

**The Principle of Integration in Sustainable Development Through  
the Process of Treaty Interpretation:  
Addressing the Balance Between Consensual Constraints and  
Incorporation of Normative Environment**

by  
Kazuki Hagiwara

Thesis submitted to  
The University of Ottawa, Faculty of Graduate and Postdoctoral Studies  
in partial fulfillment of the requirements for the degree of

**Master of Laws**

Faculty of Law, University of Ottawa  
Ottawa, Ontario, Canada

April 2013

© Kazuki Hagiwara, Ottawa, Canada, 2013

## **Abstract**

Considering that the concept of sustainable development has a function of normative integration in international law, Article 31(3)(c) provides a legitimate basis of such systemic integration. At the same time, it displays the limitations of the harmonious solution drawn from its application because it works only within the rigid consent-based framework in which the referenced rules should be legal “rules” and should be “applicable in the relations between the parties.” International jurisprudence suggests supplemental elements to overleap the consensual limitations in the application of Article 31(3)(c): a generic term and the object and purpose of the treaty. These text-based and the object-and-purpose-based developmental interpretative techniques enable interpreters to consider legal rules that are not “any relevant rules of international law applicable in the relations between the parties” under Article 31(3)(c).

<b>Chapter 1 Introduction.....</b>	<b>1</b>
1. Objectives.....	4
2. Preliminary Remarks.....	5
<b>Chapter 2 Sustainable Development in International Law .....</b>	<b>14</b>
1. Introduction .....	14
2. Evolution of sustainable development policy in international documents.....	16
(a) <i>Stockholm Declaration</i> .....	16
(b) <i>Rio Declaration</i> .....	19
(c) <i>Johannesburg Declaration</i> .....	21
(d) Rio+20.....	22
3. Principle of integration as the heart of sustainable development: From policy integration to normative integration.....	22
4. Legal status of the concept of sustainable development .....	24
5. Boundaries or expansion .....	33
(a) Legality of the Use by a State Nuclear Weapons in Armed Conflict (1996).33	
(b) Legality of the Threat or Use of Nuclear Weapons (1996) .....	34
6. Concluding Remarks.....	36
<b>Chapter 3 Sustainable Development in International Jurisprudence....</b>	<b>38</b>
1. Introduction .....	38
2. Case Study: Achieving Sustainable Development through Treaty Interpretation in Selected Cases.....	39
(a) <i>Gab ikovo-Nagymaros Project</i> .....	39
(b) <i>Iron Rhine</i> .....	43
(c) <i>OSPAR Convention Case</i> .....	46
(d) <i>US—Shrimp</i> .....	49
(e) <i>EC—Biotech</i> .....	53
3. Concluding Remarks: Interpretative Elements Relevant to Normative Integration in the Context of Sustainable Development.....	59
<b>Chapter 4 Flexible Architecture of Article 31 within the Rigid Consensual Framework: A Crucible of Interpretative Elements .....</b>	<b>60</b>
1. Introduction .....	60
2. Significance of the rules on treaty interpretation codified in the <i>Vienna Convention</i> ..	60
3. Three schools on treaty interpretation tucked into a single general rule through the codification of the law of treaties.....	66
(a) Intention of parties approach versus textual approach .....	67
(b) Shades of the teleological approach.....	74
4. Concluding Remarks: Significance of a Crucible of Interpretative Elements in the	

Context of Sustainable Development .....	78
<b>Chapter 5 Sustainable development through treaty interpretation beyond the consensual restraints: the inter-temporal law and the supplemental methods .....</b>	<b>81</b>
1. Introduction .....	81
2. Inter-temporal law and the codification of the law of treaties.....	83
(a) Scepticism and dissolution—Discussion in the 16th Session of the International Law Commission (1964) .....	83
(b) Unified and veiled—Discussion in the 18th Session of the International Law Commission (1966) .....	86
(c) Elasticity: Scope of the rules to be taken into account.....	88
3. Contrasting outcomes of two branches of inter-temporal law.....	91
4. Limitations of the second limb of inter-temporal law: Scope of Article 31(3)(c).....	94
(a) What are “any relevant rules of international law”? .....	95
(b) What are “the parties”?.....	97
5. Supplemental Interpretative Elements to Inter-Temporal Law in Normative Integration: Incorporation of Normative Environment through Evolutionary Character of a Generic Term and in the Light of the “Object and Purpose” of a Treaty for the Effective Accomplishment of the Goal of the Treaty .....	99
(a) Incorporation of normative environment through an evolutionary character of a generic term .....	100
(c) Developmental interpretation in terms of the object and purpose of a treaty.....	105
6. Concluding Remarks.....	110
<b>Chapter 6 Conclusions.....</b>	<b>112</b>
<b>Bibliography.....</b>	<b>115</b>

## Chapter 1 Introduction

In *Gab ikovo-Nagymaros Project*, the International Court of Justice (hereinafter, the “Court” or the “ICJ”) decreed that “[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”<sup>1</sup> The Court considered the concept of sustainable development to articulate the demand for harmonization between economic development and environmental protection. Setting this statement as the point of departure, this thesis examines two aspects of sustainable development: first, sustainable development as a concept that harmonizes legal rules<sup>2</sup> and has evolved and has expanded its fields of subject matter in international law;<sup>3</sup> and second, the reconciliation among the relevant

---

<sup>1</sup> *Case concerning Gab ikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 at 77-78, para.140 [*Gab ikovo-Nagymaros Project*]. Judge Oda, though he submitted his dissenting opinion, supported the concept of sustainable development that the majority described. He mentioned that;

[i]t is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic development on the one hand and preservation of the environment on the other, with a view to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests.

*Ibid.* at 157-158, para. 14 (Dissenting opinion of Judge Oda).

<sup>2</sup> See e.g. Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Leiden: Martinus Nijhoff Publishers, 2009) c. 2 at 35ff; Charles Gonthier, “Sustainable Development and the Law” (2005) 1 McGill J.S.D.L.P. 1 at 1ff; George Abi-Saab, “Forward” in Markus W. Gehring and Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) xxxiii; Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practice, and Prospects* (Oxford: Oxford University Press, 2004) at 103-109; International Law Association 2002, *New Delhi Declaration on the Principles of International Law Related to Sustainable Development* (London: ILA, 2002); Philippe Sands, “Sustainable Development: Treaty, Custom, and the Cross-Fertilization of International Law” in Alan Boyle & David Freestone (eds.), *International Law and Sustainable Development: Past Achievement and Future Challenges* (Oxford: Oxford University Press, 1999) 39 at 39ff.

<sup>3</sup> Sustainable development had a limited scope focusing upon environmental protection and economic development in the early stage of its appearance in international law. Current evolution of sustainable development shows the expansion of its scope and covers human rights and other social welfare. In this regard, the three-pillar image of the concept of sustainable development is commonly perceived. See Hugh Wilkins, “The Integration of the Pillars of Sustainable Development: A Work in Progress” (2008) 4 McGill J.S.D.L.P. 163 at 163ff; Cordonier Segger & Khalfan, *ibid.* c.1 and at 102-104; Dominic McGoldrick, “Sustainable Development and Human Rights: An Integrated Conception” (1996) 45 I.C.L.Q. 796. On the widening the scope of sustainable

fields of sustainable development, which needs normative integration by referring to the external normative environment of the treaty being interpreted.

Having considered the harmonization of these concerns as the core of the policy of sustainable development, the question remains how such harmonious integration could be achieved in the international legal process. This research assumes that the systemic integration that is a solution against the fragmentation of international law can be a possible approach to this question.

The Study Group of the United Nations International Law Commission [ILC or Commission] on the Fragmentation of International Law suggests that systemic integration could serve as a harmonic conflict-avoidance technique embodied in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* [*Vienna Convention*],<sup>4</sup> which requires interpreters to take into account any relevant rules of international law—the normative environment—in interpreting a treaty, on either a static or dynamic basis. The normative environment is a significant factor for a harmonious solution to fragmentation in international law and is defined as the background of the whole system of international law.<sup>5</sup> Considering such a normative environment, treaty interpretation could be one phase where the systemic integration could be undertaken, and thus, the coherence of international law as a whole could be strengthened.<sup>6</sup> This author considers that systemic integration could also promote a solution for the integration in the context of sustainable development because economic development, environmental protection, and human rights are not alternatives; they are essentials to our community that should be reconciled.

Conventionally, temporal aspects of the normative integration have been dealt with under the inter-temporal law.<sup>7</sup> The developmental aspect of the inter-temporal law

---

development in the WTO dispute settlement practice, Tenu Avafia, “Does the WTO’s Dispute Settlement Understanding Promote Sustainable Development?” in Gehring & Cordonier Segger, *ibid.* 259.

<sup>4</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980, accession by Canada 14 October 1970) [*Vienna Convention*].

<sup>5</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (13 April 2006), UN Doc. A/CN.4/L.682 (2006) 1 at 13, para. 12, 30, para. 45, 211, para. 419, and 208-213, paras. 413-423, online: Official Document System of the United Nations <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>>.

<sup>6</sup> *Ibid.* at 211, para. 419.

<sup>7</sup> See D. W. Greig, *Intertemporality and the Law of Treaties* (London: British Institute of International and Comparative Law, 2001); Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*

considers the development of a legal system as a whole.<sup>8</sup> This confined scope was more constrained in Article 31(3)(c) of the *Vienna Convention*, in which the inter-temporal law was arguably codified.<sup>9</sup> Thus, under this provision, the range of the available factors to which interpreters can refer is defined as “any relevant rules of international law applicable in the relations between the parties,” and thus, it is considerably limited by the consensual threshold.

Selected major cases concerning sustainable development illustrate that the normative environment, in a broader sense, which includes the unqualified interpretative factors under Article 31(3)(c), is taken into account in two ways: in the first mode, a conceptual or generic term calls for looking at the development of the extrinsic relevant legal, factual, scientific, and technological developments; in the second mode, in the light of the object and purpose of the treaty, the effective pursuit of the goal of the treaty in question requires consulting the external normative environment.<sup>10</sup> These methods supplement the limitation in scope of Article 31(3)(c) and reinforce the function of treaty interpretation in achieving sustainable development. However, if those interpretative elements do not satisfy the consent-based applicability conditions under Article 31(3)(c), reference to external factors of a treaty without the consensual basis might endanger stability of legal relations between the parties and might also subvert the authenticity of treaty interpretation.

In the international legal literature, these problematic interpretative techniques have been identified repeatedly and critically analysed. From the observation of the WTO case law, Pauwelyn insisted that international law rules taken into account by the Panels and by the Appellate Body which do not fall under the qualification of Article 31(3)(c) must be considered “at least implicitly accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as what the particular WTO term means.”<sup>11</sup> Although McLachlan’s basic stance supports the view that the term “parties” refers to all the parties to the treaty being interpreted, he identifies certain exceptional situations from the general perspective of international law where reference to rules not eligible under Article 31(3)(c) can be permissible. Firstly, when an obligation is synallagmatic and the

---

(Cambridge: Cambridge University Press, 2003) at 264-268; Duncan French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules” (2006) 55 I. C. L. Q. 281.

<sup>8</sup> *Island of Palmas Case (Netherlands v. USA)*, Arbitral Award of 4 April 1928, (1949) 2 Reports of International Arbitral Awards 829 at 845.

<sup>9</sup> See Chapter 5 below.

<sup>10</sup> See Chapter 3 below.

<sup>11</sup> Pauwelyn, *supra* note 7 at 261.

legal relations between the parties can be divided into bilateral relations, rather than *erga omnes partes* obligations, these rules may be applicable to the pair of parties to a dispute only. Secondly, such ineligible rules might be taken into account appropriately if it can be considered “as evidence of the common understanding of the parties as to the meaning of the term used.”<sup>12</sup> To a certain extent, these arguments broaden the application of Article 31(3)(c) to exceptional cases in discussing whether the term “parties” means all the parties to the treaty or to the dispute.<sup>13</sup> Therefore, these scholarly works insufficiently address the problematic situations in which the referred rules are not binding, even for the parties to the dispute, e.g. minimum coterminous circle or where the information taken into account is not legal rules but factual situations.

Considering that the concept of sustainable development is a crucial contribution to the integration of “legal, economic, and technological considerations into the process of international law,”<sup>14</sup> codified treaty interpretation rule in Article 31(3)(c) provides a legitimate basis of a developmental construction of a treaty. At the same time, it displays the limitations of the solutions drawn from its application because it works only within the rigid consent-based framework in which the referenced rules should be legal “rules” and should be “applicable in the relations between the parties.”<sup>15</sup> Thus, the question to be solved is how the question can be resolved in the context of sustainable development.

### 1. Objectives

The tension between Article 31(3)(c) and the supplemental interpretative techniques over the consensual threshold in the context of sustainable development opens the possibility for objective developmental interpretation, which might serve effective incorporation of current prevailing situations into treaty implementation. On the other hand, this indicates that the constraint of consent could obstruct the realization of public policy, such as sustainable development, in the international sphere, while demand of legal stability in international law should be secured from a formalistic perspective of the consensual paradigm in international law.

---

<sup>12</sup> Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 I.C.L.Q. 279 at 314-315. However, he, rather, seems to consider this second exception as application of Article 31 (1).

<sup>13</sup> French, *supra* note 7 at 306.

<sup>14</sup> Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Alan Boyle & David Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001) 19 at 37.

<sup>15</sup> Article 31 (3) (c) of the *Vienna Convention*.

The present research identifies the core function of sustainable development as normative integration in international law, while also tracking its conceptual evolution on the historical background and the scholarly discussion on its legal status (Chapter 2). The goal is to find possible interpretative techniques that could promote the normative integration aspect of sustainable development, which could avoid the problem of consensual foundation of the law of treaties and could lead to a more convincing explication of a treaty provision (Chapter 3). In addition, the current research aims to identify the obstructive factors of the capability these approaches have in comparison with the traditional method of the inter-temporal law codified in Article 31(3)(c), bearing in mind the balance between the static and dynamic treaty interpretation in the context of sustainable development (Chapters 4 and 5).

## 2. Preliminary Remarks

Perceptions vary regarding the relationship between sustainable development and treaty interpretation. In the author's opinion, treaty interpretation can be instrumental in realizing the objectives of sustainable development. In this regard, the present thesis begins with an analytical review of Christina Voigt's monograph on sustainable development in international law.<sup>16</sup> Her study conceptualizes sustainable development as a principle of integration in international law and presents a unique concept of sustainable development. Voigt considers sustainable development an autonomous principle with a hierarchical structure. Sustainable development works well for finding the balance between various interests within the integrative framework of sustainable development by identifying indispensable priorities and establishing certain kinds of hierarchical structure.<sup>17</sup> In such a structure, integration demands that "ultimate ecological thresholds are respected,"<sup>18</sup> and thus, in contrast to the conventional view, sustainable development as a principle of integration does not give equal importance to all concerns; the priority is given to "protecting fundamental, natural life-supporting systems in principle and in practice."<sup>19</sup>

Throughout the manuscript Voigt seems to consider, to a certain extent, sustainable development capable of functioning independently from other legal principles or techniques.<sup>20</sup> Moreover, she stresses that "[i]f sustainable development is facilitated by interpreting the conflicting provision in a harmonious way, no question of norm priority arises. Where such reading is not possible, the 'sustainability test' could be

---

<sup>16</sup> Voigt, *supra* note 2.

<sup>17</sup> *Ibid.* at 32.

<sup>18</sup> *Ibid.* at 40.

<sup>19</sup> *Ibid.* at 163.

<sup>20</sup> *Ibid.* c 6 and at 263

used to determine norm priority.”<sup>21</sup> Thus, the “value hierarchy approach” introduced by the principle of sustainable development “would enhance the capacity of international law to become a coherent and purposive system to sustain human life, welfare and development, now and in the future.”<sup>22</sup> Therefore, the principle of sustainable development might solve the fragmentation of international law. However, Voigt seems to overlook the harmonious nature of sustainable development when she emphasizes the “value hierarchy approach” under the sustainability test she defines.

Regarding the needs of the principle of sustainable development, Voigt examines potential limitations of treaty interpretation as a conflict-avoidance technique, and she analyses the failure of traditional principles for solving normative conflicts in establishing the priority between rules on international trade and climate change.<sup>23</sup> Whilst she points out some shortcomings of these conventional methods, the analysis of techniques of treaty interpretation does not provide sufficiently convincing arguments. The inspection strongly tends to incline towards the textual approach and falls short of consideration of the elastic architecture of Article 31 of the *Vienna Convention*. In addition, the lack of observation on the principle of effectiveness on the treaty interpretation weakens her observation over evolutionary and teleological interpretation techniques. Effectiveness is a guiding principle for these techniques and alleviates the shortcomings of the treaty interpretation techniques that the author observes. As a reviewer commented, it is questionable if “conflicts between trade and climate law really do exist, which cannot be resolved through adequate treaty interpretation.”<sup>24</sup> As we will examine in the following chapters, the rule on treaty interpretation codified in Article 31 of the *Vienna Convention* has pliable architecture to avoid normative conflicts. Therefore, hierarchical structure may have little room for application.

Although we agree that the concept of sustainable development remedies fragmentation of international law, the current concept is not hierarchical but harmonious, for which treaty interpretation is a more suitable methodology. In the context of sustainable development, we consider normative integration a balancing process in a crucible of treaty interpretation, but not as a hierarchical solution in applying an

---

<sup>21</sup> *Ibid.* at 339. Conceptualizing sustainable development with a hierarchical structure, Voigt focuses on where sustainable development is incarnated through prioritizing specific norms, rather than where that is realized in a congruous manner through treaty interpretation. In this sense, sustainability test is a substantial legal element of sustainable development.

<sup>22</sup> *Ibid.* at 380.

<sup>23</sup> *Ibid.* c 12, 13.

<sup>24</sup> Franz Xaver Perrez, Book Review of *Sustainable Development as a Principle of International Law: Resolving Conflicts Between Climate Measures and WTO Law* by Christina Voigt, (2009) 18 (3) R.E.C.I.E.L. 352 at 356.

autonomous principle. This viewpoint is advantageous because it remains inclusive of relevant legal rules and factors, while a hierarchical structure is exclusive of inferior law and other factors.

Over and above, as a fundamental question, why must international law consider sustainable development? As Judge Weeramantry elaborates in his separate opinion in *Gab ikovo-Nagymaros Project*, we may find the root of sustainable development in the social practice in ancient civilizations as “environmental wisdom.”<sup>25</sup> If so, we are likely to think about sustainable development in our social life as well.<sup>26</sup> Sustainable development was introduced into the international sphere as early as the 1970s. After the right of development was adopted, the idea that development can only be pursued in harmony with environmental protection was widely accepted.<sup>27</sup> At that time, the decolonized developing countries aimed at economic independence and claimed their permanent sovereignty over natural resources on which they attempted to justify abrogation of concession agreements and nationalization of exploitation of natural resources.<sup>28</sup> The New International Economic Order (NIEO) proposed in 1974 tried to expand the concept of sovereignty over natural resources to cover economic activities and sought resolution of economic disparity between the developing and developed countries.<sup>29</sup> Nonetheless, the rise of neo-liberalism in the global economy interrupted the

---

<sup>25</sup> *Gab ikovo-Nagymaros Project*, *supra* note 1 at 97-110 (Separate Opinion of Vice-President Weeramantry).

<sup>26</sup> See Voigt, *supra* note 2 at 3-5.

<sup>27</sup> *Ibid.* at 92.

<sup>28</sup> *Rights to Exploit Freely Natural Wealth and Resources*, GA Res. 626 (VII), UNGAOR, 7th Sess., Supp. No. 20, UN Doc. A/2361 (1952); *Permanent Sovereignty Over Natural Resources*, GA Res. 1803, UNGAOR, 17th Sess., Supp. No. 17, UN Doc. A/5217 (1962); *Permanent Sovereignty Over Natural Resources*, GA Res. 2158 (XXI), UNGAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966); *Permanent Sovereignty Over Natural Resources*, GA Res. 3171 (XXVIII), UNGAOR, 28th Sess., Supp. No. 30, UN Doc. A/9030 (1973). Moreover, sovereignty over natural resources incorporated into the International Covenants on human rights as collective human rights. *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Articles 1(2) and 25; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Articles 1(2) and 47. In this regard, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 2008) at 340; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) at 119.

<sup>29</sup> *Declaration on the Establishment of a New International Economic Order*, GA Res. 3201 (S-VI), UNGAOR, 6th Special Sess., Supp. No. 1, UN Doc. A/9559 (1974), para. 4(e); *Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX), UNGAOR, 29th Sess., Supp. No. 13, UN Doc. A/9631 (1974), Article 2(1).

process of dissolution of the North-South problem.<sup>30</sup> At this stage, as Article 30 of the Charter of Economic Rights and Duties of States stipulates, environmental consideration initiated by the developed countries was viewed as having the potential to unfavourably affect developmental policies of the developing countries.<sup>31</sup>

However, globalization following the end of the cold war and the establishment of WTO radically changed the situation. After the failure of NIEO, the conflict between environmental concerns and developmental demands within the concept of permanent sovereignty over natural resources was treated under the concept of sustainable development, which evolved from the Principles 11-14 of the Stockholm Declaration in 1972.<sup>32</sup> In addition to that political and structural change, the widespread awareness of the danger posed to humans by the destruction of the natural environment formed a “common concern of humankind”<sup>33</sup> and enabled both developed and developing countries to accept an integrated concept of environmental concerns in the process of making developmental policy. Thus, through a political wrangle between industrial development and environment, in the context of the North-South problem, sustainable development seems to have occupied the position of replacing the claim of NIEO, making environmental protection a genuine public policy of the world, acceptable by both developing and developed countries.

Turning to sustainable development as legal consideration for harmonizing legal rules, we can find further rationale in the international legal context. Technological and scientific developments have enhanced human activities beyond the limits of states’ borders; such increased cross-border activities have deepened interdependence between states. Thus, the density and complexity of inter-correlations between states have

---

<sup>30</sup> See text accompanying note 61.

<sup>31</sup> Article 30 of the Charter of Economic Rights and Duties of States reads as follows:  
The protection, preservation and enhancement of the environment for the present and future generations is responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. *The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries.* All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.

*Ibid.* at 261 [emphasis added].

<sup>32</sup> *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/Conf.48/14/Rev.1 (1973); 11 I.L.M. 1416 [*Stockholm Declaration*].

<sup>33</sup> Frank Biermann, “Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law” (1996) 34 *Archiv des Völkerrechts* 426 at 426-481.

advanced the formation of the common interest and concern among the international and the global communities. For achieving the shared interest and concern, modern international law has expanded in scope to cover new fields of law. To respond to new technical, scientific, and functional requests, “specialized and (relatively) autonomous” sub-systems and institutions have emerged.<sup>34</sup>

Emergence of such new fields of law and the related legal institutions indicates, on one hand, that international law has expanded, horizontally and vertically, and has been structurally changed, although its basic character remains a decentralized legal system.<sup>35</sup> The basic nature of international law can be perceived as a law of coordination, but not of subordination.<sup>36</sup> Contemporary international law of cooperation is shaped over and above this traditional international law of coexistence.<sup>37</sup> On the other hand, “specialized and (relatively) autonomous” rule-complexes tend to derogate from general international law and lack coordination between these sub-systems.<sup>38</sup> Regarding changing the structure of international law, Weeramantry observed that environmental damage beyond national boundaries formed environmental pressures towards shaping community concerns and promoting a structural shift in international law from individualism to socially oriented international law.<sup>39</sup>

One of the remarkable features of contemporary international law is that global issues—such as environmental protection, human rights, the liberalization of trade, etc.—are regulated by different multilateral legal frameworks.<sup>40</sup> Contemporary

---

<sup>34</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at 11, para. 8 and at 14, paras. 14 and 15.

<sup>35</sup> Pauwelyn, *supra* note 7 at 95.

<sup>36</sup> Charles Rousseau, “De la Compatibilité des norms juridiques contradictoires dans l’ordre international” (1932) 39 R.G.D.I.P. 133, 150-151.

<sup>37</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964), esp. pp. 60-71. On the structural change of contemporary international law, see also George Schwarzenberger, *The Frontiers of International Law* (London: Stevens, 1962); René-Jean Dupuy, *La Communauté internationale entre le mythe et l’histoire* (Paris: Economica, 1986) at 35-99; *idem*, “Communauté internationale et disparités de développement” (1979-IV) 165 Rec. des Cours 9 at 45-114; Georges Abi-Saab, “Cours general de droit international public” (1987-VII) 207 Rec. des Cours 9; Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law” (1999) 281 Rec. des Cours 9.

<sup>38</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at 11, para. 8.

<sup>39</sup> H. E. Judge C. G. Weeramantry, “Achieving Sustainable Justice Through International Law” in Marie-Claire Cordonier Segger & C. G. Weeramantry, ed., *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff Publishers, 2005) 15 at 27.

<sup>40</sup> Simma illustrates the changing structure of international law as the structural shifting

multilateral treaties establishing the legal frameworks containing rules and principles, aim to regulate their specific matters efficiently and to establish highly specialized, institutionalized, and relatively autonomous sub-systems to ensure sufficient regulation. These sub-systems are often called self-contained regimes, especially when the sub-systems entail special legal consequences concerning the violation of the treaty, which derogate from the law of the state responsibility.<sup>41</sup> Thus, an ironic situation develops in which globalization promotes the unification of the international community and the relatively autonomous and specialized multilateral conventions as the vehicle of the international community supports the compartmentalization of international law.<sup>42</sup>

This diversified and fragmented legal phenomenon endangers the unity of the international legal system as a whole and creates the risk of conflict and incompatibility between rules and principles belonging to different fields of international law, and thus, it is conceived as fragmentation of international law. At this point, it should be noted that traditional normative conflict-solving principles are not necessarily providing adequate solutions because these techniques are just a guideline and the modern subject matters are often regulated by rule-complexes that cannot be simply classified as special or general, earlier or later.<sup>43</sup> Moreover, in a broader sense, policy-conflicts where two different rules have different directions, legal backgrounds, and objectives, e.g. trade law and environmental law, may also constitute a phenomenon of international law

---

from bilateralism to community interest, and considers multilateral treaties as a vehicle of community interest. Bruno Simma, "From Bilateralism to Community Interest in International Law", (1994-VI) 250 *Rec. des Cours* 217. Similarly, Fassbender supports the idea that constitutionalization of international law explains the feature of contemporary international law as "a global legal order." Bardo Fassbender, *The United Nations Charter as the Constitution in the International Community* (Leiden: Martinus Nijhoff Publishers, 2009). Also, Boyle & Chinkin describe that the significance of multilateral treaties in contemporary international law can be understood only in the broad context of evolving interplay of law-making instruments. Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007).

<sup>41</sup> On the notion of self-contained regimes, *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] I.C.J. Rep. 3 at 41, para. 86; Bruno Simma, "Self-Contained Regimes" (1985) 16 *Netherlands Yearbook of International Law* 111; Anja Lindroos & Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO" (2005) 16 *E.J.I.L.* 857; Math Noortmann, *Enforcing International Law: From Self-help to Self-contained Regimes* (Aldershot, UK: Ashgate Publishing Ltd., 2005); Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law" (2006) 17 *E.J.I.L.* 483.

<sup>42</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5, at 10-15, paras. 5-16.

<sup>43</sup> *Ibid.* at 20-25 para.27-36.

fragmentation.<sup>44</sup> In the latter case, traditional conflict-solving techniques would not lead to any viable solution.

The essence of the problem of international law fragmentation consists in tensions and conflicts between different international legal rules.<sup>45</sup> However, the peculiarity of the contemporary matter is not just a question of a choice between conflicting alternatives, but rather, an issue of harmonizing different normative values. For the choice between conflicting international legal rules, a set of well-known principles can contribute to solving the normative conflict within hierarchical structures: *lex posterior derogat legi priori*,<sup>46</sup> *lex specialis derogat legi generali*,<sup>47</sup> and *jus cogens*.<sup>48</sup> While these conflict-solving principles prioritize conflicting rules, the current

---

<sup>44</sup> *Ibid.* at 18-19 paras.23-24.

<sup>45</sup> *Ibid.* at 10-17, paras.5-20.

<sup>46</sup> Article 30 (3) and (4) of the VCLT provide the *lex posterior* rule.

Article 30 (3): When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Article 30 (4): When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

<sup>47</sup> This principle is not incorporated into the *Vienna Convention*, although it is generally recognized as a tool solving conflicts between treaties. See Gerhard Hafner, “Comment: The Vienna Convention on the Law of Treaties and its Contribution to Peace” in Georg Nolte, ed., *Peach through International Law: The Role of the International Law Commission* (Heidelberg; Springer, 2009) 111 at 113. International jurisprudence also supports the application of this principle to international law. E.g. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] *I.C.J. Rep.* 14 at 137, para. 274. The reason why this principle did not codified in the *Vienna Convention* was that this principle was considered as a guideline for determining the meaning of a treaty term having no obligatory character. Sir Humphrey Waldock, Special Rapporteur, Third Report of the Law of Treaties, A/CN.4/167 and Add.1-3 (1964), in *Yearbook of International Law Commission 1964*, vol.2 (New York: UN, 1965), commentary to Articles 70-72, at 54, paras. (5)-(6) (A/CN.4/SER.A/1964/ADD.1). [Waldock III].

<sup>48</sup> The *Vienna Convention* provides the legal effects of the peremptory norms (*jus cogens*) upon treaties in Articles 53 and 64. Recognition of the appearance of *jus cogens* in international law constitutes a limitation of sovereign freedom of contract. (Michel Virally, “Réflexions sur le «jus cogens»” (1966) 12 *A.F.D.I.* 5 at 9-11.) While there are strong supports for acknowledging the existence of rules of *jus cogens* under some fundamental values for international community as a whole, (see e.g., Sir Gerald Fitzmaurice, “The General Principles of International Law: Considered from the Standpoint of the Rule of Law” (1957-II) 92 *Rec. des Cours* 1 at 125-126; Alfred

international legal interests are closely related to our quotidian society; thus, none can be eliminated from the decision factors. Contrary to conventional conflict-solving techniques, treaty interpretation is a “conflict-avoidance technique” that enables interpreters to read treaty texts harmoniously with other international legal rules.<sup>49</sup> Due to this characteristic, treaty interpretation can be a proper method for achieving the objectives of sustainable development; it is an enunciation of the demand of reconciliation between economic development, environmental protection, and social development.

Several principles of international law underpin the importation of sustainable development into the international legal process. As Chapter 2 will show, sustainable development in international law has been shaped through international documents that are not legally binding. Such cumulative international manifestos present the widespread acceptance of sustainable development as a goal of the international community, and they may accelerate shaping a common concern of the international community and could be forming *opinio juris* as the subjective element for establishing customary international law.<sup>50</sup> In this context, sustainable development has been incorporated into provisions and preambles of multilateral conventions as the objective.<sup>51</sup> The importance of preamble in treaty interpretation is specified in Article 31 (2) of the *Vienna*

---

Verdross, “Jus Dispositivum and Jus Cogens in International Law” (1966) 60 A.J.I.L. 55.) some authorities expressed skeptic views from the strict positivist view of conventional functions and the structural weakness of international law. (Georg Schwarzenberger, “International *Jus Cogens*” (1965) 43 Tex. L. Rev. 455; Prosper Weil, “Towards Relative Normativity in International Law” (1983) 77 A.J.I.L. 413.) For the counter argument against these skepticism, see Ulrich Fastenrath, “Relative Normativity in International Law” (1993) 4 E.J.I.L. 305; W. Riphagen, “From Soft Law to Ius Cogens and Back” (1987) 17 V.U.W.L.R 81.

<sup>49</sup> Pauwelyn, *supra* note 7 at 244ff.

<sup>50</sup> Marie-Claire Cordonier Segger, “Sustainable Development in International Law” in Hans Christian Bugge & Christina Voigt, eds., *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008) 86 at 117ff.

<sup>51</sup> E.g. *United Nations Framework Convention on Climate Change*, 14 June 1992, 1771 U.N.T.S. 107, art. 3 (4) (5), 31 I.L.M. 849; *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 11 September 2003, 2226 U.N.T.S. 208, preamble, 39 I.L.M. 1027 [*Cartagena Protocol*]; *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154; preamble, 33 I.L.M. 1144; *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No.2, preamble, 32 I.L.M. 289; *North American Agreement on Environmental Cooperation*, 14 September 1993, Can.T.S. 1994 No.3, preamble and art. 1 (b), 32 I.L.M. 1480. For more examples, Nico Schrijver, “The Evolution of Sustainable Development in International Law: Inception, Meaning and Status” (2007) 329 Rec. des Cours 217 at 288-317; Cordonier Segger & Khalfan, *supra* note2 at 95, fn. 2.

*Convention* as being comprised in the context of a treaty. Thus, insertion of sustainable development into treaty preambles as explicit consent of states brought it into the international legal process at first hand. Moreover, accumulation of practice in domestic law and policy may support the idea that sustainable development is a general principle of law.<sup>52</sup>

While sustainable development is universally accepted in most of the domestic legal systems, and in the international legal system as well, these two legal systems have completely different structures and natures. The latter is characterized by decentralized and consensual nature. Accommodation of overlapping and conflicting legal rules in a municipal legal system can be reached through a centralized and highly institutionalized structure with relatively effective enforcement. However, international communities lack such a compulsory and integrated legal system at the universal level and should have a different process to resolve that kind of issue. The objectives of sustainable development reflect the structural problem of the modern international law and treaty interpretation as a mean of resolving the issue that indicates the particularity of the process of reaching sustainable development in international law as a compartmentalized legal system.

---

<sup>52</sup> Although it seems that Voigt tries to combine general principles of *law* and general principles of *international law* (Voigt, *supra* note 2 at 145ff.), two categories of legal principles are belonging to different legal systems, i.e. domestic law and international law. As eminent scholars stated, significance of the general principles of *law* is to complement and to reinforce international legal reasoning in a given case. In this regard, see Dissenting Opinion of Judge Anzilotti, *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Germany v. Poland)* (1927), P.C.I.J. (Ser. A) No. 13 at 27; Separate Opinion of Judge Hudson, *Diversion of Water from the Meuse (Netherland v. Belgium)* (1937), P.C.I.J. (Ser. A/B) No. 70 at 76-77; Separate Opinion of Judge Sir Arnold McNair, *International Status of South-West Africa Case*, Advisory Opinion, [1950] I.C.J. Rep. 128 at 148.

## Chapter 2 Sustainable Development in International Law

### 1. Introduction

The evolution of the social demand for balancing the delicate equilibrium among environmental protection, economic development, and social development has been transferred into international law in the name of sustainable development, which is outlined in this chapter. Reviewing the evolution of sustainable development in the international community identifies the normative status and the functions of sustainable development in international law.

The current concept is brought into the international community based on the awareness that the rapid growth of human activities on a massive scale had led to a threat to and destruction of the natural environment which is essential for human beings to live. The concept of sustainable development has progressed through the adoption of international documents, mainly, the *Stockholm Declaration* (1972),<sup>53</sup> the *Rio Declaration* (1992),<sup>54</sup> and the *Johannesburg Declaration* (2002).<sup>55</sup> In addition to these declarations, the Rio+20 adopted the Outcome of the Conference “The Future We Want” (2012).<sup>56</sup> Although no direct definition of sustainable development exists, these international documents mention the constituent elements of sustainable development—policy integration, precautionary approach, inter- and intra-generational equity, sustainable use of natural resources, and public participation, among others. Moreover, the evolution of sustainable development expanded its boundaries from environmental protection to social issues (e.g. human rights, poverty, and health.)

Judge Weeramantry traced the historical root of the idea of sustainable development in his separate opinion and found its acknowledgement in several ancient

---

<sup>53</sup> *Stockholm Declaration*, *supra* note 32 at 3-5.

<sup>54</sup> *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev. 1 (1992) (Vol. 1), Annex I, 3 at 3-8 [*Rio Declaration*]; Annex II, 9 at 9-479 [*Agenda 21*].

<sup>55</sup> *Johannesburg Declaration on Sustainable Development*, Report of the World Summit on Sustainable Development, A/CONF.199/20 (2002) 1 at 1-5 [*Johannesburg Declaration*]; *Plan of Implementation of the World Summit on Sustainable Development*, *ibid.* at 6-72. [*Implementation Plan*] online: United Nations Johannesburg Summit 2002 <[http://www.johannesburgsummit.org/html/documents/summit\\_docs/131302\\_wssd\\_report\\_reissued.pdf](http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf)>.

<sup>56</sup> *Outcome of the Conference: The Future We Want*, the United Nations Conference on Sustainable Development, A/CONF.216/L.1 (2012) 1 online: Rio+20 United Nations Conference on Sustainable Development <<http://www.uncsd2012.org/content/documents/814UNCSD%20REPORT%20final%20revs.pdf>>.

civilizations.<sup>57</sup> He insisted, therefore, that it is “one of the most ancient ideas in the human heritage.”<sup>58</sup> In the contemporary context, the concept of sustainable development is introduced into international law under the premise of harmonizing economic development and environmental protection.

The root of the evolution of the concept of sustainable development can be found in political and theoretical movements regarding developmental issues in international law. The political movement that attempted to solve the gap between south and north countries and to accomplish the substantial equality between these States resulted in a series of United Nations’ resolutions on the permanent sovereignty over natural resources and the establishment of the New International Economic Order (NIEO), putting weight on economic development and establishing economic sovereignty in developing countries.<sup>59</sup> The theory of international law of development contemplated reinforcing the doctrines embodied in the NIEO and substantiating them into international legal rules.<sup>60</sup> However, it has come to a standstill without providing an efficient paradigm on the issue of development. Some authorities analysed the causes of this failure and concluded that the increased demands of trade liberalization hindered the principles to be crystallized as substantive law.<sup>61</sup>

Nevertheless, the basic principle of substantial equality has instilled legal implications to subsequent notions, such as the principle of differential and more favourable treatment, so-called special and differential treatment (S&D) in GATT/WTO law, and the principle of common but differentiated responsibilities (CDR).<sup>62</sup>

---

<sup>57</sup> Separate opinion of Vice-President Weeramantry, *Gab ikovo-Nagymaros Project*, *supra* note 1 at 97-111. See also Cordonier Segger & Khalfan, *supra* note 2 at 15

<sup>58</sup> Separate opinion of Vice-President Weeramantry, *ibid.* at 110.

