TREATY INTERPRETATION AND THE INCORPORATION OF EXTRANEOUS LEGAL RULES

DUNCAN FRENCH*

Abstract This paper considers under what circumstances, and for what reasons, an international tribunal may want to range beyond the primary text of a treaty to determine its 'correct' meaning; such extraneous legal material potentially including rules of customary international law, other treaties between the parties, general principles of law, and documents of a 'soft law' nature. The paper suggests a variety of 'mechanisms' by which a tribunal may undertake a broader interpretative approach, though all ultimately raise the same inevitable tension between accusations of judicial activism and counter-arguments of inflexibility and insularity. Nevertheless, many tribunals and individual judges continue to utilize such techniques, particularly noticeable in some recent environmental disputes. The paper will conclude with a note of caution; that though such interpretations are becoming an increasingly significant part of modern judicial decision-making—something that is generally to be welcomed—tribunals must concurrently take care to ensure that they remain within the accepted parameters of the adjudicative function.

'International courts and tribunals fight shy of laying bare the equitable and common-sense reasons on which, in fact, their interpretative work is based'[1]

I. INTRODUCTION

The issue of treaty interpretation remains a deeply obscure and subjective process. Though the 1969 Vienna Convention on the Law of Treaties[2] sets out certain basic rules of interpretation—rules that have also been endorsed as reflecting general international law[3]—they are no more than a starting point for a treaty interpreter, and invariably offer more than one possible result. The indeterminate nature of treaty interpretation thus provides international judicial and arbitral tribunals with just the necessary degree of flexibility to fashion

* Dr, Senior Lecturer in Law, University of Sheffield, United Kingdom.

[1] G Schwarzenberger *A Manual of International Law, Volume I* (4th edn Stevens & Sons London 1960) 153.

[2] 8 ILM (1969) 679.

[3] *Libyan Arab Jamahiriya/Chad* [1994] ICJ Reports 6, 21. As regards the WTO, see *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (AB-1996-1) (29 Apr 1996) (WT/DS2/AB/R) and *Japan—Taxes on Alcohol Beverages* Report of the Appellate Body (AB-1996-2) (4 Oct 1996) (WT/DS8,10–11/AB/R).

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d.french@sheffield.ac.uk

their own reasoning, hopefully without either exceeding jurisdictional limits or transgressing expectations of the adjudicative function. The extent to which treaty interpretations are acceptable to the parties is therefore very much dependent upon the individual context of the dispute and the decision ultimately reached.

This article seeks to consider, in more detail, one particular aspect of treaty interpretation: to what extent may a tribunal in interpreting provisions of a treaty do so in the light of other rules of international law? In other words, under what circumstances can a tribunal look beyond the primary text to rules of customary international law, other treaties between the parties, general principles of law, even documents of a 'soft law' nature, in determining what a treaty provision actually means? And if a tribunal does decide to range beyond the treaty in front of it, what weight should be given to these other rules of international law in the interpretation process? Though the issue of interpretation is distinct from other debates over the hierarchy of sources, *jus cogens*, the relationship between treaty law and customary international law, and other matters of treaty application (such as the scope of Article 30 of the Vienna Convention on successive treaties), these issues are clearly not altogether separable as they all relate to the broader topic of how two or more rules of international law co-exist.[4]

So why might a tribunal want to refer to other rules of international law in interpreting a treaty? It may *simply* be to provide support to an interpretation that a tribunal has already reached through an analysis of the text of the treaty alone. Such an approach is rarely controversial and is little more than judicial *obiter*. However, even an approach such as this may have a broader purpose if it allows a tribunal to embed its reasoning within the wider legal order—in part, to justify further its reasoning, but also in part, to contribute to the wider aim of promoting coherence within the international legal order.

On the other hand, recourse to other rules may not be to embed but, in fact, to seek clarification of what a treaty provision actually means. Again this is a seemingly obvious and, superficially, not particularly controversial aspect of judicial reasoning. However, 'clarification' is an amorphous term with various shades of meaning. It raises important questions such as on what basis has a tribunal chosen one particular rule of international law over another on which to rely, whether there was an intention between the parties to the principal treaty that a provision could be interpreted in such a way,[5] and whether, in

[4] For instance, see the work of the study group established by International Law Commission on fragmentation of international law: difficulties arising from the diversification and expansion of international law (Report on Fifty-Sixth Session (2004) Supplement No 10 (A/59/10)). See also, with specific regard to UNCLOS, A Boyle 'Further Development of the Law of the Sea Convention: Mechanisms for Change' (2005) 54 International and Comparative Law Quarterly 563–84.

[5] This raises, in turn, important questions both over the scope of the principle of intertemporality and whether what one is looking for is the intention of the parties to the dispute or, more broadly, the parties to the treaty, where this is different? On both questions, see subsequent discussion.

fact, a tribunal has jurisdiction to consider such rules of international law? One must also not forget that in seeking clarification of a treaty provision through another rule of international law, a tribunal must necessarily 'clarify' what it considers to be the meaning of that second rule of law. Clarification through the use of other rules of international law is, therefore, clearly not an innocuous aspect of the 'ordinary' treaty interpretation process.

Moreover, if clarification *stricto sensu* is potentially problematic, clarification as understood even more broadly is more controversial still. Might a tribunal, for instance, within the guise of clarification, use other rules of international law to modify or extend the meaning of a treaty text, at least beyond that which might be considered its ordinary meaning? Such an approach by a tribunal risks, of course, harming its judicial reputation before one or other of the parties to the dispute—as well as, potentially, more generally within the international community—and before a tribunal were to consider going down this path it would surely want to ensure that it had strong doctrinal or legal justification for doing so. And beyond this, can a tribunal go further and use rules of international law to 'read into' a treaty's additional obligations or, more radical still, contradict a clearly understood meaning? This is surely inconceivable, though as will be noted, much depends on one's perspective as to what is the actual effect of a tribunal's reasoning. Some of the cases that will be examined come very close to such approaches. There is thus an interpretative continuum from clarification, through modification, possibly right through to contradiction, and it will not always be easy to discern where a decision of a tribunal precisely falls.

What should be clear is that this issue is not just a matter of treaty interpretation. It goes to the heart of the relationship between the different sources of law that exist within the international sphere and the role of the international tribunal in making sense of such sources. As well as touching upon the delicate issue of the consensual nature of international litigation, this form of treaty interpretation risks—if not handled properly—also undermining the confidence of States in international justice itself. As Judge Buergenthal noted in his separate opinion, in discussing the International Court of Justice's approach to using other rules of international law in treaty interpretation in *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (2003), '[it] would jeopardize the willingness of States to accept the Court's jurisdiction for the adjudication of disputes relating to the interpretation or application of *specific* rules of international law.'[6]

The necessity of legal certainty and the importance of judicial self-restraint—both key to the operation of a trusted international judicial system—remain fundamental. An approach to treaty interpretation that risks undermining these principles must therefore be approached with due caution.

[6] Judgment of 6 Nov 2003 <http://www.icj-cij.org>, separate opinion of Judge Buergenthal, para 22. Emphasis added.

This is not to say that treaty interpretation which incorporates other rules of international law is not a useful, positive—and, in fact, very necessary—tool in some instances,[7] but one should remember that judicial deliberation is but part of a wider and much more complex picture of an international system ultimately premised upon sovereign consent. On the other hand, undue deference to such principles as legal certainty and judicial self-restraint may itself risk stymieing the law, preclude the development of further coherence therein, and undermine broader notions of justice within individual cases. What is called for, therefore, is for tribunals to find some sensible middle ground between respect for the limits imposed by the treaty on which they have been called to adjudicate and awareness of the general international law into which it falls.[8]

Section II considers certain issues of general interest, particularly focusing upon the relationship between jurisdiction and interpretation—a matter recently considered by the International Court of Justice in *Oil Platforms*. Section III then considers the various *mechanisms* by which such interpretation can take place. These include, but are not limited to: (i) express incorporation; (ii) judicial discernment of an intention on behalf of the parties to a treaty that changes in meaning were foreseen (what Professor Thirlway referred to as 'intertemporal *renvoi*');[9] (iii) acceptance that treaty meanings can objectively change in light of new political and legal circumstance; and finally, of particular significance, (iv) Article 31(3)(c) of the 1969 Vienna Convention, which states that '[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties.'[10] There are also other examples in the case law which do not neatly fit into any particular category, but are nevertheless clearly an attempt by a tribunal to undertake a similar process of reasoning. Section III is not intended to be comprehensive, but rather illustrative of some of the issues raised by these matters.

Section IV then takes this analysis forward by briefly considering the various judicial styles by which such interpretation occurs; in other words, the reasoning and language by which tribunals have sought to justify the incorporation of essentially extraneous considerations into their interpretation of a specific treaty. Particular attention will be given to certain environmental disputes, as this is arguably the topic-area where other sources of law have most often been utilized within the treaty interpretation process. A particular difficulty addressed is to what extent have these tribunals relied upon exam-

[7] One might go further and say it is also a 'mandatory' aspect of treaty interpretation, on which see subsequent discussion.

[8] This, however, raises another question as to what area of international law does a specific treaty fall; a matter briefly considered by Judge Higgins in *Oil Platforms*, as discussed below.

[9] H Thirlway 'The Law and Procedure of the International Court of Justice 1960–1989 Part One' 60 British Yearbook of International Law (1989) 135–43.

[10] For a recent and excellent discussion of this provision, see C McLachlan 'The Principle of Systemic Integration and Art 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly (2005) 279–319.

ples of 'non-law'—a broad term covering rules *in statu nascendi*, environmental principles, treaties not yet in force, and, recent scientific developments—to affect their interpretation of the treaty under consideration.

