38. *ILR*, Vol. 77, p. 661, § 46.
39. Ibid., p. 662, § 46.
40. Loc. cit.

41. The Kingdom of Belgium, The French Republic, The Swiss Confederation, The United Kingdom and The United States of America v. The Federal Republic of Germany, Award of 16 May 1980, *ILR*, Vol. 59, pp. 495ff.
42. Agreement on German External Debts, Signed at London, on 27 February 1953.
43. *ILR*, Vol. 59, pp. 530–531, § 18.
44. Ibid., p. 530, § 18.
45. See e.g. Bynon, passim.
46. In addition to the authorities directly cited in the body text, see also Vitányi, p. 52; Bernhardt, 1963, pp. 74–75; Fitzmaurice, 1957, p. 212.
47. Haraszti, p. 89.
48. Rousseau, p. 282.
49. Dupuy, p. 220. (Footnotes omitted.)
50. In addition to the authorities directly cited in the body text, see also Waldock, Sixth Report on the Law of Treaties, *ILC Yrbk*, 1966, Vol. 2, pp. 95–96, § 7, p. 97, §13.
51. Villiger, p. 343.
52. Ibid., n. 169.
53. Résolution adoptée par l'Institut de droit international à la session de Wiesbaden, I. Le problème intertemporel en droit international public, 11 août 1975, § 4, *Annuaire de l'Institut de droit international*, Vol. 56, p. 538.
54. See Ch. 2, Section 1, of this work.
55. Note that in linguistics, the use of this term (REFERENCE) is not always consistent.
56. Cf. Lyons, 1977, p. 174. Note that it is the utterer who invests the expression with reference. Clearly, in terms of explanation and discussion, it makes things easier if we can say that an expression refers to its referent. Hence, this is the terminology I will use in this work. However, it is important that we do not forget what we actually mean when we say that a certain expression refers to a certain phenomenon, namely that a certain speaker or author (or a certain group of speakers or writers) has used the expression to refer to the phenomenon in question.
57. The assumption is implied by Dupuy in the utterance cited above, but it can also be noted in the writings of others. Judge Van Wyk, for example, writes in his dissenting opinion to the judgment delivered by the International Court of Justice in the *South West Africa Cases (Preliminary Objections)*: "As the object of interpretation is to arrive at the intention which existed when the agreement was recorded, it follows that words or phrases must be given that meaning which they bore at the time when the instrument in question was executed." (*ILR*, Vol. 37, p. 190.) This very same way of thinking is expressed by Yasseen in even more detail: "La langue peut évoluer, le sens des mots peut s'élargir, se préciser et, dans un certain mesure, changer. Toutefois, du point de vue linguistique, les mots sont employés dans le sens qu'ils ont eu à l'époque de leur emploi, autrement on fera dire à ceux qui ont parlé ce qu'ils n'ont pas voulu dire et plus encore ce qu'ils n'ont pas pu dire. Il serait artificiel de prêter aux parties l'intention d'avoir, du point de vue linguistique, employé les mots dans un sens évolutif. Il est difficile en effet de présumer que les parties aux traités ont employé, du point de vue linguistique, les mots dans le sens inconnu et peut-être imprévisible que les mots pourraient acquérir dans l'avenir." (Yasseen, pp. 26–27; Footnote omitted.)
58. See Lyons, 1977, p. 177.
59. See ibid., p. 177.
60. See ibid., pp. 177–197.
61. See ibid., p. 178.