<sup>59</sup> Maurice Flory, *Droit international du développement* (Paris: Presses universitaires de France, 1977) at 330. On a series of resolutions on the permanent sovereignty over natural resources and the NIEO, see *supra* notes 28 and 29.

<sup>60</sup> On international law of development, see e.g. Michel Virally, “Vers un droit international du développement” (1965) 11 A.F.D.I. 3; Maurice Flory, “Souveraineté des États et coopération pour le développement” (1974-I) 141 Rec. des Cours 255; Alain Pellet, *Le droit international de développement* (Paris: Presses Universitaires de France, 1987); Guy Feuer & Hervé Cassan, *Droit international du développement* (Paris: Dalloz, 1991).

<sup>61</sup> Peter Slinn, “The International Law of Development: A Millennium Subject of a Relic of the Twentieth Century?” in Konrad Ginther *et al.*, eds., *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday* (New York: Peter Lang Publishing, 1999) 299 at 305; Georges Abi-Saab, “Whither the International Community” (1999) 9 E.J.I.L. 248 at 264-265

<sup>62</sup> Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Alphen aan den Rijn; Kluwer Law International, 2009) at c2. See also Maureen Irish, “Special and

Furthermore, the movements to establish the NIEO combined economic development with human rights and introduced the right to development.<sup>63</sup> Recent progress indicates that a connection between economic development and human rights has promoted the rights to healthy life and other emerging categories of human rights, e.g. the right to water.<sup>64</sup>

The concept of sustainable development has been introduced as a guiding principle for coordinating environmental protection and economic development at its inception. Rio+20 showed that the concept could include alongside other pertinent topics, such as urban planning, education, and food security.<sup>65</sup>

Although sustainable development is a global concern, its implementation is ensured through not only global or international efforts, but also the national governance as a receiver of international public policy.<sup>66</sup> As depicted in Section 4 below, the concept of sustainable development is incorporated into many countries' national laws and strategies; in this sense, the topic treated in this chapter—and throughout the entire manuscript in general—“sustainable development in international law,” is merely one of the phases of this policy. However, it remains important because shaping sustainable development policy in the international sphere could have considerable influence on national policy- and law-making processes.

## **2. Evolution of sustainable development policy in international documents**

### **(a) *Stockholm Declaration***

In instilling several principles of sustainable development into contemporary international law, the *Stockholm Declaration* is one of the leading documents on this topic. Principle 1 of the *Stockholm Declaration* indicates “a solemn responsibility to

---

Differential Treatment, Trade, and Sustainable Development” (Conference Note, at the Law and Development Institute Inaugural Conference at Sydney, Australia, October 2010) online:< [www.lawanddevelopment.net/img/irish.pdf](http://www.lawanddevelopment.net/img/irish.pdf)>.

<sup>63</sup> *Declaration on the right to development*, GA Res. 41/128, Annex 41, UNGAOR, 41<sup>st</sup> Sess., Supp. No. 53, UN Doc. A/41/53 (1986) 186. As a critical view, M. Bedjaoui, “Some Unorthodox Reflections on the “Right to Development,”” in Francis Snyder & Peter Slinn, eds., *International Law of Development: Comparative Perspectives* (Abingdon: Professional Books, 1987) 87.

<sup>64</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29<sup>th</sup> Sess., UN Doc. E/C.12/2002/11 (2002).

<sup>65</sup> See Section 2 (4) of the present chapter below.

<sup>66</sup> See e.g. William M. Lafferty, “The Politics of Sustainable Development: Global Norms for National Implementation” (1996) 5 *Environmental Politics* 185; John C. Dernbach, “Sustainable Development as a Framework for National Governance” (1998) 49 *Case W. Res. L. Rev.* 1.

protect and improve the environment for present and future generations.”<sup>67</sup> This responsibility corresponds to the fundamental right to the environment, which is understood in the broad context of human rights.<sup>68</sup> Principle 13 mentions the duty of States to “adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.”<sup>69</sup> More concisely, Principle 14 defines rational planning as a tool for reconciling economic development and environmental protection.<sup>70</sup> While the *Stockholm Declaration* acknowledges the needs for maintaining compatibility between economic development and environmental protection, it does not use the term sustainable development. The *Stockholm Declaration* also stipulates the importance of further development of international law in the field of environmental protection, while emphasizing the principle of state sovereignty (Principles 21, 22, 24).<sup>71</sup>

Furthermore, the Stockholm Conference adopted the Action Plan for the Human Environment.<sup>72</sup> For the implementation and follow-up of this plan, the United Nations Environmental Program (UNEP) was established based on resolutions adopted by the UN General Assembly.<sup>73</sup> The Stockholm Conference was a driving force to the conclusion of an early series of multilateral environmental agreements (MEAs), such as the Convention on International Trade in Endangered Species (CITES),<sup>74</sup> the Basel Convention,<sup>75</sup> the Ozone Convention,<sup>76</sup> and the Montreal Protocol.<sup>77</sup>

Despite this knowledge of the necessity to “ensure that development is compatible with the need to protect and improve environment”<sup>78</sup> and the significant impetus to subsequent international law-making efforts, divergence of attitudes between

---

<sup>67</sup> *Stockholm Declaration*, *supra* note 32 at 4.

<sup>68</sup> See Patricia W. Birnie *et al.*, *International Law and the Environment*, 3d ed. (Oxford: Oxford University Press, 2009) at 115.

<sup>69</sup> *Stockholm Declaration*, *supra* note 32 at 4.

<sup>70</sup> *Ibid.* at 5.

<sup>71</sup> *Ibid.*

<sup>72</sup> Action Plan for the Human Environment, *ibid.* at 6-28.

<sup>73</sup> *Institutional and financial arrangements for international environmental cooperation*, GA Res. 2997 (XXVII), UNGAOR, 27<sup>th</sup> Sess., Supp. No. 30, UN Doc. A/8370 (1973) 43.

<sup>74</sup> *Convention on International Trade in Endangered Species*, 3 March 1973, 993 U.N.T.S. 243.

<sup>75</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 U.N.T.S. 57.

<sup>76</sup> *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 1513 U.N.T.S. 293.

<sup>77</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 U.N.T.S. 293.

<sup>78</sup> *Stockholm Declaration*, *supra* note 32 at 4. (Principle 13)

groups of States—North and South, West and East—impeded taking the proper steps for achieving sustainable development. The North-South disparity emerged after decolonization made developing countries to focus on their economic independence and development, which prompted them to take a negative or sceptical attitude toward the *Stockholm Declaration*. Also, at that time, Communist States denied the existence of environmental harm by their planned economy.<sup>79</sup>

Responding to such divergent opinions, in 1983, the UN General Assembly established the World Commission on the Environment and Development (WCED) and took the initiative of solving the economic discrepancies between developing and developed countries.<sup>80</sup> In this political effort, the UN General Assembly adopted a resolution and requested the WCED to consider the notion of “sustainable development.”<sup>81</sup> In 1987, the WCED delivered the Report and Annex, *Our Common Future*, to the UN General Assembly.<sup>82</sup>

The concept of sustainable development has been rapidly recognized as a public policy for the international community since the report of the World Commission on Environment and Development was released in 1987.<sup>83</sup> The Annex, *Our Common Future*, describes the concept of sustainable development as follows:

Humanity has the ability to make development sustainable to ensure that it meets *the needs of the present without compromising the ability of future generations to meet their own needs*. The concept of sustainable development does imply limits—not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities.<sup>84</sup>

---

<sup>79</sup> Tomoaki Nishimura, “The Present Stage of the Concept of “Sustainable Development” on Modern International Law: Current Situations and Problems of International Environmental Law as Seen Through Johannesburg Summit” (*in Japanese*) (2004) 202 *Nagoya Journal of Law and Politics* 201. On divergence of developing and developed countries regarding the relationship between economic development and environmental protection in the process of the Stockholm Declaration, L. B. Sohn, “The Stockholm Declaration on the Human Environment” (1973) 14 *Harv. Int’l L.J.* 423, esp. 247.

<sup>80</sup> Cordonier Segger, *supra* note 50 at 94-95.

<sup>81</sup> *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, GA Res. 38/161, UNGAOR, 38<sup>th</sup> Sess., Supp. No. 47, UN Doc. A/38/161 (1983) 131.

<sup>82</sup> *Development and International Economic Co-operation: Environment*, Report of the World Commission on the Environment and Development, UNGAOR, 42<sup>nd</sup> Sess., A/42/427 (1987).

<sup>83</sup> Cordonier Segger & Khalfan, *supra* note 2 at 18; Cordonier Segger, *supra* note 53 at 95.

<sup>84</sup> *Development and International Economic Co-operation: Environment*, *supra* note 82

The definition provided in *Our Common Future* emphasizes one aspect of sustainable development—inter-generational equity. Also, it acknowledges the predictable technological, social, and biological limits of sustainable development. This definition is also accepted by the UN General Assembly. In resolution 42/187, the General Assembly states:

Believing that *sustainable development*, which implies meeting the needs of the present without compromising the ability of future generations to meet their own needs, *should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises...*<sup>85</sup>

Thus, the UN General Assembly considers the concept of sustainable development “a central guiding principle.”

**(b) *Rio Declaration***

The *Rio Declaration*, an epoch-making document, provided a comprehensive picture of sustainable development in 1992. The *Rio Declaration* emphasizes that sustainable development reconciles the problem between economic development and environmental protection. Principle 4 stipulates that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>86</sup> Moreover, the *Rio Declaration* presents an inclusive list of the contents of sustainable development. This list includes both basic substantial and procedural components.

Principle 2 stipulates the sovereign right of States to exploit their own resources and the responsibility not to cause damage to the environment of other States. Principle 3 embodies the notion of inter-generational equity. Principle 5 provides for the eradication of poverty. Principle 7 describes common but differentiated responsibilities. Principle 10 refers to public participation. Principle 12 mentions trade and environment relations. Principle 15 states the precautionary approach. Principle 16 lays down the polluter-pays principle, and Principle 17 sets out environmental impact assessments.<sup>87</sup>

Principle 27 refers to “the further development of international law in the field of sustainable development.”<sup>88</sup> Compared to the *Stockholm Declaration*, which remains

---

at 24, para. 27 [emphasis added].

<sup>85</sup> *Report of the World Commission on Environment and Development*, GA Res. 42/187, UNGAOR, 42<sup>nd</sup> Sess., Supp. No. 49 (Vol. 1), UN Doc. A/42/49 (1987) 154 [emphasis added].

<sup>86</sup> *Rio Declaration*, *supra* note 54 at 4.

<sup>87</sup> *Ibid.* at 3-6.

<sup>88</sup> *Ibid.* at 8.

within the traditional legal framework of state sovereignty and environmental protection (Principles 21, 22, 24), the *Rio Declaration* suggests the further development of international law.<sup>89</sup> The *Rio Declaration* emphasizes the need of integration between economic development and environmental protection (Principle 4) and acknowledges the interdependence of peace, development, and environmental protection (Principle 25). These principles indicate the new direction for the development of international law.<sup>90</sup> Chapter 39 of *Agenda 21* also stressed the need for further development of international law on sustainable development.<sup>91</sup> Moreover, in accordance with Chapter 38, the Commission on Sustainable Development was established as a follow-up to the Rio Conference by the resolutions of the UN Economic and Social Council and the General Assembly.<sup>92</sup>

One remarkable outcome of the Rio Conference was to draw a comprehensive picture of the concept of sustainable development and to form a legal framework for sustainable development in international law. Furthermore, the Rio Conference led to the conclusion of a series of MEAs, such as the United Nations Framework Convention on Climate Change<sup>93</sup> and the Convention on Biological Diversity.<sup>94</sup> Many of these MEAs, which subsequently adopted, held sustainable development as a basic philosophy of these conventions.<sup>95</sup> Thus, sustainable development matured to possess a legal status in treaty law.<sup>96</sup>

---

<sup>89</sup> Philippe Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in Winfried Lang, ed., *Sustainable Development and International Law* (London: Graham & Trotman/ Martinus Nijhoff, 1995) 53 at 57.

<sup>90</sup> *Idem*, “International Law in the Field of Sustainable Development” (1994) 65 *Brit. Y.B. Int’l L.* 303 at 338-339.

<sup>91</sup> *Agenda 21*, *supra* note 54 at 469-472, paras. 39.1-39.10

<sup>92</sup> *Ibid.* at 459-460, paras. 38.11-38.14. *Establishment of the Commission on Sustainable Development*, ESC Dec. 1993/207, UNESCOR, 1993, Supp. No. 1, UN Doc. E/1993/93, 94; *Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development*, GA Res. 47/191, UNGAOR, Supp. No. 49, U.N. Doc A/47/49 (1992) 141.

<sup>93</sup> *United Nations Framework Convention on Climate Change*, *supra* note 51.

<sup>94</sup> *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 [*Convention on Biological Diversity*].

<sup>95</sup> E.g. *Cartagena Protocol*, *supra* note 51; *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 14 October 1994, 1954 U.N.T.S. 3, 33 I.L.M. 1328; *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 U.N.T.S. 337.

<sup>96</sup> For more details see Section 4 of the present chapter below.

(c) *Johannesburg Declaration*

After the Rio Conference, the UN and other international forums made substantial progress toward the achievement of sustainable development.<sup>97</sup> Nevertheless, yet again, political and economic divergences significantly disrupted this effective action.<sup>98</sup> Indeed, the dissolution of the Soviet Union, the political shift in Eastern Europe, and the globalization of world trade broadened the gap between the rich and the poor.<sup>99</sup>

Reflecting such social and political background, the purpose of the Johannesburg Conference was to review the ten years subsequent to the Rio Conference.<sup>100</sup> The major outcomes of the Johannesburg Conference are the *Johannesburg Declaration* and the *Plan of Implementation*.<sup>101</sup> The latter is more important because it reflects an international political agreement.<sup>102</sup> The emergent topics in sustainable development, such as water, sanitation, energy, health, agriculture, and biodiversity, received special attention during the Conference sessions.<sup>103</sup> The *Plan of Implementation* covers poverty eradication; consumption and production; natural resources; social responsibility of enterprises; health; small island developing states; Africa; and regional initiatives.<sup>104</sup> On one hand, by covering these broad topics, the Conference expanded the boundaries of sustainable development and integrated social matters into sustainable development.<sup>105</sup> On the other hand, the Conference was criticised for losing its focus on sustainable development because of its haphazard topic expansion.<sup>106</sup>

---

<sup>97</sup> See e.g., Cordonier Segger, *supra* note 50 at 103-104.

<sup>98</sup> *Overall progress achieved since the United Nations Conference on Environment and Development, Report of the Secretary-General, Addendum, International legal instruments and mechanisms (Chapter 39 of Agenda 21)*, E/CN.17/1997/2/Add.29 (1997) 1 at 9-11.

<sup>99</sup> United Nations Development Programme, *Human Development Report 1999* (Oxford: Oxford University Press, 1999) at 3.

<sup>100</sup> *Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development*, GA Res. 55/199, UN GAOR, 55<sup>th</sup> Sess., UN Doc. A/Res/55/199 (2000), online: UNEP<<http://www.nyo.unep.org/pdfs/55199.pdf>>

<sup>101</sup> *Implementation Plan*, *supra* note 55 at 6-72.

<sup>102</sup> Franz Xaver Perrez, “The World Summit on Sustainable Development Environment and Trade—A potential for Success and/or Failure” (2002) 12:1 R.E.C.I.E.L. 12 at 13.

<sup>103</sup> Cordonier Segger, *supra* note 50 at 108.

<sup>104</sup> *Implementation Plan*, *supra* note 55 at 6-72.

<sup>105</sup> Cordonier Segger, *supra* note 50 at 112-113.

<sup>106</sup> Marc Pallemarts, “International Law and Sustainable Development: Any Progress in Johannesburg?” (2003) 12:1 R.E.C.I.E.L. 1 at 4.

#### (d) Rio+20

The Rio+20 Conference, held in June 2012 in Rio de Janeiro, Brazil, adopted a final outcome: “The Future We Want.”<sup>107</sup> The Conference reaffirmed the three pillars of sustainable development: “economic growth and diversification, social development and environmental protection.”<sup>108</sup> Insertion of the term “diversification” suggests the antithesis between globalization and the future of multipolarized global community. The Conference aimed at introducing “green economy” and underlined seven issues that have priority in the field of sustainable development: decent jobs, energy, sustainable cities, food security, sustainable agriculture, water, oceans, and disaster readiness. “Green economy” policy is considered one of the most important tools for achieving sustainable development, enhancing social and environmental concerns with sustained economic growth.<sup>109</sup> However, launching the “green economy” policy at a national level is carefully toned down by considering various circumstances for each country, especially developing countries. Therefore, the policy does not provide a set of legal rules but options in the process of policy-making. Moreover, it seems that the recent global economic recession and financial crises diminished enthusiasm for establishing an effective framework for sustainable development by many governments. Thus, initiation of the “green economy” policy is agreed upon, but it is nothing more than an accord at this stage, which implies that the North-South gap remains a vital challenge for establishing an effective global public policy.

### 3. Principle of integration as the heart of sustainable development: From policy integration to normative integration

Although sustainable development covers several principles/policies, integration is the core element of the concept.<sup>110</sup> The *Stockholm Declaration* incorporated the principle into Principles 11-14.<sup>111</sup> This principle was elaborated in the *Rio Declaration*, Principle 4, which reads: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>112</sup> The *Johannesburg Declaration* expanded the concerns taken into account and emphasized the interrelationship among economic development, social development, and environmental protection as follows:

---

<sup>107</sup> United Nations Conference on Sustainable Development, *Outcome of the Conference: The Future We Want*, *supra* note 56.

<sup>108</sup> *Ibid.* at 4, para.19.

<sup>109</sup> *Ibid.* at 9-11 paras.56-58.

<sup>110</sup> Voigt, *supra* note 2 at 36.

<sup>111</sup> *Stockholm Declaration*, *supra* note 32 at 4-5.

<sup>112</sup> *Rio Declaration*, *supra* note 54 at 4.

[W]e assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection— at the local, national, regional and global levels.<sup>113</sup>

These declarations focused on the policy-making process and stressed the need for consideration of these different objectives in economic development processes. Several multilateral conventions embodied this policy-oriented integration, and it became a legal obligation for the contracting parties to them.<sup>114</sup>

Although policy integration in decision-making processes is an important aspect of sustainable development that cannot be overlooked, integration also has another phase in the legal process: normative integration. This facet was featured in the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* adopted by the International Law Association.<sup>115</sup> Paragraph 7.1 reads:

The principle of integration reflects the interdependence of social, economic, financial, environmental, and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.

Some commentators defined normative integration broadly as a legal method that provides reconciliation between conflicting international law rules through a conflict-solving hierarchical structure.<sup>116</sup> Strictly speaking, traditional conflict-solving principles, *lex specialis*, *lex posterior*, and *jus cogens*, provide a guideline for the choice of applicable law in a given case, rather than affording harmonious solutions. For gaining balanced consequences, where conflicts arise between different legal rules or policies, systemic integration plays a critical role.<sup>117</sup> As the Study Group on the Fragmentation of

---

<sup>113</sup> *Johannesburg Declaration*, *supra* note 55, at 1 (Principle 5).

<sup>114</sup> *United Nations Framework Convention on Climate Change*, *supra* note 51, arts. 3 (4), 4 (1) (f); *Convention on Biological Diversity*, *supra* note 94, art. 6 (b); *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, *supra* note 95, art. 4 (2) (a), (c); *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, GA Res. 51/299, annex, UNGAOR, 51<sup>st</sup> Sess., Supp. No. 49, UN Doc. A/51/869, art.6, 36 I.L.M. 700.

<sup>115</sup> International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, *supra* note 2 at 7.

<sup>116</sup> Tomer Broude, “Principles of Normative Integration and Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration” (2008) 6 *Loy. U. Chi. Int’l. L. Rev.* 173 at 173; Voigt, *supra* note 2 at c.2.

<sup>117</sup> For systemic integration, *Fragmentation of International Law: Difficulties arising*

International Law emphasized, systemic integration is quite useful when normative conflicts occur between different fields, such as trade and environmental protection. Conflicts between legal rules typically arise when they regulate the same subject matter in a strict sense. In this case, conventional conflict-solving principles might offer a solution or, at least, provide a useful guideline. However, contemporary international law has been structurally complicated and has expanded its scope; hence, it has been governing global concerns, often with the adoption of the framework conventions and bilateral or regional agreements. In such legal structures, the principles of *lex specialis* and *lex posterior* may not exclude the application of general multilateral treaties, even if these conventions are concluded prior to the relevant bilateral or regional agreements. Rather, such general multilateral treaties provide the background and guidelines for these agreements.<sup>118</sup> Moreover, treaties are dealing with various subject matters that have equally important values for our community and that have diverse policies. To such a “policy-conflict,” application of traditional conflict-solving principles may even lead to unreasonable results; harmonious solution is required for avoiding such a normative dilemma, and systemic integration enables the balance of conflicting rules belonging to different subject matters. Sustainable development encloses this integration process within the relevant fields.

#### **4. Legal status of the concept of sustainable development**

Regarding the development of international law on sustainable development, some of the policies covered by the umbrella of sustainable development were established previously as legal rules through stipulations in treaties. The principle of integration discussed above is embodied as a general obligation in several environmental multilateral conventions. In those provisions, contracting parties are obliged to integrate environmental concerns into the process of relevant policy-making<sup>119</sup> The policy of common but differentiated responsibilities is widely accepted in environmental multilateral treaties.<sup>120</sup> The basic idea of this policy has its roots in an ideal of realizing

---

*from the Diversification and Expansion of International Law, supra* note 5 at 1ff; McLachlan, *supra* note 12 at 279ff.

<sup>118</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, ibid.* at para.31.

<sup>119</sup> See text accompanying note 114.

<sup>120</sup> On the principle of common but differentiated responsibilities, see general *supra* note 62; Yoshiro Matsui “The Principle of Common but Differentiated Responsibilities” in Nico Schrijver & Friedl Weiss, eds., *International Law and Sustainable Development: Principles and Practice* (Leiden: Martinus Nijhoff Publishers, 2004) 73; Christopher D. Stone, “Common but Differentiated Responsibilities in International Law” (2004) 98 A.J.I.L. 276; Duncan French, “Developing States and International Environmental Law:

substantial equality between developing and developed countries.<sup>121</sup> Undertaking commitments for common concerns with consideration for the different capabilities of the parties to a treaty is at the heart of the concept. Broadly, financial assistance mechanisms established in environmental conventions for developing countries can be considered a form of application of this approach. This approach is adopted in multilateral conventions more generally, e.g. Article 3(1)(2) of UNFCCC, Article 2 of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>122</sup> Articles 2(1)(a) and 4(1)(2) of the Kyoto Protocol,<sup>123</sup> etc. Also, the Biodiversity Convention contains some obligations with the term “as far as possible and as appropriate” (Articles 7-11) and considers different situations and capacities of the parties to the Convention (Preamble). Article 6 stipulates general obligations that are undertaken by each contracting party “in accordance with its particular conditions and capabilities.” Furthermore, it mentions certain special support for developing countries in making allowance for their particular needs and circumstances (Articles 12, 16-21).

The precautionary approach<sup>124</sup> is also adopted in several multilateral agreements; Judge Trindade, in his separate opinion, quoted some examples of preambles and provisions setting out the precautionary principle in a broader sense, which combines precaution and prevention.<sup>125</sup> Although the policies discussed above are not a comprehensive list, it can be said that some sustainable development policies have been already crystallized as legal rules in treaty law.<sup>126</sup>

---

The Importance of Differentiated Responsibilities” (2000) 49 I.C.L.Q 35; Rajamani Lavanya, *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006); Philippe Cullet, *Differential Treatment in International Environmental Law* (Aldershot: Ashgate Publishing, 2003).

<sup>121</sup> Cordonier Segger & Khalfan, *supra* note 2 at 136.

<sup>122</sup> *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 U.N.T.S. 120.

<sup>123</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148.

<sup>124</sup> On precautionary approach see generally Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002); Marie-Claire Cordonier Segger & Markus W. Gehring “Precaution, Health and the World Trade Organization: Moving Toward Sustainable Development” (2003-2004) 29 Queen’s L.J. 133; Joakim Zander, *Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge: Cambridge University Press, 2010).

<sup>125</sup> *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 1 at 26-27, paras. 93-96 (Separate Opinion of Judge Cañado Trindade), online: International Court of Justice <<http://www.icj-cij.org/docket/files/135/15885.pdf>>.

<sup>126</sup> For other instances, see Cordonier Segger & Khalfan, *supra* note 2 at 95-171; Rajendra Ramlogan, *Sustainable Development: Towards a Judicial Interpretation* (Leiden: Martinus Nijhoff Publisher, 2011).

On the other hand, controversies have arisen over whether some of these principles of sustainable development have been formed as customary international law. For instance, in the *EC Measures Concerning Meat and Meat Products (Hormones)*, the parties disputed whether the precautionary approach had been established as customary international law;<sup>127</sup> the European Communities (EC) tried to justify its ban on the import of meats and meat products, which used growth promotion hormones, under the precautionary principle. The EC argued the status of the precautionary principle as part of customary international law, and their ban was not excluded under Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>128</sup> The United States and Canada denied that the precautionary principle was part of customary international law. The Appellate Body did not take a clear position on the matter of the legal status of the precautionary principle in customary international law, stating “[w]hether it has been widely accepted by Members as a principle of general or customary international law appears less than clear.”<sup>129</sup> The same position was taken in the case of *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*.<sup>130</sup> This implies that the Panel and the Appellate Body are sceptical that the precautionary principle is part of customary international law.

Apart from the legal status of these specific policies related to sustainable development, several attempts have been made to establish the juridical status of sustainable development. Judge Weeramantry considered sustainable development a legal principle in *Gab ikovo-Nagymaros Project*, while the majority of the Court deemed it a social demand for reconciling economic development and environmental protection. In another occasion, he insisted that sustainable development be crystallized into customary international law in order to cope with future problems of an unexpected, urgent, and unprecedented nature, which current treaty law might not solve appropriately.<sup>131</sup> Also, Voigt asserted that sustainable development is a general principle

---

<sup>127</sup> *European Communities—Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States of America and Canada)* (1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report), online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS48%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS48%FCAB%FCR%2A+and+not+RW%2A%29&language=1)> [*EC—Hormones*].

<sup>128</sup> Article 5.7 of the SPS Agreement is quoted in Sands, *supra* note 2 at 40 n. 5.

<sup>129</sup> *EC—Hormones*, *supra* note 127 at para. 123.

<sup>130</sup> *European Communities—Measures Affecting the Approval and Marketing of Biotech Products (Complaint by the United States of America, Canada, Argentina)* (2003), WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R at para. 7.88 (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm#results](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results)> [*EC—Biotech*].

<sup>131</sup> Weeramantry, *supra* note 39 at 21.

of *international law*, although she seemed to merge it with the general principle of *law*; the two are distinctive concepts in the present author's opinion. According to Professor Lowe, the concept of sustainable development is not a legal principle but is a kind of meta-principle that has an interstitial normativity. He strongly opposes Judge Weeramantry's position in *Gab ikovo-Nagymaros Project* that the concept of sustainable development is a principle necessarily contained in the law.<sup>132</sup> Although Lowe acknowledges that the idea of the integration between economic development and environmental protection is the core of sustainable development, he did not consider this an international obligation by which states are bound.<sup>133</sup> Finally, Lowe defines the normative status of sustainable development as

a meta-principle, acting upon other legal rules and principles—a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.<sup>134</sup>

Such an interstitial normativity works as a modifier, such as the “balancing interests” test between primary norms, which judges may use.<sup>135</sup> The features of sustainable development as an interstitial norm are that (1) it is a legal concept, (2) it works between primary norms conflicting or overlapping each other, and (3) it does not depend upon the state practice or *opinio juris*.<sup>136</sup> Thus, States as primary interpreters in the decentralized international legal system would be able to use the concept of sustainable development in interpreting existing law in the processes of decision-making and policy-making within their jurisdictions by their own governmental agencies and during negotiations with other States.<sup>137</sup>

Sustainable development is integrated into domestic laws in numerous countries worldwide. Does this mean it is a general principle of law in the sense of Article 38 (1)(c) of the Statute of the International Court of Justice, referred to as “recognized by civilized nations”?<sup>138</sup> Instead of enumerating a comprehensive list of national laws and strategies in different countries, the present author intends to introduce the Japanese laws on sustainable development, which have had few occasions to be discussed; doing so avoids possible overlaps with previously published distinguished works.<sup>139</sup>

---

<sup>132</sup> Lowe, *supra* note 14 at 22

<sup>133</sup> *Ibid.* at 23-30

<sup>134</sup> *Ibid.* at 31 [footnote omitted].

<sup>135</sup> *Ibid.* at 33. But see also *ibid.* n. 18.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.* at 35.

<sup>138</sup> *Statute of the International Court of Justice*, 26 June 1945, 33 U.N.T.S. 993.

<sup>139</sup> See generally Darren A. Swanson *et al.*, *National Strategies for Sustainable Development: Challenges, Approaches and Innovations in Strategic and Co-ordinated*

Subsequent to the Rio Conference in 1992, the Japanese government established a systematic legal structure on environmental protection for *Kankyo Kihon H* (*The Basic Environment Law*) (1993)<sup>140</sup> [hereinafter KKH]. KKH provides a legal framework for environmental protection in Japan, and sustainable development is placed as an aim of it. The purpose of KKH is to “promote policies for environmental conservation to ensure healthy and cultured living for both the present and future generations of the nation as well as to contribute to the welfare of mankind” (Art. 1). Sustainable development is one of the three principles KKH stipulates for preserving a balanced progress in the society. It is necessary to: (1) enable the present and future generations of human beings to enjoy the blessings of a healthy and productive environment (Art. 3); (2) create a society ensuring sustainable development while reducing environmental load, which has adverse effects on the environment generated by human activities (Art. 4); and (3) promote the international cooperation for global environmental conservation (Art. 5). KKH specifies the stakeholders and their duties, whereas the Government’s responsibility is to shape and implement environmental policies in accordance with the three principles of this law (Art. 6). Local governments are in charge of formulating and implementing environmental policies along with national policies (Art. 7). Business entities are responsible to take necessary measures to prevent pollution, to reduce the environmental loads in their business activities, to ensure appropriate disposal of waste, and to make other voluntary efforts to reduce environmental loads (Art. 8). Citizens are responsible to reduce environmental loads in their daily lives (Art. 9). For the guidelines overseeing the environmental policy-making, three objectives are identified: (1) maintaining natural elements of the environment (air, water, soil, etc.) in good condition and protecting the human health and the living environment; (2) protecting the biodiversity; and (3) ensuring rich and harmonious contacts between human being and nature (Art. 14). The Government shall establish a basic environmental plan to promote comprehensive and systematic environmental policies (Art. 15) for specific areas of environmental conservation; establishing quality standards for pollutions of air, water, soil, and noise (Art. 16); establishing the Environmental Pollution Program (Arts. 17, 18); promoting environmental impact assessment (Arts. 19, 20); taking regulatory and economic measures to prevent interference with environmental conservation (Arts. 21,

---

*Action* (Winnipeg: International Institute for Sustainable Development, 2004) online :<[http://www.iisd.org/pdf/2004/measure\\_nat\\_strategies\\_sd.pdf](http://www.iisd.org/pdf/2004/measure_nat_strategies_sd.pdf)>; Voigt, *supra* note 2 at 21-24; Cordonier Segger, *supra* note 50 at 135-138. For sustainable development principles in domestic laws see Ramlogan, *supra* note 126.

<sup>140</sup> *Kankyo Kihon H* (*The Basic Environment Law*), Act No. 122 of 2011, amending Act No. 91 of 1993, online: Ministry of Environment, Government of Japan <<http://www.env.go.jp/en/laws/policy/basic/index.html>>.

22); promoting the use of products that reduce environmental loads (Arts. 23, 24); education for environmental conservation (Art. 25); promoting voluntary activities by private sectors and citizens (Art. 26); and implementing international cooperation (Art. 35).

The right to a healthy environment is embodied in several international and regional multilateral treaties, constitutions, and statutes of numerous countries.<sup>141</sup> KKH sets out duties of environmental protection on the part of the Government, local governments, business operators, and citizens; however, it lacks provisions regarding rights to a safe and healthy environment.<sup>142</sup>

KKH is the apex of the structure of environmental laws in Japan, and subordinate laws under corresponding topics are established: air, water, soil/agriculture/subsidence, noise/stench, energy, waste/recycling, wild animals, chemical materials, global warming, and disaster prevention. For the issue of waste/recycling, the Government adopted *Junkan-gata Shakai Keisei Suishin Kihon H* (Basic Act on Establishing a Sound Material-Cycle Society) (2000)<sup>143</sup> to systematically promote recycling and reducing the environmental loads and to realize “a society that can develop sustainably as it develops a sound economy with a minimized environmental load” (Art. 3). Also, *Seibutsu Tay -Sei Kihon H* (The Basic Act on Biodiversity)<sup>144</sup> aims at serving as a basis of policies for conservation and sustainable use of biodiversity (Art. 1). For the purpose of this act, “sustainable use of biodiversity” is defined as follows:

[U]sing the components of biodiversity by a method that does not cause long-term decrease in organisms and other components of biodiversity and benefits from biodiversity (hereinafter referred to as “sustainable method”) to ensure that current and future-generation human beings can

---

<sup>141</sup> See generally Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Review of Future Development in Fields with which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, prepared by Fatma Zohra Ksentini, Special Rapporteur, UNESCOR, 1994, UN Doc. E/CN/4/Sub.2/1994/9 (1994) at 81-93 (Appendix III), online: Office of High Commissioner for Human Rights <<http://daccess-ods.un.org/TMP/9008657.33623505.html>>.

<sup>142</sup> See E.g., Yoshinobu Kitamura, “The Environment Basic Law in Court Cases,” (in *Japanese*) Note, (2004) 48 *Sophia Law Review* 161.

<sup>143</sup> *Junkan-gata Shakai Keisei Suishin Kihon H* (Basic Act on Establishing a Sound Material-Cycle Society), Act No. 110 of 2000, online: Ministry of Environment, Government of Japan <[www.env.go.jp/en/laws/recycle/12.pdf](http://www.env.go.jp/en/laws/recycle/12.pdf)>.

<sup>144</sup> *Seibutsu Tay -Sei Kihon H* (The Basic Act on Biodiversity), Act No. 58 of June 6 2008, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=1950](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=1950)>.

enjoy benefits from biodiversity and that biodiversity, which is a basis of the survival of human beings, will be maintained in the future. (Art. 2 (2))

In addition to these environmental protection related acts, Japan's *Kaiy Kihon H* (Basic Act on Ocean Policy)<sup>145</sup> stipulates the basic principles for the ocean policies, which clarify the responsibilities of the stakeholders and require balancing economic development and the marine environment within the framework of international agreements and sustainable development (Art. 1). This Act aims at "allowing for the sustainable development and use of the oceans with conservation of marine environment in order to enjoy the benefits of the oceans in the future" (Art. 2). For this purpose, the Government shall take necessary measures for the development of living and mineral resources in consideration of the marine environment to allow for the sustainable development and use of ocean resources in the future (Art. 17), and it shall promote education with regard to oceans and sustainable development (Art. 28).

Moreover, in the Japanese legal system, sustainability is widely incorporated into laws on various subject matters: *Shinrin, Ringy Kihon H* (Forest and Forestry Basic Act),<sup>146</sup> *Shokury , N gy , and N son Kihon H* (Food, Agriculture and Rural Areas Basic Act),<sup>147</sup> *Enerug Seisaku Kihon H* (Basic Act on Energy Policy),<sup>148</sup> *Suisan Kihon H* (Fisheries Basic Act),<sup>149</sup> *Chiteki Zaisan Kihon H* (Intellectual Property Basic Act),<sup>150</sup> *Jizokuteki Y shoku Seisan Kakuho H* (Sustainable Aquaculture Production

---

<sup>145</sup> *Kaiy Kihon H* (Basic Act on Ocean Policy), Act No. 33 of April 27 2007, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=147](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=147)>.

<sup>146</sup> *Shinrin, Ringy Kihon H* (Forest and Forestry Basic Act), Act No. 119 of 2003, amending Act No. 161 of 1964, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=50](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=50)>.

<sup>147</sup> *Shokury , N gy , and N son Kihon H* (Food, Agriculture and Rural Areas Basic Act), Act No. 89 of 2005, amending Act No. 106 of 1999, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=102](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=102)>.

<sup>148</sup> *Enerug Seisaku Kihon H* (Basic Act on Energy Policy), Act No. 71 of 2002, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=123](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=123)>.

<sup>149</sup> *Suisan Kihon H* (Fisheries Basic Act), Act No. 89 of 2005, amending Act No. 89 of 2001, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=115](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=115)>.

<sup>150</sup> *Chiteki Zaisan Kihon H* (Intellectual Property Basic Act), Act No. 122 of 2002, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=129](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=129)>.

Assurance Act),<sup>151</sup> *Suisan Shigen Hogo H* (Act on the Protection of Fishery Resources),<sup>152</sup> and *Sangyo Gijutsu-Ryoku Ky ka H* (Industrial Technology Enhancement Act),<sup>153</sup> among others.

Sustainable development surely occupies the position of the basic principle of the Japanese laws enumerated above; however, rather than being a substantial rule, the concept functions as guidelines to be considered in policy-making and law-making processes. Although further scrutiny and comparative analysis is necessary, it could be said that sustainable development is nothing more than a legal policy widely accepted within various fields of law in Japan.

Beyond the arguments of whether it becomes a general principle of law in domestic laws, could sustainable development be recognized as part of customary international law or as having status in international law other than treaty law? Cordonier Segger posits one interesting argument in this regard. She argues that sustainable development is an emerging principle of customary international law as forming a commonly recognized “object and purpose” of many of general multilateral conventions governing common concerns of the international community; therefore, sustainable development could formulate one of the general objectives of international law as a whole.<sup>154</sup> Although numerous documents contain sustainable development objectives, legally binding or not, Cordonier Segger is not conclusive regarding whether sustainable development has been established as a principle of customary international law because no clear evidence is provided regarding whether the States undertake a commitment for sustainable development as a legal obligation or just as a commonly accepted policy of the international community.<sup>155</sup> Thus, she suggests another possibility: to perceive sustainable development as an objective of international law that frequently appears in major international environmental agreements.<sup>156</sup> In many of these conventions,

---

<sup>151</sup> *Jizokuteki Y shoku Seisan Kakuho H* (Sustainable Aquaculture Production Assurance Act), Act No. 36 of 2005, amending Act No. 51 of 1999, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=1905](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=1905)>.