II. TREATY INTERPRETATION THROUGH 'OTHER' LEGAL RULES

The reasons tribunals range beyond a treaty in search of the correct meaning can really only be guessed at. As with most aspects of treaty interpretation, there is an inevitable equity in the judicial decision-making process, which conceals the reality of the method used and endows the decision with a judicial seal of objectivity.[11] However, three principal reasons can tentatively be put forward as to why a tribunal might act in this way. First, a tribunal may wish to incorporate recent developments, as it considers such developments so significant that they must inevitably form part of the interpretation of a pre-existing text. The notion of 'recent developments' must be considered expansively, and potentially comprises not only new rules of law, but also evolving values and technical standards.[12] The reference in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (1971) that 'its interpretation cannot remain unaffected by the subsequent development of law' is as clear an example of this as one is likely to find.[13] Similarly, in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), the International Court noted: 'newly developed norms of environmental law are relevant for the implementation of the Treaty.'[14] This is clear appreciation by the Court on two quite separate occasions of the usefulness of new 'norms' in interpreting an older treaty, implementation inevitably also incorporating a certain measure of interpretation.

Secondly, tribunals may favour the inclusion of references to extraneous law as it is likely to encourage a more coherent approach to legal reasoning and prevent disintegration of legal rules into their various (and ultimately artificial) sub-disciplines. As Sands notes, a more integrated process of treaty interpretation 'tend[s] to unify rather than fragment the international legal order'.[15] He quotes, for instance, 'the effort by the International Court of Justice [in the 1996 *Nuclear Weapons Advisory Opinion*] to meld humanitarian law, human rights law, environmental law, and law governing the use of

[11] cf ibid 288: 'Despite the scepticism often expressed by academic theorists, international tribunals have maintained their affection . . . for express references to canons of interpretation.'

[12] The difficulties with principles and rules *in statu nascendi* are considered below.

[13] ICJ Reports (1971) 16, 31.

[14] ICJ Reports (1997) 7, 67. This case is not, however, without its difficulties, on which see subsequent discussion.

[15] P Sands 'Environmental Protection in the Twenty-first Century: Sustainable Development and International Law' in R Revesz et al (eds) *Environmental Law, the Economy and Sustainable Development* (CUP Cambridge 2000) 405.

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force into a systematic structure'.[16] And as the International Court sought to emphasize in *Namibia*, '[i]n this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.'[17] A tribunal might be similarly tempted to adopt the same approach in a more traditional bilateral dispute involving just one treaty text. This is, of course, not to deny examples of where tribunals have resolutely not done this.[18] Nevertheless, the option to *contextualize* a decision surely always exists within the inherent flexibility contained within judicial reasoning, if only at the level of *obiter*.

And thirdly, interpreting a treaty through reference to other law permits a tribunal to ensure that the narrow application of a rule is not allowed to overrule broader notions of justice. By referring to other rules of law, a tribunal can seek to provide for a more just answer than one that a restricted interpretation might otherwise give. Of course, this is most clear when the Court reverts to notions of equity to help it make its decision, but this is not the only way the Court can ensure a more 'rounded' result. Nevertheless, a tribunal will always wish to ensure that it is not seen as acting *ex aequo et bono*, but clearly within judicial limits.[19]

However, despite certain very obvious examples of such judicial 'activism', individual tribunals (or individual members thereof) are sometimes uncomfortable with an overtly broad approach to using other rules of international law in the interpretation process. Mention has already been made of Judge Buergenthal who, whilst noting that Article 31(3)(c) of the Vienna Convention 'is sound and undisputed in principle as far as treaty interpretation is concerned',[20] sought to restrain its application in practice. He was specifically raising an issue of jurisdiction, but the whole tenor of his opinion in that case is extremely sceptical about how the Court had gone about the whole question of interpretation. As he notes: '[t]he above-mentioned substantive rules of international law cannot be brought into this litigation through the back door.'[21]

Before looking in more detail at the mechanisms and styles by which such rules have been 'brought into . . . litigation', there are two preliminary points which are worth making. First, when one refers to treaty interpretation one instinctively considers the role of the judicial and arbitral tribunal. But is this right? The rules on treaty interpretation as laid out in the Vienna Convention

[16] ibid.
[17] ICJ Reports (1971) 16, 31–2.
[18] See, for instance, E Kentin 'Sustainable Development in International Investment Dispute Settlement: the ICSID and NAFTA Experience' in N Schrijver and F Weiss (eds) *International Law and Sustainable Development: Principles and Practices* (Martinus Nijhoff Publishers Leiden/Boston 2004) 324: 'Critics have pointed out that, due to their background, arbitrators may be inclined to apply investment law in isolation of other fields of law.'
[19] cf Art 38(2) ICJ Statute.
[20] Judgment of 6 Nov 2003, separate opinion of Judge Buergenthal, para 22.
[21] ibid para 28.

are, first and foremost, addressed to States, either as parties to the treaty or, in light of its reflection in customary international law, as members of the international community. Of course, treaty interpretation (including the rule contained within Article 31(3)(c)) is a fundamental aspect of judicial and arbitral decision-making, but as Aust reminds us: 'treaty interpretation forms a significant part of the day-to-day work of a foreign ministry legal adviser.'[22] But if one accepts that treaty interpretation is as much a matter for States in the implementation of their obligations, as it is for tribunals seised of a dispute, are we really saying that States are under a legal obligation to interpret their obligations in the light of other rules of international law? If we say yes, are we not just opening the floodgates to much (unnecessary?) legal uncertainty? But if one would expect States to understand their treaty obligations in light of subsequent agreement and practice (as reflected in Article 31(3)(a) and (b) respectively), then there is arguably no reason, in principle, why the same should not be true of 'any relevant rules of international law' in sub-paragraph (c). Though this may, in many ways, appear something of a moot issue, it is at least a reminder that interpretation is not something that is solely the preserve of the judicial and arbitral tribunal.

The second, and much more substantive, issue concerns the point raised by Judge Buergenthal in *Oil Platforms*. His principal concern with introducing other rules of international law via Article 31(3)(c) was not the normative uncertainty that this might create per se, but rather that it evades important questions of jurisdiction. He was particularly concerned in this case that the Court, though denying it was determining the legality of US use of force as against customary and Charter law, was necessarily doing so by virtue of Article 31(3)(c). As he himself summarizes his argument:

> principles of customary international law and whatever other treaties the parties to a dispute before the Court may have concluded do not by virtue of Article 31, paragraph 3 (c), become subject to the Court's jurisdiction. This is so whether or not they might be relevant in the abstract to the interpretation of a treaty with regard to which the Court has jurisdiction. Whether one likes it or not, that is the consequence of the fact that the Court's jurisdiction, in resolving disputes between the parties before it, is limited to those rules of customary international law and to those treaties with regard to which the parties have accepted the Court's jurisdiction. If it were otherwise, a State that has submitted itself to the Court's jurisdiction for the interpretation of one treaty would suddenly find that it has opened itself up to judicial scrutiny with regard to other more or less relevant treaties between the parties to the dispute that are not covered by the dispute resolution clause of the treaty which conferred jurisdiction on the Court in the first place.[23]

Judge Higgins, who does not raise the jurisdictional point in quite the same way, nevertheless has similar concerns: '[t]he Court has, however, not inter-

[22] A Aust *Modern Treaty Law and Practice* (CUP Cambridge 2000) 184.
[23] Separate opinion of Judge Buergenthal, para 22.

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preted [the treaty] by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law.'[24]

For Judge Buergenthal, Article 31(3)(c) cannot give a tribunal unlimited discretion in matters of treaty interpretation if it conflicts with the consensual nature of the adjudicative process.[25] In particular, Buergenthal was clearly of the opinion that the Court 'errs when it asserts that it may, on the basis of the general principle of treaty interpretation, interpret [the treaty] in light of international law . . . with regard to which the United States has not accepted the Court's jurisdiction'.[26] But is this correct? Certainly, other members of the International Court did not share his concern. Judge Koroma, for instance, notes that 'the application of general international law on the question forms part of the interpretation process which it has been entrusted to carry out'.[27] In his separate opinion, Judge Simma remarks that '[t]he Court . . . accepts, and rightly so, the principle according to which the provisions of any treaty have to be interpreted and applied in the light of the treaty law applicable between the Parties as well as of the rules of general international law "surrounding" the treaty.'[28] There is therefore a need to be cautious in making any generalized comment about the case.

Judge Buergenthal was particularly concerned that the Court used Article 31(3)(c) as a device to 'apply international law on the use of force simply because that law may also be in dispute between the parties before it and bears some factual relationship to the dispute of which the Court is seised'.[29] He notes that the Court seeks to emphasize that this is not what it is doing—in its own words, it considers that '[t]he application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation'[30]—however, he finds that this explanation 'cannot gloss over the reality of what the Court is doing in this case'.[31] Buergenthal's criticism of the Court can be read primarily in one of two ways; either that the Court was wrong to interpret the principal text—the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran[32]—in light of other rules of international law as the United States had not consented to the Court's jurisdiction to adjudicate upon such rules, or that the Court was wrong in its reasoning to actually apply such rules.

[24] Separate opinion of Judge Higgins, para 49.

[25] As he puts it, there are 'jurisdictional restraints on the Court's freedom of treaty interpretation' (separate opinion of Judge Buergenthal, para 28). For a general summary of the case, see P Bekker 'Oil Platforms (Iran v United States)' (2004) 98 American Journal of International Law 550–8.

[26] Separate opinion of Judge Buergenthal, para 24.

[27] Declaration of Judge Koroma.

[28] Separate opinion of Judge Simma, para 9.

[29] Separate opinion of Judge Buergenthal, para 29.

[30] Judgment of 6 Nov 2003, para 41.

[31] Separate opinion of Judge Buergenthal, para 29.

[32] 8 UST 899.

