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„We regret to announce the death of our most reputable colleague Professor Peter Mankowski from Germany. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team."

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Contents

CASE LAW

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Scope of Jurisdiction of Tribunals and International Authorities in Interpretation of International Law

Key words:
autonomous interpretation | good faith | European Convention on Human Rights (ECHR) | European Court of Human Rights (ECtHR) | linguistic interpretation | comparative interpretation | interpretation methods | inconsistent interpretation | international tribunal | national court | source of law | precedent | relative precedent | case-law | stare decisis | temporality of interpretation | United Nations Convention on Contracts for the International Sale of Goods (CISG) | UNCITRAL | UNIDROIT | Vienna Convention on the Law of Treaties | national law | interpretation of an international treaty | interpretation rules

Abstract *| This paper focuses on the specific attributes of the interpretation of international law from the theoretical perspective and through the analysis of selected case-law at the international, European and national level. The key document that sets forth the basic interpretation rules is the Vienna Convention on the Law of Treaties (VCLT); deemed to be the codification of customary law, the VCLT is steadfastly respected in essentially all countries of the world. However, in the international environment, the interpretation procedures incorporated in the Convention, primarily Article 31 et seq. of the VCLT, must be applied autonomously, i.e. separately from national interpretation or interpretation supplied by other authorities; autonomous interpretation only permits the latter as a subsequent instrument used for some measure of inspiration. In view of its importance and recognition in case-law, the concept of autonomous interpretation is a pivotal topic of this paper. Apart from the description itself of the*

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functioning of the autonomous interpretation, the author also analyses several associated issues and challenges.

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I. Specific Features of Interpretation of International Law

2.01. The general purpose of international treaties[1] is to define rules applicable in various legal systems.[2] This purpose is manifested in the principles of customary international law, which stipulate that agreements must be kept[3] and that a party to an international treaty[4] cannot invoke its national law as grounds for non-performance of the treaty.[5] However, in order to reach an agreement on the formulation of the rules applicable in various legal systems, the parties to international treaties often choose terms and formulations that represent a compromise drawn from the wording proposed by the individual States, which are naturally developed on the basis of their own legal concepts, ideas and doctrines. Hence, the final wording of international treaties is often rather general, sometimes even *prima facie* unclear or ambiguous.[6] Naturally, this must not and does not jeopardise the importance of the rule and its binding force.

2.02. Consequently, the interpretation of international treaties attracts major attention. Principally, it is hard to imagine a general legal rule that could be applied to a particular case without the need for interpretation. Hence, interpretation is the key factor determining the result of the majority of international disputes. However, there is no generally accepted definition of

[1] Article 2(1)(a) VCLT stipulates (cit.): *'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*

[2] See also Roderic Munday, *The Uniform Interpretation of International Conventions*, 27(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 450 (1978); Martin Gebauer, *Uniform Law: General Principles and Autonomous Interpretation*, 5(4) UNIFORM LAW REVIEW 683-705 (2000).

[3] The *pacta sunt servanda* principle is incorporated, *inter alia*, in Article 2(2) UN Charter or in Article 26 VCLT.

[4] Article 2(1)(a) VCLT stipulates (cit.): *'party' means a State which has consented to be bound by the treaty and for which the treaty is in force.*

[5] This principle is incorporated in Article 27 VCLT. *Civil law* countries have this principle traditionally embedded in their Constitutions.

[6] For instance, Aust notes (cit.): [*F*]*or multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests and concerns. The process inevitably produces some wording that is unclear or ambiguous. Despite the care lavished on drafting, and accumulated experience, there is no treaty which cannot raise some questions of interpretation* (ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, New York: Cambridge University Press (2nd ed. 2007), et. 230).

the term *interpretation of international treaties*. Each author usually endeavours to coin their own definition.[7] The general premise is, however, that the interpretation of international treaties means a procedure that aims to ascertain the meaning of a particular provision of the international treaty. This definition, in turn, complies with the oft-invoked brief definition of legal interpretation that refers to attributing meaning to a written text.[8] Consequently, the practice has greatly simplified the process and concluded that the person interpreting the normative text describes it in other words to make it more comprehensible with respect to a particular set of facts, and prepares arguments for justifying the application of this interpreted text to the set of facts. However, such attempts at a definition usually only reflect one side of the process. The other side consists in, at least, ascertaining whether the rule, according to the *interpreted contents*, can be applied to particular facts of the case or, as applicable, a legal issue.

2.03. The absence of any codified rules of international contract law prompted the adoption of the Vienna Convention on the law of treaties (VCLT) on 23 May 1969; the desired objective was, *inter alia*, to at least stipulate several fundamental rules for the interpretation of international treaties.[9] Presently, it is generally accepted that the provisions on the interpretation of international treaties incorporated in Articles 31 and 32 VCLT codify the preceding consistent customary law, making the Articles applicable even to international treaties that had been entered into before the adoption of the VCLT.[10] Nevertheless, the codification of the customary rules of interpretation has not reduced the number of issues concerning interpretation, because the rules articulated in the VCLT, which represent a

[7] For instance, Potočný argues (cit.): [*I*]*nterpretation of an international treaty is a mental process which, in accordance with cognitive rules – such as logical and linguistic rules –, ascertains the true meaning of the treaty provisions and their legal effects, as intended by the parties to the treaty.* (MIROSLAV POTOČNÝ, JAN ONDŘEJ, PUBLIC INTERNATIONAL LAW: SPECIAL PART, Prague: C.H.Beck (6th ed. 2011), et. 244); Jankuv argues (cit.): *Interpretation of an international treaty is perceived as a mental process which aims to ascertain the true meaning of a treaty provision corresponding to the intention of the parties.* (JURAJ JANKUV, DAGMAR LANTAJOVÁ, INTERNATIONAL LAW OF TREATIES AND ITS INTERACTIONS WITH THE SLOVAK LEGAL SYSTEM, Pilsen: Aleš Čeněk Publishing (2011), et. 82).

[8] CHRISTIAN DJEFFAL, STATIC AND EVOLUTIVE TREATY INTERPRETATION: A FUNCTIONAL RECONSTRUCTION, Cambridge: Cambridge University Press (2016), et. 9.

[9] Codification of the law of international treaties was declared in 1949 by the newly established UN International Law Commission to be one of its priorities. The preparatory works took almost two decades and resulted in the adoption of the VCLT on the law of treaties on 22 May 1969 at the UN Conference on the Law of Treaties in Vienna. The Convention has been signed by 116 States, source: United Nations Treaty Collection, Depositary, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed on 12 January 2022).

[10] RICHARD K. GARDINER, TREATY INTERPRETATION, New York: Oxford University Press (2008), et. 13; Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway, *The Kingdom of Belgium* v. *The Kingdom of Netherlands*, Award of 24 May 2005, marg. 45, et. 62.

compromise achieved by the State delegations participating in the creation of the VCLT, are indeed very general. One may, however, safely say that the VCLT (sometimes also referred to as the *treaty on treaties*) is one of the most successful and respected international treaties, which has significantly, through the codification of customary rules, contributed to the formation of a relatively comprehensive methodology of interpretation of international treaties.

2.04. Moreover, the VCLT interpretation rules are almost universally recognised and applied by international tribunals interpreting international treaties.[11] That being said, it needs to be emphasized that the case-law of international tribunals plays a principal role in the formation of interpretation rules, because the tribunals subsequently invoke these decisions, and their persuasive reasoning in turn helps to develop and refine the VCLT interpretation rules. This is, indeed, the reason why the need for developing a platform registering international case-law used to be frequently mentioned, as it would provide a guide to the tribunals in the application of the VCLT interpretation rules, which are, not exceptionally, articulated in a very general fashion. Some authors argue that this objective has been attained and international case-law has become a reality,[12] being created by dozens of institutions with the power to resolve disputes – and at least 24 of those institutions can be defined as international tribunals.[13]

2.05. Article 31(1) VCLT stipulates a general rule according to which an international 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 and in light of its object and purpose. The Article sets forth the circumstances and principles that must be considered and applied for the purpose of the interpretation of an international treaty. Conversely, the provision fails to describe or stipulate the precise steps to be taken in the process of interpretation. One may therefore invoke the observation of the European Court of Human Rights (ECtHR), which described

[11] CHRISTIAN DJEFFAL, STATIC AND EVOLUTIVE TREATY INTERPRETATION: A FUNCTIONAL RECONSTRUCTION, Cambridge: Cambridge University Press (2016), et. 3.

[12] INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS, Oxford: Oxford University Press (2012), et. 140; identically and with reference to the former of the above authors, see also in: CHRISTIAN DJEFFAL, STATIC AND EVOLUTIVE TREATY INTERPRETATION: A FUNCTIONAL RECONSTRUCTION, Cambridge: Cambridge University Press (2016), et. 6.

[13] KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS, New Jersey: Princeton University Press (2014), et. 70–6, quoted in CHRISTIAN DJEFFAL, STATIC AND EVOLUTIVE TREATY INTERPRETATION: A FUNCTIONAL RECONSTRUCTION, Cambridge: Cambridge University Press (2016), et. 6. As concerns specific tribunals designated as international tribunals, see: https://elaw.org/system/files/intl%20tribunals%20synoptic_chart2.pdf (accessed on 12 January 2022).

the interpretation under Article 31 VCLT as a unity, a single combined operation, which places on the same footing all of the principles of interpretation (such as interpretation in good faith, ordinary meaning of words, purpose of the treaty…).[14]

2.06. Hence, the interpretation rules set forth in the VCLT only provide the national courts with an interpretation guideline. The precise process of interpretation of any specific provisions of an international treaty applicable to individual cases is chosen by the courts themselves. It comes as no surprise, then, that the courts interpret international treaties by applying procedures and theoretical knowledge with which they are familiar from their national law – despite the fact that such procedure can generally not be embraced as appropriate. Consequently, the interpretation of the individual provisions of an international treaty may rather significantly vary depending on the court or arbitral tribunal interpreting the particular international treaty, while, ideally, the individual interpretations should exhibit no differences at all. Applying national law (law of national origin) in such interpretation is thus naturally undesirable and contrary to the purpose of international treaties.

II. Necessity to Prevent Inconsistent Interpretation in International Law

2.07. The above has the undesirable result of inconsistent interpretation of international treaties, which, according to legal theory, can be resolved by no fewer than three possible approaches.

2.08. First, the setting up of a specialised tribunal resolving disputes from a particular international treaty and thereby unifying the interpretation of the treaty, such as the ECtHR competent to resolve disputes from breaches of the European Convention on Human Rights (ECHR).[15]

2.09. The second possibility of preventing inconsistent interpretation of international treaties is the incorporation of special interpretation rules (provisions) directly in the text of a particular international treaty. Such special provisions are intended to ensure a consistent interpretation of the treaty by

[14] Judgment of the ECtHR in *Golder* v. *United Kingdom*, 21 February 1975, Application No. 4451/70, A/18, paragraph 30. However, compare also judgment of the ECtHR in *Witold Litwa* v. *Poland,* 04 April 2000, Application No. 26629/95, in which the ECtHR has held that Article 31 VCLT must also be perceived as an indication of the order (the sequence of the circumstances to be assessed) which the process of interpretation of the treaty should follow.

[15] The category of special tribunals also includes the Court of Justice of the EU (CJ EU) in relation to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Convention).

various national courts. One of the most famous interpretation rules is Article 7 UN Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG), which stipulates that in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.[16] A similar provision is incorporated in the Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention)[17] (Article 18 Rome Convention), which stipulates that in the interpretation of this Convention, regard shall be had to the international character of the rules incorporated therein and to the desirability of achieving uniformity in its interpretation and application.[18] An analogous rule is also enshrined in Article 4 UNIDROIT Convention on International Factoring[19] (Article 4), in the UNIDROIT Convention on International Financial Leasing[20] (Article 6),[21] and in the UNIDROIT Principles of International Commercial Contracts (Article 1.6).[22] Furthermore, the UNCITRAL Model Law on International Commercial Arbitration stipulates that in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.[23]

[16] Article 7(2) CISG stipulates that, when filling gaps in a treaty, the legal system of a signatory State can be had regard to only unless the gap can be filled autonomously, i.e. in conformity with the general principles of the Convention. Hence, the interpretation of the CISG always requires that a solution be primarily looked for within the framework of the Convention itself, even if there is a *gap* in the Convention. This should ensure a uniform interpretation thereof. The CISG thus prohibits any interpretation which would primarily invoke the legal system of a State. A reference to the legal system of a State signatory when filling gaps in the Convention is an *ultima ratio* solution.

[17] Rome Convention on the Law Applicable to Contractual Obligations, OJ C 27, 26 January 1998, et. 34–53. [EUR-Lex: 41998A0126(02)].

[18] Article 18 Rome Convention on the Law Applicable to Contractual Obligations (cit.): *Uniform interpretation – In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.*

[19] UNIDROIT convention on international factoring (Ottawa, Canada, 28 May 1988), available at: https://www.unidroit.org/instruments/factoring (accessed on 16 January 2022).

[20] UNIDROIT convention on international financial leasing (Ottawa, Canada, 28 May 1988), available at: https://www.unidroit.org/instruments/leasing/convention/ (accessed on 16 January 2022).