<sup>152</sup> *Suisan Shigen Hogo H* (Act on the Protection of Fishery Resources), Act No. 77 of 2007, amending Act No. 313 1951, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=32](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=32)>.

<sup>153</sup> *Sangyo Gijutsu-Ryoku Ky ka H* (Industrial Technology Enhancement Act), Act No. 36 of 2007, amending Act No. 44 of 2000, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=107](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=107)>.

<sup>154</sup> Cordonier Segger, *supra* note 50 at 116-162.

<sup>155</sup> *Ibid.* at 141.

<sup>156</sup> *Ibid.* at 149-161.

sustainable development appears in preambles or general provisions and constitutes the “object and purpose” of such agreements. In addition to these instruments, non-legally binding documents, such as Declarations of Stockholm, Rio, and Johannesburg, have placed sustainable development as an object of international law, referring to international law on sustainable development.<sup>157</sup> Combining these arguments, Cordonier Segger considers sustainable development as an object and purpose of international law.<sup>158</sup>

In the present author’s view, sustainable development is a policy objective of the international community, and when it is incorporated in various multilateral conventions, it constitutes their “object and purpose” in the context of the law of treaties. In this sense, a distinction could be made between sustainable development as “object and purpose of a treaty,” which is a legal factor to be taken into account in the process of the law of treaties, and sustainable development as a policy objective of the international community, which indicates the directions followed by the political authorities at different levels.

Another fascinating conceptualization of sustainable development exists in international law. Professor Sands considers sustainable development an emerging field of international law in which certain legal principles are contained.<sup>159</sup> Sustainable development is “a broad umbrella accommodating the specialized fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights.”<sup>160</sup> If so, the term sustainable development represents an aim or a goal to be achieved by the international community. It might be similar to noble public policies regarding human rights and maintaining international peace and security.<sup>161</sup> Therefore, it might not be valuable to discuss the legal status of the concept of sustainable development itself, although it remains important to clarify the legal status and functions of each of the rules/principles of sustainable development in a particular case.<sup>162</sup> Considering sustainable development an umbrella concept, unmethodical expansion of its scope would weaken its centripetal force as a public policy of the international community.

---

<sup>157</sup> *Ibid.* at 147-148.

<sup>158</sup> *Ibid.* at 162.

<sup>159</sup> Sands, *supra* note 89 at 53ff.

<sup>160</sup> *Ibid.* at 338-339.

<sup>161</sup> See also Cordonier Segger, *supra* note 50 at 142.

<sup>162</sup> Cf. Karel Wellens, “The Court’s Judgment in the Case Concerning the Gab ikovo-Nagymaros Project (Hungary/Slovakia): Some Preliminary Reflections” in Karel Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Leiden: Martinus Nijhoff Publishers, 1998) 765 at 780.

## 5. Boundaries or expansion

Considering the haphazard expansion of sustainable development topics in international conferences, it is beneficial to delimit the possible range in order to maintain its political and normative value.

### (a) **Legality of the Use by a State Nuclear Weapons in Armed Conflict (1996)**<sup>163</sup>

The ICJ decided not to give an advisory opinion over the issue of the legality of the use of nuclear weapons in armed conflict, which was requested by the WHO, because the WHO was not authorized to ask the advisory opinion that question. The Court considered that the resolutions upon which the WHO's request for an advisory opinion relied, allowed the WHO to "deal exclusively ... with the health and environmental effects of nuclear weapons, and ... with the effects of nuclear weapons on health and health service," but not to deal with the legality of the use of nuclear weapons.<sup>164</sup> Thus, the Court concluded that the WHO was not entitled to request the advisory opinion on the legality of the use of nuclear weapons.<sup>165</sup> In the case, the Court affirmed the WHO's contribution to international efforts towards sustainable development, but this did not mean that the resolution that conferred on the WHO the task of sustainable development could be a legal basis for the request of the advisory opinion concerning the legality of the use of nuclear weapons.

Considering the relationship of sustainable development and the legality of the use of nuclear weapons, the views of the governments submitted to the Court were inconsistent. The Mexican Government found a close relationship between sustainable development and the use of nuclear weapons. The Mexican Government mentioned that Principle 21 of the Stockholm Declaration reflects the general principle of international law that a State must refrain from using its own territory in a way that would have an adverse effect on another country's environment. In addition, the Mexican Government referred to Principles 1 and 25 of the *Rio Declaration*, emphasizing a close relationship between sustainable development and "a healthy and reproductive life in harmony with nature," and it also noted the interdependency between "peace, development, and environmental protection."<sup>166</sup> Furthermore, the Mexican Government pointed out that the use of nuclear weapons has widespread harmful effects on the environment. Thus, the

---

<sup>163</sup> *Legality of the Use by a State Nuclear Weapons in Armed Conflict Case*, Advisory Opinion, [1996] I.C.J. Rep. 66.

<sup>164</sup> *Ibid.* at 81, para.27 [emphasis in original].

<sup>165</sup> *Ibid.* at 84, para. 32.

<sup>166</sup> *Legality of the Use by a State Nuclear Weapons in Armed Conflict Case*, Advisory Opinion, "Written Statement by the Government of Mexico" (9 June, 1994), [1996] 1 at 10, para. 37, online: ICJ website <<http://www.icj-cij.org/docket/files/93/8776.pdf>>

Mexican Government insisted that “the threat or use of nuclear arm in an armed conflict would constitute a breach of principles of international environmental law generally accepted.”<sup>167</sup> The Mexican Government emphasized the interrelationship between sustainable development, health, peace, development, and environment, and it considered that sustainable development was affected by the use of nuclear weapons. Also, the Solomon Islands’ Government believed that sustainable development would be affected by the use of nuclear weapons, which have harmful consequences for the environment over the short- and long-term.<sup>168</sup> The Sri Lankan Government, as well, maintained sustainable development as a part of international humanitarian law in a broad sense and viewed the use of nuclear weapons as a breach of international law.<sup>169</sup>

Contrary to those governments, the U.S. Government insisted that the request made by the WHO did not have a legal basis because the WHO resolutions invoked in the request did not address the legality of the use of nuclear weapons.<sup>170</sup> One of the resolutions invoked by the WHO was the WHA Res. 42.26 (1989), which addressed the sustainable and equitable use of global resources in the context of health and socioeconomic development, but not in the context of the use of nuclear weapons.<sup>171</sup>

Thus, the Court and the U.S. Government find that sustainable development is a concept related to health, environment, and socioeconomic development but not to peace, unlike that discussed in Principle 25 of the *Rio Declaration*.

**(b) Legality of the Threat or Use of Nuclear Weapons (1996)<sup>172</sup>**

This advisory opinion was requested by the UN General Assembly and was given at the same date as the *Legality of the Use by a State Nuclear Weapons in Armed Conflict* case. Considering different opinions between States, as mentioned above, the Court recognized that the environment could be seriously damaged by the use of nuclear weapons, and it mentioned that

---

<sup>167</sup> *Ibid.* 9-10, para. 35.

<sup>168</sup> *Legality of the Use by a State Nuclear Weapons in Armed Conflict Case*, Advisory Opinion, “Written Statement by the Government of Solomon Islands” (9 June, 1994), 1 at 13, para. 2.30, online: ICJ website <<http://www.icj-cij.org/docket/files/93/8766.pdf>>

<sup>169</sup> *Legality of the Use by a State Nuclear Weapons in Armed Conflict Case*, Advisory Opinion, “Written Statement by the Government of Sri Lanka” (20 September, 1994), 1 at 3, online: ICJ website <<http://www.icj-cij.org/docket/files/93/8782.pdf>>

<sup>170</sup> *Legality of the Use by a State Nuclear Weapons in Armed Conflict Case*, Advisory Opinion, “Written Statement by the Government of the United States of America”, (10 June, 1994), 1 at 7, online: ICJ website <<http://www.icj-cij.org/docket/files/93/8770.pdf>>

<sup>171</sup> *Ibid.*

<sup>172</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J.Rep. 226.

the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>173</sup>

For the Court, this did not mean that international treaties relating to environmental protection “intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment.”<sup>174</sup> However, the Court also mentioned that

[n]onetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.<sup>175</sup>

The Court invoked Principle 24 of the *Rio Declaration*<sup>176</sup> and Article 35(3) and Article 55 of the Additional Protocol I to the Geneva Conventions (1977)<sup>177</sup> as supporting evidence.<sup>178</sup> Thus, the Court concluded that the international law of environment did not prohibit States from using nuclear weapons, but environmental factors must be taken into account in the implementation of international law regarding armed conflicts.<sup>179</sup> It seems that the concept of sustainable development and the principles of necessity and proportionality are connected in the context of armed conflicts.

*Gab ikovo-Nagymaros Project* generally suggested that the concept of sustainable development reconciles environmental protection and economic

---

<sup>173</sup> *Ibid.* at 241-242, para. 29. Thus, less clear though, it seems that the principle stipulated in Principle 21 of the *Stockholm Declaration* and Principle 2 of the *Rio Declaration* is crystallized into a rule of customary international law.

<sup>174</sup> *Ibid.* at 242, para. 30.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Rio Declaration*, *supra* note 54 at 7.

<sup>177</sup> *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session). Adopted at Geneva on 8 June 1977, 8 June 1977, 1125 U.U.T.S. 3 at 21, 28.*

<sup>178</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, *supra* note 172 at 242 paras. 30, 31.

<sup>179</sup> *Ibid.* at 243, para. 33.

development.<sup>180</sup> As the *Legality of the Use by a State Nuclear Weapons in Armed Conflict* case indicated, sustainable development is not a concept involved with an issue of peace; this pinpoints one of the boundaries beyond which the concept of sustainable development cannot be applied. However, as the *Legality of the Threat or Use of Nuclear Weapons* case suggested, while international environmental law itself does not restrict the inherent right of self-defence of States, sustainable development may work in the realm of the principle of proportionality by considering harmful impacts against the natural environment. Thus, the concept of sustainable development can introduce environmental perspectives into the context of armed conflict.

## 6. Concluding Remarks

Sustainable development as a world public policy has been firmly established, and its contents and methods of implementation have been steadily deepened and enriched through incorporation in treaties and non-binding documents in the international sphere and through legislation in domestic laws. A wide range of issues, from the relationship between economic development and environmental protection to human rights and other societal concerns in the international community, have been encompassed in sustainable development. On one hand, this expansion indicates that the concept of sustainable development is an umbrella notion, flexible in scope. On the other hand, imprudent extension of the topics contained in the concept might make its original aim vague and weaken its legal and social function. Sectionalism in international legislature, similar with national bureaucratic structure, requires certain adjustments in the case of overlapping and conflict between jurisdictions, but at the same time, specialized knowledge and techniques are essential for regulating modern global issues that are highly technical. Thus, the demand of integration and harmonization of different rules and policies in order to gain more effective and reasonable outcomes under the current international legal system has been amplified under sustainable development more than ever.

Regardless of its legal status, achieving sustainable development objectives is a global concern; the implementation takes various forms at different levels (international, regional, national, municipal, etc.). At the international level, a core function of sustainable development is to promote integration or reconciliation of different primary norms. Sustainable development can be grasped within the framework of fragmentation of international law, which is conceived as a problematic structure of the formal sources of international law. Thus, normative integration of sustainable development can be realized, although not exclusively, by treaty interpretation through Article 31(3)(c) of the

---

<sup>180</sup> *Gab ikovo-Nagymaros Project supra* note 1 at 77-78, para.140.

*Vienna Convention*, which engages systemic integration. The process of attaining normative integration for sustainable development through international adjudication will be examined in the next chapter.

## Chapter 3 Sustainable Development in International Jurisprudence

### 1. Introduction

This chapter investigates how international jurisprudence has dealt with the issue of sustainable development in harmonizing environmental protection and economic and social development through treaty interpretation, and identifies the interpretative techniques and elements that have been utilized for achieving normative integration. The selected relevant cases remarkably illustrate that the international tribunals have referred to the extrinsic normative environment of the treaties being interpreted for balancing different concerns. For coordinating different concerns in treaty interpretation, the international tribunals have embraced legal, social, or scientific situations and developments.

Chapter 5 will examine the conventional process of integrating the normative environment under inter-temporal law.<sup>181</sup> Inter-temporal law consist of two branches: the principle of contemporaneity and the evolutionary doctrine.<sup>182</sup> While the first part of inter-temporal law (the principle of contemporaneity) has been firmly accepted as an interpretative element, the second limb has been a target of criticism and argument due to concerns that it contains retroactive effects and, therefore, could impair a treaty's legal stability.<sup>183</sup>

Contemporary international law has expanded and deepened its regulatory sphere along with social, scientific, and technological developments. Because the formation of customary international law is a lengthy process, numerous treaties have central roles in these newly encompassed subject matters within international law. For some of these conventions—related to economic, environmental, or human rights fields—it is essential for their effective and sufficient implementation to incorporate the development of legal, social, scientific, and technological situations in application, unlike, for example, boundary delimitation treaties that aim at maintaining the initial circumstances of the parties.

When Judge Huber mentioned the second branch of the inter-temporal rules, he considered the “evolution of law” as the development of an entire legal system.<sup>184</sup>

---

<sup>181</sup> See Pauwelyn, *supra* note 7 at 264-268; French, *supra* note 7 at 281.

<sup>182</sup> See Chapter 5 Section 1 below.

<sup>183</sup> See e.g., Philip C. Jessup, “The Palmas Island Arbitration” (1928) 22 A.J.I.L. 735 at 749. See also Edith Brown Weiss, “Intergenerational Equity: A Legal Framework for Global Environmental Change” in Edith Brown Weiss, ed., *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992) 385 at 386.

<sup>184</sup> *Island of Palmas Case (Netherlands v. USA)*, *supra* note 8 at 845.

Although Huber's position reflects the specific context of a case related to a territorial acquisition title, his statement of the inter-temporal law has been quoted frequently as a point of departure for the issue. Considering his view as a prescription of inter-temporal law, he referred only to the evolution of law as the background of the interpretation and did not touch upon factual or scientific developments. In addition, Article 31(3)(c), in which the inter-temporal law branches are latently codified, provides that "any relevant rules of international law applicable in the relations between the parties." It confines the range of law taken into account in treaty interpretation under that provision to only the rules applicable in the relations between the parties.

The following section identifies two interpretative techniques through an analysis of selected cases. The first technique is the modality of finding an evolutionary character in the language of provisions contained in a treaty under interpretation. The second technique considers the development of factual situations in terms of the object and purpose of the treaty. Considering the narrowcasting codification of the inter-temporal law in Article 31(3)(c), these techniques would open out a possibility for interpreters to consider factors not covered by Article 31(3)(c), such as factual, social, and legal situations. Thus, these approaches could be supplemental methods for dealing with ineligible interpretative factors under Article 31(3)(c). Moreover, these methods could break the spell of consensualism for judges to access an evolutionary interpretation by evading the consent-based requirements imposed by Article 31(3)(c).

## **2. Case Study: Achieving Sustainable Development through Treaty Interpretation in Selected Cases**

### **(a) *Gab ikovo-Nagymaros Project*<sup>185</sup>**

*Gab ikovo-Nagymaros Project* contained some significant issues regarding the implementation of international law; it was the Court's first case to deal with the developments of international environmental law and sustainable development.<sup>186</sup> The

---

<sup>185</sup> *Gab ikovo-Nagymaros Project*, *supra* note 1.

<sup>186</sup> See e.g., Johan G. Lammers, "The *Gab ikovo-Nagymaros* Case Seen in Particular from the Perspective of the Law of International Watercourse and the Protection of the Environment" (1998) 11 *Leiden J. Int'l L.* 287; O. McIntyre, "Environmental Protection of International Rivers" (1998) 10 *J. Envtl. L.* 79; Charles B. Bourne, "The *Case Concerning the Gab ikovo-Nagymaros Project*: An Important Milestone in International Water Law" (1997) 8 *Y. B. Int'l Env. L.* 6; S. Stec & G. E. Eckstein, "Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the *Case Concerning the Gab ikovo-Nagymaros Project*" (1997) 8 *Y. B. Int'l Env. L.* 41; A. E. Boyle, "The *Gab ikovo-Nagymaros* Case: New Law in Old Bottles" (1997) 8 *Y. B. Int'l Env. L.* 13; P. Canelas de Castro, "The Judgment in the *Case Concerning the Gab ikovo-Nagymaros Project*: Positive Signs for the Evolution of International Water

conflict occurred between Hungary and Slovakia (Czechoslovakia at the beginning of the proceeding) regarding the shared project of the construction of the dams and related facilities along the Danube. A crucial issue arose regarding the continuation of the construction of dams and other facilities and environmental protection at the site of the project. Eventually, the Court ordered the parties to renegotiate while considering newly developed environmental law and knowledge.<sup>187</sup> To reach that conclusion, the Court employed the concept of sustainable development and identified that the “need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”<sup>188</sup>

In the pleadings, Slovakia invoked the term sustainable development in its Memorial to insist that the 1977 Treaty—in which the parties agreed on the dam construction project—requested them to consider the environmental protection of the area in question.<sup>189</sup> Further, Slovakia mentioned that “[t]he development was to be carried out alongside an obligation to protect the environment” with reference to Article 19 of the 1977 Treaty.<sup>190</sup> Hungary, in its Counter-Memorial, discussed the concept of sustainable development and criticized the Slovakian view on sustainable development, insisting that:

---

Law” (1997) 8 Y. B. Int’l Env. L. 21; R. Lefeber, “*The Gab ikovo-Nagymaros Project and the Law of State Responsibility*” (1998) 11 Leiden J. of Int’l L. 609; Phillippe Weckel, “Convergence du droit des traités et du droit de la responsabilité internationale à la lumière de l’Arret du 25 septembre 1997 de la Cour internationale de Justice relatif au projet Gab ikovo-Nagymaros (Hongrie/Slovaquie)” (1998) 102 R.G.D.I.P. 647; Wellens, *supra* note 162; Daniel Reichert–Facilides, “Down the Danube: The Vienna Convention on the Law of Treaties and the *Case Concerning the Gab ikovo-Nagymaros Project*” (1998) 47 I.C.L.Q. 837; Malgosia Fitzmaurice, “*The Gab ikovo-Nagymaros Case: The Law of Treaties*” (1998) 11 Leiden J. Int’l L. 321; Jan Klabbers, “The Substance of Form: The *Case Concerning the Gab ikovo-Nagymaros Project*, Environmental Law, and the Law of Treaties” (1998) 8 Y.B. Int’l Env. L. 32; *Idem*, “Cat on a Hot Tin Roof: The World Court, State Succession, and the Gab ikovo-Nagymaros Case” (1998) 11 Leiden J. Int’l L. 345; Phoebe N. Okowa, “Case Concerning the Gab ikovo-Nagymaros Project (Hungary/Slovakia)” (1998) 47 I.C.L.Q. 688.

<sup>187</sup> *Gab ikovo-Nagymaros Project*, *supra* note 1 at 77-78, paras.140-141 & at 83, para.155 (2) B and C.

<sup>188</sup> *Ibid.* at 78, para. 140.

<sup>189</sup> *Case concerning Gab ikovo-Nagymaros Project (Hungary v. Slovakia)*, “Memorial submitted by the Slovak Republic (Vol. 1)” (2 May 1994), [1997] 1 at 80, para. 2.76, online: ICJ website < <http://www.icj-cij.org/docket/files/92/10939.pdf>>.

<sup>190</sup> *Ibid.*, at 97, para. 2.108

Article 19 of the 1977 Treaty stipulates as follows:

“The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.” (Quotation in *ibid.*)

Slovakia mischaracterises the concept of sustainable development, ignoring the integrity of environment and development, the interdependence of natural resources and processes, and the relevance of environmental harm and risk to economic validity.<sup>191</sup>

According to Hungary, four criteria must be fulfilled for development to be sustainable: (1) environmental protection should be an integral part of the development process; (2) a prior environmental impact assessment (EIA) should be undertaken, and the conclusion of the EIA should be taken into account in the decision-making process; (3) decision-making should take into account conservation needs; and (4) a precautionary approach should be adopted.<sup>192</sup> In Hungary's view, Slovakia did not meet these criteria.<sup>193</sup>

In addition to the definition of the concept of sustainable development, the Court found that the 1977 Treaty was still valid and the joint regime of the treaty should be restored, and environmental assessment must be taken in conformity with Articles 15 and 19.<sup>194</sup> Thus, the Court ordered the parties to negotiate to re-establish the joint regime based on the 1977 Treaty, incorporating considerations of sustainable development. The Court suggested that the parties should re-negotiate the application of Articles 15, 19, and 20 of the 1977 Treaty using a framework that incorporated newly developed international environmental norms into the implementation of the Treaty.<sup>195</sup> According to the Court, insertion of such evolving provisions indicated that the parties recognized the potential necessity to adjust the dam project to meet new environmental norms.<sup>196</sup> Thus, the Court acknowledged the importance of the evaluation of the project's impact on and its implications for the environment, and it recognized the necessity of utilizing current standards to evaluate environmental risks.<sup>197</sup>

The wording of Articles 15 and 19 of the 1977 Treaty endorsed the reference to the newly developed scientific and normative standards after the conclusion of the Treaty.<sup>198</sup> The Court observed that Articles 15 and 19 were "designed to accommodate change, made it possible for the parties to take account of such developments and to

---

<sup>191</sup> *Case concerning Gab ikovo-Nagymaros Project (Hungary v. Slovakia)*, "Counter-Memorial of the Republic of Hungary (Volume 1)" (5 December, 1994), [1997], 1 at 16, para. 1.04, online: ICJ <<http://www.icj-cij.org/docket/files/92/10949.pdf>>.

<sup>192</sup> *Ibid.* at 17-18, para. 1.07.

<sup>193</sup> *Ibid.* at 18-19, para. 1.08.

<sup>194</sup> *Gab ikovo-Nagymaros Project*, *supra* note 1 at 76-80, paras. 132-147.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.* at 77-78, para.140.

<sup>198</sup> *Ibid.*

apply them when implementing those treaty provisions.”<sup>199</sup> The obligations contained in these provisions were, by definition, general and have to be transformed into specific obligations of performance through a negotiation process.<sup>200</sup> In other words, these provisions were evolutionary and the 1977 Treaty was not static; it remained open to adaptation to emerging norms of international law.<sup>201</sup> Under these provisions, the parties were required to consider new environmental norms when carrying out their obligations to maintain the quality of water in the Danube.<sup>202</sup> Thus, for the Court, considering current environmental standards for evaluating the environmental risks was “not only allowed by the wording of Article 15 and 19, but even prescribed, to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties to maintain the quality of the water of the Danube and to protect nature.”<sup>203</sup> Furthermore, the Court pointed out that human activity had been disturbing the natural environment for a long time; new scientific insight and increased knowledge regarding the risks for mankind had inspired new normative standards to be developed in numerous instruments since the 1970s.<sup>204</sup> The Court concluded that, “[s]uch new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.”<sup>205</sup>

Nonetheless, in this case, the Court left some issues unclear. The Court confirmed the need to take into account the newly developed legal standards, but it did not examine whether Variant C was in violation of the precautionary principle that Hungary invoked as such a standard. This left the issue of that principle’s legal status unresolved.<sup>206</sup> However, the Court avoided confirming the legal status of this precautionary principle in international law not only in this case, but in previous cases as well.<sup>207</sup>

---

<sup>199</sup> *Ibid.* at 64-65, para.104.

Article 15 of the 1977 Treaty stipulates that the contracting parties “shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks.” Also, Article 19 envisaged that: “The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.” (*Ibid.* at 22-23 para.18.)

<sup>200</sup> *Ibid.* at 67-68, para.112.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.* at 77-78, para.140.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> Boyle, *supra* note 186 at 17.

<sup>207</sup> Jochen Sohnle, “Irruption du droit de l’environnement dans la jurisprudence de la C. I.

In sum, *Gab ikovo-Nagymaros Project* was a milestone in the history of sustainable development in international law; the Court articulated it as a balancing notion working between economic development and environmental protection. Whereas the Court considered sustainable development a concept, the vice-president of the Court, Judge Weeramantry, viewed sustainable development not just as a concept, but as a principle of law: “I consider it to be more than a mere concept, but as a principle with normative value.”<sup>208</sup> Furthermore, he agreed that “[t]he law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.”<sup>209</sup> Whether sustainable development has obtained such autonomous legal status remains arguable.<sup>210</sup> The Court requested the parties to negotiate to restore the project under the 1977 Treaty while considering newly developed environmental norms and standards based on the evolving wording of Articles 15 and 19 of the same treaty in the light of the concept of sustainable development. On the other hand, the Court did not identify the rules and standards that the parties should reference in the new negotiation.

**(b) *Iron Rhine***<sup>211</sup>

*Iron Rhine* provides a concrete description of the principle of integration of sustainable development in legal relations established by a treaty between two countries.<sup>212</sup> Here, the inter-temporal law was considered one of “relevant rules of international law” in Article 31(3)(c), but it was invoked explicitly only in terms of the first branch—the principle of contemporaneity. The function of the second limb of inter-temporal law was attributed to the technique of evolutive interpretation, and, rather, it was read into Article 31(3)(c).<sup>213</sup>

Belgium possesses the right of transit in the territory of Netherlands through the Iron Rhine under Article XII of the 1839 Separation Treaty and other relevant

---

J.: *L’affaire Gab ikovo-Nagymaros*” (1998) 102 R.G.D.I.P. 85 at 110-111.

<sup>208</sup> *Gab ikovo-Nagymaros Project*, *supra* note 1 at 88 (Separate opinion of Vice-President Weeramantry).

<sup>209</sup> *Ibid.*, 90.

<sup>210</sup> See Wellens, *supra* note 162 at 780; Sohnle, *supra* note 207 at 108-109.

<sup>211</sup> *Award in the Arbitration Regarding the Iron Rhine (“IJzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005), (Permanent Court of Arbitration), (Arbitrators: Rosalyn Higgins, Guy Schrans, Bruno Simma, Alfred H. A. Soons, Peter Tomka), on line: The Permanent Court of Arbitration <<http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf>> [*Iron Rhine*].

<sup>212</sup> *Ibid.* at 28-29, paras.59-60.

<sup>213</sup> Richard K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) at 277-278.

agreements.<sup>214</sup> The dispute arose concerning the rights and obligations of both parties regarding the reactivation of the railway and the contribution to the costs required for it. Belgium requested restoration and a significant upgrade of the transportation capacity of the railway, but the Netherlands considered this request an extension of a railway that would involve new work of considerable adaptation and modernization for which Belgium should bear the cost and expense according to Article XII.<sup>215</sup>

In estimating the allocation of the costs for upgrading the line, the Tribunal indicated three perspectives: the sovereign rights of the Netherlands in relation to the construction of the new works; the necessity of environmental protection in planning “adaptation and modernization” of the existing line; the effective exercise of Belgium’s right of transit.<sup>216</sup> Determining the allocation of costs for the reactivation involved striking a balance between rights and obligation regarding economic development and environmental concerns.<sup>217</sup> In order to harmonize these conflicting demands, the Tribunal found that such reconciliation of economic development and environmental protection could be read into Article XII of the 1839 Separation Treaty. Thus, it was interpreted in light of the object and purpose of the Treaty, taking into account newly developed factual and legal situations.

Belgium is in principle entitled to exercise its right of transit in a way which corresponds to its current economic needs. At the same time, the concern of the Netherlands for its environment and the impact thereon of the intended, much more intensive, use of the railway line is to be viewed as legitimate. Such exercise of Belgium’s right of transit and the Netherlands’ legitimate environmental concerns are to be, as far as possible, reconciled. The Tribunal notes that such a reconciliation of rights echoes the balancing of interests reflected in Article XII of the 1839 Treaty of Separation. The Tribunal has found that the restoration and upgrading of the line as requested by Belgium falls to be analysed by reference of Article XII of the 1839 Treaty of Separation – not because it amounts to a “new line” (the Netherlands’ view) but rather because the object and purpose of the Treaty suggests an interpretation that would include within the ambit of the balance there struck new needs and developments relating to operation and capacity (see paragraph 84 above). As the Tribunal has already observed above (see paragraph 59), economic development is to be reconciled with the

---

<sup>214</sup> *Iron Rhine*, *supra* note 211 at c.2 at 18-23, paras.28-43.

<sup>215</sup> *Ibid.* at 32, para.74.

<sup>216</sup> *Ibid.* at 89, para.220.

<sup>217</sup> *Ibid.*

protection of the environment, and, in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded.<sup>218</sup>

Thus, the Tribunal concluded that the Netherlands possessed the right to apply its legislation and decision-making power, including environmental protection measures within its territory, regarding reactivation of the Iron Rhine, provided that such application not deny or render unreasonably difficult Belgium's right of transit. Further, Belgium enjoyed the right to make a plan for the reactivation of the Iron Rhine, but the work had to be agreed upon; the Netherlands could impose environmental measures regarding the work so long as doing so did not impair the Belgian right of transit. In other words, the costs of environmental and safety measures cannot be severed from the costs of reactivation of the Iron Rhine. Finally, the Tribunal indicated the apportionment of the relevant costs.<sup>219</sup>

The Tribunal contributed to the technique of evolutive treaty interpretation by analysing developmental factors. The Tribunal expressly referred to developments of law and technological advancement to be considered in such an interpretative approach. Associated with these evolutionary factors, two manners of evolutionary interpretation were suggested. First, the Tribunal in the present case determined an effective application of the treaty in terms of the object and purpose of it, covering factual developments. The second manner, not employed, but mentioned, derived from a generic or conceptual term; it dealt with both factual and legal developments insofar as they affected the meaning of a term.<sup>220</sup> For these two methods, the Tribunal examined the applicable rules based on Article 31(3)(c), which included provisions of European law, general international law, and international environmental law.<sup>221</sup> The Tribunal took a broad meaning of "rules" to include "soft law" in the framework of environmental treaties.<sup>222</sup> In this regard, the second facet of the inter-temporal law was read into Article 31(3)(c).<sup>223</sup> Thus, both limbs of inter-temporal law were considered under Article 31(3)(c). As the examination of the codification process shows in Chapter 5 below, Article 31(3)(c) lacks any temporal phrase, such as "at the time of conclusion" or "at the time of application," as a result of its codification. This allows interpreters to consider external rules either in a static or dynamic manner on a case-by-case basis. Two supplemental factors may direct interpreters as to the manner which would be appropriate in a particular case.

---

<sup>218</sup> *Ibid.* at 89-90, para.221.

<sup>219</sup> *Ibid.* at 97-101, paras.238-244.

<sup>220</sup> *Ibid.* at 36-37, para.79.

<sup>221</sup> *Ibid.* at 28, para.58

<sup>222</sup> *Ibid.*

<sup>223</sup> Gardiner, *supra* note 213 at 277-278.

(c) *OSPAR Convention Case*<sup>224</sup>

The British Nuclear Fuels (BNFL), which was a public limited company wholly owned by the United Kingdom, operated a licensed nuclear enterprise at Sellafield in Cumbria. In 1993, the BNFL was permitted “to build a MOX Plant to process spent nuclear fuels by retrieving and blending separated plutonium oxide and uranium oxide into pellets to be reused as fuel in nuclear reactors.”<sup>225</sup> Ireland presented its concerns of radioactive discharge from the MOX Plant and the effect on the environment.<sup>226</sup> This case concerns the disclosure of relevant information on the MOX Plant and its impact on the environment.

Ireland was apprehensive of the pollution of Ireland Sea by the MOX Plant, and under Article 9 of the *Convention for the Protection of the Marine Environment of the North-East Atlantic [OSPAR Convention]*,<sup>227</sup> it required the United Kingdom to disclose information regarding the Plant’s emanations.<sup>228</sup> Ireland brought the dispute to the Permanent Court of Arbitration based on Article 32 of the same convention. The parties disputed the meaning and scope of Article 9 (3), which specified the conditions under which the parties could refuse to disclose the relevant information.<sup>229</sup> Article 9 (3) of the

---

<sup>224</sup> *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award Decision of 2 July 2003* (2003), 23 UNRIAA 59, (Permanent Court of Arbitration), (Arbitrators: W. Michael Reisman, Dr. Gavan Griffith, Lord Mustill) [*OSPAR Convention Case*]

<sup>225</sup> *Ibid.* at 71, para.15.

<sup>226</sup> *Ibid.* at 74, para.23

<sup>227</sup> *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992, 2354 U.N.T.S. 67, 32 I.L.M. 1069 (entered into force 25 March 1998).

<sup>228</sup> *OSPAR Convention Case*, *supra* note 224 at 80, para.41.

<sup>229</sup> Article 9 stipulate as follows:

1. The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.
2. The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.
3. The provisions of this Article shall not affect the right of Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for such information

*OSPAR Convention* established the parties' rights to refuse the request for information, "in accordance with their national legal systems and applicable international regulations" where the information affected "commercial and industrial confidentiality," including intellectual property.<sup>230</sup> Hence, the United Kingdom refused to disclose the information and insisted that Article 9 did not confer direct rights to access information. The information requested by Ireland should not fall into the scope of Article 9(2), but rather, should be classified under Article 9 (3)(d), which gives the parties the right to refuse to provide for a request for information on the ground of commercial confidentiality.<sup>231</sup>

Regarding the meaning and content of "their national legal systems," the parties agreed that the terms contained English law, the United Kingdom's Environmental Information Regulations (1992), and EC Directive 90/313/EEC.<sup>232</sup> However, the parties disagreed on the meaning of "applicable international regulations" in Article 9 (3). Ireland proposed that "applicable international regulations" included not only current but also evolving "international law and practice," and it relied on Principle 10 of the *Rio Declaration* and the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*.<sup>233</sup> Proposing the strict textual interpretation, the United Kingdom contended that no "applicable international regulations" existed other than EC Directive 90/313/EEC, which was implemented in the municipal law in the United Kingdom; it replied to Ireland that the *Rio Declaration* was

---

to be refused where it affects:

- (a) the confidentiality of the proceedings of public authorities, international relations and national defence;
- (b) public security;
- (c) matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings;
- (d) commercial and industrial confidentiality, including intellectual property;
- (e) the confidentiality of personal data and/or files;
- (f) material supplied by a third party without that party being under a legal obligation to do so;
- (g) material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

*Ibid.* at 66-67, para.6.

<sup>230</sup> *Ibid.* at 89, para.93.

<sup>231</sup> *Ibid.* at 80, para.43.

<sup>232</sup> *Ibid.* at 89, paras.94-95.

<sup>233</sup> *Ibid.* at 89-90, paras.96, 98. *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517 (entered into force 30 October 2001) [*Aarhus Convention*]

not a treaty and that the *Aarhus Convention* had not been ratified by either party.<sup>234</sup> Regarding these contentions, the Tribunal held that in order not to “produce anachronistic results that are inconsistent with current international law, a tribunal must certainly engage in *actualisation* or contemporization when construing an international instrument that was concluded in an earlier period.”<sup>235</sup> At this point, the Tribunal confirmed that under Article 31 (3)(b) and (c), the Tribunal was authorized to apply only current “international law and practice,” but not “evolving international law and practice.”<sup>236</sup> In other words, law *in statu nascendi* was not admissible for application except when the parties agreed to empower a tribunal to apply such norms. Thus, the Tribunal determined not to include these instruments in interpreting Article 9 (3), despite Ireland’s proposal.

By affirming the demand of “*actualisation* and contemporization” of international instruments through interpretation, the Tribunal confirms the second phase of inter-temporal law without explicitly referring to it; i.e., a treaty must be interpreted in light of the rules of international law in force at the time of its application. Article 31(3)(c) is considered a tool to refer to such current international law. The Tribunal clearly indicates the scope of Article 31(3)(c) excludes law *in statu nascendi* and is limited to *lex lata*, more precisely, law in force between the parties.

In this regard, in his dissenting opinion, Judge Griffith found significance of the ineligible rules under Article 31(3)(c) and afforded “a relevant normative and evidentiary value” on them.<sup>237</sup> Although Judge Griffith agrees with the majority that the *Aarhus Convention* is not *ex facie* a binding instrument between the parties under Article 31(3)(c), he insisted that this does not mean that the Convention has no normative values.<sup>238</sup> Because the *Aarhus Convention* is a *lex lata* in force between some states, this instrument cannot be classified as merely “almost law” or “material that has not yet become law.”<sup>239</sup> And, apart from the issue of which provisions in the *Aarhus Convention* are reflecting customary international law, the United Kingdom is a signatory to the *Aarhus Convention* and thus is required to refrain from acts that would defeat the object and purpose of the Convention in accordance with Article 18 of the *Vienna Convention*.<sup>240</sup> Principle dictates that unratified treaties can gain “an evidentiary value”

---

<sup>234</sup> *Ibid.* at 89-90, paras.96-97.

<sup>235</sup> *Ibid.* at 91, para.103.

<sup>236</sup> *Ibid.* at 90-91, paras.99-101.

<sup>237</sup> *Ibid.* at 121, para.10 (Dissenting Opinion of Judge Gavan Griffith).

<sup>238</sup> *Ibid.* at 121, para.9.

<sup>239</sup> *Ibid.* at para.11.

<sup>240</sup> *Ibid.* at para.13.

to establish and identify the intentions of the signatories.<sup>241</sup> Thus, Judge Griffith concluded as follows:

[T]he Aarhus Convention falls within the definition of applicable law and Article 31(3)(c) of the Vienna Convention as a legal source that possesses some normative and evidentiary value to the extent that regard may be had to it to inform and confirm the content of the definition of information contained in Article 9 (2) of the OSPAR Convention.

This view suggests a possibility of extension of the scope of “relevant rules” to be referred to under Article 31(3)(c) from the strict sense of “applicable in the relations between the parties” to the rules having “normative and evidentiary values” in defining treaty terms.

