

Treaty Interpretation Methods

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"In space, no one can hear you think."

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1 Treaty Interpretation Methods

1.1 Introduction: The Crucible of Meaning

Treaties stand as the bedrock of international order, the meticulously crafted instruments through which sovereign states navigate the complex terrain of shared interests, mutual obligations, and the ever-present potential for conflict. They are, in essence, *frozen conversations* – encapsulating agreements painstakingly negotiated at a specific moment in time, designed to endure. Yet, the very nature of language, the passage of time, and the inherent unpredictability of human affairs ensure that the seemingly concrete words inscribed within these agreements will inevitably demand interpretation. This process, far from being a mere academic exercise confined to legal scholars, is the vital crucible in which the abstract language of diplomacy is transformed into concrete action, shaping the destiny of nations, the allocation of precious resources, the protection of fundamental rights, and the fragile balance between peace and conflict. The art and science of treaty interpretation is, therefore, not peripheral to international law; it is its beating heart, the indispensable mechanism by which written commitments are given life and meaning in the real world.

The Interpretive Imperative: Why Words Alone Are Never Enough

At its core, a treaty is a formal, binding agreement governed by international law, concluded between states or international organizations possessing treaty-making capacity. It represents the expressed consent of sovereign entities to be bound by specific rules governing their interactions. This binding nature, the very force that gives treaties their power, simultaneously creates the fundamental need for interpretation. The ideal of a treaty so perfectly drafted that its application in every conceivable future circumstance is self-evident is a chimera. Linguistic ambiguity is inherent. Terms like “reasonable,” “significant harm,” “equitable utilization,” or “full protection and security” possess inherent elasticity; their precise contours can only be defined when applied to concrete situations. Unforeseen technological advancements, such as cyber operations or genetic engineering, present scenarios the original drafters could scarcely imagine, demanding that existing treaty language be understood in novel contexts. Geopolitical shifts and the emergence of new global challenges – climate change, pandemics, transnational terrorism – strain the application of treaties conceived in a different era. Furthermore, treaties often embody delicate compromises, sometimes resulting in deliberately vague phrasing or even conflicting obligations within the same instrument or across different agreements signed by the same state. Differing national perspectives, strategic objectives, and cultural understandings further complicate a shared reading of the text. Without a consistent, principled method to resolve these inevitable ambiguities and conflicts, the binding nature of treaties would dissolve into chaos, leaving each party free to impose its own self-serving reading. Interpretation is the indispensable bridge between the static text and the dynamic world it seeks to govern.

The High Stakes: When Interpretation Shapes Reality

The consequences of how a treaty is interpreted are profound and far-reaching, moving far beyond theoretical debates into the tangible fabric of international relations. At its most dramatic, interpretation can mean the difference between peaceful resolution and armed conflict. Consider the Cuban Missile Crisis of 1962, a pivotal moment teetering on nuclear brinkmanship. A key question revolved around the interpretation of the

Charter of the Organization of American States (OAS) and the United Nations Charter. Did the discovery of Soviet missiles in Cuba constitute an “armed attack” under Article 51 of the UN Charter, justifying US unilateral military action in self-defense? Or was it a deployment falling short of that threshold, requiring collective action through the OAS or UN Security Council? The interpretation of these terms held the fate of millions in the balance; a broad reading could have triggered war, while a narrower one opened space for diplomatic solutions, ultimately averting catastrophe. Beyond averting war, interpretation determines the demarcation of land and maritime boundaries, directly impacting national territory, resource access, and the lives of border communities. It dictates the allocation of vital resources like water from shared rivers or fishing rights in contested waters. In the realm of human rights, the interpretation of open-textured provisions in covenants like the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR) defines the scope of fundamental freedoms – what constitutes “torture,” “cruel and inhuman treatment,” or a “fair trial” evolves through judicial interpretation, expanding or contracting the protection afforded to individuals against state power. Trade agreements hinge on the interpretation of tariff schedules, rules of origin, and exceptions clauses, affecting billions in commerce and domestic industries. Environmental treaties rely on interpreting obligations to prevent “significant adverse effects” or implement the “precautionary approach” to address complex ecological threats. Ultimately, the consistent, good faith interpretation of treaties underpins the predictability and stability of the entire international legal order; its absence breeds distrust, non-compliance, and the unraveling of cooperative frameworks painstakingly built over decades.

The Bedrock: Pacta Sunt Servanda and the Guiding Spirit of Good Faith

Amidst the complexities of interpretive methodology, one foundational principle stands immutable: *pacta sunt servanda*. Enshrined in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), this maxim – “every treaty in force is binding upon the parties to it and must be performed by them in good faith” – is the cornerstone of the entire treaty system. It asserts the fundamental legal force of agreements freely entered into by states. Without this presumption of binding obligation and the expectation of compliance, treaties would be reduced to mere expressions of political intent, devoid of legal significance. Crucially, the principle of *pacta sunt servanda* is inextricably intertwined with the overarching obligation of good faith. Good faith is not merely an abstract ideal; it is the vital spirit that must permeate every stage of a treaty’s life cycle – from negotiation and conclusion through implementation and, critically, interpretation. It demands that states approach the interpretation of their obligations honestly, fairly, and reasonably. Good faith acts as a safeguard against interpretations that are patently absurd, clearly contradict the treaty’s evident purpose, or are manifestly designed to evade obligations. It requires interpreters to seek a meaning that is compatible with the treaty’s overall framework and the legitimate expectations of the other parties. A state cannot, acting in bad faith, exploit an ambiguity to justify actions it knows contravene the treaty’s fundamental aims. This principle tempers the potentially rigid application of textual rules and ensures that interpretation serves the broader goals of fidelity to agreements and the maintenance of international trust and cooperation. It is the golden thread running through all established methods of treaty interpretation.

The Vienna Convention: Codifying the Framework

Recognizing the critical importance of a coherent approach and the need to codify widespread state practice, the international community embarked on a monumental task: drafting a comprehensive framework for the law of treaties. This effort culminated in the Vienna Convention on the Law of Treaties (VCLT), adopted in 1969 and entering into force in 1980. While not universally ratified, the VCLT is widely regarded as largely reflecting customary international law on the subject, binding even on non-party states in most respects. Its significance cannot be overstated; it provides the primary, systematic codification of the rules governing the conclusion, entry into force, amendment, interpretation, and termination of treaties. For the purposes of interpretation, Articles 31, 32, and 33 of the VCLT constitute the core framework that dominates modern practice. Article 31 establishes the “general rule” of interpretation, a structured yet flexible approach emphasizing good faith, the ordinary meaning of terms within their context, and the object and purpose of the treaty. Article 32 delineates the “supplementary means of interpretation,” such as the preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion, permissible under specific conditions. Article 33 provides crucial rules for interpreting treaties authenticated in two or more languages. The VCLT did not invent these methods out of thin air; it distilled centuries of state practice, judicial decisions, and scholarly debate into a coherent system, aiming to provide predictability while accommodating the inherent complexities of international agreements. It represents the indispensable starting point for any serious examination of how treaties are understood and applied, setting the stage for the detailed exploration of its intricate provisions, historical evolution, and practical application that will unfold in the subsequent sections of this analysis. The journey into the crucible of meaning begins with understanding how the VCLT sought to structure the seemingly elusive art of discerning the true intent and purpose behind the words states commit to parchment.

1.2 Historical Evolution: From Oracles to Codification

The Vienna Convention on the Law of Treaties (VCLT), standing as the modern lodestar for interpretation, did not materialize in a vacuum. Its Articles 31-33 represent the crystallization of centuries of evolving thought, state practice, and jurisprudential struggle over how to decipher the true meaning of agreements between sovereigns. Understanding the historical trajectory that led to the VCLT’s codification is essential, revealing how shifting conceptions of sovereignty, law, and the nature of obligation fundamentally shaped the methods interpreters employ today. This journey begins not in diplomatic conferences, but in the shadow of temples and the pronouncements of oracles.

Ancient and Medieval Foundations: Oaths, Divine Sanction, and Literalism

In the ancient world, treaties were profoundly sacral acts, imbued with religious significance far exceeding mere legal formalism. Their binding force stemmed not solely from mutual consent, but from the invocation of divine witnesses and the dire consequences of perjury sworn upon sacred objects. The earliest recorded treaties, such as the Egyptian-Hittite peace treaty (c. 1259 BCE) inscribed on silver tablets, explicitly called upon “a thousand gods and goddesses” of both lands to bear witness and punish the violator. This reliance on divine sanction permeated ancient practice. Roman *fides* (good faith) was a cornerstone of international relations (*ius gentium*), but treaties (*foedera*) were solemnized through elaborate rituals conducted by the

priestly college of the *Fetiales*, involving oaths sworn to Jupiter. Breach was not merely a legal wrong but a sacrilege, inviting divine retribution. Interpretation in this context often leaned towards literalism. The precise words of the oath, uttered in ritualized formulae, were paramount. Ambiguities were potentially dangerous, risking divine wrath. While arbitrators existed (often religious figures or respected elders), their role was frequently constrained by the perceived need to adhere strictly to the letter of the sworn agreement. A fascinating example is the Spartan interpretation of the “Thirty Years’ Peace” with Athens (446 BCE). When Athens argued that rebellion by Spartan allies did not technically violate the “peace” clause, Sparta countered with a literal reading emphasizing non-aggression, demonstrating how textual parsing could justify conflict even against the spirit of an agreement ostensibly designed for peace.

Medieval Europe inherited and adapted these traditions within a Christian framework. Treaties, often termed covenants or truces, were still frequently sworn solemn oaths, invoking God and saints as witnesses and guarantors. The binding force remained deeply intertwined with religious duty. The Peace of God (*Pax Dei*) and Truce of God (*Treuga Dei*) movements, attempting to limit feudal warfare, relied heavily on ecclesiastical authority to interpret and enforce these agreements, often interpreting violations through the lens of sin and moral failing. However, alongside this sacral dimension, a nascent focus on the written word and legal reasoning began to emerge, particularly with the rediscovery of Roman law in the 12th century. Canon lawyers and secular jurists like Gratian and the glossators started to analyze agreements with greater legal precision. Yet, literalism often prevailed. The emphasis remained on the precise terms of the agreement as sworn, with interpretation frequently seeking a single, “correct” meaning discernible from the text itself, under the watchful eye of divine authority. This period established the enduring tension between the words committed to parchment (or stone) and the underlying spirit or intent, heavily weighted towards the former under the sanction of the divine.

The Early Modern Era: Natural Law, Sovereignty, and Textual Focus

The Renaissance, Reformation, and the devastating wars of religion shattered the unified religious framework of medieval Europe, paving the way for the rise of the sovereign state as the primary actor in international relations. This seismic shift profoundly impacted treaty interpretation. Thinkers like Hugo Grotius, often hailed as the “father of international law,” sought to ground the binding force of treaties not primarily in divine will, but in natural law and reason, applicable to all nations irrespective of faith. In his seminal work *De Jure Belli ac Pacis* (1625), Grotius argued that the fundamental principle *pacta sunt servanda* was a dictate of natural law, inherent in human sociability. While acknowledging the importance of the parties’ intent (*voluntas*), Grotius placed significant weight on the words of the treaty as the primary evidence of that intent, especially in agreements designed for permanence. He recognized that interpretation should consider the context and circumstances, but the text was paramount.

Emmerich de Vattel, writing in the mid-18th century (*Le Droit des Gens*, 1758), further solidified the focus on state sovereignty and the primacy of the text. For Vattel, the sovereign will of the state was supreme. The treaty text, as the authentic expression of that consented will, became the central object of interpretation. He famously articulated a strong version of textualism: “It is not permissible to interpret what has no need of interpretation.” When words were clear and unambiguous, they must be applied literally, regardless of

perceived hardship or unintended consequences. Only in cases of genuine ambiguity or absurdity should interpreters look beyond the text, primarily to ascertain the shared intent of the parties at the time of conclusion. Vattel's influence was immense, cementing the "plain meaning rule" as a dominant approach. His work reflected the era's growing positivist leanings, emphasizing state practice and consent over abstract natural law principles. This period also saw early, albeit limited, attempts at codifying diplomatic practice. Georg Friedrich von Martens, in his *Précis du droit des gens moderne de l'Europe fondé sur les traités* (1788), compiled treaties and state practice, implicitly promoting consistency in interpretation. The focus shifted decisively towards the text as the objective manifestation of sovereign consent, setting the stage for the intentionalist debates to come.

The 19th and Early 20th Centuries: Positivism and the Rise of Intentionalism

The 19th century witnessed the zenith of legal positivism in international law. Law was seen not as derived from natural principles, but solely from the expressed will of sovereign states. This philosophical shift had a profound effect on treaty interpretation, giving rise to the "will theory" or intentionalism. The binding force of a treaty stemmed exclusively from the consent of the parties, therefore, the goal of interpretation must be to discover the actual, historical, subjective *common intent* of the original parties at the precise moment the treaty was concluded. The text was important, but primarily as evidence of that antecedent intent. If the text seemed ambiguous or potentially at odds with what negotiators *really* meant, the historical intent must prevail.

This school of thought led to the elevation of *travaux préparatoires* – the preparatory work of the treaty, including minutes of negotiations, successive drafts, memoranda, and statements by delegates – to near-primary status. These documents were mined exhaustively to reconstruct the drafting history and pinpoint the shared understanding of the parties. The Permanent Court of International Justice (PCIJ), established after World War I, frequently adopted this approach. In the *Lotus* case (1927), concerning jurisdiction over collisions on the high seas, the PCIJ extensively scrutinized the drafting history of the relevant convention to ascertain the intent behind the limitations on state jurisdiction, arguably prioritizing the inferred intent over a purely textual analysis. Similarly, interpreting the complex minority protection treaties established after WWI heavily relied on *travaux* to understand specific guarantees.

