Ulf Linderfalk

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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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1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?[96]

The award was pronounced on 31 July 1989.[97] The arbitration tribunal found that the 1960 agreement had indeed the force of law, and that it could be invoked in the relations between Senegal and Guinea-Bissau. Having answered question 1 in the affirmative, the tribunal did not consider it necessary to proceed to answering also question 2. In August 1989, Guinea-Bissau had filed an application with the International Court of Justice, requesting the Court to give its opinion on the validity of the 1989 award. According to the argument of Guinea-Bissau, the award was to be considered null and void, since the tribunal had exceeded its powers by (among other things) not providing sufficient justification for answering only question 1 and not question 2.

The Court begins by defining its task:

> It [i.e. the Court] has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.
>
> 48. Such manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its competence.[98]

The Court declares it will take "the relevant rules of interpretation" to be those reflected in articles 31 and 32 of the Vienna Convention.[99] Then it takes a first step in the interpretation process by reminding us of the ordinary meaning:

> In the present case, Article 2 of the Arbitration Agreement presented a first question concerning the 1960 Agreement, and then a second question relating to delimitation. A reply had to be given to the second question "in the event of a negative answer to the first question". The Court notes that those last words, which were originally proposed by Guinea-Bissau itself, are categorical.[100]

Obviously, it is the opinion of the Court that in order to clarify the provision at issue, nothing more is needed than conventional language. Nevertheless, the Court seems anxious to confirm its position. For this very purpose it invokes a special agreement concluded between Guinea and Guinea-Bissau in 1983:

> In fact in the present case the Parties could have used some such expression as that the Tribunal should answer the second question "taking into account" the reply given to the first, but they did not; they directed that the second question should be answered only "in

the event of a negative answer" to that first question. In that respect, the wording was very different from that to be found in another Arbitration Agreement to which Guinea-Bissau is a party, that concluded on 18 February 1983 with the Republic of Guinea. By that Agreement, those two States asked another tribunal to decide on the legal value and scope of another Franco-Portuguese delimitation convention and annexed documents, and then "according to the answers given" to those initial questions, to determine the "course of the boundary between the maritime territories" of the two countries.[101]

For the interpretation of the 1985 special agreement between Senegal and Guinea-Bissau, this second agreement can without doubt be considered a treaty *in pari materia*. No explanation is given to indicate that the 1983 special agreement is considered part of either the preparatory work of that treaty, or of the circumstances of its conclusion. It appears that in the view of the Court, treaties *in pari materia* may be used as a means of interpretation in and of itself.

My third example is the judgment of the European Court of Human Rights in the *Müller and Others* case.[102] In 1981, Josef Felix Müller, a young Swiss artist, had been invited to show some of his pictures in an exhibition of modern art in Fribourg. His works depicted a number of explicit sexual acts, both heterosexual and homosexual in nature. The pictures offended the authorities. Müller's works were seized, and together with the exhibition organisers Müller was sentenced for breaking Swiss laws banning obscene publications. The question arose whether Switzerland, by taking these measures, had acted in violation of its obligations under article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. This gave the European Court occasion to make the following general comment on the contents of this article:

Admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second [sic!] sentence of paragraph 1 of Article 10, which refers to "broadcasting, television or cinema enterprises", media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas "in the form of art".[103]

Clearly, when the European Court interprets the European Convention for the Protection of Human Rights, the *International Covenant on Civil and Political Rights* can be considered a treaty *in pari materia*. There can be no doubt that the European Court uses the International Covenant to confirm an interpretation already performed according to the provisions of

VCLT article 31. For the interpretation of the European Convention, the International Covenant cannot be considered a relevant rule of international law, in the sense of VCLT article 31 § 3(c). The states that are parties to the International Covenant are not identical to those that are parties to the European Convention. It is apparent that, in the view of the European Court, treaties *in pari materia* may be used as a means of interpretation in and of itself.

6 OTHER SUPPLEMENTARY MEANS OF INTERPRETATION: THE CONTEXT

A third means of interpretation that can be used by appliers according to the provisions of VCLT article 32, apart from "the preparatory work of the treaty" and "the circumstances of its conclusion", is the context. The point is that some uses of the context are not allowed under the provisions of article 31, but it would still make sense to exploit them under the provisions of article 32. When appliers use the supplementary means of interpretation according to VCLT article 32, the task to be performed is partly different from the task for which they use the context or the object and purpose of the treaty according to the provisions of article 31. When appliers use the context or the object and purpose of a treaty, according to the provisions of article 31, they have already used conventional language, but they have discovered that it leads to conflicting results.[104] Supplementary means of interpretation, on the other hand, can be used for three different purposes: (1) appliers wish to confirm a meaning obtained through the application of article 31; (2) appliers wish to determine the meaning of a treaty provision, because interpreting the treaty according to article 31 leaves the meaning ambiguous or obscure; (3) appliers wish to determine the meaning of a treaty provision, because interpreting the treaty according to article 31 leads to a result which is manifestly absurd or unreasonable.[105]

Considering these different tasks, it is obviously the case that appliers, by using the context or the object and purpose according to the provisions of article 32, would in many cases obtain a result more far-reaching than that which they are capable of obtaining when they use these same means according to the provisions of article 31. When the context or the object and purpose are used by appliers according to the provisions of article 31, the ensuing interpretation result must be partially or completely reconciled with the interpreted treaty provision when read in accordance with conventional language. This is a limitation appliers do not have to observe when they use supplementary means of interpretation, according to the provisions of article 32. When appliers use supplementary means of interpretation, the

purpose being the one earlier referred to as (3), the ensuing interpretation result may well go beyond the limits set by the ordinary meaning.

From a practical point of view, I see no reason why the context and the object and purpose could not be used as supplementary means of interpretation. The question is whether such usage may be considered correct as a matter of principle. When it comes to using the object and purpose, the answer must be considered a given. Evidently, VCLT article 32 indirectly approves of a certain use of the object and purpose by allowing for an application of the rule of necessary implication.[106] Considering the very limited conditions under which the rule of necessary implication applies, it does not seem likely that the object and purpose – parallel to this – could also be used as a "full" supplementary means of interpretation, in the same way as the preparatory work of the treaty and the circumstances of its conclusion. When it comes to using the context, however, the issue is somewhat more complicated. Prima facie there are reasons for using the context as a supplementary means of interpretation according to the provisions of article 32, but there are also prima facie reasons for *not* using the context as such a means of interpretation. All things considered, however, I would like to argue that only the former conclusion can be considered well-founded. In my opinion, there are *conclusive* reasons for using the context as a supplementary means of interpretation, but there are not conclusive reasons for the opposite. To support this position, I would like to cite the rules of interpretation laid down in international law.