**(d) US—Shrimp<sup>242</sup>**

US—Shrimp arose over complaints submitted by India, Malaysia, Pakistan, and Thailand regarding the United States’ measures of restricting on shrimp imports as an environmental measure to protect sea turtles. Section 609 of *Public Law 101-162*<sup>243</sup> restricted importing certain shrimp and shrimp products to protect sea turtles. In examining whether such law amounted to a measure covered by the term of conservation of “exhaustible natural resources” under Article XX (g), the Appellate Body of the WTO took an evolutive interpretation approach. In order to reach an answer, the Appellate Body examined whether the sea turtles constitute “exhaustible natural resources” for the purpose of Article XX (g).

The Appellate Body relied primarily on the textual approach and held that “[t]extually, Article XX (g) is *not* limited to the conservation of ‘mineral’ or ‘non-living’ natural resources.”<sup>244</sup> Besides this simple textual approach, the Appellate Body referred

---

<sup>241</sup> *Ibid.* at para.15.

<sup>242</sup> *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India; Malaysia; Pakistan; Thailand)* (1998), WTO Doc. WT/DS58/AB/R at paras. 153, 155 (Appellate Body Report), online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCAB%FCR%2A+and+not+RW%2A%29&language=1)> [US—Shrimp].

<sup>243</sup> *Public Law 101-162*, 16 U.S.C. §1537 (1997).

<sup>244</sup> US—Shrimp, *supra* note 242 at para.128 [emphasis in original]. The Appellate Body read the interpretation rule codified in the VCLT as follows:

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning

to several factors determining the evolutionary character of “exhaustible natural resources.” First, consideration was given to the fact that more than 50 years had passed since the text “exhaustible natural resources” was adopted. Because of such a lapse of time, the Appellate Body held that the words “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”<sup>245</sup> Second, the Appellate Body observed that Article XX was not modified in the process of negotiation from the Uruguay Round for the establishment of the WTO, and it suggested that the Parties continuously admitted “the importance and legitimacy of environmental protection as a goal of national and international policy.”<sup>246</sup> Furthermore, the Appellate Body quoted the preamble of the WTO, adding emphasis as follows:

The *Parties* to this Agreement,

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development, ... (emphasis added)<sup>247</sup>

The Appellate Body upheld that the parties to the WTO recognized that the social demands covered by the WTO would change, that the objective of sustainable development would be a guideline for that change, and that the wording of the preamble endorsed that the generic term “natural resources” was to be interpreted evolutionally.<sup>248</sup>

---

imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.

*Ibid.* para.114 [footnote omitted].

<sup>245</sup> *Ibid.* at para.129.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.* [footnote omitted] .

<sup>248</sup> *Ibid.* at para.130. As to the concept of sustainable development the Appellate Body adopted the three pillars image as “integrating economic and social development and environmental protection.” *Ibid.* at para.129, n. 107. On widening the scope of sustainable development in the WTO dispute settlement practice, Tenu Avafia, “Does the WTO’s Dispute Settlement Understanding Promote Sustainable Development?” in Gehring & Cordonier Segger, *supra* note 2 259ff.

In addition to these interpretative elements in the WTO agreement, the Appellate Body referred to the extrinsic normative environment to sustain the interpretation that the term “natural resources” including non-living and living resources. The broad range of the documents mentioned by the Appellate Body included legal documents and non-legally binding declaration<sup>249</sup>: the *United Nations Convention on the Law of the Sea*,<sup>250</sup> the *Convention on Biological Diversity*, *Agenda 21*, and the *Resolution on Assistance to Developing Countries relating to the Convention on the Conservation of Migratory Species of Wild Animals*.<sup>251</sup> Finally, the Appellate Body concluded that, “we believe it is too late in the day to suppose that Article XX (g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.”<sup>252</sup>

In determining the character of Section 609 in terms of standards provided under the chapeau of Article XX, the Appellate Body found that their responsibility, in this respect, was “to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX.”<sup>253</sup> The textual approach was explicitly adopted in the sense of identifying the ordinary meaning of the texts to be interpreted. However, the Appellate Body also mentioned that the context and the object and purpose of Article XX had to be taken into account. As part of the context of the chapeau of Article XX, the Appellate Body considered two interpretative elements: the negotiating history as a manifestation of the intentions of the negotiators and the evolution of law after the preamble of the WTO Agreement was negotiated. These two elements were interrelated in conjunction with the concept of sustainable development.

First, the Appellate Body examined the negotiating history of the preamble of the WTO Agreement and determined that the insertion of the concept of sustainable development into the preamble demonstrated the intentions of the negotiators that the world’s resources should be utilized in accordance with the objective of sustainable development.<sup>254</sup> Second, the normative developments, which occurred since the preamble was negotiated, were taken into account as factors serving to clarify the

---

<sup>249</sup> *US—Shrimp*, *supra* note 242 at para.130.

<sup>250</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (entered into force 16 November 1994).

<sup>251</sup> *Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals*, June 23 1979, 19 I.L.M. 11.

<sup>252</sup> *US—Shrimp*, *supra* note 242 at para.131.

<sup>253</sup> *Ibid.* at para.155.

<sup>254</sup> *Ibid.* at paras. 152-153.

objectives of WTO Members with respect to the relationship between trade and the environment. In this regard, the Appellate Body cited the Decision of Ministers at Marrakesh, establishing the Committee on Trade and Environment (CTE), which along with the *Rio Declaration* and *Agenda 21*, promotes sustainable development.<sup>255</sup> Finally, the Appellate Body observed that the reference to the preambular language of “sustainable development” gave “colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT1994, in particular.”<sup>256</sup>

Based on the interpretative elements as part of the context of the chapeau of Article XX, the object and purpose of the same article was scrutinized and the aim of the chapeau of Article XX was described as the prevention of destroying the balance of rights and obligations between Members by abuse or misuse of the right to invoke exceptions provided in Article XX.<sup>257</sup> The chapeau was regarded as elucidating that each of the exceptions in Article XX is “a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994,” and provides requirements making the measures legitimate.<sup>258</sup> The Appellate Body interpreted the chapeau of Article XX as an expression of the principle of good faith, which can be seen as a general principle of law and a general principle of international law—more precisely, the doctrine of *abus de droit*.<sup>259</sup> Consequently, abuse or misuse of the treaty right would constitute a breach of treaty in violating the rights of other Members. Identifying such an abusive exercise, the Appellate Body confirmed that its task here was to interpret the chapeau with “*seeking additional interpretative guidance, as appropriate, from the general principles of international law*.”<sup>260</sup>

Along with the confirmed task, the Appellate Body referred to several international instruments that provided evidence showing that the measure under Section 609 constituted unjustifiable discrimination under Article XX.<sup>261</sup> Regarding the failure of balancing circumstances of exporting countries and the appropriateness of the measure under Section 609, the Appellate Body analysed the insufficiency of negotiations prior to the exercise of the measure, stating:

---

<sup>255</sup> *Ibid.* at para.154.

<sup>256</sup> *Ibid.* at para.155 [emphasis in original]. The same phrase can be found also in paragraph 153.

<sup>257</sup> *Ibid.* para.156.

<sup>258</sup> *Ibid.* para.157 [emphasis in original]. The Appellate Body invoked the preparatory work of the Article XX in accordance with Article 32 of the VCLT.

<sup>259</sup> *Ibid.* at para.158.

<sup>260</sup> *Ibid.* [emphasis added]. Article 31 (3) (c) was cited in the footnote attached to this sentence.

<sup>261</sup> *Ibid.* at paras.166-172.

Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.<sup>262</sup>

In *Gab ikovo-Nagymaros Project*, the Court ordered the parties to renegotiate the issue along the guideline of sustainable development, which included the newly developed legal normative environment that the Court found in that case. Similarly, here, the Appellate Body suggested that faithful negotiation was essential to maintain a balance between environmental protection and fair trade objectives within the framework of the WTO, and it considered the preambular language of sustainable development as a guideline, saturating the concept employed in a treaty with related rules and policies formed outside of the treaty in question.

(e) *EC—Biotech*<sup>263</sup>

*EC—Biotech* proceeded from complaints brought by the United States, Canada, and Argentina over a moratorium by the European Union regarding measures affecting “biotech products” of genetically modified organisms (GMOs). Among other issues, the question was raised regarding relevant rules of international law that could be referenced in interpreting the WTO agreements, including the *SPS Agreement*, the *TBT Agreement*, and the GATT 1994. While the complaining parties submitted that the WTO rules exclusively regulated the legal issues regarding GMOs, the European Communities (EC) insisted that other relevant rules of international law, particularly the *Convention on Biological Diversity*<sup>264</sup> and the *Cartagena Protocol*,<sup>265</sup> must be taken into account in interpreting WTO agreements.<sup>266</sup> The Panel observed this question from two perspectives, which indicated different objectives of using other rules of international

---

<sup>262</sup> *Ibid.* at para.166.

<sup>263</sup> *EC—Biotech supra* note 130.

<sup>264</sup> *Convention on Biological Diversity, supra* note 94.

<sup>265</sup> *Cartagena Protocol, supra* note 51.

<sup>266</sup> *EC—Biotech, supra* note 130 at para.7.49. EC invoked the view of the Appellate Body held in the *United States—Standards for Reformulated and Conventional Gasoline (Complained by Brazil and Venezuela)* (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/2-9.pdf](http://www.wto.org/english/tratop_e/dispu_e/2-9.pdf)> [*US—Gasoline*], which stated that “the General Agreement is not to be read in clinical isolation from public international law.” (*ibid.* at 16.)

law in treaty interpretation. First, other rules of international law that were applicable in the relations between the parties were to be taken into account together with the context under Article 31(3)(c), and second were the rules not applicable in the relations between the parties, but that were to be taken into account as informative evidence determining the “ordinary meaning” of a treaty term.

According to the EC, the *Convention on Biological Diversity* and the *Cartagena Protocol* were related to this case; however, the *Convention on Biological Diversity* was binding only on the EC, Argentina, and Canada and had been signed by the United States, and the *Cartagena Protocol* was of obligatory nature only for the EC and had been signed only by Argentina and Canada.<sup>267</sup> Hence, the EC invoked the approach taken in *US—Shrimp*, which allowed the Appellate Body to interpret the WTO Agreement “by reference to treaties which are not binding on all parties to the proceedings,” insisting that the Panel should follow the same approach set forth in that case.<sup>268</sup>

Moreover, the EC argued that the United States was not a signatory State to the *Cartagena Protocol* but was participating in the Cleaning House Mechanism established under Articles 11 and 20 of the Protocol; therefore, the United States should not have any objections to the approach required by the Protocol.<sup>269</sup> In this regard, the EC additionally invoked Article 18 of the *Vienna Convention* as reflecting customary international law, which stipulates that a State that has signed a treaty be bound to refrain from acts that would defeat the treaty’s object and purpose.<sup>270</sup>

Contrary to the EC’s contention, the United States and Argentina argued that the *Cartagena Protocol* could not be applied to this dispute because they were not parties to it; only the EC was bound by the Protocol.<sup>271</sup> Since they only mentioned the EC and did not identify other WTO Members’ status as parties to the Protocol, it seemed that they implicitly considered the scope of the term “parties” in Article 31(3)(c) to be the parties to a dispute. On the other hand, Canada had the same view as the other two parties, initially, but it changed its standpoint later and argued that the term “parties” referred to all parties to the treaty being interpreted.<sup>272</sup> Moreover, the United States and Canada contended that the *Cartagena Protocol* explicitly stated that the “Protocol shall not be

---

<sup>267</sup> *EC—Biotech*, *supra* note 130 at para.7.53.

<sup>268</sup> *Ibid.* at para.7.52. On *US—Shrimp* see previous section in this chapter.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.* On the Panel’s construction of Article 18 in this regard, *ibid.* at para.7.74, fn.251. On the details of Article 18 of the VCLT, see Jan Klabbers, “How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent” (2001) 34 *Vand. J.Transnat’l L.* 283.

<sup>271</sup> *EC—Biotech*, *supra* note 130 at para.7.58 (the United States of America); 7.63 (Argentina).

<sup>272</sup> *Ibid.* at para.7.60.

interpreted as implying a change in the rights and obligations of a Party under any existing international agreements.”<sup>273</sup>

On these conflicting arguments, the Panel first defined the scope of Article 31(3)(c) of the *Vienna Convention*. Regarding the range covered by the phrase “rules of international law,” the Panel held that this phrase included international treaties, customary international law, and the general principles of international law; however, it stated that it was not self-evident if the general principles of law recognized by civilized nations could be covered by the terms, leaving it unclear.<sup>274</sup> On *ratione personae* covered by “the parties,” the Panel pointed out that Article 31(3)(c) did not contain any words specifying the parties, despite some of the other provisions in the *Vienna Convention* that inserted some terms setting out the range of the parties involved, e.g., “one or more parties” (Article 31 (2)(b)) and “the parties to a dispute” (Article 66).<sup>275</sup> The Panel inferred, from the general definition of the term “party” in Article 2 (1)(g) of the *Vienna Convention* and the principle of sovereign equality, that the term “the parties” in Article 31(3)(c) meant all WTO Members.<sup>276</sup> Thus, the Panel concluded that the rules of international law to be taken into account in interpretation of the WTO agreements

---

<sup>273</sup> *Ibid.* at paras.7.59 (United States), 7.61 (Canada).

<sup>274</sup> *Ibid.* at para.7.67. In this paragraph the Panel mentioned as follows:

Regarding the recognized general *principles* of law which are applicable in international law, it may not appear self-evident that they can be considered as “rules of international law” within the meaning of Article 31(3)(c). However, the Appellate Body in *US – Shrimp* made it clear that pursuant to Article 31(3)(c) general principles of international law are to be taken into account in the interpretation of WTO provisions. As we mention further below, the European Communities considers that the principle of precaution is a “general principle of international law”. Based on the Appellate Body report on *US – Shrimp*, we would agree that if the precautionary principle is a general principle of international law, it could be considered a “rule of international law” within the meaning of Article 31(3)(c) [emphasis in original] [footnote omitted] .

However, the Panel stated, afterwards, that [w]e stated earlier that, in our view, the relevant rules of international law to be taken into account include general principles of law. The European Communities contends that the so-called ‘precautionary principle’ is a relevant principle of this kind.” (*Ibid.* at para.7.76.) It might be a typographical error but could lead to confusion between two notions of general principles of law and of international law.

<sup>275</sup> *Ibid.* at para.7.68.

<sup>276</sup> *Ibid.* at paras. 7.68-7.71. The Panel’s construction of the term “the parties” is criticized as “under-inclusiveness.” We shall see this issue in Section 4 (2) of Chapter 5 below. For the present, see Margaret A. Young, “II. The WTO’s Use of Relevant Rules of International Law: An Analysis of the Biotech Case”, *Current Developments*, (2007) 56 I.C.L.Q. 907 at 908, 914-918.

should have applicability for all WTO Members. Supporting this interpretation, the Panel pointed out that consideration of all interpretative elements in Article 31 could lead to “more than one permissible interpretation,” and Article 31(3)(c) could provide a guideline for an interpreter to settle such interpretation, which was more in accord with other applicable rules of international law.<sup>277</sup> Thus, it was reasonable for the Panel to interpret the term “parties” as all parties to a treaty because that construction “ensures and enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.”<sup>278</sup> In sum, the Panel took the strict view on the meaning of the “parties” in Article 31(3)(c), and it concluded that the *Convention on Biological Diversity* and the *Cartagena Protocol* were not qualified as “relevant rules” in terms of Article 31(3)(c)<sup>279</sup>

After examining the scope of Article 31(3)(c), the Panel inspected the applicability of the precautionary principle that the EC regarded “a fully-fledged and general principle of international law” and a relevant rule of international law in the present case.<sup>280</sup> The Panel avoided expressing its view on the issue of that principle’s legal status, similar to the attitude taken by the Appellate Body’s opinion in the *EC—Hormones*.<sup>281</sup>

Successively, the Panel turned to investigate an alternative basis for considering other rules of international law in interpreting the WTO agreements, even if those rules were not applicable between the WTO Members and, thus, did not fit the terms of Article

---

<sup>277</sup> *EC—Biotech, ibid.* at para.7.69.

<sup>278</sup> *Ibid.* at para.7.70.

<sup>279</sup> *Ibid.* at paras.7.73-7.75. Additionally, the Panel observed Article 18 of the VCLT and suggested that the “object and purpose” of a treaty should not be identified as a rule of international law. *Ibid.* at para.7.74, fn.251.

<sup>280</sup> *Ibid.* at paras.7.76 and 7.78.

<sup>281</sup> *Ibid.* at paras.7.86-7.89. In the *EC—Hormones* the Appellate Body avoided to make clear the legal status of the principle in international law as follows:

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.

*EC—Hormones supra* note 127 at 46, para.123 [footnote omitted].

31(3)(c). Regarding such a case, the EC pointed out that in *US—Shrimp*, the Appellate Body took into consideration some conventions, including the *Convention on Biological Diversity*, that the United States invoked even though they did not sign or ratify them; it insisted that the Panel in this dispute must follow the same approach taken by the Appellate Body in that case.<sup>282</sup> The Panel emphasized the primary role of the “ordinary meaning” in treaty interpretation pursuant to Article 31 (1), and it specified the methods for ascertaining the ordinary meaning of treaty terms: by referring to dictionaries<sup>283</sup> and by considering other relevant rules of international law to establish or confirm the

---

<sup>282</sup> *EC—Biotech*, *supra* note 130 at para.7.91.

<sup>283</sup> In several occasions the Appellate Body confirmed the usefulness of using dictionaries as a point of departure for determining a meaning of a term. *India—Additional and Extra-Additional Duties on Imports from the United States (Complaint by the United States of America)* (2008), WTO Doc. WT/DS360/AB/R (Appellate Body Report), at para.167, online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS360%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS360%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>; *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (Complained by Brazil, Thailand) (2005), WTO Doc. WT/DS269/AB/R, WT/DS/286/AB/R (Appellate Body Report), at para.175, online: WTO <[http://docsonline.wto.org/GEN\\_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/286ABR.doc](http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/286ABR.doc)> [*EC—Chicken Cuts*]; *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (Complaint by Canada) (2004), WTO Doc. WT/DS257/AB/R (Appellate Body Report), at para. 58, online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS257%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS257%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>. For critical views presented by the Appellate Body on the dictionary-based textual approach in the WTO, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Appellate Body Report), at para. 153, online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS70%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS70%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>; *United States—Tax Treatment for “Foreign Sales Corporations,” (Complaint by European Union)* (2000) WTO Doc. WT/DS108/AB/R (Appellate Body Report), at para.129, online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS108%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS108%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>. See Young, *supra* note 289 at 918; Federico Ortino, “Treaty Interpretation and the WTO Appellate Body Report in *US—Gambling*: a Critique” (2006) 9 J.Int’l Econ.L. 117 at 122-124; Henrik Horn & Joseph Weiler, “European Communities—Trade Description of Sardines: Textualism and its Discontent” in Henrik Horn & Petros C. Mavroidis, eds., *The WTO Case Law of 2002* (Cambridge: Cambridge University Press, 2005) 248 at 252; William Davey, “The WTO Dispute Settlement System: The First Ten Years” (2005) 8 J.Int’l Econ.L. 17 at 22. For the supporting view for more details on the dictionary-based textual approach, see Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009) at 221-235.

ordinary meaning in a given context. For such usage of other rules of international law, those rules were taken into account not because they were legal rules but because they were of “informative character” in the same way as dictionaries are.<sup>284</sup>

The reference to extrinsic documents as being of informative character in determining the “ordinary meaning” in connection with Article 31 (1) is a controversial interpretative technique.<sup>285</sup> Also, it should be noted that this technique could lead to deviations from the context and arbitrary reasoning.<sup>286</sup> In fact, the Panel did not invoke either of the documents mentioned in the present case without analysing the irrelevance of these conventions.<sup>287</sup> After all, the Appellate Body in *US—Shrimp* referred to relevant rules of international law that were not signed or ratified in determining the meaning of the generic term “natural resources” and in ascertaining a developmental interpretation. Of course, this approach could offer a possible remedy to the inconvenience of the strict condition of “the parties” under Article 31(3)(c) to take into account external rules of international law.<sup>288</sup> It could be grasped within an implied process of contextualizing the ordinary meaning that has been firmly established in WTO jurisprudence.<sup>289</sup> The process is not just to search additional and supporting sources for the interpretation ascertaining the ordinary meaning of a text as codified in Article 31 of the *Vienna Convention*, but to transform a plain meaning of a linguistic word to the “ordinary meaning” of a legal text, reflecting the common intentions of the parties in terms of the context and the object and purpose of the treaty.<sup>290</sup> As the next chapter discusses, the subjective element in treaty

---

<sup>284</sup> *EC—Biotech*, *supra* note 130 at para.7.92. In comparison of the Panel’s statements between paragraphs 7.69-7.70 and 7.92-7.95, this approach seems to be not mandatory, while the reference to “relevant rules” in pursuant to Article 31 (3) (c) is of obligatory character. See Young, *supra* note 276 at 918.

<sup>285</sup> Compare the views presented by McLachlan and by the ILC Study Group on the Fragmentation of International Law. McLachlan, *supra* note 12 at 315; *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at para.450. Young also presented an interesting understanding of this approach that finding the ordinary meaning is not a matter of consent but rather of intersubjectivity, which means that the meaning of a term can be determined in terms of social practices within a community. Young, *supra* note 276 at 919.

<sup>286</sup> Young, *ibid.* at 924.

<sup>287</sup> Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Alphen aan den Rijn: Kluwer Law International, 2011) at 175

<sup>288</sup> Cf. Young, *supra* note 276 at 925.

<sup>289</sup> Van Damme, *supra* note 283 at 213-274.

<sup>290</sup> *EC—Chicken Cuts* *supra* note 283 at para.239. Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at 365 and 366.

interpretation—i.e. the intentions of the parties—is not explicitly codified in Article 31, but it underpins the whole architecture of the *Vienna Convention* and that article as well.

### **3. Concluding Remarks: Interpretative Elements Relevant to Normative Integration in the Context of Sustainable Development**

Although sustainable development represents reconciliation between economic development and environmental protection, the integration process should incorporate knowledge and information from various fields in terms of balancing conflicting demands. This requires interpreters to refer not only to other relevant rules of international law but also to factual situations relevant to the issues, which might lead to an evolutive interpretation. Article 31(3)(c) provides a legal basis for this normative integration through treaty interpretation, but its scope of materials referenced is limited only to the legal rules that are applicable in the relations between the parties. The interpretative techniques using a generic term and the object and purpose of a treaty could be considered supplementary to the shortage of the scope of Article 31(3)(c).

Outside of the scope of Article 31(3)(c), i.e., rules not applicable between parties and non-legal (social, scientific, technological, and so forth), materials may be incorporated in treaty interpretation to achieve effective and realistic application of treaties in reconciling conflicting demands. A generic or conceptual term enables treaty interpreters to take into account developmental factors, such as legal, social, scientific, and technological advancements. Regardless of whether a treaty contains such evolvable terms, effective application in the light of the object and purpose of a treaty allows interpreters to heed external situations of the treaty, which may contain legal development as well.

These techniques are useful for the accomplishment of normative integration in terms of the object and purpose and in accordance with the actual context of a treaty, and thus, they serve sustainable development; however, in the case of the issues related to economic, environmental, and human rights, they could lead to arbitrary interpretation and juridical activism without reference to the parties' consent. Balancing between supplementing the failure of a consensual legal system and evading capricious interpretation is crucial to enhance the authenticity and predictability of international judgments and the legal stability of treaties.

## **Chapter 4 Flexible Architecture of Article 31 within the Rigid Consensual Framework: A Crucible of Interpretative Elements**

### **1. Introduction**

The previous chapter described the concomitant existence of two supplemental modes of normative integration through treaty interpretation. At this point, *Iron Rhine* contributes to clarifying these patterns of treaty interpretation in practice. First, the effective pursuit of a treaty's goal, in light of its object and purpose, requires consideration of the normative environment. Second, "a conceptual or generic term" of a treaty justifies reliance on the external legal and factual developments and situations of the treaty.<sup>291</sup>

In the next chapter, the legal basis, effects, and limits of these patterns legitimizing normative integration through treaty interpretation will be investigated in comparison with the codification process of the inter-temporal law crystallized in Article 31(3)(c). Prior to embarking on these tasks, the following sections will identify the architecture of Article 31 of the *Vienna Convention* as a single general rule on treaty interpretation forming a crucible of interpretative elements, which unifies the traditional methods and provides a flexible framework for interpreters.

### **2. Significance of the rules on treaty interpretation codified in the *Vienna Convention***

Before application, a treaty term and its meaning should be interpreted and determined.<sup>292</sup> Hence, treaty interpretation is a daily routine for practitioners and scholars of international law.<sup>293</sup> Nevertheless, the methodology of treaty interpretation remains a frequently contested subject in international treaty disputes.<sup>294</sup> Furthermore, in

---

<sup>291</sup> See Section 1 (2) of the previous chapter above. See Julian Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences" (2010) 9 *The Law and Practice of International Courts and Tribunals* 433 at 450, 467, and 472.

<sup>292</sup> Gardiner, *supra* note 213 at 26-29, esp. 27; Mustafa Kamil Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit traités" (1976-III) 151 *Rec. des Cours* 1at 9, para.2. Cf. *Case concerning the Factory at Chorzów* (Claim for Indemnity) (Jurisdiction) (*Germany v. Poland*) (1927), P.C.I.J. (Ser. A) No. 9 at 39 (Dissenting Opinion by M. Ehrlich); Tsune-Chi Yü, *The Interpretation of Treaties* (New York: Columbia University Press, 1927) at 40.

<sup>293</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007) at 230; Gardiner, *supra* note 213 at 11.

<sup>294</sup> Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, *Yearbook of International Law Commission 1966*, Vol.2 (New York: UN, 1967) at 218, para. (3) (A/CN.4/SER.A/1966/ADD.1). Clive Parry, "The Law of Treaties" in Max Sørensen, ed., *Manual of Public International Law* (New York: St. Martin's Press, 1968)

spite of the large volume of deliberations, views on the methods of treaty interpretation are diverse. McNair described such a situation: “[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation.”<sup>295</sup>

Moreover, authorities on the law of treaties have been sceptical regarding the obligatory nature of treaty interpretation canons and on codifying them as rigid rules.<sup>296</sup> Although the ILC recognized that the treaty interpretation canons and principles were not of compulsory nature and that “the interpretation of documents is to some extent an art, not an exact science,”<sup>297</sup> it codified a few select principles into a general rule on treaty interpretation. In regard to the codification of the rule, the ILC indicated its position in support of the textual approach, but they also considered the intention of the parties in interpreting treaties.<sup>298</sup>

Thus, treaty interpretation rules codified in the *Vienna Convention* transitioned mere canons, or guidelines employed in practice of treaty interpretation, into obligatory legal rules.<sup>299</sup> In spite of the uncertainty of their legally binding nature before codification, the ICJ has repeatedly held that the treaty interpretation rules in the *Vienna Convention* have been considered a codification of existing customary international law.<sup>300</sup> Also, the WTO Appellate Body, human rights courts, and other international

---

175 at 210; Jennings pointed out the practical importance of treaty interpretation. Robert Jennings, “General Course on Principles of International Law” (1967-II) 121 *Rec. des Cours* 323 at 544; Aust, *supra* note 310 at 230; Ulf Linderfalk, “Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation” (2007) 54 *Netherlands International Law Review* 133 at 133.

<sup>295</sup> McNair, *supra* note 290 at 364.

<sup>296</sup> Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, *supra* note 294 at 218, para. (1). See also McNair, *supra* note 290 at 366; Harvard Research in International Law, *Law of Treaties, Comment on Article 19 (a)* (1935) 29 *A.J.I.L. Supplement* 653 at 946-947 [Harvard Research].

<sup>297</sup> Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, *supra* note 294 at 218, para. (4).

<sup>298</sup> *Ibid.* at 218-219, para. (5).

<sup>299</sup> Santiago Torres Bernardez, “Interpretation of treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties” in Gerhard Hafner *et al.*, eds., *Liber Amicorum Professor Ignaz Seidle-Hohenveldern in honour of his 80<sup>th</sup> Birthday* (The Hague: Kluwer Law International, 1998) 721 at 721.

<sup>300</sup> Bernardez, *ibid.* at 721ff. *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] I.C.J. Rep. 53 at 69-70, para.48; *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6 at 21-22, para.41; *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [1995] I.C.J. Rep. 6 at 18, para.33; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [1996] I.C.J. Rep. 803 at 812, para.23; *Legality of the Use by a State of Nuclear Weapons in*

tribunals and national courts have referred to the treaty interpretation rules in the *Vienna Convention* as the codification of existing customary international law.<sup>301</sup> On one hand, such recognition of Articles 31 and 32 as codified customary rules on the topic suggests that the rules of the *Vienna Convention* provide a rigid framework of treaty interpretation, and thus, interpreters should strictly follow these rules.<sup>302</sup> On the other hand, the more convincing view indicates that the framework of the *Vienna Convention* on treaty interpretation does not provide an exclusively complete list of interpretational methods. Articles 31 and 32 are of mandatory character but their application remains elastic and,

---

*Armed Conflict*, *supra* note 165 at 75, para. 19; *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, [1999] I.C.J. Rep. 1045 at 1059, para.18; *LaGrand Case (Germany v. United States of America)*, [2001] I.C.J. Rep. 466 at 501, para. 99; *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, [2002] I.C.J. Rep. 625 at 645-646, para.37; *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at 174, para. 94; *Case concerning Avena and Other Mexican Nationals*, *supra* note 266 at 48, para. 83; *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 43 at 109-110, para.160; *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, [2008] I.C.J. Rep. 177 at 219, para.112; *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, [2009] I.C.J. Rep. 213 at 237, para.47; *Case concerning Pulp Mills on the River Uruguay*, *supra* note 174 at 30, para.65, online: International Court of Justice < <http://www.icj-cij.org/docket/files/135/15877.pdf>>. Gardiner notes that “The Court nowadays presents application of the rules as virtually axiomatic.” Gardiner, *supra* note 213 at 13-17.

<sup>301</sup> Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984) at 153; Yasseen, *supra* note 292 at 16; Van Damme *supra* note 283 at 50 n77; Gardiner, *supra* note 213 at c4; *Golder v. The United Kingdom* (1975), 18 E.C.H.R. (Ser. A) 1 at 14, para. 29; *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)* (1983), Inter-Am. Comm. H.R. No. 3, OC-3/83, 70 I.L.R. (1986) 449 at 465-466; *The Queen on the application of International Air Transport Association, Eurpean Low Fare Airline Association v. Department of Transport*, C-344/04, [2006] E.C.R. I-403 at para.40; *Us—Gasoline*, *supra* note 266 at 16-17.

<sup>302</sup> Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008) at 314. See also Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (AA Dordrecht: Springer, 2007) at 7, 9, and 14.

to some extent, open-ended.<sup>303</sup> This approach to the codification has left interpreters with a considerable degree of flexibility.<sup>304</sup>

Article 31 of the *Vienna Convention* incorporated different methods or approaches of treaty interpretation into a single general rule as a crucible of interpretative elements.<sup>305</sup> This “crucible approach”<sup>306</sup> combined different interpretational approaches—namely, the textual, the intentions, and the teleological methods—and it enabled interpretative elements to work together.<sup>307</sup> A commentator considered this approach an important contribution to end the controversy over treaty interpretation methods by enfolding them in a single general rule on treaty interpretation, although the same author pointed out that differing approaches continue to coexist.<sup>308</sup> Some other

---

<sup>303</sup> See Gardiner, *supra* note 213 at 36-38 (Gardiner describes that proper application of the treaty interpretation rules in the Vienna Convention is the correct procedure and the best assurance of reaching the correct interpretation. *Ibid.* at 29-33.); Van Damme, *supra* note 283 at 56-72.

<sup>304</sup> Yasseen, *supra* note 292 at 13; Serge Sur, *L'interprétation en droit international public* (Paris: Librairie Générale de droit et de jurisprudence, 1974) at 71; Pierre-Marie Dupuy, “La Convention de Vienna sur le droit des traités à l’épreuve de la pratique: quel bilan trente ans après son entrée en vigueur” (2006) 39 Rev. B.D.I. 411 at 412-413; Van Damme, *supra* note 283 at 51-52; Sinclair, *supra* note 301 at 115-117.

<sup>305</sup> Stanislaw Nahlik, who was the Representative of Poland in the Vienna Conference on the Law of Treaties, commented that “articles 27 and 28 were a successful combination of three possible approaches to the question of interpretation, namely the textual, the intentional and the functional approach. They thus constituted a coherent and well-balanced part of the convention.” *United Nations Conference on the Law of Treaties, 2d Sess. Vienna, 9 April-22 May 1969, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, 13th plenary Mtg., UN Doc. A/CONF.39/11/Add.1.* (New York: United Nations, 1970) at 58, para. 67. The commentary to the draft articles on treaty interpretation explained the crucible architecture of the rules that “[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.” Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, *supra* note 294 at 219-220, para. (8) (A/CN.4/SER.A/1966/ADD.1). Aust, *supra* note 293 at 234.

<sup>306</sup> Gardiner, *supra* note 213 at 9-10, 36-38.

<sup>307</sup> The commentary to the draft articles on treaty interpretation explained the crucible architecture of the rules that “all the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.” Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, *supra* note 294 at 219-220, para. (8).

<sup>307</sup> Gardiner, *supra* note 213 at 9-10, 36-38.

<sup>308</sup> Shigeki Sakamoto, “Myth and Reality of Treaty Interpretation: What Does the End of Conflicting Doctrine of Interpretation Mean?” (*in Japanese*) (2003) 22 Sekai Hou Nempou (Yearbook of World Law) 30. Compare a statement by Sir Humphrey Waldock (Expert Consultant) at the Vienna Conference, *United Nations Conference on the Law of Treaties, 1st Sess. Vienna, 26 March-24 May 1968, Official Records, Summary Records*

authorities indicated that the codified rule of treaty interpretation in the *Vienna Convention* inclines to the textual approach.<sup>309</sup> Although the Commission emphasized the textual approach, they simultaneously underlined the subjective element expressed in the text of the treaty: “the text of the treaty must be presumed to be the authentic expression of the intentions of the parties.”<sup>310</sup>

The prominence on the intention of the parties in the context of treaty interpretation seems to be consistent with the contractual concept of treaty reflecting the principle of consent within the framework of the *Vienna Convention*. The consent of a State plays a decisive role at several phases during the life of a treaty. Article 2 (1)(a) of the *Vienna Convention* defined a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied into a single instrument or in two or more related instruments and whatever its particular designation,” but it provides no further description of “an international agreement.”<sup>311</sup> Although an element of the parties’ intention is not explicitly envisaged in any provisions in the *Vienna Convention*, such a subjective element supposedly underlies every treaty. For example, in the commentary to the Article 2 (1)(a) that defines “treaty” in the *Vienna Convention*, the ILC examined whether the element of “intention to create obligations

---

*of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 33d Mtg., UN Doc. A/CONF.39/11. “E.70. V.6” (New York: United Nations, 1970) at 184 para.66

<sup>309</sup> Sir Humphrey Waldock, Special Rapporteur of the International Law Commission, mentioned that the textual approach the ILC’s basic stance to the codification of rules on treaty interpretation:

This article corresponds to article 1 of the Institute's resolution and to major principles I to III and VI in the Fitzmaurice formulation. It takes as the basic rule of treaty interpretation the primacy of the text as evidence of the intentions of the parties. It accepts the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties. While not excluding recourse to other indications of the intentions of the parties in appropriate cases, it makes the actual text the dominant factor in the interpretation of the treaty. The Institute of International Law adopted this — the textual — approach to treaty interpretation, despite its first Rapporteur's strong advocacy of a more subjective, “intentions of the parties”, approach.

Waldock III, *supra* note 47 at 56, para.(13). See also Yasseen, *supra* note 292 at 25-27; György Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest: Akadémiai Kiadó, 1973) at 102-103; Rudolf Bernhardt, “Interpretation and Implied (Tacit) Modification of Treaties” (1967) 27 *Z.a.ö.R.V.* 491 at 497-498.

<sup>310</sup> Commentary to articles 27 and 28, Draft Articles on the Law of Treaties, *supra* note 294 at 220, para. (11) and at 223, para. (18).

<sup>311</sup> Malgosia Fitzmaurice & Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005) at 6-7.

under international law” must be added to the definition of treaty; they concluded that the subjective element was implied in the phrase of “governed by international law.”<sup>312</sup>

While not all international agreements have legally binding force, the concordance of the expressed wills of parties to create a treaty that legally binds their relations produces law between them.<sup>313</sup> As the *SS Lotus* confirmed, States’ free will as expressed in conventions yield legally binding force.<sup>314</sup> In other words, the *pacta sunt servanda* affords legally binding force to a consent between states.<sup>315</sup>

As discussed in the following sections, the orthodox methods of treaty interpretation, to a certain extent, aim at ascertaining the common intentions of the parties reflected in the text of the treaty.<sup>316</sup> The difference lies in how to reach them and the position such a subjective element occupies in the process of treaty interpretation, although the controversy might not be remarkable in practice.<sup>317</sup> The textual approach primarily refers to the actual text, identifying the ordinary and plain meaning in which the intentions of the parties are presupposed to be reflected.<sup>318</sup> Although reference to the preparatory works is a feature of the intentions approach, the textual approach does not deny recourse to them in a case where the meaning of the text is unclear. The difference lies in whether recourse to the preparatory works is “*quasi-habitual*.”<sup>319</sup> Even the teleological approach to determination of the object and purpose of a treaty should be

---

<sup>312</sup> Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission, 1966*, vol. 2 (New York: UN, 1967) at 189, para. (6) (A/CN.4/SER.A/1966/Add.1).

<sup>313</sup> Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009) at 77. See also G. I. Tunkin, *Theory of International Law*, trans. by William E. Butler (Cambridge: Harvard University Press, 1974) at 11-16; Paul Reuter, *Introduction au droit des traités*, 2<sup>ème</sup> éd. (Paris: Presses Universitaires de France, 1985) at 33, para. 63. See also V. D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff Publishers, 1997), pp. 357-358; Eduardo Jiménez de Aréchaga, “International Law in the Past Third of a Century”, (1978-I) 159 Rec. des Cours 1 at 36.

<sup>314</sup> *S.S. “Lotus” Case (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No. 10 at 18.