However, intentionalism faced mounting criticism. Ascertaining a single, unified "common intent" among multiple states, often with differing objectives and compromises struck behind closed doors, proved elusive and frequently contentious. *Travaux préparatoires* could be incomplete, ambiguous themselves, or reflect the views of individual delegates rather than a collective agreement. Relying heavily on them risked undermining the stability and predictability of the agreed text, potentially allowing states to invoke preliminary discussions to evade their formal obligations. Critics argued it could freeze treaties in the past, ignoring the possibility that language and circumstances evolve. Furthermore, excessive focus on historical intent sometimes led to interpretations that seemed manifestly at odds with the treaty's apparent purpose or contemporary realities, highlighting the method's limitations in a changing world. The stage was set for a synthesis.

The Path to Codification: ILC Work and the VCLT

The devastation of World War II underscored the urgent need for a more stable, predictable, and universally

accepted framework for international law, including the law of treaties. The newly formed United Nations entrusted this monumental task to its International Law Commission (ILC). Beginning in 1949, under successive Special Rapporteurs (including influential figures like Hersch Lauterpacht, Gerald Fitzmaurice, and ultimately Sir Humphrey Waldock), the ILC embarked on drafting what would become the VCLT. Interpretation was one of the most complex and fiercely debated topics.

The ILC grappled with reconciling the competing schools: the textual focus championed since Vattel, the intentionalism dominant in the early 20th century, and the emerging teleological approach emphasizing the treaty's object and purpose. The records of the ILC's discussions reveal intense arguments. Fitzmaurice strongly advocated for a hierarchical approach prioritizing the text. Others argued for greater flexibility to consider intent and purpose. Waldock's approach

1.3 The General Rule: Text, Context, Object and Purpose

The arduous debates within the International Law Commission (ILC), meticulously chronicled in the previous section, ultimately forged a consensus that rejected the rigid prioritization of any single interpretive school – textualism, intentionalism, or teleology. Instead, the drafters of the Vienna Convention on the Law of Treaties (VCLT) crafted Article 31 as a sophisticated, integrated framework. This provision, now the undisputed cornerstone of modern treaty interpretation, embodies a delicate compromise, demanding that interpreters consider text, context, and object and purpose not as isolated steps, but as interlocking elements of a unified, dynamic process guided by the golden thread of good faith. Understanding this “General Rule” is paramount, for it represents the calibrated mechanism through which the frozen words of diplomacy are thawed and applied to the complexities of state interaction. Consider the pivotal *Gabčíkovo-Nagymaros Project* case before the International Court of Justice (ICJ), where the interpretation of a 1977 treaty between Hungary and Slovakia concerning a massive dam system on the Danube hinged crucially on applying Article 31. The Court didn't merely parse dictionary definitions; it wove together the treaty's specific terms, its overarching environmental and economic goals, and the subsequent conduct of the parties, demonstrating Article 31 in action to resolve a dispute with profound ecological and geopolitical implications.

The Integrated Approach: A Single Operation

Article 31(1) VCLT provides the core directive: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” This formulation is deliberately constructed as an integrated whole, not a sequence of hierarchical steps. The ILC Commentary emphasized that these elements – “ordinary meaning,” “context,” and “object and purpose” – “are to be considered as *one* rule, not three.” This is not merely theoretical; it reflects the practical reality of interpretation. An interpreter begins with the text, but immediately understands that words derive their meaning from the surrounding framework and the treaty's fundamental aims. Attempting to isolate “ordinary meaning” without considering context or purpose risks absurdity or sterility. Conversely, focusing solely on object and purpose without grounding in the text risks judicial legislation, rewriting the treaty under the guise of interpretation. The process is inherently iterative and holistic. A judge or diplomat starts with the provision in question, considers its wording, looks at how it fits within the treaty's overall

structure and other related agreements (context), and constantly tests potential meanings against the treaty's *raison d'être* (object and purpose), all while striving to give effect to the parties' commitments in good faith. This integrated nature avoids the pitfalls of the historical schools. It prevents the rigid literalism that plagued early modern practice, sidesteps the quagmire of endlessly debating historical intent that characterized intentionalism, and tempers the potential overreach of pure teleology by anchoring purpose firmly within the agreed text and context. The WTO Appellate Body, in *US – Gambling*, vividly illustrated this integration. Faced with interpreting the U.S. schedule of commitments under the General Agreement on Trade in Services (GATS) regarding “recreational services,” it didn't just consult dictionaries. It examined the specific term (“recreational services”) in the context of the entire GATS structure and classification systems used at the time (*context*), assessed the *ordinary meaning* of the words in that setting, and constantly evaluated its findings against the GATS *object and purpose* of progressive liberalization of trade in services, ultimately concluding that gambling services were included.

Ascertaining the “Ordinary Meaning”

The starting point, the anchor within the integrated process, remains the text of the treaty itself. Article 31(1) directs interpreters to give the treaty's terms their “ordinary meaning.” However, this concept is deceptively simple. It emphatically does *not* equate to a mechanical application of dictionary definitions isolated from the treaty's ecosystem. As Sir Gerald Fitzmaurice, a key figure in the VCLT's development, cautioned, “The ‘ordinary meaning’ is not an abstraction. It is the meaning which the term would normally bear *in its context* and *in relation to the subject matter of the treaty*.” The “ordinary meaning” is thus the meaning that would be attributed to the terms by a reasonable, informed reader situated within the treaty's specific linguistic, technical, and functional framework. This requires careful consideration of the specific language chosen. For instance, interpreting the word “investment” in a bilateral investment treaty (BIT) requires understanding its specialized meaning within the field of international investment law, which may differ significantly from its colloquial usage. Terms like “full protection and security” or “fair and equitable treatment” in BITs carry established, albeit evolving, connotations developed through arbitral jurisprudence. Technical terms, such as “chlorofluorocarbons” in the Montreal Protocol or “critical habitat” in biodiversity treaties, demand reference to their scientific or technical definitions. The famous *Japan – Alcoholic Beverages* case at the WTO demonstrates this nuance. The dispute centered on whether imported vodka and shochu were “like products” to Japanese shochu under GATT Article III (National Treatment). While dictionary definitions might suggest similarities, the Appellate Body looked for the “ordinary meaning” *in the context* of the GATT and its purpose of preventing protectionism. It considered factors like physical characteristics, end-uses, consumer perceptions, and tariff classification, concluding that despite dictionary overlap, the competitive relationship in the marketplace rendered them “like products” for the purposes of the treaty obligation. The “ordinary meaning” is therefore contextual and functional, discerned not in a vacuum but embedded within the treaty's specific linguistic and purposive landscape.

Defining the “Context” (Article 31(2))

To prevent the “ordinary meaning” from floating untethered, Article 31(2) explicitly defines the “context” that must be considered alongside the text. This context comprises several specific elements, forming the

immediate interpretive framework within which the treaty operates. Firstly, it includes the treaty text *itself* in its entirety – preamble, articles, and annexes. The preamble, often overlooked as mere rhetoric, is particularly crucial context. As the ICJ stated in the *Reservations to the Genocide Convention* Advisory Opinion, the preamble “indicates the general purpose of the Convention” and provides essential insight into its spirit and aims. For example, the preamble to the UN Charter, with its powerful invocation to “save succeeding generations from the scourge of war,” profoundly shapes the interpretation of its substantive provisions on the use of force and collective security. Secondly, the context includes “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.” This covers instruments negotiated alongside the main treaty and intrinsically linked to it, such as an agreed minute clarifying a specific provision, a separate protocol on implementation, or even a contemporaneous exchange of notes resolving an ambiguity. An illustrative case is the ICJ’s consideration of the 1948 *Annex VII* Agreement between the UK and Albania concerning the Corfu Channel dispute; the Court treated this agreement, concluded simultaneously with the Special Agreement submitting the dispute, as forming part of the context for interpreting the Special Agreement itself. Thirdly, the context encompasses “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” This captures unilateral declarations or statements made during negotiations that were formally accepted by the other parties as interpretive guides. A key example arose in the *Fisheries Jurisdiction (Spain v. Canada)* case, where Canada argued that statements it made upon signing the UN Convention on the Law of the Sea (UNCLOS), regarding the scope of its optional exception to compulsory jurisdiction, formed part of the context accepted by other states. While the ICJ ultimately found the statements did not meet the strict requirements of Article 31(2)(b) *in that instance*, it confirmed the principle. This defined context provides the essential backdrop against which the “ordinary meaning” of the specific terms takes shape, ensuring they are understood within their intended legal and diplomatic ecosystem.

The Role of “Object and Purpose”

Completing the integrated triad is the directive to interpret the treaty “in the light of its object and purpose.” This teleological element serves as the compass guiding the interpreter through potential ambiguities, ensuring the treaty remains an effective instrument for achieving its fundamental goals. The object and purpose represent the treaty’s overarching rationale – its *raison d’être* – discerned from the instrument as a whole. Key indicators include the treaty’s title, its preamble (which often explicitly states aims), the substantive obligations it creates, its overall structure, and sometimes even the circumstances leading to its conclusion. For instance, the object and purpose of the Convention on the Prevention and Punishment of the Crime of Genocide is unequivocally to prevent and punish genocide; this purpose decisively guided the ICJ in its *Reservations* opinion, influencing its approach to the permissibility of reservations. Similarly, the WTO Agreements’ preamble explicitly references objectives like raising living standards, ensuring full employment, expanding trade, and sustainable development; these aims constantly inform the interpretation of complex trade provisions by panels and the Appellate Body, as seen in the *US – Shrimp* case where sustainable development influenced the interpretation of GATT exceptions. However, the role of object and purpose is inherently bounded. It acts as a guiding light, not a license to rewrite the treaty. Article 31(1) mandates

interpretation *in accordance with* the ordinary meaning in context *and in the light of* object and purpose. This phrasing indicates that object and purpose illuminates the text; it does not override clear textual meaning. As the ICJ emphasized in the *Territorial Dispute (Libya/Chad)* case, “the Court must... have regard above all to its [the treaty’s] actual terms” and cannot interpret them based on object and purpose alone if the text is unambiguous. A powerful illustration of both the power and the limits of teleology is the “living instrument” doctrine applied by the European Court of Human Rights (ECtHR) to the European Convention on Human Rights (ECHR). While the ECtHR interprets the Convention’s guarantees (like “private life” or “torture”) in light of evolving societal values to ensure its continued effectiveness (*Tyrer v. UK*), it remains anchored in the *text* of the Convention. It does not invent entirely new rights not grounded in the agreed provisions, however compelling the contemporary purpose might seem. Object and purpose thus provides dynamic vitality to treaty interpretation, ensuring it serves the ends for which the agreement was made, while fidelity to the text maintains the stability derived from state consent.

This intricate dance between text, context, and object and purpose, performed under the watchful principle of good faith, constitutes the core engine of treaty interpretation under the VCLT. While Article 31 provides a structured framework, its application demands sophisticated judgment, balancing the inherent tension between the stability promised by the written word and the need for treaties to function effectively in a changing world. The interpreter must constantly shuttle between the specific provision and the treaty’s broader architecture and aims, refining the understanding of each element in light of the others. It is this integrated, holistic approach that distinguishes the modern methodology from its historical predecessors. Yet, the framework acknowledges that even this robust process may sometimes leave meaning ambiguous or obscure, or lead to manifestly unreasonable results. Furthermore, treaties are not static; their application over time generates new understandings. This recognition leads naturally to the supplementary means offered by Article 32 and, more dynamically, to the crucial provisions of Article 31(3), which explicitly incorporate the evolving practice of the parties and the changing landscape of international law into the interpretive calculus, ensuring the General Rule possesses the necessary dynamism to meet the demands of contemporary statecraft. The exploration of these vital elements forms the essential next chapter in understanding how the crucible of meaning operates in practice.

1.4 Subsequent Agreements, Practice, and Relevant Rules

The elegant synthesis of text, context, and object and purpose under Article 31(1) VCLT provides a powerful framework, yet treaties are living instruments operating across time. Static interpretation risks ossification, rendering agreements incapable of addressing unforeseen circumstances or evolving norms. Recognizing this, the Vienna Convention architects ingeniously embedded dynamism within the General Rule itself. Article 31(3) mandates that, alongside the core triad, interpreters *must* take into account three further elements: subsequent agreements between parties clarifying the treaty’s application, subsequent practice establishing the parties’ understanding of its terms, and any relevant rules of international law applicable in the relations between the parties. These provisions transform the interpretive process from a static examination of origins into a dynamic engagement with the treaty’s life in the real world, allowing meaning to be clarified, refined,

and even subtly evolved through the parties' ongoing relationship and the broader legal landscape. This capacity for adaptation is not a loophole but a vital feature, ensuring treaties remain effective and relevant instruments of cooperation long after the ink has dried on the original document.

Subsequent Agreements Between Parties (Art. 31(3)(a))

Article 31(3)(a) directs interpreters to consider “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” This provision acknowledges that parties may, after the treaty's conclusion, reach a shared understanding about what specific terms mean or how certain obligations should be implemented in practice. Such agreements serve as powerful interpretive tools precisely because they represent the *contemporaneous* and *expressed* consent of all parties regarding the meaning of their earlier commitment. Crucially, for an agreement to qualify under this paragraph, it must reflect the common understanding of *all* parties bound by the treaty provision in question. This requirement safeguards against interpretations being imposed by a majority or powerful faction.