[21] Article 6 UNIDROIT Convention on International Financial Leasing (cit.): *(1) In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

[22] See Article 1.6 The UNIDROIT Principles of International Commercial Contracts (cit.): '*(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application. (2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.*'

[23] See Article 2A(1) The UNCITRAL Model Law on International Commercial Arbitration (cit.): '*In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.*'

2.10. If an international treaty determines the jurisdiction of a special or, as applicable, a particular tribunal to resolve disputes arising therefrom and, at the same time, contains no special interpretation rule regarding the unification of interpretation, then the desired uniform interpretation [independent of the laws of the State signatories] requires (as the third approach) the application of autonomous interpretation. In this regard, one may refer to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention (1958)). It has been argued that the terms used in the New York Convention (1958) are principally endowed with autonomous interpretation. Hence, the tribunals should not interpret the provisions of the New York Convention (1958) with reference to national law, because the desired effect is the accomplishment of a uniform interpretation in all State signatories.[24]

III. Autonomous Interpretation

III.1. Concept and Objectives of Autonomous Interpretation

2.11. Autonomous interpretation is a common method of interpreting international treaties, but it is rather difficult to define. For instance, *Linhart, K.* describes autonomous interpretation as an aspiration to interpret international treaties as an independent law, i.e. refraining from such interpretation of international treaties that would refer to concepts incorporated in the law of the State signatories.[25] *Meyer-Sparenberg, W.* adds that autonomous interpretation is the consequence of teleological interpretation, because the purpose and objective of international law is to approximate and consolidate multiple national legal systems.[26] *Gebauer, M.* notes that the definition of autonomous interpretation has a negative and a positive branch. He argues that, from the negative perspective, autonomous interpretation is defined as an interpretation in which the interpreter does not refer to the concepts of any specific national (domestic) law. From the positive perspective, autonomous interpretation is defined as an interpretation in which the interpreter interprets

[24] International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958, New York Convention: A Handbook for Judges, with the Assistance of the Permanent Court of Arbitration Peace Palace*, Den Haag (2011), et. 13.

[25] KARIN LINHART, INTERNATIONALES EINHEITSRECHT UND EINHEITLICHE AUSLEGUNG, Tübingen: Mohr Siebeck (2005), et. 37.

[26] WOLFGANG MEYER-SPARENBERG, STAATSVERTRAGLICHE KOLLISIONSNORMEN, Berlin: Duncker & Humblot (1990), et. 110. Also referred to in: KARIN LINHART, INTERNATIONALES EINHEITSRECHT UND EINHEITLICHE AUSLEGUNG, Tübingen: Mohr Siebeck (2005), et. 37.

the terms and rules of an international treaty exclusively within the context of the respective treaty and its purpose.[27]

2.12. Autonomous interpretation is one of the fundamental principles of interpretation of international treaties. It aims to sever the international treaty from the national laws of the signatory countries. The need for an autonomous interpretation of international treaties stems from the purpose itself of international treaties, as well as from the generally acknowledged customary law that was incorporated in Articles 31 to 33 VCLT. The general interpretation rule in Article 31(1) VCLT emphasises that an international treaty shall be interpreted (cit.): *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.* This wording clearly implies that the interpretation must not attribute to the terms used in the treaty the same meaning that such terms possess in the legal theory of the individual States, let alone any specific legal cultures. Indeed, one must realize that these terms were used in the text of the particular international treaty as a compromise reflecting its object and purpose. The VCLT thus emphasises interpretation in compliance with the ordinary meaning of the terms, with the object and purpose of the treaty, and in compliance with the assessment of the overall circumstances surrounding the treaty and the term used. But it would be a mistake to refer to 'ordinary meaning' in terms of a simple semantic interpretation; it is necessary to refer to the ordinary meaning attributed to the respective terms and concepts from the legal perspective. These levels must be strictly distinguished, because it is by no means exceptional in practice that it is indeed the semantic interpretation that is used to interpret certain terms; and it is by no means exceptional that legal documents even go so far as to refer to general explanatory (linguistic) dictionaries. Although legal terminology employs general terms coined by ordinary language, it often attributes its own, specific legal meaning to such terms. Hence, attempts to construe the terms using general interpretations may be inappropriate and should instead be avoided whenever possible. Indeed, one must never abandon the *niveau* of law that must only be corrected by an effort to accomplish a reasonable universality of these legal terms.[28] The VCLT stipulates that

[27] Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, 5(4) UNIFORM LAW REVIEW 683–705 (2000). Autonomous interpretation according to *Martin Gebauer* is primarily founded on the method of systematic and teleological interpretation because the linguistic and historical interpretations do not, in his opinion, lead to the autonomous interpretation.

[28] For more details concerning the semantic interpretation, see also MARTA CHROMÁ, LEGAL TRANSLATION IN THEORY AND IN PRACTICE, Prague: Karolinum (2014), et. 45, although the author's analysis of the issue is more closely connected with translations and exemplified by a specific substance.

the context for the purpose of interpretation of a treaty shall comprise especially, without limitation, any agreement that was made between all the parties in connection with the conclusion of the international treaty, as well as any subsequent practice in the application of the treaty.[29] The VCLT also stipulates that if the meaning of a provision remains ambiguous, recourse may be had to supplementary means of interpretation (supplementary interpretation), including the preparatory work of the treaty (*travail préparatoire*) and the circumstances of its conclusion.[30] The interpretation rules incorporated in the VCLT also clearly imply that the VCLT has no provision stating that recourse may be had to the legal system of any of the State signatories. Consequently, as a rule, the interpretation must be autonomous, independent of the legal systems of the signatories.[31]

2.13. The above general rule in Article 31 VCLT contains three separate interpretation principles combined in a single combined operation that places all of them on equal footing.[32] This single combined operation results in the autonomous interpretation of the terms used in the international treaty. As mentioned above, the general rule provides no description or statement as to the precise steps to be taken in the process of interpretation.

2.14. First of all, the interpreter should apply all principles of the general rule within the framework of the single combined operation. This rule was also articulated by the WTO Appellate Body in its decision in *EC-chicken cuts* (cit.): [*I*]*nterpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.*[33]

2.15. The first principle of the VCLT general interpretation rule stipulates that international treaties should be interpreted in good faith. Apart from the wording itself of Article 31 VCLT,

[29] See Article 31(2) and Article 31(3) VCLT.

[30] Article 32 VCLT stipulates (cit.): *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, 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.*

[31] A certain definition or description of an independent (autonomous) interpretation is also included in other international treaties, such as the above-mentioned Article 7 CISG.

[32] Compare also judgment of the ECtHR in *Golder* v. *United Kingdom*, 21 February 1975, Application No. 4451/70, A/18, [1975] ECHR 1, (1979) 1 EHRR 524, IHRL 9 (ECHR 1975), paragraph 30.; Yearbook of the International Law Commission (1966), Vol. II, UN Document No. A/CN.4/SER.A/1966/Add.l, et. 219–220; OLIVER DÖRR, KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, New York: Springer (2012), section 3, et. 39.

[33] Compare decision of the WTO Appellate Body in *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, No. AB-2005-5, Document No. WT/DS269/AB/R and WT/DS286/AB/R, 12 September 2005, paragraph 176.

this requirement directly follows from the rule prescribing the performance of contracts in good faith, as enshrined in Article 26 VCLT.[34] However, 'good faith' is not defined in the VCLT and, consequently, the principle of interpretation in good faith raises a number of further questions as to the precise meaning of 'interpretation in good faith' in practice. For instance, *Lo* supports the existence of specific criteria to test whether the given interpretation complies with the principle of good faith. Specifically, *Lo* proposes the following criteria to assess interpretation in good faith:[35]

a. fairness / unfairness of the interpretation – the interpreter should review whether the interpretation results in a manifest unfairness or inequality in the rights of one of the parties;
b. malicious intent – the tribunal should ascertain whether any objective circumstances exist that indicate bad faith / malice on the part of the entity submitting the interpretation;
c. rationality / irrationality – the interpreter should review whether the interpretation is reasonable or, as applicable, whether it is deemed reasonable by the relevant international community and the parties involved;
d. consistency / inconsistency – the interpreter should review whether the given interpretation significantly and groundlessly differs from an interpretation of the same provision that was performed in the past; and
e. compliance with the purpose of the international treaty – the interpreter should also review whether the interpretation complies with the general purpose of the international treaty.

2.16. Other authors in turn primarily emphasise the reasonableness of the interpretation. Hence, an interpretation in good faith should not be unreasonable. Quite the opposite, it should eliminate any strictly formally linguistic, or overly teleological, interpretation that could result in unreasonable conclusions.[36]

2.17. International courts and tribunals often fail to explicitly mention the principle of interpretation in good faith in their decisions. This may also be due to the fact that 'good faith' itself is very

[34] Article 26 VCLT (cit.): *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

[35] Compare CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES, New York: Springer (2017), et. 294.

[36] See also OLIVER DÖRR, KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, New York: Springer (2012), section 3, et. 61, or RICHARD K. GARDINER, TREATY INTERPRETATION, New York: Oxford University Press (2008), et. 151.

difficult to define and that, for many interpreters, the term only represents an abstract principle the application of which is rather complicated. This approach is further corroborated by the cautious use of the principle – for instance, the NAFTA arbitral tribunal in *Terminal Forest Products* described this principle in very ambiguous words as a general rule applicable to the interpretation and application of international treaties.[37] A similarly ambiguous commentary was provided by the International Court of Justice (ICJ) in its decision in *Border and Transborder Armed Actions,* in which the ICJ ruled as follows (cit.):

> [*T*]*he principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (Nuclear Tests, Z.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist…*[38]

2.18. However, the extensive case-law of international courts and tribunals has also produced decisions in which these institutions describe the principle of good faith in greater detail. For instance, the WTO Appellate Body in its decision in *US – Import Prohibition of Certain Shrimp* ruled that the principle of good faith comprises, *inter alia*, the prohibition of abusing the law (*abus de droit*). In other words, the WTO Appellate Body confirmed the general rule that the interpretation of an international treaty provision should not result in an unreasonable detriment to the rights of the other party.[39]

2.19. The second principle requires that the interpretation of the individual terms always comply with the ordinary meaning of the terms used in the treaty. However, as noted by *Prof. Schwarzenberger*, almost every term has multiple meanings,

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[37] Decision of the NAFTA Arbitral Tribunal in the decision of 06 June 2006 in *Canfor Corporation* v. *United States of America; Terminal Forest Products Ltd.* v. *United States of America*, paragraph 182 (cit.): [*G*] *ood faith is a basic principle for interpretation of a treaty. It is stated in so many words in Article 31(1) of the Vienna Convention ('A treaty shall be interpreted in good faith . . .'). Good faith is also a basic principle in the performance of a treaty by States.*

[38] Judgment of the ICJ in Border and Transborder Armed Actions (*Nicaragua* v. *Honduras*) of 20 December 1988, paragraph 94.

[39] Decision of the WTO Appellate Body in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, paragraph 158 (cit.): [*T*]*he chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.' 156 An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.*

including the word 'meaning' itself.[40] Hence, the determination of the ordinary meaning of a used term requires at least a substantiated consideration, i.e. an analysis of the term by the interpreter. In this connection, the ordinary meaning of a term used in an international treaty must be determined by a non-isolated consideration of the term that has due regard for the context, i.e. primarily a consideration of the nature and purpose of the treaty and of the provision in which the term being interpreted is used – in compliance with the third principle. *Dörr* notes that the ordinary meaning ought to be assessed from the perspective of a person reasonably familiar with the subject matter of the international treaty, and points out that international tribunals frequently assess such meaning with the help of specialised or general dictionaries.[41] However, the use of dictionary definitions can only be perceived as the potential first step towards the interpretation of the term, which needs to be refined in accordance with the remaining two principles of the general interpretation rule. The reason is that the dictionary definitions totally ignore the circumstances attending the formation and purpose of the individual international treaties, which could have a fundamental impact on the ordinary meaning of the term used in the treaty. Hence, they cannot be the sole resources relied on in the interpretation of concepts in international treaties.

2.20. The third principle follows the preceding two and stipulates that the ordinary meaning should be assessed in the comprehensive context of the treaty and in compliance with the object and purpose thereof. This principle is primarily the manifestation of the fact that no treaty provision was created in a contextual vacuum. Quite the opposite. Each treaty provision has its purpose, justification and systematic connections in the general scheme of the treaty. This fact itself requires that the treaty be interpreted with due regard for these circumstances in order to prevent a literal isolated interpretation that could even contradict the purpose itself of the provision and, by extension, the entire international treaty. The primary goal of searching for the context of the provision or expression is then especially the confirmation of the ordinary meaning (second principle).

[40] See also Georg Schwarzenberger, *Myth and realities of Treaty Interpretation: Articles 27–29 of the Vienna draft Convention on the law of treaties,* 9(1) VIRGINIA JOURNAL OF INTERNATIONAL LAW 13 (1968). Adopted from RICHARD K. GARDINER, TREATY INTERPRETATION, New York: Oxford University Press (2008), et. 161.

[41] See also OLIVER DÖRR, KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, New York: Springer (2012), section 3, margin 41.