<sup>315</sup> Dionisio Anzilotti, *Cours de droit international*, trans. by G. Gidel (Paris: Sirey, 1929) vol. 1 at 43-44; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Archon Books, Reprinted in 1970) at 156; Josef L. Kunz, “The Meaning and the Range of the Norm Pacta Sunt Servanda” (1945) 39 A.J.I.L. 180 at 181. See also the third paragraph of the preamble of the VCLT.

<sup>316</sup> See *EC—Computer Equipment*, at para. 84. *Contra* Van Damme, *supra* note 283 at 67-68.

<sup>317</sup> Sinclair, *supra* note 301 at 116-117.

<sup>318</sup> See text accompanying note 309.

<sup>319</sup> Sir Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points” (1951) 28 Brit. Y. B. Int’l. L. 1 at 5 [emphasis in original].

based on the intentions of the parties, which are revealed in its actual texts.<sup>320</sup> Only the extreme objectivistic position, known as the New Haven School, pays no heed to such subjective elements in the process of treaty interpretation, easily allowing arbitrary interpretation according to the interpreters' understanding of the treaty's aim.<sup>321</sup> The intentions of the parties, as a basis of treaty interpretation, would be the common and shared will that creates the reciprocal basis for the treaty.<sup>322</sup> Such a common intention could be found through dissecting the relevant preparatory work. At the same time, it could evolve according to changes in social, scientific, and technological developments. Jiménez de Aréchaga pointed out that the will of the parties can be constant or evolving, and the treaty interpretation rules should reflect these two possibilities.<sup>323</sup> Within the limits of the actual text, the States parties' domestic and international behaviours might serve to afford new or expanded meanings to the text.<sup>324</sup>

### **3. Three schools on treaty interpretation tucked into a single general rule through the codification of the law of treaties**

According to Fitzmaurice, who scrutinized the practice and literature on treaty interpretation, the methods of treaty interpretation can be simplified and categorized into three different arguments: (1) the intentions school, (2) the textual school, and (3) the teleological school.<sup>325</sup> For the intention approach, the only legitimate purpose of treaty interpretation is to establish and give effect to the parties' intentions, or presumed

---

<sup>320</sup> Yasseen, *supra* note 292 at 57-58.

<sup>321</sup> See Section 3 (2) below.

<sup>322</sup> Andreas Paulus, "Reciprocity Revisited" in Ulrich Fastenrath *et al.* ed., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 113; Bruno Simma, "Reciprocity" in *Encyclopaedia of Public International Law*, vol. 4 (Amsterdam: Elsevier, 2000) 29; Emmanuel Decaux, *La réciprocité en droit international* (Paris: Librairie Générale de droit et de jurisprudence, 1980).

<sup>323</sup> Jiménez de Aréchaga, International Law Commission, 16<sup>th</sup> Sess., 728<sup>th</sup> Mtg., A/CN.4/SR.728 in *Yearbook of the International Law Commission 1964*, Vol. 1 (New York: UN, 1965) at 34, para. 10 (A/CN.4/SER.A/1964).

<sup>324</sup> See also Rudolf Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights" (1999) 43 *German Yearbook of International Law* 11 at 21-24; Yoshiro Matsui, "Joyaku Kaishaku ni okeru Togo no Genri: Joyaku-ho-joyaku Dai 31 jo 3 (c) wo Chushin ni (Systemic Integration in Treaty Interpretation: An Analysis on Article 31(3)(c) of the VCLT)" in Shigeki Sakamoto, ed., *Kokusai Rippo no Saizensen: Fujita Hisakazu Sensei Koki Kinen (Current Issues of International Lawmaking: Festschrift in honour of Professor Hisakazu Fujita's 70th Birthday)* (Tokyo: Yushindo Kobun Sha, 2009) [in Japanese] 101 at 133-134.

<sup>325</sup> Fitzmaurice, *supra* note 319 at 1-2. See also Francis G. Jacobs, "Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference" (1969) 19 *I. C. L. Q.* 318.

intentions. For the textual approach, the primary aim is determining what the text conveys in accordance with the ordinary and apparent meaning of its terms. The teleological approach establishes the treaty's general purpose, construing the text in terms of the treaty's object and purpose. However, as Fitzmaurice acknowledged, the different treaty interpretation schools of thought are not exclusive from each other, but "theories of treaty interpretation can be constructed (and are indeed normally held) compounded of all three."<sup>326</sup>

This section will trace the historical development of the treaty interpretation arguments and identify the significance of the codification of the rules of treaty interpretation in the *Vienna Convention* as preliminary remarks for the next chapter. For this purpose, the interrelationship of the three traditional schools and the location of the New Haven School among treaty interpretation arguments will be examined below. The three traditional schools, more or less, apparently or potentially, commonly aimed at establishing the intentions of the parties, and the difference lies in their methodological approaches to reach that end. However, a remarkable contrast can be found between the traditional three schools and the New Haven School, which aims at making a treaty operative in considering the purpose of the treaty independently from other interpretative factors.

#### **(a) Intention of parties approach versus textual approach**

In the early stage of international law, the intention of the parties approach and the textual approach were not clearly divided into two different schools. For example, Grotius emphasized that treaties must be interpreted in good faith, and he mentioned that «[l]a mesure d'une droite interpretation est l'induction de la volonté, tirée des signes les plus probables. Ces signes sont de deux sortes: les *paroles* et les *autres conjectures*. On les considère ou *séparément* ou *conjointement*.»<sup>327</sup> Moreover, he stated that «[s]'il n'y a aucune conjecture qui conduise à un autre sens, les paroles doivent être entendues dans le sens qui leur est propre, non selon la grammaire, en s'attachant à leur origine, mais selon l'usage populaire, «cet arbitre, ce maître, ce régulateur du langage.»<sup>328</sup> Vattel, who is often considered the founder of the textual approach,<sup>329</sup> posed the primary maxim for the interpretation as «*il n'est pas permis d'interpréter ce qui n'a pas besoin*

---

<sup>326</sup> Fitzmaurice, *supra* note 319 at 1.

<sup>327</sup> Hugo Grotius, *Le droit de la guerre et de la paix*, tome 2<sup>ème</sup> (trans. M. P. Pradier-Fodéré, Paris: Librairie de Guillaumin et Cie, 1867), c. XVI, section I, para.2 [emphasis in original], [footnote omitted].

<sup>328</sup> *Ibid.* at section II, para. 1 [footnote omitted].

<sup>329</sup> E.g. David J. Bederman, *Classic Canons: Rhetoric, Classicism and Treaty Interpretation* (Aldershot: Ashgate, 2001) at 140.

*d'interprétation.»*<sup>330</sup> He acknowledged, however, that the objective of the interpretation is to determine the parties' intentions:

Si les idées des hommes étoient toujours distinctes & parfaitement déterminées, s'ils n'avoient pour les énoncer que des termes propres, que des expressions également claires, précises, susceptible d'un sens unique; il n'y auroit jamais des difficultés à découvrir leur volonté dans les paroles par lesquelles ils ont voulu l'exprimer: il ne faudroit qu'entendre la langue.<sup>331</sup>

Although these early international law scholars emphasized the importance of interpreting actual texts in a treaty, they believed the aim of treaty interpretation was to establish the parties' intentions. Thus, these statements stress the textual interpretation as a means to find such intentions.

This approach was supported by early international jurisprudence.<sup>332</sup> These cases revealed that international tribunals often took a negative or restrictive view regarding using *travaux préparatoires*. This indicated that these cases considered the texts in a treaty to be authentic manifestations of the accord between the parties. For example, in the case of *Georges Pinson (France) v. United Mexican States*, where the interpretation of the *Convention of Reclamation between France and Mexico* was disputed, the tribunal presented a formula for general rules of treaty interpretation.<sup>333</sup>

1. Autant que le texte de la convention est clair par lui-même, il n'y a pas lieu d'en appeler à de prétendues intentions contraires de ses auteurs, sauf le cas exceptionnel dans lequel les deux parties litigantes reconnaîtraient que le texte ne correspond pas à leur intention commune.

---

<sup>330</sup> E. Vattel, *Le droit des gens ou Principes de la loi naturelle, appliqués à la conduite and aux affaires des Nations and des Souverains* (Londres, 1758) tome 1, Liv. II, c. XVII, section 263. (available at <http://gallica.bnf.fr/ark:/12148/bpt6k865729.r=vattel.langEN>)

<sup>331</sup> *Ibid.* section 262.

<sup>332</sup> E.g. *Aspinwall Case* (United States and Venezuelan Claim Commission, 1889) and *Sambiaggio Case* (Italian-Venezuelan Mixed Claims Commission, 1903), quoted in Jackson H. Ralston, *International Arbitral Law and Procedure: Being a Résumé of the Procedure and Practice of International Commissions, and Including the Views of Arbitrators upon Questions Arising under the Law of Nations* (Boston: Ginn and company, 1910) at 9-10; Surya P. Sharma, "The ILC Draft and Treaty Interpretation with Special reference to Preparatory Works" (1968) 8 *Indian Journal of International Law* 367 at 375; Shigeki Sakamoto, *The Law of Treaties: Theory and Reality [in Japanese]* (Tokyo: Toshindo, 2004) at 157-158 fn.20-23.

<sup>333</sup> *Georges Pinson (France) v. United Mexican States* (1928) 5 R.I.A.A.327 at 422, para.50.

2. Autant que le texte n'est pas suffisamment clair, il est loisible de recourir aux intentions des parties contractantes. Si, dans ce cas, les intentions sont claires et unanimes, elles doivent prévaloir sur toute autre interprétation possible. Si, au contraire, elles divergent ou ne sont pas claires, il faut chercher l'interprétation qui, dans le cadre du texte, correspond le mieux, soit à une solution raisonnable de la controverse, soit à l'impression que l'offre de la partie qui a pris l'initiative a raisonnablement et de bonne foi dû faire sur l'autre partie.

3. Pour fixer le sens du texte conventionnel ou les intentions des parties contractantes, les négociations diplomatiques qui ont conduit à la conclusion de la convention peuvent être prises en considération, à moins que les parties contractantes n'aient fini par adopter un texte incompatible avec la teneur des négociations, ou qu'elles n'aient consciemment renoncé à invoquer les éléments d'interprétation que les pourparlers diplomatiques pourraient fournir.

4. Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente.

5. En cas de doute sur la portée d'une stipulation conventionnelle, elle doit être entendue dans un sens qui en assure la possibilité d'application, tandis que, en cas d'impossibilité de fixer son sens exact, elle doit être interprétée en faveur de la partie qui a contracté l'engagement.

This formula represents a pioneer in visualizing the canons of treaty interpretation, prior to the Harvard draft articles.<sup>334</sup> According to the prescription, so long as the text of a treaty is clear, the drafters' intentions are of no consequence (Paragraph 1). When the text is not sufficiently clear, reliance on the drafters' intentions becomes reasonable (Paragraph 2). Reference to *travaux préparatoires* can be taken into account to fix the meaning of the text or the intentions of the parties (Paragraph 3). Any problem that cannot be solved through interpretation or other methods must be resolved according to general principles of international law (Paragraph 4). Where a determination of the precise meaning of the text is impossible, the principle of *contra proferentem* must be applied (Paragraph 5). The first two paragraphs refer to different schools of treaty interpretation. Paragraph 1 incorporates textual interpretation, and Paragraph 2 relies on the intention of the parties approach. Overall, the prescription positions itself within the

---

<sup>334</sup> V. D. Degan, "Attempts to Codify Principles of Treaty Interpretation and South-West Africa Case" (1968) 8 *Indian Journal of International Law* 1 at 9.

textual approach, but it also allows for the intentions school and provides for the invocation of preparatory works in determining the meaning of the text. The international courts seem to follow this practical formula.<sup>335</sup> This prescription indicates that the textual approach and the intentions school are not exclusive, but they can complement each other in practice.<sup>336</sup>

It seems that the practice of treaty interpretation by international tribunals cannot be categorized simply into a specific school of interpretation, but many believe that the textual approach dominated in theory and practice.<sup>337</sup> On the other hand, advocates of the intentions school emphasized the significance of the preparatory works in determining the will of the parties.<sup>338</sup> For the intentions approach, the goal of treaty interpretation is to find the parties' intentions expressed at the time of conclusion. For example, Sir Hersch Lauterpacht submitted his draft articles on treaty interpretation to the Institute of International Law in 1950 along with the intention school of thought.

1. La recherche de l'intention des parties étant le but principal de l'interprétation, il est légitime et désirable, dans l'intérêt de la bonne foi et de la stabilité des transactions internationales, de prendre le sens naturel des termes comme point de départ du processus d'interprétation. C'est à la partie qui prétend donner aux termes ou dispositions contestées du traité un sens différent du sens naturel ou qui leur attribue un sens apparemment clair qu'incombe le fardeau de la preuve. La clarté apparente ou supposée de ces termes ou dispositions ne saurait justifier le rejet de la preuve contraire, ni la rendre indûment difficile.
2. Le recours aux travaux préparatoires, lorsqu'ils sont accessibles, est notamment un moyen légitime et désirable aux fins d'établir l'intention des parties dans tous les cas où, malgré sa clarté apparente, le sens d'un traité prête à controverse. Il n'y a aucun motif d'exclure l'usage de travaux préparatoires, dûment consignés et publiés, à l'encontre d'Etats ayant adhéré au traité postérieurement à sa signature par les parties originaires.<sup>339</sup>

---

<sup>335</sup> In this regard, Sharma, *supra* note 332 at 375.

<sup>336</sup> See Fitzmaurice, *supra* note 319.

<sup>337</sup> Van Damme, *supra* note 283 at 35.

<sup>338</sup> Hersch Lauterpacht, "De l'Interprétation des traités", Rapport et projet de résolutions présentés à l'Institut de Droit International, (1950-I) 43 A.I.D.I. 366 at 377-402, 433, paras 1 and 2. For the utility to refer to the preparatory works, *idem*, "Some Observations on Preparatory Work in the Interpretation of Treaties" (1935) 48 H.L.R. 549 at 575-576.

<sup>339</sup> *Idem*, Interprétation des traités, (1950) 43:1 A.I.D.I. 433 at 433 paras. 1 and 2.

Paragraph 1 provides that the objective of treaty interpretation is identifying the parties' intentions. Paragraph 2 envisages that the reference to *travaux préparatoires* was preferable whenever treaty terms were disputed, regardless of their superficial plainness. Lauterpacht deemed that even if a text precisely reflected the intentions of the parties, the reference to *travaux préparatoires* would be useful to make a firm verification of the contents of the intentions.<sup>340</sup> This position contrasts remarkably with textualism that restrictively invokes *travaux préparatoires* only in cases where the text is not sufficiently clear.

However, this draft article was strongly criticized from the empirical and practical perspectives by Sir Eric Beckett, among others.<sup>341</sup> He pointed out that it was difficult to establish the common will of the parties because disputes normally arise from unexpected circumstances; therefore, the parties would not have any common intentions regarding those specific situations.<sup>342</sup> Moreover, he strongly criticized that Lauterpacht's arguments substituted *travaux préparatoires* for a treaty. Sir Beckett argued that the task of the courts was not to determine the parties' intentions but to interpret treaties.<sup>343</sup> Moreover, he insisted that the adopted treaty texts did not necessarily reflect the actual positions or intentions of the parties presented in the negotiation process. Once in effect, a treaty's text has its own life that is progressively independent from the negotiation process.<sup>344</sup> The sceptical view on the intentional approach presented by Beckett from a realistic perspective questions the presupposed existence of the real intention of the parties based on the legal fiction in the context of treaty interpretation.<sup>345</sup> Verdross expressed a similar view in the Commission in the context of application of inter-temporal law to law-making treaties.<sup>346</sup>

---

<sup>340</sup> *Ibid.* at 377-402.

<sup>341</sup> For the useful comparison on the Sir Beckett's view and the Lauterpacht's position, G. G. Fitzmaurice & F. A. Vallat, "Sir (William) Eric Beckett, K.C.M.G., Q.C." (1968) 17 I.C.L.Q. 267 at 302-313.

<sup>342</sup> E. Beckett, "Observations des membres de la Commission sur le rapport de M. Lauterpacht—1. Comments by Sir Eric Beckett" (1950) 43:1 A.I.D.I. 435 at 438-439.

<sup>343</sup> *Ibid.* at 435.

<sup>344</sup> *Ibid.* at 435-444.

<sup>345</sup> See Fuad Zarbiyev, "Judicial Activism in International Law: A Conceptual Framework for Analysis" (2012) 3 Journal of International Dispute Settlement 247 at 263; Julius Stone, "Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process" (1954) 1 Sydney L. Rev. 344.

<sup>346</sup> Verdross, International Law Commission, 16th Sess., 728th Mtg., A/CN.4/SR.769 in *Yearbook of the International Law Commission 1964*, Vol. 1 (New York: UN, 1965) at 33, para.7 (A/CN.4/SER.A/1964).

Other members of the Institute of International Law supported Beckett's arguments.<sup>347</sup> Sir Gerald Fitzmaurice, who was Lauterpacht's successor, aligned himself with the textual approach, and his report resulted in the Granada Resolution in 1956,<sup>348</sup> which expressed such approach as follows:

L'Institut de Droit international

Estime que lorsqu'il y a lieu d'interpréter un traité, les Etats, les organisations et les juridictions internationales pourraient s'inspirer des principes suivants :

Article premier

1. L'accord des parties s'étant réalisé sur le texte du traité, il y a lieu de prendre le sens naturel et ordinaire des termes de ce texte comme base d'interprétation. Les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international.

2. Toutefois, s'il est établi que les termes employés doivent se comprendre dans un autre sens, le sens naturel et ordinaire de ces termes est écarté.

Article 2

1. Dans le cas d'un différend porté devant une juridiction internationale il incombera au tribunal, en tenant compte des dispositions de l'article premier, d'apprécier si, et dans quelle mesure, il y a lieu d'utiliser d'autres moyens d'interprétation.

2. Parmi ces moyens légitimes d'interpréter se trouvent :

- a) Le recours aux travaux préparatoires ;
- b) La pratique suivie dans l'application effective du traité ;
- c) La prise en considération des buts du traité.<sup>349</sup>

This resolution influenced the ILC's codification of the rules on treaty interpretation.<sup>350</sup>

The Special Rapporteur Waldock mentioned this resolution as one of the inspirations for his draft articles.<sup>351</sup> While the Granada Resolution adopts the textual approach, it allows

---

<sup>347</sup> E.g. Sir Arnold McNair, (1950) 43:1 A.I.D.I. at 450-452.

<sup>348</sup> For the transition of the resolutions on treaty interpretation in l'Institut, see J. H. W. Verzijl, *International Law in Historical Perspective: Juridical Facts as Sources of International Rights and Obligations*, vol. 6 (The Hague: Martinus Nijhoff Publishers, 1973) at 302-305.

<sup>349</sup> Resolution of 19 April 1956, (1956) 46 A.I.D.I. at 364-365. For the English version, Waldock III, *supra* note 47 at 55, para.11.

<sup>350</sup> See Gardiner, *supra* note 213 at 62.

<sup>351</sup> Waldock III, *supra* note 47 at 55, para. 10.

interpreters to access preparatory works without any requisite conditions, such as vagueness of the text. This differs remarkably from the ILC draft articles.<sup>352</sup>

Fitzmaurice took the textual approach based on the analysis of the ICJ jurisprudence, and he deduced six principles from the case law: (1) Actuality (or Textuality), (2) the Natural and Ordinary Meaning, (3) Integration, (4) Effectiveness, (5) Subsequent Practice, and (6) Contemporaneity.<sup>353</sup> These principles formed the basis of Special Rapporteur Waldock's first draft article on treaty interpretation, and they were reflected in the final adopted provisions of Article 31 of the *Vienna Convention*. The ILC decided not to include the temporal factors (the inter-temporal law) in their codification of general rules of treaty interpretation because this issue was too complex to be codified in a general rule<sup>354</sup>. However, the codification process revealed that the two limbs of inter-temporal law underpinned Article 31(3)(c).<sup>355</sup>

While Fitzmaurice favoured the textual approach, he also considered the difference between the intentional approach and textualism to be merely methodological; he only questioned whether having recourse to *travaux préparatoires* should be a routine at any given time, even where the text was clear enough, or should be allowed only in cases where the text was ambiguous or obscure.<sup>356</sup> McNair also describes the main task of treaty interpretation as “the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*”<sup>357</sup> The difference between them can be seen only in their methods; textualism tries to establish the parties' intentions through determining the meaning of the treaty's text, while the intentions school determines the will of the parties by reading the preparatory works.<sup>358</sup>

The intentions school seeks to find what the parties contemplated at the time of conclusion, and methodologically, it references the treaty's preparatory works. The textual approach relies instead on the ordinary meaning of the text and presupposes that the parties' intentions should be expressed in the text. Thus, it can be said that both schools, ultimately, seek to find and ascertain what the parties contemplated, but through different procedures.

---

<sup>352</sup> Jacobs, *supra* note 325 at 322.

<sup>353</sup> Sir Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points” (1957) 33 Brit. Y. B. Int'l. L. 203 at 211-212. In this article the sixth principle added to the five principles which had already presented in the article published in 1951 (Fitzmaurice, *supra* note 334 at 9.).

<sup>354</sup> This will be analysed with more specificity in the subsequent chapter.

<sup>355</sup> Gardiner, *supra* note 213 at 64.

<sup>356</sup> Fitzmaurice, *supra* note 319 at 5.

<sup>357</sup> McNair, *supra* note 290 at 365 [emphasis in original].

<sup>358</sup> Sinclair, *supra* note 301 at 115.

**(b) Shades of the teleological approach**

One other traditional school on treaty interpretation also tries to look for the intentions of the parties in the treaty, but does so on a teleological basis. In order to confirm the meaning of a treaty's term, the teleological approach references the treaty's aim, object, and purpose. The utility of the teleological approach makes treaty terms suitable in reality, in filling the gaps and expanding texts as long as they are consistent with the objects and purposes of the treaty. While the teleological approach works where the text is ambiguous and disturbs the operation of the treaty, this method cannot alter the meaning of the text when the text has apparently clear meaning.<sup>359</sup> In other words, the teleological approach does not intend to determine the object and purpose of a treaty in question independently from the parties' common intentions expressed in the treaty's text.<sup>360</sup> This approach also falls under the general rule established in Article 31 with reference to the "object and purpose" of a treaty.<sup>361</sup> On the other hand, this approach could easily lead to a kind of judicial activism beyond the interpretative functions of international tribunals. In this regard, the ILC carefully advanced that their task of codification of the interpretation rule was not to lead to such radical consequences. The principle of effectiveness was reduced to two interpretative elements—good faith and object and purpose—in Article 31 (1) and was not specified as an autonomous factor.<sup>362</sup>

This moderate teleological approach was also adopted, albeit loosely, in Article 19 of the Harvard Draft, which reads:

- (a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

---

<sup>359</sup> Fitzmaurice, *supra* note 319 at 8.

<sup>360</sup> Cf. Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1982) at 229; Yasseen *supra* note 292 at 57-58.

<sup>361</sup> Gardiner, *supra* note 213 at 189ff.

<sup>362</sup> Commentary to Articles 27 and 28 of the Draft Articles on the Law of Treaties, *supra* note 294 at 219, para. (6). See van Damme, *supra* note 283 at 275-278.

(b) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.<sup>363</sup>

For the drafters, the function of treaty interpretation could be summarized as follows:

The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of discovering some preëxisting specific intention of the parties with respect to every situation arising under a treaty...In most instances, therefore, interpretation involves *giving* a meaning to a text—not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve.<sup>364</sup>

Article 19 (a) considered all these interpretative elements in the manner of determining the goal of the treaty and did not mention the position of the treaty text in treaty interpretation.<sup>365</sup>

In contrast, another stream of the teleological approach seeks “the closest possible approximation to the genuine shared expectations of the parties within the limits established by overriding community policies”<sup>366</sup> through investigating the “context” that is formed by the broad sense of the process of communication between the parties, rather than construing the written objectives in the treaty.<sup>367</sup> For the New Haven school, treaty interpretation is also placed in the progress of achievement of the world public order as international law process.

In the public order we recommend, applier-interpreters must, therefore, be committed to *primary interpretation*, or the giving of deference to the genuine shared expectations of the particular parties to an agreement; to *supplementary interpretation*, or the completion of

---

<sup>363</sup> Harvard Research, *supra* note 296 at 661.

<sup>364</sup> *Ibid.* at 946 [emphasis in original].

<sup>365</sup> See Gardiner, *supra* note 213 at 58-59.

<sup>366</sup> Myers S. McDougal, Harold D. Lasswell & James C. Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven: Yale University Press, 1967) at 82-83.

<sup>367</sup> *Ibid.* at 35-39, 53-59, 76-77, 371-384.

ambiguous or vague expectations according to the goal of public order; and to *policing and integrative interpretation*, which includes, *negatively*, giving no effect to the expectations of the parties when they conflict with the goals of the system of public order, and *affirmatively*, encouraging conformity of future agreement-making with the goals of public order.<sup>368</sup>

According to this statement, the New Haven school seems to become comparable with the intentions school because both investigate the parties' intentions in the treaty. Nevertheless, the New Haven school emphasizes not the preparatory works but the context of the treaty (the contextuality principle), which is typically embodied in Article 19 (a) of the Harvard Draft quoted above.<sup>369</sup> However, in comparison with the Harvard Draft, the supplementary, policing, and integrative interpretations are remarkable features of the New Haven school, where treaty interpretation no longer relies on conventional interpretative factors but refers to the public order. The contextuality consists of various interpretative factors and has no hierarchical distinctions between them; moreover, these factors are considered factual circumstances and actual intentions independent from the texts of the treaty.<sup>370</sup> From this perspective, "the final text" for the textual approach is only a starting point. Rather, the social and political situations, the negotiation process, and the parties' conduct prior and subsequent to the treaty can have greater importance to ascertaining the parties' shared expectations.<sup>371</sup> Such observation is compatible with the peculiar conceptualization of international agreement as "a continuing process of communication and collaboration between the parties in the shaping and sharing of demanded values," but not a collocation of words.<sup>372</sup>

The amendment submitted by the delegation of the United States of America during the Vienna Conference attempted to combine the draft Articles 27 and 28 (current Articles 31 and 32 of the *Vienna Convention*) in one single article, which comprehensively illustrated the teleological approach:

A treaty shall be interpreted in good faith *in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:*

---

<sup>368</sup> *Ibid.* at 394-395.

<sup>369</sup> *Ibid.* at 119-121.

<sup>370</sup> Cf. McDougal, *United Nations Conference on the Law of Treaties, 1st Sess. Vienna, 26 March-24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 31st Mtg., UN Doc. A/CONF.39/11 (New York: United Nations, 1970) at 167 para.39.

<sup>371</sup> McDougal, Lasswell & Miller, *supra* note 366 at 96-97.

<sup>372</sup> *Idem*, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven: New Haven Press, 1994) at xxiii.

- (a) *the context of the treaty*;
- (b) *its objects and purposes*;
- (c) any agreement between the parties regarding the interpretation of the treaty;
- (d) any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
- (e) any subsequent practice in the application of the treaty which establishes the *common understanding of the meaning of the terms as between the parties generally*;
- (f) *the preparatory work of the treaty*;
- (g) *the circumstances of its conclusion*;
- (h) any relevant rules of international law applicable in the relations between the parties;
- (i) *the special meaning to be given to a term if the parties intended such term to have a special meaning.*<sup>373</sup>

From this formula, the interpretation would take into account of all these factors, whereas the textual approach postulates that the text has an ordinary or plain meaning and interpretative factors are invoked for determining the supposed meaning. For McDougal, “[t]he text of a treaty and the common public meanings of words would be made the point of departure of interpretation, but not the end of the inquiry.”<sup>374</sup> In the broad sense of context, the parties shared expectation (the parties’ intentions) is the primary aim of the treaty interpretation for this approach. This amendment was not supported by the delegates in the Conference because it disregarded the actual text of a treaty.<sup>375</sup>

---

<sup>373</sup> Amendment submitted by United States of America, (A/CONF.39/C.1/L.156), *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March—24 May 1968 and 9 April—22 May 1969, Official Records, Documents of the Conference*, UN Doc. A/CONF.39/11/Add.2 (New York: United Nations, 1971) at 149 [emphasis in original].

<sup>374</sup> McDougal, *supra* note 370 at 168, para.49.

<sup>375</sup> Nahlik (Poland), *United Nations Conference on the Law of Treaties, 1st Sess. Vienna, 26 March-24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 32d Mtg., at 174, para.25; Talalaev (Union of Soviet Socialist Republics), *ibid.*, at 175, paras.40-43; de Bresson (France), *ibid.* at 175-176, paras.47-50; Sinclair (United Kingdom), *ibid.* at 177-178, paras.3-9; Nyamdo (Mongolia), *ibid.* 33d Mtg., at 179, para.17; Ruda (Argentina), *ibid.* at 179-180, paras.22-25; Mwendwa (Kenya), *ibid.* at 180-181, paras.29-31; Ogundere (Nigeria), *ibid.* at 181, paras.36-37; Suarez (Mexico) *ibid.* para.40; Alvarez Tabio (Cuba), *ibid.* at 182, para.45; Razafindralambo (Madagascar), *ibid.* at 183, paras. 61-63. *Contra* Krispis

Consequently, distinctions exist among some streams within the teleological approach from the text-based to the policy-based ones. On one hand, the teleological approach could pave the way for judicial activism and might jeopardize the stability of a treaty by impairing the value of the text. On the other hand, the teleological approach might be suitable for so-called law-making treaties.<sup>376</sup> In fact, although some exceptions exist, the teleological and evolutive approaches in the interpretation of human rights treaties—a typical category of treaties characterized as law-making or social type of conventions—are a remarkable trend in practice.<sup>377</sup> McDougal and his colleagues suggest that international conventions play a critical role in “the establishment and maintenance both of a global constitutive process of authoritative decision and of a transnational public order in the shaping and sharing of all values.”<sup>378</sup> Cumulative practice of general multilateral conventions, and newly developed techniques for their implementation, might corroborate their suggestion.

#### **4. Concluding Remarks: Significance of a Crucible of Interpretative Elements in the Context of Sustainable Development**

From the perspective of the different treaty interpretational approaches, Article 31 (and Article 32) is based firmly on the textual approach, but it is not intended to be extremely objective, like Sir Beckett’s view. Rather, the textualism taken by the ILC presupposes that the parties’ intentions authenticate the text. The recourse to the preparatory works occupies only a supplementary mean, as Article 32 stipulates, which indicates that only the method adopted by the intentions school is supplementary. In this sense, the ascertainment of the intentions crystallizing at the time of the conclusion of a treaty is an ancillary aim of treaty interpretation in the *Vienna Convention*. In other words, through these manipulations in the codification, the crucible approach adopted by the ILC contains the compromised approach that the parties’ intentions are assumed in the text. Moreover, the effectiveness on which the teleological school relies, as mentioned above, is absorbed into the textualism through two interpretative elements: good faith and the object and purpose.<sup>379</sup> The object and purpose is placed in a broad concept of the context, which includes written materials of the preamble and annexes of the treaty and the related agreements between the parties. Therefore, the teleological approach also presupposed the intentions of the parties as its ground.

---

(Greece), *ibid.* 32d Mtg., at 172, para.7.

<sup>376</sup> Cf. Fitzmaurice, *supra* note 353 at 207-209.

<sup>377</sup> *Case of Golder v. UK, Loizidou v. Turkey, Mamatkulow and Askarov v. Turkey*

<sup>378</sup> McDougal, Lasswell & Miller, *supra* note 372 at xxiii.

<sup>379</sup> Gardiner, *supra* note 213 at 159-160.

For this architecture, the changes of social, scientific, and technological fields could be reflected through the possibility of development of the meaning of a text. Once the interpretation of the text developed in line with the newly encountered progress, it becomes as if the parties originally intended to allow the expansion of the textual terminology to include the broader meanings, but the parties would not always foresee such progressive situations.<sup>380</sup>

That was a time when trained diplomatic specialists disposed of only external affairs mainly through bilateral relations. Because treaties today deal with highly specialized, scientific, and technological matters through bilateral, multilateral, and quasi-universal frameworks, the knowledge and experience of experts in the relevant fields is essential in the process of treaty-making, in addition to ordinary negotiators such as diplomats and lawyers. Moreover, scientists and engineers acquire new learning and information through the progress of research and development. In such a complicated treaty-making process, it seems hard to admit the legal fiction of a State who has its own will. Consent to be bound could be seen as presentation of a country's diplomatic policy. However, it might be an illusion to believe it possible to identify the parties' intentions at the time of negotiation regarding any disputed term of a treaty at a later point in time. The parties cannot be expected to foresee the terms of the treaty that would be contested in the future. In this sense, the text-based construction should provide a sufficiently flexible and stable framework for interpreters because it does not directly approach the intentions of the parties; it simply presupposes the parties' intent reflected in the treaty's text.

Nevertheless, considering that contemporaneity is the regular basis of treaty interpretation,<sup>381</sup> how could these factual developments be read into the "ordinary meaning" of the text? Article 31 (1) states that a treaty shall be interpreted in accordance

---

<sup>380</sup> See *Case concerning Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] I.C.J. Rep. 3 at 32, para.77. [*Aegean Sea Continental Shelf*]; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, [2009] I.C.J. Rep. 213 at 242-244, paras.63-71. [*Navigational and Related Rights*]

<sup>381</sup> Sir Humphrey Waldock, Special Rapporteur, Sixth Report on the Law of Treaties, A/CN.4/186 and Add.1-7 (1966), in *Yearbook of International Law Commission 1966*, Vol.2 (New York: UN, 1967) at 96, para.7 (A/CN.4/SER.A/1966/ADD.1) [Sixth Report on the Law of Treaties]; Oliver Dörr, "Article 31 General Rule of Interpretation" in Oliver Dörr & Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012) 521 at 533. Malgosi Fitzmaurice & Panos Merkouris, "Canons of Treaty Interpretation: Selected Case Studies From the World Trade Organization and the North American Free Trade Agreement" in Malgosi Fitzmaurice, Olufemi Elias & Panos Merkouris, eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff Publishers, 2010) 153 at 154.

with “the ordinary meaning.” Is that ordinariness estimated at the time of conclusion or at the time of application of the treaty?

## Chapter 5 Sustainable development through treaty interpretation beyond the consensual restraints: the inter-temporal law and the supplemental methods

### 1. Introduction

The current international legal environment includes numerous treaties related to various sustainable development issues. Some of these conventions are capable of incorporating newly developed legal, social, scientific, and technological situations in application, while other are intended to maintain the initial circumstances between the parties instead, such as boundary delimitation treaties.

Acknowledging that sustainable development serves the normative integration in international law, the temporal aspect of integration questions whether a given treaty rule should be interpreted in the light of the law at the time of conclusion or by the law newly developed at the time of application. Conventionally, temporal aspects of stability and change of international law are governed by inter-temporal law.<sup>382</sup> One of a few cases frequently cited for describing inter-temporal law in international law is the *Island of Palmas* case. In this case, Judge Huber indicated that inter-temporal law contained two aspects as follows.

(...) a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled. (...) As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which [subjects] the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.<sup>383</sup>

The first part of this statement required interpreters to look at the law at the time when the territorial title was established and not to consider the law developed after or the law in force at the time any dispute arose.<sup>384</sup> The principle of contemporaneity states

---

<sup>382</sup> E.g., see Anthony D'Amato, "International Law, Intertemporal Problems" in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2 (Amsterdam; North-Holland Elsevier, 1992) 1234 at 1234-1236.

<sup>383</sup> *Island of Palmas Case*, *supra* note 8 at 845.

<sup>384</sup> Rosalyn Higgins, "Some Observations on the Inter-Temporal Rule in International Law" in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law

that, “language in a treaty must be interpreted in the light of definitions of words that were prevalent at the time the treaty was made” and that “a treaty should be interpreted in the light of the rules of international law in force at the time the treaty was made.”<sup>385</sup> Thus, the principle designates that the acts taken in the distant past regarding a given territory must be evaluated in accordance with the law in force when the acts took place and serve as stabilizing territorial integration.<sup>386</sup>

The second part of the statement expressed the modality of maintaining the validity of the rights acquired in the past. Manifestation of the territorial title must continue in conformity with the conditions required by the development of law. Because D’Amato placed emphasis on contemporaneity and identified the inter-temporal law as “the principle of non-retroactivity of legal rules in international law,” he insisted that Huber’s statement on the second branch of inter-temporal law was a confused extension not generally accepted.<sup>387</sup> Higgins pointed out that if this second part indicates that the right lawfully acquired in the past had to be estimated by the law evolved at the time of the dispute, the legal consequences of the first part of the statement are negated.<sup>388</sup> Therefore, the second limb of inter-temporal law can be grasped as an exception to the first limb of inter-temporal law, which is legitimate only in certain cases where special consideration are required.<sup>389</sup>

In spite of the reference to the evolution of law as the background of the interpretation, Judge Huber’s statement did not include factual, social, or scientific developments. The contraction of the scope of normative environment referenced under the application of the inter-temporal law under Article 31(3)(c) is more straitened by the consensual requirements. Although the inter-temporal law is not directly codified, rather is submerged under the texts in this provision, the range of the rules to be taken into account in treaty interpretation under that provision become even narrower than Huber’s original formula, i.e. “any relevant rules of international law applicable in the relations between the parties.”

The interpretative techniques extracted in Chapter 3 could cure the contraction of the scope of normative environment referenced under the consensual requirements specified in Article 31(3)(c) by referring to the evolutionary character of a generic term and incorporating extrinsic developments regarding the object and purpose of a treaty under interpretation. Nonetheless, because these approaches go beyond the consensual

---

International, 1996) 173 at 173.

<sup>385</sup> D’Amato, *supra* note 382 at 1234.

<sup>386</sup> *Ibid.* at 1235.

<sup>387</sup> D’Amato, *supra* note 382 at 1235.

<sup>388</sup> Higgins, *supra* note 384, at 174.

<sup>389</sup> *Ibid.*

requirements set forth by Article 31(3)(c), it would be problematic to authenticate and legitimate the reliance on factual (social, scientific, and technological) advancements and rules not binding on the parties.

