THE PRINCIPLE OF SYSTEMIC INTEGRATION AND ARTICLE 31(3)(C) OF THE VIENNA CONVENTION

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> 'Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.'
>
> per Verzijl P, *Georges Pinson Case* (1927–8) AD no 292

I. OF FRAGMENTATION AND INTERPRETATION

A. Oil Platforms *and the Re-emergence of a Neglected Rule of Interpretation*

The recent judgment of the International Court of Justice in *Oil Platforms*[1] has shone a searchlight onto one of the most neglected corners of the interpretation section of the Vienna Convention, namely Article 31(3)(c).[2] This clause provides, with deceptive simplicity:

> There shall be taken into account, together with the context:
>
> . . . (c) any relevant rules of international law applicable in the relations between the parties.

Until very recently, Article 31(3)(c) languished in such obscurity that one commentator concluded that there was a 'general reluctance' to refer to it in

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[1] *Case concerning Oil Platforms (Iran v United States of America)* 42 ILM 1334 (2003), esp at para 41.

[2] Vienna Convention on the Law of Treaties 1969 ('VCLT').

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international judicial practice.[3] Yet its dramatic deployment by the International Court in *Oil Platforms* as a bridge between the provisions of a treaty of friendship and the customary international law of armed conflict has served to reignite interest in the clause's potential scope and application. The interest of the International Court has coincided with renewed attention to this aspect of interpretation by other international tribunals,[4] and by the International Law Commission.[5] It is no accident that this renewed attention 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.[6]

This article starts from the proposition that Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.[7] As such, they must be 'applied and interpreted against the background of the general principles of international law',[8] and, as Verzijl put it in the extract above, a treaty must be deemed 'to refer to such principles for all questions which it does not itself resolve expressly and in a different way'.[9]

At this level, the principle operates, on most occasions, as an unarticulated major premise in the construction of treaties. It flows so inevitably from the nature of a treaty as an agreement 'governed by international law'[10] that one might think that it hardly needs to be said, and that the invocation of it would add little to the interpreter's analysis. Reference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process.

However, 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. In this role, it serves a function analogous to that of a

[3] Sands 'Treaty, Custom and the Cross-fertilization of International Law' *1 Yale Human Rights and Development Law Journal* (1998) 85, at 95.

[4] See, eg, the decisions of the European Court of Human Rights cited below at n 110.

[5] The Commission decided to include a study on this topic in the programme of work to be undertaken by its Study Group on Fragmentation of International Law at its 54th Session (2002): *Official Records of the General Assembly, Fifty-fifth session, Supplement No 10* (A/55/10), chap IX.A.1, para 729. A preliminary study on the topic prepared by the author in collaboration with William Mansfield (ILC(LVI)/SG/FIL/CRD.3/Rev 1) was presented at the Fifty-sixth Session in July 2004: *Report of the Study Group* (A/CN.4/L 663/Rev 1).

[6] See generally, Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003) ('Pauwelyn').

[7] See Koskenniemi 'Study on the Function and Scope of the *lex specialis* rule and the question of self-contained regimes' (ILC(LVI)/SG/FIL/CRD.1 and Add 1) ('Koskenniemi'), para 160.

[8] McNair *The Law of Treaties* (OUP Oxford 1961) 466.

[9] Above.

[10] VCLT, Art 2(1)(a).

master-key in a large building.[11] Mostly the use of individual keys will suffice to open the door to a particular room. But, in exceptional circumstances, it is necessary to utilize a master-key which permits access to all of the rooms. In the same way, a treaty will normally be capable of interpretation and application according to its own terms and context. But in hard cases, it may be necessary to invoke an express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law, applying general principles of international law.

Despite the fact that Article 31(3)(c) gives legislative expression to this fundamental principle, the International Law Commission drew back from exploring its full implications when it framed the Vienna Convention. Thus, as Waldock tellingly put it in the Commission's Explanatory Report, when explaining the omission of any more detailed rule about inter-temporality, the Commission 'abandoned the attempts to cover the point in the draft, realising that it would have involved entering into the whole relationship between treaty law and customary law'.[12]

The resulting formulation has thus been criticized as giving very little guidance as to when and how it is to be used; what to do about overlapping treaty obligations; and whether the other applicable international law is that in force at the conclusion of the treaty or otherwise. Indeed, Judge Weeramantry commented in his separate opinion in the *Gabčikovo-Nagymaros* case, that the sub-paragraph 'scarcely covers this aspect with the degree of clarity requisite to so important a matter'.[13] Thirlway concludes in even more dismissive terms that: 'It is . . . doubtful whether this sub-paragraph will be of any assistance in the task of treaty interpretation.'[14]

The issue, then, is not whether the rule found in Article 31(3)(c) exists and may be applied in some circumstances. Rather the task is one of 'operationalizing'[15] the sub-paragraph so that it may more fully perform its purpose, and, in the process, reduce fragmentation and promote coherence in international law. An exploration of what is involved in the principle behind Article 31(3)(c) will enable the elaboration of an outline approach to interpretation which will:

(a) reinstate the central role of customary, or general, international law in the interpretation of treaties;
(b) locate the relevance of other conventional international law in this process; and

[11] The author is indebted to Xue Hanquin, Ambassador of China to the Netherlands and member of the International Law Commission, for this illuminating analogy.

[12] *Yearbook of the International Law Commission* (1964) vol II, 184, para 74 ('*Yearbook*').

[13] *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep 1997, 7 at 114.

[14] Thirlway 'The Law and Procedure of the International Court of Justice 1960–1989 Part Three' (1991) 62 BYIL 1 at 58.

[15] To borrow a term employed by Sands, above n 3.

(c) shed new light on the position of treaties in the progressive development of international law over time (the so-called problem of 'inter-temporality').

In order thus to begin to unlock the full potential of Article 31(3)(c), it is first necessary to introduce some rather general ideas about the context in which it operates. This involves two elements. The first is the changing nature of the international legal system and the perils of fragmentation which it faces. The second is the process of interpretation itself: both as an aspect of legal reasoning applied to legal texts generally; and more specifically as a process of legal reasoning in international law. These two aspects are inter-linked.

B. The Changing Nature of the International Legal System

One starts from the proposition, so illuminatingly developed by Higgins, that international law is better understood as a normative system and a process rather than as rules.[16] She wisely observes that one consequence of this perspective is that: 'this entails harder work in identifying sources and applying norms, as nothing is mechanistic and context is always important'.[17] For the purposes of the present topic, this insight serves to remind us of three things. First, that all international legal acts, including the making of treaties, form part of a wider legal system. The rules of interpretation are themselves one of the means by which the system as a whole gives form and meaning to individual rules. Secondly, the content of international law changes and develops continuously—it provides a constantly shifting canvas against which individual acts, including treaties, fall to be judged. Any approach to interpretation has to find a means of dealing with this dynamism.

Thirdly, one of the characteristics which distinguishes international law from other legal systems is its horizontality.[18] Lacking a single legislature or court of plenary competence, and depending in all aspects fundamentally on state consent, international law lacks developed rules for a hierarchy of norms.[19] It draws its normative content from a wide range of sources operating at different levels of generality. Article 38 of the Statute of the International Court of Justice, which has served as a general catalogue of the sources of international law, ascribes no order of relative priority amongst those sources. The rules of customary international law, and 'the general principles of law recognized by civilized nations' are,[20] for the most part, capable of express exclusion by the detailed rules of a treaty. But in fact their role is much more pervasive, as they provide the foundations of the international

[16] Higgins *Problems and Process: International Law and How we use it* (OUP Oxford 1994), 1, 8.

[17] Ibid.

[18] Ibid.

[19] Subject to the (contested) category of peremptory norms or *jus cogens*, which are granted priority over treaties pursuant to Arts 53 and 64 VCLT.

[20] Art 38(1)(c) Statute of the International Court of Justice.

legal system. Rules derived from these sources may well be expressed at a very great level of generality. They may even, as in the case of general principles derived from private law sources, be inchoate in character.[21] But they are nonetheless rules of law within the international legal system for all that.

Yet within this system, the treaty has come to have a pervasive reach. This was apparent to Brierly, who, writing in the immediate aftermath of the establishment of the modern international legal system, observed that a new class of international law-making treaties was emerging, which were the substitute in the international system for legislation.[22] He commented: 'Their number is increasing so rapidly that the "conventional law of nations" has taken its place beside the old customary law and already far surpasses it in volume.'[23]

Shelton develops the consequences of this in terms of increasing stress on coherence within the international legal system. She characterizes these as issues of 'relative normativity'—problems of deciding priority amongst competing rules which may apply to the legal matter or dispute:[24]

> Until the twentieth century, treaties were nearly all bilateral and the subject matter of international legal regulation mostly concerned diplomatic relations, the seas and other international waterways, trade, and extradition. Today, the number of international instruments has grown substantially, multilateral regulatory treaties are common, the topics governed by international law have proliferated and non-State actors are increasingly part of the system. This complexity demands consideration and development of means to reconcile conflicts of norms within a treaty or given subject area, for example, law of the sea, as well as across competing regimes, such as free trade and environmental protection.

One consequence of the relentless rise in the use of treaties as a means for ordering international civil society,[25] is that the dynamic process of the development of international law now takes place in no small measure through the continuous progressive development of treaties. Thus, for example, in the *Mox Plant* case to be examined later in this paper,[26] the arbitral tribunals were invited to consider numerous international instruments in the field of environmental protection—each one building upon those that had come before.

A similar process may be observed even in the framing of bilateral treaties in the same subject area—such as, for example, foreign investment protection or free trade agreements. Each state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has

[21] Lauterpacht *Private Law Sources and Analogies of International Law* (Longmans London 1927).

[22] Brierly *The Law of Nations* (5th edn OUP Oxford 1955), citation taken from 6th edn (unchanged on this point) edited by Waldock (Clarendon Press Oxford 1963) at 58 .

[23] Ibid.