62. Special Agreement, signed at Bissau, on 18 February 1983, Article 5 § 1. (The text cited is that provided by the arbitration tribunal. See *ILR*, Vol. 77, p. 643, § 1.)
63. See Lyons, 1977, p. 178.
64. Article 1 § 1. (The text cited is that provided by the Court. See *ILR*, Vol. 77, p. 642, § 1.)
65. Article 4.
66. See Lyons, 1977, pp. 193–197.
67. See ibid., p. 194.
68. Loc. cit.
69. See ibid., p. 680.
70. Cf. ibid., pp. 158–161.
71. Loc. cit.
72. I let it remain unsaid, whether the referent in this case is defined extensionally or intensionally – or possibly extensionally *and* intensionally. (Cf. Lyons, 1977, pp. 207–208.)
73. See Section 5 of this chapter.
74. See Section 4 of this chapter.
75. Dispute Concerning Filleting within the Gulf of St Lawrence (Canada/France), Award of 17 July 1986, *ILR*, Vol. 82, pp. 591ff.
76. Agreement between Canada and France on their Mutual Fishing Relations, signed at Ottawa, on 27 March 1972.
77. The text cited is that provided by the arbitration tribunal. (See *ILR*, Vol. 82, p. 601.)
78. Ibid., pp. 617–618, § 35.
79. Ibid., p. 618, § 36.
80. Ibid., pp. 619–620, § 37. (Footnote omitted.)
81. 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.
82. Covenant of the League of Nations, article 22 § 6.
83. International Status of South-West Africa, Advisory Opinion of 11 July 1950, ICJ Reports, 1950, pp. 128ff.
84. See UNGA res. 2145 (XXI) of October 1966, §§ 3–4.
85. See UNSC res. 284 (1970).
86. See *ILR*, Vol. 49, p. 18, § 45.
87. The text cited is that provided by the Court (ibid.)
88. Ibid., pp. 21–22, §§ 53–54.
89. See e.g. Sinclair, 1984, p. 140; Jiménez de Aréchaga, pp. 48–50; Elias, 1974, pp. 77–78.
90. Similarly, Waldock, 1981, pp. 540–541.
91. See e.g. *Oppenheim's International Law*, p. 1282, n. 35; Thirlway, 1991, pp. 59–60, Cf. Thirlway, 1989, pp. 139–143; Sinclair, 1984, pp. 125–126; Elias, 1980, pp. 296–302.
92. *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Jurisdiction, Judgment of 19 December 1978, *ILR*, Vol. 60, pp. 512ff.
93. Note that the text cited is a translated version of the original French text used by the ICJ. Both the original text and the English translation are cited in the judgment. (See *ILR*, Vol. 60, pp. 579–580, § 48.)
94. Ibid., p. 591, § 77.
95. Ibid., p. 592, § 78.

96. The reasoning of the Court gives evidence of the simultaneous interpretation of two separate texts. First, the Court is dealing with the meaning of the Greek government's reservation and the expression "the territorial status of Greece". Second, the Court is dealing with the meaning of the 1928 General Act and the expression "rights". Some authors express themselves as if they were assuming that the Court's reasoning concerning the interpretation of the expression "the territorial status of Greece" could, without further reservation, be cited as support for an interpretation of VCLT article 31. Of course, such a position is open to criticism for reasons separate from those here discussed. Certainly, it must not be taken as evident that the rule applied to interpret treaties is the same one used to interpret reservations; quite the opposite. (Cf. *Fishery Jurisdiction (Spain v. Canada)*, *ICJ Reports*, 1998, p. 453, § 46.) For further discussions of this particular issue, see M. Fitzmaurice, 1999, p. 127 et seq.
97. *Webster's New World Dictionary*, Third College Edition.
98. In the practice of international courts and tribunals, further examples can be found of the type of interpretative situation encountered in *Aegean Sea Continental Shelf*. (See e.g. *Canadian Agricultural Tariffs*, *ILR*, Vol. 110, pp. 579–581, §§ 132–138; *Guinea-Bissau v. Senegal*, *ILR*, Vol. 83, pp. 45–46, §§ 84–85.)
99. See p. 85 of this work.
100. See p. 80 of this work.
101. Loc. cit.
102. Loc. cit.
103. See pp. 82–83 of this work.
104. Loc. cit.
105. See e.g., Villiger, p. 343, n. 169.
106. See Section 2 of this chapter.
107. The text given here is the agreement text as cited in the reasons adduced for judgement, § 21.
108. Ibid., § 24.
109. Ibid., § 25.
110. Loc. cit.
111. See Section 2 of this chapter.
112. Note that the text cited is the English translation of the Convention published in *International Law Reports*. (See *ILR*, Vol. 77, pp. 659–660, § 45. My italics.) The Convention was authenticated in French and Portuguese only. For the authenticated French text, see *Archives Diplomatiques*, Vol. 24 (1887), pp. 5ff.
113. *ILR*, Vol. 77, p. 662, § 49. (Footnote omitted.)
114. See Section 2 of this chapter.
115. The text cited is that provided by the arbitration tribunal. (See *ILR*, Vol. 59, p. 514. My italics.)
116. See ibid., pp. 530–531, § 18 (The passage has been cited earlier in this work, see pp. 80–81.)
117. Ibid., p. 531, § 18.
118. Ibid., § 19.
119. I am assuming, of course, that in the terms of the loan, fixed dates were specified for payment of interest.