It would be extremely helpful, for the purposes of this article, to say that Buergenthal's criticism of the Court's analysis was ultimately derived from the Court's application of Article 31(3)(c), rather than the rule itself. This is certainly the focus of Judge Higgins's approach. She notes, with her usual measure of incisiveness, 'the Court states that the matter is really "one of interpretation of the Treaty . . . ". But the reality is that the Court does not attempt to interpret . . . the text . . . The intervening 20 pages have been spent on the international law of armed attack and self-defence and its application, as the Court sees it, to the events surrounding the United States attacks on the oil platforms'.[33] However, though Judge Higgins is hesitant as to the capacity of Article 31(3)(c) to 'incorporat[e] the totality of the substantive international law' within a specific treaty text, she ultimately leaves the issue undecided.[34]

However, one cannot so easily dismiss Judge Buergenthal's criticism. His concern with the 'jurisdictional restraints on the Court's freedom of treaty interpretation' raises a wider concern. But if one gives too broad an interpretation of what he is saying, Article 31(3)(c) becomes almost a dead-letter. There is possibly room for some middle ground—but only just. Buergenthal seems to make a distinction between two very different forms of interpretation. Though not clearly demarcated, what Buergenthal is particularly concerned with is not interpretation per se, but that the Court interprets the treaty as requiring it to make 'a preliminary determination' as to the legality of US action under general international law in order to be able to make a definitive determination as to the legality of action under the treaty. It is the Court's belief that the two are interconnected—and, in particular, that the specific question of treaty compliance is dependent upon a judgment as to the compatibility of the US action with the general law—that is so much concern to Buergenthal.

He was resisting an interpretative technique that established a framework of reasoning, which he felt was not contained in, or justified by, the treaty itself. For Buergenthal, the Court's reasoning was unfortunately supplementary to, rather than simply being elucidatory of, the provisions of the treaty. Though not writing about *Oil Platforms*, Orakhelashvili's general comment on Article 31(3)(c) seems particularly apposite: 'the purpose of interpreting by reference to "relevant rules" is, normally, not to defer the provisions being interpreted to the scope and effect of those "relevant rules", but to clarify the content of the former by referring to the latter.'[35] It is Buergenthal's opinion that the Court understood Article 31(3)(c) as permitting such deference to

[33] Separate opinion of Judge Higgins, para 47.

[34] ibid para 46. She goes on to note that '[i]t is not a provision [referring to Art XX(1)(d) of the 1955 Treaty] that *on the face of it* envisages incorporating the entire substance of international law on a topic not mentioned in the clause—*at least not without more explanation than the Court provides*' (emphasis added).

[35] A Orakhelashvili 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 European Journal of International Law 537.

general international law that is his principal ground for criticizing the Court's decision. However, this is a fine distinction and one that might easily be misunderstood.

Thus, within this context of this case, the notions of interpretation, application, and adjudication are all clearly closely related. A significant aspect of the issue, however, is that the method of the Court was to approach these distinctions with a noted lack of precision, saying as it does that it 'cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law'.[36] The verb 'to operate' here is key; for those suspicious of how the Court reasoned, such ambiguity can only but reaffirm the impression that the Court sought to evade jurisdictional limitations. Moreover, Judge Buergenthal must surely also have been aware of, and deeply concerned by, the opinions of fellow judges, such as Judge Simma, who in his separate opinion stated quite categorically:

> [f]rom the viewpoint of legal policy and political relevance however, there can be no doubt that in the present case the emphasis is squarely on the question of the legality *vel non* of the use of armed force by the United States against the oil platforms . . . I see no problem in the fact that the part of the Judgment devoted to the issue of United States use of armed force is considerably larger than that dealing with the question of the violation of the Treaty as such.[37]

There is a crucial distinction between interpretation and application, which both the Court and certain individual judges seemed to blur or, at least, appeared to do so within the language of their reasoning.

Before leaving *Oil Platforms*, one should also mention—if only as a brief aside—the role *jus cogens* played in the deliberations. In accepting that the prohibition in international law on the use of force, other than in self-defence, is a peremptory norm of general international law, a number of the judges sought to emphasise this aspect as having a bearing on the relevance and applicability of customary/Charter law to the 1955 Treaty. Whilst the Court arguably says little on the issue, both Judges Simma and Al-Khasawneh were persuaded as to its significance, whereas, on the other hand, Judge Buergenthal was clearly not. Judge Simma, after having supported the Court's reliance on Article 31(3)(c), goes on to say immediately afterwards: '[i]f these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.'[38] Judge Al-Khasawneh also relies on *jus cogens* for support: 'I do not feel . . . that the concept of *lex specialis* (assuming that the 1955 Treaty was one) would operate to exclude the operation of rules of international law that have

[36] Judgment of 6 Nov 2003, para 41.
[37] Separate opinion of Judge Simma, para 3.
[38] ibid para 9.

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a peremptory character.'[39] Judge Buergenthal, however, in decrying 'relevant rules of international law' as falling outside the Court's jurisdiction in this case, goes on to note that '[i]t would be irrelevant, in that connection, whether the Charter provision in question might also be deemed to be a *jus cogens* rule.'[40]

It is unclear whether the notion of *jus cogens* is being considered here as an aspect of interpretation, application, or jurisdiction. In fact, each judge just mentioned clearly has a very different understanding as to the purpose of *jus cogens* within the context of this case. Simma sees *jus cogens* as principally supporting the interpretative process. Al-Khasawneh arguably sees the issue more in terms of hierarchy of sources and their respective application, though the reference to 'would operate to exclude' may also touch upon the question of jurisdiction. His reasoning is not entirely clear on this point. Buergenthal certainly narrows his discussion of *jus cogens* to the issue of jurisdiction. As regards the approach of the wider Court, it has been suggested that its reasoning 'affirms that the effects of *jus cogens* can be relevant both in terms of substance and jurisdiction'.[41] However, this is debatable. What is certain is that *jus cogens* remains as amorphous a concept as ever it was, with no clear sense of its outer limits or jurisprudential implications. The introduction of *jus cogens* arguably not only complicates an already complex situation, but also mystifies legal reasoning, when what is required is some clarification. Though it must be true that treaties, which are otherwise valid, must not be interpreted in such a way as to violate a peremptory norm (and such a rule has clearly a role to play in *Oil Platforms*),[42] to over-simplify the reasoning in this case to *just* a question of compatibility with *jus cogens*,[43] rather than the more intricate issues posed by Article 31(3)(c) would be an unfortunate reduction in legal analysis.

III. MECHANISMS OF INCORPORATION

I have sought to categorize four different approaches to this issue and have termed them 'mechanisms of incorporation', but this might be over-concretizing what is often a much more fluid approach. First, a *mechanism* suggests a reasoning process that is clear, precise and definable. However, evidence

[39] Dissenting opinion of Judge Al-Khasawneh, para 9.

[40] Separate opinion of Judge Buergenthal, para 23.

[41] A Orakhelashvili 'Oil Platforms (Islamic Republic of Iran v United States of America), Merits, Judgment of 6 Nov 2003' (2004) 53 International and Comparative Law Quarterly 759.

[42] ibid: 'It is one thing to say that the Court cannot adjudicate on matters not covered by a treaty conferring jurisdiction to it, and it is quite another thing to argue that the Court should adjudicate on the matters covered by a treaty in a manner leading to the result which the parties to that treaty are not allowed at all to achieve through exercise of their contractual powers.'

[43] This is not to deny the importance of *jus cogens*, either generally, or potentially within the case, simply, that this is not the only, or necessarily the most important, aspect.

suggests that this is often not the case. Even where a tribunal makes reference to Article 31(3)(c) of the 1969 Vienna Convention, arguably the most 'certain' of the mechanisms to be discussed, there remains much conceptual doubt as to its nature, purpose and scope; the various opinions in *Oil Platforms* are surely testimony to this. What becomes immediately apparent is that while tribunals are often prepared to seek to justify their reasoning, usually by reference to a recognized (if not necessarily accepted) means of incorporating extraneous law, the parameters for using such mechanisms are often—purposely—not well delimited. Whether this comes perilously close to suggesting that such mechanisms are purely a device for judicial creativity is debatable; nevertheless, the lack of clear limitations on how a tribunal is to approach such interpretation must potentially be a significant concern.

Secondly, though I have identified four different approaches, listed briefly as express incorporation, subjective evolution of meaning (*intertemporal renvoi*), objective revision in meaning, and Article 31(3)(c), it is also to be recognized that these are not distinct methodological approaches, either conceptually or recognized as such by tribunals. Though this might be regretted, reality is much more complex and ill-formed. Moreover, there are numerous examples of where a tribunal relies upon 'other' law, but without any clear attempt to clarify either what it is doing or why it has done so. By referring to mechanisms of incorporation, it must be understood, therefore, that one is neither suggesting that such approaches are particularly specific, nor that there is something exclusive about such models of reasoning. Ultimately, these mechanisms of incorporation are used by tribunals to the extent that they provide a more-or-less legitimate 'gateway' for the discussion of other sources of international law into the judicial decision-making process; whether such mechanisms equally impose limitations on such reasoning is up to each tribunal itself to determine.

A. Express incorporation

The first means of incorporation is that which is achieved through express inclusion into the text of the primary treaty itself. The most obvious—if seemingly also the most trite—example are the statutes and other founding instruments of international tribunals and other bodies, which lay down the applicable sources of law to be considered by them.[44] It might be argued that these can neither be considered as proper nor particularly useful examples of express incorporation as such provisions are not really concerned with inter-

[44] As regards applicable law provisions in a *compromis*, a recent interesting example was the arbitral agreement between Belgium and the Netherlands concerning the Iron Rhine railway, which requested the tribunal 'to render its decision on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under Art 292 of the EC Treaty' (*Arbitration regarding the Iron Rhine Railway (Belgium v The Netherlands)* (The Hague 24 May 2005) <http://www.pca-cpa.org>).

pretation at all. Though this might superficially appear to be correct, the point has already been made that application and interpretation are closely related and finely balanced. This is clearly visible, for instance, in the 1998 Rome Statute establishing the International Criminal Court (ICC). Article 21.1 states that the ICC shall apply:

> (a) In the first place, this Statute, Elements of Crimes, and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law . . . provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Though again phrased as an issue of applicable law, rather than interpretation, it is clear that as part of the judicial function, the former may inevitably raise aspects of the latter. In part, this is because the ICC, like any judicial tribunal, will wish to use interpretative techniques to synthesize its reasoning to avoid overt clashes with different sources, even here where such a clear hierarchy is established. Though such synthesis may sometimes be little more than *obiter*, it is, nevertheless, an important legitimating function of the judicial reasoning process. Moreover, for the ICC to determine when an alternative source of law is applicable (so clearly mandated here through the phrases 'in the second place' and 'failing that') requires an interpretation of the hierarchically superior source to determine its scope and limitations. Interpretation thus becomes part of the application process.[45]

A slightly different example of applicable law is that provided by Article 3.2 of the 1994 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, which states that '[t]he Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.' This has proved to be a key provision and one that the Appellate Body of the WTO, in particular, has relied upon to attempt to integrate the covered agreements with general international law. Though the WTO disciplines arguably comprise, to a large extent, a self-contained regime, this cannot be taken to mean absolute isolation from the rest of international law.[46]

[45] A not dissimilar issue of interpretation *qua* application might arise if a tribunal were called upon to interpret the following recitals from the preamble of the 2000 Cartagena Protocol on Biosafety (39 ILM (2000) 1027): 'Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements, Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.'