According to international law, two first order rules of interpretation are *prima facie* applicable, when an applier sets out to determine whether or not the context shall be considered a "supplementary means of interpretation". Let us call them by the numbers 1 and 18. Interpretation rule no. 1 provides:

> 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.[107]

Interpretation rule no. 34 may be stated as follows:

> If it can be shown that a treaty provision permits an act or a state-of-affairs, which – from the point of view of the parties – can be considered less tolerable than another generically identical act or state-of-affairs, then the provision shall be understood to permit this second act or state-of-affairs, too.[108]

Unfortunately, the application of interpretation rules nos. 1 and 34 leads to conflicting results.

Applying interpretation rule no. 34, we come to the result that the context *shall* be considered a "supplementary means of interpretation". According to interpretation rule no. 34, the context shall be considered a "supplementary

means of interpretation", if good reasons can be provided showing that, as part of the extension of this expression, another means is included, the usage of which can be considered less tolerable to the parties to the Vienna Convention than a usage of the context. In the Vienna Convention, the legally acceptable means of interpretation have been arranged in the form of two separate articles. Article 31 lists the means of interpretation, which appliers primarily shall use for the interpretation of a treaty – they have earlier been termed as PRIMARY MEANS OF INTERPRETATION. Article 32 lists the means of interpretation, which appliers shall use in case the primary means of interpretation prove insufficient for determining the legally correct meaning of an interpreted treaty provision. Of course, the basic idea underlying this arrangement is that, typically, the means of interpretation listed in article 31 are better indicators of the legally correct meaning of a treaty provision than the means listed in article 32.[109] One of the means listed in article 31 is the context; one of the means listed in article 32 is the preparatory work of the treaty. Seen in this light, when appliers use the preparatory work of a treaty for the interpretation of a treaty, arguably, this act of interpretation can be considered less tolerable to the parties to the Vienna Convention than an act of interpretation using the context. Given the contents of interpretation rule no. 34, the context shall then be considered a "supplementary means of interpretation".

Applying interpretation rule no. 1, we come to the result that the context *shall not* be considered a "supplementary means of interpretation". According to interpretation rule no. 1, the context shall not be considered a "supplementary means of interpretation" if it can be shown that, when applying the rules of conventional language, the context cannot be denoted as a SUPPLEMENTARY MEANS OF INTERPRETATION. In conventional language, for a given phenomenon to be denoted as SUPPLEMENTARY, there must be a second phenomenon, to which the first may be considered a supplement. It is the implicit meaning conveyed by the expression "supplementary means of interpretation" that the means listed in article 32 are a supplement to those listed in article 31. In other words, the expression "supplementary means of interpretation" (deictically) refers back to the primary means of interpretation. It follows that the means of interpretation listed in article 32 have an identity completely different from those listed by article 31: no single element can be used as a supplementary means of interpretation according to the provisions of article 32, if, according to the provisions of article 31, it can already be used as a primary means of interpretation. The context can be used as a primary means of interpretation according to the provisions of article 31. Given interpretation rule no. 1, then, the context shall not be considered a "supplementary means of interpretation".

Thus, interpretation rules nos. 1 and 34 are in clear conflict. This conflict can be resolved according to a rule of international law – this much is clear. Complexity is added by the fact that under the regime established by the Vienna Convention, the conflict between interpretation rules nos. 1 and 34 is governed by two second-order rules of interpretation. Let us call them by the numbers 40 and 41. Interpretation rule no. 40 states:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of interpretation rules no. 17–39, and that the application of the former rule either leaves the meaning of the interpreted treaty provision ambiguous or obscure, or amounts to a result which is manifestly absurd or unreasonable, then the provision shall not be understood in accordance with this former rule.[110]

Interpretation rule no. 41 provides as follows:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of interpretation rules nos. 17–39, then, rather than with the latter of the two rules, the provision shall be understood in accordance with the former, except for those cases where interpretation rule no. 40 applies.[111]

In my judgment, in the situation where an applier sets out to determine whether the context shall be considered a "supplementary means of interpretation", the rule that determines the relationship between interpretation rules nos. 1 and 34 is the latter: if it can be shown that the interpretation of the expression "supplementary means of interpretation" in accordance with interpretation rule no. 1 leads to a result, which is different from that obtained by interpreting the expression in accordance with interpretation rule no. 34, then the expression shall not be understood in accordance with interpretation rule no. 1. It would then be my task to establish that the application of interpretation rule no. 1 either leaves the meaning of the interpreted treaty provision ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Quite clearly, the application of interpretation rule no. 1 does not leave the meaning of the interpreted treaty provision ambiguous or obscure. The decisive question is whether I can establish that the application leads to a result which is manifestly absurd or unreasonable.

In the situation at hand, saying that the application of interpretation rule no. 1 leads to a result which is manifestly absurd or unreasonable is tantamount to saying that interpretation rules nos. 1 and 34 are based on communicative assumptions, of which the assumption underlying an application of the former is arguably substantially weaker than the assumption underlying an application of the latter.[112] Interpretation rule no. 1 is based

on the assumption that parties to a treaty express themselves in such a way that every expression included in the treaty, whose form corresponds to an expression of conventional language, bears a meaning that agrees with the rules of that language.[113] Translated to the interpretation of the expression "supplementary means of interpretation", the idea could be expressed as follows:

> The parties to the Vienna Convention have expressed themselves in such a way that that the meaning of the expression "supplementary means of interpretation" agrees with the rules of conventional language.

For the sake of simplicity, let us term this as the assumption underlying the application of rule no. 1. Interpretation rule no. 34 is based on the assumption, that parties to a treaty express themselves in such a way that, arguably, from the point of view of the parties, every act or state-of-affairs permitted by the treaty can be considered more tolerable than those generically identical acts or state-of-affairs that are not permitted.[114] Translated to the interpretation of the expression "supplementary means of interpretation", the idea could be expressed in the following manner:

> The parties to the Vienna Convention have expressed themselves in such a way that every act or state-of-affairs permitted by article 32 can be considered more tolerable to the parties than those generically identical acts or state-of-affairs that the article does not permit.