2.21. As the above-mentioned individual principles of the general interpretation rule clearly indicate, the most important factor in the interpretation of an international treaty is naturally the wording itself of the treaty provisions.[42] The terms used must be interpreted in their ordinary meaning, which essentially means that the tribunal should identify the meaning that would be attributed to the term by an informed expert in the field, in view of the type of the international treaty in which the term is used. When considering the meaning of the terms used, international tribunals often refer in their decisions to definitions of terms in specialised dictionaries and other publications.[43] But gleaning the actual meaning of a particular term only from the wording itself is rather exceptional. The second principle of the general rule thus stipulates that one must also review the general context of the term used. The interpreting tribunal should therefore primarily apply systematic interpretation and consider the meaning of the term in the context of the remaining provisions of the treaty, the general scheme of the treaty and other factors, such as the recitals (preamble), location of the expression in the text, use of the same expression elsewhere in the text, use of the same expression in another associated treaty,[44] or even the name itself of the treaty.[45] Moreover, the tribunal should review the meaning of the terms used with due regard for the object and purpose of the treaty. Hence, the tribunal should apply the teleological interpretation method and interpret the terms in such manner that their meaning is consistent with the objective and purpose of the treaty. Conversely, it is imperative to reject any interpretation conflicting with the objective and purpose of the international treaty. Similarly, it is necessary to reject any interpretation that would render the provision inapplicable, or otherwise purposeless or meaningless in any manner. The purpose of the treaty can most frequently be ascertained from its

[42] See also judgment of the ICJ in *Territorial Dispute* (*Libyun Aruh Jamuhiriyu/Chad*), 03 February 1994, I. C. J. Reports 1994, et. 41; judgment of the ICJ in *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), 15 December 2004, I.C.J. Reports 2004, et. 279, paragraph 100.

[43] See also: judgment of the ECtHR in *Golder* v. *United Kingdom*, 21 February 1975, Application No. 4451/70, A/18, [1975], (1979) 1 EHRR 524, IHRL 9 (ECHR 1975), paragraph 32; judgment of the ICJ in *Kasikili/Sedudu Island* (*Botswana/Namihia*), 13 December 1999, I. C. J. Reports 1999, et. 1045, paragraph 30.

[44] See also judgment of the ICJ in *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*) of 11 September 1992, paragraph 374.

[45] See also judgment of the ICJ in *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), 12 December 1996, I.C.J. Reports 1996, et. 803, paragraph 47, in which the Court interpreted the individual terms of the Treaty with reference to, *inter alia*, the name of the Treaty and, in connection therewith, applied an extensive interpretation of the term 'commerce'.

opening provisions,[46] recitals (preamble),[47] name,[48] or the treaty provisions themselves, using a general rational interpretation in compliance with general social and legal well-known facts, which the decision-making bodies (tribunals, arbitrators and other institutions) are essentially presumed to have broad knowledge of and extensive experience with. Considering the nature and duration of the individual international treaties, the interpreting tribunal should have regard to the temporal perspective and consider the meaning of the respective term at the time at which it was used by the parties.

2.22. Last, but not least, the tribunal should implement the entire process of interpreting the treaty provision in compliance with the principle of good faith. This principle also corresponds to the basic rule of the international law of treaties, i.e. that treaties should be performed in good faith.[49] The *principle of good faith* is a rather ambiguous concept; nonetheless, in view of the above doctrinal premises of interpretation in good faith, it is at least reasonable to assume that one of its integral components is the imperative of reasonableness and judiciousness.[50] In other words, the resulting interpretation of a treaty term must lead to the fulfilment of the purpose of the treaty and shall not result in unfair or unreasonable, let alone absurd conclusions in any individual case. This must always be assessed on an individual basis, and it is the liability of the interpreter (tribunal) to consider whether the preferred interpretation results in any undesirable outcomes contrary to the principle of interpreting an international treaty in good faith. The core of the assessment is a consideration as to whether or not the implemented interpretation is fair, rational and consistent, and complies with the purpose of the interpreted provision / the international treaty itself.[51] In view of the general nature of VCLT provisions and the diversity of the interpretation practice, there are no fixed rules governing the assessment. Similarly, there is no generally recognised definition of good faith. Hence, the tribunals are endowed with a relatively broad discretion. However, such

[46] See also Article 1 Charter of the United Nations.

[47] See also the Charter of the United Nations, CISG, UN Convention relating to the Status of Refugees of 1951, VCLT et al.

[48] See also judgment of the ICJ in Oil Platforms (*Islamic Republic of Iran* v. *United States of America*), 12 December 1996, I.C.J. Reports 1996, et. 803, paragraph 47. For more details, see RICHARD K. GARDINER, TREATY INTERPRETATION, New York: Oxford University Press (2008), et. 180.

[49] See Article 26 VCLT (cit.): '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*'

[50] RICHARD K. GARDINER, TREATY INTERPRETATION, New York: Oxford University Press (2008), et. 157, 148.

[51] See CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES, New York: Springer (2017), et. 294.

approach in turn places a heavier burden on the tribunal, which is obliged to substantiate its decisions and any conclusions made therein in great detail.

2.23. Article 31(2)(a) VCLT supplements or refines the general interpretation rule by stipulating that the context shall also comprise (cit.): '*… any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*'

2.24. This means that the interpretation of the treaty by the tribunal should also involve an assessment of the parties' agreements, which are connected to the treaty without being an integral part thereof. However, such materials must be the result of a consensus reached by all parties to the international treaty and must relate to the object thereof. Such agreements may, for instance, provide an authentic interpretation of certain concepts or particularise the actual functioning of the mechanisms anticipated in the treaty. This applies, for instance, to the *Harmonized Commodity Description and Coding System*, considered by the WTO Appellate Body to be a part of the WTO Agreement.[52]

2.25. The important requirement is that the agreements be made *in connection with the conclusion of the treaty*, i.e. approximately in the period during which the treaty was being negotiated and concluded. The words '*in connection with the conclusion of the treaty*' suggest that the agreements should be made within the scope of a particular interval in order to be deemed made, in view of Article 31(2) VCLT, in the context of that provision. However, no precise definition of this interval has been stipulated in international law so far.[53] The main reason for the lack of such definition is the fact that international law has no precisely delimited meaning for the 'conclusion of the treaty'. This is neither the case in the VCLT, in which the 'conclusion of the treaty' must be interpreted in the context of the individual provisions, and the contents of the term may include any of the two different intervals[54] analysed below.

2.26. The first interval is the period between the opening of negotiations and the moment at which the parties approve the

[52] See decision of the WTO Appellate Body in *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, No. AB-2005-5, Document No. WT/DS269/AB/R and WT/DS286/AB/R, 12 September 2005, paragraph 195.

[53] BERT VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW, The Netherlands: Springer (1973), et. 79. See also ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES, The Netherlands: Springer (2007).

[54] Bert Vierdag, *The time of the Conclusion of a multilateral treaty: Article 30 of the Vienna convention on the law of treaties and related provisions*, 59(1) THE BRITISH YEARBOOK OF INTERNATIONAL LAW 80 (1988).

text of the treaty, without yet agreeing to be bound by it.[55] Such a delimitation, however, cannot be applied for the purpose of Article 31(2) VCLT, because the parties to an international treaty may still agree, in the period between the signing and the ratification of the treaty, that the meaning of any particular provisions will be interpreted in a particular manner. For the purpose of interpreting an international treaty using the context in terms of Article 31(1) VCLT, the 'conclusion of the treaty' must be interpreted as the interval between the opening of the negotiations and the day on which the treaty takes effect with respect to the last party, as this definition is analysed in detail by *Vierdag*.[56]

2.27. The author of this paper agrees with *Vierdag* that the 'conclusion of the treaty' should contain the interval from the opening of the negotiations to the moment at which the treaty becomes binding on the last of the parties.

2.28. But the important factor is that the agreement on the method of interpreting the international treaty provisions actually be agreed to by all parties, whether or not the agreement was also entered into by any authority superior to the parties. An agreement entered into by an international body of which all parties are members does not meet the requirements under Article 31(2)(a) VCLT unless the agreement is unanimously accepted by all parties.

2.29. Article 31(3) VCLT then stipulates that the context of the treaty also includes:

> *(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; and*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*

2.30. These 'contextual' aspects of Article 31(3) VCLT are generally linked by the fact that, as opposed to the circumstances listed in Article 31(2) VCLT, they have no relation to the conclusion

[55] Bert Vierdag, *The time of the Conclusion of a multilateral treaty: Article 30 of the Vienna convention on the law of treaties and related provisions*, 59(1) THE BRITISH YEARBOOK OF INTERNATIONAL LAW 80 (1988).

[56] BERT VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW, The Netherlands: Springer (1st ed. 1973), et. 86. *Ex multis*, see also ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES, The Netherlands: Springer (2007), et. 148–151; Linderfalk ponders the existence of 3 time intervals, […] *to my knowledge no support for either alternative can be drawn from the preparatory work of the convention. Nor does it appear that the expression at issue has yet been seriously brought into focus by international courts and tribunals. My conclusion is that at this moment the prevailing legal state of affairs cannot be convincingly determined.*

of the treaty and are only developed later, independently of the process of negotiation and conclusion of the treaty. They comprise subsequent agreements on treaty interpretation, later practice of the parties, or generally recognised rules of international law applicable in relations between the parties.[57] Paragraph 3 (just like Paragraph 2) prescribes no particular form, which means that all of the above-enumerated acts can be performed in any identifiable form. The application of the treaty by the parties ought to be repeated, consistent and applied, or at least recognised and accepted by all parties to the treaty. There is no temporal test. The temporal aspect may attest to the general nature and consistency of a particular practice. However, international law requires no particular minimal duration of such practice. The practice must be repeated and consistent, but there is no mandatory limit for reporting such practice. By identifying international law as the applicable interpretation instrument, the VCLT emphasises the fact that international treaties are a concept and source of international law, and it is therefore appropriate to interpret the treaties with due regard for international law.[58]

2.31. Article 31(3)(c) VCLT has regard to the fact that the purpose of international treaties does not consist in the codification of any and all existing rules of international law applicable between the parties. The subject matter of international treaties, however broad, is always limited. This is why it is supplemented by legal principles and customary international law, which are both on an equal footing with international treaties. Essentially, unless the international treaty excludes the application of any general principle or of customary international law, the rule continues to apply between the parties. Indeed, the international treaty need not specify any and all rules relating to a particular subject matter; it must only identify the rules the application of which ought to be excluded. As the hitherto published opinions imply, the VCLT can be used in the interpretation of an international treaty even if it is not attached to it.

2.32. Similarly, general principles of law remain applicable even if they are not explicitly or otherwise mentioned in the international

[57] For instance, (1) Paragraph 5.2 Doha Ministerial Decision on Implementation related concerns 14 November 2001 to CISG; (2) The 'understandings and additional agreements' adopted by the Biological Weapons Convention of 1975 Review Conference; (3) Resolutions adopted by the Conference of States Parties under the London (Dumping) Convention from 1975; (4) Recommendations adopted by the International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling from 1948.

[58] This rule was also emphasised in the ICJ Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) of 21 June 1971, I.C.J. Reports 1971, paragraph 53 (cit.): '(…) *Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.* (…).'

treaty, as corroborated by the case-law of international tribunals. For instance, in the *Chorzów Factory* case, the Permanent Court of International Justice (PCIJ) has held that an obligation exists to pay compensation for a breach of an international treaty even if it does not directly and explicitly follow from the treaty.[59] The Appellate Body has also held that customary international law covers WTO agreements to the extent that it does not conflict with the WTO agreements, or is not directly incorporated therein.[60]

2.33. One must also mention that Article 31(4) VCLT sets forth an exception to the rule of interpretation of the ordinary meaning in that it stipulates that a special meaning shall be given to a term if it is established that the parties so intended. For instance, the main reason why the International Law Commission (ILC) decided to explicitly incorporate this provision in its proposal was its emphasis on the fact that the burden of proof lies with the party that invokes the special meaning of any particular concept. In its commentary to the VCLT, the Commission (ILC) also pointed out that this exception had been mentioned on several occasions by the PCIJ.[61] The ILC has invoked the PCIJ opinion in *Legal Status of Eastern Greenland*, in which the PCIJ held (cit.): '*The geographical meaning of the word "Greenland"*, i.e. *the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention*.'[62] Regardless of the obvious meaning of a term, the parties may, pursuant to Article 31(4)

[59] Chorzów Factory (*Germany* v. *Poland*), Merits, 1928 PCIJ (ser. A) paragraph 73, available at: http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm (accessed on 19 January 2022).

[60] World Trade Organization, *Korea – Measures Affecting Government Procurement,* Report of the Panel, WT/DS163/R, 01 May 2000, paragraph 7.9.

[61] Draft Articles on the Law of Treaties with commentaries 1966, International Law Commission, 18th session, Commentary to Article 27, et. 222, paragraph 17, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (accessed on 19 January 2022).