[46] See generally, J Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of Public International Law* (CUP Cambridge 2003).

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Beyond this, the reference to 'clarify . . . in accordance with customary rules of interpretation' is very obviously a strong connecting factor between the two. Though it is not explicit authorization to include any particular rule of substantive law, it surely has even greater potential impact in terms of interpretation and legal reasoning, arguably incorporating as it does Articles 31 and 32 (including, by definition, Article 31(3)(c)) of the 1969 Vienna Convention.[47]

Beyond the narrow provisions on applicable law—which, it has already been conceded, may not be a particularly good example of express incorporation—one can point to various treaties that include references to other law, including customary international law, the UN Charter, other treaties and non-binding instruments, as well as various 'without prejudice' provisions. UNCLOS is a particularly good example of many of these techniques,[48] seeing as its objective is to provide for a 'legal order for the seas'. The preamble to UNCLOS, for instance, notes that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law' and Article 87 on the high seas notes that the freedom thereon is to be exercised 'under the conditions laid down by this Convention and by other rules of international law'.[49] Article 301 of UNCLOS restates, in a modified form, Article 2.4 of the UN Charter on the prohibition on the use of force. Many other provisions also reflect/codify accepted rules of general international law.[50] There is a further reference to the UN Charter in the preamble, where it notes that UNCLOS will 'contribute' to various broader goals of the international community 'in accordance with the Purposes and Principles of the United Nations as set forth in the Charter'. Also of interest are the various articles of UNCLOS which make reference to other treaty and non-binding texts, particularly in the provisions on the prevention of pollution of the marine environment.

This interweaving of binding and, in some instances, non-binding rules within UNCLOS is an important feature of a comprehensive approach, which this Convention seeks to foster. Therefore, while the express inclusion of such references, particularly generic references, may not immediately strike one as

[47] cf 'customary rules of interpretation are, so far, the only portions of customary international law to have found their way meaningfully into WTO dispute settlement' (M Matsushita et al *The World Trade Organization: Law, Practice and Policy* (OUP Oxford 2003) 64).

[48] It is beyond the scope of this paper to include even a representative sample of international treaties which expressly incorporate other international rules. However, one particularly interesting if slightly different example is North American Free Trade Agreement (NAFTA) (32 ILM (1993) 289 and 605) Art 104: 'In the event of any inconsistency between this Agreement and the specific trade obligations set out in [certain environmental agreements] . . . such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement . . . '.

[49] See, for instance, Art 221 UNCLOS.

[50] McLachlan (n 10) 314: 'although the United States had not ratified UNCLOS, it had accepted during the course of argument [in *Shrimp-Turtle*] that the relevant provisions for the most part reflected international customary law.'

raising acute problems of interpretation, such provisions nevertheless provide a clear entry-point for other sources of law and, potentially, provide tribunals with a justification for a more wide-ranging reasoning process. Though there has been little or no judicial discussion of the effect of such provisions,[51] it is the existence of such references that is interesting, as well as speculating as to the discretion they might provide tribunals in generating more permissive treaty interpretation in the future.

B. Intertemporal renvoi *and objective revision in meaning*

Though classified as two distinct mechanisms, it is arguable that intertemporal *renvoi* and objective revision in meaning are most sensibly dealt with together, as both deal with the evolution in meaning of definitions and terms in the text of a treaty. The principle of inter-temporality—the concept that terms should be interpreted in light of their meaning as understood by the parties at the time of negotiation[52]—while often determinative, may, in other cases, only be a starting point and thus displaced by subsequent developments. The leading case is, of course, the 1971 Advisory Opinion on *Namibia*. The International Court of Justice made the following well-known statement:

> 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'.[53]

The reason for analysing inter-temporal *renvoi* and objective revision in meaning together is clear from Thirlway's criticism of the reasoning in the Advisory Opinion; '[t]here must be a danger . . . of confusing what . . . 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.'[54] If true, there may actually be little substantive difference between judicial interpretation of inter-temporal *renvoi* and a more objective approach

[51] cf *Southern Bluefin Tuna Cases (New Zealand* v *Japan; Australia* v *Japan), (Provisional Measures) (ITLOS)* (1999) (39 ILM (2000) 1359), separate opinion of Judge Treves: 'Even though . . . [the 1995 Straddling Stocks] Agreement is independent from the United Nations Law of the Sea Convention, it has remarkable links with it. Article 4 provides that the Agreement "shall be interpreted and applied in the context of and in a manner consistent with the [United Nations Law of the Sea] Convention"' (para 10). One should note, of course, that the Straddling Stocks Agreement was negotiated to implement the relevant provisions of UNCLOS, thus arguably creating a closer nexus between these two conventions than between UNCLOS and those other rules only referenced generically in the text.

[52] *Island of Palmas Case* (1928) 2 RIAA 829 per Judge Huber: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'

[53] ICJ Reports (1971) 16, 31.

[54] Thirlway (n 9) 136–7.

to such issues, as both provide the governing tribunal ample discretion in selecting the most appropriate interpretation.

Nevertheless, at the level of theory at least, inter-temporal *renvoi* is premised upon a subjective understanding of a treaty, that meanings change only when the parties themselves intended their words to alter in light of shifting circumstances. Reasoning analogous to this can arguably be seen in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), where the International Court noted that '[b]y inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law.'[55] Though the judgment is not sufficiently precise for this to be the only interpretation one can necessarily give to the reasoning in this case, the above quotation does, nevertheless, seemingly rely quite clearly on the parties' intentions to reach this conclusion. References by the International Court to 'evolving' and 'static' also hark back to the International Court's earlier advisory opinion in *Namibia*.

However, it is difficult not to disagree with Thirlway who, referring to *Namibia*, notes that:

> the Court did not find as a fact that the parties . . . contemplated that the concepts . . . should acquire a different content with the development of international law, but that, because the concepts were, in the Court's view, 'by definition evolutionary', they 'must consequently be deemed to have accepted them as such'. Not only is no evidence referred to that the parties had such an intention; none is offered to show that the concepts were at the time regarded as such.[56]

The reference in *Gabčíkovo-Nagymaros* to 'the parties recognized the potential necessity' is arguably equally ambiguous on the issue of actual intention. Recognition alone is usually not sufficient to generate intent. Moreover, once one begins down this path of reasoning, there is little that could not be covered by such an expansive view of intention. The approach of the International Court is similarly unclear when it notes that certain Articles in the 1977 treaty between Hungary and Slovakia (as successor to Czechoslovakia) 'impose a continuing—and thus necessarily evolving—obligation'.[57] Without questioning the actual decision reached, of interest is the Court's understanding that continuous obligations are 'necessarily evolving' without, again, reference to any evidence of intention on the part of the States involved.

This broad notion of intention is seemingly confirmed by the International Court's reasoning in *Aegean Sea Continental Shelf* (1978), in which the Court noted that in using 'a generic term . . . the presumption necessarily arises that its meaning was intended to follow the evolution of the law'.[58] Surely the use

[55] ICJ Reports (1997) 7, 67–8.
[56] Thirlway (n 9) 137.
[57] ICJ Reports (1997) 7, 78.
[58] ICJ Reports (1978) 3, 32. See also *Case concerning Kasikili/Sedudu Island (Botswana/*

of such presumptions to determine subjective intention, whilst undoubtedly a most useful judicial tool, is a contradiction? One consequence—if taken to its logical extreme—is that so long as the words used are of a particular open type, tribunals may have the discretion to determine their meaning in light of changing developments, regardless of actual intention. I again defer to Thirlway, who puts it so well:

> [t]he Court's discussion proceeds on the basis that a term used in a legal text can . . . have a content which is referable to the law as it stands at the time when the term comes to be interpreted, because that was the parties' intention. From this, the conclusion is drawn that a term which *can* operate in this way *does* do so, as a matter of intertemporal law, as though it were an application of the other—non voluntarist—intertemporal rule.[59]

In a similar way, the International Court in *Gabčíkovo-Nagymaros* arguably finds that because continuing obligations can evolve, they have evolved. In other words, because such obligations are capable of holding such an interpretation, they actually do so, with or without reference to actual intention. In fact, the implicit presumption is that, in light of the current importance placed upon environmental considerations, the parties could *not* have intended such obligations *not* to hold such a meaning.

Another very good example of such reasoning is the report of the Appellate Body of the World Trade Organization in *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle case)* (1998).[60] The Appellate Body had to consider, inter alia, whether the meaning of the term 'exhaustible natural resources' within the context of the general exceptions also now included *living* natural resources. As the Appellate Body noted: '[t]he words of Article XX(g) . . . were actually crafted more than 50 years ago. They 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.'[61] On the face of this, this certainly suggests a rather non-voluntarist approach to treaty interpretation.