Let us term this as the assumption underlying application of rule no. 34.

As far as I can see, there are only two ways of showing that an assumption A is substantially weaker than an assumption B. First, arguments can be presented undermining the assumption A. Second, arguments can be presented reinforcing the assumption B. I will now present three arguments, which either reinforce the assumption underlying the application of interpretation rule no. 34, or undermine the assumption underlying the application of rule no. 1.

For my first argument, I would like to begin by directing attention to Vienna article 31 § 2. According to article 31 § 2, the context includes – in addition to the text of the interpreted treaty – "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". However, in principle, such agreements and documents – had it not been the case that, according to the provisions of VCLT article 32, the context should be

considered a means of interpretation in and of itself – could also have been taken into account, forming part of "the preparatory work of the treaty" or "the circumstances of its conclusion".[115] They would then be included in the extension of the "supplementary means of interpretation". Thus, the contents of article 31 § 2 would appear to undermine the assumption underlying application of rule no. 1.

For my second and third arguments, I take as a starting-point the so-called rule of necessary implication. According to the general opinion expressed in the literature, the rule of necessary implication is a norm, which can be applied on the basis of VCLT article 32.[116] The contents of the norm may be described in terms of the following two rules of interpretation:

Rule no. 30
If it can be shown that according to linguistics a meaning can be read into a treaty provision by implication, and that such an implication is necessary to avoid that, by applying the provision, a result is attained which is not among the *teloi* conferred on the treaty, then this meaning shall be adopted.

Rule no. 31
If it can be shown that according to linguistics, a meaning can be implicitly read into a treaty provision, and that such an implication is necessary to avoid that, by applying the provision, another part of the treaty will in practice be normatively useless, then this meaning shall be adopted.[117]

Obviously, the means of interpretation, on which these two rules are being based, is the object and purpose of the treaty.[118] Consequently, at least partly, the object and purpose would seem to be a "supplementary means of interpretation". This is certainly a very interesting observation, for two reasons. First, the object and purpose is an element, which cannot be denoted as a SUPPLEMENTARY MEANS OF INTERPRETATION, at least not as long as we abide by the rules of conventional language. Second, arguably, an act of interpretation using the object and purpose of a treaty can be considered more tolerable for the states parties to the Vienna Convention than an act of interpretation using the preparatory work of the treaty, the circumstances of its conclusion, ratification work, or treaties *in pari materia* – all elements comprised in the extension of the expression "supplementary means of interpretation". Thus, the rule of necessary implication would seem to undermine the assumption underlying the application of interpretation rule no. 1.

In addition to the three arguments outlined above, we may note the absence of counter-arguments. I fail to find a single argument that either

reinforces the assumption underlying the application of interpretation rule no. 1 or that undermines the assumption underlying the application of interpretation rule no. 34. Naturally, it is matter of judgment whether this means that the assumption underlying the application of interpretation rule no. 1 is *substantially* weaker than the assumption underlying the application of interpretation rule no. 34. Personally, I find it difficult to arrive at any other conclusion. For the determination whether the context shall be considered a "supplementary means of interpretation" or not, it can indeed be shown that the application of interpretation rule no. 1 "leads to a result which is manifestly absurd or unreasonable", in the sense of rule no. 40. In other words, if interpreting the expression "supplementary means of interpretation" in accordance with interpretation rule no. 1 leads to a result, which is different from that obtained by interpreting the expression in accordance with interpretation rule no. 34, then in my judgment the expression "supplementary means of interpretation" shall not be understood in accordance with rule interpretation no. 1. Instead, it shall be understood in accordance with interpretation rule no. 34: the context shall be considered a "supplementary means of interpretation".

7 THE "SUPPLEMENTARY MEANS OF INTERPRETATION" 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 "supplementary means of interpretation"? There is a significant difference between a usage of the primary means of interpretation and a usage of the supplementary means. As we know, in order for a rule of interpretation to apply, the applier must be able to show that a state-of-affairs exists that comes within the scope of application of that rule. Generally speaking, this task may be described by a single sentence: by using a given means of interpretation, good reasons must be provided showing a concordance to exist between the parties to the interpreted treaty with regard to its norm content. Seeking better precision, we will of course have more difficulty describing the task. If we say that good reasons are provided showing a concordance to exist between the parties to a treaty with regard to its norm content, then the precise import of this undertaking will differ considerably depending on the means of interpretation we have assumed. These differences are particularly marked if we compare the way appliers use supplementary means of interpretation according to VCLT article 32, with the way they use primary means according to article 31.

When appliers use a primary means of interpretation, they are told specifically under what circumstances they may successfully argue, on the basis of that means, that a concordance exists between the parties to the interpreted treaty with regard to its norm content.[119] Conventional language, for example, cannot be used for the interpretation of a treaty provision, unless it can be shown that the provision contains an expression whose form corresponds to that of an expression used in conventional language.[120] And a rule of international law cannot be used as part of "the context" for the interpretation of a given treaty provision, unless it can be shown to govern the act or state-of-affairs, in relation to which the provision is interpreted.[121] When appliers use a "supplementary means of interpretation", they are not acting under similar constraints. The appliers are not specifically told under what circumstances they may successfully argue, on the basis of each and every means of interpretation, that a concordance exists between the parties to the interpreted treaty with regard to its norm content. If an applier argues that by using a certain supplementary means of interpretation a concordance can be shown to exist between the parties to a certain treaty with regard to its norm content, then this should be sufficient, as long as the applier can show the proposition in question to be supported by good reasons.[122] In other words, when appliers interpret a treaty using a "supplementary means of interpretation", the communicative standard assumed is the following:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that what is comprised by each and every supplementary means of interpretation is not logically contradicted, insofar, and to the extent, that by using the means in question good reasons can be provided showing a concordance to exist between the parties to the treaty with regard to its norm content.