The formality of these subsequent agreements varies considerably. They can range from highly structured protocols or amendments requiring ratification, such as the numerous protocols expanding or clarifying obligations under environmental conventions like the Montreal Protocol on Substances that Deplete the Ozone Layer, to less formal but equally binding instruments. Agreed minutes adopted by treaty bodies where all parties are represented, like decisions of the Conference of the Parties (COP) to the UN Framework Convention on Climate Change explicitly interpreting adaptation finance provisions, frequently fall under this category. Joint declarations issued by all parties, such as those clarifying jurisdictional scopes or dispute settlement procedures in complex multilateral trade or fisheries agreements, are also common examples. Even a formalized exchange of diplomatic notes confirming a shared understanding on a specific point can constitute a subsequent agreement under Article 31(3)(a). The International Court of Justice (ICJ) relied heavily on such agreements in the *Kasikili/Sedudu Island* dispute between Botswana and Namibia concerning boundary interpretation along the Chobe River. The Court examined a series of agreements, including a Joint Report of the Technical Commission and Minutes of a meeting between senior officials, concluded after the original 1890 Anglo-German Treaty, finding they constituted subsequent agreements demonstrating the parties' shared understanding of the boundary's location. The potency of Article 31(3)(a) lies in its ability to provide authoritative, unambiguous clarification directly from the treaty masters themselves, cutting through textual ambiguities that might otherwise fester into disputes.

Subsequent Practice in Application (Art. 31(3)(b))

Perhaps the most dynamic and frequently invoked element of Article 31(3) is subparagraph (b): “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” While subsequent agreements involve explicit statements, subsequent practice focuses on the parties' *conduct* – what they actually *do* when applying the treaty over time. This conduct, if sufficiently consistent and concordant, can reveal an implicit shared understanding of what the treaty obligations entail, effectively shaping or even evolving its meaning. The International Law Commission (ILC), in its pivotal 2018 Conclusions on Subsequent Agreements and Subsequent Practice, emphasized that it is not the practice alone, but the *agreement* of the parties regarding interpretation that such practice reveals, which carries

decisive weight.

Identifying practice that meets this threshold requires careful scrutiny. Not every action by a state party qualifies. The practice must be “concordant, common and consistent” (as articulated in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* Advisory Opinion) and must demonstrate a pattern revealing the parties’ understanding of their obligations. This practice can encompass a wide range of state actions: consistent patterns of domestic legislation implementing treaty obligations, executive decisions applying treaty rules, official statements justifying actions by reference to the treaty, diplomatic correspondence invoking treaty provisions in specific ways, and even deliberate omissions or acquiescence in the face of another party’s practice. A compelling illustration is the practice concerning navigation rights on the San Juan River, central to the ICJ case *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. Costa Rica argued its treaty rights included navigation with official vessels for police functions and the transport of tourists. Nicaragua contested this. The Court meticulously examined decades of practice: Costa Rica’s consistent use of the river for police patrols and tourist boats, Nicaragua’s issuance of visas and permits acknowledging such activities, and its long-standing lack of protest. This “virtually uniform, continuous and unchallenged” practice, the Court held, established the parties’ agreement that the treaty permitted such navigation, effectively interpreting the scope of the original right. The ILC Conclusions further clarify that practice by *one* party, if *accepted* by other parties (through express affirmation or lack of objection when obligated to react), can also contribute to establishing agreement. However, isolated acts, inconsistent behavior, or practice by entities not acting on behalf of the state do not suffice. This focus on practice ensures treaty interpretation remains grounded in the reality of how states understand and live by their commitments, providing a crucial conduit for meaning to adapt to changing circumstances and practical needs, as vividly demonstrated in the realm of cross-border resource management and security cooperation.

Relevant Rules of International Law (Art. 31(3)(c))

The most conceptually expansive and frequently debated element within Article 31(3) is subparagraph (c): “any relevant rules of international law applicable in the relations between the parties.” Often termed the principle of “systemic integration,” this provision mandates that treaties should not be interpreted in clinical isolation but rather as part of the broader, interconnected system of international law. It compels interpreters to consider the normative environment within which the treaty operates, ensuring coherence and preventing conflicting obligations where possible. This is particularly vital in an era of increasing legal specialization and potential “fragmentation” of international law into self-contained regimes.

The scope of “relevant rules” is broad, encompassing customary international law, general principles of law recognized by civilized nations, and crucially, *other treaties* that are binding on all the parties to the treaty being interpreted. The inclusion of other treaties is powerful, allowing interpreters to draw upon developments in related or even distinct fields of law that post-date the original treaty. However, Article 31(3)(c) is also a source of significant controversy, centering on three key questions. First, what does “applicable in the relations between the parties” mean? Must the relevant rule be binding on *all* parties to the treaty being interpreted, or does “applicable” have a broader meaning? The prevailing view, supported by the ILC and most jurisprudence (like the ICJ’s *Oil Platforms* case), leans towards requiring the rule to be binding on all

parties to avoid imposing obligations derived from treaties a state hasn't accepted. Second, *when* should these rules be considered applicable – at the time of the treaty's conclusion, or at the time of interpretation? The evolutionary nature of international law strongly suggests the latter is more appropriate for ensuring contemporary relevance, though this raises concerns about altering the original bargain. Third, how directly must the rule be “relevant”? While some connection is necessary, the threshold is not always clear-cut.

These controversies play out vividly in fields like human rights and environmental law. Human rights bodies frequently invoke Article 31(3)(c) to interpret older treaties in light of newer, more protective customary norms or conventions reflecting evolving understandings of human dignity. The European Court of Human Rights (ECtHR) consistently interprets the ECHR in light of developments in other international human rights instruments and customary law. Similarly, environmental treaties are often interpreted using principles like the precautionary approach or sustainable development, even if not explicitly mentioned in the original text, drawing on their status as relevant rules of international law. The ICJ's *Pulp Mills on the River Uruguay* case exemplifies this, where the Court interpreted a 1975 bilateral treaty in light of contemporary international environmental law principles, including environmental impact assessment obligations, through the lens of Article 31(3)(c). This provision acts as a vital conduit, ensuring treaties breathe the air of contemporary international law norms, preventing them from becoming relics disconnected from the evolving legal conscience of the international community, particularly in areas demanding dynamic responses to new global challenges.

The Interplay and Weight of Article 31(3) Elements

The elements of Article 31(3) do not operate in sterile isolation from each other or from the core components of Article 31(1). Instead, they form an integral part of the single, holistic interpretive operation mandated by the General Rule. The interpreter must weave together the text, context, object and purpose, *and* any relevant subsequent agreements, subsequent practice, and applicable rules of international law. Determining the precise weight and interplay of these factors, however, is where the art of interpretation truly lies, demanding careful judicial discernment under the overarching principle of good faith.

Several factors influence the probative value of Article 31(3) elements. The *clarity* and *specificity* of a subsequent agreement (Art. 31(3)(a)) will generally give it significant weight, often providing near-definitive clarification. For subsequent practice (Art. 31(3)(b)), the *consistency*, *duration*, and *generality* of the practice are crucial. Widespread, long-standing, and uniform practice by a representative group of parties carries far more weight than sporadic or inconsistent actions. The *representativeness* of the practice matters – practice by states particularly affected by a provision is highly relevant. The ICJ in the *Temple of Preah Vihear* case heavily relied on Thailand's decades-long conduct (including using maps showing the temple in Cambodia and failing to protest) as subsequent practice establishing its acceptance of the boundary. For relevant rules of international law (Art. 31(3)(c)), the *relevance* and *specificity* of the rule to the interpretive question at hand, and its *acceptance* by the parties, are key determinants. A directly applicable, well-established customary norm will carry more weight than a peripheral or contested principle.

A critical boundary constantly navigated is that between *interpretation* under Article 31, which clarifies meaning within the existing treaty framework, and *modification* under Article 39 VCLT, which formally

changes the rights and obligations. Subsequent agreements and practice under Article 31(3)(a) and (b) must genuinely aim to *clarify* the existing treaty, not substantially alter it. If practice effectively establishes a new agreement *modifying* the treaty, this falls outside interpretation and into the realm of amendment or the creation of new customary law. Distinguishing between the two can be subtle, hinging on whether the conduct reveals an understanding of what the treaty *already* means or demonstrates an intention to *change* what it means. The WTO Appellate Body grappled with this in *EC – Computer Equipment*, cautioning that not all practice constitutes “subsequent practice” under Article 31(3)(b); it must be practice establishing agreement on *interpretation*, not merely evidence of subjective views or conduct potentially amounting to a waiver. This distinction safeguards the stability of treaty commitments while allowing their meaning to adapt organically through authentic, shared understanding demonstrated over time.

Thus, Article 31(3) injects vital dynamism and contextual richness into the interpretive process. It acknowledges that treaties are not frozen in time but live through the actions, agreements, and evolving legal environment of the parties bound by them. By mandating consideration of these elements as part of the General Rule, the VCLT ensures that interpretation remains a living dialogue, responsive to the practical realities of state interaction and the progressive development of international law itself. Yet, even this sophisticated framework may occasionally leave meaning ambiguous or lead to manifestly unreasonable results. When the integrated application of Articles 31(1) and 31(3) proves insufficient, interpreters must then turn to the supplementary means outlined in Article 32, a recourse acknowledging the inherent limitations of even the most comprehensive primary methods and opening the door to the often-contentious realm of drafting history and original context.

1.5 Supplementary Means of Interpretation

While Article 31 VCLT, with its integrated triad and dynamic incorporation of subsequent agreements, practice, and systemic integration, provides a remarkably robust framework for discerning treaty meaning, its application does not always yield crystalline clarity. As the previous section acknowledged, even this sophisticated methodology may occasionally leave terms ambiguous or obscure, or lead to interpretations that are manifestly unreasonable or absurd. Recognizing the inherent limitations of language and foresight, the Vienna Convention architects provided a crucial safety valve in Article 32. This provision allows recourse to “supplementary means of interpretation,” most notably the contentious *travaux préparatoires*, but only under strictly defined conditions and with the clear understanding that these sources play a secondary, confirmatory, or clarifying role, never displacing the primacy of the Article 31 process. This carefully calibrated recourse acknowledges history’s pull without allowing it to undermine the stability of the agreed text.

The Conditional Role of Supplementary Means

Article 32 VCLT establishes a clear hierarchy: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty (*travaux préparatoires*) 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.” This threshold requirement is fundamental

and deliberate, reflecting the VCLT's core philosophy of prioritizing the text as the authentic expression of consent. Supplementary means are not an alternative starting point; they are a restricted secondary avenue. The International Law Commission (ILC) Commentary stressed that Article 32 "does not provide for alternative, autonomous, means of interpretation but only for means to supplement an interpretation governed primarily by the rule in article 31."

This conditional nature serves several vital purposes. Firstly, it upholds the primacy of the treaty text itself, protecting the final, negotiated agreement from being undermined by preliminary discussions or discarded proposals that did not make it into the final text. States should be held to what they signed, not what they might have discussed. Secondly, it promotes predictability and stability. Over-reliance on supplementary means, especially *travaux préparatoires*, which are often inaccessible, incomplete, or reflect individual state positions rather than consensus, can create uncertainty and encourage parties to delve into historical minutiae to justify self-serving interpretations. Thirdly, it acknowledges that the integrated approach of Article 31, incorporating context, purpose, and subsequent practice, is usually sufficient. Recourse to supplementary means is the exception, not the rule. Tribunals rigorously apply this threshold. The WTO Appellate Body, in *EC – Computer Equipment*, emphasized that supplementary means "may *not* be used to modify a meaning established under Article 31." Only when the Article 31 process genuinely hits an impasse – producing ambiguity, obscurity, or absurdity – does Article 32 unlock the door to the drafting archives and historical context.

Travaux Préparatoires: Drafting History Under Scrutiny

The most prominent, and frequently debated, supplementary means is the *travaux préparatoires* – the official records of the treaty's negotiation and drafting process. This encompasses a wide range of documents: successive drafts of the treaty text, summary records of negotiating sessions (plenary discussions, committee meetings), proposals and amendments submitted by delegations, reports of drafting committees, explanatory memoranda circulated by the chair or secretariat, and sometimes even verbatim transcripts if available. The allure of the *travaux* is evident: they offer a window into the discussions, compromises, and specific concerns that shaped the final text, potentially revealing the shared understanding of the negotiators on the meaning of particular provisions at the time of drafting. Proponents argue they provide crucial context for understanding why specific wording was chosen and what problems it was intended to solve.

The International Court of Justice (ICJ) has frequently utilized *travaux*, albeit cautiously, to confirm interpretations or resolve ambiguities. In the seminal *Competence of the General Assembly for the Admission of a State to the United Nations* Advisory Opinion (1950), the Court examined the San Francisco Conference records to understand the compromise reflected in Article 4(2) of the UN Charter regarding Security Council recommendations for membership, using them to confirm its textual and purposive interpretation. Similarly, in the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case (Indonesia v. Malaysia), the ICJ consulted the *travaux* of an 1891 Convention to clarify the meaning of a boundary description, finding it supported the interpretation derived from the text and subsequent practice.