[24] Shelton 'International Law and 'Relative Normativity'' in Evans (ed) *International Law* (OUP Oxford 2003) 145 at 148–9.

[25] Ku 'Global Governance and the Changing Face of International Law' ACUNS Repts and Papers 2001 no 2.

[26] Below, Part III B.

entered with other states. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before.

In making this observation about the nature of the modern treaty-making process, it is not necessary to go so far as to contend that such common elements may point to the emergence of a norm of customary international law. Nor is the matter sufficiently disposed of as one concerning successive treaties on the same subject matter.[27] For this purpose, it is irrelevant whether the prior treaty is in force between the same parties, or different ones. The important point is that this everyday reality in the practice of foreign ministries has the inevitable consequence that treaties are developed in an iterative process in which many normative elements are shared. From having been a series of distinct conversations in separate rooms, the process of treaty-making is now better seen as akin to a continuous dialogue within an open-plan office.[28] A modern approach to treaty interpretation must adequately reflect this reality.

C. The Perils of Fragmentation

Given the extent, then, of this sharing of legal ideas and formulations, is there a real risk of the fragmentation of international law? What do we mean by fragmentation in this context? Brownlie adverted to the danger of fragmentation in 1988, writing:[29]

> A related problem is the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as 'international human rights law' or 'international law and development'. As a consequence the quality and coherence of international law as a whole are threatened. . . .
>
> A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.

Brownlie was making a point which was partly pedagogical—a bid for what might be called 'joined-up writing' in international law. But he also pointed to a broader systemic risk: that the development of specialized fields of international law—if progressed in isolated compartments—could lead to serious conflicts of laws within the international legal system. It has been this latter concern—fuelled by the proliferation of specialist international

[27] VCLT Art 30.

[28] The writer is indebted to William Mansfield for this metaphor.

[29] Brownlie 'The Rights of Peoples in Modern International Law' in Crawford (ed) *The Rights of Peoples* (Clarendon Press Oxford 1988) 1 at 15; see also his subsequent comments in [2001] ASIL Proceedings 13–15.

tribunals[30]—which has more recently preoccupied the international law community.

Thus the very enlargement in the scope and reach of international law, which has gathered pace since the end of the Cold War in the era of globalization, has called attention to the lack of homogeneity in the international legal system. As Hafner put it, in the feasibility study which prompted the International Law Commission to examine the issue of fragmentation:[31]

> Hence, the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law. This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration.

The challenge for treaty interpretation posed by this dimension of the development of international law is of a different order to that of iterative dialogue within a particular area of legal development, discussed above. Reference to external sources to inform the meaning of a legal text within a particular subject area has its own difficulties. But it is at least a cumulative process—building upon the meaning of the text. The kind of potential for serious conflict between different subjects in international law raises the question of how far the process of interpretation may be used to determine the relationship between the obligations in any particular treaty and other, potentially conflicting, obligations in other parts of international law.

The decision of the International Law Commission to take up the task of studying the fragmentation of international law, and the subsequent work of the Study Group which it established, has shown a commendably practical focus on the legal techniques which may be employed to resolve such normative conflicts. The subsequent division of the Study Group's work into five areas of research serves to remind us of the range of techniques already available to the international lawyer. They include the *lex specialis* rule;[32] the rules on successive treaties, and on the modification of multilateral treaties;[33] and the concept of *jus cogens*.[34]

However, the process of interpretation by reference to other international law obligations required by Article 31(3)(c) has a particular significance amongst these techniques. The other rules examined by the Study Group all provide an a priori solution to determine priority between substantive rules in

[30] See, eg, the collection of papers of 'The Proliferation of International Tribunals: Piecing together the Puzzle', a symposium held at New York University in October 1998, published in (1999) 31 NYU J Int'l L & Pol 679–933.

[31] Hafner 'Risks ensuing from Fragmentation of International Law', *Official Records of the General Assembly, Fifty-fifth session, Supplement No 10* (A/55/10), annex 321. The most recent report of the Study Group is dated 28 July 2004 (A/CN.4/L.663/Rev 1).

[32] Koskenniemi, above n 7.

[33] VCLT Arts 30 and 41, as to which see respectively Melescanu (ILC(LVI)SG/FIL/CRD.2) and Daoudi (ILC (LVI)/SG/FIL/CRD.4).

[34] VCLT Art 53 as to which see Golicki (ILC(LVI)/5G/FIL/(RD.5).

cases of true and irreducible conflict. These techniques employ different relational links to do this, namely:

(a) *Status:* The notion of *jus cogens* or peremptory rules is that certain rules in the international legal system have a higher status within the international legal system—being mandatory rules, from which no derogation by treaty is permitted. Further, certain multilateral treaties may themselves either expressly or in accordance with their object and purpose limit subsequent derogations;[35]

(b) *Specificity:* The concept of *lex specialis* contemplates that the more specific rule may take precedence over the general;

(c) *Temporality:* The *lex posteriori* rule ascribes priority to the most recent treaty rule on the same subject matter.

Interpretation, 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. By the same token, the application of a technique of interpretation that permits reference to other rules of international law offers the enticing prospect of averting conflict of norms, by enabling the harmonization of rules rather than the application of one norm to the exclusion of another. It is therefore to the process of interpretation that we must now turn.

D. The Process of Interpretation

One starts from the proposition that the interpretation of legal texts is not simply an exercise in the use of language and its application to fact patterns. Of course, that is a key part of the exercise, and the interpretation of treaties will in this respect find common cause with the interpretation of other legal texts, such as national legislation. These parallels should not be ignored, as they may provide a rich source of comparative understanding on generic issues.[36] But the process of interpretation is also an integral part of the legal system in which the text is situated. Legal texts only make sense within the context of the system that gives them authority and meaning.[37] By the same token, the process of legal interpretation itself performs an integrating task within the legal system. As Koskenniemi explains:[38]

> Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles. Far from being merely an 'academic' aspect of the

[35] VCLT Art 41. See, eg, Art 311 of the United Nations Convention on the Law of the Sea 1982.

[36] For a recent very interesting contribution to the literature on the problem of time in statutory interpretation see Bradley 'The Ambulatory Approach at the Bottom of the Cliff: Can the Courts Correct Parliament's Failure to Update Legislation?' (2003) 9 Canterbury L R 1.

[37] Scobbie 'Some Common Heresies about International Law' in Evans (ed) *International Law* (OUP Oxford 2003) 59 at 65.

[38] Above n 7, para 29.

> legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators.

In this way, the process of interpretation encapsulates a dialectic between the text itself and the legal system from which it draws breath. The analogy with the interpretation of contracts is instructive.[39] For much of the time, interpretation of contracts and treaties alike will be a matter of ascertaining and giving effect to the intention of the parties by reference to the words they have used.[40] It is a natural aspect of legal reasoning to start first with the document under construction and only to look beyond it in hard cases, where reference to the document alone is insufficient or contested.[41]

But the fact that such an approach is rightly adopted as a starting-point in both contract and treaty interpretation should not be allowed to obscure its equally important counterweight: the impact of the surrounding legal system. As regards transnational contracts in private international law, the point has been put thus:[42]

> contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies . . . for failure to perform any of those obligations . . .

A very similar point may be made about the position of treaties in public international law. Its consequence for the process of interpretation of treaties is that, in order to understand how this process operates, it is necessary to appreciate the impact of the peculiar characteristics of international law as a legal system.[43] One of those characteristics has already been introduced. It is the very horizontality of the system: the lack of an omnicompetent legislature, or of a developed set of secondary rules defining the hierarchy and precedence of norms; and the diversity, and different levels of generality of the sources of international law.

The other characteristic is the nature of the international judicial process. A systematic study of the jurisprudence of international tribunals suggests a strong centrifugal tendency to chart a coherent course within international

[39] A connection already made by Grotius *De Jure Belli ac Pacis* (1646), Ch XVI 'On Interpretation', in the translation by Kelsey (Clarendon Press Oxford 1925) vol II.

[40] In contract law, this may be seen as an aspect of party autonomy or 'will theory', as to which see Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press Oxford 1979). For a recent defence of the role of the intentions of the parties in contractual interpretation, see DW McLauchlan 'The New Law of Contract Interpretation' (2000) 19 NZULR 147.

[41] Koskenniemi above n 7, para 59.

[42] *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 67, per Lord Diplock.

[43] A point famously made by Julius Stone in 'Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process' (1953) 1 Sydney LR 344.

law.[44] Despite the scepticism often expressed by academic theorists,[45] international tribunals have maintained their affection in this regard for express reference to canons of interpretation, which can be traced to the very foundation of modern international law.[46] Even Julius Stone, while contending that such canons cannot be treated as if they were rules of law, since their wide indeterminacy may be seen as a cloak for judicial creativity, nevertheless admits that they may serve a useful function by imparting 'a sense of continuity of tradition, relieving the psychological loneliness inseparable from the responsibility of policy-making'.[47]

But all international tribunals, even the International Court of Justice, are limited in their ability to integrate the disparate elements of the legal system within which they operate by a factor which distinguishes them from most national courts. That is the limitation on their jurisdictional competence, which flows from the fact that they are themselves creatures of state consent established by treaty. A constant theme in the decisions which will be examined below, and a possible explanation for the recent focus on Article 31(3)(c) itself, is the interplay between the jurisdictional constraints upon the scope of the tribunal's competence and the interpretation of the law to be applied.

What, then, may we learn from the experience of international tribunals in the interpretation of treaties? It was the special genius of Sir Gerald Fitzmaurice that, in his magisterial study of the Law and Practice of the International Court of Justice, he was able to distil a welter of jurisprudence on treaty interpretation into just six major principles: actuality; natural and ordinary meaning; integration; effectiveness; subsequent practice; and contemporaneity.[48] These principles, derived as they were from primary sources, cut through much of the circularity and sterility of earlier debates.[49] Fitzmaurice's formulation facilitated the Commission's task of drafting the interpretation code in the Vienna Convention, and has had an enduring influence on treaty interpretation.[50]

But, crucially for present purposes, and unlike McNair writing at a similar time,[51] or indeed the ILC itself the following decade, Fitzmaurice did not add a principle of systemic integration to his formulation. For him, the Principle of Integration (his Principle III) was limited in its application to the body of the

[44] Charney 'Is International Law threatened by International Tribunals?' (1998) 271 *Recueil des Cours* 101.