The Appellate Body does go on to note, however, that the preamble of the WTO Agreement 'which informs . . . the GATT 1994' both indicates the parties' awareness of the 'importance and legitimacy of environmental protection' and 'explicitly acknowledges "the objective of *sustainable development*"' and thus 'the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"'.[62] This

Namibia) [1999] ICJ Reports declaration per Judge Higgins, 1045 at 1113: 'The term "the main channel" is not a "generic term" (cf *Aegean Sea Continental Shelf* case, *ICJ Reports 1978,* para 77)—that is to say, a known legal term, whose content the Parties expected would change through time.'

[59] Thirlway (n 9) 142.

[60] AB-1998-4, 12 Oct 1998 (WT/DS58/AB/R).

[61] para 129.

[62] para 130.

reasoning (relying heavily again upon *Namibia*) might indicate, if not intertemporal *renvoi*, certainly evidence of, at least, an ex post subjective intention.[63] However, this too is over-simplistic in terms of an analysis of this particular dispute.

What is actually happening in this case is the development of reasoning through an amalgam of a variety of very different approaches—what might be referred to as a convergence of arguments—without any real attempt to isolate individual theoretical positions. As can be seen by how the Appellate Body draws its conclusions on this particular point together:

> Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) . . . may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).[64]

Though superficially very coherent, this is ultimately judicial reasoning at its most unscientific, even if the end-result is actually a very sensible one. The Appellate Body relies on, inter alia, recent developments in international environmental law, the preamble of the 1994 WTO Agreement, previous panel reports, and the principle of effectiveness in treaty interpretation. Only in a footnote does the Appellate Body feel it necessary to add that '[f]urthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 *to exclude* "living" natural resources from the scope of application of Article XX(g)'[65]—and even here there is no intention, only evidence of a lack of a counter-intention. Now, as the objective of the Appellate Body was clearly always to come to this conclusion, it is not that surprising that it uses all the textual, purposive and ancillary ammunition it can muster to support its reasoning. However, to what extent is 'we believe it is too late in the day' an acceptable and valid justification for treaty interpretation?

A preferable approach to such questions 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. The Appellate Body comes very close, at points, to recognizing such an argument; to take another excerpt from *Namibia*, on which it relied, 'an international

[63] This raises, however, the complex issue of the relationship between GATT 1947 and GATT 1994. See Art II(4) WTO Agreement: 'The General Agreement on Tariffs and Trade 1994 . . . is legally distinct from the General Agreement on Tariffs and Trade, dated 30 Oct 1947.'

[64] para 131.

[65] Note 114.

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instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation',[66] which might be considered as potentially supporting such an objective method of interpretation.[67] More clearly still is the statement by the arbitral tribunal in *Arbitration regarding the Iron Rhine Railway (Belgium v The Netherlands)* (2005) that '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'.[68] Such an approach clearly has much to commend it, as it allowed this tribunal to affirm and uphold the 'object and purpose' of the relevant treaty under discussion and not to be literally constrained by the 'juridical facts' of 1839, the date of the original agreement. This was considered to be particularly important when the treaty 'was not intended as a treaty of limited or fixed duration'.[69]

But to what extent, concomitantly, does such an approach not only permit a tribunal to consider current developments (including—as in *Iron Rhine Railway*—technological developments) as part of the wider interpretative process, but allow, potentially even require, a tribunal to impose an altogether new meaning on a term or provision because of the way the law has subsequently changed, and how far might a tribunal go in this respect? The reality is that, as with much else in the reasoning process, there are no definitive limitations, only internal restraints. One cannot help sensing that a tribunal which does act in this way is not only responding to the prevailing legal framework, but also the political environment in which its decision will be received. The refining of the 'sacred trust' in *Namibia* was much in tune with the will of the vast majority of the international community at the time. The Appellate Body in *Shrimp-Turtle* was likely to be similarly politically astute in its judgment in the light of recent environmental considerations. It might be suggested that the International Court in *Gabčíkovo-Nagymaros* was also relying on something akin to this when it noted that '[t]he awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of [the pertinent treaty provisions].'[70]

[66] ICJ Reports (1971) 16, 31. Cf *Gabčíkovo-Nagymaros* ICJ Reports (1997) 122, separate opinion per Judge Bedjaoui: 'the essential basis for the interpretation of a treaty remains the "*fixed reference*" to contemporary international law at the time of its conclusion. The "*mobile reference*" to the law which will subsequently have developed can be recommended only in exceptional cases.'

[67] cf Thirlway (n 9) 137: 'It may be objected that the 'entire legal system prevailing' . . . includes the principle of intertemporal law, so that . . . [the sentence] . . . rather evades than meets the difficulty'. See also *Iron Rhine Railway* (2005) para 79: 'Art 31, para 3, subpara (c) of the Vienna Convention also requires there to be taken into account "any relevant rules of international law applicable in the relations between the parties." The intertemporal rule would seem to be one such "relevant rule".'

[68] *Iron Rhine Railway* (2005) para 80.

[69] ibid para 82.

[70] ICJ Reports (1997) 7, 68.

However, while such objectivity might have the obvious benefit of ensuring contemporaneousness,[71] the argument that treaties can be objectively revised may provide tribunals too much latitude, with too few safeguards, for discretionary decision-making. Moreover, 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 the fundamental notion of consent, both at the treaty adoption stage and, subsequently, during dispute settlement. Nevertheless, the more general point that a treaty must be interpreted 'within the framework of the entire legal system' is highly attractive—the notion that international law is a seamless web, though idealistic, is always alluring.

Of course, such an ideal can be achieved by many means. In particular, the significant role that the interpretative technique contained within Article 31(3)(c) of the Vienna Convention, considered below, should not be neglected in this regard. The utility of objective revision in meaning is, in comparison, more controversial. However, as something that tribunals are clearly prepared to do—if only implicitly—such objective revision in meaning will remain an important, if background, judicial tool. In any event, as a counter-balance to intertemporal *renvoi*, recognizing such an objective approach at least reminds us of the reality, rather than the fiction, of what many tribunals are often involved doing.

C. Article 31(3)(c) of the 1969 Vienna Convention

This article has already had occasion to refer to Article 31(3)(c) of the 1969 Vienna Convention many times. In full, it reads, '[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties'. As an aspect of interpretation, it must be considered alongside, and integral to, Articles 31(1) (the 'basic rule');[72] Article 31(2) (the context); Articles 31(3)(a) (subsequent agreement) and (b) (subsequent practice); Article 31(4) (special meaning); and Article 32 (supplementary means of interpretation). However, as a feature of treaty interpretation, it has long since been marginalized and ignored. As Sands comments: 'what it actually means in practice is difficult to know since it appears to have been expressly relied upon only very occasionally in judicial practice. It also seems to have attracted little academic comment. There appears to be a general reluctance to refer to Article 31(3)(c)'.[73] Nevertheless,

[71] It is to be noted that in the literature, the notion or principle of contemporaneity is used both to mean what I have previously referred to as the principle of intertemporality (arguably the traditional sense) and to reflect how I most often use the term, somewhat in line with Vice President Weeramantry's view in *Gabčíkovo-Nagymaros*.

[72] Art 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[73] P Sands 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in A Boyle and D Freestone (eds) *International Law and Sustainable Development—Past Achievements and Future Challenges* (OUP Oxford 1999) 49–50.

as was noted in the 2004 report of the International Law Commission study group on the matter: 'the fact that article 31(3)(c) was rarely expressly cited should not obscure its importance as a rule of treaty interpretation'.[74] And as McLachlan continues: 'it is submitted that the principle is not to be dismissed as a mere truism. Rather, it has the status of a constitutional norm within the international legal system'.[75]

Though one might quibble about the language of a constitutional norm, the broader assertion that it nevertheless has an important role to play in treaty interpretation must be correct for two very different reasons. First, Article 31(3)(c) is one of the only provisions in international law—if not the only one—that has the facility to integrate *all* the various sources of international law. Other, arguably more limited, rules, include Article 30 of the Vienna Convention which concerns successive treaties 'relating to the same subject-matter' and such judicial concepts as *lex specialis*. As regards Article 30, even if one could resolve issues surrounding the disputed notion of 'same subject-matter',[76] it certainly says nothing about the other sources of law recognized in Article 38.1 of the ICJ Statute. On the other hand, Article 31(3)(c) prima facie appears much broader in both its remit and scope.[77]

Secondly, it is worth noting that it is Article 31 in its entirety that is entitled the 'general rule of interpretation', and not just the foundational rule in Article 31(1), as is sometimes presumed. Though this may be a very obvious point, it is worth repeating; the reference in the header to the singular nature of the rule indicates the holistic and comprehensive approach that is demanded of treaty interpreters when applying Article 31. Of course, not all parts of Article 31 will always be relevant in all cases; but when they are, they *must* be utilized. Article 31(2) and (3) are not discretionary add-ons, but prescriptive and mandatory aspects of the 'general rule'. As Article 31(3) states: 'There *shall* be taken into account . . . '; whatever flexibility and discretion the rules themselves may provide, ignoring them is not part of this. However, the obligatory nature of Article 31(3)(c), in particular, has clearly not always been recognized in judicial decision-making, arguably to the detriment of subsequent legal reasoning.

Of course, the 'obligation' to consider 'other rules' is also incumbent upon the parties themselves to raise in legal argument; thus, the failure of a tribunal to discuss such rules may sometimes be a symptom of a wider lack of awareness as to the proper scope of treaty interpretation amongst the legal advisers

[74] ILC Report (n 4) 301.

[75] McLachlan (n 10) 280.

[76] Aust (n 22) 183: '[t]he meaning of the expression . . . is not clear but should probably be construed strictly, so that the article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.'

[77] In addition, as McLachlan notes, in contrasting the rule of interpretation contained within article 31(3)(c) with these other approaches, '[i]nterpretation, on the other hand, precedes all of these techniques, since it is only by means of a process of interpretation that it is possible to determine whether there is in fact a true conflict of norms at all' (McLachlan (n 10) 286).

in their respective foreign ministries. As a general defence to this lack of respect for and/or acknowledgement of, Article 31(3)(c) by all sides, one might return to the argument made earlier that incorporating other sources of international law into the interpretation of a treaty opens up the unwelcome possibility of legal unpredictability and, is thus, generally discouraged.