## **2. Inter-temporal law and the codification of the law of treaties**

Through the process of codification of treaty interpretation rules, explicitly inserting these two branches of inter-temporal law into the draft articles was abandoned. However, the inter-temporal law elements potentially remain in Article 31(3)(c).<sup>390</sup> In the codification of the law of treaties, two limbs of the inter-temporal law were dissolved and unified. The dissolution and unification made their temporal aspects drop from the texts and specified the rules to be considered from law in general to “any relevant rules of international law.” Thus, the inter-temporal law elements were submerged in the relevant provision of the codified law of treaties.

As the next sub-sections indicate, this process—in which the inter-temporal law elements were concealed in the text—revealed that the Commission faced a serious difficulty on the codification of the inter-temporal law. The ambiguity caused by the effect of the application of the second limb of the inter-temporal law, whether it was related to the application or the modification of a treaty, led to technical intricacy of the codification of the inter-temporal law. The Commission transposed the issue of the application of inter-temporal law to the matter of the intention of the parties, whether the terms used were intended to have a fixed content or to change meaning with the evolution of the law.<sup>391</sup>

This section will trace the process in which the application of the inter-temporal law elements was implicitly codified, and it will investigate the possible consequences that can be drawn from such tacit codification.

### **(a) Scepticism and dissolution—Discussion in the 16th Session of the International Law Commission (1964)**

Beyond the specific meaning of Judge Huber’s statement within the context of *Island of Palmas*,<sup>392</sup> Waldock, Special Rapporteur of the ILC, formulated the inter-temporal law

---

<sup>390</sup> *Idem*, “Time and the Law: International Perspectives on an Old Problem” (1997) 46 I.C.L.Q. 501 at 519; Gardiner, *supra* note 213 at 258.

<sup>391</sup> See Waldock, International Law Commission, 18<sup>th</sup> Sess., 872<sup>nd</sup> Mtg., A/CN.4/SR.872 in *Yearbook of the International Law Commission 1966*, Vol. 1 (New York: UN, 1967) at 199, para. 9 (A/CN.4/SER.A/1966).

<sup>392</sup> Higgins comprehended the Judge Huber’s statement as “providing that by virtue of the principles of inter-temporal law a State must continue to maintain a title, validly won, in an effective manner—no more and no less.” Higgins, *supra* note 384 at 174.

elements as generally applicable rules in treaty interpretation in the draft Article 56, entitled “the inter-temporal law”:

1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.
2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.<sup>393</sup>

Special Rapporteur Waldock explained the relation between these two provisions as follows: “although the provisions of a treaty are to be interpreted in the light of the law in force when [the treaty] was drawn up, the application of the treaty, as so interpreted, is governed by the general rules of international law in force at the time when the treaty is applied.”<sup>394</sup>

The members of the Commission raised doubts on this draft article, especially regarding the distinction between interpretation and application of a treaty and the contradiction between the two paragraphs.<sup>395</sup> Considering the members’ comments, Special Rapporteur Waldock proposed to redraft these two paragraphs separately into different draft articles:<sup>396</sup> draft Article 56 (1) converted into draft Article 70 (1)(b); draft Article 56 (2) transferred to draft Article 73.<sup>397</sup> Although, draft Article 70 (1)(b) used the

---

<sup>393</sup> Waldock III *supra* note 47 at 8-10 .

<sup>394</sup> *Ibid.*, at 9, para.(5).

<sup>395</sup> Verdross, at 33, para.6; Jiménez de Aréchaga, at 34, para.11; Paredes, at 34, para.13; 279<sup>th</sup> meeting Ago at 39, para.52, at 40, paras.62-64. Besides those comments, Verdross concerned with the application of inter-temporal law to the law-making treaties (728<sup>th</sup> meeting at 33 para.7.), Pal considered the draft Article 56 was a wrong projection of the principle (729<sup>th</sup> meeting at 35, para.5.).

<sup>396</sup> Waldock III, *supra* note 47 at 56, para. (15).

<sup>397</sup> Draft Article 70 (General rules) (1) was drafted as follows:

1. The terms of a treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term—
  - (a) in its context in the treaty and in the context of the treaty as a whole;
  - and
  - (b) in the context of the rules of international law in force at the time of the conclusion of the treaty.

Waldock III, *supra* note 47 at 52.

Draft Article 73 (Effect of a later customary rule or of a later agreement on interpretation of a treaty) provided as follows:

The interpretation at any time of the terms of a treaty under article 70 and 71 shall take account of—

- (a) the emergence of any later rule of customary international law affecting the subject-matter of the treaty and binding upon all the parties;
- (b) any latter agreement between all the parties to the treaty and

phrase “the rules of international law in force at the time of the conclusion of the treaty,” this was intended to cover “the linguistic usage current at the time of the conclusion of the treaty” as well.<sup>398</sup> Contrary to this expansion for the first branch of inter-temporal law, draft Article 73, which dealt with the second branch of the inter-temporal law, decomposed the evolution of law into three factors: (a) any later rule of customary international law, (b) any later agreement, and (c) any subsequent practice. For this dissolution of the facets of the evolution of law, Article 56 (2) was constrainedly enclosed in paragraph (a) of Article 73, which referred only to customary international law rules.<sup>399</sup>

Regarding this alteration, some members of Commission questioned whether Paragraphs (a) and (b) of draft Article 73 were related to the modification of a treaty more than to treaty interpretation.<sup>400</sup> Waldock also shared this scepticism<sup>401</sup> and proposed a new draft Article 69A (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) as succeeded draft Article 73.<sup>402</sup> Draft Articles 70 and 69A became draft Articles 69 and Article 68, respectively, in the draft articles provisionally adopted by the Commission in 1964.<sup>403</sup> Thus, the commentaries on these

---

relating to its subject-matter;

- (c) any subsequent practice in relation to the treaty evidencing the consent of all the parties to an extension or modification of the treaty.

Waldock III, *supra* note 47 at 53.

<sup>398</sup> Waldock III, *supra* note 47 at 57, para. (15).

<sup>399</sup> Cf. Gardiner, *supra* note 313 at 257-258.

<sup>400</sup> Verdross, International Law Commission, 16<sup>th</sup> Sess., 767<sup>th</sup> Mtg., A/CN.4/SR.767 in *Yearbook of the International Law Commission 1964*, Vol. 1 (New York: UN, 1965) at 296, para. 35 (A/CN.4/SER.A/1964); de Luna, *ibid.* paras. 36-37; Pal, *ibid.* at 296-297, para. 41.

<sup>401</sup> Waldock, International Law Commission, 16<sup>th</sup> Sess., 767<sup>th</sup> Mtg., A/CN.4/SR.767 in *ibid.* at 296, paras. 38-39.

<sup>402</sup> Draft Article 69A stipulates as follows:

The operation of a treaty may also be modified—

- (a) by a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;
- (b) by a subsequent practice of the parties in the application of the treaty establishing their tacit agreement to an alteration or extension of its provisions; or
- (c) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

Waldock, International Law Commission, 16<sup>th</sup> Sess., 769<sup>th</sup> Mtg., A/CN.4/SR.769 in *ibid.* at 309, para. 3.

<sup>403</sup> Draft Article 69 (1) (b) stipulates as follows;

1. A treaty shall be interpreted in good faith in

draft articles confirmed that draft Article 69 (1)(b) reflected the first branch of inter-temporal law, and draft Article 68 (c) embodied the second element of inter-temporal law.<sup>404</sup> Therefore, in discussions during the 16th session of the Commission in 1964, the second branch of the inter-temporal law was considered an issue of treaty modification, but the first element remained as a rule of treaty interpretation.

**(b) Unified and veiled—Discussion in the 18th Session of the International Law Commission (1966)**

Draft articles on the law of treaties adopted in 1964 by the Commission were sent to and reviewed by governments. Among others, the United Kingdom thought that a new customary international law should not modify a treaty without the consent of the parties and proposed to delete draft Article 68 (c).<sup>405</sup> The Government of Israel considered logical steps of treaty interpretation and modification and submitted an idea to unify two legs of the inter-temporal law in a single article.<sup>406</sup> Special Rapporteur Waldock turned to these comments and proposed to drop the provision and to cover the second limb of the inter-temporal law under Article 69 (1).<sup>407</sup>

---

accordance with the ordinary meaning to be given to each term:

(a) (...context and object and purpose...)

(b) In the light of the rules of general international law in force at the time of its conclusion.

Report of the Commission to the General Assembly, Report of the International Law Commission covering the work of its sixteenth session, 11 May-24 July 1964, UNGAOR, 19<sup>th</sup> Sess., Supp. No. 9, UN Doc. A/5809 (1964) in *Yearbook of the International Law Commission 1964*, vol. 2 (New York: UN, 1965) at 199 (A/CN.4/SER.A/1964/ADD.1).

Draft Article 68 envisages as follows:

The operation of a treaty may also be modified:

(a) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;

(b) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or

(c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

*Ibid.* at 198.

<sup>404</sup> Commentary to Articles 69-71, para.(11), *ibid.* at 202-203; commentary to Article 68, para.(3), *ibid.* at 198-199.

<sup>405</sup> Sixth Report on the Law of Treaties, *supra* note 381 at 88.

<sup>406</sup> *Ibid.* at 87-88.

<sup>407</sup> The proposed draft Article 69 (1) provided as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the light of :

Along with this reconsideration, Waldock thought that the draft Article 69 (1)(b) was incomplete because it might be open to the interpretation of denying the possibility that terms might ever change with the evolution of international law. Hence, he proposed to delete the phrase “in force at the time of its conclusion” from draft Article 69 (1)(b) to cover both branches of the inter-temporal law. As a result, “sub-paragraph (b) should simply refer to ‘the rules of international law’, (or to the principles of international law) *leaving the application of the inter-temporal law to be implied.*”<sup>408</sup>

Although two limbs of the inter-temporal law were incorporated in a single provision, their functions were veiled by an absence of temporal juncture for interpreters to consider. In this regard, the Special Rapporteur Waldock stated he was under the impression that:

... the Commission was generally disinclined to deal with the problem of inter-temporal law in the draft articles. It was a matter of interpretation to determine the precise meaning of a term of international law used in a treaty or of a treaty provision which clearly involved the application of international law. The question whether the terms used were intended to have a fixed content or to change in meaning with the evolution of the law could be decided only by interpreting the intention of the parties. The matter was, strictly speaking, not one of inter-temporal law; the evolution of the law affected the application of the agreement, but not its meaning. That approach was, however, probably too subtle for the purpose of drafting a convention.<sup>409</sup>

Thus, two possibilities of interpretation of a term were considered for determination only by the intention of the parties. Jiménez de Aréchaga shared this view and stated that:

- 
- (a) The context of the treaty and its objects and purposes;
  - (b) The rules of international law;
  - (c) Any agreement between the parties regarding the interpretation of the treaty;
  - (d) Any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally.

Waldock, International Law Commission, 18<sup>th</sup> Sess., 866<sup>th</sup> Mtg., A/CN.4/Sr.866, in *Yearbook of the International Law Commission 1966*, Vol. 1 (2) at 163, para. 106.

<sup>408</sup> Sixth Report on the Law of Treaties, *supra* note 381 at 97, para. 13 [emphasis added].

<sup>409</sup> Waldock, International Law Commission, 18<sup>th</sup> Sess., 872<sup>nd</sup> Mtg., A/CN.4/Sr.872, in *Yearbook of the International Law Commission 1966*, Vol. 1 (2) (New York: UN, 1967) at 199, para. 9 (A/CN.4/SER.A/1966).

[T]here are two possibilities: either the parties had intended to incorporate in the treaty certain legal concepts that should remain unchanged, or they had had no such intention, in which case the legal concepts might be subject to change and would have to be interpreted not only in the context of the law in force at the time when the instrument had been concluded, but also in the framework of the entire legal order binding between the parties at the time of the interpretation.

410

Draft Article 69 (1)(b) was transferred to Article 69 (3)(c) because the elements of the inter-temporal law were believed to be external to the text and to the context of the treaty being interpreted.<sup>411</sup> After the Commission adopted Article 69,<sup>412</sup> it was renumbered as Article 27 in the final draft articles of the law of treaties adopted in 1966.<sup>413</sup>

In the Conference of the Law of Treaties in Vienna in 1968 and 1969, the final draft Article 27 (3) (c) was not discussed, but adopted as it was as Article 31(3)(c).

### **(c) Elasticity: Scope of the rules to be taken into account**

The codification process manipulated the scope of the rules to which the interpreters were referred. For example, “the law” was initially just mentioned for the first branch and “the rules of international law” for the second one in draft Article 56. When the second limb was separated from the first limb, as covered in the previous section, for the first branch, the text contained “the rules of general international law” (draft Article 69 (1)(b)), and for the second one, the text included the phrase “a new rule of customary law” (draft Article 68 (c)). In the drafting process in 1966, the second branch moved, and it was covered by the provision stipulated in the first branch. The scope of the rules for the first limb was automatically applied to the second one as well, i.e. “the rules of general

---

<sup>410</sup> Jiménez de Aréchaga, International Law Commission, 18<sup>th</sup> Sess., 870<sup>th</sup> Mtg. A/CN.4/Sr.870, in *ibid* at 190, para. 71 (A/CN.4/SER.A/1966).

<sup>411</sup> Draft Article 69 proposed by the Drafting Committee, International Law Commission, 18<sup>th</sup> Sess., 883<sup>rd</sup> Mtg., A/CN.4/Sr.883, in *Yearbook of the International Law Commission 1966*, Vol. 1 (2) at 267, para. 90 (A/CN.4/SER.A/1966); Commentary to Articles 27 and 28, *Yearbook of International Law Commission 1966*, Vol.2 (New York: UN, 1967) at 222, para. (16) (A/CN.4/SER.A/1966/ADD.1).

<sup>412</sup> International Law Commission, 18<sup>th</sup> Sess., 884<sup>th</sup> Mtg., A/CN.4/Sr.884, in *Yearbook of the International Law Commission 1966*, Vol. 1 (2) at 270, paras. 30-31 (A/CN.4/SER.A/1966).

<sup>413</sup> Draft Articles on the Law of Treaties, *Yearbook of International Law Commission 1966*, Vol.2 (New York: UN, 1967) at 217-218 (A/CN.4/SER.A/1966/ADD.1).

international law” further broadened to “any relevant rules of international law” in the final draft.

For the first limb of the inter-temporal law, the scope of the rules referenced was quite extensive at the beginning, just mentioned as “the law” (draft Article 56 (1)). However, followed by the discussion in 1964, the phrase was confined to “the rules of international law” (draft Article 70 (1) (b)). Because the first limb of the inter-temporal law in draft Article 56 (1) was incorporated as a rule of treaty interpretation in draft Article 70 (1)(b), the range of the law was changed from “the law” to “the rules of international law.”<sup>414</sup> Among the International Law Commission, some members argued to modify the phrase “the rules of international law.” For instance, Ago doubted this phrase because different treaties could provide rules that contradict each other; thus, he suggested redrafting it as “the general principles of international law,” instead of using the term “rules.”<sup>415</sup> Verdross insisted the insertion of “general” before “rules.”<sup>416</sup> Tunkin thought that “the principles of international law” was preferable to “the general rules of international law.”<sup>417</sup> These positions were strongly opposed by Special Rapporteur Waldock. It was useful to refer not only to the general or the principles of international law, but also to regional or other rules of international law to provide clarity for the terms in a treaty.<sup>418</sup> In the case of relevant new concepts developing after a treaty had been created, Ago questioned whether the new concept would replace the one stipulated in the treaty.<sup>419</sup> Special Rapporteur Waldock responded that it was not a matter of treaty interpretation in light of the international law in force but a problem of the intention of the parties at the time of the treaty’s conclusion because those parties could not foresee how the meaning of a term would evolve.<sup>420</sup>

---

<sup>414</sup> Waldock, International Law Commission, 16<sup>th</sup> Sess., 729<sup>th</sup> Mtg., A/CN.4/SR.729 in *Yearbook of the International Law Commission 1964*, Vol. 1 (New York: UN, 1965) at 40, para. 61 (A/CN.4/SER.A/1964); see also Discussion of the ILC in the 728<sup>th</sup> and 729<sup>th</sup> meetings, in *ibid* at 33-40 (A/CN.4/SER.A/1964).

<sup>415</sup> Ago, International Law Commission, 16<sup>th</sup> Sess., 769<sup>th</sup> Mtg., A/CN.4/SR.769 in *Yearbook of the International Law Commission 1964*, Vol. 1 (New York: UN, 1965) at 310, para.9 (A/CN.4/SER.A/1964).

<sup>416</sup> Verdross, International Law Commission, 16<sup>th</sup> Sess., 770<sup>th</sup> Mtg., A/CN.4/SR.770 in *ibid.* at 316, para.12 (A/CN.4/SER.A/1964).

<sup>417</sup> Tunkin, International Law Commission, 16<sup>th</sup> Sess., 770<sup>th</sup> Mtg., A/CN.4/SR.770 in *ibid.* at 316, para.16 (A/CN.4/SER.A/1964).

<sup>418</sup> Waldock, International Law Commission, 16<sup>th</sup> Sess., 770<sup>th</sup> Mtg., A/CN.4/SR.770 in *ibid.* at 316, paras.13, 17, 27 (A/CN.4/SER.A/1964). See also de Luna, International Law Commission, 16<sup>th</sup> Sess., 769<sup>th</sup> Mtg., A/CN.4/SR.769 in *ibid.* at 310, para.13 (A/CN.4/SER.A/1964).

<sup>419</sup> Ago, International Law Commission, 16<sup>th</sup> Sess., 770<sup>th</sup> Mtg., A/CN.4/SR.770 in *ibid.* at 317, para.32 (A/CN.4/SER.A/1964).

<sup>420</sup> Waldock, International Law Commission, 16<sup>th</sup> Sess., 770<sup>th</sup> Mtg., A/CN.4/SR.770 in

However, when the provisional draft articles were adopted in 1964, the draft Article 70 was redrafted as draft Article 69. At this stage, the phrase “the rules of international law” was modified as “the rules of general international law” in subparagraph (1)(b).<sup>421</sup> No explanation was given for this change. Special Rapporteur Waldock also remained confused regarding this point because, as we have seen, the discussion in the Commission in 1964 did not decide to introduce the word “general” before “international law.”<sup>422</sup> Thus, the term “general” was removed, and the phrase “the rules of international law” was recovered in the draft Article 69 (1)(b) in Waldock’s sixth report.<sup>423</sup>

The draft Article 69 proposed by Special Rapporteur Waldock in his sixth report was discussed in the 18th session of the Commission in 1966. Although the members of the Commission generally agreed to the new phrase, “the rules of international law” in draft Article 69 (1)(b), the minutes showed two views on what rules were to be referenced.<sup>424</sup> Questions were raised whether other rules of international law were binding on the parties.<sup>425</sup> Some of the members considered other rules of international law to be binding on the parties.<sup>426</sup> Others read the phrase in a broader sense. Because a treaty, as an act of parties, was situated in the entire international legal order and a meaning of a term used in a treaty was established by the legal order, the phrase meant the entire international legal order.<sup>427</sup>

---

*ibid.* at 317, para.33 (A/CN.4/SER.A/1964); de Luna, International Law Commission, 16<sup>th</sup> Sess., 770<sup>th</sup> Mtg., A/CN.4/SR.770 in *ibid.* at 317, para.34 (A/CN.4/SER.A/1964).

<sup>421</sup> Report of the Commission to the General Assembly, Report of the International Law Commission covering the work of its sixteenth session, 11 May-24 July 1964, UNGAOR, 19<sup>th</sup> Sess., Supp. No. 9, UN Doc. A/5809 (1964) in *ibid.*, Vol. 2 (New York: UN, 1965) at 199 (A/CN.4/SER.A/1964/ADD.1).

<sup>422</sup> Sixth Report on the Law of Treaties, *supra* note at 381, para. 12.

<sup>423</sup> *Ibid.* at 101, para.25.

<sup>424</sup> Verdross insisted to replace “general” to “customary” in order not to refer to treaty rules. Verdross, International Law Commission, 18<sup>th</sup> Sess., 870<sup>th</sup> Mtg., A/CN.4/Sr.870, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 191, para. 74 (A/CN.4/SER.A/1966).

<sup>425</sup> Reuter, International Law Commission, 18<sup>th</sup> Sess., 870<sup>th</sup> Mtg., A/CN.4/Sr.870, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 188, para. 43 (A/CN.4/SER.A/1966).

<sup>426</sup> Tunkin, International Law Commission, 18<sup>th</sup> Sess., 870<sup>th</sup> Mtg., A/CN.4/Sr.870, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 190, para. 64 (A/CN.4/SER.A/1966); Jiménez de Aréchaga, International Law Commission, 18<sup>th</sup> Sess., 870<sup>th</sup> Mtg., A/CN.4/Sr.870, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 190, para. 70 (A/CN.4/SER.A/1966); Reuter, International Law Commission, 18<sup>th</sup> Sess., 871<sup>st</sup> Mtg., A/CN.4/Sr.871, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 195, paras. 22-23 (A/CN.4/SER.A/1966).

<sup>427</sup> Yasseen, International Law Commission, 18<sup>th</sup> Sess., 871<sup>st</sup> Mtg., A/CN.4/Sr.871, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 197, paras. 51-52 (A/CN.4/SER.A/1966); Waldock, International Law Commission, 18<sup>th</sup> Sess., 872<sup>nd</sup> Mtg., A/CN.4/Sr.872, in *ibid.*, Vol. 1 (2) (New York: UN, 1967) at 199, para. 8 (A/CN.4/SER.A/1966).

Taking these comments, the Drafting Committee proposed new texts of the draft Article 69 [27].<sup>428</sup> Paragraph (1)(b) was moved to paragraph (3)(c) and was modified as follows: “any relevant rules of international law applicable in the relations between the parties.” This phrase is identical as the text of Article 31(3)(c) of the *Vienna Convention*. The process of codification of the rules on treaty interpretation shows that the range of rules referenced was elastic from “the law” to “a new rule of customary international law.” In addition, it was shrunk and then stretched, from the rules binding on the parties to the entire international legal order. The final text specified the scope of the rules considered to any relevant rules of international law, but at the same time, it limited the rules to only those binding on the parties.

While two limbs of the inter-temporal law were explicitly codified initially, the ambiguity of the implication given by the application of the second limb upon the law of treaties located these two branches separately in the draft article. The second branch of the inter-temporal law was considered a rule related to modification of a treaty and was completely distinguished from the first limb, which exclusively functioned as a rule of treaty interpretation. Although these two branches consolidated in a single provision at a later stage, the deletion of the phrase referring to temporal element made both limbs submerged under the texts of the provision. The answer to the question whether the development of international law must be considered in interpreting a term of a treaty was determined in accordance with the intentions of the parties to the treaty.

### **3. Contrasting outcomes of two branches of inter-temporal law**

The inter-temporal law covers not only territorial titles but also the general applicability as a substantive rule and as a rule of interpretation of international law.<sup>429</sup> International adjudicators express their positions in some different cases on either the first or the second limb of inter-temporal law. For example, *Case concerning Rights of Nationals of the United States of America in Morocco*, regarding whether the meaning of “dispute” or «différend» in Article 20 of the Treaty of 1863 confined to civil cases or included civil and criminal cases, the Court considered the usage of the term at the time when the treaties were concluded; it held that no clear distinction existed between civil and criminal cases when the treaties were concluded in 1787 and 1836.<sup>430</sup> In *Western Sahara*, the Court replied to the question whether Western Sahara was at the time of colonization

---

<sup>428</sup> International Law Commission, 18<sup>th</sup> Sess., 883<sup>rd</sup> Mtg., A/CN.4/Sr.883, in *ibid*, Vol. 1 (2) (New York: UN, 1967) at 267, para. 90 (A/CN.4/SER.A/1966).

<sup>429</sup> T. O. Elias, “The Doctrine of Intertemporal Law” (1980) 74 A.J.I.L. 285 at 285.

<sup>430</sup> *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, [1952] I.C.J. Rep. 176 at 189.

by Spain a territory belonging to no one (*terra nullius*) by observing that the question had “to be interpreted by reference to the law in force at that period.”<sup>431</sup>

Contrary to these cases, in some cases, the international tribunals considered the situations at the time when the disputes occurred, rather than the circumstances existing at the time when the treaties were concluded. In *The Minquiers and Ecrehos Case*, the United Kingdom and France disputed the territorial sovereignty over the Minquiers and Ecrehos. Both parties claimed their original territorial title to these islands based on their continued activities since the 11th century. The Court held, in this regard, that “[w]hat is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”<sup>432</sup>

Further, the parties to that case argued the issue of the determination of a “critical date” for allowing evidence in the present case. The United Kingdom submitted that the date of the conclusion of the Special Agreement/compromis must be considered as the critical date because the dispute did not “crystallize” before that agreement, and “all acts before that date must be taken into consideration by the Court.”<sup>433</sup> France contended that the date of the Convention of 1839 should be determined as the critical date and all subsequent acts must be excluded from consideration.<sup>434</sup> The Court held that the dispute regarding sovereignty over the islands in question did not arise before the years 1886 and 1888, when France for the first time claimed its sovereignty over the disputed islands.<sup>435</sup> Because the Court held that the critical date was the date when the dispute crystallized, all acts before the critical date were taken into account.<sup>436</sup> The Court, however, considered that acts over the sites in question had been taken long before the dispute materialized and had continued without intervals; it held that “in the view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned.”<sup>437</sup> In conclusion, the Court found that the British authorities possessed the islands and exercised State functions there during the greater part of the history from 13th to 20th centuries, and it concluded that sovereignty over the islands belonged to the United Kingdom.<sup>438</sup>

---

<sup>431</sup> *Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 at 38-39, para.79.

<sup>432</sup> *The Minquiers and Ecrehos Case (France v. United Kingdom)*, [1953] I.C.J.Rep. 47 at 57.

<sup>433</sup> *Ibid.* at 59.

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.* at 59.

<sup>437</sup> *Ibid.* at 59-60.

<sup>438</sup> *Ibid.* at 67, 70-72.

In the case of *Legal Status of Eastern Greenland*, the PCIJ determined the critical date to be July 10, 1931, on which the Norwegian government's proclamation declared the occupation over Eastern Greenland by the Danish Government, which was alleged as a violation of the existing legal situation, unlawful and invalid.<sup>439</sup> In this case, the Court held that

it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding the occupation.

The most remarkable contrasting consequences of these two branches of inter-temporal law can be seen in comparing the cases concerning Namibia (South West Africa). In the *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, Judgment (1966), the Court held that "to determine what the rights and obligations of the Parties relative to the Mandate were and are (...), the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed."<sup>440</sup> For the Court, considering subsequent events such as the dissolution of the League of Nations in reading the mandate system meant, "engaging in an *ex post facto* process, exceeding its functions as a court of law."<sup>441</sup> However, five years later, the Court held the opposite position:<sup>442</sup>

[V]iewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.

---

<sup>439</sup> *Legal Status of Eastern Greenland (Denmark v. Norway)* (1933), P.C.I.J. (Ser. A/B) No. 53 at 25, 45

<sup>440</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966 [1966] I.C.J.Rep. 6 at 23, para. 16.

<sup>441</sup> *Ibid.* at 47-48, para. 89.

<sup>442</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] I. C. J. Reports 16 at 31, para. 53.[*Namibia*]

Supporting this position, which was contradictory to the judgment in 1966, the Court referred to Article 22 of the Covenant of the League of Nations.

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—“the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust.” The parties to the Covenant must consequently be deemed to have accepted them as such.

The Court was careful to refer not only to developments of law but also to relevant social situation, i.e., the dissolution of the League of Nations and establishment of the United Nations.<sup>443</sup>

#### **4. Limitations of the second limb of inter-temporal law: Scope of Article 31(3)(c)**

Sustainable development is a concept promoting integration between divergent fields of international law and can engulf developments of international law that take place in accordance with technological, scientific, and social development in the process of treaty interpretation. International tribunals encompass the new development of international law in treaty interpretation in relevant cases. Article 31(3)(c) of the *Vienna Convention* provides a tool for interpreters to use such a normative environment in an interpretation.<sup>444</sup> However, this provision entails ambiguity on the ordinary meaning of “any relevant rules of international law applicable in the relations between the parties”; the determination of the scope of the normative environment for the interpreters depends on the construction of these terms in the provision. In this regard, views differ concerning the reach of Article 31(3)(c); such views represent the tension between a rigid conception of a treaty as a concordance of the consent between sovereign states and the

---

<sup>443</sup> In this regard, French mentioned that a tribunal when it considers technological developments and new meaning of terms in wider interpretative process “is not only responding to the prevailing legal framework, but also the political environment in which its decision will be received.” Moreover, concerning *Namibia* case, he wrote that the refining of the term “sacred trust” was “much in tune with the will of the vast majority of the international community at the time.” French, *supra* note 7 at 299.

<sup>444</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at 211, para. 419.

consideration of the rapid technological, scientific, and social changes to be integrated into the existing international legal system.

**(a) What are “any relevant rules of international law”?**

The reference to “any relevant rules of international law” means that treaty provisions must be read against the background of the broader context of general international law.<sup>445</sup> However, when the Study Group on the Fragmentation of International Law mentioned the term “normative environment,” the background was not necessarily limited to the general international law, but it also included other sources of international law.<sup>446</sup> Hence, this question can be divided into two parts: What kind of legal materials can be considered “relevant rules of international law” under this provision? And, what is the nature of the relevancy? Under Article 31(3)(c), rules of customary and conventional international law are both included in the term “rules of international law.”<sup>447</sup> The *OSPAR Convention* case held that the Tribunal is authorized under Article 31(3)(c) to apply only to currently existing legal rules, regardless of their forms as written or customary; therefore, law *in statu nascendi* is not admissible except when the State Parties agreed to empower a tribunal to apply such norms.<sup>448</sup> And, “the general principles of law recognized by civilized nations”<sup>449</sup> can be considered by the

---

<sup>445</sup> Aust, *supra* note 293 at 243; McNair, *supra* note 290 at 466.

<sup>446</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at 212-213, para. 423. Article 31(3)(c) as “systemic integration” (*ibid.* at 208, para. 413.) which makes the integration into the process of legal reasoning of a sense of coherence and meaningfulness (*ibid.* at 211, para. 419.) may contribute to a whole process of interpretation and application of formal law (*ibid.* at 213, para. 423.). For the critical view on this regard, see Voigt, *supra* note 2 at 286.

<sup>447</sup> Sinclair, *supra* note 301 at 139 (“every treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary”). Contra Sands *supra* note 2 at 57 (seeming to consider only rules of customary international law). *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at paras. 426 (b) and 470-478; Statement made by the delegate of the Federal Republic of Germany (Mr. Fleischhauer), *United Nations Conference on the Law of Treaties, 2d Sess. Vienna, 9 April-22 May 1969, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, 13th plenary Mtg.*, *supra* note 322 at 57, para. 66.

<sup>448</sup> *OSPAR Convention Case*, *supra* note 224 at 90-91, paras.99-101.

<sup>449</sup> *Statute of the International Court of Justice*, 26 June 1945, art. 38 (1) (c), 33 U.N.T.S. 993. Recently, it seems that the distinction between “the general principles of law recognized by civilized nations” and the general principles of *international law* has become relatively ambiguous in practice and in literature. See *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of*

international tribunals under this provision. *Golder v. United Kingdom* explicitly confirmed that the general principles of law were covered by Article 31(3)(c).<sup>450</sup>

However, international tribunals sometimes also refer to resolutions of international organizations and some kinds of soft law instruments in addition to these typical formal sources of international law under this provision. *Loizidou v. Turkey* referred to the UN Security Council Resolution 541 (1983), which declared that the attempt to create a “Turkish Republic of Northern Cyprus” (TRNC) was invalid under the provision, and it upheld that Article 159 of the Constitution of TRNC that the Turkish Government invoked did not have any legal effects.<sup>451</sup> *Mamatkulov & Askarov v. Turkey* considered the decisions taken by the human rights treaty bodies and the judgements of international tribunals.<sup>452</sup> In addition, according to a more flexible view, international agreements between states that are not ratified by “the parties” in the sense of Article 31(3)(c) can possess “some normative and evidentiary value to the extent that regard may be had to it to inform and confirm the content of the definition of information contained” in the terms being interpreted.<sup>453</sup> Thus, regarding the material scope of Article 31(3)(c), the international jurisprudence suggests the possibility of expansion of the range of “the rules of international law” under this provision from the rules legally binding on “the parties” to the legally relevant instruments, which do not necessarily have legally binding force.

The term “relevant” pertains to the limitation *ratione materiae*. Some commentators focus on the subject matter of interpreted treaty terms and referred norms.<sup>454</sup> Marceau argues that knowledge of rule relevancy is needed to make determinations on a case-by-case basis, and she suggested that the relevance refers not only to the subject matter of the rules referred by the interpreters but also to the theme of the dispute.<sup>455</sup> Yasseen presents a broader sense of the term “relevant,” under which any

---

*International Law*, *supra* note 5 at 96, para. 183.

<sup>450</sup> *Golder v. The United Kingdom* (1975), 18 E.C.H.R. (Ser. A) 1, 1 E.H.R.R. 524 at 17-18, para. 35. But see *EC—Biotech*, *supra* note 130 at para.7.67. (*EC—Biotech* did not clearly confirm that the general principles of law could be considered as the “rules of international law” under the provision.)

<sup>451</sup> *Loizidou v. Turkey* (1996) 310 E.C.H.R. (Series A) Reports of Judgements and Decisions, 1996-VI at 2231, paras.43-44.

<sup>452</sup> *Mamatkulov & Askarov v. Turkey* 46827/99 and 46951/99, Council of Europe: European Court of Human Rights, 4 February 2005 at paras. 40-45, 114-115 available at: <http://www.unhcr.org/refworld/docid/42d3ef174.html> [accessed 26 October 2012]

<sup>453</sup> Dissenting Opinion of Judge Gavan Griffith, *OSPAR Convention Case*, *supra* note 224 at 122-123, para.17.

<sup>454</sup> E.g., Villiger, *supra* note 313 at 433; Sands, *supra* note 2 at 57. Noteworthy, Sands considers only customary international law as “any relevant rules of international law”.

<sup>455</sup> Gabrielle Marceau, “Conflicts of Norms and Conflicts of Jurisdictions: The

rules that can clarify disputed concepts contained in the treaty being interpreted are covered.<sup>456</sup>

**(b) What are “the parties”?**

“Any relevant rules of international law” are also to be “applicable in the relations between the parties.” The question here is whether the term “parties” refers to all the parties to the treaty that is being interpreted or the parties to a dispute. The *Vienna Convention* defines the term “party” as “a State which has consented to be bound by the treaty and for which the treaty is in force.”<sup>457</sup> Clearly, this definition refers not to a party to a particular *dispute*, but to a party to the *treaty*.<sup>458</sup> However, this definition does not necessarily exclude the possibility that the term “parties” in Article 31(3)(c) can reference the parties to a dispute under the treaty.<sup>459</sup> Moreover, some provisions of the Vienna Convention use the phrase “all the parties” when they specifically intend such meaning; provisions of Articles 15 (c), 20 (2), 30 (3), (4), 31 (2) (a), 40 (2), 54 (b), 57, 59 (1), 60 (2) (a) (ii) include the modifier “all” before “the parties.” This suggests that “the parties” in Article 31(3)(c) does not inevitably mean that the term should be read as “*all* the parties.”<sup>460</sup> Thus, some authorities believe that the term “parties” means the parties to a dispute in a particular case.<sup>461</sup> French takes this position from a pragmatic perspective, although he admits that this view is controversial.<sup>462</sup> He observes the four reasons supporting his opinion:

---

Relationship between the WTO Agreement and MEAs and other Treaties” (2001) 35 J. of World Trade 1081 at 1087.

<sup>456</sup> Yasseen, *supra* note 292 at 63. (He described the meaning of the relevant rules as the rules contained in the law of treaties, rules relating to the subject matter which the treaty regulates, and the rules clarifying certain notions which the treaty contains.). See also Pauwelyn, *supra* note 7 at 263-264.

<sup>457</sup> Article 2 (1) (g) of the *Vienna Convention*. Cf. Sub-paragraph (f) of the same article defines the term “contracting State” as “a State which has consented to be bound by the treaty, *whether or not the treaty has entered into force*” [emphasis added].

<sup>458</sup> Contra Pauwelyn, *supra* note 7 at 257. But see *ibid.* at 260-263.

<sup>459</sup> Joshua Meltzer, “Interpreting the WTO Agreements—A Commentary on Professor Pauwelyn’s Approach”, Comment, (2003-2004) 25 Mich. J. Int’l. L. 917 at 917-919.

<sup>460</sup> *Ibid.* at 918.

<sup>461</sup> *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, *supra* note 5 at 238-239, para. 472; Gardiner, *supra* note 213 at 265; French, *supra* note 7 at 305-307; Gabrielle Marceau, “WTO Dispute Settlement and Human Rights” (2002) 13 E.J.I.L. 753 at 781-783. Voigt does not make clear her position as to this question; however, her critical comments on the WTO jurisprudence that takes strict interpretation of the term suggest that she supports this view. Voigt, *supra* note 2 at 282-283;

<sup>462</sup> French, *ibid.* at 307.

First, the requirement of duality of treaty membership is often an almost impossible criterion to meet. Secondly, it is impossible to ignore the disparity between the ideal of uniform interpretation of commitments amongst all parties and the reality of the current system of consensual jurisdiction. Thirdly, the extensive use of bilateral commitments, even within a multilateral context, ensures that, in most cases, such uniform interpretations are not actually required. Fourthly, as there clearly is much judicial discretion in this area of dispute settlement, one should not ignore this (or marginalize it as ‘judicial politics’), but rather recognize it as a key element of the interpretative process.<sup>463</sup>

Contrary to this view, an orthodox and strict approach interprets the term “the parties” as “all the parties,” so that the interpreters can refer to only conventions that are binding on all the parties to the treaty being interpreted.<sup>464</sup> This view provides a simple and clear argument and coincides with the formalistic contractual concept of treaty.<sup>465</sup> McLachlan supports this position, but he submits two exceptional cases: when a particular obligation contained in the treaty being interpreted is reciprocal or synallagmatic, which would make the relationship between the parties bilateral, at least as to that obligation; and “any relevant rules of international law” can be sufficient to be applicable only between the parties to the dispute.<sup>466</sup> Moreover, McLachlan finds the possibility of external rules not in force between the parties to be considered under Article 31 (1) as “evidence of the common understanding of the parties as to the meaning of the term used.”<sup>467</sup> In his opinion, such a reference to the rules unqualified under Article 31(3)(c) may be justified pursuant to Article 31 (1) within the consideration of the object and purpose of the treaty.<sup>468</sup> A proposition inferred from this position is that treaties that have more parties would have more chances to be isolated from other treaties that constitute part of the normative environment.<sup>469</sup>

Pauwelyn also considered the abovementioned second exception identified by McLachlan from the perspective of the intentional approach to treaty interpretation:

---

<sup>463</sup> *Ibid.*

<sup>464</sup> Van Damme seems to support this view by interpreting “parties” as “signatories.” Van Damme, *supra* note 283 at 362.