[45] A view particularly often expressed in the United States. See, eg, *Harvard Research Draft Convention on the Law of Treaties* (1935) 29 AJIL Supp. 937; and McDougal, Lasswell and Miller *The Interpretation of Agreements and World Public Order* (Yale UP, New Haven, 1967).

[46] Vattel *Le Droit des Gens* (1758), Ch XVII 'The Interpretation of Treaties', in the translation by Fenwick (Carnegie Institution Washington 1916) vol III.

[47] Above n 43, 364.

[48] (1951) 28 BYIL 1; (1957) 33 BYIL 204.

[49] See, eg, the debate between Lauterpacht (1949) 26 BYIL 48 and Stone, above n 43.

[50] See Thirlway above n 14.

[51] Above n 8.

Treaty. It did not apply to the broader legal system. Why, if the principle is indeed as fundamentally important as is here contended, might that have been so? One reason already suggested might be the very character of the principle as an unarticulated major premise—its existence at once obvious to anyone within the system and rarely needing to be prayed in aid. Another might have been Fitzmaurice's avowed exclusive focus on the work of the International Court of Justice. Other international tribunals, precisely because of their even more limited remit, seem to have had more occasion to make express that which the ICJ may assume.[52]

Finally, Fitzmaurice was fundamentally committed to the principle of contemporaneity in treaty interpretation (his Principle VI). He was prepared to accept that the subsequent practice of the parties themselves might shed light on the interpretation of a treaty (Principle V). But he saw other references to an external context, which he conceded might include international law, as necessarily rooted in the time when the treaty was originally concluded. For him, this was simply a particular application of the doctrine of inter-temporal law as applied to the interpretation of treaties.[53] This had the effect of setting the law in aspic, and inhibiting the development of a conception of treaties as taking their place within a dynamic legal system. As will be seen, a rigid application of this view was decisively rejected by the ILC, and has since also been rejected in the jurisprudence of the ICJ.

These introductory remarks have raised large claims about the relationship between the task of treaty interpretation and the broader theme of systemic coherence within the international legal system. It is now necessary to test those claims, and to explore their significance, by reference to the actual experience of international tribunals in hard cases. This will be done in Part III by reference to five short case studies of integration in the practice of different types of international tribunals at the turn of the 21st century; culminating in *Oil Platforms*, decided by the ICJ in November 2003.

On the basis of this analysis, it will be possible in Part IV to advance some suggestions about the proper role of Article 31(3)(c) in meeting the challenges of fragmentation against the background of general developments in international law. However, it is first necessary to introduce Article 31(3)(c) itself in its proper context; to understand its genesis; and to chart its career as the neglected son of treaty interpretation until its recent ascendancy.

[52] See the additional references cited in McNair op cit.

[53] Fitzmaurice (1957) above n 48, 225–7; and see also his earlier article dealing with intertemporality (1953) 30 BYIL 5–8. Fitzmaurice relied on the classic statement of Judge Huber in *Island of Palmas Arbitration* (1928) 2 RIAA 829, 845. Huber was concerned in that case with the acquisition of title of territory, a context which much more strongly requires the application of a principle of contemporaneity.

II. ARTICLE 31(3)(c) OF THE VIENNA CONVENTION

A. Construction

Article 31(3)(c) is found within Part III Section 3 of the Vienna Convention. This section constitutes a framework approach to the interpretation of treaties. Article 31 provides the '*General Rule of Interpretation*' in the following terms:

> 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.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>   (b) any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>   (c) *any relevant rules of international law applicable in the relations between the parties*.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.' [emphasis added].

Paragraph 3 lists three matters which are required to be taken into account in treaty interpretation in addition to the context. These are not ranked in any particular order. The third of them is sub-paragraph (c) referring to 'any relevant rules of international law applicable in the relations between the parties'. All of these three additional factors form a mandatory part of the interpretation process. They are not (as contrasted with the provisions of Article 32 on *travaux préparatoires*), only to be referred to where confirmation is required or the meaning is ambiguous, obscure or manifestly absurd or unreasonable.[54]

Textual analysis of Article 31(3)(c) reveals a number of aspects of the rule which deserve emphasis:

(a) It refers to '*rules* of international law'—thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules;
(b) The formulation refers to rules of international law in general. The words are apt to include all of the sources of international law, including custom, general principles, and, where applicable, other treaties;

[54] The test provided under Art 32 for reference to supplementary means of interpretation.

(c) Those rules must be both *relevant* and '*applicable* in the relations between the parties'. The sub-paragraph does not specify whether, in determining relevance and applicability one must have regard to all parties to the treaty in question, or merely to those in dispute;
(d) The sub-paragraph contains no temporal provision. It does not state whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises.

It is important also to keep in mind some more general features of the approach contained in Articles 31–2. Their broad appeal may in part be attributable to the fact that they adopt a practical set of considerations which are general and flexible enough to be applied across an almost infinitely wide cast of treaty interpretation problems. The Convention eschews taking a fixed stand on any of the great doctrinal debates on interpretation, save that it is firmly focused on objective reference points rather than the chimera of the intentions of the parties. Thus it adopts both an ordinary meaning and a purposive approach. It also permits reference to the statements of states, both before the conclusion of the treaty, and by way of subsequent practice. Yet the Convention does not purport to be an exhaustive statement of the international law rules of interpretation. It contains no mention, for example, of the *lex specialis* rule, which has had enduring significance in resolving conflicts of norms.

This is not to suggest that the Convention's rules are a mere will-o'-the-wisp, with no fixed content. On the contrary, reference, for example, to the recent experience in the WTO DSU, where the Appellate Body has been insisting that panels take the Convention's rules seriously, shows just how exacting is a proper application of the code.[55] But it serves to emphasize that the code operates as the outline of an integrated reasoning process. Although the Convention does not require the interpreter to apply its process in the order listed in Articles 31–2, in fact that order is intuitively likely to represent an effective sequence in which to approach the task. In that regard, therefore, Article 31(3)(c) must take its place as part of the wider process. As will be seen below, some of the issues where reference to external sources of international law may be helpful may be better resolved as part of an enquiry into either the ordinary meaning of the words in their context, or the object and purpose of the treaty.

B. Travaux Préparatoires

Reference to the work of the International Law Commission in the formulation of the draft articles which led to Article 31 is helpful in understanding the text of sub-paragraph (3)(c) and also in elucidating some of the controversies which were not then resolved and which may require further consideration.

[55] See the cases discussed at Part III C below, and, more generally, Cameron and Gray (2001) 50 ICLQ 248.

The first draft of articles on *interpretation* of treaties was introduced into the work of the Commission on treaties by the Third Report of the Special Rapporteur, Sir Humphrey Waldock.[56] Waldock's first formulation provided (in the then numbered Article 70(1)(b)) for the interpretation of a treaty 'in the context of rules of international law *in force at the time of its conclusion*' [emphasis added]. Waldock's formulation was a synthesis[57] derived from a resolution of the *Institut de Droit International* which called for interpretation 'in the light of the principles of international law',[58] and Sir Gerald Fitzmaurice's formulation (based on the jurisprudence of the ICJ) which emphasised the principle of contemporaneity (although without express reference to other rules of international law).

In Waldock's original formulation, this rule was complemented by an additional rule (ultimately omitted from the VCLT) dealing specifically with the intertemporal law. Draft Article 56 provided as follows:[59]

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

Waldock's proposal for the incorporation of intertemporal provisions did not find favour with the Commission and did not survive the 1964 discussions.

Nevertheless the issue of intertemporal law continued to provoke controversy both in the responses of governments in consultations on the Commission's drafts and in the further discussions of the Commission in 1966.

The other material matter which had provoked debate in the formulation of the article was whether or not there ought to be a reference to 'principles' rather than 'rules', and (in a similar vein) whether the reference to rules ought to be qualified by the expression 'general'. In the end, neither of these proposals prevailed. The ILC Official Commentary on the Draft Articles confines its discussion on the meaning and application of what is now article 31(3)(c) to an account of the discussion on intertemporality, without shedding further

[56] '*Yearbook*' (1964) vol II.
[57] Ibid 55 para 10.
[58] *Annuaire de l'Institut de Droit International* ('*Annuaire*') (1956) 364–5. Inclusion of this reference in the resolution of the Institut had had a controversial history. It did not appear in Lauterpacht's original scheme in 1950 (*Annuaire* (1950-I) 433). A reference to the interpretative role of general principles of customary international law was subsequently added by him in 1952 (*Annuaire* (1952-I) 223). It faced considerable opposition on grounds of uncertainty, and inconsistency with the Institut's codification role (*Annuaire* (1952-II) 384–6, remarks of Guggenheim and Rolin *Annuaire* (1954-I) 228). When Fitzmaurice was appointed to replace Lauterpacht as rapporteur, there was no reference of this kind in his draft (*Annuaire* (1956) 337–8). It was only added in the course of the debate, following an intervention of Basedevant (*Annuaire* (1958) 344).
[59] *Yearbook* (1964) vol II 8–9.

light on the situations in which the Commission considered that the article might be employed.[60]

The issues received a full debate also in the Committee of the Whole at the UN Conference in Vienna convened to adopt the Convention in 1968. A number of delegations made comments about the temporal element, as well as about more general questions of interpretation. The debates on these issues were ultimately inconclusive and did not result in an amendment of Article 31(3)(c).