Nevertheless, it is increasingly recognized as vital that other rules should be included within judicial decision-making, when this is appropriate. As McLachlan summarizes, '[i]t is no accident that this renewed attention [on Article 31(3)(c)] has surfaced at a time of increasing concern about the fragmentation of international law—a concern that the proliferation of particular treaty regimes would not merely lead to narrow specialization, but to outright conflict between international norms'.[78] The compartmentalism so characteristic of conventional international law post-1945, whilst having the positive effect of ensuring the development of detailed and, on the whole, well-crafted legal texts, also ensured, however, that any synergies and connexions that might exist were not nurtured and most conflicts not resolved.[79] International rules developed in a generally ad hoc manner, largely without recourse to legal developments occurring elsewhere. This prolonged period of isolation between international regimes has now come back to haunt the international legal community, which is now faced with serious questions surrounding both the hierarchy of norms and, equally fundamentally, complex issues of interpretation.

It is therefore not surprising that the issue of fragmentation within the international legal order has recently been taken up by the International Law Commission as an area of study and, as one aspect of this work, the ILC is focusing upon the nature and operation of Article 31(3)(c). The 2004 report of the International Law Commission study group on this issue, as based on the outline and presentation by New Zealand commissioner William Mansfield, is illuminating in many respects. First, the general point is made that Article 31(3)(c) 'was quite essential for promoting harmonization and guaranteeing the unity of the international legal system'.[80] This is a central theme of much of the recent work on Article 31(3)(c) and clearly relates treaty interpretation to more general considerations to reduce fragmentation within the legal order. Of course, treaty interpretation cannot, of itself, accomplish this. Nevertheless, it has an important contributory role to play. The ILC also makes the valuable point that explicit references to Article 31(3)(c) and reliance on the rule therein are not synonymous and that one should not take the number of cases in which it has been expressly mentioned as a measure of its significance.

Secondly, the ILC study group notes that '[a]s a general rule, there would be no room to refer to other rules of international law unless the treaty itself

[78] ibid 280.

[79] This specialism refers not only to the law developed, but also very often to the diplomats and lawyers involved in such legal developments.

[80] ILC Report (n 4) 301.

gave rise to a problem in its interpretation'.[81] On one level, this must be correct. When the meaning of a treaty provision is clear, there will rarely be a need, and certainly little judicial desire, to introduce extraneous material.[82] But it is important to recognize that this is not what Article 31(3)(c) actually says. It does not say 'take[ ] into account . . . any relevant rules of international law' *only when there is textual or conceptual uncertainty*. On the contrary, Article 31(3)(c) is, on the face of it, open-ended in its remit; it seemingly applies whenever there are 'relevant rules . . . applicable in the relations between the parties'. Of course, judicial practice would seem to be against such a view. Nevertheless, there is a counter-danger of marginalizing Article 31(3)(c) if it is constrained too tightly to fit within certain exceptional circumstances.

The ILC study group focused on three situations when the use of the provision would 'arise normally'. First, if 'the treaty rule is unclear and the ambiguity appears to be resolved by reference to a developed body of international law'. This must be, at least superficially, considered uncontroversial. However, scratch a bit deeper, and there are a number of unanswered questions. In particular, what is meant by 'a developed body of international law'? If 'developed' refers to any criterion other than the issue of the validity of the rule, then one might need to be more sceptical. Though rules and principles *in statu nascendi* are particularly problematic, if 'developed' requires something in addition to validity, possibly suggesting a certain degree of historical pedigree to the rule being relied upon, then this would pose a further, arguably unnecessary, hurdle. Moreover, if reference to a 'body of . . . law' suggests the necessity of a certain cumulative amount of law, in contrast to a single rule, before Article 31(3)(c) can be 'activated' then again this is clearly debatable. What both issues do seem to touch upon, however, is the very obvious concern that Article 31(3)(c) must not be utilized too readily, it being very much seen as a subsidiary part of the general rule of interpretation. This, of course, returns us to the discussion in the previous paragraph as to what precisely should be the purpose and remit of the provision.

The second situation in which reliance on Article 31(3)(c) might arise is if 'the terms used in the treaty have a well-recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer'. This takes us back somewhat to the issues raised by *intertemporal renvoi*. There is no specific textual justification in Article 31(3)(c) for an approach based solely on intention.[83] Of course, much depends upon the timing of the

[81] ibid 300.

[82] See Boyle (n 4) 569: 'If the integrity and global character of . . . [UNCLOS] are to be preserved, courts must necessarily approach interpretation by reference to Art 31(3)(c) with some caution.'

[83] cf Yearbook of the International Law Commission 1966, Vol II 222: 'It [the Commission] considered that . . . the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties.'

intention to which the report refers. If the intention referred to is the intention of the parties at the point of submitting the dispute to adjudication, then this would permit subsequent developments to influence the legal text. But if, as is likely, what is meant was the time at which the treaty was originally agreed, then this is more restrictive and, in particular, potentially excludes subsequent developments within customary—and other—sources of law. However, the approach of the ILC study group on this issue may be taken to reflect a more nuanced approach to the principle of intertemporal law. By its reference to 'can . . . be taken to have intended', *express* consent from the parties involved is seemingly not required. This would largely be in line with the jurisprudence of the International Court on the same issue, as discussed previously.

The third situation in which a tribunal might use Article 31(3)(c) is if 'the terms of the treaty are by their nature open-textured and reference to other sources of international law will assist in giving content to the rule'. A footnote to the ILC report considers the reasoning of the World Trade Organization Appellate Body in a number of its recent cases as a good example of such open-textured 'construction'.[84] Though some WTO members have taken objection to the argument that the relevant terms were actually as 'open-textured' as the Appellate Body believed them to be in those cases, this aspect of Article 31(3)(c) to 'assist in giving content' is clearly an important feature of the broader interpretative technique. The reference to 'open-textured' is also surely implicit reference to related dicta in *Namibia*.

If the ILC study group has identified the three principal legal situations in which Article 31(3)(c) may be best utilized, there are nevertheless a number of outstanding issues. First, the issue of relevance. Article 31(3)(c) requires for rules of international law to be relied upon in the process of interpretation they must be relevant. Of course, for all appearances, this is self-explanatory—*irrelevant* rules are, by their very nature, irrelevant! However, there is a real danger of circularity in argument if one is not careful. Though Sands is correct to note that relevance requires that 'it should be related in some way to the treaty norm being interpreted',[85] this does not take us forward very much. Though there is probably a presumption that it is a much looser concept than 'same subject-matter' under Article 30 of the Vienna Convention on successive treaties, how flexible a concept it is remains unclear. Its lack of precision therefore provides enormous discretion to individual tribunals.

Judge Higgins, commenting on the International Court's reasoning in *Oil Platforms*, notes that one should not 'ignore that Article 31, paragraph 3, requires "the context" to be taken into account: and "the context" is clearly that of an economic and commercial treaty'.[86] She goes on to add that '[w]hat is envisaged by Article 31, paragraph 3(c), is that a provision that requires interpretation . . . will be illuminated *by recalling what type of treaty this is*

[84] ILC Report (n 4) n 650.
[85] Sands (n 73) 57.
[86] Judgment of 6 Nov 2003, separate opinion of Judge Higgins, para 46.

and any other "relevant rules" governing Iran-United States relations'.[87] By focusing so closely on the context, Higgins thus sought to place certain constraints on what rules might be considered relevant and, equally importantly, rules that should not (or 'at least not without more explanation than the Court provides').[88] While it is arguable whether relying on 'the context' provides any more legal certainty than the notion of 'relevance' itself, it nevertheless highlights the point that Article 31(3)(c) is not a provision that should be interpreted completely free of internal constraints. Moreover, and as noted above, though Judge Higgins's analysis is arguably more carefully considered than Judge Buergenthal's opinion in the same case, both seek to develop a more tightly defined approach to the use of Article 31(3)(c), as both perceive it to be open to misuse as an undisciplined and rather random judicial technique.

A second, equally important, constraint is the notion of applicability. In other words, to whom must relevant rules be applicable? The Vienna Convention is singularly unhelpful on this point. This is particularly problematic when a tribunal is relying on another treaty (in contrast to a rule of general international law) for interpretation purposes, and is especially the case when both treaties are multilateral in nature. So when talking of 'applicable in the relations between the parties', who are the parties referred to, and what must be applicable between them? As regards the first issue, does the term 'parties' refer only to the parties to the dispute or all parties to the principal treaty under interpretation? And as regards the second issue, must all the 'parties' (however that is defined) also be parties to the second treaty?

As McLachlan points out, there is no decisive answer to these questions. He considers, however, subject to heavy qualification, that the most defensible understanding is that Article 31(3)(c) refers to all parties to the principal treaty and that it also requires that all parties to the principal treaty be parties to the secondary treaty.[89] This is clearly a very strict interpretation of the provision as it means that in a case of both the primary and secondary treaties being multilateral in character, all the parties to the primary treaty must be parties to the secondary treaty (what one might refer to as 'duality of treaty membership') in order for them to 'benefit' from the 'gateway facility' of Article 31(3)(c). The qualifications McLachlan puts forward are, however, extensive. First, even where the secondary treaty is not binding on all the parties to the principal treaty, the rule in the secondary treaty is nevertheless applicable when it is also a rule of general international law.[90] Secondly, where the effect of the principal treaty (even where it is of multilateral character) is simply to

[87] ibid. Emphasis added.
[88] ibid.
[89] McLachlan (n 10) 313–15.
[90] I have reworked McLachlan's classification, somewhat, as he sees this first exception not as a qualification but as a further acceptable understanding of Art 31(3)(c). For ease of presentation, however, I consider it makes more sense to consider it as a qualification.

create bilateral obligations *inter partes*, the assumption is that general consistency in interpretation is not necessarily required amongst all parties and therefore duality of treaty membership need not be a prerequisite. Thirdly, where the secondary treaty is not binding on all parties (or not binding at all, in certain exceptional circumstances) but where nevertheless the secondary treaty is 'evidence of the common understanding of the parties [to the principal treaty] as to the meaning of the term used',[91] then again that is sufficient to invoke Article 31(3)(c).