However, the dangers and limitations of *travaux préparatoires* are equally significant, justifying their subsidiary status. Firstly, they are often incomplete or inaccessible. Negotiations, particularly sensitive ones,

may involve informal discussions not recorded, or records may be sealed or poorly maintained. Secondly, they may reflect the views of individual delegates or factions, not the consensus of all parties. A proposal by one state, vigorously debated but ultimately not adopted, reveals little about the *common* understanding embodied in the final text. Thirdly, they may contain contradictory statements or reveal discarded options that could mislead interpreters about the significance of the wording ultimately chosen. Fourthly, excessive reliance can undermine the finality of the text, encouraging states to re-litigate negotiations. As Judge Sir Hersch Lauterpacht warned, dwelling on rejected proposals risks “emasculating the text.” The WTO Appellate Body, in *EC – Chicken Cuts*, exemplified the cautious approach. Faced with classifying “salted” chicken, it first applied Article 31 (text, context, object/purpose), then used *travaux* (a committee chairman’s explanatory note) only to *confirm* the meaning it had already established, explicitly stating the *travaux* were “not, on their own, capable of resolving the interpretive question.” This careful balancing act acknowledges the potential value of drafting history while firmly subordinating it to the primacy of the final agreement expressed in the treaty text.

Circumstances of Conclusion: Historical Context

Beyond the specific negotiation records, Article 32 also permits consideration of the “circumstances of [the treaty’s] conclusion.” This broader historical context encompasses the geopolitical, social, economic, technological, and legal environment prevailing at the time the treaty was adopted. It aims to situate the agreement within the historical moment, understanding the challenges, concerns, and prevailing norms that prompted its creation and shaped its provisions. This might include the state of international relations (e.g., Cold War tensions, decolonization processes), significant prior events (e.g., a war, an environmental disaster, an economic crisis), scientific understanding at the time, technological limitations, or specific incidents that directly led to the negotiations.

Understanding these circumstances can illuminate the *problems* the treaty aimed to address and the *rationale* behind specific obligations. For instance, interpreting the nuclear non-proliferation provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) inevitably requires understanding the Cold War context of mutual deterrence and the intense fears surrounding nuclear weapons development in the 1960s. Similarly, interpreting older treaties on maritime boundaries or resource rights must consider the technological limitations on exploration and exploitation that existed when they were drafted.

However, employing the circumstances of conclusion carries significant caveats. Crucially, like *travaux*, it is supplementary and conditional. Its purpose is to shed light on the meaning the terms reasonably bore *at the time of conclusion*, primarily to resolve ambiguities left by Article 31 or avoid absurdities. It should not be used to import contemporary values or understandings that contradict the text. Furthermore, it must be distinguished sharply from subsequent practice (Article 31(3)(b)), which concerns conduct *after* the treaty’s conclusion and can demonstrate an *evolving* agreement on interpretation. Circumstances of conclusion are frozen in time. The ICJ highlighted this distinction in the *Territorial Dispute (Libya/Chad)* case. While acknowledging the historical context of colonial boundaries in Africa, the Court firmly based its decision on the clear text of the 1955 Treaty, stating that “the Court cannot have regard to... the circumstances connected with the conclusion of the treaty” when the text is unambiguous. Historical context provides background

illumination, not a tool to override the expressed agreement.

Other Supplementary Means: State Conduct, Expert Opinions, Maxims

While *travaux* and circumstances of conclusion are explicitly named in Article 32, the phrase “including” indicates the list is not exhaustive. Other supplementary means may be resorted to under the same strict conditions. Three categories are particularly relevant: pre-signature state conduct, opinions of jurists and expert bodies, and established legal maxims.

- **Pre-Signature Conduct:** Actions or statements by states *before* the treaty’s formal conclusion, but during the negotiation phase, can sometimes shed light on their understanding of terms being negotiated. However, this is distinct from *travaux* (which are the records of the negotiations themselves) and must be treated with even greater caution, as positions can shift significantly before final agreement. An example might be unilateral statements made publicly during negotiations that align with the final agreed text, potentially confirming a particular understanding. The Iran-US Claims Tribunal occasionally referenced such pre-conclusion conduct as supplementary means.
- **Opinions of Jurists and Expert Bodies:** The writings of highly qualified publicists (scholars) and the work of expert bodies like the International Law Commission (ILC) are recognized sources of international law under Article 38(1)(d) of the ICJ Statute. While not binding, they can serve as persuasive supplementary means to confirm an interpretation derived from Article 31 or to elucidate complex legal concepts within the treaty. For instance, an ILC commentary on a draft article that later formed the basis of a treaty provision can be highly relevant. The ICJ and other tribunals frequently cite scholarly works and ILC reports to support their reasoning. The WTO Appellate Body, in *US – Shrimp*, drew upon environmental law scholarship and concepts discussed in UNEP reports as supplementary means supporting its interpretation of “exhaustible natural resources” under GATT Article XX(g). Their value lies in their persuasive reasoning, not their authority.
- **Legal Maxims (Interpretive Principles):** Courts frequently employ Latin maxims or established interpretive principles as supplementary tools. These are not rigid rules but presumptions or guides to reasoning. Key examples include:
 - *Expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others): Suggests that if a treaty lists specific items, unlisted items are presumptively excluded. Used cautiously, as drafters may not intend exhaustive lists.
 - *Ejusdem generis* (of the same kind): When general words follow specific words, the general words are interpreted as applying only to things of the same kind as the specific words. Useful for interpreting open-ended lists.
 - *In dubio mitius* (in doubt, the milder rule): Suggests that if a treaty term is ambiguous, the interpretation that imposes a lesser obligation or restricts sovereignty less should be preferred. This maxim, reflecting sovereignty concerns, is applied cautiously, particularly in fields like human rights where effective protection is paramount.

- *Ut res magis valeat quam pereat* (so that the thing may rather have effect than be destroyed): Favors an interpretation that gives effect to the treaty as a whole and its provisions, rather than rendering it or parts of it ineffective.

The ICJ used *in dubio mitius* cautiously in the *Fisheries Jurisdiction (UK v. Iceland)* case, considering it alongside other factors when interpreting a contentious jurisdictional clause. Tribunals treat these maxims as flexible tools of logic, not determinative rules, always subservient to the text and context as revealed through Article 31.

Thus, Article 32 provides a necessary, albeit carefully circumscribed, toolkit for when the primary interpretive methods under Article 31 reach their limits. It acknowledges the potential relevance of historical intent and context without allowing them to destabilize the primacy of the treaty text as the authentic expression of state consent. The cautious approach to *travaux préparatoires*, the contextual use of historical circumstances, and the supplementary role of expert opinions and legal maxims, all subject to the threshold of ambiguity, obscurity, or absurdity, ensure that this recourse supports rather than supplants the integrated framework established by the VCLT. Yet, the quest for meaning encounters another layer of complexity when the treaty's words are not confined to a single language, but resonate equally in two or more authentic texts, potentially diverging in subtle or significant ways. This challenge of multilingual authenticity forms the critical subject of Article 33 and the next phase of our exploration.

1.6 Languages and Authenticity

The intricate dance of interpretation, navigating text and context, original purpose and evolving practice, confronts a unique dimension of complexity when the treaty itself speaks in multiple tongues. As Section 5 concluded, the recourse to supplementary means like *travaux préparatoires* offers limited historical insight when the primary methods falter, yet the challenge deepens when the very words of the agreement possess equal authority across different languages, potentially diverging in subtle or significant ways. This is the domain of Article 33 of the Vienna Convention on the Law of Treaties (VCLT), a provision addressing the specific realities of multilingual treaties – a common feature in modern international law reflecting the diversity of its subjects. The negotiation, adoption, and application of treaties authenticated in two or more languages introduce inherent risks of linguistic discrepancies, whether arising from drafting oversights, nuances lost in translation, or deliberate compromises masking divergent understandings. Article 33 provides a structured, though demanding, framework for navigating this linguistic labyrinth, seeking to uphold the binding force of the agreement while respecting the equal dignity of its authentic expressions.

The Presumption of Equal Authenticity

Article 33(1) VCLT establishes the foundational principle: “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that in case of divergence a particular text shall prevail.” This presumption of equal authenticity is a deliberate rejection of any inherent hierarchy based on the language of negotiation, the size of the linguistic community, or political dominance. It embodies a principle of linguistic equality and respect, recognizing

that each authentic text represents the treaty as consented to by the parties in that language. This principle has profound practical consequences. It means that interpreters cannot simply default to one language version, such as the language of the negotiating conference or the lingua franca of diplomacy. All authentic texts must be consulted and given due weight. The practical necessity of this rule is evident in foundational instruments like the Charter of the United Nations, authenticated in Chinese, English, French, Russian, and Spanish, or the Marrakesh Agreement establishing the World Trade Organization (WTO), authentic in English, French, and Spanish. In bilateral treaties between states with different official languages, such as the numerous agreements between Canada (English/French) and Mexico (Spanish), or France and Germany, multilingual authentication is standard practice, reflecting mutual respect.

The consequences of this presumption are significant. Firstly, it demands that interpreters possess, or have access to, expertise in all authentic languages. International courts and tribunals routinely engage expert linguists and translators. Secondly, it requires a meticulous comparison of the different language versions whenever ambiguity or dispute arises. A term appearing clear in one language may have a different connotation or scope in another. For example, in the contentious *Canada/France Arbitration* concerning maritime boundary delimitation in the areas of St. Pierre and Miquelon, the interpretation of the 1972 Franco-Canadian Arbitration Agreement was complicated by minor but potentially significant differences between the equally authentic French and English texts regarding the tribunal's mandate. The tribunal had to navigate these linguistic variations without assuming the primacy of either text. The presumption also underscores the critical importance of precision during the drafting and translation process. A famous Cold War anecdote, though perhaps apocryphal, highlights the stakes: during negotiations on arms control, the English term “to deploy” was reportedly translated into Russian with a word implying movement from storage to operational status, a nuance carrying significant military implications. While the specific case is debated, it illustrates the potential for divergence rooted in technical or contextual linguistic differences. The presumption of equality thus imposes a discipline of linguistic scrutiny, ensuring no party gains an interpretive advantage solely based on language.

Reconciling Divergences: The Primary Rule

Recognizing that textual divergences are inevitable in multilingual treaties, Article 33(2)-(4) establishes a hierarchical methodology for resolving them. The primary rule, articulated in Article 33(3), directs interpreters towards reconciliation: “The terms of the treaty are presumed to have the same meaning in each authentic text.” This presumption imposes a strong obligation to seek an interpretation that harmonizes the different language versions, rendering them compatible rather than contradictory. It reflects a fundamental belief that the parties intended to agree on a single set of obligations, expressed equivalently across languages, even if the phrasing differs.

Achieving this reconciliation demands a specific sequence of actions, deeply integrating the core VCLT interpretive methods. Firstly, as per Article 33(3), the interpreter must compare the divergent texts meticulously. This involves identifying the precise nature of the difference – is it a matter of scope, connotation, grammatical structure, or apparent contradiction? Secondly, and crucially, the interpreter must apply the General Rule of interpretation (Article 31) and the Supplementary Means (Article 32) *to each language ver-*

sion individually. This step is essential; it ensures that each text is understood on its own terms within its linguistic and contextual framework before comparison. The “ordinary meaning” must be sought within the specific language, considering its nuances and idiomatic expressions. Context, object and purpose, and subsequent agreements/practice are analyzed for each text. Only after establishing the meaning each text yields independently through this rigorous application of Articles 31 and 32 can a meaningful comparison be undertaken.

The goal is to find a common meaning that accommodates *all* authentic versions. Often, this reveals that apparent differences are merely stylistic or that a broader interpretation in one language encompasses the narrower sense in another, allowing for a harmonious reading. The object and purpose of the treaty frequently plays a pivotal role in this reconciliation process. An interpretation that renders the treaty effective and coherent across all languages is preferred over one that creates internal conflict or undermines its rationale. A classic example demonstrating this approach is the *Case concerning the Air Service Agreement of 27 March 1946 (USA v. France)* before an arbitral tribunal. A dispute arose over whether France had the right to impose unilateral limitations on US airlines. The Agreement was authentic in English and French. The English text (Article XI) referred to rates being fixed “in agreement with the aeronautical authorities”, while the French text used “*de accord avec*” (in agreement with). The US argued “in agreement with” implied mutual consent, while France interpreted “*de accord avec*” as merely requiring consultation or notification. The tribunal meticulously applied VCLT rules (even before the VCLT entered into force, recognizing them as custom). It analyzed the ordinary meaning within each language, considered the context of other articles, and crucially, examined the treaty’s object and purpose of facilitating air services. Finding that both interpretations were linguistically plausible, the tribunal concluded that the object and purpose – ensuring the smooth operation of agreed services – required the interpretation that changes needed mutual agreement, thereby reconciling the texts by adopting the meaning that ensured the treaty’s functionality. This case illustrates how reconciliation, guided by the treaty’s aims and rigorous linguistic analysis, is often achievable.

The Exception: When Reconciliation Fails

Despite the strong presumption favoring reconciliation and the powerful tools provided by Articles 31 and 32, Article 33(4) VCLT acknowledges a stark reality: there may be instances where the comparison of authentic texts, rigorously applying the primary methods, reveals a “difference of meaning” that “cannot be removed” by those methods. This signifies a genuine, irreconcilable divergence that persists even after exhausting the integrated interpretive process.

In this exceptional scenario, Article 33(4) provides the final recourse: “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” This rule, while seemingly offering a solution, operates under significant constraints and is invoked relatively rarely by international courts and tribunals, often as a last resort. It involves a two-step analysis: First, a definitive conclusion must be reached that the divergence cannot be resolved through the standard application of Articles 31, 32, and the reconciliation presumption of Article 33(3). Second, the interpreter must then actively *choose* the meaning that, while not eliminating the difference, “best reconciles” the conflicting texts, using the treaty’s object and purpose as the paramount guide.