C. Application

Since the adoption of the Vienna Convention, Article 31 as a whole has come to be recognised as declaratory of customary international law rules of interpretation.[61]

However, despite this general approval, there appear to be few recorded instances of state practice or of the judicial use of sub-paragraph (3)(c) itself, until the recent cases discussed in Part III below. Express references to Article 31(3)(c) in the jurisprudence of international tribunals have been located only in a small number of decisions of the Iran-US Claims Tribunal and the European Court of Human Rights. For what purpose were these references made?

1. Iran–US Claims Tribunal

In the Iran–US Claims Tribunal, the issue which prompted reference to Article 31(3)(c) was the determination of the nationality requirements imposed by the Algiers Accords in order to determine who might bring a claim before the Tribunal. Thus, in *Esphahanian v Bank Tejarat*[62] the issue was whether a claimant who had dual Iran/US nationality might bring a claim before the Tribunal. The Tribunal expressly deployed Article 31(3)(c) of the Vienna Convention[63] in order to justify reference to a wide range of materials on the law of diplomatic protection in international law. These materials supported

[60] 'Articles on the Law of Treaties with commentaries adopted by the International Law Commission at its 18th session', reproduced in *United Nations Conference on the Law of Treaties 1969*, 42–3.

[61] See the summary of state practice, jurisprudence and doctrinal writings in Villiger *Customary International Law and Treaties* (Nijhoff Dordrecht 1985) 334–43. (Villiger himself comes to the more qualified conclusion that the rules were, at least in 1985, still 'emerging customary rules on interpretation which originated in Vienna'. But see now especially *Territorial Dispute Case* (*Libyan Arab Jamahiriya v Chad*) ICJ Rep (1994) 6 (International Court of Justice); *Golder v United Kingdom* ECHR Ser. A, [1995] no 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases* 70 ILR 449 (1986), (Inter American Court of Human Rights); *United States—Standards for Reformulated and Conventional Gasoline* AB—1996-1 WT/DS2/AB/R, 29 Apr 1996, 16 (World Trade Organization Appellate Body).

[62] 2 Iran-USCTR (1983) 157.

[63] Ibid 161.

the Tribunal's conclusion that the applicable rule of international law was that of dominant and effective nationality.[64]

Elsewhere in its jurisprudence, the Tribunal has confirmed that: 'the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.'[65]

2. *European Court of Human Rights*

The other international tribunal which has made serial use of Article 31(3)(c) is the European Court of Human Rights ('ECHR').

The ECHR has found reference to Article 31(3)(c) especially helpful in construing the scope of the right to a fair trial protected by Article 6 of the European Convention on Human Rights. In *Golder v United Kingdom*[66] that Court had to determine whether Article 6 guaranteed a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined. The Court referred to Article 31(3)(c) in carrying out its task of interpretation. Through that route, the Court referred in turn to Article 38(1)(c) of the Statute of the International Court of Justice as recognising that the rules of international law included 'general principles of law recognized by civilized nations'.[67] It found that a right of access to the civil courts was such a general principle of law, and that this could be relied upon in interpreting the meaning of Article 6.

In *Loizidou v Turkey,*[68] the Court had to decide whether to recognize as valid certain acts of the Turkish Republic of Northern Cyprus ('TRNC'). It invoked Article 31(3)(c)[69] as a basis for reference to UN Security Council resolutions and evidence of state practice supporting the proposition that the TRNC was not regarded as a state under international law. Therefore the Republic of Cyprus remained the sole legitimate government in Cyprus and acts of the TRNC were not to be treated as valid.

That meagre crop of decisions was all the international jurisprudence that Article 31(3)(c) had yielded until 1998, when the first of the decisions to be discussed in Part III was rendered. So it is to the recent experience with the impact of systemic coherence that we must now turn.

[64] See also, to like effect, *Case no A/18* (1984) 5 Iran-USCTR 251, 260. The provision was also relied upon in a dissent in *Grimm v Iran* 2 Iran-USCTR 78, 82 on the question of whether a failure by Iran to protect an individual could constitute a measure 'affecting property rights' of his wife.

[65] *Amoco International Finance Corporation v Iran* (1987–II) 15 Iran-USCTR 189 at 222 para 112.

[66] Judgment 21 Feb 1975, ECHR Ser A no 18; 57 ILR 200 at 213.

[67] Ibid 35.

[68] 18 Dec 1996, Reports 1996–VI; 108 ILR 443 at 462 para 44.

[69] Ibid.

III. INTEGRATION IN PRACTICE

This section analyses five recent cases where different international tribunals have grappled with the role to be accorded to other international law norms in the interpretation of treaties.

The cases are:

(a) *Pope & Talbot Inc v Canada,* an arbitration conducted under the North American Free Trade Agreement ('NAFTA');[70]
(b) The *Mox Plant* litigation between Ireland and the United Kingdom;[71]
(c) The *Shrimp-Turtle*[72] and *Beef Hormones*[73] decisions of the WTO Appellate Body;
(d) The trio of decisions on the relationship between the right of fair trial and state immunity (*Al-Adsani, Fogarty*, and *McElhinney*) decided by the European Court of Human Rights;[74] and finally,
(e) *Oil Platforms*[75] in the International Court of Justice.

These cases have been chosen in part because they exemplify in microcosm many of the trends in international law introduced in Part I above. Each case is drawn from a different field of international law, which has its own developed body of rules, contained partly in custom and partly in treaty. Thus, *Pope & Talbot* is concerned with foreign investment law; *Mox Plant* with international environmental protections in the law of the sea; *Shrimp-Turtle* and *Beef Hormones* with world trade law; *Al-Adsani et al* with human rights law; and *Oil Platforms* with peace and security.

All of the cases were decided within the last six years, and they also exemplify the development of international adjudication. Four of the tribunals owe their very existence to developments in the reach of international dispute resolution over the last 12 years: the three tribunals in *Mox Plant* and the WTO Appellate Body.

[70] Award on the merits, 10 Apr 2001; award in respect of damages, 31 May 2002 (2002) 41 ILM 1347.

[71] International Tribunal for the Law of the Sea: the *Mox Plant* case (*Ireland v United Kingdom*)—*Request for Provisional Measures Order* (3 Dec 2001) <www.itlos.org>; Permanent Court of Arbitration: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention: Ireland v United Kingdom—Final Award* (2 July 2003) (2003) 42 ILM 1118; Permanent Court of Arbitration: the *Mox Plant* case: *(Ireland v United Kingdom)—Order No 3* (24 June 2003) (2003) 42 ILM 1187.

[72] WTO *United States: Import Prohibition of certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 Oct 1998) WT/DS58/AB/R; (1999) 38 ILM 118.

[73] WTO *EC measures concerning meat and meat products (hormones)—Report of the Appellate Body* (16 Jan 1998) WT/DS-26/AB/R.

[74] *Al-Adsani v United Kingdom*, Application no 35763/97, 123 ILR 24 (2001); *Fogarty v United Kingdom* Application no 37112/97, 123 ILR 54 (2001); and *McElhinney v Ireland* Application no 31253/96, 123 ILR 73 (2001).

[75] Above n 1.

But the cases also have a more particular significance for the present study in that they each illustrate a different facet of the problem of systemic integration in treaty interpretation. They have been ranked for that purpose in ascending order of difficulty. Thus:

(a) *Pope & Talbot* was simply concerned with the construction of a particular term in an investment treaty ('*fair and equitable treatment*') by reference to the wider body of international investment law;
(b) *Mox Plant* had to contend with a complex matrix of potentially relevant international environmental law measures alleged to bear on the parties' rights and duties under the UNCLOS and OSPAR Conventions. But the external references were still, for the most part, to other conventions and instruments specific to the subject matter of protection of the environment and the control of nuclear shipments;
(c) *Shrimp-Turtle*, on the other hand, involved a problem of contextual interpretation of the second, broader type identified in Part I. In that case, the tribunal was still plainly concerned with the construction of broad terms in the WTO Covered Agreements. But the external reference was to a set of international obligations wholly outside world trade law, namely international environmental law;
(d) *Al-Adsani* takes that process one stage further. The ECHR was there concerned with an article in the European Human Rights Convention (protecting the right to a fair trial) which did not on its terms invite consideration of the law of state immunity at all. Yet that is exactly what the Court did;
(e) *Oil Platforms* sees the International Court of Justice itself using a process of systemic coherence in interpretation so as to import wholesale into the essential security interests exception to a treaty of amity, the customary international law of armed conflict.

The cases also represent an ascending order of recognition of the potential significance of Article 31(3)(c) itself. It merits no mention at all in *Pope & Talbot*. It achieves a reference *en passant* in *Mox Plant* (before the OSPAR Tribunal) and *Shrimp-Turtle*. But, in both cases, the other international law rules advanced by the parties were ultimately held by the tribunal to be either inapplicable or not dispositive. In *Al-Adsani* and *Oil Platforms*, by contrast, Article 31(3)(c) assumes pivotal importance in the Courts' reasoning, and the other rules of international law referred to are ultimately decisive of the case.

A. Pope & Talbot Inc v Canada[76]

The first example concerns the potential impact of customary international law on the interpretation of a treaty. *Pope & Talbot* was an arbitration claim

[76] Above n 70.

brought by an American company, Pope & Talbot Inc, against Canada under NAFTA concerning the imposition of an export quota regime on timber producers.

One of the central issues in the case was whether Canada had breached Article 1105(1) of NAFTA, which provides:

> Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The parties differed both on: (a) the content of international law implicated by Article 1105(1); and (b) the question of whether or not the requirement to accord 'fair and equitable treatment' was additional to the ordinary protections of international law or subsumed within it. The investor contended that reference to a wide range of materials could be made in determining the content of international law for the purpose of Article 1105, and, in any event, that the requirement of 'fair and equitable treatment' was self-standing. Canada on the other hand (with the support of the United States Government) contended that the international law standard referred to in Article 1105 was a single standard and required that the conduct in question must be 'egregious'.