<sup>465</sup> Villiger, *supra* note 313 at 433.

<sup>466</sup> McLachlan, *supra* note 12 at 315.

<sup>467</sup> *Ibid.*

<sup>468</sup> *Ibid.*

<sup>469</sup> Marceau, *supra* note 461 at 781; McLachlan, *ibid.* at 314.

[E]ven though a particular treaty provision may not be legally binding on all WTO members, or not even on all disputing parties in a particular case, such treaty may still play a role under [Article] 31(3)(c) if it can be said to reflect the ‘common intentions’ of WTO members, or under [Article] 31 (1) if it can be said to reflect the ‘ordinary meaning’ of a WTO treaty term.<sup>470</sup>

In his view, the emphasis is on the function of treaty interpretation to ascertain the common intentions of all parties to the treaty.<sup>471</sup> And, when the reference to any sources are not legally binding on the parties, they can be justified appropriately under Article 31 (1) for establishing the “ordinary meaning” of the term concerned in the light of the object and purpose of the treaty.<sup>472</sup>

Regarding this disagreement on the meaning of the “parties,” the present author bears in mind that treaty interpretation is routine work for international lawyers and practitioners, and therefore, interpreting a term of a treaty is a necessary task in the process of operation and implementation of treaty at international and national levels in addition to dispute settlement. Thus, the hypothetical context that the term “the parties” means the parties to a dispute under the treaty is too limited.

Having lowered the threshold of the conditions to justify the rules referred to by interpreters, legally non-binding instruments might be taken into account by interpreters under Article 31(3)(c). Alternatively, because the entire architecture of Article 31 is designed to ascertain the “ordinary meaning” with the crucible of interpretative elements, legally non-binding rules and non-legal materials could be available for interpreters under Article 31 (1) if such rules establish the “ordinary meaning” of a term concerned. If so, the boundary between Article 31 (1) and (3)(c) might be ambiguous.

##### **5. Supplemental Interpretative Elements to Inter-Temporal Law in Normative Integration: Incorporation of Normative Environment through Evolutionary Character of a Generic Term and in the Light of the “Object and Purpose” of a Treaty for the Effective Accomplishment of the Goal of the Treaty**

Considering that inter-temporal law is latently codified in Article 31(3)(c) as discussed above, that provision defines the scope of the rules to be taken into consideration under the inter-temporal law as “any relevant rules of international law,” and it encloses them

---

<sup>470</sup> Pauwelyn, *supra* note 7 at 260.

<sup>471</sup> *Ibid.* at 257.

<sup>472</sup> McLachlan, *supra* note 12 at 315.

with the consensual conditions requiring relevant legal materials to be “rules” and “applicable between the parties.”

However, international jurisprudence suggests that supplemental interpretative factors overlap on these consensual constraints and heed extrinsic normative environment of a treaty being interpreted: A generic term and the object and purpose of a treaty that lead to a progressive construction.<sup>473</sup> These approaches, on the one hand, enable interpreters to refer to legal materials that have broader range than Article 31(3)(c). On the other hand, these methods may entail the problem of authenticity by referring to materials outside of a treaty and the qualification of the material referenced. In other words, what elements could legitimize interpreters to decide to take into account such external legal materials?

**(a) Incorporation of normative environment through an evolutionary character of a generic term**

The Appellate Body found that the term “natural resources” in Article XX(g) is a generic term and is evolutionary, and therefore, it found it “pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.”<sup>474</sup> The Panel observed this developmental construction of the term “natural resources” by the Appellate Body in a manner in *US—Shrimp*; the referred provisions of different conventions and international documents by the Appellate Body were not necessarily legally applicable to all disputing parties.<sup>475</sup> However, the Appellate Body cites them not “because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do.”<sup>476</sup> Thus, this indicates that interpreters can refer to the rules that are not applicable to all the parties in determining the content of a term of a treaty in an evolutionary manner, if those rules possess informative character in defining the ordinary meaning of a term in question. The Panel did not consider this method as the application of Article 31(3)(c), but rather thought as the application of Paragraph (1) of the same article.<sup>477</sup>

A generic term in treaty interpretation has a catalytic function leading to an evolutive interpretation because such a term is “by definition evolutionary.”<sup>478</sup> In *Namibia*, the Court held that the terms “the strenuous conditions of the modern world,”

---

<sup>473</sup> See Chapter 3 of the present thesis.

<sup>474</sup> *US—Shrimp*, *supra* note 242 at para.130.

<sup>475</sup> See *EC—Biotech*, *supra* note 130 at para. 7.94.

<sup>476</sup> *Ibid.* at para.7.92.

<sup>477</sup> *Ibid.* at paras.7.92-7.96 and fn. 271.

<sup>478</sup> *US—Shrimp*, *supra* note 242 at para. 130.

“the well-being and development,” and “sacred trust” in Article 22 of the Covenant of the League of Nations were of such a character; it found that “its interpretation cannot remain unaffected by the subsequent development of law. ... [A]n international instrument has to be interpreted and applied within the framework of entire legal system prevailing at the time of the interpretation.”<sup>479</sup>

The issue of whether a term in a treaty can be classified as generic is “an essentially relative question; it depends upon the development of international relations.”<sup>480</sup> The ILC suggests possible categories for such terms that may have an evolutive character: the terms (a) imply to take into account subsequent changes corresponding with technical, economic, and legal developments; (b) set up an obligation for further progressive development for the parties; and (c) express the concept in a very general nature and must take into account changing circumstances.<sup>481</sup> Thus, the terms contained in a treaty employed in scientific, technological, economic, and other specialized fields might be developed along with discovery of new knowledge and learning. Moreover, a general or comprehensive term might include new content in its meaning, such as “commerce” in *Navigational and Related Rights*. In that case, the term “commerce” was read as a generic term and as fitting the present situation and brought the transport of tourists under the term, under which such service was not foreseen to be dealt with at the time of conclusion of the treaty between the parties.<sup>482</sup> However, even an identical term in different agreements can possess different meanings.<sup>483</sup> A generic term is not a mere word but a legal term in a treaty, which has its own meaning that is determined in the light of the context and the object and purpose of the treaty containing it.<sup>484</sup>

Moreover, genericness of a term can be found not only in a nature of a term but also in a wording of a provision. In the *Gab ikovo-Nagymaros Project*, the Court

---

<sup>479</sup> *Namibia*, *supra* note 442 at 31, para. 53.

<sup>480</sup> Nationality Decrees Issued in Tunis and Morocco PCIJ Series B, No. 4 (1923) at 24.

<sup>481</sup> *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 58<sup>th</sup> Sess. A/CN.4/L/702 (2006) at 16, para.23. The Commission does not explain the category (b) in detail nor does provide any examples. Regarding this type of concept, Arato suggests obligations contained in framework conventions where the parties agree further commitments in the future. Arato, *supra* note 291 at 470.

<sup>482</sup> *Navigational and Related Rights*, *supra* note 380 at 242-244, paras.63-71.

<sup>483</sup> *MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures* (2001), (International Tribunal for the Law of the Sea), at para.51, online: ITLOS < [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/2001-5.13.11.01.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/2001-5.13.11.01.E.pdf) >.

<sup>484</sup> *Cf. Aegean Sea Continental Shelf*, *supra* note 380 at 63, para.4 (Dissenting Opinion of Judge De Castro).

primarily relied on the wording of the provisions in question and held that the wording prescribed the parties to take into account current standards to evaluate the environmental risks.<sup>485</sup>

Once a term is considered generic, it requires interpreters to take into account the progress of law after the conclusion of the treaty in question and the law prevailing at the time of interpretation. In *Aegean Sea Continental Shelf*, the Court pronounced that:

[o]nce it is established that the expression “the territorial status of Greece” was used in Greece’s instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.<sup>486</sup>

The ICJ takes the position that a term’s genericness allows its content to develop in the light of legal advancement, and it seems that the Court considers that the question of whether such development of the meaning of the term is valid as treaty interpretation in a given case is an issue of intention of the parties. This means that a decisive element to draw a developmental construction based on a generic term is an intention of the parties to the treaty containing such a term.<sup>487</sup> For example, in *Namibia*, the Court held that the parties to the Covenant must be deemed to have accepted the concepts embodied in Article 22 of the Covenant (“the strenuous conditions of the modern world,” “the well-being and development,” and “sacred trust”) as having evolutionary meanings in the light of legal and social developments by employing such general expressions.<sup>488</sup> Also, in the case of *Navigational and Related Rights*, the Court explicitly referred to “the parties’ common intention” to sustain its view that the meaning of the term “commercial” was evolutionary in nature:

[T]here are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty

---

<sup>485</sup> *Gab ikovo-Nagymaros Project*, *supra* note 1 at 77-78, para.140.

<sup>486</sup> *Aegean Sea Continental Shelf*, *supra* note 380 at 32, para.77.

<sup>487</sup> Arato, *supra* note 291 at 433; Martin Dawidowicz, “The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v. Nicaragua*” (2011) 24 *Leiden Journal of International Law* 201.

<sup>488</sup> *Namibia*, *supra* note 442 at 31, para. 53. See Arato, *supra* note 291 at 470.

was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.<sup>489</sup>

These pronouncements express a presumption that the adoption of a generic term in a treaty provision suggests the parties' intention that the meaning of the term is capable of developing along with advancement of international law. The approach taken by the Court that considers the intention of the parties as evidence of capability of evolutionary interpretation is supported by some authorities.<sup>490</sup> For instance, Jiménez de Aréchaga states:

The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concepts that would remain unchanged, or, if they had had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belonged. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up...<sup>491</sup>

The same stance regarding the fundamental of the intention of the parties in interpreting the developmental meaning of a term is shared by Special Rapporteur Waldock.<sup>492</sup> Also, Thirlway insists that, "where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the

---

<sup>489</sup> *Navigational and Related Rights*, *supra* note 380 at 242, para. 64.

<sup>490</sup> Arato, *supra* note 291 at 1ff; Higgins, *supra* note 390 at 518. See Malgosia Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights" in Alexander Orakhelashvile & Sarah Williams, eds., *40 Years of the Vienna Convention on the Law of Treaties* (London: British Institute of International and Comparative Law, 2010) 55 at 56-57.

<sup>491</sup> Jiménez de Aréchaga, International Law Commission, 16<sup>th</sup> Sess., 728<sup>th</sup> Mtg., A/CN.4/SR.728 in *Yearbook of the International Law Commission 1964*, Vol. 1 (New York: UN, 1965) at 34, para. 10 (A/CN.4/SER.A/1964). For the same purport of his statement, see International Law Commission, 18<sup>th</sup> Sess., 870<sup>th</sup> Mtg. A/CN.4/Sr.870, in *Yearbook of the International Law Commission 1966*, Vol. 1 (2) (New York: UN, 1967) at 190, para. 71 (A/CN.4/SER.A/1966).

<sup>492</sup> Waldock, International Law Commission, 18<sup>th</sup> Sess., 872<sup>nd</sup> Mtg., A/CN.4/Sr.872, in *Yearbook of the International Law Commission 1966*, Vol. 1 (2) (New York: UN, 1967) at 199, para. 9 (A/CN.4/SER.A/1966).

development of the law, the treaty must be interpreted so as to give effect to that intention.”<sup>493</sup>

For those advocates, the subjective element of the will of the parties is essential for justifying evolutionary interpretation. However, as some pointed out, a fundamental problem of this approach is how to establish the original intention of the parties regarding the future evolution of a term.<sup>494</sup> A similar warning is presented by Thirlway regarding the Court’s reference to the intention of the Parties to the Covenant in *Namibia*:

The doubts prompted by this line of argument do not relate to the legal logic, but to the basic finding, as to the intentions of the States concerned in 1919, upon which it is built. There must be a danger, when applying this line of approach, of confusing what, on the basis of the available evidence, may be found to have been the actual intention of the parties concerned, and what is judged, with the benefit of hindsight, to be what *ought* to have been their intention.<sup>495</sup>

The critics, who are inclined to the textual approach emphasizing a developmental nature of a term rather than the subjective element of the parties’ original intent, suggest another approach.<sup>496</sup> French states that, “[a] preferable approach to such question might therefore simply be to recognize that certain concepts and terms within a treaty can be subject to objective revision, without the pretence of subjective interpretation.”<sup>497</sup> McLachlan disagrees with the statement of Jiménez de Aréchaga in the Commission, and he clearly argues that, “it is submitted that a safe guide to decision on this issue will not be found in the chimera of the imputed intention of the parties alone... The enquiry is thus into whether the concept is, in the context in which it is used, a mobile one.”<sup>498</sup> On the other hand, as French points out, such an argument “may provide tribunals too much latitude, with too few safeguards, for discretionary decision-making.”<sup>499</sup> Moreover, he warns that

unless one is also prepared to accept the highly speculative argument that States have agreed to such objective revision by virtue of some rule of general international law, such objective revision also undermines

---

<sup>493</sup> Hugh Thirlway, “The Law and Procedure of the International Court of Justice 1960-1989 Part Three” (1991) 62 Brit. Y. B. Int’l L. 1 at 57.

<sup>494</sup> Arato, *supra* note 291 at 466; Hugh Thirlway, “The Law and Procedure of the International Court of Justice 1960-1989 Part One” (1989) 60 Brit. Y. B. Int’l L. 1 at 142.

<sup>495</sup> Thirlway, *ibid.* at 136-137 [emphasis in original].

<sup>496</sup> McLachlan, *supra* note 12 at 317; French *supra* note 7 at 298-299.

<sup>497</sup> French, *ibid.* at 298.

<sup>498</sup> McLachlan, *supra* note 12 at 317.

<sup>499</sup> French, *supra* note 7 at 300

the fundamental notion of consent, both at the treaty adoption stage and, subsequently, during dispute settlement.<sup>500</sup>

Thus, the textual approach to an evolutionary interpretation based on a generic term eludes ascertainment of the intention of the parties as to the developmental character of the term in question. This approach might simplify legal logic in treaty interpretation, but it would be insufficient to provide any safeguard against a kind of judicial activism through a tribunal's arbitrary construction of a generic term.<sup>501</sup> At this point, Young presents an interesting view when analysing *EC—Biotech*: “‘ordinary meaning’ is not a matter of consent, but rather of intersubjectivity. Meaning in language is not dependent on the consent of participants, but rather develops according to social practices within a community.”<sup>502</sup> This approach may presuppose related collective behaviours in practice in a community to deduce a common understanding of the participants regarding the term in question; thus, it may provide a proper safeguard against such risk without facing a difficult task of ascertaining individual consent of the parties.

**(c) Developmental interpretation in terms of the object and purpose of a treaty**

Another way to lead a progressive interpretation is based on the object and purpose of a treaty. The Tribunal in *Iron Rhine* clearly distinguished this prospect from one based on a generic term:

In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.<sup>503</sup>

This statement explicitly identifies that factual circumstances are to be taken into account in the light of the object and purpose of a treaty for its effective application. This approach is much more problematic because of the indeterminate and intricate nature of the concept of “object and purpose.”

The origin of the concept of “object and purpose” in the *Vienna Convention* is traced back to *Reservations to the Convention on the Prevention and Punishment of the*

---

<sup>500</sup> *Ibid.* See also Fitzmaurice, *supra* note 490 at 58.

<sup>501</sup> Cf. Fitzmaurice, *supra* note 353 at 226. (He argues a danger of inter-temporal law in importing what the parties never really contended into treaty terms and in imposing the parties obligations they never actually assumed.)

<sup>502</sup> Young, *supra* note 276 at 919.

<sup>503</sup> *Iron Rhine*, *supra* note 211 at para. 80.

*Crime of Genocide*.<sup>504</sup> In the Advisory Opinion, the majority of the Court considered that the object and purpose of the Genocide Convention was “to safeguard the very existence of certain human groups” and “to confirm and endorse the most elementary principles of morality”; moreover it reflected the common will of the parties, and thus, constituted the rule of conduct individual parties must follow in appraisal of the admissibility of any reservation.<sup>505</sup> However, such an abstract identification of the object and purpose as criteria for judging compatibility of any reservation with the Convention was sharply criticized:

It hinges on the expression “if the reservation is compatible with the object and purpose of the Convention”. What is the “object and purpose” of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter. One has only to look at them to realize the importance of this question. As we showed at the beginning of our Opinion, these are the articles which are causing trouble.<sup>506</sup>

The ILC also expressed doubt over the objectivity of the “object and purpose” test in replying to the request by the General Assembly on the issue of reservations to multilateral treaties.<sup>507</sup> Similarly, at the early stage of the codification of the law of treaties, Special Rapporteur Waldock hesitated to employ this concept as criteria for the admissibility of any reservation because, even if it could provide an objective test, it would operate only subjective perspectives.<sup>508</sup> However, finally, because of the compromise of the legal policy in the codification process, the concept occupied pivotal roles in various phases of a life of a treaty set out by the *Vienna Convention*.<sup>509</sup> Once this criterion was adopted by the ILC, Special Rapporteur Waldock commented that “[t]he objects and purposes of the treaty [...] are criteria of fundamental importance for the interpretation in good faith of a treaty” in evaluating the compatibility of any reservation.<sup>510</sup>

---

<sup>504</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15 at 24.

<sup>505</sup> *Ibid.* at 23-24.

<sup>506</sup> *Ibid.* at 44 (Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo).

<sup>507</sup> GA Res. 478 (V) 1950; YBILC 1951, vol. II, p. 128, para. 24.

<sup>508</sup> Waldock I, pp. 65-66.

<sup>509</sup> Reuter, *supra* note 313 at 161, para.284; Jan Klabbbers, “Some Problems Regarding the Object and Purpose of Treaties” (1997) 8 Finnish Yearbook of International Law 138 at 138-139.

<sup>510</sup> Waldock IV at 51, para. 6.

Uncertainty of the specification of the “object and purpose” lies not only in objective or subjective operation of the criteria but also in the vagueness of the concept itself. In the first place, although the concept is introduced into eight different articles of the *Vienna Convention*, the indeterminacy of the concept appears in inconsistent terminology used in these provisions.<sup>511</sup> While the basic format of “object and purpose” is employed in seven provisions, only in Article 60 (3)(b) is the conjunction “or” inserted between “object” and “purpose.” This implies that these two elements are distinguishable.<sup>512</sup> When divided, “object” refers to direct goals to be achieved by the treaty and “purpose” includes ultimate aims. For instance, the *Chemical Weapons Convention* focuses on elimination of the use and production of chemical weapons, and its ultimate goal is to serve for protection of human life and promotion of human welfare.<sup>513</sup> The latter’s scope is extremely broad and could cover all treaties governing any human activities.<sup>514</sup> Thus, the terms “object” and “purpose” could be combined as a notion.

In the second place, there is the indeterminacy of attributive and numerical issues of the object and purpose. Klabbers insists that a treaty should have a single “object and purpose” that would be compatible with the notion employed in provisions in the *Vienna Convention*.<sup>515</sup> For example, Article 60 (3)(b) stipulates that “the violation of a provision essential to the accomplishment of the object or purpose of the treaty,” which implies that the essentiality of the provision would be established in the light of the object and purpose of the treaty so that the “object and purpose” attach to the treaty per se, but not to a provision.<sup>516</sup> However, some cases clearly referred to the “object and purpose” of a provision.<sup>517</sup> For instance, in *US—Shrimp*, the Appellate Body underlined

---

<sup>511</sup> Articles 18; 19 (1) (b); 20 (2); 31 (1); 33 (4); 41 (1) (b) (ii); 58 (1) (b) (ii); and 60 (3) (b). For the recent research on this issue, David S. Jonas & Thomas N. Saunders, “The Object and Purpose of a Treaty: Three Interpretative Methods” (2010) 43 *Vand. J. Transnat’l. L.* 565.

<sup>512</sup> Paul Reuter, “Solidarité et divisibilité des engagements conventionnels” in Yoram Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers, 1989) 623 at 628; Klabbers, *supra* note 508 at 145.

<sup>513</sup> *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction*, 13 January 1993, 1974 U.N.T.S. 317, 32 I.L.M. 800 [*Chemical Weapons Convention*]. Klabbers, *supra* note 508.

<sup>514</sup> Isabelle Buffard & Karl Zemanek, “The ‘Object and Purpose’ of Treaty: An Enigma?” (1998) 3 *Austrian Review of International & European Law* 311 at 319-321; Klabbers, *supra* note 501.

<sup>515</sup> Klabbers, *supra* note 508.

<sup>516</sup> Cf. Denis Alland, *Justice privée et ordre juridique international* (Paris: Pedone, 1994) at 231.

<sup>517</sup> See *Case concerning the Factory at Chorzów* (Claim for Indemnity) (Jurisdiction)

the importance of the object and purpose of the chapeau of Article XX and criticized the Panel's decision:

The Panel failed to scrutinize the immediate context of the chapeau: i.e., paragraph (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the chapeau of Article XX. Rather, the Panel looked into the object and purpose of the whole of the GATT and the WTO Agreement, which object and purpose it described in an overly broad manner.<sup>518</sup>

Given that the concept of "object and purpose" is inherent in a treaty as a whole, the question whether it should be a singular or could be multiple remains undetermined. Practically, even bilateral treaties can govern some different issues, and it seems to be meaningless to consolidate several issues dealt with by a treaty under a singular object and purpose using general terms covering broader sense.<sup>519</sup>

Lastly, the methodology to identify actual goals of a treaty remains unsolved, even if the terminology, attribution, numbers of "object and purpose" could be defined as proper manner. International courts often referred to preamble, essential provisions, and general character of a treaty.<sup>520</sup> In *Iron Rhine*, the Tribunal, by referring to the non-fixed duration of the 1839 Treaty, identified the object and purpose of the 1839 Treaty as establishing continuous commercial communication between the parties based on a stable separation between Belgium and the Netherlands.<sup>521</sup> In this regard, the context of the treaty is also relevant in determining the object and purpose; the context is described in Article 31 (2), it presents strictly consensual character, but it has broader sense in practice.<sup>522</sup>

The indefinite nature of the object and purpose, on the one hand, can allow interpreters to refer arbitrarily to external legal and factual environment extensively, without providing either textual or intentional evidence indicating such integration. On the other hand, the ambiguity and difficulty of identifying the object and purpose of a treaty can constitute the internal limit for the integration based on the object and purpose if the substantial and methodological vagueness would make interpreters to avoid relying on it. A possible safeguard is suggested in *Iron Rhine*: "...it seems that an evolutive interpretation, which would ensure an application of the treaty that would be *effective* in

---

(*Germany v. Poland*) (1927), P.C.I.J. (Ser. A) No. 9 at 24-25.

<sup>518</sup> *US—Shrimp*, *supra* note 242 at para. 116.

<sup>519</sup> See Gardiner, *supra* note 213 at 194-196. *Contra* Klabbbers, *supra* note 508.

<sup>520</sup> Gardiner, *supra* note 213 at 196-197, 199-200.

<sup>521</sup> *Iron Rhine*, *supra* note 211 at 38, para.83.

<sup>522</sup> Van Damme, *supra* note 283 at 215; Orakhelashvili, *supra* note 302 at 340.

terms of its object and purpose...”<sup>523</sup> The maxim *ut res magis valeat quam pereat* is incorporated into the codified rule on treaty interpretation as two elements: “in good faith” and “in the light of its object and purpose” in Article 31 (1).<sup>524</sup> These two elements might constitute dual aspects of the principle of effectiveness.<sup>525</sup> Thus, it is said that the principle of effectiveness provides an external limitation for normative integration based on the object and purpose of a treaty, which redeems the indeterminacy of the concept of the object and purpose of a treaty in interpretation.<sup>526</sup>

In addition to the issues related to the uncertainty of determination of the object and purpose, a problem arises regarding the choice of information available for interpreters in terms of the object and purpose of a treaty. When *EC—Biotech* found informative character in the *Convention on Biological Diversity*<sup>527</sup> and the *Cartagena Protocol*<sup>528</sup> in respect to interpretation of the WTO Agreements, it was not based on Article 31(3)(c); instead, it was aimed at identifying “ordinary meaning” as stipulated in Paragraph (1) of the same article. An impetus for the Panel to look at such extraneous legal documents could be the presumption that the meaning of a text is not a matter of consent of the parties, but rather a matter of general usage in the international community.<sup>529</sup>

Comparing approaches in terms of the object and purpose and in reading a generic term, both reflect the intention of the parties originally inserted or expressed in the treaty. However, the effects of these elements slightly differ. Whereas a generic term specifies its content so that the reference to other rules of international law and factual situation related to it remain limited, the object and purpose of a treaty is less clear than a generic term is. Therefore, the range of integration of the external normative environment is broader than in the case of a generic term.<sup>530</sup>

As long as a treaty can be perceived as a concordance of intentions of the parties, its object and purpose cannot be completely independent of the parties’ will. On the other hand, a treaty—especially a certain kind of treaty—can obtain an autonomous life its own away from the original intentions of the parties.<sup>531</sup> Highly public policy oriented treaties—such as human rights and environmental protection—typically incline to

---

<sup>523</sup> *Iron Rhine*, *supra* note 211 at 37, para. 80 [emphasis added].

<sup>524</sup> Commentary to Articles 27 and 28, *supra* note 294 at 219, para.(6)

<sup>525</sup> Gardiner, *supra* note 213 at 159-160.

<sup>526</sup> See Van Damme, *supra* note 283 at 278-285; Gardiner, *supra* note 213 at 159-161, 201; Arato, *supra* note 291 at 475-476; *Iron Rhine*, *supra* note 211 at paras. 80-84.

<sup>527</sup> *Convention on Biological Diversity*, *supra* note 94.

<sup>528</sup> *Cartagena Protocol* *supra* note 51.

<sup>529</sup> Young, *supra* note 276 at 919.

<sup>530</sup> Arato, *supra* note 291.

<sup>531</sup> E.g. A. Verdross, ILC 728<sup>th</sup> meeting, at 33, para.7.

incorporate various changes in legal, scientific, technological, and other relevant fields for arranging the development of their legal contents and standards based on the object and purpose. Tension between the consensual foundation for legal stability of the relations between the parties established by a treaty and the demand of adopting new situations in accordance with the social needs in the international community requires interpreters to balance between a treaty's authenticity and efficacy.<sup>532</sup>

The application of these techniques—taking into account extrinsic situations based on the evolutionary character of a generic term and in terms of the object and purpose of the treaty, on one hand—could serve for normative integration without regard to the consensual threshold. Conversely, this could seriously undermine the foundation of the law of treaties if it could not provide any convincing evidence for legitimating the reference to such extraneous informative materials.<sup>533</sup>

## 6. Concluding Remarks

Sustainable development has been a universally accepted policy in the international community. Technically, the achievement of sustainable development requires an integration of different legal rules, factual situations, and the relevant, newly discovered, technical knowledge. This developmental temporal aspect is captured by the second branch of the inter-temporal law; however, while the first part of that law is invariably adopted in international law, the second limb is considered an exception and remains a consistent target of criticism.<sup>534</sup> Thus, embodiment of the second limb of the inter-temporal law in Article 31(3)(c) is not straightforward and the scope of its application is obscure.

The balance between the two branches of the inter-temporal law in Article 31(3)(c) is kept by the requirements limiting interpreters to referencing the scope of rules to “any relevant rules of international law applicable in the relations between the parties.” This consensual requirement serves legal stability between the parties to the treaty that is being interpreted by allowing interpreters to consider only rules to which all the parties are bound. This advantages the formalistic perspective of the law of treaties. Different consequences of treaty interpretation could result from relying on either the first or the second branch of the inter-temporal law, but Article 31(3)(c) seems to be balancing these

---

<sup>532</sup> See also Georg Nolte, “Treaties over Time in Particular: Subsequent Agreements and Practice” in Report of the International Law Commission, GAOR, 63d Sess., UN Doc. A/63/10, Supp. No.10 (2008), Annex I, para.1.

<sup>533</sup> See Arato, *supra* note 291 at 475-476.

<sup>534</sup> See e.g., Hugh Thirlway, “Reflection on *Lex Ferenda*” (2001) 32 *Netherlands Yearbook of International Law* 24.

demands well, providing a sufficiently sophisticated foundation for interpreters to think about normative integration based on the consent of the parties.<sup>535</sup>

While this equilibrium can be kept within the consensual paradigm of the law of treaties, rules not applicable in the relations between the parties and non-legal situations are excluded from this framework. Is this inadequacy owed to Article 31(3)(c)? The answer depends on how one grasps the scope of the inter-temporal law. If one considers the reach to cover a broad sense of normative environment, including factual situations, the answer would be yes;<sup>536</sup> otherwise, these other factors are inherently out of scope of Article 31(3)(c). As discussed above, the provision envisages only rules applicable in the relations between the parties, instead of embracing the evolution of law entirely. Thus, these two interpretative factors are strained from the scope of that provision.

The text-based and the object-and-purpose-based developmental interpretative techniques enable interpreters to consider these disqualified factors in Article 31(3)(c). A possible solution within the framework of the *Vienna Convention* is to read prospects of developmental interpretation of a treaty's terms in "the ordinary meaning" in Article 31 (1). For considering the extrinsic normative environment and incorporating it in the meaning of the text, this provision might be a sufficient foundation for an evolutionary interpretation. However, considering the coherency between Article 31 (1) and (3)(c), if Paragraph (1) can cover the legal rules that are not applicable in the relations between the parties, what would be the purpose of Paragraph (3)(c)? Moreover, reference to such external factors of a treaty without the consensual basis might endanger the steadiness of legal relations between the parties and subvert the validity of treaty interpretation.

---

<sup>535</sup> See *Gab ikovo-Nagymaros Project*, *supra* note 1 at 121ff. Esp., 123, para. 15 (Separate Opinion of Judge Bedjaoui).

<sup>536</sup> See *ibid.* at 114 (Separate Opinion of Vice-President Weeramantry).

## Chapter 6 Conclusions

Sustainable development in international law is an evolving concept. At the early stage of the appearance of the concept, it was clearly focused on the integration of economic development and environmental protection in policy-making. Once the concept was established in Rio de Janeiro in 1992, diverse matters were tied in with it and came forward in the Johannesburg Conference and the Rio+20 on sustainable development. On the one hand, this expansion of the subject matter of sustainable development indicates a growing interest in the social issues among the international community. On the other hand, the haphazard extension of the issues suggests the transfiguration of the concept from an umbrella that works for specific fields (economic, environmental, and human rights) with certain legal implications (integration), to a mere cornucopia of social problems.

Normative integration is dealt with in the topic of the fragmentation of international law, which seeks solutions for normative conflicts in contemporary international law that are not entirely resolved through conventional conflict-solving guidelines. The study suggests that the systemic integration through application of Article 31(3)(c) would provide an effective alternative for harmonizing different demands imposed by different rules and policies. Thus, achievement of sustainable development in the phase of normative integration presupposes to be engaged through treaty interpretation and takes into account extraneous legal rules of the treaty in question.

However, in international jurisprudence on sustainable development, integration between different legal rules does not provide an entire picture of normative integration of sustainable development, but factual, scientific, technological situations and developments, and legal rules that are not binding the parties also are considered by tribunals in treaty interpretation. These interpretative factors are disqualified under the rigid consent-based requirements imposed by Article 31(3)(c) to which interpreters refer. Although Article 31(3)(c) latently codified inter-temporal law, which allows interpreters to consider legal situations at the time of conclusion or application of the treaty, it limits the range of rules considered in treaty interpretation by stipulating “any relevant rules of international law applicable in the relations between the parties.” Thus, the broad range of ineligible factors accounted for were left outside the scope of that provision. This segmentation of interpretative factors in treaty interpretation is a consequence of the consensual paradigm of the law on treaties. However, international adjudication employs supplemental methods to overcome this consentient threshold: a generic term and the object and purpose of the treaty.

While the rules qualified under Article 31(3)(c) must be applicable in the relations between the parties, and that means these rules are binding the parties based on their consent, factual situations, scientific, technological developments, and legal rules that are not obligatory to the parties, are factors that exist and evolve irrelevant of the parties' consent. These interpretative elements may serve as an effective achievement of sustainable development because newly discovered scientific knowledge might affect implementation of any treaty obligation by incorporating such new information. In this sense, a remarkable contrast can be seen between the supplemental interpretative methods and a recently developed institutional mechanism of fleshing out the treaty obligations in conformity with factual and legal situations—especially regarding newly discovered rules and scientific knowledge through activities of COP, MOP, and other meetings of parties and meetings of experts in the multilateral legal frameworks governing environmental issues.<sup>537</sup> This relatively new machinery of adjusting legal obligations to prevailing technical trends sheds light on the issue of static and dynamic balance of a treaty with consideration of the rigidity and vulnerability of the consentient model of the law of treaties.

The tension between interpretative techniques over the consensual threshold of international law in the context of sustainable development suggests that the constraint of consent may create difficulties in realizing public policy of sustainable development in the international community, and the confrontation between developmental character of sustainable development and the demand of legal stability in international law reflects this.

---

<sup>537</sup> See e.g., Annecoos Wiersema, “The New International Law-Makers?: Conferences of the Parties to Multilateral Environmental Agreements” (2009) 31 Mich. J. Int’l L. 231; Jacob Werksman, “The Conference of Parties to Environmental Treaties” in Jacob Werksman (ed.) *Greening International Institutions* (London: Earthscan Publications Limited, 1996) 55; Robin R. Churchill & Geir Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law” (2000) 94 A. J. I. L. 623; Nikolaos Lavranos, “Multilateral Environmental Agreements: Who Makes the Binding Decisions?” (2002) 11 Eur. Envtl. L. Rev. 44; Jutta Brunnée, “COPing with Consent: Lawmaking Under Multilateral Environmental Agreements” (2002) 15 Leiden J. Int’l L. 1; Gerhard Loibl, “Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention—The Role of ‘International Institutions’” (2005) 5 Non-State Act. & Int’l L. 1; Malgosia Fitzmaurice & Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005) at 254-269; Finkelman, *supra* note 333; Christopher C. Joyner, “The Legal Status and Effect of Antarctic Recommended Measures” in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 163.

Deviation from the consensual model might not provide any realistic answer under the current phase of development of international law. However, build-up of the international consciousness on sustainable development through cumulative practice, an authenticity valid within the consensual paradigm of international law for referring to factual situations, soft-law materials, and non-binding legal rules between the parties could be provided.<sup>538</sup>

---

<sup>538</sup> Cf. Young, *supra* note 276 at 919.

## **Bibliography**

### **TREATIES AND LEGISLATION**

#### **Treaties**

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 U.N.T.S. 57.
- Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 11 September 2003, 2226 U.N.T.S. 208.
- Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992, 2354 U.N.T.S. 67.
- Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79.
- Convention on International Trade in Endangered Species*, 3 March 1973, 993 U.N.T.S. 243.
- Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, GA Res. 51/299, annex, UNGAOR, 51<sup>st</sup> Sess., Supp. No. 49, UN Doc. A/51/869.
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 U.N.T.S. 120.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction*, 13 January 1993, 1974 U.N.T.S. 317.
- International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.
- International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3
- Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148.
- Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154.
- Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 U.N.T.S. 293.
- North American Agreement on Environmental Cooperation*, 14 September 1993, Can.T.S. 1994 No. 3.
- North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2.
- Protocol additional to the Geneva Conventions of 12 August 1949. and relating to the protection of victims of international armed conflicts (Protocol I) (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of*

- international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session). Adopted at Geneva on 8 June 1977, 8 June 1977, 1125 U.U.T.S. 3.*
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, 2244 U.N.T.S. 337.*
- Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 993.*
- United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397*
- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 14 October 1994, 1954 U.N.T.S. 3.*
- United Nations Framework Convention on Climate Change, 14 June 1992, 1771 U.N.T.S. 107.*
- Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 U.N.T.S. 293.*
- Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.*

## **National legislations**

### **Japan**

- Chiteki Zaisan Kihon H* (Intellectual Property Basic Act), Act No. 122 of 2002, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=129](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=129)>.
- Enerug Seisaku Kihon H* (Basic Act on Energy Policy), Act No. 71 of 2002, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=123](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=123)>.
- Jizokuteki Y shoku Seisan Kakuho H* (Sustainable Aquaculture Production Assurance Act), Act No. 36 of 2005, amending Act No. 51 of 1999, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=1905](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=1905)>.
- Junkan-gata Shakai Keisei Suishin Kihon H* (Basic Act on Establishing a Sound Material-Cycle Society), Act No. 110 of 2000, online: Ministry of Environment, Government of Japan <[www.env.go.jp/en/laws/recycle/12.pdf](http://www.env.go.jp/en/laws/recycle/12.pdf)>.
- Kaiy Kihon H* (Basic Act on Ocean Policy), Act No. 33 of April 27 2007, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=147](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=147)>.
- Kankyo Kihon H* (*The Basic Environment Law*), Act No. 122 of 2011, amending Act No.

91 of 1993, online: Ministry of Environment, Government of Japan <<http://www.env.go.jp/en/laws/policy/basic/index.html>>.

*Sangyo Gijutsu-Ryoku Ky ka H* (Industrial Technology Enhancement Act), Act No. 36 of 2007, amending Act No. 44 of 2000, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=107](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=107)>.

*Seibutsu Tay -Sei Kihon H* (The Basic Act on Biodiversity), Act No. 58 of June 6 2008, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=1950](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=1950)>.

*Shinrin, Ringy Kihon H* (Forest and Forestry Basic Act), Act No. 119 of 2003, amending Act No. 161 of 1964, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=50](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=50)>.

*Shokury , N gy , and N son Kihon H* (Food, Agriculture and Rural Areas Basic Act), Act No. 89 of 2005, amending Act No. 106 of 1999, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=102](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=102)>.