I wish to immediately add a point of clarification to this statement. As we well know, when appliers interpret a treaty according to the provisions of VCLT article 32, they may use the preparatory work of that treaty. According to some authors, when appliers use the preparatory work of a treaty, it is because they wish to establish the intentions assumed to be held by the treaty parties at the point in time when the treaty was established as definite.[123] Consider for instance the following statement of professor Amerasinghe, concerning the way to interpret the statute of an international organisation:

> *Intention of the parties – travaux préparatoires.* The actual intention of the parties at the time the constitution of an organization was formulated, as evidenced in the *travaux pré paratoires*, has sometimes been sought in attempts to interpret constitutional texts.[124]

The message cannot be missed. When appliers use the preparatory work of a treaty, primary attention should be focused on the state-of-affairs that existed at the time of its conclusion. What appliers wish to establish by using the preparatory work is the concordance possibly arrived at by the negotiating states, at the point in time when the treaty was established as definite. In my view, this proposition is acceptable only on the condition that certain qualifications are added.

When appliers interpret a treaty provision, in accordance with the provisions of VCLT articles 31–32, it is to determine the legally correct meaning of the provision in question. This legally correct meaning of a treaty provision has earlier been defined as follows:

> The correct meaning of a treaty should be identified with the pieces of information conveyed by that treaty with regard to its norm content, according to the intentions of the treaty parties – all those states, for which the treaty is in force – insofar as these intentions can be considered mutually held.[125]

It might be that on one point this definition deserves to be clarified. The legally correct meaning of a treaty provision is an utterance meaning.[126] By the utterance meaning of a text we mean the content of the utterance or utterances expressed by that text.[127] An utterance, in turn, can be described as the use by a specific subject of a specific piece of written or spoken language on a specific occasion.[128] Now, it is an important characteristic of a treaty provision that in each and every case it expresses several utterances, all at the same time. There are always two or more parties to a treaty. If two or more states – by whatever means – have consented to be bound by a treaty, then we can also say about the text of that treaty that it embodies an equal number of separate utterances. These utterances will not necessarily be made on the exact same occasion. If we take a treaty with two parties only, it is usually the case that the treaty was consented to by both parties simultaneously. If we take instead a multilateral treaty, the case is often the opposite. Consider any wide-reaching international, multilateral treaty open for general accession: naturally, different parties will have given their consent on different occasions. Obviously, given our ambition to properly clarify the concept of the legally correct meaning of a treaty, the definition given above is in need of adjustment:

> The correct meaning of a treaty should be identified with the pieces of information conveyed by that treaty with regard to its norm content, according to the intentions of the treaty parties – all those states, for which the treaty is in force – at the moment in time when each respective utterance is made, insofar as these intentions can be considered mutually held.

As anyone might expect, the point I want to make is the following. In one sense, professor Amerasinghe is outright correct when he argues that what appliers wish to establish by using the preparatory work of a treaty is the concordance that possibly existed among the negotiating states at the point in time when the treaty was established as definite. If the purpose of using the preparatory work of a treaty is to establish the utterance meaning of that treaty, then clearly the only relevant question is whether by using the preparatory work a concordance can be established *between those states that are parties to the treaty at the time of interpretation*. Of course, such a concordance may have existed already at the point in time when the treaty was established as definite. But it may also have come into existence on some later occasion; it all depends on when the parties to the treaty expressed their consent to be bound. However, let it be realised that by using the preparatory work of a treaty, and the preparatory work only, appliers cannot possibly establish a concordance arrived at subsequent to the establishing of the treaty as definite. The meaning of the expression "the preparatory work of the treaty", in the sense of VCLT article 32, is limited to include only such representations that were produced *during the drafting of the treaty in question*. The best that can accomplished by an applier using the preparatory work of a treaty, and the preparatory work only, is if he can show a concordance to have existed among the negotiating states at the point in time when the drafting of the treaty came to a conclusion, i.e. when the treaty was established as definite.

In another sense professor Amerasinghe is simply wrong. As a general proposition, it cannot be considered correct that what appliers wish to establish by using the preparatory work of a treaty is the concordance that possibly existed among the negotiating states at the point in time when the treaty was established as definite. In principle, when appliers set out to interpret a treaty, the situation confronted must be one of the following two: (1) among the states that are parties to the treaty at the time of interpretation, each participated in the capacity of a negotiating state during the process of its drafting; (2) at the time of interpretation other states are parties to the treaty than those who once participated in its drafting. In the first of the two situations, it is obvious that the legally correct meaning of the interpreted treaty can be identified with the concordance possibly arrived at by the negotiating states, at the point in time when the treaty is established as definite. In the second situation, it may be the case, but not necessarily so. The utterance meaning of the interpreted treaty can be identified with the concordance possibly arrived at by the negotiating states at the point in time when the treaty is established as definite, but only on the condition that there are good reasons for assuming the concordance to be espoused by the

other parties to the treaty.[129] Only in the first situation can it correctly be asserted, that what appliers wish to establish by using the preparatory work is the concordance that possibly existed among the negotiating states at the time when the treaty was established as definite.

8 CONCLUSIONS

"Recourse may be had to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable" – this is provided in VCLT article 32. It is the purpose set for this chapter to describe what this means. Based on the observations made in this chapter, the following ten rules of interpretation can be established:

Rule no. 17
§ 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 by using the preparatory work of the treaty a concordance can be shown to exist, as between the parties to the treaty, and with regard to the norm content of the interpreted treaty provision, so that the provision – in light of the preparatory work – in one of the 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 if this rule, THE PREPARATORY WORK of a treaty means any representation produced in the process of drafting the treaty, whether textual or not.
§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 18
§ 1. If, by using the preparatory work of a treaty, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of an interpreted treaty provision, then the provision shall be understood in such a way that it logically agrees with the concordance.
§ 2. For the purpose if this rule, THE PREPARATORY WORK of a treaty means any representation produced in the process of drafting the treaty, whether textual or not.
§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 19
§ 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 by using the circumstances of the treaty's conclusion a concordance can be shown to exist, as between the parties to the treaty, and with regard to the norm content of the interpreted treaty provision, so that the provision – in light of the circumstances of the treaty's conclusion – in one of the 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, a CIRCUMSTANCE OF THE TREATY'S CONCLUSION means any state-of-affairs, whose existence at least partially can be said to have caused the conclusion, except for those cases where this state-of-affairs can be taken into account already for the application of the interpretation rules nos. 7–14 or 17–18.
§ 3. For the purpose of this rule, the CONCLUSION of a treaty means the point in time when the treaty was established as definite.
§ 4. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 20
§ 1. If, by using the circumstances of a treaty's conclusion, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of an interpreted treaty provision, then the provision shall be understood in such a way that it logically agrees with the concordance.
§ 2. For the purpose of this rule, a CIRCUMSTANCE OF THE TREATY'S CONCLUSION means any state-of-affairs, whose existence at least partially can be said to have caused the conclusion, except for those cases where this state-of-affairs can be taken into account already for the application of the interpretation rules nos. 7–14 or 17–18.
§ 3. For the purpose of this rule, the CONCLUSION of a treaty means the point in time when the treaty was established as definite.
§ 4. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 21
§ 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 by using any ratification work of the treaty, a concordance can be shown to exist, as between the parties to the treaty, and with regard to the norm content of the interpreted treaty provision, so that the provision – in light of the ratification work used – in one of the 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, RATIFICATION WORK means any representation unilaterally produced by a state in the process of deciding whether to ratify the treaty.
§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 22
§ 1. If, by using any ratification work of a treaty, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of an interpreted treaty provision, then the provision shall be understood in such a way that it logically agrees with the concordance.
§ 2. For the purpose of this rule, RATIFICATION WORK means any representation unilaterally produced by a state in the process of deciding whether to ratify the treaty or not.
§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 23
§ 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 by using a treaty *in pari materia* a concordance can be shown to exist, as between the parties to the treaty, and with regard to the norm content of the interpreted treaty provision, so that the provision – in light of the treaty *in pari materia* – in one of the 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, a TREATY IN PARI MATERIA means a treaty whose subject matter is identical – at least partly – with the subject matter covered by the treaty interpreted.
§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 24
§ 1. If, by using a treaty *in pari materia*, a concordance can be shown to exist, as between the parties to the interpreted treaty, and with regard to the norm content of the interpreted treaty provision, then the provision shall be understood in such a way that it logically agrees with the concordance.
§ 2. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 25

§ 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 by using the context of the provision a concordance can be shown to exist, as between the parties to the treaty, and with regard to the norm content of the interpreted treaty provision, so that the provision – in light of the context – in one of the 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, the CONTEXT of an interpreted treaty provision means any element that fits the description provided in article 31 §§ 2 and 3 of the 1969 Vienna Convention on the Law of Treaties.

§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 26

§ 1. If, by using the context of an interpreted treaty provision, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of the interpreted provision, then the provision shall be understood in such a way that it logically agrees with the concordance.

§ 2. For the purpose of this rule, the CONTEXT of an interpreted treaty provision means any element that fits the description provided in article 31 §§ 2 and 3 of the 1969 Vienna Convention on the Law of Treaties.

§ 3. 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 Ch. 1, Section 5, of this work.
2. For a more detailed discussion of the expression "ambiguous or obscure", see Ch. 10, Section 3, of this work.
3. Similarly, *Oppenheim's International Law*, p. 1276; Villiger, p. 345; Yasseen, pp. 79–80; Greig, pp. 480–481; Rest, p. 155; Hilf, p. 88; Gross, p. 117; Schröder, p. 130; Degan, 1968, p. 18; Bernhardt, 1967, p. 502; see also, implicitly, Karl, 1983, p. 194; Sinclair, 1984, p. 140. For a different opinion, see Dupuy, p. 221.
4. In linguistics it would be termed as deictic reference.
5. Regarding the concept *general referring expression* in general, see Ch. 3, Section 3, of this work.
6. Regarding the concept *generic referring expression* in general, see loc. cit.
7. See Ch. 1, Section 2, of this work.
8. Cf. Ch. 3, Section 3, of this work.
9. See e.g. Karl, 1983, p. 187; Hilf, p. 88; Bernhardt, 1967, p. 502; Sinclair, 1984, pp. 117–118. Cf. also *Oppenheim's International Law*, p. 1276; Villiger, p. 345; Yasseen, pp. 79–80; Rest, p. 155; Gross, p. 117.

10. See e.g. *Starke's International Law*, p. 437; *Oppenheim's International Law*, p. 1277; Seidl-Hohenveldern, 1992, p. 95; Brownlie, p. 630; Yasseen, p. 83; Haraszti, pp. 120–121; Verzijl, pp. 317–318; Rest, pp. 54–55; O'Connell, p. 263; Sharma, p. 372.
11. The following texts provide an excellent overview: *Review of the Multilateral Treaty-Making Process* (1985), in extenso; Verzijl, p. 122 et seq.; Hamzeh, pp. 178–189.
12. See e.g. Exchange of Notes between the United States of America and the Federal People's Republic of Yugoslavia, on 28 November 1962.
13. Cf. Elias, 1974, pp. 81–82; Yasseen, p. 83. Cf. also Rosenne, at the ILC's eighteenth session, 872nd meeting, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 201, § 35; and, implicitly, Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 223, § 20.
14. Haraszti, p. 120.
15. Cf. *Starke's International Law*, pp. 437–438; *Oppenheim's International Law*, pp. 1277–1278; Seidl-Hohenveldern, 1992, p. 95; Brownlie, p. 630; Villiger, p. 345; Sinclair, 1984, pp. 141–147; Verdross and Simma, pp. 492–494; Yasseen, pp. 83–90; Elias, 1974, pp. 80–82; Haraszti, pp. 117–138; Lang, pp. 164–168; Briggs, pp. 705–712; Verzijl, pp. 317–318; Rest, pp. 54–60; O'Connell, pp. 262–264; Sharma, p. 372; Jennings, pp. 550–552; Voïcu, pp. 48–52; Rosenne, 1963, pp. 1378–1388; Bernhardt, 1963, pp. 109–120; De Visscher, 1963, pp. 115–121.
16. On the whole, most of these opinions seem to be such that they can be summarised by one the following five statements (or by variations of these). (1) The meaning of "the preparatory work" of a treaty shall be limited to include only *written* representations. (*Oppenheim's International Law*, p. 1277, n. 9.) (2) The meaning of "the preparatory work" of a treaty shall be limited to include only representations *mutually* produced by the negotiating states. (De Visscher, 1963, p. 115.) (3) The meaning of "the preparatory work" of a treaty shall be limited to include only such representations that can be said to have *made their mark* on the text of the final agreement. (O'Connell, p. 262; Haraszti, p. 125.) (4) The meaning of "the preparatory work" of a treaty shall be limited to include only such representations *that establish a concordance* of the parties with regard to the interpretation of the treaty. (O'Connell, p. 262; Haraszti, p. 122.) (5) The meaning of "the preparatory work of the treaty" includes a representation produced during the drafting of a treaty, but only on the condition either that all parties were involved in its production, or that the representation had been made public before the parties expressed their consent to be bound by the treaty. (*Starke's International Law*, pp. 437–438.)
17. See e.g. *Review of the Multilateral Treaty-Making Process* (1985), passim.
18. See Voïcu, p. 50; De Visscher, 1963, p. 115.
19. See Section 7 of this chapter.
20. GA res. 2278 (XXII), § 7. (My italics.)
21. Another (if somewhat unusual) case is when a state has indeed been involved in the drafting of a treaty, but for one or another reason was excluded from specific discussions during the process. (See for example *Young Loan*, *ILR*, Vol. 59, pp. 495ff., especially pp. 544–545.)
22. Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Judgment of 10 September 1929, *PCIJ*, Ser. A, No. 23, p. 42.
23. The author who first made clear his rejection of this idea was Hersch Lauterpacht. (See Lauterpacht, 1934, pp. 805–808, or Lauterpacht, 1935, pp. 584–586.)
24. See Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 223, § 20.