1. NAFTA Tribunal: Merits Phase

The Tribunal found in its award on the merits that the requirement to accord fair and equitable treatment was additional to the protection of international law afforded by the first phrase of the article, and that it did not comport any element of egregious conduct.[77] It arrived at that view by referring to obligations assumed by the contracting parties to NAFTA under other bilateral investment treaties into which they had entered. Under those treaties, the obligation of 'fair and equitable treatment' was construed as not limited by any minimum standard under customary international law. The Tribunal found that it was unlikely as a matter of the object and purpose of NAFTA that the States Party would have intended to assume lesser obligations as between themselves than they had already accorded to third states under bilateral investment treaties. Any other interpretation would mean that the NAFTA parties were failing to provide most favoured nation treatment for their respective nationals. The Tribunal went on to find that Canada had breached Article 1105 in denying to the investor the fair treatment to which it was entitled.

2. NAFTA Free Trade Commission

After the award on liability had been rendered, but before the hearing on damages, the States Parties convened a meeting of the NAFTA Free Trade

[77] Award on the merits, para 118, 55–6.

Commission.[78] This Commission adopted an Interpretation on 31 July 2001 in the following terms:

> 1 Article 1105(1) prescribes the *customary* international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. [emphasis added]
> 2 The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. NAFTA Arbitral Tribunal: Damages Phase

When the matter came back before the Arbitral Tribunal in *Pope & Talbot* at the damages stage, it was obliged to consider the meaning and effect of this interpretation. It noted, first, the addition of the word 'customary' before 'international law'. It found that the word 'customary' had been deleted from the draft text of NAFTA Article 1105 prior to the final text. The Tribunal observed:[79]

> as is made clear in Article 38 of the Statute of the ICJ, international law is a broader concept than customary international law, which is only one of its components. This difference is important. For example, Canada has argued to this Tribunal that customary international law is limited to what was required by the cases of the Neer era of the 1920's whereas international law in its entirety would bring into play a large variety of subsequent developments.

The Tribunal then held that customary international law had in any event evolved such that it now included the concept of fair and equitable treatment and that it did not require 'egregious' conduct.[80] It then proceeded to find that, even if the narrower formulation were adopted, the conduct of Canada in the case would still amount to a breach of Article 1105.

The case of *Pope & Talbot* may simply be an example of a conflict between different understandings or interpretations of general law. Although the Tribunal did not refer expressly to Article 31(3)(c), NAFTA itself contains a similar rule, enjoining the parties to interpret and apply the provisions of the Treaty in accordance with its stated objectives 'and in accordance with applicable rules of international law'.[81] The Tribunal presented the conflict as being between custom and other components of international law. But the true ques-

[78] The Free Trade Commission is, by NAFTA Art 2001(2), empowered to, inter alia, 'resolve disputes that may arise regarding [the Agreement's] interpretation or application'. Pursuant to Art 1131(2), an interpretation by the Commission of a provision of the Agreement 'shall be binding on a Tribunal'. This Interpretation may be found at: <www.worldtradelaw.net/nafta/chap11interp.pdf>.

[79] Above n 70 para 46.

[80] The Tribunal relied upon dicta of the ICJ in *Case concerning Elettronica Sicula SpA*, ICJ Rep (1989) 15 at 76.

[81] Art 102 para 2.

tion was whether there was evidence (including by reference to other investment treaties) of a shift in state practice as regards the *content* of the customary international law rule referred to in NAFTA Article 1105. That problem was not addressed by the Free Trade Commission's decision in favour of harmonization.

Subsequent NAFTA Tribunals called upon to interpret Article 1105 in the light of the Free Trade Commission's decision[82] have stressed that the customary international law standard is not to be treated as frozen in the 1920s, and that state practice in the formulation of other investment treaties may well be relevant in determining the content of the customary standard of fair and equitable treatment.[83]

B. The Mox Plant *Litigation*[84]

The second example concerns the role which reference to other *treaties* may play in the interpretation of the treaty in question. It comes from the (still pending) litigation brought by Ireland in various fora against the United Kingdom concerning the operation of the Mox nuclear reprocessing plant at Sellafield. The dispute has produced three relevant decisions:

(a) A judgment of the International Tribunal for the Law of the Sea ('ITLOS') on a request for provisional measures;
(b) An arbitration award under the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic ('OSPAR Convention') in proceedings for access to certain information concerning the operation of the Mox Plant;
(c) An order in an arbitration under the provisions of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS').[85]

Each of the tribunals considered a different aspect of the relationship between the treaty regime which it was called upon to interpret and apply, and other related regimes.

1. ITLOS

ITLOS emphasized the separate and distinct nature of each of the treaty regimes referred to. It held:[86]

[82] See esp *Mondev International Ltd v USA* (2003) 42 ILM 85; and *ADF Group Inc v USA* (award dated 9 Jan 2003 in case no ARB(AF)/00/1).
[83] *Mondev* ibid 109 para 125.
[84] For references, see above n 71.
[85] In the course of that arbitration, the European Commission lodged a complaint in the European Court of Justice ('ECJ') against Ireland, alleging that Ireland, in bringing the UNCLOS arbitration proceedings was in breach of its community obligations. Complaint no C-459/03 lodged on 30 Oct 2003.
[86] Above n 71 paras 50–2.

> even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the [Law of the Sea] Convention, the rights and obligations under those agreements have a separate existence from those under the Convention;
>
> . . . the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.

As a result of this decision, the Tribunal held that it had jurisdictional competence to order provisional measures and that Ireland was entitled to constitute an arbitral tribunal under UNCLOS, which could proceed concurrently with the proceedings before an OSPAR Tribunal for the provision of information.

2. *OSPAR Arbitral Tribunal*

In the OSPAR proceedings, there were two respects in which it was contended by Ireland that a reference to other rules of international law would affect the construction of the parties' obligations under the OSPAR Convention. First, Ireland submitted that the provision in Article 9(3)(d) of the OSPAR Convention which referred to 'applicable international regulations' entailed a reference to international law and practice. This, Ireland alleged, included the Rio Declaration[87] and the Aarhus Convention on Access to Information, Public Participation and Decision-making, and Access to Justice in Environmental Matters 2001. The United Kingdom replied that the Rio Declaration was not a treaty, and that the Aarhus Convention had not yet been ratified by either Ireland or the United Kingdom.

The Tribunal accepted that it was entitled to draw upon current international law and practice in construing this treaty obligation (and in so doing made an express reference to Article 31(3)(c)). However, it held that neither of the instruments contended for by Ireland were in fact rules of law applicable between the parties and therefore declined to apply them.[88]

One of the arbitrators, Gavan Griffith QC, dissented on this point.[89] He pointed out that the Aarhus Convention was in force, and that it had been signed by both Ireland and the UK. The latter had publicly stated its intention to ratify that Convention as soon as possible. At the least, this entitled the Tribunal to treat the Aarhus Convention as evidence of the common views of the two parties on the definition of environmental information.

[87] Declaration of the UN Conference on Environment and Development *Report of the United Nations Conference on Environment and Development,* Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales no E. 93.I.8 and Corrigenda), vol I: *Resolutions adopted by the Conference, resolution 1, annex I*. See also (1992) 31 ILM 874.

[88] Above n 71, paras 93–105, 1137–8.

[89] Ibid 1161–5.

Secondly, the United Kingdom had submitted that its only obligation under the OSPAR Convention had been discharged by the application in the United Kingdom of European Directive 90/313. The Tribunal held that both regimes could co-exist, even if they were enforcing identical legal obligations.[90] It observed:[91]

> The primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.

Curiously, the Tribunal did not refer to another of the Convention's provisions, which enjoined it in rather broader terms to decide 'according to the rules of international law, and, in particular, those of the Convention'.[92]

3. UNCLOS Arbitral Tribunal

When the substantive claim came before an UNCLOS arbitral tribunal, one of the objections raised by the United Kingdom to the jurisdiction of the Tribunal was that Ireland's claims were founded upon other international law instruments. The Tribunal held that there was a cardinal distinction between jurisdiction and applicable law. The limits on its jurisdiction meant that, to the extent that any aspects of Ireland's claims arose under legal instruments other than UNCLOS, such claims would be inadmissible.[93] It left open the possibility, however, that, in applying UNCLOS, it might have regard to other legal obligations between the parties in determining the content of the applicable law.

In summary, the principal issue raised by the *Mox Plant* litigation with reference to the present topic related to the interrelationship between different treaty regimes relating to the protection of the environment and the control of nuclear shipments. *ITLOS*, in underlining the distinct nature of the UNCLOS treaty regime for the purpose of maintaining parallel jurisdiction, emphasized that even identical terms used in different treaties might well have a different meaning in the light of their objects and purpose. The UNCLOS Tribunal accepted that reference to other treaties might be permissible for the purpose of interpretation, but drew a clear distinction between that and the foundation of a claim for jurisdictional purposes. The OSPAR Tribunal (which had the opportunity to consider the matter in the greatest detail) accepted the scope for reference to other rules of international law in interpretation of the OSPAR Convention. But it emphasised a clear distinction between rules of interna-

[90] The President of the Tribunal, Professor Michael Reisman, dissented on this issue: ibid 1157–60.

[91] Ibid 1144 para 143.

[92] Art 32(5)(a), referred to in Dr Griffith's dissent 1161, para 2(1) ; and see: Churchill and Scott 'The Mox Plant Litigation: the First Half-Life' (2004)53 ICLQ 643 at 670.

[93] Above n 71 paras 18–19, 1189–90.

tional law which were already in force between the parties, and evolving standards and principles which might not yet have crystallized into law applicable to the parties.

C. Shrimp-Turtle *and* Beef Hormones *in the WTO DSU*

Several decisions of the Appellate Body of the WTO have considered the application of principles of international environmental law in the interpretation of the WTO Covered Agreements. The WTO Dispute Settlement Understanding specifically requires interpretation 'in accordance with customary rules of interpretation of public international law'.[94] These cases illustrate the use of developing principles of international law in the interpretation of open-textured treaty provisions.