The application of this rule is inherently delicate, carrying the risk of appearing to favour one language version or imposing a meaning not fully supported by any single text. Its use demands exceptional judicial care. The International Court of Justice (ICJ) confronted this challenge head-on in the pivotal *LaGrand (Germany v. USA)* case. The dispute centered on Article 36 of the Vienna Convention on Consular Relations (VCCR), concerning the right to consular notification for detained foreign nationals. The critical issue was whether Article 36(1)(b) created individual rights enforceable by the detained person. The equally authentic English and French texts diverged significantly on this point. The English text stated the detaining authorities “shall inform” the detainee of his rights, while the French text used “*sont informés*” (are informed), phrasing suggesting a passive construction less clearly conferring an individual right. Applying Article 31 to both texts, the ICJ found ambiguity. Subsequent practice under Article 31(3)(b) also proved inconclusive. Facing an irreconcilable divergence under Article 33(4), the Court then turned to the object and purpose of the VCCR – “to contribute to the development of friendly relations among nations” and “to ensure the efficient performance of functions by consular posts” on behalf of their nationals. The Court reasoned that these aims could only be fully realized if the treaty’s provisions were interpreted as conferring individual rights on the nationals concerned. Consequently, it adopted the interpretation “best reconciling” the texts in light of this purpose, effectively giving precedence to the English text’s active formulation (“shall inform”) as it more clearly embodied the necessary individual right to be informed. This decision, while resolving the immediate dispute, also sparked debate, illustrating the high stakes and inherent difficulty of applying Article 33(4). It demonstrates that when linguistic reconciliation proves impossible, the treaty’s overarching rationale becomes the decisive factor, potentially leading to interpretations that prioritize the agreement’s functional effectiveness over strict adherence to a single linguistic formulation, though always striving to respect the authentic texts as much as possible within that constraint.

Navigating the complexities of multilingual treaties under Article 33 VCLT thus demands linguistic precision, rigorous application of the core interpretive rules to each text, a strong presumption in favor of reconciliation, and, in the rare but critical instance of irreconcilable divergence, a purposive choice guided by the treaty’s fundamental aims. This framework, while imperfect, provides an essential structure for ensuring that the binding force of treaties is not undermined by the very diversity of expression intended to make them accessible and legitimate across linguistic boundaries. It underscores that the search for meaning in the crucible of international law must sometimes transcend the literal words of a single text to grasp the shared commitment embodied in the agreement as a whole. This intricate interplay between language, law, and purpose inevitably leads us towards the deeper philosophical currents – the enduring schools of thought on textualism, intentionalism, and teleology – that continue to shape the application of these rules, even within the structured confines of the VCLT.

1.7 Major Schools of Thought: Textualism, Intentionalism, Teleology

The intricate dance required by Article 33 VCLT to reconcile divergent authentic texts underscores a fundamental truth: despite the Vienna Convention’s sophisticated framework, treaty interpretation remains an art profoundly influenced by underlying philosophical currents. Beneath the structured application of Arti-

cles 31-33, enduring debates persist about the ultimate source of treaty meaning – is it found strictly in the words agreed upon, in the minds of those who drafted them, or in the aims the agreement seeks to achieve? These questions crystallize into three major schools of thought – textualism, intentionalism, and teleology – whose tensions continue to shape judicial reasoning and state practice even within the VCLT’s unifying structure, revealing the inherently contested nature of discerning meaning from the “frozen conversations” of diplomacy.

Textualism (Objective Approach)

Textualism champions the written treaty text as the supreme and objective manifestation of state consent. Rooted in the early modern shift towards sovereignty articulated by Vattel (“It is not permissible to interpret what has no need of interpretation”), this school posits that the authentic agreement lies solely in the words to which states formally bound themselves. Textualists argue that focusing on the “ordinary meaning” of the terms, understood within their grammatical structure and the treaty’s immediate context, promotes crucial values of predictability, stability, and legal certainty in international relations. By adhering strictly to the text, textualism aims to prevent states from evading obligations through appeals to unrecorded intentions or evolving societal values not reflected in the agreement. This approach manifests in a pronounced skepticism towards extrinsic evidence, particularly *travaux préparatoires*, which are seen as unreliable indicators of collective intent and potentially undermining the finality of the negotiated text.

Modern textualism finds strong expression in the jurisprudence of the World Trade Organization (WTO) Appellate Body. In the landmark *US – Shrimp* case, while ultimately invoking object and purpose, the Appellate Body began its analysis with a rigorous textual examination of the term “exhaustible natural resources” in GATT Article XX(g), emphasizing dictionary definitions and the treaty context. Similarly, in *EC – Chicken Cuts*, the Appellate Body meticulously parsed the specific wording of the European Communities’ tariff schedule (“salted” meat) against the Harmonized System nomenclature, prioritizing the textual commitment over arguments based on perceived intent or purpose. Proponents argue this textual discipline prevents judicial overreach and respects state sovereignty by holding parties to their actual, documented commitments. However, textualism faces criticism for potential rigidity. Critics contend it can lead to absurd or unjust outcomes when applied to poorly drafted provisions, fails to address unforeseen technological or societal developments, and may ignore the underlying rationale of the agreement when the text is ambiguous or open-textured. The challenge lies in discerning the “ordinary meaning” without inadvertently importing subjective assumptions, a task demanding careful contextualization even within a textualist framework.

Intentionalism (Subjective Approach)

In stark contrast to textualism’s objective focus, intentionalism, also known as the subjective or “will theory,” seeks the actual, historical, common intent of the treaty’s original drafters and parties at the time of its conclusion. Dominant in the 19th and early 20th centuries under the influence of legal positivism, intentionalists argue that the binding force of a treaty stems solely from state consent; therefore, interpretation must aim to discover that antecedent shared will. The text is crucial, but primarily as evidence of intent; if the words seem ambiguous or potentially at odds with what negotiators *really* meant, the historical intent must prevail. This school places heavy reliance on supplementary means, especially *travaux préparatoires* (negotiation

records, drafts, delegates' statements), as the primary repository of evidence revealing the parties' genuine understanding and compromises.

The Permanent Court of International Justice (PCIJ) frequently exemplified this approach. In the contentious *Lotus* case (1927), concerning jurisdiction over collisions on the high seas, the Court extensively scrutinized the drafting history of the relevant convention to ascertain the intent behind limitations on state jurisdiction, arguably prioritizing the inferred intent over a purely textual analysis. Similarly, interpreting intricate minority protection treaties established after World War I heavily depended on *travaux* to understand specific guarantees. Proponents argue intentionalism offers the deepest respect for state sovereignty and the consensual nature of treaty obligations, ensuring states are bound only by what they genuinely intended to agree upon. However, intentionalism faces formidable practical and theoretical challenges. Ascertaining a single, unified "common intent" among multiple states, often with divergent objectives and compromises struck behind closed doors, is frequently elusive and contentious. *Travaux préparatoires* can be incomplete, ambiguous, or reflect individual views rather than collective agreement. Over-reliance risks undermining the stability and predictability of the agreed text, allowing states to invoke preliminary discussions to evade formal obligations. Furthermore, it can freeze treaties in the past, ignoring the potential for language and circumstances to evolve, rendering agreements ineffective in addressing contemporary challenges. The ILC debates preceding the VCLT highlighted these criticisms, leading to the demotion of *travaux* to supplementary status under Article 32.

Teleology (Purposive Approach)

Teleology shifts the focus from the text's literal meaning or the drafters' historical intent towards the treaty's overarching object and purpose. This school, emphasizing effectiveness (*effet utile*), argues that interpretation should be guided by the treaty's fundamental goals and rationale, ensuring it remains a living and effective instrument for achieving its aims. Teleologists contend that treaties are designed to solve problems and create regimes (e.g., protecting human rights, safeguarding the environment, regulating trade); interpretation must therefore breathe life into these purposes, adapting where necessary to changing contexts to fulfill the agreement's *raison d'être*. This approach readily accommodates evolutive interpretation, where the meaning of terms is understood to develop over time to maintain the treaty's relevance and effectiveness.

Teleology finds its most robust application in human rights jurisprudence. The European Court of Human Rights (ECtHR), in seminal cases like *Tyrer v. UK* (1978) concerning judicial corporal punishment, explicitly declared the European Convention on Human Rights (ECHR) a "living instrument" to be interpreted "in the light of present-day conditions." Concepts like "torture," "private life," or "family life" have expanded significantly through purposive interpretation, ensuring contemporary protection standards. Similarly, the Inter-American Court of Human Rights (IACtHR) emphasizes *pro homine* interpretation (favoring the individual) and effectiveness, integrating regional context and evolving norms. Teleology is also prominent in environmental law, where interpreting obligations like preventing "significant adverse effects" or applying the "precautionary approach" demands a focus on achieving the treaty's protective goals, as seen in the ICJ's invocation of sustainable development in *Gabčíkovo-Nagymaros*. Proponents argue teleology ensures treaties fulfill their intended function and remain dynamic instruments of progress. Critics, however, warn

of the risks of judicial activism. They contend an overemphasis on purpose can override clear textual meaning, disregard state consent by imposing contemporary values not present at the treaty's conclusion, and grant excessive discretion to interpreters, potentially rewriting treaties under the guise of interpretation. The challenge lies in balancing effectiveness with fidelity to the text and the original consent, ensuring purpose illuminates rather than obliterates the agreed terms.

The VCLT as a Compromise and the Enduring Tensions

The Vienna Convention on the Law of Treaties did not resolve these philosophical debates; it ingeniously sought to channel and integrate them into a structured yet flexible framework. Articles 31-33 represent a deliberate compromise, incorporating core elements of all three schools within a unified methodology. Textualism is enshrined as the starting point and anchor (ordinary meaning). Intentionalism finds expression, albeit cautiously, through the consideration of subsequent agreements and practice (Article 31(3)(a)-(b)) which reflect the parties' evolving understanding, and the supplementary role of *travaux* and circumstances of conclusion (Article 32). Teleology is explicitly embedded through the directive to interpret "in the light of [the treaty's] object and purpose" (Article 31(1)).

Despite this synthesis, the underlying tensions persist, manifesting in the interpretative tendencies of different courts and tribunals and in scholarly critiques. The International Court of Justice (ICJ) often exhibits a predominantly textualist/contextual approach, tempered by teleology and cautious use of subsequent practice, as seen in its emphasis on the clear text in *Territorial Dispute (Libya/Chad)* and its purposive reasoning in the *Namibia Advisory Opinion*. In contrast, the ECtHR openly champions a teleological and evolutive approach, prioritizing the effectiveness of human rights protection. WTO dispute settlement leans heavily towards textualism but incorporates context and purpose systematically. Investment arbitration tribunals display wide variation, with some strictly textual (e.g., *Plama v. Bulgaria* rejecting an expansive reading of an "umbrella clause" absent clear textual support) and others more purposive (e.g., *Saluka v. Czech Republic* interpreting "fair and equitable treatment" broadly in light of investment protection aims).

The enduring debate centers on whether the VCLT is primarily descriptive (codifying existing custom) or prescriptive (imposing a specific methodology), and crucially, whether it truly resolves the inherent tensions or merely provides a common vocabulary within which they play out. Does the integrated approach offer genuine guidance on how to *weight* text versus purpose when they point in different directions? Can subsequent practice legitimately *evolve* meaning beyond the original understanding captured by the text and context? The answers often depend on the interpreter's implicit allegiance to one school

1.8 Specialized Contexts: Human Rights, Investment, Environmental Treaties

The philosophical currents explored in the preceding section – textualism, intentionalism, and teleology – do not flow uniformly across the vast ocean of international agreements. While the Vienna Convention on the Law of Treaties (VCLT) provides the overarching navigational chart, the specific characteristics, objectives, and enforcement mechanisms inherent to different categories of treaties profoundly influence how its interpretive principles are applied in practice. The integrated approach of Articles 31-33 bends and flexes,

subtly emphasizing different elements to accommodate the unique nature and functional demands of regimes governing human dignity, economic investment, planetary health, and territorial sovereignty. Understanding this contextual adaptation is crucial, revealing how the crucible of meaning is fired differently depending on the treaty's *raison d'être*.

Human Rights Treaties: Evolutive Interpretation and Effectiveness

Human rights treaties stand apart in the international legal landscape. Unlike reciprocal agreements balancing state interests, they establish obligations *erga omnes partes* – owed by states directly to individuals within their jurisdiction, creating vertical relationships focused on protection rather than horizontal bargains. This unique character, coupled with often deliberately open-textured norms designed to endure (e.g., “torture,” “inhuman or degrading treatment,” “private life,” “fair trial”), demands a distinctive interpretive approach. Teleology reigns supreme here, powerfully guided by the principle of effectiveness (*effet utile*) and the imperative to interpret treaties in a manner that renders rights practical and effective, not theoretical and illusory.

