THE VIENNA CONVENTIONS ON THE LAW OF TREATIES

A COMMENTARY

Volume I

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confirmation by practice of the Convention in general.[146] At the same time, the ECtHR has shown that it can reject subsequent practice if it does not prove conclusive,[147] or simply relativize it.[148] Its evaluation of subsequent practice nevertheless remains fairly flexible since the Court does not demand, in order to take it into consideration, that the practice be followed 'unanimously' by the contracting parties, but merely by a 'great majority' of the latter.[149] As far as the ECJ is concerned, this Court has made moderate use of the subsequent practice of parties for it clearly privileges a teleological and ends-focused interpretation which minimizes this practice in favour of the intentions underlying Community treaties. It has even dismissed this practice if it is contrary to its vision of the treaties.[150] Nevertheless, it is possible to find use of this technique in certain cases, such as *International Fruit Company and others* of 1972.[151]

46. Case law reveals that subsequent practice is classified as an element for the interpretation of a treaty, but that it is out of the question to envisage an amendment or a termination of the treaty by lapse, with the help of this procedure—an approach confirmed by the ICJ in its judgment of 1997 in the *Gabčíkovo-Nagymaros Project* case.[152]

47. As for Article 31(3)(c), which allows interpretation to be situated amongst the relevant rules of international law, the ECtHR has long seemed to be one of the few courts to make explicit use of it. Since the *Golder* case, the Court has thus referred to the general principles of law as envisaged by Article 38 of the ICJ Statute, in order to interpret Article 6(1) of the Convention.[153] Ever since, there have been numerous examples where the ECtHR has drawn from the international normative environment with the aim of interpreting the Convention.[154] Today, however, it is no longer the only court to do so. In its judgment of 6 November 2003 in the case of the *Oil Platforms* opposing Iran and the United States, the ICJ decided to interpret Article XX of the Friendship Treaty concluded between these two States in the light of the 'relevant rules of international law on the use of force', in conformity with Article 31(3)(c) of the Vienna Convention.[155] In the same way, without expressly mentioning this Article, the DSB has always insisted on

[146] Judgments of 28 November 1984, *Rasmussen*, Series A, no. 87, paras 40–1; of 28 October 1987, *Inze*, Series A, no. 126, para. 41; of 25 November 1991, *Toth*, Series A, no. 224, para. 77.

[147] Judgment of 21 February 1986, *James and others*, Series A, no. 98, para. 65.

[148] Judgment of 26 October 1988, *Martins Moreira*, Series A, no. 43, para. 54.

[149] See the case of *Loizidou v Turkey*, *supra* n 99, paras 79–80, where the Court also speaks of 'a practice denoting practically universal agreement amongst Contracting Parties'.

[150] For examples, see Case 232/78, Judgment of 25 September 1979, *Commission v France*, ECR 1979, p 2729, in which the conduct of the States and the absence of application of secondary law by the States or institutions were not considered as an element of interpretation of the treaty.

[151] Cases 21–24/72, 12 December 1972, ECR 1972, p 1219.

[152] Judgment of 25 September 1997, *ICJ Reports 1997*, pp 66–9, paras 100 and 114. On this aspect, see M. Kohen, 'La codification du droit des traités: quelques éléments pour un bilan global', *RGDIP*, 2000, vol. 3, pp 598–9. Nevertheless, the interpretation of Art. 27 of the UN Charter by the ICJ in the Advisory Opinion of 21 June 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*) is based on interpretative practice in a wide enough manner to confirm the validity of the vote of the Security Council, *ICJ Reports 1971*, paras 19–41.

[153] Judgment of 21 February 1975, *supra* n 99, para. 35.

[154] See, amongst others, the Judgment of 7 July 1989, *Soering*, Series A, no. 169, para. 88; the Judgment of 21 November 2001, *Al-Adsani v United Kingdom*, ECR 2001-XI, para. 55; the Judgment of 4 February 2005, *Mamatkulov and Askarov v Turkey*, ECR 2005-I, para. 111; the Judgment of 30 June 2005, *Bosphorus v Ireland*, ECR 2005-VI, para. 150; the Judgment of 22 June 2006, *Bianchi v Switzerland*, Application no. 7548/04, para. 81; and the Judgment of 29 January 2008, *Saadi v United Kingdom*, Application no. 13229/03, para. 62.