Thus, for example, Article XX of the General Agreement on Tariff and Trade 1947 (GATT) provides, inter alia:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> . . .
> (b) necessary to protect human, animal or plant life or health.
> . . .
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

These terms are general and open-textured. Reference to the treaty language alone does not provide any ready means of determining whether a particular measure is or is not 'necessary to protect . . . animal or plant life', or 'relating to the conservation of exhaustible natural resources'.

In *Shrimp-Turtle*[95] the measure under consideration was a United States ban on the importation of a commercial seafood, shrimp, in order to protect against the incidental killing of another species, sea turtles. In its decision, the Appellate Body made extensive reference to international environmental law texts. It found that the terms 'natural resources' and 'exhaustible' in paragraph (g) of Article XX were 'by definition evolutionary'.[96] It therefore referred to

[94] Art 3(2) Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Marrakesh Agreement establishing the World Trade Organization ('DSU'), reproduced in World Trade Organization *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (CUP Cambridge 1999) 354, 355.

[95] WTO *United States: Import Prohibition of certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 Oct 1998) WT/DS58/AB/R; (1999) 38 ILM 118.

[96] Ibid, para 130 citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (*Advisory Opinion*) ICJ Rep (1971) 31.

Article 56 of the UNCLOS in support of the proposition that natural resources could include both living and non-living resources.[97] The Tribunal also referred in support of this construction to Agenda 21[98] and to the resolution on assistance of developing countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.[99] In deciding the question whether sea-turtles were 'exhaustible', the Appellate Body referred to the fact that all of the seven recognised species of sea-turtles were listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES').

However, ultimately, the Appellate Body still found that the United States had infringed the GATT by failing to negotiate with complainant states on its ban, and thus proceeding with the unilateral measure which was in effect discriminatory. In so doing, it emphasized that the chapeau of Article XX was 'but one expression of the principle of good faith', which it found to be a general principle of international law.[100] 'Our task here', said the Tribunal expressly relying on Article 31(3)(c), 'is to interpret the language of the chapeau, seeking interpretative guidance, as appropriate, from the general principles of international law'.[101]

A similar issue has arisen in the construction of the Sanitary and Phyto-sanitary Agreement ('SPS Agreement').[102] In its decision in *Beef Hormones*,[103] the Appellate Body considered the impact of a European Union directive banning the import of hormone-fed beef. The European Union had relied for the validity of the directive on the precautionary principle, which it contended had become a general rule of customary international law. The issue raised for the Appellate Body was the consistency of that principle with Articles 5.1 and 5.2 of the SPS Agreement which specifically required a risk assessment conducted on the basis of scientific evidence. The Appellate Body found that the status of the precautionary principle as a rule of customary international law was still a matter of debate.[104] It went on to find that, although the principle could not override specific obligations under the SPS Agreement, it did indeed find reflection in some of those obligations. It held:[105]

> [A] panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS

[97] The Tribunal noted that the Complainant States had ratified UNCLOS. The United States had not done so, but had accepted during the course of the hearing that the fisheries law provisions of UNCLOS for the most part reflected international customary law.

[98] Adopted by the United Nations Conference on Environment and Development, 14 June 1992 *Report of the United Nations Conference on Environment and Development,* Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales no. E. 93.I.8 and Corrigenda).

[99] Final Act, Bonn, 23 June 1979, (1980) 19 ILM15.

[100] Above n 95, para 158.

[101] Ibid.

[102] Agreement on the Application of Sanitary and Phyto-sanitary Measures, reproduced in op cit n 94, 59–72.

[103] WTO *EC measures concerning meat and meat products (hormones)—Report of the Appellate Body* (16 Jan 1998) WT/DS-26/AB/R.

[104] Ibid para 123.

[105] Ibid para 124.

> measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, eg life-terminating, damage to human health are concerned.

However, the Tribunal concluded that:[106]

> the precautionary principle does not, by itself, and without a clear textual directive to that effective, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement.
>
> 125. We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Article 5.1 and 5.2 of the SPS Agreement.

The decisions of the Appellate Body on this issue are now the subject of a growing scholarly literature.[107] The Appellate Body has emphasised from the outset of its work that the requirement in Article 3(2) of the DSU that panels apply 'customary rules of interpretation of public international law' requires a rigorous application of the code of interpretation set out in Article 31 of the Vienna Convention to the issues before it. It has not hesitated to reverse panel decisions on the ground that they have failed to follow Article 31's interpretative approach.[108] The Appellate Body has only once mentioned Article 31(3)(c), and then in a footnote.[109] However, it has made extensive reference to other rules of international law in carrying out its interpretative function. Nevertheless, the decisions to date of the Appellate Body also show the limitations of the interpretative method as a means of integrating specific treaty obligations into the fabric of general international law. In both of the decisions just considered, the Appellate Body in the end found that the express obligations assumed by the parties under the Covered Agreements of the WTO overrode the principles of international environmental law whose application was sought.

D. Al-Adsani*: State Immunity and the Right to a Fair Trial*

In a trio of landmark decisions all handed down on 21 November 2001, the European Court of Human Rights utilized Article 31(3)(c) in order to decide whether a plea of State immunity constituted a disproportionate restriction on

[106] Ibid paras 124 and 125.

[107] See, eg, Pauwelyn 'The Role of Public International Law in the WTO: How Far Can We Go?' 95 AJIL (2001) 535; Marceau 'WTO Settlement and Human Rights' 13 EJIL (2002)753; Sands above n 3; Lowenfeld *International Economic Law* (OUP Oxford 2002) 314–39; and Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003).

[108] WTO *United States—Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body* (29 Apr 1996) WT/DS2/AB/R.

[109] Above n 95 para 158 n 157. The clause is also referred to by a WTO Panel in *United States—Section 110(5) of US Copyright Act*—World Trade Organisation Panel Report (15 June 2000) WT/DS160/R, para 6.5.5.

the right of access to court in civil claims protected by Article 6(1) of the European Convention.[110] In each case, the Court decided by majority that the plea did not offend the Convention:

(a) In *Al-Adsani*, the plea of state immunity was raised to bar a civil claim of torture against Kuwait in the English court. The ECHR was split 9 : 8;
(b) In *Fogarty*, the plea of state immunity was raised against a civil claim of sex discrimination in employment in the United States Embassy in London. The Court decided the case on a 14 : 1 majority;
(c) In *McElhinney*, state immunity was pleaded by the United Kingdom in the Irish court in a tort claim arising out of the actions of the British army on Irish soil. The case was decided on a 12 : 5 majority.

In each of these cases, the Court held that the right of access to the courts enshrined in Article 6 was not absolute. It could properly be subject to restrictions, provided that they pursued a legitimate aim and were proportionate to that aim. In making that assessment, the Court held that it should interpret Article 6 in accordance with the Vienna Convention, including Article 31(3)(c). It reasoned (in terms which are identical in each of the three judgments:[111]

> the Convention has to be interpreted in the light of the rules set out in the Vienna Convention . . . and . . . Article 31(3)(c). . . indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account . . . The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity.
>
> It follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).

These ECHR cases, present a more difficult scenario of potential conflict between the international law on State immunity and the protections enshrined in the European Convention. The Court referred to the law on sovereign immunity, not so much to resolve the meaning of a disputed term within the Convention, but rather to ascertain the foundation for a conflicting rule of international law. It then used Article 31(3)(c) as a basis for enabling it to give weight

[110] *Al-Adsani v United Kingdom* Application no 35763/97 123 ILR 24 (2001); *Fogarty v United Kingdom* Application no 37112/97) 123 ILR 54 (2001); and *McElhinney v Ireland* Application no 31253/96 123 ILR 73 (2001). The ECtHR also referred to Article 31(3)(c) in *Bantovíc v Belgium* 123 ILR 94 (2001) at 108 para 57. For a critique of the Court's approach, see Orakhelaskvili (2003) 14 EJIL 529.

[111] *Al-Adsani* ibid 40, paras 55–6; see also: *Fogarty* ibid 65, paras 35–6; *McElhinney* ibid 85, paras 36–7.

to the rule on State immunity in determining whether it was a 'disproportionate measure' curtailing the right to access of justice in Article 6 of the Convention.

Those judges of the Court who dissented did not do so on the basis that international law should be excluded from consideration in the construction of Article 6. Rather, they found that the rule of State immunity should, as a matter of international law, cede precedence to a peremptory rule of international law (*jus cogens*) prohibiting torture;[112] or admit of an exception for torts committed on the territory of the state.[113]

E. International Court of Justice: Oil Platforms

The most recent, and very significant, utilization of Article (31)(3)(c) has been by the International Court of Justice in *Case concerning Oil Platforms (Iran v United States)*.[114] In that case, the Court was called upon to interpret two provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. It was requested to determine whether actions by Iran which were alleged to imperil neutral commercial shipping in the Iran–Iraq war, and the subsequent destruction by the United States Navy of three Iranian oil platforms in the Persian Gulf, were breaches of the Treaty. The Court's jurisdiction was limited to disputes arising as to the interpretation or application of the Treaty.[115] It had no other basis for jurisdiction which might have provided an independent ground for the application of customary international law.[116]

One of the operative provisions of the Treaty provided that:[117]

> The present Treaty shall not preclude the application of measures:
> . . . (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

The United States had argued[118] that the effect of this provision was simply to exclude from the scope of the treaty all such measures, and that the provision could and should be interpreted in accordance with its ordinary meaning, leaving a wide margin of appreciation for each state to determine its essential security interests. It submitted that there was no place to read into the treaty rules derived from the customary international law on the use of force (as Iran had argued), and that to do so would violate the limits on the Court's jurisdiction.