The most striking manifestation of this is the doctrine of “evolutive interpretation,” explicitly endorsed by bodies like the European Court of Human Rights (ECtHR). Treaties like the European Convention on Human Rights (ECHR) are conceived not as static codes frozen in 1950, but as “living instruments” to be interpreted “in the light of present-day conditions” (*Tyrer v. United Kingdom*, 1978, concerning judicial corporal punishment). This approach recognizes that concepts of human dignity, privacy, and justice evolve. What constituted “degrading punishment” or a violation of “private life” decades ago may differ vastly from contemporary understandings. For instance, the ECtHR in *Soering v. United Kingdom* (1989) interpreted Article 3 ECHR (prohibition of torture/inhuman treatment) in light of evolving global standards on capital punishment and prison conditions to find that extraditing someone to face the “death row phenomenon” violated the Convention. Similarly, understandings of “family life” have expanded to include various non-marital relationships (*Marckx v. Belgium*, 1979), and “private life” now encompasses personal data protection (*S. and Marper v. United Kingdom*, 2008). This evolutive approach is not unbridled judicial activism; it finds grounding within the VCLT framework. The treaty’s object and purpose (universal protection of human rights) inherently suggests a dynamic quality (*Dudgeon v. United Kingdom*, 1981). Subsequent practice under Article 31(3)(b) can be found in the evolving jurisprudence of the court itself and state practice reflecting changing societal values. Systemic integration under Article 31(3)(c) allows incorporation of newer human rights instruments and customary norms. Furthermore, the *pro homine* principle – that interpretations should favor the individual whose rights are at stake – acts as a powerful teleological compass. Supervisory bodies like the ECtHR, the UN Human Rights Committee (HRC), and the Inter-American Court of Human Rights (IACtHR) play a vital role in developing this dynamic jurisprudence, their interpretations carrying significant weight precisely because they operationalize the treaty’s protective purpose. Textual fidelity remains important, but the clear terms are interpreted generously, and ambiguities resolved expansively in favor of rights protection, ensuring the treaty remains a vital shield in an ever-changing world.

International Investment Agreements (IIAs): Balancing Text and Sovereignty

International Investment Agreements (IIAs), primarily Bilateral Investment Treaties (BITs) and investment

chapters in Free Trade Agreements (FTAs), present a contrasting interpretive landscape characterized by inherent asymmetry. These treaties grant substantive protections (e.g., Fair and Equitable Treatment (FET), National Treatment, protection against expropriation) and procedural rights (investor-State Dispute Settlement - ISDS) to foreign investors, enforceable directly by those investors against host states through arbitration. This structure fuels intense interpretive debates centered on balancing investor protection against the host state's sovereign right to regulate in the public interest.

Interpretation in this field grapples with several unique challenges. Broad standards like FET are deliberately open-ended, requiring tribunals to give them concrete meaning. The bilateral nature of many BITs contrasts with multilateral rule-setting, complicating reliance on consistent subsequent practice. Multiple authentic languages are common, raising Article 33 VCLT complexities. Crucially, tribunals operate without a formal system of precedent (*stare decisis*), yet practice shows heavy reliance on prior awards, creating de facto jurisprudence. The core tension lies between a strict textualism emphasizing the specific consent captured in the treaty text and a more purposive approach focusing on the overarching aim of investment protection and promotion.

This tension plays out vividly in interpreting FET. Tribunals adopting a more textualist/contextual approach scrutinize the treaty language and related agreements, often requiring evidence of a specific state commitment or narrowly defining obligations. For instance, in *Plama v. Bulgaria* (2008), the tribunal adopted a restrictive interpretation of an “umbrella clause,” requiring clear textual evidence before elevating a contract breach to a treaty violation. Conversely, tribunals leaning towards teleology derive broader principles from the treaty's purpose. The influential *Saluka v. Czech Republic* (2006) tribunal, interpreting a Netherlands-Czech BIT, stated that the FET standard “provides a basic and general standard which is detached from the host State's domestic law,” evolving through arbitral practice to include protection of legitimate investor expectations. This concept of “legitimate expectations,” while central to many FET findings, is largely judge-made, extrapolated from the treaty's protective purpose rather than explicit text, demonstrating teleological reasoning. Similar debates rage over expropriation clauses, particularly concerning indirect expropriation through regulatory measures. Tribunals must interpret where legitimate regulation ends and compensable “taking” begins, often balancing the treaty text against the state's police powers and the investment's reasonable expectations, highlighting the constant interpretive tightrope walk between investor rights and regulatory sovereignty. The legitimacy of the entire ISDS system often hinges on perceptions of whether tribunals are interpreting treaties faithfully or effectively rewriting them through expansive purposive interpretations.

Environmental Treaties: Precaution, Integration, and Common Concern

Environmental treaties confront the daunting task of regulating complex, often poorly understood ecological systems amidst scientific uncertainty and potentially catastrophic, irreversible harm. This context demands interpretive approaches that prioritize prevention, anticipate unforeseen consequences, and integrate evolving scientific knowledge and legal norms. Key principles shaping interpretation include the precautionary principle/approach, sustainable development, and the recognition of environmental protection as a “common concern of humankind.”

The precautionary principle, codified in treaties like the Rio Declaration (Principle 15) and operationalized in

instruments such as the Cartagena Protocol on Biosafety, directly influences interpretation. Where scientific uncertainty exists concerning serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Interpreters thus face the challenge of applying treaty obligations (e.g., to prevent “significant adverse effects,” to employ “best available techniques,” to conduct environmental impact assessments) in situations where harm is plausible but not definitively proven. A precautionary interpretation might impose stricter obligations or lower thresholds for action than a purely textual reading might initially suggest, guided by the treaty’s protective purpose. The ICJ’s *Gabčíkovo-Nagymaros Project* case, while concerning an older treaty, pointedly highlighted that “new norms and standards” in environmental law must be taken into account via Article 31(3)(c), influencing how the 1977 treaty’s requirements for environmental protection were understood decades later.

Systemic integration under Article 31(3)(c) VCLT is particularly vital for environmental treaties. Environmental challenges are interconnected, and legal responses are fragmented across numerous conventions (climate, biodiversity, ozone, chemicals, etc.). Interpreting a provision in the UN Framework Convention on Climate Change (UNFCCC) or the Convention on Biological Diversity (CBD) frequently requires considering obligations under related treaties, customary international environmental law principles (like the duty to prevent transboundary harm), and even human rights norms recognizing a right to a healthy environment. The concept of “sustainable development,” explicitly referenced in preambles of many environmental and economic agreements, acts as a crucial integrating principle, requiring interpreters to balance environmental protection, economic development, and social needs. Furthermore, the framing of environmental protection as a “common concern of humankind” (e.g., Preamble, UNFCCC) adds normative weight, potentially influencing the interpretation of obligations towards a more collective and urgent understanding, even within treaties primarily structuring interstate relations. Interpretation in this field thus becomes an exercise in weaving a coherent normative web, ensuring environmental treaties remain effective tools for addressing planetary crises despite evolving science and deepening understanding of ecological interconnectedness.

Law of the Sea and Boundary Treaties: Precision and Stability

In stark contrast to the dynamic, purpose-driven interpretation favored in human rights and environmental law, treaties concerning the law of the sea and territorial or maritime boundaries prioritize textual precision, stability, and predictability above all. These agreements, such as the United Nations Convention on the Law of the Sea (UNCLOS) or bilateral boundary treaties, aim to provide clear, enduring frameworks for sovereignty, jurisdiction, and resource rights – matters fundamental to state identity and security. Ambiguity here is not merely inconvenient; it can be a direct source of conflict.

Consequently, textualism and a strong emphasis

1.9 Interpretation by Courts and Tribunals: ICJ, WTO, Investment Arbitration

The meticulous textualism demanded by boundary treaties and the law of the sea, prioritizing stability and predictability through clear written commitments, provides a stark counterpoint to the dynamic, purpose-driven approaches flourishing in other specialized regimes. This divergence underscores a crucial reality: the

Vienna Convention’s interpretive framework, while universally applicable, is not mechanically applied. Its nuanced principles – text, context, purpose, subsequent practice, systemic integration – are filtered through the institutional character, mandate, and underlying philosophy of the adjudicative bodies tasked with resolving disputes. Examining how key international courts and tribunals navigate this framework reveals the living practice of treaty interpretation, where abstract rules meet concrete controversies, shaping jurisprudence and, ultimately, the effectiveness of international law itself.

The International Court of Justice (ICJ): Cautious Application of the VCLT

As the principal judicial organ of the United Nations, the International Court of Justice occupies a unique position, adjudicating diverse disputes ranging from territorial sovereignty and use of force to environmental protection and diplomatic law. Its Statute (Article 38(1)) lists the sources of international law it applies, including treaties and customary law, implicitly encompassing the customary rules of treaty interpretation later codified in the VCLT. The ICJ consistently affirms the VCLT Articles 31-33 as reflecting customary law, making them the cornerstone of its interpretive methodology. However, its application is characterized by a pronounced caution, often leaning towards textualism and contextual analysis while demonstrating increasing openness to subsequent practice, yet remaining wary of expansive teleology or heavy reliance on *travaux préparatoires*.

The Court frequently emphasizes the primacy of the treaty text. A defining example is the *Territorial Dispute (Libya/Chad)* case (1994). Libya argued that a 1955 Treaty with France (acting for Chad) was merely a framework for future delimitation, not a definitive boundary. The ICJ meticulously parsed the treaty’s wording, particularly Article 3 which declared a “conventional boundary... fixed” and described it in detail using geographical coordinates. Finding the text “clear and precise,” the Court held it established an immediate and definitive boundary, stating unequivocally: “Once the Court has established that the text is clear, it is not permissible, under the guise of interpretation, to revise that text or to change the meaning which it bears.” This strict textualism provided certainty in a high-stakes sovereignty dispute. Similarly, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (2001), the Court anchored its jurisdiction firmly in the precise wording of the parties’ commitments in the 1990 Doha Minutes, interpreted in good faith.

Despite this textual anchor, the ICJ increasingly recognizes the vital role of subsequent practice under Article 31(3)(b) as evidence of the parties’ agreement on interpretation. The *Navigational and Related Rights (Costa Rica v. Nicaragua)* case (2009) offers a masterclass. The dispute centered on the scope of Costa Rica’s right of “free navigation” on the San Juan River under an 1858 Treaty. Nicaragua argued this only covered commerce. The ICJ, after establishing the ordinary meaning of the terms, turned to subsequent practice. It meticulously examined decades of conduct: Costa Rica’s consistent use of the river for subsistence fishing, transport of police, schoolchildren, and tourists, coupled with Nicaragua’s issuance of relevant permits, visas for tourists, and crucially, its long-standing lack of protest against such activities. This “virtually uniform, continuous and unchallenged” practice, the Court held, established the parties’ agreement that the treaty encompassed navigation for purposes beyond mere commerce, effectively evolving the interpretation to include essential state functions and local community needs. This case demonstrates how subsequent practice

breathes life into older treaties, adapting them to contemporary realities without formal amendment.

While utilizing object and purpose, the ICJ typically employs it cautiously, often to confirm textual interpretations or resolve ambiguities revealed by context and practice, rather than as an independent driver of meaning. Its use of *travaux préparatoires* under Article 32 is similarly restrained, usually confined to confirming interpretations derived from Article 31 or resolving genuine ambiguities, reflecting the Court's commitment to the primacy of the final text and stability in international agreements.

World Trade Organization (WTO) Dispute Settlement: Textualism with Nuance

The World Trade Organization's dispute settlement system, particularly its Appellate Body (AB), has developed a highly distinctive and influential approach to treaty interpretation, characterized by a strong textualist foundation systematically infused with contextual and purposive elements. Article 3.2 of the Dispute Settlement Understanding (DSU) explicitly mandates that the WTO agreements are to be "clarified in accordance with customary rules of interpretation of public international law," confirming the application of VCLT rules. The AB, from its earliest decisions, established a reputation for rigorous textual analysis, often described as "textualism with context."

The seminal *US – Shrimp* case (1998) exemplifies this layered approach. The core issue was whether the US embargo on shrimp imports caught without turtle-excluder devices qualified under GATT Article XX(g) as relating to the "conservation of exhaustible natural resources." The AB began *textually*, examining the ordinary meaning of "exhaustible natural resources." It noted that "natural resources" were not static but evolutionary, and "exhaustible" included both biological resources like turtles and non-living resources like minerals. Crucially, it then placed this textual analysis firmly within the *context* of the entire WTO Agreement, pointing to the Preamble of the Marrakesh Agreement which explicitly references "sustainable development" and the need to protect the environment. This context illuminated the *object and purpose* relevant to interpreting the exception, allowing the AB to conclude that living resources like sea turtles were indeed covered, but ultimately finding the US application violated the chapeau of Article XX due to arbitrary discrimination. This case showcases the AB's method: starting with the text, expanding systematically to the broader context (the whole WTO treaty system), and using the object and purpose derived from that context (including sustainable development) to inform, but not override, the textual analysis.

This textual discipline is paramount when interpreting Members' specific commitments. In *EC – Chicken Cuts* (2005), the dispute centered on the tariff classification of frozen boneless chicken cuts with added salt. The EC argued they fell under "salted meat" (higher duty) rather than "fresh/chilled/frozen" chicken (lower duty). The AB meticulously analyzed the specific terms in the EC's Schedule ("salted," "meat"), their ordinary meaning, and crucially, the context provided by the Harmonized System (HS) nomenclature, a standardized classification system integral to WTO schedules. It emphasized that schedules are part of the treaty text itself. While the EC invoked supplementary means (*travaux* – an explanatory note from the HS Committee Chairman), the AB stressed it could only *confirm* a meaning already established under Article 31, not establish it independently. Finding the ordinary meaning guided by the HS context pointed towards the cuts not being "salted" in the tariff sense, the AB ruled against the EC. This case underscores the AB's commitment to textual precision within a defined contextual framework (the HS), prioritizing the written

commitment over subjective intent or perceived purpose.

Subsequent practice under Article 31(3)(b) plays a role but is applied cautiously. The AB requires practice demonstrating a “concordant, common and consistent” understanding of *all* Members concerning the interpretation of a specific provision, a high threshold in a diverse membership of over 160 states. This stringent approach reflects a concern that widespread practice could effectively modify rights and obligations without formal amendment.