[62] PCIJ Judgment No. 20 (General List No. 43), 05 September 1933, *Denmark* v. *Norway* – Legal Status of Eastern Greenland, published in: 1933 P.C.I.J. (ser. A/B) No. 53 (April 05), paragraph 111, available at: http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm (accessed on 19 January 2022). See also ICJ Advisory Opinion of 28 May 1948 in *Admission of a State to the United Nations* (Charter, Article 4), published in: ICJ Reports, 1948, et. 57 et seq. or Arbitral Award of the Permanent Court of Arbitration (PCA) set up in connection with a dispute relying on the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 03 December 1976 – Annex B to the Convention, on Arbitration – Annex III to the Additional Protocol, on 'Financial Arrangements' (Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 03 December 1976), of 12 March 2004, in a dispute between the Netherlands and France, published in: ICGJ 374 (PCA 2004), available in the original French version at: https://pcacases.com/web/sendAttach/76 (accessed on 19 January 2022), in an English translation available at: http://www.worldcourts.com/pca/eng/decisions/2004.03.12_Netherlands_v_France.pdf (accessed on 19 January 2022).

VCLT, invoke any special meaning thereof, but the burden of proof regarding the special meaning of the term lies with the party invoking such special meaning.

2.34. Article 32 VCLT contains supplementary means of interpretation. These include primarily preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion. However, these supplementary means can only be used in the final phase of interpretation, only **(i)** to confirm the meaning resulting from the tribunal's application of the interpretation rules in Article 31 VCLT, or **(ii)** to determine the meaning when the interpretation according to Article 31 VCLT leaves the meaning ambiguous or obscure; or leads to a result that is manifestly absurd or unreasonable.[63]

2.35. **Re (i)** The application of the supplementary means of interpretation in order to confirm any meaning is entirely unlimited. The interpreter may always decide whether or not they apply the supplementary means to support or enhance their interpretation on the basis of Article 31 VCLT. But if the interpretation based on the text and context is clear, these means of interpretation are not necessary. Hence, the interpreter has the discretion to decide whether or not the means shall be used. This situation has been addressed, for instance, by the WTO Appellate Body, which has held that if the interpretation based on the text itself and on the context is clear, the supplementary means shall not be used.[64]

2.36. **Re (ii)** It is at the interpreter's sole subjective discretion to decide whether, following an attempt at interpretation pursuant to Article 31 VCLT**,** the interpreter considers the meaning of the term or provision being interpreted as ambiguous or obscure. If this situation actually occurs, it will be resolved using the mechanism enshrined in Article 32 VCLT. This means that recourse to the supplementary means of interpretation under Article 32 VCLT is available if the meaning remains ambiguous or obscure after the interpretation rules incorporated in Article 31 VCLT are applied. The discretion in such cases has been well illustrated in *Chile Price Band System,*[65] in which the arbitral tribunal held as follows (cit.): '*[T]he text and context of "variable import levy" and "minimum import price" alone do not enable*

[63] See also Article 32 VCLT.

[64] Report of the WTO Appellate Body in DS397 European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – AB-2011-2- (Report of the Appellate Body) of 15 July 2011, in *China* v. *European Communities*, third parties: Brazil; Canada; Chile; Colombia; India; Japan; Norway; Taiwan; Thailand; Turkey and United States, paragraphs 352 and 353.

[65] Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R, 03 May 2002.

us to determine the meaning of those terms without ambiguity.'[66] The arbitral tribunal subsequently refrained from an analysis of such interpretations that allow for multiple meanings, and directly explained further procedure as it held as follows (cit.): '*[T]he determination of their meaning should therefore include an analysis which goes beyond a purely grammatical or linguistic interpretation. Pursuant to Article 32 of the Vienna Convention, we will take recourse to supplementary means of interpretation*'.[67]

2.37. The second branch of Article 32 VCLT plays a far less significant role in practice, as it is activated only where the application of the general rule leads to a manifestly absurd or unreasonable result. Hence, the application of such procedure in practice must be rather exceptional, because the application of such a mechanism would result in an unacceptable weakening of the rule incorporated in Article 31 VCLT. Consequently, the situations requiring the use of the supplementary means of interpretation pursuant to the second branch of Article 32 VCLT should be exceptional, and recourse to this method should only be allowed in extreme cases, especially because the absurdity or unreasonableness of the term interpreted pursuant to Article 31 VCLT must be manifest.

2.38. However, the author of this paper is of the opinion that the VCLT thereby does not prevent the use of the supplementary means of interpretation, but only endeavours to prevent the use of such means as the main interpretation procedure. Hence, the first step is to attempt an interpretation pursuant to Article 31 VCLT and reach a conclusion. If the attempt at interpretation using the general rules pursuant to Article 31 VCLT fails, the use of the supplementary means of interpretation is essentially unlimited. Consequently, the interpreter of the international treaty enjoys discretion as to whether or not they use these supplementary means. This is clear from another function performed by these methods and means, namely their use as *confirmation*. Indeed, these methods and means not only provide an instrument to perform the interpretation itself when the general means fail, they also provide an instrument to confirm the accuracy of the interpretation performed using the general and basic means of interpretation.

2.39. Article 33 VCLT then contains interpretation rules to be applied in cases in which the treaty is authenticated in two or more languages. The fundamental rule is that the language versions

[66] Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R, 03 May 2002, paragraph 7.35.

[67] Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R, 03 May 2002, paragraph 7.35.

are equally binding, unless the parties agree otherwise. Hence, when interpreting the terms used, the courts must, as a rule, examine any and all binding language versions of the treaty. At the same time, it is presumed that the terms used in the treaty have the same meaning in each of the original texts. However, if the terms used have a different meaning in the individual language versions of the treaty with the same binding force, the tribunal should adopt as decisive the meaning that best reconciles the texts, having regard to the object and purpose of the treaty.[68]

2.40. Applying the above-mentioned interpretation rules, the tribunal should arrive at a fully autonomous interpretation of the treaty, i.e. an interpretation that is by no means tied to the legal systems and traditions of the individual State parties.

2.41. However, the VCLT fails to mention another supplementary component of autonomous interpretation, namely **comparative interpretation.**[69] This method, however, follows from the hierarchy itself of the sources of international law that lists judicial decisions as a subsidiary source.[70] The tribunal interpreting international treaty provisions ought to look up and analyse the interpretation of the particular treaty provision provided in the decisions made by the tribunals of other State parties. The persuasive force of those decisions might assist the tribunal in clarifying the concepts or mechanisms of the international treaty, especially if the tribunal has to choose between two or more alternative interpretations that all comply with the rules of interpretation set forth in the VCLT. Following such procedure, tribunals contribute to the desirable unification of the application practice. Nevertheless, it is necessary to have regard to the fact that the tribunal should primarily consider the persuasiveness of the reasoning and its applicability to the given case, and not merely apply the resulting solution of the foreign tribunal. Indeed, decisions of foreign tribunals are not binding on other tribunals and have effects only in terms of the persuasiveness of the applied reasoning.

2.42. It is not inconceivable, though, that by using autonomous interpretation in compliance with the above-mentioned rules,

[68] See Article 33 VCLT. However, the procedure in practice is frequently different and the individual language versions with an identical validity and binding force are attributed different authority. For more details, see also OLIVER DÖRR, VIENNA CONVENTION ON THE LAW OF TREATIES-A COMMENTARY, Berlin: Springer (2012), et. 594; ANTHONY AUST, MODERN TREATY LAW AND PRACTISE, Cambridge: Cambridge University Press (2007), et. 254; PHILIPP WENDEL, STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATINAL LAW, Berlin: Springer (2007), et. 61.

[69] Martin Gebauer, *Uniform Law: General Principles and Autonomous Interpretation*, 5(4) UNIFORM LAW REVIEW 683-705 (2000).

[70] See also Article 38(1)(d) of the Statute of the International Court of Justice.

the tribunal arrives at the same interpretation or solution that would be applied to an identical situation under national law. It is undisputable that two tribunals may arrive at the same interpretation using fundamentally different interpretation methods. Such a situation is certainly not problematic in any respect. But the important thing is that the tribunal interpreting an international treaty must always proceed in compliance with the rules stipulated in the VCLT in order to make sure that its interpretation of the treaty is indeed autonomous, i.e. completely independent of national law.

III.2. Issues Relating to Autonomous Interpretation

III.2.1. Temporality of Interpretation

2.43. Autonomous interpretation of an international treaty naturally gives rise to a number of challenges, the solutions to which are being extensively discussed. One of the most frequently discussed issues is the temporality of interpretation, i.e. the determination of the time period to which the interpretation of the treaty should relate. Generally, the approach to this issue can be **twofold, i.e. the approach can be static or dynamic** (the latter also being referred to as the ***evolutive interpretation***). The static approach requires an analysis of the meaning of the terms in the context of the time during which the treaty was concluded. The dynamic approach requires an analysis of the meaning of the terms at the time at which the treaty is being interpreted. These two approaches answer the question of whether the meaning of the terms used in the treaty may vary in time. This problem used to be discussed in connection with the drafting of the VCLT, but no preference for one or the other of the solutions was incorporated in the final version due to varying opinions of the delegates.[71] Similarly, no clear conclusion was reached by the Study Group of the UN International Law Commission in its 2006 Report.[72] Hence, the issue has remained unresolved ever since.[73]

[71] See also 2 Yearbook of the International Law Commission 222 (1966), A/CN.4/SER.A/1966/Add.l, margin 16.

[72] See also Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law. Report of the Study Group on the Fragmentation of International Law*, UNITED NATIONS – GENERAL ASSEMBLY, Fifty-eighth session, Geneva, 01 May – 09 June and 03 July – 11 August 2006 (2006), et. 476–478, available at: https://undocs.org/en/A/CN.4/L.682 (accessed on 10 December 2021).

[73] For more details, see also Zdeněk Nový, *Evolutionary Interpretation of International Treaties*, in ALEXANDER BĚLOHLÁVEK, NADĚŽDA ROZEHNALOVÁ, VIII CYIL – CZECH YEARBOOK OF INTERNATIONAL LAW, Den Haag: Lex Lata (2017), et. 205–240; CHRISTIAN DJEFFAL, STATIC

2.44. The *temporality* issue has been tackled by the arbitral tribunal of the Permanent Court of Arbitration (PCA) in the Hague in its 1932 award in *Las Palmas.* The arbitral tribunal held that a treaty ought to be interpreted in light of the international law that was in force at the time of its formation. The application of the treaty provision, however, should be governed by the rules of international law in force at the time of its application.[74] The same solution was also proposed during the drafting of the VCLT.[75] To this day, however, no rule defining the precise procedure for applying the dynamic interpretation has been formulated, let alone codified. Nonetheless, the ICJ came up with a relatively extensive explanation in this regard in *Costa Rica* v. *Nicaragua*, in which the ICJ held that where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[76] The ICJ has thus clarified that there are certain requirements that must be fulfilled in order for the dynamic interpretation to be applicable.

2.45. Firstly, the term that is to be the subject of the dynamic interpretation should be of a general nature and should comprise a general and broad set of several classes of things. If the term used in the international treaty is very specific, the room for a dynamic interpretation is rather limited, or such interpretation is even entirely excluded.

2.46. Secondly, the treaty must be entered into for a very long period of time or be 'of continuing duration' in order to justify the application of the dynamic interpretation. If the international

AND EVOLUTIVE TREATY INTERPRETATION: A FUNCTIONAL RECONSTRUCTION, Cambridge: Cambridge University Press (2016); Taslim Elias, *The Doctrine of Intertemporal Law*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 285 (1980); Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties Part I,* 21 HAGUE YEARBOOK OF INTERNATIONAL LAW 101 (2008); DW GREIG, INTERTEMPORALITY AND THE LAW OF TREATIES, London: British Institute of International and Comparative Law (2003).

[74] Arbitral award in *ad hoc* arbitration in *Island of Palmas*, U.N. Reports of International Arbitral Awards (23 January 1923), et. 845.

[75] See also 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 8-9 (1964), A/CN.4/SER.A/1964/ADD.1, proposal for Article 56 (cit.): '*1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. 2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.*'

[76] Judgment of the ICJ in Dispute Regarding Navigational and Related Rights (*Costa Rica* v. *Nicaragua*), of 13 July 2009, paragraph 66 (cit.): '[*w*]*here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.*' Available at: https://www.icj-cij.org/public/files/case-related/133/133-20090713-JUD-01-00-EN.pdf (accessed on 19 January 2022).

treaty was entered into for a short period of time or for a specific event, the dynamic interpretation is inapplicable.

2.47. Thirdly, if the above-mentioned requirements are fulfilled, one may assume that the parties intended the application of the dynamic interpretation. But it is a rebuttable presumption that could be opposed by arguing that the parties, conversely, had a clear desire not to apply the dynamic interpretation to a particular term. In the said case, the ICJ focused on the issue of whether 'commercio' has an evolving meaning suitable for the use of the dynamic interpretation. The ICJ found that to be the case, because 'commercio' is a general term that refers to a class of activities. The international treaty of 1858,[77] which was the subject of the proceedings, had been entered into for an indefinite period of time and, consequently, the idea from the very beginning had been to set up a long-term legal regime between the parties.[78]

2.48. The author of this paper believes that a tribunal should always start with an analysis of whether or not the parties made any provisions in the treaty for the issue of temporality of interpretation and application, or at least laid the basis for construction of the issue. If this is not the case, the tribunal should attribute the meaning to the terms used in the treaty that the respective terms had when the treaty was concluded.[79] At the same time, the tribunal should consider in good faith the parties' intention when using the term. Concepts with general contents, which even the parties must presume to evolve over time, form an exception to this rule. These concepts should be interpreted by the tribunal in light of the circumstances attending their application.[80] The tribunal must also consider

[77] The Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858, available at: https://jusmundi.com/en/document/treaty/en-treaty-of-limits-between-costa-rica-and-nicaragua-1858-canas-jerez-treaty-1858-thursday-15th-april-1858 (access on 19 January 2022).