25. See, expressly, *Starke's International Law*, pp. 437–438; Seidl-Hohenveldern, 1992, p. 95; *Oppenheim's International Law*, p. 1278; Sinclair, 1984, pp. 142–144; Verdross and Simma, pp. 492–493, n. 8; Yasseen, pp. 89–90; Elias, 1974, p. 82; Haraszti, pp. 122–123; Lang, p. 165; Rest, pp. 58–59; Rosenne, 1963, pp. 1378–1383. See also, implicitly, Brownlie, p. 630; Villiger, p. 345.
26. See Seidl-Hohenveldern, p. 95; *Oppenheim's International Law*, p. 1278; Verdross and Simma, pp. 492–493, n. 8; Rest, p. 59.
27. See Section 7 of this chapter.
28. See Bernhardt, 1963, p. 112; Ruegger, at the Institute of International Law and its session in Grenada, 1956, *Annuaire de l'Institut de droit international*, Vol. 46 (1956), pp. 342–343. For the somewhat older literature, see Spencer, p. 124; Lauterpacht, 1934, p. 719.
29. See Ris, p. 112; Yasseen, p. 83; Haraszti, pp. 120–121; Verzijl, p. 317; Rest, p. 54; O'Connell, p. 262; Voïcu, p. 163, n. 73.
30. See Draft Articles with Commentaries (1966), *ILC Yrbk*, 1966, p. 223, § 20.
31. Professor Vierdag has come to the same conclusion. (See Vierdag, 1988, p. 86.) The fact is that it agrees exceptionally well with the preparatory work of the Vienna Convention. The ILC states in its 1966 Commentary, with regard to the then existing draft and the relationship held between the means of interpretation listed in articles 27 and 28, later to be adopted as VCLT articles 31 and 32, respectively: "The elements of interpretation in article 27 all relate to the agreement between the parties at *the time when or after it received authentic expression in the text*. *Ex hypothesis* this is not the case with preparatory work". (Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 220, § 10.) Nothing in the records from the Vienna Conference can be seen to indicate a departure from this idea.
32. See Sinclair, 1984, p. 141; Yasseen, p. 90; Haraszti, p. 119; Voïcu, p. 53.
33. See Sinclair, 1984, p. 141; Vitányi, p. 67; Yasseen, p. 91; Haraszti, pp. 118–120; Voïcu, pp. 52–54, cf. n. 178. See also Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 59, § 22.
34. Cf. *EC-Poultry*, § 83. It is quite another thing that this requirement sets up limitations for the existence of the state-of-affairs in time. In order for a state-of-affairs to be categorised as the cause of a treaty's conclusion, this state-of-affairs must have existed at a point in time not later than the end of the treaty's conclusion – this goes without saying.
35. See Vierdag, 1988, pp. 76–82.
36. See ibid, pp. 82ff.
37. This is the sense in which the word CONCLUSION, CONCLUSION, CELEBRACIÓN seems to have been used, for example, in VCLT articles 2 § 1(a), 3, 4, 31 § 2(a), 49.
38. This is the sense in which the word CONCLUSION, CONCLUSION, CELEBRACIÓN seems to have been used, for example, in VCLT articles 6, 7 § 2(a), 31 § 2(b), 46, 52.
39. See VCLT article 24.
40. See Section 2 of this chapter.
41. Cf. the ILC Commentary of 1966: "The elements of interpretation in article 27 all relate to the agreement between the parties at *the time when or after it received authentic expression in the text*. *Ex hypothesis* this is not the case with preparatory work". (Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 220, § 10.)
42. Sinclair, 1984, p. 141.
43. Haraszti, p. 119.

44. Dupuy, p. 222.
45. Voïcu, p. 52.
46. Yasseen, p. 90.
47. See Ch. 7, Section 1, of this work.
48. See Ch. 5, Section 1, of this work, cf. VCLT article 31 § 2(a).
49. See Ch. 6, Section 4, of this work, cf. VCLT article 31 § 3(c).
50. Concerning the use of "the context" as a supplementary means of interpretation, see Section 6 of this chapter.
51. With regard to these, see Section 2 of this chapter.
52. See Torres Bernárdez, p. 743, n. 46; Yasseen, p. 83; Haraszti, pp. 121–122; Verzijl, pp. 320–321, cit. *Anglo-Iranian Oil*, *ICJ Reports*, 1952, p. 93, and *Howard Claim*, *ILR*, Vol. 18, pp. 410–411; Bernhardt, 1963, p. 112; Ruegger, at the Institute of International Law and its session in Grenada, 1956, *Annuaire de l'Institut de droit international*, Vol. 46 (1956), pp. 342–343. For the somewhat older literature, see e.g. Spencer, p. 124; Lauterpacht, 1934, p. 719.
53. Haraszti, p. 122.
54. See Ch. 6, Section 2, of this work.
55. See e.g. Bernhardt, 1963, p. 112; Ruegger, at the Institute of International Law and its session in Grenada, 1956, *Annuaire de l'Institut de droit International*, Vol. 46 (1956), pp. 342–343.
56. See Section 2 of this chapter.
57. In addition to the authorities cited in the text, see diss. op. Ajibola, *Territorial Dispute (Libya/Chad)*, *ILR*, Vol. 100, pp. 66–67, §§ 66–70; *S.D. Myers*, *ILR*, Vol. 121, p. 140, § 62; *Mondev*, *ILR*, Vol. 125, pp. 145–146, § 111; *Maritime Delimitation: Jan Mayen*, *ILR*, Vol. 99, p. 419, § 22; *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, p. 669, § 70; *Rainbow Navigation v. Department of the Navy*, *ILR*, Vol. 96, p. 103.
58. *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgement of 12 December 1996, *ICJ Reports*, 1996 (II), pp. 803ff.
59. The text cited is the one provided by the court. (See *ICJ Reports*, 1996 (II), p. 809, § 15.)
60. Ibid., p. 812, § 24.
61. Ibid., p. 812, § 25.
62. Ibid., p. 813, § 26.
63. Ibid., p. 815, § 31.
64. Ibid., p. 814, § 28.
65. Ibid., pp. 814–815, § 29.
66. Ibid., p. 815, § 30.
67. Ibid., p. 814, § 29.
68. See Sections 2 and 3 of this chapter.
69. See p. 251 of this work.
70. Dissenting Opinion of Judge Schwebel, Case Concerning *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, *ILR*, Vol. 84, pp. 400ff.
71. Separate opinion of Judge Oda, Case Concerning *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, ibid., pp. 389ff.
72. Ibid., p. 395.
73. Ibid., p. 403.