Investment Arbitration Tribunals: Divergent Approaches and Legitimacy Debates

The decentralized world of investor-State dispute settlement (ISDS), conducted primarily through ad hoc arbitral tribunals constituted under treaties like BITs or the ICSID Convention, presents a kaleidoscope of interpretive approaches. Unlike the ICJ or WTO AB, there is no centralized appellate body to ensure consistency. Consequently, tribunals exhibit significant divergence, ranging from strict textualism to pronounced purposivism, fueling ongoing debates about predictability, legitimacy, and the balance between investor protection and state regulatory sovereignty.

The spectrum is evident in interpreting key standards like Fair and Equitable Treatment (FET). At the textualist end, tribunals demand clear evidence within the treaty language or context. In *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24, 2008), the tribunal confronted an “umbrella clause” (stipulating observance of written obligations entered into with investors). Applying a strict textual and contextual reading, the tribunal held that such clauses require “clear and unambiguous language” to elevate ordinary contractual breaches into treaty violations. Finding the clause in the Energy Charter Treaty insufficiently explicit, it rejected Plama’s claim, prioritizing state sovereignty and the specificity of consent. Conversely, other tribunals adopt a more purposive approach, inferring broader protections from the treaty’s overarching object and purpose of promoting and protecting investments. *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, 2006) is a landmark in this regard. Interpreting the FET clause in the Netherlands-Czech BIT, the tribunal acknowledged the absence of a precise definition but reasoned that the standard must be understood “in light of the object and purpose of the Treaty.” It derived the now-central concept of protecting the investor’s “legitimate expectations” as inherent to FET, even without explicit textual grounding. This approach emphasizes the effectiveness of the investment protection guarantee but risks being perceived as exceeding the specific text consented to by the state.

This interpretive divergence extends to the use of precedent. Despite the absence of formal *stare decisis*, tribunals frequently cite prior awards. However, the weight given varies. Some tribunals engage deeply with previous jurisprudence, seeking coherence (

1.10 Beyond the VCLT? Contemporary Debates and Challenges

The kaleidoscopic landscape of treaty interpretation, vividly illustrated by the divergent approaches of the ICJ’s textual caution, the WTO Appellate Body’s disciplined contextualism, and the often unpredictable oscillations within investment arbitration, reveals an underlying truth: the Vienna Convention on the Law of Treaties (VCLT) provides a remarkably resilient framework, yet its application in the dynamic 21st century

constantly tests its boundaries. The structured interplay of text, context, object and purpose, supplemented by subsequent agreements, practice, and systemic integration, while theoretically comprehensive, increasingly confronts novel realities. The rise of complex global challenges demanding collective action, the proliferation of non-state actors shaping legal discourse, and the sheer velocity of technological and societal change press against the edges of the VCLT's mid-20th-century architecture. This section delves into the crucible of contemporary critique and adaptation, exploring whether the VCLT remains the definitive chart for navigating the treaty universe or requires supplementary instruments to guide the voyage ahead.

Evolutionary Interpretation: How Far Can Meaning Evolve?

The concept that treaty meaning is not frozen in time but can adapt—"evolutive interpretation"—stands as perhaps the most potent and contentious challenge to a strictly originalist reading of the VCLT. While Article 31(3)(c) explicitly incorporates "relevant rules of international law applicable between the parties," and subsequent practice under Article 31(3)(b) allows for organic development based on party conduct, the precise limits of permissible evolution remain vigorously debated. How far can meaning shift without effectively amending the treaty absent formal consent?

The foundation for evolutive interpretation often lies within the treaty itself. Terms with inherently dynamic content—such as "degradation of the environment," "public morals," "scientific knowledge," or "family life"—invite contemporary application. The European Court of Human Rights (ECtHR) famously embraced this in *Tyrer v. United Kingdom* (1978), declaring judicial corporal punishment degrading under Article 3 ECHR despite its historical acceptance, reasoning the Convention is a "living instrument" interpreted "in the light of present-day conditions." Similarly, the International Court of Justice (ICJ) in *Costa Rica v. Nicaragua* (2009) interpreted an 1858 river navigation right to include modern police patrols and tourist transport based on long-standing, unchallenged subsequent practice. Environmental treaties frequently demand evolutive readings. The term "exhaustible natural resources" in GATT Article XX(g), interpreted narrowly in 1947, was expansively read by the WTO Appellate Body in *US – Shrimp* (1998) to include living sea turtles, influenced by contemporary environmental consciousness and the treaty's preamble referencing sustainable development. The object and purpose of a treaty, particularly one establishing a continuing regime like human rights or environmental protection, inherently suggests an intention for its provisions to remain effective (*effet utile*) as contexts change.

However, the line between legitimate evolution and impermissible amendment is perilously thin. Critics argue that expansive evolutive interpretations risk usurping state sovereignty and bypassing formal amendment procedures, effectively rewriting treaties through judicial fiat. Concerns about democratic legitimacy and legal certainty loom large. The intense debates surrounding ECtHR judgments on issues like prisoners' voting rights (*Hirst v. United Kingdom (No 2)*, 2005) or assisted dying (*Pretty v. United Kingdom*, 2002) highlight the friction between a dynamic human rights framework and national democratic processes. The ICJ's *Navigational and Related Rights* ruling, while grounded in demonstrable practice, still involved interpreting an 1858 treaty to cover activities (tourism transport) likely unimaginable to its drafters. The core challenge lies in distinguishing genuine evolution inherent in the treaty's terms or purpose from interpretations that impose entirely new obligations reflecting contemporary values not grounded in the original

consent. The legitimacy of evolutive interpretation hinges critically on demonstrating its basis within the VCLT framework – through the ordinary meaning of open-textured terms in their *contemporary* context, subsequent practice establishing agreement, or systemic integration of new customary norms binding the parties – rather than appearing as an extra-constitutional judicial power.

Subsequent Practice by Non-Parties and Third Parties

Article 31(3)(b) VCLT anchors subsequent practice firmly in the agreement of *the parties* to the treaty. Its essence is the practice establishing *their* understanding. Yet, the modern landscape features treaties with profound *erga omnes* (towards all) or *erga omnes partes* (towards all parties) character, impacting the global commons or fundamental norms like human rights or environmental protection. Can practice by states *not* party to the treaty, or even by non-state actors (international organizations, NGOs, corporations), influence its interpretation under the VCLT framework? This question probes the boundaries of consensualism in an interconnected world.

The prevailing view, reinforced by the International Law Commission's (ILC) 2018 Conclusions on Subsequent Agreements and Subsequent Practice, maintains a strict requirement: subsequent practice under Article 31(3)(b) must reflect the agreement of *the parties*. Practice by non-parties is generally irrelevant for establishing the parties' common understanding. However, the ILC acknowledged nuance. Practice by non-parties *could* potentially be relevant under Article 32 as supplementary means, or exceptionally, if it *reflects* or *influences* the understanding of the actual parties. Furthermore, widespread practice by non-parties might contribute to the formation of new customary international law, which could then be incorporated via Article 31(3)(c) if applicable between the parties. The ICJ's *Namibia Advisory Opinion* (1971) offers a complex precedent. While interpreting the UN Charter, the Court considered the practice of UN organs, including resolutions and actions by member states, many of whom were not original parties to the Charter. However, the Court framed this as subsequent practice *of the Organization itself* (of which the members were part), implicitly treating it as practice of the parties acting collectively through the institution. This approach provides a pathway for interpreting constitutive treaties of international organizations by considering the practice of their organs as reflecting the collective will of the member states (the parties).

The role of non-state actors (NGOs, corporations, expert bodies) is even more indirect. Their practice cannot constitute subsequent practice under Article 31(3)(b), as they are not parties. However, their actions can *inform* the practice of states or international organizations. NGO submissions to courts, expert reports commissioned by treaty bodies, or industry standards can influence state behavior or judicial reasoning. For instance, amicus curiae briefs from environmental NGOs in cases like *Pulp Mills* or *Whaling in the Antarctic* provided scientific and legal arguments that shaped the Court's understanding of relevant rules and standards, potentially feeding into Article 31(3)(c) or supplementary means under Article 32. While their role is significant in shaping the normative environment, their impact on treaty interpretation remains mediated through the actions and acceptance of states or the reasoning of judicial bodies applying VCLT rules, rather than constituting an independent source under Article 31(3)(b).

The Role of Non-State Actors and Soft Law

Closely related to the question of third-party practice is the burgeoning influence of non-state actors and

non-binding normative instruments (“soft law”) on treaty interpretation. While the VCLT framework remains staunchly state-centric, recognizing only states and international organizations as treaty-makers and interpreters under Articles 31-33, the reality of global governance involves a dense web of interactions where NGOs, multinational corporations, expert networks, and soft law standards permeate the interpretative process. How does this influence operate within, or despite, the VCLT’s formal structure?

The primary mechanisms remain indirect but potent. First, non-state actors generate information and arguments that inform the practice and understanding *of states*. NGO reports documenting human rights abuses, scientific assessments by the Intergovernmental Panel on Climate Change (IPCC), or technical standards developed by industry bodies like the International Maritime Organization (IMO) can shape how states implement treaties and what they accept as legitimate interpretations. This filtered state practice can then become relevant under Article 31(3)(b) or (a). Second, non-state actors actively participate in international litigation and treaty body proceedings. Amicus curiae submissions to the ICJ, WTO panels, regional human rights courts, and investment tribunals provide detailed legal arguments, empirical data, and perspectives that tribunals may draw upon when applying VCLT rules. While not binding, these submissions can illuminate context, object and purpose, relevant rules of international law (Art. 31(3)(c)), or serve as supplementary means (Art. 32). The WTO Appellate Body in *US – Shrimp* explicitly considered submissions from environmental NGOs when interpreting “exhaustible natural resources” and the chapeau of GATT Article XX. Third, soft law instruments – declarations, guidelines, codes of conduct, expert restatements (like the ILC Draft Articles) – can provide evidence of emerging customary norms or general principles relevant under Article 31(3)(c), or elucidate the ordinary meaning of technical terms. They offer persuasive authority on how treaty provisions *should* be understood in light of evolving standards, even if not formally binding.

The interpretative weight of non-state input and soft law depends entirely on its reception by states and judicial bodies within the VCLT framework. A tribunal might cite an NGO report or ILC Draft Article as supplementary means supporting an interpretation derived from Article 31, or as evidence of relevant rules or state practice. Soft law often acts as a catalyst or conduit for the crystallization of norms later recognized as customary law, thereby becoming incorporated via Article 31(3)(c). While the formal sources under the VCLT remain unchanged, the ecosystem in which interpretation occurs is increasingly populated and influenced by actors and norms beyond the strict confines of treaty parties and binding law, subtly shaping the application of the established rules.

****Critiques of the VCLT: Is**

1.11 Interpretation in Action: Case Studies of Landmark Disputes

The theoretical debates and critiques surrounding the Vienna Convention on the Law of Treaties (VCLT), while illuminating the framework’s tensions and perceived limitations, find their most compelling resolution not in abstract discourse, but in the crucible of actual disputes. Here, the interplay of textual analysis, contextual understanding, object and purpose, subsequent practice, and supplementary means ceases to be academic and becomes the very mechanism determining sovereignty, resource allocation, environmental

protection, and fundamental rights. Examining landmark cases reveals the VCLT's living application, showcasing how its principles navigate complex realities, sometimes confirming its sufficiency, at other times revealing its interpretive edges, and always demonstrating the high stakes involved in discerning meaning from the "frozen conversations" of diplomacy.

11.1 The Nicaragua Case (ICJ: Military and Paramilitary Activities): Custom vs. Treaty, Object/Purpose

The 1986 *Military and Paramilitary Activities in and against Nicaragua* case presented the International Court of Justice (ICJ) with a Cold War-era geopolitical quagmire and a profound interpretive challenge concerning the relationship between treaty law and customary international law, heavily reliant on object and purpose. Nicaragua accused the United States of violating international law by supporting Contra rebels and mining its harbors. A critical jurisdictional hurdle arose from a US reservation to its acceptance of the Court's compulsory jurisdiction, excluding "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." Nicaragua's Application invoked both the UN Charter (a multilateral treaty) and customary international law prohibiting the use of force and intervention.

The US argued the reservation barred jurisdiction over claims based *even partially* on the UN Charter, as not all Charter parties (like the USSR or El Salvador) were before the Court. Nicaragua countered that its claims rested *independently* on identical customary law norms. The Court faced a pivotal interpretive question: Could the reservation be read to exclude disputes based on customary law paralleling Charter provisions? Applying the VCLT (recognized as custom), the ICJ began with the text of the reservation ("disputes arising under a multilateral treaty"). It determined the *ordinary meaning* of "arising under" suggested the dispute must be one that *necessarily requires* the interpretation or application of the treaty itself. Crucially, the Court invoked the *object and purpose* of the reservation. Based on the circumstances of its formulation and US statements, the Court inferred its purpose was to prevent the US from being sued alone for breaches of multilateral commitments binding many states – the *collective action* problem. Therefore, if Nicaragua's claims could be adjudicated *solely* on the basis of customary international law, which bound the US and Nicaragua *bilaterally* irrespective of the Charter, the reservation would not apply. The Court found the core prohibitions on the use of force and non-intervention existed independently in customary law, co-existing with the Charter. Consequently, it affirmed jurisdiction over the customary law claims. This reasoning showcased the power of teleological interpretation: understanding the reservation's aim allowed the Court to navigate the text and avoid an outcome that would have effectively immunized the US from suit for alleged violations of fundamental norms simply because they were also codified in the UN Charter. The subsequent merits decision, finding the US violated customary law, underscored the profound real-world consequences hinging on this interpretive approach.