I can see much merit in limiting applicability in some way such as this as it provides for greater legal certainty than might otherwise be the case and gives less room for judicial 'cherry-picking'. Moreover, the qualifications do modify what clearly is an overly-rigid rule. However, both pragmatically and theoretically, I am not totally convinced this understanding—both as regards who the parties are and what must be applicable between them—is altogether correct. First, on a pragmatic level, judicial practice (and the general thrust of judicial reasoning in this area) seems to be against such an approach. In fact, most judicial decisions are rather imprecise when it comes to such details. Secondly, and more importantly, I am unconvinced that Article 31(3)(c) refers to all parties to the principal treaty, rather than just those involved in the dispute. In particular, whilst this notion of uniformity of interpretation across all treaty parties is an admirable notion, it does not necessarily fit easily with other provisions in international law. Article 63.2 of the ICJ Statute, for instance, makes it quite clear that, as regards the extent of the jurisdiction of the ICJ in matters concerning multilateral treaties, only on those third State parties that actually intervene will the judgment 'be equally binding upon it'. Of course, Article 63 of the ICJ Statute concerns intervention (and, thus consequently, jurisdiction) whereas Article 31(3)(c) Vienna Convention concerns interpretation. Nevertheless, one might sensibly ask how uniform interpretation of conventional obligations can be achieved without the necessary non-consensual jurisdiction to accomplish this. The lack of *stare decisis* in international law would also seemingly confirm the inability of international law to impose such a uniform result across all parties. Of course, a more critical perspective might suggest that what is being pointed to here is a divergence between the theoretical position—that whenever an identical dispute arises between different parties to the same treaty, the effect of Article 31(3)(c) should a priori be the same[92]—and the reality that this cannot be guaranteed, even when the same tribunal is called upon to adjudicate the dispute.

[91] McLachlan (n 10) 315.

[92] McLachlan goes further by noting that 'Art 31 is concerned with the promulgation of a general rule, which would apply to the interpretation of a treaty irrespective of whether any particular parties to it may happen to be in dispute' (McLachlan (n 10) 315).

Ultimately, neither the provision itself nor its negotiating history provides a definitive answer to these questions of applicability. However, primarily because of the following factors, it is suggested that the issue of applicability not be considered so strictly, but that, in most cases, Article 31(3)(c) should only require applicability between the parties to a particular dispute.[93] 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. While recognizing that this emphasis on the parties to a dispute 'run[s] the risk of potentially inconsistent interpretation decisions dependent upon the happenstance of the particular treaty partners in dispute',[94] overall this seems to me to be a more realistic—even if less coherent—approach to the issue. As regards the issue of what must be applicable between the parties, by emphasizing only the parties to the dispute, this aspect becomes less contentious, though not altogether uncontroversial.

IV. STYLES OF INCORPORATION

The final part will consider some of the various styles of incorporation adopted by international courts and tribunals. As noted in the introduction, this is principally concerned with the reasoning and language use by tribunals in which they have sought to justify the incorporation of extraneous considerations into their interpretation of a specific treaty. In many ways, this is also a further unanswered question in relation to Article 31(3)(c) (after the notions of 'relevance' and 'applicability'); what does 'taken into account' actually mean? It is not my intention to provide anything like a comprehensive analysis of the case law. Rather, the aim is to highlight the high degree of flexibility that exists within this aspect of treaty interpretation. In particular, while it would be possible to examine, in much more detail, many recent cases which have relied on extraneous rules, covering a variety of topic-areas, including use of force (*Oil Platforms)*, human rights decisions[95] and cases involving

[93] Cf Boyle, above n 4 at 571, n 43: 'Apart from being inconsistent with the ILC Commentary on Art 31(3), this leaves unanswered the question how the article should be applied in other contexts, eg by treaty COPs, the UN, or foreign ministries.'

[94] McLachlan (n 10) 314.

[95] See *Al-Adsani v United Kingdom* (34 EHRR 11 (2002) 289, para 55): '[The European Convention on Human Rights] . . . cannot be interpreted in a vacuum . . . The Convention should

foreign investment disputes,[96] this final part takes a rather different approach.

One very noticeable aspect of the recent case law has been the reliance upon such incorporation techniques in disputes involving environmental protection and sustainable development. These inter-related areas are providing a rich seam of primary material; *Gabčíkovo-Nagymaros*, *Dispute concerning Article 9 of the OSPAR Convention* (2003),[97] *Shrimp-Turtle* and, to a lesser extent, *Iron Rhine Railway* are amongst the recent cases that have had an environmental/sustainability focus. As the International Court intimated in *Gabčíkovo-Nagymaros*, the very nature of environmental arguments makes this form of treaty interpretation a highly tempting tool for tribunals to use.[98] The recent development of international environmental law, the lack of environmental considerations in many older treaties, the linkages that are now perceived to exist between environmental and non-environmental issues, and the continuous revelation in scientific knowledge can all be pointed to as key factors as to why environmental arguments have been raised in international litigation and why international tribunals have sought to find means by which such arguments are fully reflected in final judgments. Environmental arguments are thus both relatively recent in their elaboration and often cross-cutting in their character.

A particularly thorny issue raised by such environmental arguments is to what extent can tribunals rely upon what might ungenerously, and possibly inaccurately, be called 'non-law'; this is a broad term to cover customary rules *in statu nascendi*, environmental principles, treaties not yet in force (either generally or for particular States) and, as a very different sub-species, recent scientific developments.[99] While it is less controversial for established norms to be relied upon in this way, what is more contentious is reliance on those environmental norms, principles and rules that are not *yet* binding, or the legal status of which is not yet fully established.[100] Such reliance also raises, in a sharper focus, the related issue of intertemporality and the incorporation of

so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.' cf Orakhelashvili (n 35) 560: 'it appears that the Court's approach in *Al-Adsani* consists not in interpretation, but merely of non-application of Art 6 to the cases where it would otherwise apply.'

[96] As an example, see *Marvin Roy Feldman Karpa v United Mexican States* (ICSID Case No ARB(AF)/99/1) (40 ILM (2001) 615) para 30: 'Given the legal and the factual background of this case, the Tribunal deems it *appropriate to recall that*, under general international law . . . ' and para 33: 'This result, obtained under general principles of international law, *has now to be checked against* the NAFTA legal framework' (emphases added).

[97] Judgment of 2 July 2003 (42 ILM (2003) 1118).

[98] See text related to n 70.

[99] See *Kasikili/Sedudu Island* [1999] ICJ Reports 1045, 1060: 'In order to illuminate the meaning of words agreed upon in 1890, there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties.'

[100] This is also not to ignore the doubly contested notion that environmental principles may find legitimacy in treaty interpretation as general principles of law.

subsequent developments, what vice-president Weeramantry called, in his separate opinion in *Gabčíkovo-Nagymaros*, the principle of contemporaneity.[101]

Nevertheless, as regards the use of non-law in treaty interpretation, subject to one very clear exception—the majority decision in *Article 9 OSPAR*—much of the reasoning in recent environmental cases has been, at best, ambiguous and, at worst, illusory. Such references range from the purely rhetorical to those that are intended to have a specific purpose; part of the problem may be that many tribunals have not necessarily always made clear why they have relied upon a particular principle/concept/emerging rule.

One particularly good example of this is the following pronouncement by the International Court in *Gabčíkovo-Nagymaros*:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such 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. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[102]

The International's Court comments, whilst muted, are—at the very least—of great rhetorical significance.[103] Not only was this clear judicial recognition of the importance of sustainable development in international affairs, the Court in its judgment clearly affirmed the role of law in the integration of environmental concerns with other considerations.[104] Despite the dispute being bilateral in nature, the Court recognized the value of the environment as a significant factor in international decision-making, notwithstanding the understandable lack of reference to sustainable development itself within the primary legal text under discussion, negotiated as it was in 1977. Nevertheless, sustainable development, which the Court described as a 'concept', is not necessarily given normative weight. As Lowe comments: '[i]t is not at all clear

[101] ICJ Reports (1997) 7, 113: 'In the application of an environmental treaty, it is vitally important that the standards in force at the time of application would be the governing standards.'

[102] ICJ Reports (1997) 7, 78.

[103] R Higgins 'Natural Resources in the Case Law of the International Court' in Boyle and Freestone (eds) (n 73) 111: 'an innovation not only in the jurisprudence of the Court but also in the law relating to utilization of natural resources.'

[104] cf A Boyle 'The *Gabčíkovo-Nagymaros* Case: New Law in Old Bottles' (1997) 8 Yearbook of International Environmental Law 14: 'One can only guess at the instruments that the Court had in mind . . . It tells us much about the nature of contemporary international lawmaking that the Court seemed happy to treat a number of these new norms as law, that the parties must take account of, without further reference to state practice or authority.'

that sustainable development is among the norms and standards to which the previous sentence refers.'[105] He adds: '[w]here, in the *begriffshimmel* of the international legal order, does an 'apt expression of a need' fit?'[106] Moreover, as Birnie and Boyle note, 'it is difficult to see an international court reviewing national action and concluding that it falls short of a standard of "sustainable development". The International Court of Justice did not do so in . . . *Gabčíkovo-Nagymaros* . . . preferring instead to address more readily justiciable questions.'[107]

This more limited view of what the Court sought to achieve in *Gabčíkovo-Nagymaros* was taken further by the arbitral tribunal in *Article 9 OSPAR* in a dispute on the accessibility of environmental information. In seeking to further clarify the scope of the judgment, the tribunal notes 'that the ICJ in its decision in the *Gabčíkovo-Nagymaros* case, was not, as Ireland argued, proposing that it—and arguably other international tribunals—had an inherent authority to apply law *in statu nascendi* . . . the Court's reference in *Gabčíkovo-Nagymaros* is to new law "in a great number of *instruments*" . . . and not material that has not yet become law'.[108] Though accepting that 'current international law and practice'[109] is admissible through Article 31(3)(c), and, that consequently, 'lest it produce anachronistic results that are inconsistent with current international law, a tribunal must engage in actualization or contemporization when construing an international instrument that was concluded in an earlier time',[110] interpretation must ultimately respect the rights of States as sovereign parties to treaties. As the majority firmly stated: '[t]he issue here is one of interpretation in good faith . . . A treaty is a solemn undertaking and States Parties are entitled to have applied to them and their peoples that to which they have agreed and not things to which they have not agreed.'[111] Thus, legal principles which have yet to acquire full normative status and, in this case, treaties and other legal texts not yet binding on the parties,[112] are beyond the limits of judicial interpretation.