[112] Ibid *Al-Adsani* 49–51, Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajic.
[113] Ibid *McElhinney* 88, Dissenting Opinion of Judges Caflisch, Cabral Barreto, and Vajic.
[114] Op cit n 1.
[115] Art XXI para 2.
[116] Cf the position in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Rep (1986) 14, in which the Court was asked to interpret very similar treaty language, but also had an additional basis for its jurisdiction as a result of unilateral declarations made by both parties under Art 36, para 2 of its Statute.
[117] Art XX para 1(d).
[118] Rejoinder of the United States, 23 Mar 2001, Part IV 139–40.

The Court approached the question of interpretation rather differently. It asked first whether such necessary measures could include a use of armed force, and, if so, whether the conditions under which such force could be used under international law (including any conditions of legitimate self-defence) applied.[119] Having referred to other aids to interpretation, the Court then reasoned:[120]

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3(c)). The Court 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 on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by . . . the 1955 Treaty.

The Court then proceeded to apply those general rules of international law to the conduct of the United States. It concluded that the measures could not be justified as necessary under the Treaty 'since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty'.[121]

Although the Court's judgment on the merits was supported by a large majority of the judges, a wide range of different views on the question of the proper approach to interpretation were expressed in their Separate Opinions:[122]

(a) Judge *Buergenthal* took the narrowest view on Article 31(3)(c).[123] He emphasised that the Court's jurisdiction was limited to only those matters which the parties had agreed to entrust to it, and opined that this also limited the extent to which the Court could refer to other sources of law in interpreting the treaty before it. In his view, this limitation excluded reliance on other rules of international law, whether customary or conventional, and even if found in the UN Charter;[124]

(b) Judge *Simma* (who, prior to his appointment to the Court, had been the first Chairman of the ILC Study Group on Fragmentation) considered that the Court should have taken the opportunity to declare the customary

[119] Op cit n 1 para 40 1352.
[120] Ibid para 41 1352
[121] Ibid para 78 1362.
[122] The Court entered judgment by 14 votes to 2 declining to uphold Iran's claim (Judges Al-Khasawneh and Elaraby dissenting) and by 15 votes to 1 declining to uphold the United States' counterclaim (Judge Simma dissenting).
[123] Ibid 1409–13 paras 20–32.
[124] Ibid 1410 paras 22–3.

international law on the use of force, and the importance of the Charter even more firmly than it had.[125] He accepted that, given the jurisdictional constraints on the Court, this might have had to be done by *obiter dicta*.[126] Nevertheless, he upheld the role which the Court accorded to Article 31(3)(c), as allowing it to refer to both other treaty law applicable between the parties, and the rules of general international law surrounding the treaty.[127] He considered that: 'If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of treaty interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.'[128] But he also conceded that the scope of measures which might permissibly be taken to protect the essential security interests of a party may be wider than measures taken in self-defence;[129]

(c) Judge *Higgins* was, by contrast, much more critical of the Court's use of Article 31(3)(c).[130] She pointed to the need to interpret Article XX para 1(d) in accordance with the ordinary meaning of its terms and in its context, as part of an economic treaty. She considered that the provision was not one 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'.[131] She concludes: 'The Court has, however, not interpreted Article XX, paragraph 1(d), by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law.'[132]

(d) Judge *Kooijmans*, although he does not mention Article 31(3)(c) in terms, develops the most nuanced analysis of the role of general international law in the interpretation of Article XX para 1(d).[133] He characterises the Court's approach as 'putting the cart before the horse',[134] since it does not begin with a proper analysis of the text of the treaty itself. But he accepts that, in order to determine whether a particular measure involving the use of force is 'necessary', the Court has 'no choice but to rely for this purpose on the body of general international law'.[135] So the right approach is to accept that the Court has no jurisdiction to rule on whether the acts complained of can be justified as acts of legitimate self-defence; and to assess the necessity of a particular measure first by reference to whether there was a reasonable threat to a party's security interests justifying protective measures. If those measures included the use of force, the assessment of the legality of those measures would be assessed against the presumptions of general international law.[136]

[125] Ibid 1430–4 paras 5–16.
[126] Ibid 1431 para 6.
[127] Ibid 1432 para 9.
[128] Ibid.
[129] Ibid para 10.
[130] Ibid 1386–8 paras 40–54.
[131] Ibid 1387 para 46.
[132] Ibid 1387 para 49.
[133] Ibid 1396–1402 paras 21–52.
[134] Ibid 1400 para 42.
[135] Ibid 1401 para 48.
[136] Ibid 1402 para 52.

The judgment of the ICJ in *Oil Platforms* represents a bold application of Article 31(3)(c) to a treaty which significantly pre-dates the VCLT. The Court does so in order to import wholesale into its treaty analysis a substantial body of general international law, including the UN Charter, in a field of the utmost importance, namely the use of force. The conduct of the state in question was then assessed by reference to the position under general international law, which in turn was applied to assess its position under the Treaty. The Court for the first time acknowledged the pivotal role of Article 31(3)(c) in this process, but did not give further guidance as to when and how it should be applied. This is regrettable, in view of the apparent disjunction in the court's reasoning, highlighted in the separate opinions, between the language of the treaty and the extensive excursus into customary international law.

The approach advocated by Judge Buergenthal is surely too narrow in that it conflates jurisdiction with choice of law, and would cut off the process of treaty interpretation from its essential hinterland. But it has to be said that the apparent leap taken by the court in its analysis invites such criticism. Surely the better approach is that advocated by Judge Kooijmans, by means of which the scope of the reference to custom could have been more firmly anchored to the treaty language. It should not be forgotten that the facts of the case located the matter as one where the 'measures . . . necessary to protect [the party's] essential security interests' involved the use of force. It is contrary to commonsense to suggest that parties to a treaty of amity concluded between two members of the United Nations after the adoption of the UN Charter can have intended to contemplate the use of force between each other of a kind outlawed by the Charter and by customary international law. The Court may well have found itself placing undue weight on a principle of interpretation to make this point, in view of the jurisdictional constraints under which it was working. But, as Judge Simma reminds us, the rules of custom and Charter with which the Court was concerned were in any event of a peremptory character, and so their impact could not properly be ignored.

IV. A PROCESS FOR THE APPLICATION OF SYSTEMIC INTEGRATION

The cases surveyed in Part III are plainly not the last word on the potential for the application of Article 31(3)(c). On the contrary, now that the genie is out of the bottle, it is likely that many more tribunals will pray its terms in aid in hard interpretation cases. However, the five case studies do provide a good range of generic types of problems encountered in the application of the principle of systemic integration. Taken together with the background factors sketched in Part I, and the analysis of Article 31 in Part II, they provide a platform upon which to advance some general observations about the approach which the interpreter of a treaty may wish to adopt in looking at general international law.

It is important to be clear about the nature and purpose of such a restatement of principles. Interpretation is, as has been earlier suggested, a process of legal reasoning. In that process, particular 'rules' of interpretation will have greater or lesser relevance, and indicate particular consequences, depending on the nature of the interpretation problem and the selection and deployment of a particular principle. It follows that the value of any elaboration of an approach under Article 31(3)(c) (or beyond it) should be judged by reference to its utility in elucidating and guiding, by way of an organised set of factors, the necessary elements in the process of interpretation.

The particular set of problems with which Article 31(3)(c) is concerned relates to the consideration of material sources external to the treaty (itself a legal text). It is thus concerned with the relationship of the general to the particular. The problem is therefore one of the *weight* to be attached to particular external material sources in the interpretation process. It is not (for the most part) a matter of constructing artificial exclusionary rules.

Nevertheless, the cases show that the problems posed by apparently conflicting norms in international law continue to present tribunals with difficult choices. In making those choices, tribunals have been actively engaged in the construction of a framework of principle within which to operate. Article 31(3)(c) in its unadorned form has been criticised as failing to provide the necessary guidance within that framework.

So it is that we must return to the three overall tasks in the 'operationalizing' of Article 31(3)(c) which were adopted at the outset, namely: the relevance of custom and general principles of law in the treaty interpretation process; the scope for references to other applicable conventional international law in this process; and the problems arising from the changing face of international law over time. It is possible to advance the relevant points as a series of numbered propositions derived from what has gone before.

A. The Role of Custom and General Principles

1. Properly conceived, customary international law and the general principles of law form two of a set of progressive concentric circles, each one constituting a field of reference of potential assistance in treaty interpretation. As Max Huber illuminatingly put it:[137]

> Il faut donc chercher la volonté des parties dans le texte conventionnel, d'abord dans les clauses relatives à la contestation, ensuite dans l'ensemble de la convention, ensuite dans le droit international général, et enfin dans les principes généraux de droit reconnus par les nations civilisées. C'est par cet encirclement concentrique que le juge arrivera dans beaucoup de cas à établir la volonté

[137] *Annuaire* (1952-I) 200–1. For a similar analysis as applied to statutory interpretation in domestic law see: Glazebrook 'Filling the gaps' in Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis Wellington 2004) 153.

> presumptive des parties 'conformément aux exigencies fondamentales de la plenitude du droit et de la justice internationale'. Ainsi que le rapporteur formule admirablement la tâche du juge.

2. Thus, it is always essential to keep in mind that Article 31(3)(c) is only part of a larger interpretation process, in which the interpreter must first consider the plain meaning of the words in their context and in the light of the object and purpose of the provision. It was for this reason, for example, that the WTO Appellate Body ultimately decided that it had to give primacy to the treaty provisions in *Shrimp-Turtle* and *Beef Hormones*. As ITLOS reminded us in *Mox Plant*, the considerations of context and object may well lead to the same term having a different meaning and application in different treaties.