11.2 The Gabčíkovo-Nagymaros Project Case (ICJ): Treaty Law, Necessity, and Environmental Protection

The 1997 *Gabčíkovo-Nagymaros Project* case involved a complex dispute between Hungary and Slovakia (succeeding Czechoslovakia) concerning a 1977 Treaty governing the joint construction and operation of a system of dams and barrages on the Danube River. Hungary, citing environmental concerns and changing circumstances, suspended and then abandoned its part of the project. Czechoslovakia (later Slovakia) proceeded unilaterally with a "provisional solution" (Variant C), diverting the Danube. Both sides

alleged treaty breaches. The case became a landmark for applying the VCLT to treaty performance, invocation of state of necessity, and crucially, integrating evolving environmental norms through interpretation.

The Court meticulously applied the VCLT's general rule (Art. 31) to interpret the 1977 Treaty. It examined the *text* of key provisions on joint construction, operation, and environmental protection. It considered the *context*, including the Treaty's structure and related agreements. Significantly, the Court emphasized the Treaty's *object and purpose*: not only to produce hydroelectricity and improve navigation but also to protect the environment, explicitly stated in Article 15 requiring the parties to ensure water quality and protect nature. Hungary argued its abandonment was justified by a "state of necessity," claiming the ecological risks posed an imminent peril. The Court, interpreting the customary law of necessity (relevant under Art. 31(3)(c)), found the peril was not sufficiently imminent at the time of abandonment, rejecting this defence for the suspension. However, the environmental dimension profoundly impacted the interpretation of the Treaty's *continuing* obligations.

The Court made a groundbreaking move: it held that newly developed norms of international environmental law, emerging since 1977, must be taken into account when interpreting and implementing the Treaty's existing environmental provisions. Specifically, it referenced the concepts of "sustainable development" and the "obligation to undertake an environmental impact assessment" (EIA). While the 1977 Treaty didn't explicitly mention EIAs, the Court reasoned that the general obligation to protect the environment (Art. 15) had to be read in light of contemporary standards applicable between the parties via Article 31(3)(c). "This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development," the Court stated, effectively using systemic integration to inject contemporary environmental imperatives into the interpretation of the older treaty. This demanded that the parties *re-negotiate* their operational regime for the project, incorporating modern environmental safeguards. The case thus powerfully demonstrated how Article 31(3)(c) facilitates evolutionary interpretation, ensuring treaties remain relevant instruments for addressing contemporary global challenges like environmental protection, while respecting the parties' original framework agreement.

11.3 The US – Shrimp/Turtle Case (WTO): Text, Context, Object/Purpose, and Evolutionary Potential

The 1998 *US – Import Prohibition of Certain Shrimp and Shrimp Products* ("Shrimp/Turtle") dispute at the World Trade Organization (WTO) became a defining moment for environmental protection within the trade regime and a masterclass in the Appellate Body's (AB) nuanced application of the VCLT. The US banned shrimp imports harvested without "turtle excluder devices" (TEDs), aiming to protect endangered sea turtles. Complainants (India, Malaysia, Pakistan, Thailand) argued this violated GATT Article XI (prohibition on quantitative restrictions) and was not justified under Article XX(g) (exceptions for measures "relating to the conservation of exhaustible natural resources"). The dispute centered squarely on interpreting Article XX(g).

The AB embarked on a rigorous VCLT analysis, beginning with the *text* of Article XX(g). It focused on the phrase "exhaustible natural resources." Consulting dictionary definitions, the AB noted that "natural resources" were not static but "by definition, evolutionary." It then placed this textual analysis within the crucial *context* of the entire WTO Agreement, highlighting the Preamble to the Marrakesh Agreement, which

explicitly recognizes the objective of “sustainable development” and the need to “protect and preserve the environment.” This context was indispensable for understanding the *object and purpose* of the WTO agreements relevant to interpreting the exception. The AB concluded that “exhaustible natural resources” in 1994 included both living (like sea turtles) and non-living resources, significantly evolving from a potentially narrower historical understanding. It found the US measure had a “substantial relationship” to conservation, satisfying “relating to.”

However, the AB then meticulously analyzed the chapeau of Article XX (prohibiting “arbitrary or unjustifiable discrimination”). Here, subsequent practice and context were key. The AB found the US application discriminatory because it demanded other countries adopt *identical* TED programs without considering different local conditions, and had negotiated seriously only with some countries (in the Americas) but not others (the complainants). This lack of flexibility and effort constituted unjustifiable discrimination. Critically, the AB also consulted *supplementary means* (Art. 32), including a 1996 report by a UNEP expert on TED effectiveness, to understand the feasibility and appropriateness of the measures. While upholding the environmental objective and the evolutionary interpretation of “exhaustible natural resources,” the AB demonstrated how the chapeau’s textual requirements and the principle of good faith (embedded in the chapeau’s purpose to prevent abuse of exceptions) constrained the application of the measure. The ruling showcased the AB’s signature method: starting textually, expanding to context and object/purpose to allow evolutionary interpretation, but rigorously applying the treaty’s overall structure and good faith requirements to ensure non-discriminatory application. It affirmed that environmental measures could be justified under WTO rules but must be applied fairly.

11.4 The Chagos Archipelago Advisory Opinion (ICJ): Self-Determination, Decolonization, and Subsequent Practice The 2019 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* Advisory Opinion addressed the bitter legacy of colonialism and hinged critically on the interpretation of UN General Assembly (GA) resolutions concerning decolonization and self-determination, analyzed through the lens of subsequent practice under the VCLT. The central question was whether the UK’s detachment of the Chagos Archipelago from Mauritius before granting independence in 1968, to establish a US

1.12 Conclusion: The Art and Science of Discernment

The contentious *Chagos Archipelago* Advisory Opinion, where the International Court of Justice (ICJ) interpreted decades of UN General Assembly resolutions and state practice as subsequent agreement under Article 31(3)(b) VCLT, effectively affirming Mauritius’ right to self-determination, underscores the profound stakes embedded in the interpretive act. This journey through the labyrinth of treaty interpretation methods, from ancient oaths sworn before deities to the nuanced application of the Vienna Convention’s Articles 31-33 across diverse modern tribunals, reveals a fundamental truth: discerning the meaning of treaties is not merely a technical exercise but the vital alchemy transforming static text into living law. As we reach the culmination of this examination, we reflect on the enduring framework, the inherent creativity within its bounds, the emerging challenges demanding adaptation, and the indispensable role this craft plays in

sustaining the fragile edifice of international order.

12.1 Recapitulation: The Enduring Framework and Its Nuances

The Vienna Convention on the Law of Treaties (1969) stands as the monumental achievement codifying, and largely crystallizing, customary rules governing how treaties are understood. Its core genius lies in Articles 31-33, which rejected the historical dominance of any single school—textualism, intentionalism, or teleology—in favor of an integrated, yet hierarchically structured, methodology. Article 31(1) establishes the cardinal rule: interpretation begins and is anchored in the text’s “ordinary meaning,” but this meaning is inherently contextual, illuminated by the treaty’s preamble, annexes, and related agreements, and crucially guided by its overarching “object and purpose.” This integrated triad operates as a single, dynamic process, demanding constant interplay rather than sequential steps. Article 31(3) injects necessary dynamism, mandating consideration of subsequent agreements clarifying the treaty, subsequent practice establishing the parties’ evolving common understanding, and relevant rules of international law binding upon them (systemic integration). Only when this primary process leaves meaning ambiguous, obscure, or leads to manifest absurdity does Article 32 permit recourse to supplementary means—predominantly the contentious *travaux préparatoires* and circumstances of conclusion—always subordinate to the primacy of Article 31. Article 33 addresses the unique complexities of multilingual treaties, establishing the presumption of equal authenticity and a sophisticated hierarchy for reconciling divergences, ultimately resorting to the meaning best reconciling the texts in light of the treaty’s purpose. Threading through this entire structure is the golden principle of *pacta sunt servanda*, demanding good faith in performance and interpretation, acting as a safeguard against abuse and absurdity. This framework, as demonstrated in landmark cases from *Gabčíkovo-Nagymaros* (integrating environmental norms) to *US – Shrimp* (evolving “exhaustible natural resources”), has proven remarkably resilient, providing a common language and structured approach amidst the inherent subjectivity of discerning meaning.

12.2 Interpretation as a Dynamic and Creative Process

Despite its structured rules, treaty interpretation defies reduction to a mechanical algorithm. It remains, fundamentally, an art demanding judgment, discernment, and a nuanced appreciation of context. The VCLT provides the orchestra and the score, but the interpreter—whether judge, arbitrator, diplomat, or scholar—must conduct the performance. The rules guide but do not dictate the precise weight given to text versus purpose when they pull in different directions, or how definitively subsequent practice displaces a seemingly clear original meaning. Is the ECtHR’s “living instrument” doctrine a legitimate application of evolutive interpretation grounded in object and purpose and subsequent consensus, or does it sometimes verge on judicial legislation, as critics of rulings like *Hirst v. UK* (prisoner voting) contend? Does the WTO Appellate Body’s rigorous textualism occasionally obscure the functional realities of modern trade, or is it the essential guarantor of predictability in a rules-based system? The inherent tension the VCLT navigates—between the stability and predictability derived from the agreed text and state consent, and the adaptability and effectiveness required to address unforeseen circumstances and evolving norms—cannot be resolved by formula. It requires constant, context-specific balancing. This interpretive creativity, however, is not license. It operates within the disciplined constraints of the VCLT framework and the principle of good faith. A tribunal cannot simply

impose its preferred policy outcome; it must demonstrate how its interpretation flows logically from the application of Articles 31-33 to the specific treaty language and context. The creativity lies in the sophisticated *application* of the rules to complex realities, weaving together text, context, purpose, practice, and relevant law into a coherent and persuasive narrative of meaning, as the ICJ did in *Costa Rica v. Nicaragua* by finding modern police functions embedded in an 1858 “free navigation” right through subsequent practice.

12.3 Navigating the Future: Challenges and Adaptations

The VCLT framework, forged in a different era, faces unprecedented pressures demanding thoughtful adaptation. The fragmentation of international law into specialized, sometimes overlapping or conflicting regimes (trade, investment, human rights, environment, cyber) intensifies the challenge of systemic integration (Art. 31(3)(c)). Can this provision adequately reconcile obligations under, say, a trade agreement promoting fossil fuels and an environmental treaty demanding emissions reductions? Tribunals must navigate these clashes with heightened sensitivity to regime interaction, potentially developing more sophisticated approaches to identifying “relevant” rules and managing normative conflict through interpretation before declaring incompatibility. The rapid pace of technological change poses another frontier. How are terms like “sovereignty,” “intervention,” “armed attack,” or “due diligence” in foundational treaties like the UN Charter to be interpreted in the context of cyber operations, autonomous weapons, or AI-driven disinformation campaigns? Treaties on digital trade, data flows, or cybercrime require interpretation adaptable to technologies evolving far faster than diplomatic conferences can convene. Evolutionary interpretation and subsequent practice will be critical, demanding agile responses from states and adjudicators. Furthermore, the legitimacy of interpretive processes themselves is under scrutiny. Concerns about judicial overreach in evolutive interpretations, inconsistencies in investment arbitration awards, and the perceived democratic deficit when tribunals “make law” challenge the system’s acceptance. Enhancing transparency, fostering dialogue between tribunals (comity), ensuring diverse representation on benches, and grounding interpretations demonstrably within the VCLT framework are essential for maintaining legitimacy. The rise of non-state actors and soft law, while influential in shaping the normative environment, must continue to find their place *within* the state-centric VCLT structure, primarily through informing state practice, relevant rules, or supplementary means, rather than bypassing it. The increasing complexity of global challenges—pandemics, climate migration, biodiversity collapse—demands interpretations that facilitate cooperation and effective action without sacrificing the consent-based foundation of international law.

12.4 The Indispensable Craft: Ensuring Peace, Cooperation, and Justice

Ultimately, the meticulous craft of treaty interpretation is not an arcane legal specialty but the bedrock upon which the possibility of a rules-based international order rests. It is the indispensable mechanism for transforming the “frozen conversations” of diplomacy into actionable obligations capable of resolving disputes peacefully, as the ICJ did in averting potential conflict through its interpretation of the 1955 Treaty in *Libya/Chad*. It provides the shared language through which states navigate competing interests over boundaries, resources, and trade rights, fostering predictability essential for cooperation, as seen in the WTO’s intricate parsing of tariff commitments. Crucially, it is the vehicle through which the fundamental promises of human dignity and environmental stewardship, embedded in treaties but often framed in aspirational or

open-textured terms, are given concrete meaning and enforceability. The ECtHR’s interpretation of “torture” or “private life,” evolving to prohibit corporal punishment (*Tyrer*) or protect digital data (*S. and Marper*), demonstrates how interpretation breathes life into abstract rights, holding states accountable. The ICJ’s invocation of sustainable development in *Gabčíkovo-Nagymaros* shows how interpretation can integrate emerging ecological imperatives into existing legal frameworks. Without principled, good-faith interpretation, treaties risk becoming dead letters, their ambiguities exploited, their purposes frustrated, and their potential for fostering peace, cooperation, and justice squandered. In a world grappling with complex interdependence and existential threats, the art and science of discerning treaty meaning—rooted in the VCLT’s enduring structure yet demanding constant, creative, and responsible application—remains more vital than ever. It is the crucible where the words states commit to parchment are tested, refined, and ultimately forged into the tools for building a more just and stable world, a continuous testament to the power and peril of language itself in the arduous pursuit of international law’s highest ideals. The ICJ’s somber observation in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, finding no explicit prohibition yet emphasizing the cardinal principles that must govern any use, underscores that even in the silence or ambiguity of text, interpretation guided by fundamental principles remains paramount to the survival of our shared humanity.