[78] Dispute Regarding Navigational and Related Rights (*Costa Rica* v. *Nicaragua*), Judgment,ICJ, 13 July 2009, paragraph 67.

[79] Similarly, see also decision of the *ad hoc* Commission in *Delimitation of the border between Eritrea and Ethiopia* of 13 April 2002, Reports of international arbitral awards, 2006, Vol. XXV, et. 83–195, here et. 110 (cit.): *It has been argued before the Commission that in interpreting the Treaties it should apply the doctrine of 'contemporaneity.' By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.*

[80] Such as, for instance the terms used in the *Namibia* case, namely 'the strenuous conditions of the modern world' or 'the well-being and development.' See also the ICJ Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* of 21 June 1971, I.C.J. Reports 1971, paragraph 53 (cit.): *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 nature of the international treaty being interpreted. For instance, the ECtHR has consistently held that the ECHR is a living instrument of law that must be interpreted in light of present-day conditions, primarily in order to make sure that the protection of fundamental rights afforded by this Convention is real, not merely illusory.[81] In doing so, the tribunal should always make sure that the resulting interpretation is not contrary to the purpose of the treaty and ensures its functional application.

III.2.2. Uniformity of Interpretation

2.49. The uniformity of interpretation of an international treaty is a fundamental objective that should also be accomplished, ideally, by using autonomous interpretation. However, if the interpretation of the treaty is not subject to the jurisdiction of a single tribunal, one may frequently encounter the problem of divergent interpretations of the same provision by different tribunals, leading to inconsistencies in the application of the treaty. This problem fundamentally jeopardises the purpose and the functioning of the international treaty. In theory, no such differences should exist, because tribunals are obliged to interpret treaty provisions independently of the national law and in compliance with the VCLT interpretation rules or, as applicable, the interpretation rules incorporated in the particular international treaty. Theoretically, two foreign tribunals should, when applying the same interpretation rules, arrive at an identical interpretation of the respective treaty provision.

2.50. But the practice is traditionally more complex, and differences arise in the interpretation of treaties. The reasons vary, but the most common cause is probably the complexity and intricacy of the entire process of interpretation, which the tribunals implement according to very generally formulated rules.

2.51. The solution to this problem is not straightforward. First and foremost, it is necessary to make sure that all tribunals interpreting the treaty proceed completely independently of the national legal systems and let the interpretation be governed

the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.;

[81] See also judgment of the ECtHR in *Demir and Baykara* v. *Turkey*, 12 November 2008, Application No. 34503/97, paragraph 68 (cit.): *'[T]he Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see Soering v. the United Kingdom, 7 July 1989, § 102, Series A no. 161; Vo v. France [GC], no. 53924/00, § 82, ECHR 2004-VIII; and Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).'*

only by sources of international law. If there are two or more available alternative interpretations, it is also desirable that the tribunals execute a comparative study and review the interpretation of the same provision by foreign tribunals. In the interest of the unification of treaty interpretation, a persuasive reasoning of foreign tribunals could serve as an authority on interpretation that the tribunal reflects in its interpretation.

IV. Case-law

2.52. Generally, the procedure adopted by both national and international courts and tribunals in the autonomous interpretation of treaties ought to be identical. Hence, they should apply: (i) special interpretation rules set forth in the international treaty being interpreted, (ii) the interpretation rules provided for in Articles 31 to 33 VCLT, which are binding on the signatories of the treaty, as well as all others, because they represent customary international law that must always be applied due to the nature of international treaties as an instrument of international law.

2.53. If the resulting interpretation is ambiguous, the interpreting tribunals may supplement their considerations by a comparison of the case-law of foreign tribunals (authorities) that were called upon to interpret the same provision in the past that is the subject matter of interpretation in the respective case at hand. Autonomous interpretation can essentially be deemed a method of reasoning. In this connection, *Gebauer* emphasises the role of comparative law, arguing that regard must be had to the decisions of foreign tribunals in order to serve as sources of reasoning, i.e. ensure that their consideration could, despite the non-binding force of such foreign decisions, facilitate uniform autonomous interpretation. Hence, the importance of such decisions consists in their quality.[82] To this end, it is thus necessary to make sure that the tribunal analyses any relevant cases in great detail, disregards immaterial differences or similarities and, conversely, applies connections and differences of significant importance.

2.54. The need for a uniform autonomous interpretation lies at the very heart of the legal principles of legitimate expectations and legal certainty. By making similar decisions in similar cases and by duly considering the context, the tribunal ascertains whether the case submitted to the tribunal is identical or analogous to a previously interpreted case. After all, States and their tribunals

[82] Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation,* 5(4) UNIFORM LAW REVIEW 683-705 (2000).

are often bound to proceed in such manner, for instance, under Article 7 CISG or similar provisions of other international treaties. Tearing out of context means severing the causal nexus between the acts being assessed and the decision itself. Hence, national courts must have regard to specific factual and legal circumstances – otherwise, the reference to other decisions would be empty and hollow. A laconic *ratio decidendi* will not do justice to justice and it is not a desirable situation, despite the fact that it is presently considered as common practice. Hence, as pertinently argued by *Pelikánová*, a legal norm, whether described in any particular convention or arising from an agreement, obviously never exists only for the sake of existence itself, and its being has a purpose and it will always be embedded in a particular context in order to influence the behaviour of its addressees.[83]

2.55. Consistent case-law of State parties can also be considered as subsequent practice for the purposes of interpretation, because the case-law of tribunals of foreign countries bound by the treaty may also establish an understanding regarding interpretation, or at least an indication of such an understanding. This does not, however, give rise to *stare decisis*, and it is more likely a *relative precedent*. Interpretation of an international treaty naturally also requires the use of the rules of international customary law codified in the VCLT on the law of treaties.[84] National courts have engaged in such comparisons for some time already. When interpreting a source of law that is based on an international treaty, it is necessary to start with an interpretation of each *ratio decidendi*, with special importance being attributed to legal comparison (comparison with the law of other State parties). However, the requirement for, if possible, a uniform interpretation in all State parties must not preclude the possibility of having regard to the principles of other similar sources of law and thus departing from the interpretation principles, should such means of interpretation fail.[85,86]

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[83] Irena Pelikánová, *Reason, Law and Interpretation*, 12 BULLETIN ADVOKACIE 23-31 (2010), (cit.): '*A legal rule can never be perceived as self-serving, it always applies in a specific context and aims at a specific resultant behaviour of the addressees of the rule.*'

[84] Richard Happ, *Anwendbarkeit völkerrechtlicher Auslegungsmethoden auf das UN-Kaufrecht*, 5 RECHT DER INTERNATIONALEN WIRTSCHAFT 376, 376 (1997).

[85] Decision of the Supreme Court of Austria (*Oberstes Gerichtshof*), Case 4Ob594/78, 30 January 1979, available at the website of the Federal Chancellery of Austria at: https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=876c8b08-ceea-4a3b-8778-55c377125bd2(accessed on 19 January 2022).

[86] A similar approach has also been adopted by the Czech Supreme Court. See judgment of the Supreme Court of the Czech Republic of 19 October 2016, Case 31 Cdo 1570/2015, paragraphs 16, 17. Similarly, see also judgment of the Supreme Court of the Czech Republic – chamber, of 17 December 2014, Case 23 Cdo 2702/2012.

2.56. Such approach may consequently mean the hybridisation and mutual approximation of the Anglo-Saxon system of 'precedents' and the continental 'legislative' system. However, this will not result in any transformation, only in the monitoring of changes in the interpretation climate. No new international doctrine is to be expected yet in terms of *stare decisis*; on the other hand, it is legitimate to require the tribunals to be versed in the contextual *realia* in analogous decisions rendered by other tribunals.[87]

2.57. Consequently, one may conclude, in connection with the above, that if a tribunal considers the reasoning and conclusions articulated by foreign tribunals as persuasive in terms of their applicability to the given case, and in compliance with the interpretation rules set forth in the international treaty being interpreted and in the VCLT, the tribunal may have regard to and reflect them in its decision in the interest of the uniform interpretation and application of the international treaty.

2.58. In other words, the manner in which other tribunals (international tribunals or national courts) apply autonomous interpretation is irrelevant for the interpreting tribunal, because all institutions and individuals interpreting the international treaty provisions should proceed according to the same rules of autonomous interpretation.

2.59. The only aspect potentially relevant for the tribunal called upon to provide an interpretation is the determination of how other tribunals construed the same provision of the international treaty that is submitted to the respective tribunal for interpretation. When applying this comparative method, however, the tribunal should primarily consider the case-law of the tribunals that have interpreted the same provision of the relevant international treaty. Indeed, each international treaty is encased in a different context, which has to be considered by the tribunals in their autonomous interpretation in compliance with Articles 31 to 33 VCLT. Similarly, no difference should theoretically exist between the autonomous interpretation performed by international courts and tribunals and the autonomous interpretation provided by national courts and tribunals. Indeed, all interpreters should apply the same procedure.

[87] John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation,* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 115–265 (2000–2001) (under the citation no. 525). See also James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales,* 32 CORNELL INTERNATIONAL LAW JOURNAL 273–317 (1999) (under the citation no. 125).

2.60. In any case, decisions of foreign tribunals (national courts or international tribunals) are not, as a rule, binding on the interpreting tribunal throughout the process of the autonomous interpretation. The interpreting tribunal should have regard to their decisions only after the tribunal performs the autonomous interpretation of the given provision in compliance with the procedure specified above. These decisions should be relevant for the conclusions of the tribunal only if the tribunal is faced with two or more alternative interpretations as a result of its own autonomous interpretation. In such case, the tribunal should undertake a meticulous comparative analysis and ponder which foreign tribunal's solution is the most suitable due to the persuasiveness of the foreign tribunal's reasoning from the perspective of the autonomous meaning and uniform application of the provision being interpreted.

2.61. The application of the interpretation rules codified in the VCLT has become an unquestionable standard for the interpretation of all international treaties. In other words, it has been generally accepted that the interpretation of an international treaty requires that the interpreter proceed in compliance with the rules set forth in Articles 31 to 33 VCLT, which represent consistent customary law. For instance, the ICJ has applied the said interpretation rules ever since the VCLT was adopted and in essentially all cases submitted to it.[88] A similar approach has also been adopted by other international courts and tribunals, such as the ECtHR, the International Tribunal for the Law of the Sea, WTO dispute resolution bodies, as well as a number of arbitral tribunals.[89]

IV.1. Case-law of International Tribunals

IV.1.1. European Court of Human Rights

2.62. Autonomous interpretation has been regularly addressed by the ECtHR. The history of the ECtHR requires a few words about Protocol No. 16 to the European Convention on Human Rights (ECHR), which entered into force in 2018 and enables

[88] OLIVER DÖRR, KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, New York: Springer (2012), section 3 – Interpretation of treaties, margin 6 (cit.): '*It is by now generally recognized that the provisions on treaty interpretation contained in Arts 31 and 32 reflect pre-existing customary international law. For many years now, the ICJ has applied the rules of interpretation laid down in the Convention as codified custom to virtually every treaty that came before it.*'

[89] See also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, New York: Cambridge University Press (2nd ed. 2000), et. 230; OLIVER DÖRR, KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, New York: Springer (2012), section 3 – Interpretation of treaties, margin 6, in which the authors quote a number of specific decisions in connection with each of the dispute resolution authorities.

the highest tribunals and States to request that the ECtHR give advisory opinions on questions of principle relating to the interpretation or application of the ECHR. From the perspective of the ECtHR case-law and the contribution to international practice, it is important that the ECtHR office searches for decisions (i) considered significant for specific periods, because, *inter alia*, they represent a major benefit for the evolution of case-law and address issues of broader importance, or (ii) contributing to the interpretation and clarification of principles underlying the ECHR or the protection of human rights as such. Such cases then frequently provide guidance with respect to the autonomous interpretation of various terms and concepts, both from the perspective of the interpretation and application of the ECHR itself, and from a broader perspective, i.e. with respect to the international interpretation of concepts in the area of fundamental and human rights. The qualified and organised basis of the ECtHR thus ensures that the ECHR essentially has at its disposal its own mechanism for the creation and dissemination of a uniform interpretation basis. Hence, if a particular international treaty, such as the ECHR, has such a potential at its disposal, the significance of the case-law is even more enhanced; on the other hand, the importance of the individualisation of each individual case is not to be diminished. Admittedly, autonomous interpretation must always be implemented from the perspective of each individual international act (international treaty); nevertheless, the interpretation mechanisms of international treaties, such as the ECHR, also represent an important guidance for broader international practice from the perspective of the general interpretation of sources and instruments of international law. See, for instance, the recent clarification provided by the ECtHR in respect of the interpretation of the fundamental principles of *ne bis in idem*,[90] etc.