In vociferously defending this decision, McDorman remarks upon 'the difference between operational and litigational approaches to international environmental law and practice'.[113] In particular, he contrasts what he terms

[105] V Lowe 'Sustainable Development and Unsustainable Arguments' in Boyle and Freestone (eds) (n 73) 20.
[106] ibid.
[107] P Birnie and A Boyle *International Law and the Environment* (2nd edn OUP Oxford 2002) 95.
[108] Judgment of 2 July 2003, para 101.
[109] 'but only insofar as such law and practice are relevant' (ibid).
[110] The tribunal, however, raised the question whether actualization was necessary 'of a treaty made scarcely ten years earlier' (para 103).
[111] para 102.
[112] Specifically, the 1999 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (now in force) and draft proposals for a related EC directive.
[113] T McDorman 'Access to Information under Article 9 of the OSPAR Convention' (2004) 98 American Journal of International Law 337. See also *Iron Rhine Railway* (2005): '[t]here is

the operational aspect of international environmental law, relying as much on declarations of principles and other soft law codes as it does on legally binding treaties, and the *litigational* approach, which takes a more circumscribed view to such issues. As he says: 'while states work largely within the operational edifice, they are acutely aware that international environmental law may arise in litigation, and that the distinction between binding and nonbinding instruments is, in that context, a crucially important one.'[114] He concludes: 'in international environmental litigation, hard law and international legal obligations matter more than environmental aspirations and atmospherics.'[115] In many ways, this is a damning indictment of many of the environmental arguments presented in many recent environmental disputes.

This restrictive approach can, however, be contrasted with the views of the dissenting arbitrator in *Article 9 OSPAR*, the opinions of individual judges in other cases and, perhaps, the approach of the majority of the tribunal in *Article 9 OSPAR* elsewhere in its judgment.[116] In his dissent, Gavan Griffith was particularly concerned that the majority had interpreted the excerpt from *Gabčíkovo-Nagymaros* restrictively so as to exclude a signed, yet unratified, treaty. In relying, in part, on Article 31(3)(c) and, in part, on the general principle that 'signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature',[117] Griffith argues that such treaties should be considered '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 relevant provision of the primary treaty]'.[118] In the *Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan), Provisional Measures* (1999), Judge Treves in his separate opinion was even more forthcoming when he noted that, as regards the relevance of the 1995 Straddling Fish Stocks Agreement, '[t]he Agreement has not yet come into force and has been signed, but not ratified, by Australia, Japan and New Zealand. It seems, nonetheless, *significant for evaluating the trends* followed by international law.'[119] This undoubtedly much more liberal

considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law . . . The mere invocation of such matters does not, of course provide the answers . . . ' (para 58).

[114] ibid 338.

[115] ibid.

[116] cf paragraph 145: 'this submission is confirmed by Articles 4 and 5 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts.' This may, of course, be a moot point as these articles may be taken to reflect customary international law, though the tribunal does not say this expressly.

[117] Quoting from *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* [2001] ICJ Reports 40, 68. See also Art 18 of the 1969 Vienna Convention on the Law of Treaties.

[118] *Article 9 OSPAR* (2003), dissenting opinion of Griffith, para 19.

[119] Separate opinion of Judge Treves, para 10. Emphasis added. cf Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea: *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* (Award on Jurisdiction and Admissibility) (2000) (39 ILM (2000) 1359) para 71: 'Finally, the Tribunal observes that, *when it comes into force*, the

approach was also evident, as has already been pointed out, in *Shrimp-Turtle* (1998), in which the Appellate Body—without reference to the issue of whether the WTO members in dispute were parties to such treaties or not—sweepingly noting that '[i]t is . . . pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.'[120]

However, probably unique amongst judicial opinions is Vice-President Weeramantry's seamless reliance on law and non-law in *Gabčíkovo-Nagymaros* to interpret the 1977 treaty between Hungary and Slovakia (as successor).[121] Though it must be conceded that much of Weeramantry's use of such materials is clearly premised upon discerning an independent rule of customary international law in the field of sustainable development, there is nevertheless also clear reference to using such material to interpret the treaty. There is a fundamental connection here with his belief in the necessity for contemporaneous in treaty interpretation, which has already been remarked upon. As he summarizes: '[i]f the Treaty was to operate for decades into the future, it could not operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into.'[122]

This concern for contemporaneousness is also reflected in the struggle many tribunals have faced in dealing with the relationship between legal principles *in statu nascendi* and the interpretation of treaties. The pervasive nature of the precautionary principle in legal argument is arguably the most well-known example of this problem. Beyond the important, but arguably increasingly sterile, debate as to whether the precautionary principle is a rule of customary international law,[123] is the equally pressing matter of its role in treaty interpretation. The Appellate Body in *EC Measures concerning Meat*

[Straddling Stocks] Agreement…should, for States Parties to it, not only go far towards resolving procedural problems that have come before this Tribunal but, if the Convention is faithfully and effectively implemented, ameliorate the substantive problems that have divided the Parties.' Nevertheless, the key point to note is that the arbitral tribunal was not prepared to give effect to the Straddling Stocks Agreement prior to entry into force.

[120] *Shrimp-Turtle* (1998) para 130. Moreover, in its report, the Appellate Body makes explicit reference to both official non-binding texts, such as the 1992 Rio Declaration on Environment and Development and Agenda 21, as well as more general policy documents, such as the 1987 report of the World Commission on Environment and Development, *Our Common Future*.

[121] Boyle (n 104) 14: 'Judge Weeramantry's expansive and eloquent use of general principles of law will doubtless add to his reputation for creative and original perspectives on the legal process.'

[122] ICJ Reports (1997) 7, 113–14. See also Weeramantry's dissenting opinion in *Kasikili/Sedudu Island*, ICJ Reports (1999) 1045, 1183: 'Environmental standards transcend temporal barriers . . . Consequently, in environmental matters, today's standards attach themselves to yesterday's transactions, and must be given due effect in judicial determinations stemming from them.'

[123] *Mox Plant (Provisional Measures)* (2001) Order of 3 Dec 2001 (41 ILM (2002) 405), separate opinion of Judge Wolfrum: 'It is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of international customary law.'

and Meat Products (Hormones) (1998) *(Beef Hormones)*,[124] in many ways, set the scene. After ruling that it was not prepared to 'take a position' on the 'important, but abstract, question' of its legal status, it nevertheless went on to find 'some aspects of the relationship of the precautionary principle to the SPS Agreement [*sic*]'.[125] In particular, through such phrases as 'finds reflection in', does not 'exhaust the relevance of the precautionary principle' and 'representative governments commonly act from perspectives of prudence and precaution', the Appellate Body adopted the language,[126] if not the substance, of the precautionary principle in interpreting the legal text before it. However, in concluding that the precautionary principle 'does not, by itself, and without a clear textual directive . . . [override] . . . the normal (ie customary international law) principles of treaty interpretation',[127] the Appellate Body—though not contradicting itself—created further uncertainty as to the precise role that such principles can play. They can be reflected in, and be relevant to, the interpretation of a treaty, but they cannot override it; arguably, an easier distinction to make conceptually than is often possible in practice.[128] To return to the question raised at the very outset of this paper, at what point on the clarification-modification-contradiction continuum does this method of interpretation fall?

V. CONCLUSION

It has been my aim throughout this paper to highlight the various methods and styles by which arbitral and judicial tribunals have attempted to incorporate other rules of international law into matters of treaty interpretation. This permeation into the reasoning process is likely to become an increasingly common feature of judicial deliberations in the future, particularly in cross-cutting areas such as environmental protection. And while such interpretative techniques will always remain contentious, they provide international tribunals with an inherent flexibility; but as this paper has sought to show this is a flexibility that is (i) virtually incapable of strict classification; (ii) seemingly impossible to institutionalize; (iii) occasionally not recognized as

[124] AB-1997-4, 16 Jan 1998 (WT/DS26/AB/R, WT/DS48/AB/R).

[125] para 124. Emphasis removed.

[126] Similar language can be seen in the more recent decision of ITLOS in *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (2003) (Order of 8 Oct 2003) para 99: 'prudence and caution require [the parties] establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in areas concerned.'

[127] *Beef Hormones* (1998) para 124.

[128] As a recent example of the potential role of the precautionary principle on treaty interpretation, see the dissenting opinion by Griffith in *Article 9 OSPAR* (2003). In particular, relying explicitly on the precautionary principle, he argued that the finding of the majority 'that Ireland "has failed to demonstrate" adverse effect . . . must be vitiated as predicated upon the wrong approach to the burden of proof' (para 75).

anything other than 'ordinary' treaty interpretation; (iv) sometimes condemned; but concurrently (v) can also provide international law with a much needed coherency, if not also a certain judicial dynamism. This process, however, is most controversial when the rules and principles relied upon are not widely endorsed. International tribunals must, therefore, tread carefully to ensure they remain within the accepted parameters of the adjudicative mould.