74. Ibid., p. 404.
75. Loc. cit.
76. Ibid., p. 405.
77. Loc. cit.
78. *Beagle Channel Arbitration (Chile v. Argentina)*, Award of 18 February 1977, *ILR*, Vol. 52, pp. 93ff.
79. See Ch. 4, Section 4, of this work.
80. *ILR*, Vol. 52, p. 186.
81. Loc. cit.
82. See ibid., pp. 220–226, §§ 164–175.
83. See ibid., for example p. 144, § 47, p. 145, § 48, p. 163, § 67, p. 178, § 97, pp. 187–188, § 114.
84. Declaration of Judge Gros, *Beagle Channel Arbitration*, ibid., pp. 228ff.
85. Ibid., pp. 228–229, § 2.
86. Ibid., p. 229, § 2.
87. See Berman, p. 317; Thirlway, 1991, pp. 66–71; *Starke's International Law*, p. 438; Villiger, p. 345; Verdross and Simma, p. 494; Verzijl, p. 324; Haraszti, p. 148; Bernhardt, 1967, p. 500. See also, implicitly, Merrills, pp. 224–225.
88. Cf. e.g. *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, pp. 673–674, § 81; Van der Mussele, *Publ. ECHR*, Ser. A, Vol. 70, p. 16, § 32; *US-France Air Services Award*, *ILR*, Vol. 54, p. 334, §§ 67–68; *Italy-United States Air Transport Arbitration*, *ILR*, Vol. 45, p. 414.
89. In addition to the authorities cited in the text, see diss. op. Ajibola, *Territorial Dispute (Libya/Chad)*, *ILR*, Vol. 100, pp. 66–67, §§ 66–70; *Maritime Delimitation: Jan Mayen*, *ILR*, Vol. 99, p. 419, § 22; *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, p. 669, § 70; *Rainbow Navigation v. Department of the Navy*, *ILR*, Vol. 96, p. 103.
90. *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment of 12 December 1996, *ICJ Reports*, 1996 (II), pp. 803ff.
91. See Section 4 of this chapter.
92. The text cited is the one provided by the court. (See *ICJ Reports*, 1996 (II), p. 812, § 24.)
93. Ibid., pp. 814–815, § 29.
94. *Case Concerning The Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 2 March 1990, *ILR*, Vol. 92, pp. 1ff.
95. Exchange of letters between France and Portugal, on 26 April 1960, for the purpose of defining the maritime boundary between the Republic of Senegal and the Portuguese territory of Guinea.
96. Note that the original agreement exists only in French and Portuguese. The text cited is the English translation used by the court. (See *ILR*, Vol. 92, p. 34, § 14.)
97. *Guinea-Bissau v. Senegal*, Award of 31 July 1989, *ILR*, Vol. 83, pp. 1ff.
98. *ILR*, Vol. 92, p. 45, §§ 47–48.
99. Ibid., pp. 45–46, § 48.
100. Ibid., p. 46, § 50.
101. Ibid., pp. 46–47, § 51.
102. Case of Müller and Others, Judgment of 24 May 1988, *Publ. ECHR*, Ser. A, Vol. 133.
103. Ibid., p. 19, § 27.

104. See Ch. 4–7 of this work, especially the introductions to till Ch. 4 and Ch. 7.
105. See the introduction to this chapter.
106. See Ch. 9, Section 4, of this work.
107. See Ch. 3 of this work.
108. See Ch. 9, Section 6, of this work.
109. Cf. Draft Articles with Commentaries (1966): "Although a few Governments indicated a preference for allowing a larger role to preparatory work and even for including it in the present article [what is now VCLT art. 31], the majority appeared to be in agreement with the Commission's treatment of the matter. Certain members of the Commission also favoured a system which would give a more automatic role to preparatory work and other supplementary means in the process of interpretation. But the Commission considered that the relationship established between the 'supplementary' elements in interpretation in present article 28 [what is now VCLT art. 32] – which accords with the jurisprudence of the International Court on the matter – should be retained. The elements of interpretation in article 27 [what is now VCLT art. 31] all relate to the agreement between the parties *at the time when or after it received authentic expression in the text. Ex hypothesis* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text — Accordingly, the Commission was of the opinion that the distinction made in articles 27 and 28 [what is now VCLT arts. 31 and 32] between authentic and supplementary means of interpretation is both justified and desirable." (*ILC Yrbk*, 1966, Vol. 2, p. 220, § 10.)
110. See Ch. 10 of this work.
111. Loc. cit.
112. For a more detailed treatment of the expression "leads to a result that is manifestly absurd or unreasonable", see Ch. 10 of this work.
113. See the introduction to Ch. 3 of this work.
114. See Ch. 9, Section 6, of this work.
115. Cf. Thirlway, 1991, pp. 36–37; Amerasinghe, pp. 201–202; Bernhardt, 1984, p. 323; Yasseen, p. 84; Elias, 1974, p. 75; Rest, p. 145; Jennings, p. 549; Schwarzenberger, 1957, pp. 516, 531; Fitzmaurice, 1951, pp. 12–13. See also Draft Articles with Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 221, § 13 *in fine*.
116. See Ch. 9, Section 4, of this work.
117. Loc. cit.
118. Loc. cit.
119. There is one, and only one, exception to this; and that is when a treaty is interpreted using a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".
120. See the introduction to Ch. 3 of this work.
121. See Ch. 6, Section 4, of this work.
122. See Thirlway, 1991, p. 36; Amerasinghe, p. 200; *Oppenheim's International Law*, p. 1277; Villiger, p. 345; Bos, 1984, p. 152; Yasseen, p. 90; Lang, p. 164; O'Connell, p. 262; Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 223, § 18; Waldock, Third Report on the Law of Treaties, ibid., p. 58, § 21; Jennings, p. 552; Bernhardt, 1963, p. 112. See also, implicitly, Merrills, p. 90; Sinclair, 1984, p. 141; Haraszti, pp. 122, 123, 131; Sharma, p. 286.
123. See also Haraszti, p. 138.