2.63. In *Engel* v. *The Netherlands,*[91] the ECtHR performed an autonomous interpretation of '*criminal charge*' pursuant to Article 6 ECHR. In order to assess whether a particular sanction has a criminal nature, the ECtHR stipulated three criteria;[92] the

[90] *Aurelian-Erik Mihalache* v. *Romania*, Judgment of the ECtHR, Application No. 54012/10, 08 July 2019.

[91] *Engel, van der Wiel, de Wit, Dona and Schul* v. *The Netherlands*, Judgment of the ECtHR, Application No. 5100/71, 5101/71, 5102/71, 5354/72 and 5372, 08 June 1976, The ECtHR has held that the concept of *criminal charge* has an autonomous meaning in terms of Article 6 ECHR regardless of the classification used by the national legal systems (paragraph 81).

[92] In this regard, see also the following decisions (selection from recent years): judgment of the ECtHR, Application No. 24130/11 and 29758/11, *A and B* v. *Norway*, 15 November 2016, judgment of the ECtHR, Application No. 55391/13, 06 November 2018, *Ramos Nunes de Carvalho e Sá* v. *Portugal*, paragraph 107; judgment of the ECtHR, Application No. 54012/10, 08 July 2019, *Aurelian-Erik Mihalache* v. *Romania*, paragraph 54.

assessment according to national law has been considered by the ECtHR merely as an *informative circumstance* or, in this particular case, as one of the evaluation criteria. The ECtHR held that the most important factor is the assessment of the seriousness of the act and the harshness of the stipulated penalty. Conversely, classification of a particular act according to the governing law, according to the ECtHR, plays no major role. The author is of the opinion that using classification according to national law as one of the evaluation parameters can be considered as rather exceptional in criminal matters, because criminal offences (acts that could be sanctioned by criminal penalties) could be highly contingent on the location, i.e. dependant, *inter alia*, on local circumstances, which may potentially significantly differ from one country or region to another. However, a comparison of the classifications adopted by various State signatories may also serve as a guidance; such procedure could, depending on the facts of the case, eliminate potential extremes from the perspective of an autonomous assessment. Hence, the ECtHR endeavoured to discover the common denominator of all parties to the treaty. The ECtHR thereby stipulated entirely independent criteria that the tribunals must have regard to in their interpretation of the term 'criminal' as incorporated in Article 6 ECHR. The ECtHR also stipulated that the interpretation of terms contained in the ECHR cannot be governed by national law. The ECtHR considered the individual evaluation criteria as alternative, not cumulative.[93] The cumulative application of the evaluation criteria is only conceivable if no clear interpretation can be arrived at using a single criterion,[94] or if the use of a single criterion is impossible.[95] But the conclusion regarding the alternative use of the individual criteria, as articulated by

[93] Judgment of the ECtHR, Application No. 61821/00, 01 February 2005, *Cristian Ziliberberg* v. *Modova*, paragraph 31 et seq.

[94] See also Handbook on European law relating to access to justice, Luxembourg: Publications Office of the European Union (2016), et. 26–26, available at: https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.PDF (accessed on 19 January 2022).

[95] See also judgment of the ECtHR, Applications No. 39665/98 and No. 40086/98, 09 October 2003, *Ezeh and Connors* v. *United Kingdom*, paragraph 86; see also MARIA BERGSTRÖM, ANNA JONSSON CORNELL, EUROPEAN POLICE AND CRIMINAL LAW CO-OPERATION, London: Bloomsbury Publishing (2014), et. 117; DENIS ABELS, PRISONERS OF THE INTERNATIONAL COMMUNITY: THE LEGAL POSITION OF PERSONS DETAINED AT INTERNATIONAL CRIMINAL TRIBUNALS, Berlin: Springer Science & Business Media (2012), et. 399; SUSAN EASTON, CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE, Oxford: Oxford University Press (2012), et. 292 et al. See also judgment of the ECtHR, Application No. 14939/03, 10 February 2009, *Sergey Zolotukhin* v. *Russia*, paragraph 53, judgment of the ECtHR, Applications Nos. 24130/11 and 29758/11, 15 November 2016, *A and B* v. *Norway*, paragraph 105, judgment of the ECtHR, Application No. 26780/95, 28 October 1999, *Escoubet* v. *Belgium*, paragraph 32; see also JOHAN BOUCHT, THE LIMITS OF ASSET CONFISCATION: ON THE LEGITIMACY OF EXTENDED APPROPRIATION OF CRIMINAL PROCEEDS, London: Bloomsbury Publishing (2017), et. 123; WILLIAM A. SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY, Oxford: Oxford University Press (2015), et. 283 et al.

the ECtHR, is rather debatable. Such a categorical conclusion could, conversely, result in prioritising interpretation based on a single criterion and eliminating a completely or significantly different interpretation based on another criterion. Hence, the assessment should principally be performed according to all conceivable criteria or, as applicable, according to all criteria that could be deemed primary; only then may it become necessary to look for potential intersections or use substitute criteria.

2.64. The decision in *Engel* was immediately followed by ECtHR's decision in *König* v. *Germany*[96] in which the ECtHR also subsumed the phrase *civil rights and obligations* under autonomous interpretation. However, the criterion according to national law becomes more important with respect to civil rights or obligations, as opposed to criminal offences (criminal charges), because it is necessary for the classification to be made by national law; the qualification under the ECHR, from the perspective of ECtHR jurisdiction, may only follow afterwards.[97]

2.65. Another judgment in which the ECtHR applied autonomous interpretation is *Chassagnou and Others,*[98] in which the ECtHR, inter alia, addressed the issue of whether or not a local hunters' association is an *association* in terms of Article 11 ECHR. France, as the respondent, argued that hunters' associations are public-law corporations entrusted with the exercise of State power by the law and, consequently, do not fall within the scope of Article 11 ECHR. The ECtHR rejected such reasoning and held that if the State signatories were allowed to formally determine whether an association or a corporation was a public-law body, and thereby remove the entity from the scope of Article 11 ECHR, the purpose and object of the ECHR would be jeopardised. Hence, the ECtHR was of the opinion that the term *association* must possess an autonomous meaning. Its classification according to French law only has relative value for the interpretation, and constitutes no more than a *starting-point*. The ECtHR subsequently reviewed the valid and

[96] Judgment of the ECtHR, Application No. 6232/73, 28 June 1978, *Dr. Eberhard König* v. *Germany*, paragraphs 88 and 89.

[97] Judgment of the ECtHR, Application No. 37575/04, 03 April 2012, *Boulois* v. *Luxembourg*, paragraph 90. Such rights in terms of the ECHR include, according to the case-law of the ECtHR, the following rights: tax matters except those falling within the scope of criminal sanctions (judgment of the ECtHR, Application No. 44759/98, 12 July 2001, *Ferrazzini* v. *Italy*, paragraph 29), matters relating to the entry, stay and deportation of aliens (judgment of the ECtHR, Application No. 399652/98, 5 October 2000 *Maaouia* v. *France*, paragraph 40), or matters relating to passive voting right (judgment of the ECtHR, Application No. 24194/94, 21 October 1997, *Pierre-Bloch* v. *France*, paragraphs 49–52). See also Handbook on European law relating to access to justice, Luxembourg: Publications Office of the European Unio (2016), et. 27–28, available at: https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.PDF (accessed on 19 January 2022).

[98] Judgment of the ECtHR, Applications Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, *Chassagnou and Others* v. *France*.

applicable French law on hunters' associations[99] and concluded that it is an *association* in terms of the ECHR, primarily in view of the purpose and object of Articles 9 to 11 ECHR, which ought to guarantee freedom of thought and opinion, freedom of expression, and freedom of association to individuals.[100]

IV.1.2. Inter-American Court of Human Rights

2.66. The Inter-American Court of Human Rights[101] also applied autonomous interpretation of the law. In *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, the Court held as follows:

> *[T]he terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.*[102]

[99] The ECtHR reviewed, *inter alia*, the process of formation of the association, conditions of membership, election of the chairman, powers of the association, etc.

[100] Judgment of the ECtHR, Applications Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, *Chassagnou and Others* v. *France*, paragraphs 100–102.

[101] The Inter-American Court of Human Rights has jurisdiction to interpret and to resolve disputes arising from the American Convention on Human Rights adopted under the auspices of the Organization of American States (OAS) on 22 November 1969 (O.A.S.T.S. No. 36, 1144 et seq.), which entered into force on 18 July 1978.

[102] Judgment of the Inter-American Court of Human Rights of 31 August 2001 in *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, see the judgment on *Merits, Reparations and Costs*, paragraph 146 (specific application of this approach in relation to the discussed issue in the merits was incorporated primarily in paragraph 148 of the decision). In this regard, the judgment invokes the Advisory Opinion OC-16/99 of 01 October 1999, in *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*). A Series No. 16, paragraph 114. The above-mentioned judgment of the Inter-American Court of Human Rights is also available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (accessed on 19 January 2022). The decision is cited as IACtHR, 06 September 2002, in academic literature. See also Jonathan P. Vuotto, *Awas Tingni* v. *Nicaragua*: *International Precedent for Indigenous Land Rights?*, 22 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 232 (2004); Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous People's Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua,* 24(3) ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 612 (2007); MARTIN FORREST, STEPHEN SCHNABLY, RICHARD WILSON, JONATHAN SIMON, MARK TUSHNET, INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW: TREATIES, CASES & ANALYSIS, Cambridge: Cambridge University Press (2006), et. 913 et seq.; Alexandra Xanthaki, *Indigenous Rights in International law Over the Last 10 Years and Future Developments*, 10 MELBOURNE JOURNAL OF INTERNATIONAL LAW (2009), available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/1686060/Xanthaki.pdf (accessed on 19 January 2022); Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nationals Declaration on the Rights of Indigenous Peoples*, 27(1) WISCONSIN INTERNATIONAL LAW JOURNAL 65 (2009); GEORG NOLTE, TREATIES AND SUBSEQUENT PRACTICE, Oxford: Oxford University Press (2013), et. 270; Valerio De Oliveira Mazzuoli, Dilton Ribeiro, *Indigenous Rights Before the Inter-American Court of Human Rights: A Call for a Pro Individual Interpretation,* 2 THE TRANSNATIONAL HUMAN RIGHTS REVIEW 32-62 (2015), available at: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.cz/&httpsredir=1&article=1013&context=thr (accessed od 19 January 2022); Diana Contreras-Garduño, Sebastiaan Rombouts, *Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights*, 27(72) MERKOURIOUS – UTRECHT JOURNAL OF INTERNATIONAL AND EUROPEAN LAW 4-17 (2010); EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES, Oxford:

2.67. This approach also complies with the conclusions made in the referenced decisions mentioned above. It is noteworthy that the conclusion reached by the Court in the said case and articulated on the merits was indeed revolutionary in terms of adjudicating the ownership title belonging to members of a community through the collective ownership title of the original people.[103] Evolutive interpretation of international treaties and international standards as such is especially prominent in the area of human rights, as outlined above in connection with the case-law of the ECtHR. An interesting aspect transpires in this particular connection, important for the interpretation of international treaties, namely the interaction between international legal instruments.[104] Hence, a comparison with the interpretations of similar concepts contained in other international treaties undoubtedly constitutes one of the auxiliary approaches in the interpretation of concepts and terms in international treaties. In such case, however, it is imperative to make a thorough assessment of the contents, object and purpose, as well as the circumstances attending the conclusion of such *other* international treaties, and especially the issue of whether any qualified connection exists to the interpreted international treaty. Thus, in *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, the Court emphasised the need for reflecting objective criteria. At the same time, however, the Court highlighted that the interpretation of certain concepts and

Oxford University Press (2014); Bryan Neihart, *Awas Tingni v. Nicaragua Reconsidered: Grounding Indigenous Peoples' Land Rights in Religious Freedom*, 42(1) DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY (2013); Núria Reguart-Segarra, *Business, Indigenous Peoples' Rights and Security in the Case Law of the Inter-American Court of Human Rights*, 4(1) BUSINESS AND HUMAN RIGHTS JOURNAL 109–130 (2019); Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, 129 INTERNATIONAL STUDIES IN HUMAN RIGHTS 114–115 (2019); Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10(2) NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 56 (2011), available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1125&context=njihr (accessed on 19 January 2022); Siegrried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 121-140 (2011), available at: https://academic.oup.com/ejil/article/22/1/121/436597 (accessed od 19 January 2022); Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21(3) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 597 (2010), available at: https://academic.oup.com/ejil/article/21/3/585/508638 (accessed od 19 January 2022).

[103] See also Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua*, 24(3) ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 612 (2007).

[104] See also Alan Boyle, *Soft Law in International Law-Making* in MALCOLM EVANS, INTERNATIONAL LAWS, Oxford: Oxford University Press (2nd ed. 2006), et. 148, as well as Alexandra Xanthaki, *Indigenous Rights in International law Over the Last 10 Years and Future Developments*, 10 MELBOURNE JOURNAL OF INTERNATIONAL LAW (2009), available at: https://law.unimelb.edu.au/__data/assets/pdf_file/0009/1686060/Xanthaki.pdf (accessed on 19 January 2022), invoking the previously mentioned author in footnote 58.

terms must be perceived as a whole,[105] i.e. as an interpretation of a particular international treaty as a whole.