CHAPTER 4

USING THE CONTEXT: THE "TEXT" OF A TREATY

The purpose of this chapter – together with Chapters 5 and 6 – is to describe what it means to interpret a treaty using the context. Context is defined in article 31, §§ 2–3 of the Vienna Convention. In paragraph 2, we are told what the context is to comprise:

> The context, for the purpose of the interpretation of a treaty, shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in 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.

Paragraph 3 adds three further elements, which – this is how it reads – shall be taken into account "together with the context", namely …

> (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.

These further elements are usually also considered as forming part of the context, in the sense of paragraph 1.[1] I have chosen to follow this practice.[2] It is clear that an investigation into the meaning and use of the context will require considerable discussion. Consequently, I have chosen to divide the concept into three parts. In Chapter 4, I shall first attempt to describe what it means to interpret a treaty using the contextual element described as the "text" of the treaty. In Chapter 5, I shall attempt to describe what it means to interpret a treaty using the elements set out in article 31 § 2, subparagraphs (a) and (b). Finally, in Chapter 6, I shall attempt to describe what it means to interpret a treaty using the elements set out in article 31 § 3.

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context" – this is provided in article 31 § 1.

> Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte [...]

Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de éstos [...].

One thing is immediately evident from reading this text. When an applier uses the context in accordance with the provisions of article 31, the context is not considered independently of other means of interpretation. When the context is used, this is always in relation to conventional language ("the ordinary meaning"). Seen from a different perspective, we could say that when the context is used, it is always a second step in the interpretation process.[3] The question has arisen whether a given complex of facts shall be considered as coming within the scope of application of the norm expressed by a certain treaty provision P; and the provision P has been interpreted using conventional language. However, this (very first) introductory act of interpretation has proved to be insufficient. The ordinary meaning of the treaty provision P is either vague or ambiguous – using conventional language leads to conflicting results. Possibly, conventional language has a role to play in the process to an understanding of the provision, but it must then be supplemented by additional means of interpretation. The idea of using the context is that it will serve as such a supplement. Where the ordinary meaning of a treaty provision is vague, using the context will make the text more precise. Where the ordinary meaning is ambiguous, using the context will help to determine which one of several possible meanings is correct, and which one is not. All this is evident from reading VCLT article 31 § 1.[4] What the provision says is *not* that the terms of a treaty shall be interpreted in their context. What the provision says is that a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context". Hence, a shorthand description of how the context shall be used could look like this:

> 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.

In this chapter – let me repeat – I shall attempt to describe only what it means to interpret a treaty using the contextual element described as the "text" of that treaty. That being the case, in order for the task to be considered accomplished, the following questions must be answered:

(1) What is meant by "the text" of a 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 "the text" of the treaty?

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

1 "[T]HE TEXT"

What is meant by "the text" of a treaty? According to VCLT article 31 § 1 "[t]he context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including its preamble and annexes ...".

Aux fins de l'interprétation d'un traité, le contexte comprend, outre le texte, préambule et annexes inclus [...].

Para los efectos de la interpretación de un tratado, el contexto comprenderá, además del texto, incluidos su preámbulo y anexos [...].

What is meant by "the text" of a treaty might appear evident and plain. Nevertheless, as far as my experience goes the following two clarifications are certainly not out of place.

First, let it be established as a fact that, in the sense of the Vienna Convention, a TREATY TEXT is not necessarily the same thing as a set of words and sentences. In addition to a body of text – text *stricto sensu* – treaties also often include a variety of non-textual representations, such as maps, tables, and diagrams.[5] When we read article 31 § 2, it is not clearly understood whether representations of this kind shall be counted as part of the "text" of a treaty. The term TREATY TEXT is ambiguous. It can be used first in the sense of *words and sentences used for an international agreement in written form*, but also in the sense of *document where the authentic and definite expression of an international agreement is to be found*, *as opposed to preparatory work*, *unauthenticated translations*, *and other such documents*. In my view it is in the latter sense, and not the former, that the Vienna Convention uses the term TEXT. The alternative must quite simply be considered unreasonable. If a non-textual representation is contained in a treaty, but it cannot be considered part of the context for interpretation purposes, then only if it comes under the provisions of article 32 will the non-textual representation be of significance for the interpretation process. Such a radical hierarchisation of the various parts of a treaty cannot possibly be what the parties to the Vienna Convention wished to achieve.[6]

Second, let it be realised that a TREATY TEXT, in the sense of the Vienna Convention, is not necessarily tantamount to *one* instrument. A treaty is an agreement; and an agreement can (at least in principle) take the form of any number of instruments, and still be considered as one, single treaty text. "Treaty", as provided in Vienna Convention article 2 § 1(a), "means an international agreement concluded between States in written form and governed