[155] Judgment of 6 November 2003, *ICJ Reports 2003*, p 182, para. 41.

the fact that the General Agreement should not be read 'in clinical isolation from public international law'.[156] Yet even though Article 31(3)(c) has not been totally forgotten, the DSB nevertheless applies it moderately.[157] This provision however appears essential in the opinion of some authors who regret its 'under use', since it would in fact allow the 'operationalization' of the link between conventional international law and customary international law, and thus, the avoidance of fragmentation in international law.[158]

Reintegration of the intention of the parties (paragraph 4)

48. The Vienna Convention places priority on textual interpretation. Nevertheless, as reflected by the history of the ILC *travaux*, proponents of interpretation based on the intention of the parties (or 'subjective' interpretation) have not surrendered. Moreover, it is not always obvious in practice to distinguish between the 'declared' intention of the parties resulting from a reading of the text, and the search for the true intention of the parties, a much more subjective exercise. The compromise represented by Article 31 therefore makes space for the intention of the parties in a somewhat subsidiary manner, but that space has proven crucial for certain courts. Indeed, while logic may imply that the discovery of a 'special meaning' should lead to an analysis of the intention of the parties, the reality is sometimes limited to affirming the existence of a 'special meaning' to privilege this intention, without always paying attention to the veracity of this specificity. The ECJ has notably been a fine example of this approach.

49. In conformity with its line of conduct privileging textual interpretation, the ICJ has accorded minimal space for the intention of the parties. The Court has applied this method in a strictly supplementary manner in order not to give fodder to critics. Therefore, in the case of the *Land, Island and Maritime Frontier Dispute* of 1992, the Court sought the intention of the parties in the 1980 general Peace Treaty referred to by the Special Agreement bringing the case before the Court. As the Special Agreement contained several vague provisions, the Court did not hesitate to 'have regard to the common intention as it is expressed in the words of the Special Agreement', while continuing to underline that this analysis should 'constitute no more than a supplementary means of interpretation'.[159] Nevertheless, it did not hesitate to seek the intention of the parties in order to confirm an interpretation;[160] a relatively prudent approach which has been

[156] The *Gasoline* Report of 29 April 1996, *supra* n 94, p 19. See also the *Banana* Report of 9 September 1997, *supra* n 95, para. 10, as well as the *Poultry* Report of 13 July 1998, *supra* n 120. On this refusal of 'clinical isolation', see G. Marceau, 'A Call for Coherence in International Law. Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement', *Journal of World Trade*, 1999, vol. 5, esp. pp 115 ff.

[157] See eg the case of *Measures Affecting Government Procurement*, WT/DS163/R, Panel Report of 19 June 2000, para. 7.96: the Panel recognized that customary international law can be taken into consideration in the relationships between WTO members, but only on condition that WTO Agreements do not contain contrary provisions. See also the case of *Measures Affecting the Marketing and Approval of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Panel Report of 29 September 2006, para. 7.75: in spite of an invocation of Art. 31(3(c), the Panel refused, in this particular case, to take into consideration the Cartagena Protocol, given that none of the complainant parties was a party to this treaty.

[158] See the detailed developments of Ph. Sands on this aspect in: 'Vers une transformation du droit international? Institutionnaliser le doute', *Droit international 4* (Paris: IHEI-Pedone, 2000), pp 213 and 220 ff. Also see studies relating to the issue of the 'fragmentation of international law' carried out by the ILC, and notably the report from its 57th session (2005), A/60/10, pp 204 ff.

[159] Judgment of 11 September 1992, *ICJ Reports 1992*, p 584, para. 376.

[160] See eg the Judgment of 14 June 1993 in the case of *Jan Mayen*, *ICJ Reports 1993*, *supra* n 74, p 51, para. 28.