IV.1.3. Decision-making of WTO (World Trade Organization)

2.68. Decisions rendered under the auspices of the WTO represent another example of the institutionalised decision-making practice of an international forum. This applies, for instance, to the WTO decision in *Arguments made by the European Communities in Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*. In this case, the decision-making authority found as follows in its Report (cit.):

> *'[T]he interpretation of Article 5.1 of the Agreement on Safeguards, in the light of its wording, context and purpose and in accordance with the principle of effective treaty interpretation, mandates this conclusion: each provision was drafted with its own meaning and must be given its autonomous meaning when being interpreted. On the contrary, by denying the binding character of the necessity requirement except within very strict limits, Korea is trying to unduly reduce the scope of its obligations under the WTO Agreements, and thus the rights arising thereunder to the European Communities. Reduction or modification of rights and obligations is emphatically not allowed under the WTO.'*[106]

[105] See also GEORG NOLTE, TREATIES AND SUBSEQUENT PRACTICE, Oxford: Oxford University Press (2013), et. 270.

[106] WTO Panel Report in WT/DS98: *Korea – Definitive Safeguard Measure on Imports of Certain Dairy* Products (*Korea* – Dairy), *European Communities* v. *Korea*, third party: USA, 21 June 1999, paragraph 4.649. As concerns this case, it should also be noted that the Appellate Body departed from the opinion of the first-instance authority in certain aspects concerning the interpretation of the international treaty, albeit not in the quoted part. See also: YANG GUOHUA, BRYAN MERCUIO, LI YONGJIE, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION, The Hague: Kluwer Law International (2005), et. 224; AUGUST REINISCH, MARY FOOTER, CHRISTINA BINDER, INTERNATIONAL LAW AND … SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW, Oxford: Bloomsbury Publishing (2016), et. 124; Daniel Pickard, Tina Potuto Kimble, *Can U.S. Safeguard Actions Survive WTO Review: Section 201 Investigations in International Trade Law,* 29 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 43-45 (2007); Lee Yongshik, *Test of Multilateralism in International Trade: U.S. Steel Safeguards,* 25(1) NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS (2004); Terrence Stewart, Patrick McDonough, Marta Prado, *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs are Addressed,* 24(1) FORDHAM INTERNATIONAL LAW JOURNAL 652–725 (2000); Cherie O. Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28(2) UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 325-326 (2007); Henry Gao, *Taming the Dragon: China's Experience in the WTO Dispute Settlement System,* 34(4) RESEARCH COLLECTION SCHOOL OF LAW, SINGAPORE MANAGEMENT UNIVERSITY 369-392 (2007), available at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1800&context=sol_research (accessed on 19 January 2022); Ho Cheol Kim, *Burden of Proof and the Prima Facie Case: The Evolving History and its Applications in the WTO Jurisprudence,* 6(3) RICHMOND JOURNAL OF GLOBAL LAW &

IV.1.4. Decision-making Practice of ICSID and Other Decisions in Investment Protection Disputes

2.69. Autonomous interpretation of investment protection treaties has been repeatedly addressed by arbitral tribunals established for resolving disputes within the framework of the ICSID.[107] The ICSID case-law is mostly a typical example of 'searching and finding' an autonomous interpretation. The domain of economic transactions has indeed revealed that a consistent international interpretation of specific terms and concepts is very hard to find.[108] The reason is that this area is typical for the overlapping of multiple laws and regulations with varying purposes and different origins. Apart from special national regimes reflecting territorial specifics, including the peculiarities of various investment interests of the individual States, mostly depending on the particular level of their economic development, the area represents a platform upon which safety, currency, climatic and other interests combine. The use of an interpretation developed in the case-law of other fora or international interpretation practice in relation to a different international treaty could be very problematic, because one and the same State participates in certain international initiatives, while abstains from others that are contrary to the State's idea of a particular type of international cooperation, and consequently reflect the specifics of the particular country. The use of the

BUSINESS 254 (2007).

[107] See also: Alberto Álvarez Jiménez, *The interpretation of necessity clauses in bilateral investment treaties after the recent ICSID annulment decision,* 94 REVISTA ACADÉMICA E INSTITUTIONES DE LA UCPR (2014); Annamaria Viterbo, *Dispute Settlement Over Exchange Measures Affecting Trade and Investments: The Overlapping Jurisdictions of the IMF, WTO, and the ICSID* (13 July 2008), Society of International Economic Law (SIEL) Inaugural Conference (2008), available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154673 (accessed on 19 January 2022); William Burke-White, Anndreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties,* 48(2) VIRGINIA JOURNAL OF INTERNATIONAL LAW 307-410 (2008); Todd Henderson, James C. Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption,* 93 GEORGETOWN LAW JOURNAL 1835 (2004–2005); Martin Paparinskis, *Franck Charles Arif v. Republic of Moldova: Courts Behaving Nicely and What to Do About It,* 31(1) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 122-128 (2016); Hussein Haeri, *A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law: The Gillis Wetter Prize,* 27(1) ARBITRATION INTERNATIONAL 27-46 (2011); Steffen Hindelang, *The Autonomy of the European Legal Order* in MARC BUNGENBERG, CHRISTOPH HERRMANN, COMMON COMMERCIAL POLICY AFTER LISBON (EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW, Berlin: Springer (2013); Flavien Jadeau, Fabien Gelinas, *CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation* in BJORKLUND, A. ET AL. (eds.) THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT BETWEEN THE EUROPEAN UNION AND CANADA (CETA). Transnational Dispute Management, special edition (2016), available at: https://ssrn.com/abstract=2931503 (accessed on 19 January 2022).

[108] See also Annamaria Viterbo, *Dispute Settlement Over Exchange Measures Affecting Trade and Investments: The Overlapping Jurisdictions of the IMF, WTO, and the ICSID* (July 13, 2008), Society of International Economic Law (SIEL) Inaugural Conference (2008), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154673 (accessed on 19 January 2022).

case-law developed in relation to other international treaties, or other States, could thus be debatable. Moreover, the protection of investments is typically regulated by bilateral agreements, whether in the form of BITs or in the form of investment protection clauses incorporated in agreements on commercial cooperation, etc; there are presently approximately 6,000 such treaties concluded since 1958 worldwide. Nevertheless, the case-law in investment protection disputes clearly illustrates how the endeavour to develop an autonomous interpretation intertwines with attempts to balance the global interpretation relating to certain concepts and terms, on the one hand, and the interpretation from the perspective of a particular international treaty, on the other. The factor that tips the balance is the use of case-law from the perspective of treaties for the reciprocal promotion and protection of investments (BITs), each of which constitutes a special source of law, yet they all express a certain globalised practice. Consequently, the parties and investors to whom the treaties apply may also reasonably rely on the fact that the international practice attributes a uniform meaning to the individual concepts, as long as the particular BIT contains no special provisions.[109]

2.70. While the ICSID platform is not the only venue for the resolution of investment disputes, its case-law is rather important, primarily because it is published and therefore easily accessible and widely known. This aspect is significant especially due to the creation of an expectation regarding a particular qualified interpretation. Besides, although the ICSID decisions are decisions rendered by particular arbitral tribunals, the ICSID – to some extent – also guarantees the uniformity of the interpretation. In this connection, however, it is necessary to bear in mind that investment disputes are specific for the fact that one of the parties is always the investor, as the person deriving and applying their rights directly from the international treaty, whereas the decisions made by the WTO or the International Monetary Fund[110] are decisions rendered in disputes between States as parties to a particular international treaty.[111]

[109] From the perspective of overlapping regulations, see also Brian Havel, John Mulligan, *The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic,* 3(1) CAPE TOWN CONVENTION JOURNAL 81-94 (2014); Martin Gebauer, *Uniform Law, General Principles and Autonomous Interpretation,* 5(4) UNIFORM LAW REVIEW 683 (2000).

[110] See also RICHARD EDWARDS, INERNATIONAL MONETARY COLLABORATION, New York: Translation (1985).

[111] As concerns the intersection of the case-law of the WTO and of the International Monetary Fund, see also JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW, New York: Cambridge University Press (2003); Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: the Fund's Articles of Agreement and the WTO Agreements,* 96(3) AMERICAN JOURNAL OF INTERNATIONAL LAW 620 (2002).

2.71. However, the ICSID case-law also constitutes a prominent benchmark and standard because of its position between purely public-law disputes, on the one hand, and private-law disputes, on the other. From the private-law perspective, one ought to mention the interpretation practice regarding the New York Convention (1958),[112] which, conversely (as opposed to the case-law of the WTO and the International Monetary Fund), represents an interpretation of the said international treaty (New York Convention (1958)) in private-law disputes, despite the fact that the parties to the arbitration are also, and not exceptionally, States. After all, even the decisions rendered in proceedings conducted at the ICSID are arbitral awards covered by the New York Convention (1958).

2.72. For instance, in *Orascom TMT Investments,*[113] the arbitral tribunal interpreted the term *siége social* (*registered office*) referred to in the Agreement between the Belgo-Luxembourg Economic Union and the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments signed in 1991 (BIT). First of all, the arbitral tribunal held that *siége social* clearly did not refer to the national law of any State party. Then the arbitral tribunal explained that the grammatical and syntactic structure of the provision and the context in which the term was employed in the respective BIT made it clear that the term had an autonomous meaning. The arbitral tribunal added that if the parties to the BIT had wanted to include a reference to national law, they could have done so explicitly.[114] The arbitral tribunal thus correctly considered the autonomous interpretation of the BIT as the *starting point,* and, conversely, the interpretation of the terms according to national law as an undesirable interpretation that the parties would have to have explicitly agreed on if they had intended such interpretation. Such perception of the interpretation of international treaties is fully consistent with the above-described premises of autonomous interpretation. The arbitral tribunal in the said case generally held, in compliance with the above, that it is by no means exceptional if the terms used in a BIT have a different (autonomous) meaning when compared to the same terms in the context of national legal systems. The purpose of autonomous interpretation is indeed to ensure a uniform

[112] See also Jan van den Berg, *Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions,* 34(1) ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL 156-189 (2019).

[113] ICSID Arbitral Award in *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria*, ICSID No. ARB/12/35, 31 May 2017.

[114] ICSID Arbitral Award in *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria*, ICSID No. ARB/12/35, 31 May 2017, paragraphs 278 and 279.

application of the international treaty of the State signatories.[115] The arbitral tribunal concluded, in the said case, that '*siége social*' had an autonomous meaning specifically in the context of the respective (individual) BIT.

2.73. Then the arbitral tribunal proceeded to the determination of the contents of the term. The arbitral tribunal first examined the meaning of the said term in all three official language versions. Then the tribunal analysed the meaning of the term from the perspective of its purpose and efficiency of interpretation, as well as from the perspective of interpretation in good faith and the purpose and objectives of the BIT. Having completed this extensive analysis, the ICSID arbitral tribunal held that *siége social* in the context of the BIT meant the registered office of a company.[116]

2.74. A similar approach was adopted by another ICSID arbitral tribunal in *Tecmed,*[117] which construed '*fair and equitable treatment*' (used in Article 4 of the BIT between Spain and Mexico) as autonomous, applying the criteria set forth in Article 31 VCLT.[118]

2.75. Although the ICSID case-law is more important for painting a cross-border picture of the autonomous interpretation of specific agreements on the reciprocal promotion and protection of investments due to its publicity, one should not ignore other decisions whose contents are frequently known only from annotations or partial references. In this connection, see for instance the decision of the *ad hoc* arbitral tribunal (arbitration governed by the UNCITRAL Rules) in *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG* v. *Czech Republic,*[119] in which the arbitrators performed an autonomous interpretation of the term 'juridical person' using the VCLT interpretation rules. The tribunal held that a juridical person must exhibit, *inter alia*, the following features: capacity to invest, enter into contracts, acquire property, and sue and be sued in its own name. The arbitrators then emphasised that the interpretation must always be congruent with the object and purpose of the particular international treaty (in this particular case, in order to interpret the '*investor*' according

[115] ICSID Arbitral Award in *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria*, ICSID No. ARB/12/35, 31 May 2017, paragraphs 280 and 281.

[116] ICSID Arbitral Award in *Orascom TMT Investments S.à r.l.* v. *People's Democratic Republic of Algeria*, ICSID No. ARB/12/35, 31 May 2017, paragraphs 282–298.

[117] ICSID Arbitral Award in *Técnicas Medioambientales Tecmed* v. *Mexico*, ICSID No. ARB(AF)/00/2.

[118] ICSID Arbitral Award in *Técnicas Medioambientales Tecmed* v. *Mexico*, ICSID No. ARB(AF)/00/2, paragraph 155.