*Suisan Kihon H* (Fisheries Basic Act), Act No. 89 of 2005, amending Act No. 89 of 2001, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=115](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=115)>.

*Suisan Shigen Hogo H* (Act on the Protection of Fishery Resources), Act No. 77 of 2007, amending Act No. 313 1951, online: Japanese Law Translation, Ministry of Justice, Government of Japan <[http://www.japaneselawtranslation.go.jp/law/detail\\_main?re=01&vm=&id=32](http://www.japaneselawtranslation.go.jp/law/detail_main?re=01&vm=&id=32)>.

## **United States**

*Public Law 101-162*, 16 U.S.C. §1537 (1997).

## **JURISPRUDENCE**

### **Permanent Court of International Justice**

*Case concerning the Factory at Chorzów* (Claim for Indemnity) (Jurisdiction) (*Germany v. Poland*) (1927), P.C.I.J. (Ser. A) No. 9.

*S.S. "Lotus" Case* (*France v. Turkey*) (1927), P.C.I.J. (Ser. A) No. 10.

*Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)* (*Germany v. Poland*) (1927), P.C.I.J. (Ser. A) No. 13.

*Diversion of Water from the Meuse (Netherland v. Belgium)* (1937), P.C.I.J. (Ser. A/B) No. 70.

*Legal Status of Eastern Greenland (Denmark v. Norway)* (1933), P.C.I.J. (Ser. A/B) No.

### **International Court of Justice**

- International Status of South-West Africa Case*, Advisory Opinion, [1950] I.C.J. Rep. 128
- Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15.
- Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, [1952] I.C.J. Rep. 176.
- The Minquiers and Ecrehos Case (France v. United Kingdom)*, [1953] I.C.J.Rep. 47.
- South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966 [1966] I.C.J.Rep. 6.
- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] I. C. J. Reports 16.
- Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12.
- Case concerning Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] I.C.J.Rep. 3.
- Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, [1980] I.C.J. Rep. 3.
- Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] I.C.J. Rep. 14.
- Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] I.C.J. Rep. 53.
- Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6.
- Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrein)*, [1995] I.C.J. Rep. 6.
- Legality of the Use by a State Nuclear Weapons in Armed Conflict Case*, Advisory Opinion, [1996] I.C.J. Rep. 66.
- Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J.Rep. 226.
- Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [1996] I.C.J. Rep. 803.
- Case concerning Gab ikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 [*Gab ikovo-Nagymaros Project*].
- Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, [1999] I.C.J. Rep. 1045.
- LaGrand Case (Germany v. United States of America)*, [2001] I.C.J. Rep. 466.
- Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v.*

*Malaysia*), [2002] I.C.J. Rep. 625.

*Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] I.C.J.Rep. 161.

*Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] I.C.J.Rep. 12.

*Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.

*Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 43.

*Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, [2008] I.C.J. Rep. 177.

*Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, [2009] I.C.J. Rep. 213.

*Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010], 1, online: International Court of Justice <<http://www.icj-cij.org/docket/files/135/15877.pdf>>.

#### **WTO Panel and Appellate Body**

*Canada—Measures Affecting the Export of Civilian Aircraft (Complaint by Brazil)* (1999), WT/DS70/AB/R (Appellate Body Report), at para. 153, online: WTO<[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS70%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS70%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>.

*European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (Complained by Brazil, Thailand) (2005), WTO Doc. WT/DS269/AB/R, WT/DS/286/AB/R (Appellate Body Report), online: WTO <[http://docsonline.wto.org/GEN\\_viewerwindow.asp?http://docsonline.wto.org:80/DFDocuments/t/WT/DS/286ABR.doc](http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DFDocuments/t/WT/DS/286ABR.doc)>.

*European Communities—Measures Affecting the Approval and Marketing of Biotech Products (Complaint by the United States of America, Canada, Argentina)* (2003), WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (Panel Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm#results](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results)> [EC—Biotech].

*European Communities—Measures Concerning Meat and Meat Products (Hormones)* (Complaint by the United States of America and Canada) (1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report), online: WTO<

[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS48%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS48%FCAB%FCR%2A+and+not+RW%2A%29&language=1) > [*EC—Hormones*].

*India—Additional and Extra-Additional Duties on Imports from the United States (Complaint by the United States of America)* (2008), WTO Doc. WT/DS360/AB/R (Appellate Body Report), online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS360%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS360%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>.

*United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Complaint by Canada)* (2004), WTO Doc. WT/DS257/AB/R (Appellate Body Report), online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS257%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS257%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>.

*United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India; Malaysia; Pakistan; Thailand)* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS58%FCAB%FCR%2A+and+not+RW%2A%29&language=1)> [*US—Shrimp*].

*United States—Standards for Reformulated and Conventional Gasoline (Complained by Brazil and Venezuela)* (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report), online: WTO <[http://www.wto.org/english/tratop\\_e/dispu\\_e/2-9.pdf](http://www.wto.org/english/tratop_e/dispu_e/2-9.pdf)>.

*United States—Tax Treatment for “Foreign Sales Corporations,” (Complaint by European Union)* (2000) WTO Doc. WT/DS108/AB/R (Appellate Body Report), at para.129, online: WTO <[http://docsonline.wto.org/imrd/gen\\_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS108%FCAB%FCR%2A+and+not+RW%2A%29&language=1](http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS108%FCAB%FCR%2A+and+not+RW%2A%29&language=1)>.

#### **Other international tribunals**

*Award in the Arbitration Regarding the Iron Rhine (“IJzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005), (Permanent Court of Arbitration), (Arbitrators: Rosalyn Higgins, Guy Schrans, Bruno Simma, Alfred H. A. Soons, Peter Tomka), on line: The Permanent Court of Arbitration <<http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf>> [*Iron Rhine*].

*Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award Decision of 2 July 2003* (2003), 23 UNRIAA 59, (Permanent Court of Arbitration), (Arbitrators: W. Michael Reisman, Dr. Gavan Griffith, Lord Mustill) [*OSPAR Convention Case*].

*Georges Pinson (France) v. United Mexican States* (1928) 5 Reports of International Arbitral Awards 327.

*Golder v. The United Kingdom* (1975), 18 E.C.H.R. (Ser. A) 1, 1 E.H.R.R. 524.

*Island of Palmas Case (Netherlands v. USA)*, Arbitral Award of 4 April 1928, (1949) 2 Reports of International Arbitral Awards 829.

*MOX Plant Case (Ireland v. United Kingdom), Provisional Measures* (2001), (International Tribunal for the Law of the Sea).

*Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)* (1983), Inter-Am. Comm. H.R. No. 3, OC-3/83, 70 I.L.R. (1986) 449.

*The Queen on the application of International Air Transport Association, Eurpean Low Fare Airline Association v. Department of Transport*, C-344/04, [2006] E.C.R. I-403.

#### **UN DOCUMENTS: RESOLUTIONS, DECLARATIONS, REPORTS, AND RECORDS OF CONFERENCES**

*Charter of Economic Rights and Duties of States*, (1975) 14 I.L.M. 251 at 262-264.

*Charter of Economic Rights and Duties of States*, GA Res. 3281 (XXIX), UNGAOR, 29th Sess., Supp. No. 13, UN Doc. A/9631 (1974).

Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Review of Future Development in Fields with which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, prepared by Fatma Zohra Ksentini, Special Rapporteur, UNESCOR, 1994, UN Doc. E/CN.4/Sub.2/1994/9 (1994) at 81-93 (Appendix III), online: Office of High Commissioner for Human Rights <<http://daccess-ods.un.org/TMP/9008657.33623505.html>>.

*Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/Conf.48/14/Rev.1 (1973).

*Declaration on the Establishment of a New International Economic Order*, GA Res. 3201 (S-VI), UNGAOR, 6th Special Sess., Supp. No. 1, UN Doc. A/9559 (1974)

*Declaration on the right to development*, GA Res. 41/128, Annex 41, UNGAOR, 41<sup>st</sup> Sess., Supp. No. 53, UN Doc. A/41/53 (1986).

*Development and International Economic Co-operation: Environment*, Report of the World Commission on the Environment and Development, UNGAOR, 42<sup>nd</sup> Sess.,

A/42/427 (1987).

*Establishment of the Commission on Sustainable Development*, ESC Dec. 1993/207, UNESCOR, 1993, Supp. No. 1, UN Doc. E/1993/93, 94.

*Institutional and financial arrangements for international environmental cooperation*, GA Res. 2997 (XXVII), UNGAOR, 27<sup>th</sup> Sess., Supp. No. 30, UN Doc. A/8370 (1973) 43.

*Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development*, GA Res. 47/191, UNGAOR, Supp. No. 49, U.N. Doc A/47/49 (1992) 141.

*Johannesburg Declaration on Sustainable Development*, Report of the World Summit on Sustainable Development, A/CONF.199/20 (2002) 1.

Nolte, Georg. "Treaties over Time in Particular: Subsequent Agreements and Practice" in Report of the International Law Commission, GAOR, 63d Sess., UN Doc. A/63/10, Supp. No.10 (2008), Annex I.

*Outcome of the Conference: The Future We Want*, the United Nations Conference on Sustainable Development, A/CONF.216/L.1 (2012) 1 online: Rio+20 United Nations Conference on Sustainable Development <<http://daccess-ods.un.org/TMP/9410760.99872589.html>>.

*Overall progress achieved since the United Nations Conference on Environment and Development, Report of the Secretary-General, Addendum, International legal instruments and mechanisms (Chapter 39 of Agenda 21)*, E/CN.17/1997/2/Add.29 (1997) 1

*Permanent Sovereignty Over Natural Resources*, GA Res. 1803, UNGAOR, 17th Sess., Supp. No. 17, UN Doc. A/5217 (1962).

*Permanent Sovereignty Over Natural Resources*, GA Res. 2158 (XXI), UNGAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966).

*Permanent Sovereignty Over Natural Resources*, GA Res. 3171 (XXVIII), UNGAOR, 28th Sess., Supp. No. 30, UN Doc. A/9030 (1973).

*Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, GA Res. 38/161, UNGAOR, 38<sup>th</sup> Sess., Supp. No. 47, UN Doc. A/38/161 (1983) 131.

Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, (13 April 2006), UN Doc. A/CN.4/L.682 (2006) 1, online: Official Document System of the United Nations <<http://daccess-ods.un.org/TMP/8846477.27012634.html>>.

*Report of the World Commission on Environment and Development*, GA Res. 42/187, UNGAOR, 42<sup>nd</sup> Sess., Supp. No. 49 (Vol. 1), UN Doc. A/42/49 (1987) 154.

- Rights to Exploit Freely Natural Wealth and Resources*, GA Res. 626 (VII), UNGAOR, 7th Sess., Supp. No. 20, UN Doc. A/2361 (1952).
- Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev. 1 (Vol. 1), Annex I, (1992) 1.
- Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development*, GA Res. 55/199, UN GAOR, 55<sup>th</sup> Sess., UN Doc. A/Res/55/199 (2000), online: UNEP<<http://www.nyo.unep.org/pdfs/55199.pdf>>.
- United Nations Conference on the Law of Treaties, 1st Session Vienna, 26 March-24 May 1968, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, UN Doc. A/CONF.39/11/Add.1. (New York: United Nations, 1970).
- United Nations Conference on the Law of Treaties, 2d Session Vienna, 9 April-22 May 1969, Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, UN Doc. A/CONF.39/11/Add.1. (New York: United Nations, 1970).
- United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March—24 May 1968 and 9 April—22 May 1969, Official Records, Documents of the Conference*, UN Doc. A/CONF.39/11/Add.2 (New York: United Nations, 1971)
- Waldock, Sir Humphrey. Special Rapporteur, Sixth Report on the Law of Treaties, A/CN.4/186 and Add.1-7 (1966), in *Yearbook of International Law Commission 1966*, Vol.2 (New York: UN, 1967) (A/CN.4/SER.A/1966/ADD.1) [Sixth Report on the Law of Treaties].
- . Special Rapporteur, Third Report of the Law of Treaties, A/CN.4/167 and Add.1-3 (1964), in *Yearbook of International Law Commission 1964*, vol.2 (New York: UN, 1965) (A/CN.4/SER.A/1964/ADD.1) [Third Report on the Law of Treaties].

## **SECONDARY MATERIAL: MONOGRAPHS**

- Alland, Denis. *Justice privée et ordre juridique international* (Paris: Pedone, 1994).
- Anzilotti, Dionisio. *Cours de droit international*, trans. by G. Gidel (Paris: Sirey, 1929) vol. 1.
- Aust, Anthony. *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007).
- Bederman, David J. *Classic Canons: Rhetoric, Classicism and Treaty Interpretation* (Aldershot: Ashgate, 2001).
- Birnie Patricia. W. *et al.*, *International Law and the Environment*, 3d ed. (Oxford:

- Oxford University Press, 2009).
- Boyle, Alan. & Chinkin, Christine. *The Making of International Law* (Oxford: Oxford University Press, 2007).
- Cordonier Segger, Marie-Claire. & Khalfan, Ashfaq. *Sustainable Development Law: Principles, Practice, and Prospects* (Oxford: Oxford University Press, 2004).
- Cullet, Philippe. *Differential Treatment in International Environmental Law* (Aldershot: Ashgate Publishing, 2003).
- Decaux, Emmanuel. *La réciprocité en droit international* (Paris: Librairie Générale de droit et de jurisprudence, 1980).
- Degan, V. D. *Sources of International Law* (The Hague: Martinus Nijhoff Publishers, 1997).
- Dupuy, René-Jean. *La Communauté internationale entre le mythe et l'histoire* (Paris: Economica, 1986).
- Fassbender, Bardo. *The United Nations Charter as the Constitution in the International Community* (Leiden: Martinus Nijhoff Publishers, 2009).
- Feuer, Guy. & Cassan, Hervé. *Droit international du développement* (Paris: Dalloz, 1991).
- Fitzmaurice, Malgosia. & Elias, Olufemi. *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005).
- Flory, Maurice. *Droit international du développement* (Paris: Presses universitaires de France, 1977).
- Friedmann, Wolfgang. *The Changing Structure of International Law* (London: Stevens & Sons, 1964).
- Gardiner, Richard K. *Treaty Interpretation* (Oxford: Oxford University Press, 2008)
- Greig, D. W. *Intertemporality and the Law of Treaties* (London: British Institute of International and Comparative Law, 2001).
- Grotius, Hugo. *Le droit de la guerre et de la paix*, t. 2 (trans. M. P. Pradier-Fodéré, Paris: Librairie de Guillaumin et Cie, 1867).
- Haraszti, György. *Some Fundamental Problems of the Law of Treaties* (Budapest: Akadémiai Kiadó, 1973).
- Honkonen, Tuula. *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects* (Alphen aan den Rijn; Kluwer Law International, 2009)
- Koskenniemi, Martti *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).
- Kulovesi, Kati. *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Alphen aan den Rijn: Kluwer Law International, 2011)

- Lauterpacht, Hersch. *Private Law Sources and Analogies of International Law* (Archon Books, Reprinted in 1970).
- Lauterpacht, Sir Hersch. *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1982).
- Lavanya, Rajamani. *Differential Treatment in International Environmental Law* (Oxford: Oxford University Press, 2006).
- Linderfalk, Ulf. *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (AA Dordrecht: Springer, 2007).
- McDougal, Myers S. Lasswell, Harold D. & Miller, James C. *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven: Yale University Press, 1967).
- McNair, Lord. *The Law of Treaties* (Oxford: Clarendon Press, 1961).
- Noortmann, Math. *Enforcing International Law: From Self-help to Self-contained Regimes* (Aldershot, UK: Ashgate Publishing Ltd., 2005).
- Orakhelashvili, Alexander. *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008).
- Pahuja, Sundhya. *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).
- Pauwelyn, Joost. *Conflict of Norms in Public International Law : How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003).
- Pellet, Alain. *Le droit international de développement* (Paris: Presses Universitaires de France, 1987).
- Ralston, Jackson H. *International Arbitral Law and Procedure: Being a Résumé of the Procedure and Practice of International Commissions, and Including the Views of Arbitrators upon Questions Arising under the Law of Nations* (Boston: Ginn and company, 1910).
- Ramlogan, Rajendra. *Sustainable Development: Towards a Judicial Interpretation* (Leiden: Martinus Nijhoff Publisher, 2011).
- Reuter, Paul. *Introduction au droit des traités*, 2<sup>ème</sup> éd. (Paris: Presses Universitaires de France, 1985).
- Sakamoto, Shigeki. *The Law of Treaties: Theory and Reality [in Japanese]* (Tokyo: Toshindo, 2004).
- Schrijver, Nico. *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 2008).
- Schwarzenberger, George. *The Frontiers of International Law* (London: Stevens, 1962)
- Sinclair, Ian. *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester:

- Manchester University Press, 1984).
- Sur, Serge. *L'interprétation en droit international public* (Paris: Librairie Générale de droit et de jurisprudence, 1974).
- Swanson, Darren A. *et al.*, *National Strategies for Sustainable Development: Challenges, Approaches and Innovations in Strategic and Co-ordinated Action* (Winnipeg: International Institute for Sustainable Development, 2004) online :< [http://www.iisd.org/pdf/2004/measure\\_nat\\_strategies\\_sd.pdf](http://www.iisd.org/pdf/2004/measure_nat_strategies_sd.pdf)>.
- Trouwborst, Arie. *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002).
- Tunkin, G. I. *Theory of International Law*, trans. by William E. Butler (Cambridge: Harvard University Press, 1974).
- United Nations Development Programme, *Human Development Report 1999* (Oxford: Oxford University Press, 1999).
- van Damme, Isabelle *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009).
- Vattel, E. *Le droit des gens ou principes de la loi naturelle, Appliqués à la conduite and aux affaires des Nations and des Souverains*, Liv. II.
- Verzijl, J. H. W. *International Law in Historical Perspective: Juridical Facts as Sources of International Rights and Obligations*, vol. 6 (The Hague: Martinus Nijhoff Publishers, 1973).
- Villiger, Mark E. *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009).
- Voigt, Christina. *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Leiden: Martinus Nijhoff Publishers, 2009).
- Yü, Tsune-Chi. *The Interpretation of Treaties* (New York: Columbia University Press, 1927)
- Zander, Joakim. *Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge: Cambridge University Press, 2010).

## **SECONDARY MATERIAL: ARTICLES**

- Abi-Saab, George. "Cours general de droit international public" (1987-VII) 207 Rec. des Cours 9.
- . "Whither the International Community" (1999) 9:2 E.J.I.L. 248.
- . "Forward" in Markus W. Gehring and Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) xxxiii.

- Andreas Paulus, "Reciprocity Revisited" in Ulrich Fastenrath *et al.* ed., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 113.
- Arato, Julian. "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences" (2010) 9 *The Law and Practice of International Courts and Tribunals* 433
- Avafia, Tenu. "Does the WTO's Dispute Settlement Understanding Promote Sustainable Development?" in Markus W. Gehring and Marie-Claire Cordonier Segger, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) 259.
- Bedjaoui, Mohammed. "Some Unorthodox Reflections on the "Right to Development,"" in Francis Snyder & Peter Slinn, eds., *International Law of Development: Comparative Perspectives* (Abingdon: Professional Books, 1987) 87.
- Bernhardt, Rudolf. "Interpretation and Implied (Tacit) Modification of Treaties" (1967) 27 *Z.a.ö.R.V.* 491
- . "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights" (1999) 43 *German Yearbook of International Law* 11.
- Biermann, Frank. "Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law" (1996) 34 *Archiv des Völkerrechts* 426
- Bolinteanu, Alexandru. "Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention" (1974) 68 *A.J.I.L.* 672.
- Bourne, Charles B. "The *Case Concerning the Gab ikovo-Nagymaros Project*: An Important Milestone in International Water Law" (1997) 8 *Y. B. Int'l Env. L.* 6.
- Boyle, A. E. "The *Gab ikovo-Nagymaros Case*: New Law in Old Bottles" (1997) 8 *Y. B. Int'l Env. L.* 13: P. Canelas de Castro, "The Judgment in the *Case Concerning the Gab ikovo-Nagymaros Project*: Positive Signs for the Evolution of International Water Law" (1997) 8 *Y. B. Int'l Env. L.* 21.
- Broude, Tomer. "Principles of Normative Integration and Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration" (2008) 6 *Loy. U. Chi. Int'l. L. Rev.* 173
- Brunnée, Jutta. "COPing with Consent: Lawmaking Under Multilateral Environmental Agreements" (2002) 15 *Leiden J. Int'l L.* 1.
- . "Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements" in Rudiger Wolfrum & Volker Röben, eds., *Developments of International Law in Treaty Making* (Berlin: Springer, 2005) 101.
- Buffard, Isabelle. & Zemanek, Karl. "The 'Object and Purpose' of Treaty: An Enigma?" (1998) 3 *Austrian Review of International & European Law* 311.

- Capotorti, Francesco. "L'extinction et la suspension des traités", (1971-III) 134 Rec. des Cours 417.
- Churchill, Robin R. & Ulfstein, Geir. "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 A.J.I.L. 623.
- Cordonier Segger, Marie-Claire. & Gehring, Markus W. "Precaution, Health and the World Trade Organization: Moving Toward Sustainable Development" (2003-2004) 29 Queen's L.J. 133.
- Cordonier Segger, Marie-Claire. "Sustainable Development in International Law" in Hans Christian Bugge & Christina Voigt, eds., *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008) 86.
- Craven, Matthew. "Legal Differentiation and the Concept of the Human Rights Treaty in International Law" (2000) 11 E.J.I.L. 489.
- D'Amato, Anthony. "International Law, Intertemporal Problems" in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 2 (Amsterdam; North-Holland Elsevier, 1992) 1234.
- Davey, William. "The WTO Dispute Settlement System: The First Ten Years" (2005) 8 J.Int'l Econ.L. 17.
- Dawidowicz, Martin. "The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v. Nicaragua*" (2011) 24 Leiden Journal of International Law 201.
- Degan, V. D. "Attempts to Codify Principles of Treaty Interpretation and South-West Africa Case" (1968) 8 Indian Journal of International Law 1.
- Dernbach, John C. "Sustainable Development as a Framework for National Governance" (1998) 49 Case W. Res. L. Rev. 1.
- Dörr, Oliver. "Article 31 General Rule of Interpretation" in Oliver Dörr & Kirsten Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012) 521.
- Dupuy, Pierre-Marie. "La Convention de Vienna sur le droit des traités à l'épreuve de la pratique: qui bilan trente ans après son entrée en vigueur" (2006) 39 Rev. B.D.I. 411.
- Dupuy, René-Jean. "Communauté internationale et disparités de développement" (1979-IV) 165 Rec. des Cours 9.
- Edith Brown Weiss, "Intergenerational Equity: A Legal Framework for Global Environmental Change" in Edith Brown Weiss, ed., *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992) 385.
- Elias, T. O. "The Doctrine of Intertemporal Law" (1980) 74 A.J.I.L. 285.

- Fastenrath, Ulrich. "Relative Normativity in International Law" (1993) 4 E.J.I.L. 305.
- Finkelman, Andrew D. "The Post-Ratification Consensus Agreements of the Parties to the Montreal Protocol: Law or Politics? An Analysis of *Natural Resources Defense Council v. EPA*" (2008) 93 Iowa L. Rev. 665.
- Fitzmaurice G. G. & Vallat, F. A. "Sir (William) Eric Beckett, K.C.M.G., Q.C." (1968) 17 I.C.L.Q. 267.
- Fitzmaurice, Malgosia. "*The Gab ikovo-Nagymaros Case: The Law of Treaties*" (1998) 11 Leiden J. Int'l L. 321.
- . "Consent to Be Bound- Anything New Under the Sun?" (2005) 74 Nordic J. Int'l. L. 483.
- . & Merkouris, Panos. "Canons of Treaty Interpretation: Selected Case Studies From the World Trade Organization and the North American Free Trade Agreement" in Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris, eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff Publishers, 2010) 153
- Fitzmaurice, Sir Gerald. "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 Brit. Y. B. Int'l. L. 1.
- . "The General Principles of International Law: Considered from the Standpoint of the Rule of Law" (1957-II) 92 Rec. des Cours 1.
- . "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 Brit. Y. B. Int'l. L. 203.
- Flory, Maurice. "Souverainete des États et coopération pour le développement" (1974-I) 141 Rec. des Cours 255.
- French, Duncan. "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities" (2000) 49 I.C.L.Q 35.
- . "Treaty Interpretation and the Incorporation of Extraneous Legal Rules" (2006) 55 I. C. L. Q. 281.
- Gonthier, Charles. "Sustainable Development and the Law" (2005) 1 McGill J.S.D.L.P. 1
- Goodman, Ryan. "Human Rights Treaties, Invalid Reservations, and State Consent" (2002) 96 A.J.I.L. 531.
- Hafner, Gerhard. "Comment: The Vienna Convention on the Law of Treaties and its Contribution to Peace" in Georg Nolte, ed., *Peach through International Law: The Role of the International Law Commission* (Heidelberg; Springer, 2009) 111.
- Hagiwara, Kazuki. "Codification of the Principle of Serious Breach and Its Applicability to Multilateral Treaties: An Analysis of Fitzmaurice's Draft and Waldock's Draft" [*in Japanese*] (2004) 9:3 Yokohama Journal of Social Sciences 7.

- Helfer, Laurence R. “Nonconsensual International Lawmaking” (2008) 1 U. Ill. L. Rev. 71.
- Higgins, Rosalyn. “Some Observations on the Inter-Temporal Rule in International Law” in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996) 173.
- . “Time and the Law: International Perspectives on an Old Problem” (1997) 46 I.C.L.Q. 501.
- Horn, Henrik. & Weiler, Joseph. “European Communities—Trade Description of Sardines: Textualism and its Discontent” in Henrik Horn & Petros C. Mavroidis, eds., *The WTO Case Law of 2002* (Cambridge: Cambridge University Press, 2005) 248.
- Jacobs, Francis G. “Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference” (1969) 19 I. C. L. Q. 318.
- Jennings, Robert. “General Course on Principles of International Law” (1967-II) 121 Rec. des Cours 323.
- Jessup, Philip C. “The Palmas Island Arbitration” (1928) 22 A.J.I.L. 735.
- Jiménez de Aréchaga, Eduardo. “International Law in the Past Third of a Century”, (1978-I) 159 Rec. des Cours 1.
- Johnston, Douglas. “Theory, Consent, and the Law of Treaties: A Cross-Disciplinary Perspective” (1988-1989) 12 Australian Year Book of International Law 109.
- Joyner, Christopher C. “The Legal Status and Effect of Antarctic Recommended Measures” in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 163.
- Kitamura, Yoshinobu. “The Environment Basic Law in Court Cases,” (*in Japanese*) Note, (2004) 48 Sophia Law Review 161.
- Klabbers, Jan. “Some Problems Regarding the Object and Purpose of Treaties” (1997) 8 Finnish Yearbook of International Law 138.
- . “Cat on a Hot Tin Roof: The World Court, State Succession, and the Gab ikovo-Nagymaros Case” (1998) 11 Leiden J. Int’l L. 345.
- . “The Substance of Form: The *Case Concerning the Gab ikovo-Nagymaros Project*, Environmental Law, and the Law of Treaties” (1998) 8 Y.B. Int’l Env. L. 32.
- . “How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent” (2001) 34 Vand. J. Transnat’l L. 283.
- Kunz, Josef L. “The Meaning and the Range of the Norm Pacta Sunt Servanda” (1945) 39 A.J.I.L. 180.

- Lafferty, William M. “The Politics of Sustainable Development: Global Norms for National Implementation” (1996) 5 *Environmental Politics* 185.
- Lammers, Johan G. “The Gab ikovo-Nagymaros Case Seen in Particular from the Perspective of the Law of International Watercourse and the Protection of the Environment” (1998) 11 *Leiden J. Int’l L.* 287.
- Lauterpacht, Hersch. “De l’Interprétation des traités”, Rapport et projet de résolutions présentés à l’Institut de Droit International, (1950-I) 43 A. I. D. I. 366.
- . “Some Observations on Preparatory Work in the Interpretation of Treaties” (1935) 48 *H.L.R.* 549.
- Lavranos, Nikolaos. “Multilateral Environmental Agreements: Who Makes the Binding Decisions?” (2002) 11 *Eur. Env’tl. L. Rev.* 44.
- Lefeber, R. “*The Gab ikovo-Nagymaros Project and the Law of State Responsibility*” (1998) 11 *Leiden J. of Int’l L.* 609.
- Linderfalk, Ulf. “Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation” (2007) 54 *Netherlands International Law Review* 133.
- Lindroos, Anja. & Mehling, Michael. “Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO” (2005) 16 *E.J.I.L.* 857.
- Loibl, Gerhard. “Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention—The Role of ‘International Institutions’” (2005) 5 *Non-State Act. & Int’l L.* 1.
- Marceau, Gabrielle. “Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties” (2001) 35 *J. of World Trade* 1081.
- . “WTO Dispute Settlement and Human Rights” (2002) 13 *E.J.I.L.* 753
- Matsui, Yoshiro. “Joyaku Kaishaku ni okeru Togo no Genri: Joyaku-ho-joyaku Dai 31 jo 3 (c) wo Chushin ni (Systemic Integration in Treaty Interpretation: An Analysis on Article 31(3)(c) of the Vienna Convention)” in Shigeki Sakamoto, ed., *Kokusai Rippo no Saizensen: Fujita Hisakazu Sensei Koki Kinen (Current Issues of International Lawmaking: Festschrift in honour of Professor Hisakazu Fujita’s 70th Birthday)* (Tokyo: Yushindo Kobun Sha, 2009) [in Japanese] 101.
- Maureen Irish, “Special and Differential Treatment, Trade, and Sustainable Development” (Conference Note, at the Law and Development Institute Inaugural Conference at Sydney, Australia, October 2010) online: <[www.lawanddevelopment.net/img/irish.pdf](http://www.lawanddevelopment.net/img/irish.pdf)>.
- McGoldrick, Dominic. “Sustainable Development and Human Rights: An Integrated Conception” (1996) 45 *I.C.L.Q.* 796.

- McIntyre, O. "Environmental Protection of International Rivers" (1998) 10 J. Envtl. L. 79.
- McLachlan, Campbell. "The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention" (2005) 54 I.C.L.Q. 279.
- Nishimura, Tomoaki. "The Present Stage of the Concept of "Sustainable Development" on Modern International Law: Current Situations and Problems of International Environmental Law as Seen Through Johannesburg Summit" (*in Japanese*) (2004) 202 *Nagoya Journal of Law and Politics* 201.
- Okowa, Phoebe N. "Case Concerning the Gab ikovo-Nagymaros Project (Hungary/Slovakia)" (1998) 47 I.C.L.Q. 688.
- Ortino, Federico. "Treaty Interpretation and the WTO Appellate Body Report in *US—Gambling*: a Critique" (2006) 9 J.Int'l Econ.L. 117.
- Parry, Clive. "The Law of Treaties" in Max Sørensen, ed., *Manual of Public International Law* (New York: St. Martin's Press, 1968) 175.
- Pauwelyn, Joost. "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 A.J.I.L. 535
- Perrez, Franz Xaver. "The World Summit on Sustainable Development Environment and Trade—A potential for Success and/or Failure" (2002) 12:1 R.E.C.I.E.L. 12.
- Perrez, Franz Xaver. Book Review of *Sustainable Development as a Principle of International Law: Resolving Conflicts Between Climate Measures and WTO Law* by Christina Voigt, (2009) 18 (3) R.E.C.I.E.L. 352.
- Plender, Richard. "The Role of Consent in the Termination of Treaties" (1986) 57 Brit. Y. Int'l. L. 133.
- Reichert-Facilides, Daniel. "Down the Danube: The Vienna Convention on the Law of Treaties and the *Case Concerning the Gab ikovo-Nagymaros Project*" (1998) 47 I.C.L.Q. 837.
- Reuter, Paul. "Solidarité et divisibilité des engagements conventionnels" in Yoram Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff Publishers, 1989) 623.
- Riphagen, W. "From Soft Law to Ius Cogens and Back" (1987) 17 V.U.W.L.R 81.
- Rousseau, Charles. "De la Compatibilité des normes juridiques contradictoires dans l'ordre international" (1932) 39 R.G.D.I.P. 133
- Sakamoto, Shigeki. "Myth and Reality of Treaty Interpretation: What Does the End of Conflicting Doctrine of Interpretation Mean?" (*in Japanese*) (2003) 22 *Sekai Hou Nempou* (Yearbook of World Law) 30.
- Sands, Philippe. "International Law in the Field of Sustainable Development" (1994) 65 Brit.Y.B.Int'l.L. 303.

- . “International Law in the Field of Sustainable Development: Emerging Legal Principles” in Winfried Lang, ed., *Sustainable Development and International Law* (London: Graham & Trotman/ Martinus Nijhoff, 1995) 53.
- . “Sustainable Development: Treaty, Custom, and the Cross-Fertilization of International Law” in Alan Boyle & David Freestone (eds.), *International Law and Sustainable Development: Past Achievement and Future Challenges* (Oxford: Oxford University Press, 1999) 39
- Schrijver, Nico. “The Evolution of Sustainable Development in International Law: Inception, Meaning and Status” (2007) 329 *Rec. des Cours* 217.
- Schwarzenberger, Georg. “International *Jus Cogens*” (1965) 43 *Tex. L. Rev.* 455.
- Sharma, Surya P. “The ILC Draft and Treaty Interpretation with Special reference to Preparatory Works” (1968) 8 *Indian Journal of International Law* 367.
- Simma, Bruno. “Consent: Strains in the Treaty System” in Ronald St. J. Macdonald & Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague: Martinus Nijhoff Publishers, 1983) 485.
- . “Self-Contained Regimes” (1985) 16 *Netherlands Yearbook of International Law* 111.
- . “From Bilateralism to Community Interest in International Law”, (1994-VI) 250 *Rec. des Cours* 217.
- . “Reciprocity” in *Encyclopaedia of Public International Law*, vol. 4 (Amsterdam: Elsevier, 2000) 29.
- . & Pulkowski, Dirk. “Of Planets and the Universe: Self-contained Regimes in International Law” (2006) 17 *E.J.I.L.* 483.
- Slinn, Peter. “The International Law of Development: A Millennium Subject of a Relic of the Twentieth Century?” in Konrad Ginther *et al.*, eds., *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday* (New York: Peter Lang Publishing, 1999) 299.
- Sohn, L. B. “The Stockholm Declaration on the Human Environment” (1973) 14 *Harv. Int’l L.J.* 423.
- Sohnle, Jochen. “Irruption du droit de l’environnement dans la jurisprudence de la C. I. J.: L’affaire Gab ikovo-Nagymaros” (1998) 102 *R.G.D.I.P.* 85
- Stec, S. & Eckstein, G. E. “Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ’s Decision in the *Case Concerning the Gab ikovo-Nagymaros Project*” (1997) 8 *Y. B. Int’l Env. L.* 41.
- Stone, Christopher D. “Common but Differentiated Responsibilities in International Law” (2004) 98 *A.J.I.L.* 276.

- Stone, Julius. "Fictional Elements in Treaty Interpretation: A Study in the International Judicial Process" (1954) 1 Sydney L. Rev. 344.
- Thirlway, Hugh. "The Law and Procedure of the International Court of Justice 1960-1989 Part One" (1989) 60 Brit. Y. B. Int'l L. 1.
- . "Reflection on *Lex Ferenda*" (2001) 32 Netherlands Yearbook of International Law 24.
- Tomuschat, Christian. "International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law" (1999) 281 Rec. des Cours 9.
- Torres Bernardez, Santiago. "Interpretation of treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties" in Gerhard Hafner *et al.*, eds., *Liber Amicorum Professor Ignaz Seidle-Hohenveldern in honour of his 80<sup>th</sup> Birthday* (The Hague: Kluwer Law International, 1998) 721.
- Verdross, Alfred. "Jus Dispositivum and Jus Cogens in International Law" (1966) 60 A.J.I.L. 55.
- Virally, Michel. "Vers un droit international du développement" (1965) 11 A.F.D.I. 3.
- . "Réflexions sur le 'jus cogens'" (1966) 12 A.F.D.I. 5.
- Weckel, Phillippe. "Convergence du droit des traités et du droit de la responsabilité internationale à la lumière de l'Arret du 25 septembre 1997 de la Cour internationale de Justice relatif au projet Gab ikovo-Nagymaros (Hongrie/Slovaquie)" (1998) 102 R.G.D.I.P. 647.
- Weeramantry, H. E. Judge C. G. "Achieving Sustainable Justice Through International Law" in Marie-Claire Cordonier Segger & C. G. Weeramantry, ed., *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff Publishers, 2005) 15.
- Weil, Prosper. "Towards Relative Normativity in International Law" (1983) 77 A.J.I.L. 413.
- Wellens, Karel. "The Court's Judgment in the Case Concerning the Gab ikovo-Nagymaros Project (Hungary/Slovakia): Some Preliminary Reflections" in *idem* (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Leiden: Martinus Nijhoff Publishers, 1998) 765.
- Werksman, Jacob. "The Conference of Parties t to Environmental Treateis" in Jacob Werksman, ed., *Greening International Institutions* (London: Earthscan Publications Limited, 1996) 55.
- Wiersema, Annecoos. "The New International Law-Makers?: Conferences of the Parties to Multilateral Environmental Agreements" (2009) 31 Mich. J. Int'l L. 231.

- Wilkins, Hugh. "The Integration of the Pillars of Sustainable Development: A Work in Progress" (2008) 4 McGill J.S.D.L.P. 163.
- Yasseen, Mustafa Kamil. "L'interprétation des traités d'après la Convention de Vienne sur le droit traités" (1976-III) 151 Rec. des Cours 1.
- Yoshiro Matsui "The Principle of Common but Differentiated Responsibilities" in Nico Schrijver & Friedl Weiss, eds., *International Law and Sustainable Development: Principles and Practice* (Leiden: Martinus Nijhoff Publishers, 2004) 73
- Young, Margaret A. "II. The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case", *Current Developments*, (2007) 56 I.C.L.Q. 907 at 908.
- Zarbiyev, Fuad. "Judicial Activism in International Law: A Conceptual Framework for Analysis" (2012) 3 *Journal of International Dispute Settlement* 247.