124. Amerasinghe, p. 200.
125. See p. 33 of this work.
126. See Ch. 2, Section 1, of this work.
127. Loc. cit.
128. Loc. cit.
129. Here, there is an obvious parallel to the provisions of VCLT article 31 § 3(b): all parties to a treaty need not necessarily contribute to a practice, for it to be considered one that "establishes agreement between the parties regarding [the treaty's] interpretation". (Cf. Ch. 6, Section 2, of this work.)

CHAPTER 9

USING SUPPLEMENTARY MEANS OF INTERPRETATION (CONT'D)

"[S]upplementary means of interpretation", according to the provisions of VCLT article 32, "[may be used] in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable". In Chapter 8, I began investigating the contents of this article 32. The task I took on was to establish what it means to interpret a treaty using "supplementary means of interpretation", in the sense of the set of elements that can be used to supplement the means of interpretation listed in VCLT article 31. In this chapter, I shall attempt to conclude this investigation. The task assumed is to establish what it means to interpret a treaty using "supplementary means of interpretation", in the sense of the rules of interpretation that can be applied according to VCLT article 32.[1]

In the literature, several rules are mentioned as candidates for the list of rules applicable when the primary means of interpretation have been found to be insufficient. In my opinion, eight of these rules may be considered a use of the "supplementary means of interpretation". They are as follows: the rule of restrictive interpretation; the principle of *contra proferentem*; exceptions shall be narrowly interpreted; the rule of necessary implication; interpretation *per analogiam*; interpretation *per argumentum a fortiori*; interpretation *per argumentum e contrario*; and the principle of *ejusdem generis*. I have chosen to organise this chapter so that in Sections 1 through 8, I shall begin by arguing this position in "positive" terms. The purpose is to establish the status of these eight rules, and to define their norm content. In Section 9, I shall then argue my position in "negative" terms. I shall introduce a series of rules, which according to some authors should be considered a use of the "supplementary means of interpretation", and I shall attempt to explain why I believe they *cannot* be regarded as such.

1 THE RULE OF RESTRICTIVE INTERPRETATION

The rule of restrictive interpretation – sometimes referred to as the *principle* of restrictive interpretation, or in Latin termed as the maxim *in dubio mitius* –[2] is probably among the most rarely applied rules of interpretation in twentieth century international case law. Nevertheless, it is a view generally held in the literature that it should still be considered part of international law.[3] Based on this fact, it is my conclusion that the rule of restrictive interpretation is a valid rule of international law.

As examples of cases where the rule of restrictive interpretation has been applied, authors note three cases in particular; they will be cited here only in brief. A first example is the international award in the case concerning *Kronprins Gustaf Adolf*:

> [I]t must be observed that, considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting parties to a treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted in favour of the natural liberty and independence of the party concerned.[4]

A second case is the judgment of the Permanent Court of International Justice in the *International Commission of the River Oder*:

> [T]he Court ... [cannot] accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that the interpretation should be adopted which is most favourable to the freedom of States.[5]

A third case is the advisory opinion delivered by the PCIJ in the *Frontier between Turkey and Iraq*:

> In its telegram to the Court of October 8th, the Turkish Government adduced as an argument in favour of the correctness of its contentions, the fact that the Council itself had felt constrained to ask the Court for an advisory opinion as to the nature of the powers derived by it from Article 3 of the Treaty of Lausanne. This argument appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the present case, however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear.[6]

Together, these three decisions tell us all we want to know about the contents of the rule of restrictive interpretation.

First of all, we can tell what should be understood when we talk about restrictive interpretation.[7] When a treaty is interpreted and the rule of restrictive interpretation is applied, the means of interpretation assumed is the principle of state sovereignty. Restrictive interpretation is what we speak about when a treaty is interpreted in favour of the freedom of action inherent in all states as sovereign subjects – a fact that may be observed especially in the rulings in the *International Commission of the River Oder* and the *Kronprins Gustaf Adolf*. Given that a treaty always implies that, for every state bound by that treaty sovereign freedom of action is partly relinquished, restrictive interpretation – just as it is described in the *Frontier Between Turkey and Iraq* – would then be tantamount to an act of interpretation, the purpose of which is to limit those obligations of states laid down in the interpreted treaty.

Secondly, we are allowed to define how the rule of restrictive interpretation operates in the context of the other rules laid down in VCLT articles 31–32. As observed in Chapter 8 of this work, when appliers interpret a treaty using a "supplementary means of interpretation", the task may be approached in two fundamentally different ways. "[S]upplementary means of interpretation" can be used independently of other means of interpretation, or they can be used relative to conventional language, subject to the limits set by "the ordinary meaning".[8] Judging from the way the rule of restrictive interpretation is expressed in the three examples cited, it seems that the principle of state sovereignty is a means of interpretation that may only be used relative to conventional language. When the rule of restrictive interpretation is applied it is not to limit as far as possible the obligations of the parties to the interpreted treaty.[9] The purpose of the exercise, rather, may be described as the making of a choice: among the two possible ordinary meanings, appliers are to adopt the one by which the obligations of the parties will be most fully limited.

Hence, if the rule of restrictive interpretation shall be put to words, it may be stated as follows:

Rule no. 27
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 the provision contains an obligation, whose extension in one of the two possible ordinary meanings is comparably greater than it is in the other, then the latter meaning shall be adopted.

With this choice of words, I have claimed to be reproducing what was earlier termed as the view "generally held in the literature". To make the