[119] Arbitral award rendered in *ad hoc* arbitration, 11 October 2017, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG* v. *Czech Republic* (solar energy).

to the particular international treaty). In this connection, the arbitral tribunal, *inter alia*, made a comparison with a preceding decision in investment matters, specifically the ICSID decision in *Abaclat and Others* v. *Argentina*.[120]

IV.2. Case-law of CJ EU

2.76. The issue of autonomous interpretation has also been regularly addressed in the case-law of the EU courts. Among others, the need for an autonomous interpretation has been repeatedly dealt with by the ECJ in decisions concerning the interpretation of provisions of the Brussels Convention. For instance, in C-189/87 (*Athanasios Kalfekis*),[121] the German Federal Court of Justice made a reference for a preliminary ruling to the ECJ as to whether the phrase 'matters relating to tort, delict or quasi delict' must be given an independent meaning, or whether it can be construed in accordance with the applicable German law. The Court of Justice (ECJ) held that in order to ensure the equality and uniformity of the rights and obligations arising out of the Brussels Convention, the concepts incorporated in the Convention should not be interpreted simply as referring to the national law. Accordingly, the concept of 'matters relating to tort, delict or quasi-delict' must be regarded as an autonomous concept that is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect.[122] The ECJ arrived at similar conclusions in C-26/91 (*Jakob Handte*),[123] where the French Cour de Cassation made a reference to the ECJ in respect of the interpretation of the phrase '*matters relating to a contract*'. According to the Court of Justice (ECJ), the Court has consistently held that the phrase is to be interpreted independently, primarily having regard to the objectives and general scheme of the Brussels Convention, in order to ensure that it is applied uniformly in all the Contracting States. The phrase should therefore not be taken as referring to how the legal relationship in question before the

[120] ICSID decision on jurisdiction and admissibility, case no. ARB/07/5. See also Ridhi Kabra, *Has Abaclat v. Argentina left the ICSID with a massive problem?,* 31(3) ARBITRATION INTERNATIONAL 425-453 (2015).

[121] Judgment of the ECJ, Case C-189/87, 27 September 1988, *Athanasios Kalfelis* v. *Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others*, European Court Reports 1988 -05565 et seq. [ECLI:EU:C:1988:459] [EUR-Lex: 61987CJ0189].

[122] Judgment of the ECJ, Case C-189/87, 27 September 1988, *Athanasios Kalfelis* v. *Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others*, European Court Reports 1988 -05565 et seq. [ECLI:EU:C:1988:459], paragraphss 14 through 16.

[123] Judgment of the ECJ, Case C-26/91, 17 June 1992, *Jakob Handte & Co. GmbH* v. *Traitements Mécano-chimiques des Surfaces SA*., European Court Reports 1992 I-03967 et seq. [ECLI:EU:C:1992:268]. [EUR-Lex: 61991CJ0026].

national court is classified by the relevant national law.[124] The ECJ specifically held in this case that it is immaterial how the particular relationship is classified by the national law of the Member State or, as applicable, the law of the forum.[125] The ECJ has ruled similarly in other matters relating to the interpretation of the Brussels Convention.[126]

IV.3. Comparison with Case-law of Czech Courts

2.77. The autonomous interpretation of international treaties is naturally applied not only by international tribunals, whether operating on a specific institutionalised platform or as *ad hoc* tribunals, but also by national courts.

2.78. For instance, in a dispute arising from a contract of carriage entered into pursuant to the Convention on the Contract for the International Carriage of Goods by Road (CMR), the Supreme Court of the Czech Republic construed the requirement of the written form prescribed for a claim in terms of Article 32(2) CMR.[127,128] First, the Supreme Court held that the CMR did not provide any detailed specification of the concept of the written form. Then the Supreme Court added that the interpretation of the requirement of the written form could not be directly based on national law as the sole source of law. National law can only be applied to the resolution of issues that are not covered by the CMR on the contract of carriage, or with respect to which the Convention directly refers to national law. Hence, the Czech Supreme Court correctly explained that the CMR is a unification international treaty whose purpose is to unify the law regulating the terms of a contract of carriage in the international carriage

[124] Judgment of the ECJ, Case C-26/91, 17 June 1992, *Jakob Handte & Co. GmbH* v. *Traitements Mécano-chimiques des Surfaces SA.*, European Court Reports 1992 I-03967 et seq. [ECLI:EU:C:1992:268]. [EUR-Lex: 61991CJ0026]. In English (cit.): *[I]n replying to the question from the national court, it should first be observed that the Court has consistently held that the phrase 'matters relating to a contract' in Article 5(1) of the Convention is to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention, in order to ensure that it is applied uniformly in all the Contracting States. The phrase should not therefore be taken as referring to how the legal relationship in question before the national court is classified by the relevant national law.* The case concerned the interpretation of the word *contract*.

[125] See also ULRICH MAGNUS, PETER MANKOWSKI, BRUSSELS I. REGULATION, Nex York: Walter de Gruyter (2011), et. 123; ANDREJ SAVIN, JAN TRZASKOWSKI, RESEARCH HANDBOOK ON EU INTERNET LAW, Denmark: Edward Elgar Publishing (2014), et. 232.

[126] See also judgment of the ECJ, Case C-34/82, 22 March 1983, *Martin Peters Bauunternehmung GmbH* v. *Zuid Nederlandse Aannemers Vereniging*, paragraphs 9 and 10. European Court Reports 1983 -00987. [ECLI:EU:C:1983:87]. [EUR-Lex: 61982CJ0034]; judgment of the ECJ, Case C-9/87, 08 March 1988, *SPRL Arcado* v. *SA Haviland*, paragraphs 10 and 11. European Court Reports 1988 -01539. [ECLI:EU:C:1988:127]. [EUR-Lex: 61987CJ0009].

[127] Convention of 19 May 1956 which entered into force on 02 July 1961. Published in the Czech Republic as Decree of the (Czech) Minister of Foreign Affairs on Convention on the Contract for the International Carriage of Goods by Road (CMR) No. 11/1975 Coll. Entered into force for the Czech Republic on 03 December 1974.

[128] Judgment of the Supreme Court of the Czech Republic – Grand Chamber, 19 October 2016, Case 31 Cdo 1570/2015.

of goods by road and, as such, the interpretation must be based on the same foundation in all State parties, regardless of the State in which the claim is made. The Supreme Court has ruled as follows (cit.):

> [*t*]*he terms of the Convention must be interpreted independently of their meaning in the national law (unless the convention makes a direct reference to the latter). In order to make sure that the Convention has analogous effects in all State signatories, it is necessary to implement autonomous interpretation, with due regard for the purpose, objectives and general scheme of the Convention.*[129]

2.79. The Czech Supreme Court finally concluded its general introduction to the method of interpretation by stating that autonomous interpretation in the case of the CMR meant such interpretation that honoured the best observance of the purpose and objectives of the respective international treaty and complied with the general decision-making practice across the State signatories.[130] This conclusion is to be fully embraced. Moreover, the quoted judgment of the Czech Supreme Court is also highly commendable from the perspective of a comparative supplementation of the interpretation, as the Court based its autonomous interpretation of the term *written form* on extensive research into judicial decisions rendered in other State signatories and invoked the interpretation of the term provided by German, Dutch, Hungarian and Austrian courts. The Court thus endeavoured to develop an interpretation that would be acceptable in all State signatories in good faith.

V. Conclusion

2.80. Interpretation employed in the international environment, specifically the interpretation used by international tribunals, exhibits a number of specifics that distinguish this interpretation from interpretation at the national level. Apart from the individual interpretation methods and nuances, for instance, the need for a comparative analysis of the various language versions of one and the same international treaty, the absolutely fundamental basis for interpretation of an international source of law is the necessity of an autonomous interpretation. Autonomous interpretation represents an interpretation

[129] Judgment of the Supreme Court of the Czech Republic – Grand Chamber, 19 October 2016, Case 31 Cdo 1570/2015, paragraph 15.

[130] Judgment of the Supreme Court of the Czech Republic – Grand Chamber, 19 October 2016, Case 31 Cdo 1570/2015, paragraph 16.

independent of the national legal systems and the applicable case-law bases. At the same time, the analysis provided in this paper suggests that the doctrine and legal theory, as well as the case-law (international and national), agree on the principal requirement that the autonomous interpretation must first and foremost observe the purpose and meaning of the interpreted source of law. Autonomous interpretation in the international environment remains a very topical issue, and it is reasonable to expect that future case-law will continue to use and develop the concept.

| | |

Summaries

FRA [***L'étendue de la compétence des juridictions et des autorités internationales en matière d'interprétation du droit international***]

Le présent article examine les spécificités de l'interprétation du droit international d'abord dans une perspective théorique, puis en analysant plusieurs décisions de justice rendues aux niveaux international, européen et national. Le texte fondamental énonçant les principales règles d'interprétation est la Convention de Vienne sur le droit des traités (CVDT), qui est considérée comme une codification du droit coutumier, et qui jouit à ce titre d'un grand respect dans la quasi-totalité des États du monde. Les procédés d'interprétation prévus par la Convention, notamment par son article 31 et ss., lorsqu'ils sont appliqués dans un contexte international, doivent cependant l'être de manière autonome, c'est-à-dire en faisant abstraction de l'interprétation nationale ou de celle utilisée par d'autres autorités. Ces dernières peuvent être utilisées à titre subsidiaire, comme source d'inspiration. Étant donné l'importance de l'interprétation autonome et de son respect dans la jurisprudence, cette notion est le thème central de l'article. Outre les caractéristiques de l'interprétation autonome, l'auteur se penche également sur les problèmes qui y sont associés.

CZE [***Rozsah pravomoci soudů a mezinárodních orgánů při výkladu mezinárodního práva***]

Tento článek se zaměřuje na specifika výkladu mezinárodního práva, a to jednak z teoretického hlediska, jednak rovněž analýzou vybrané judikatury na úrovni mezinárodní, evropské i vnitrostátní. Základním dokumentem poskytující výchozí výkladová pravidla je Vídeňská úmluva o smluvním právu

(VCLT), která se považuje za kodifikaci obyčejového práva, tudíž požívá silného respektu napříč v podstatě všemi státy světa. Úmluvou poskytnuté interpretační postupy, obsažené zejména v jejím čl. 31 a násl., je však zapotřebí v mezinárodním prostředí činit autonomně, tj. s oproštěním se od interpretace vnitrostátní či poskytnuté jinými orgány, přičemž tato může při autonomním výkladu sloužit pouze následně a v mezích jakési inspirace. Vzhledem k důležitosti autonomního výkladu a jeho dodržování v rozhodovací praxi je tak tento pojem stěžejním tématem tohoto článku, přičemž autor se zabývá kromě popisu samotného fungování autonomního výkladu rovněž problémy s ním spojenými.

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POL [***Zakres kompetencji sądów i organów międzynarodowych w interpretacji prawa międzynarodowego***]
Praktyka wykładnicza międzynarodowych źródeł *prawa ma swoją specyfikę, czego najbardziej wyrazistym przykładem jest konieczność przeprowadzania autonomicznej interpretacji. Dlatego niniejszy artykuł nie tylko wskazuje inne odmienności, ale również omawia sens i cel autonomicznej wykładni, sposób jej przeprowadzania oraz związane z tym problemy. Perspektywy doktrynalne w końcowej części artykułu są analizowane w oparciu o praktykę orzeczniczą wybranych instytucji sądowniczych jak na poziomie międzynarodowym, tak europejskim i krajowym.*

DEU [***Reichweite der Kompetenzen von Gerichten und internationalen Stellen bei der Auslegung des internationalen Rechts***]
Die Auslegungsprinzipien der internationalen Rechtsquellen bergen zahlreiche Besonderheiten – eine der markantesten von ihnen ist die Notwendigkeit der autonomen Auslegung. Deshalb konzentriert sich der Artikel neben der Definition weiterer Unterschiede v.a. auf den Sinn und Zweck der autonomen Auslegung, die Art und Weise, in der sie erfolgt, und die mit ihr verbundenen Probleme. Die doktrinalen Ausgangspunkte werden vom Artikel in einer abschließenden Passage ebenfalls analysiert, und zwar anhand der Entscheidungspraxis ausgewählter Gerichte sowohl auf internationaler und europäischer als auch auf nationaler Ebene.

RUS [***Объем компетенции судов и международных органов при толковании международного права***]

В процедурах толкования международных источников права можно обнаружить целый ряд особенностей, наиболее существенной из которых является необходимость осуществления автономного толкования. В данной связи, помимо перечисления других отличительных черт, настоящая статья главным образом посвящена смыслу и цели автономного толкования, способу его осуществления и связанным с ним проблемам. В заключительной части статьи также анализируются доктринальные основы в свете практики принятия решений некоторыми судебными организациями как на международном и европейском уровне, так и на национальном уровне.

ESP [***Alcance de la competencia de los tribunales y organismos internacionales en la interpretación del derecho internacional***]

Los métodos de interpretación de las fuentes de derecho internacionales presentan numerosas particularidades, de las cuales la más significativa es la necesidad de una interpretación autónoma. Por lo tanto, este artículo, además de delimitar las otras diferencias, se centra, en particular, en el sentido y el objetivo de la interpretación autónoma, su aplicación y los problemas relacionados. El artículo concluye con el análisis de los fundamentos doctrinales dando cuenta de las resoluciones de varios organismos judiciales tanto en el ámbito internacional y europeo como en el nacional.

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