3. Nevertheless, the inherently limited subject matter scope of a treaty, and the fact of its character as a creature of international law, have the consequence that international law will have a pervasive impact on treaty interpretation. This is not uncommonly recognized expressly in modern treaties (eg WTO DSU Article 3.2; NAFTA Article 102, para 2; OSPAR, Article 32(6)(a)). The Rome Statute for the International Criminal Court establishes a progressive hierarchy of norms to be applied by the Court, radiating out from the Rome Statute itself, and including both 'principles and rules of international law' and general principles of law.[138]

4. But, even when it is not made express, the principle of systemic integration will apply, and may be articulated as a presumption with both positive and negative aspects:

(a) *negatively* that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognised principles of international law or with previous treaty obligations towards third states;[139] and,
(b) *positively* that the parties are to taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way': *Georges Pinson*.

5. In applying this principle, there is an especially significant role for customary international law and general principles of law. As a WTO Panel recently put it:[140]

> the relationship of the WTO Agreements to customary international law is broader than [the reference in Article 3.2 re: customary rules of interpretation].

[138] Rome Statute of the International Criminal Court, Article 21; as to which see: Pellet 'Applicable Law' in Cassese et al *The Rome Statute of the International Criminal Court: A Commentary* (OUP Oxford 2002) 1051.

[139] *Rights of Passage over Indian Territory (Preliminary Objections) (Portugal v India) Case ICJ Rep* (1957) 142; Jennings and Watts (eds) *Oppenheim's International Law* (9th edn, Longman London 1992) 1275.

[140] *Korea—Measures affecting Government Procurement* (1 May 2000, WT 1DS163/R) 183, para 7.96

> Customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

Thus most of the cases considered in this article have involved the assertion and application of principles of customary international law (in the Iran–US Claims Tribunal cases, before the ECHR, in the emphasis on customary international law by the NAFTA Free Trade Commission, and by the ICJ in *Oil Platforms*).

6. This has been typically done in one of three situations:

(a) The treaty rule is unclear and the ambiguity is resolved by reference to a developed body of international law (as in the issue of double nationality dealt with by the Iran-US Claims Tribunal in *Esphahanian v Bank Tejarat)*;
(b) The terms used in the treaty have a well-recognised meaning in customary international law, to which the parties can therefore be taken to have intended to refer. This is the case, for example, in the construction of the terms 'fair and equitable treatment' and 'full protection and security', discussed in *Pope & Talbot Inc v Canada*; or
(c) 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. This was the position in the construction of Article XX of the GATT discussed in *Shrimp-Turtle* and *Beef Hormones*, and may well have also been considered by the ICJ to be the position in *Oil Platforms*.

7. There are two different levels at which reference to broader principles of customary international law may be necessary:

(a) within a particular part of international law (as was the case, for example in the references to custom in the foreign investment cases: *Pope & Talbot, Mondev, Esphahanian*; and in relation to environmental protection instruments in *Mox Plant*);
(b) when the court must look beyond the particular sub-system to rules developed in another part of customary international law (as in *Al-Adsani* and *Oil Platforms*).

8. In the latter case, the court is engaged in a larger process of fitting the treaty obligation into its proper place within the larger normative order. But, even in this situation, it is still essential, as Judge Kooijmans rightly reminded us in *Oil Platforms*, to relate the other norm to the treaty obligation in question.

9. The importance of the rules of customary international law and general principles of law in this process is not because of their overriding character, since international law reserves for overriding customary rules the special category of *jus cogens*. Otherwise, it must be accepted that a treaty can of course derogate from custom, provided that it does so expressly.[141] Moreover, treaties can and do expressly develop the law progressively beyond the solutions arrived at by custom. An approach which, in the name of integration, gave excessive weight to pre-existing law would potentially stifle one of the main functions of treaty-making, namely to achieve by convention further or different obligations than those which already exist.

10. Rather, the significance of such rules is that they perform a systemic or constitutional function in describing the operation of the international legal order. Examples include: the criteria of statehood (*Loizidou*); the law of state responsibility (which has influenced both the reach of human rights obligations[142] and the law of economic counter-measures in the WTO DSU);[143] the law of state immunity; the use of force; and the principle of good faith (*Shrimp-Turtle*).

11. Although the general principles of law recognized by civilized nations may well constitute, as Huber suggested, a further concentric circle, they, too, perform a similar task in locating the treaty provision within a principled framework (as was done in determining the scope of the fair trial right in *Golder*). In that regard, it should not be forgotten that Article 31 (3)(c)'s reference to 'rules of international law' comports a reference to the international legal system as a whole, many of whose rules are necessarily expressed at a high level of generality.

12. This part of the interpretation process may on occasion involve extensive investigation of sources outside the treaty in order to determine the content of the applicable rule of custom or general principle (as in *Al-Adsani* and *Oil Platforms*). Determining that content may be the subject of contention and disagreement. But this should not occasion surprise or concern. It is an unavoidable part of any 'common law' element in a legal system, even where that element is included as part of a process of treaty interpretation.

B. Other Applicable Conventional International Law

13. The second general problem, which was not resolved in the formulation of Article 31(3)(c), is the test to be applied to determine in what circumstances another rule of *conventional* international law is applicable in the relations between the parties. The problem is this: is it necessary that all the parties to

[141] See, eg, the importance of the rule requiring waivers of state immunity by treaty to be express: *Oppenheim* above n 139 351, and *Argentine Republic v Amerada Hess Shipping Corp* 109 S Ct 683 (1989).

[142] See, eg, *Loizidou v Turkey* (Preliminary Objections), ECHR, series A [1995] no 310 and *Issa v Turkey* (Application no 31831/96, 16 November 2004). See also the reliance on the public international law rules of jurisdiction in *Bankovíc* op cit n 110 paras 59–60 109.

[143] See Pauwelyn above n 6 at 271.

the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes?

14. The problem is particularly acute where the treaty under interpretation is a multi-lateral treaty of very general acceptation (such as the WTO Covered Agreements). In such a case, it is inherently unlikely that there will be a precise congruence in the identity of the parties to the two treaties. If complete identity of parties were required before the other treaty could be regarded as being 'applicable in the relations between the parties', it would have the ironic effect that the more membership of a particular multilateral treaty such as the WTO Covered Agreements expanded, the more those treaties would be cut off from the rest of international law.[144]

15. There are four possible solutions to this problem:

(a) Require that all parties to the treaty under interpretation also be parties to any treaties relied upon.[145] This is a clear but very narrow standard.
(b) Permit reference to another treaty provided that the treaty parties in *dispute* are also parties to the other treaty. This approach would significantly broaden the range of treaties potentially applicable for interpretation purposes. But it would run the risk of potentially inconsistent interpretation decisions dependent upon the happenstance of the particular treaty partners in dispute.
(c) A third option would be to require a finding that, insofar as the treaty were not in force between all members to the treaty under interpretation, the rule contained in it was treated as being a rule of customary international law.[146] This approach has the merit of doctrinal rigour. It would revert the analysis to section A above. But it could have an inappropriately restrictive effect in two situations:
    (i) It could preclude reference to treaties which have very wide acceptance in the international community (including by the disputing states) but which are nevertheless not universally ratified and which are not accepted in all respects as stating customary international law (such as UNCLOS);
    (ii) It could also preclude reference to treaties which represent the most important elaboration of the content of international law on a specialist subject matter, on the basis that they have not been ratified by all the parties to the treaty under interpretation.
(d) Establish an intermediate test which does not require complete identity of treaty parties, but does require that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty

[144] Marceau above n 107 at 781.
[145] This was the approach adopted by the GATT panel in *United States—Restrictions on Imports of Tuna*, 16 June 1994, and adopted DS29/R para 5.19.
[146] See, eg, the emphasis placed in *Shrimp-Turtle* on the fact that, although the United States had not ratified UNCLOS, it had accepted during the course of argument that the relevant provisions for the most part reflected international customary law (above n 95 para 51).

under interpretation 'in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned'.[147] This approach has in fact been adopted in some of the decisions of the WTO Appellate Body.[148]

16. It is submitted that the requirement of Article 31(3)(c) of 'rules of international law applicable in the relations between the parties' is properly consistent only with options (a) and (c), in the sense that 'parties' must be read as referring to all the parties to the treaty, so that any interpretation of the treaty's provisions imposes consistent obligations on all the parties to it. Article 2 of the Convention defines 'party' as 'a state which has consented to be bound by the treaty and for which the treaty is in force', and Article 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.

17. However, this position must be qualified in two respects:

(a) if on its proper construction, a particular obligation in the treaty is owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes* (even if contained within a multilateral treaty), then the *application* of that obligation as between the relevant pair of parties (as opposed to its interpretation generally) may properly be considered in the light of other obligations applying bilaterally between those parties only;[149]

(b) in any event, as Griffith pointed out in his dissent in *Mox Plant*,[150] reference may properly be made to other treaties, even if they are not in force between the litigating parties, as evidence of the common understanding of the parties as to the meaning of the term used. This may be done pursuant to the overall requirement of Article 31(1) to consider the object and purpose of the treaty. Further, Article 31(4) permits a special meaning to be ascribed to a term, if it is established that the parties so intended. In many cases, this type of purposive enquiry will provide a better explanation for decisions referring to other treaties within the WTO DSU than Article 31(3)(c) itself. The open-textured language of exclusions in the Covered Agreements themselves calls for a programmatic interpretation which may properly take account of other material sources of international law. In doing so, the tribunal is using other treaties not so much as sources of binding law, but as a rather elaborate law dictionary.

[147] Pauwelyn above n 6, 257—63 supports this approach in the case of the WTO Covered Agreements.

[148] See, eg, the sources relied upon by the Appellate Body in *Shrimp-Turtle*, above n 95 para 51.

[149] For a recent exploration of this idea in the context of the WTO Covered Agreements, see Pauwelyn, above n 6, ch 8 440–86 and Pauwelyn 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907.

[150] See the text above at n 87.

C. Intertemporality

18. The third general issue is the question of what to do about the problem of intertemporality as it applies to treaties. When reference is to be made to other rules of international law in the interpretation of a treaty, is the interpreter limited to international law applicable at the time the treaty was framed? Or may the interpreter also refer on occasion to subsequent developments?

19. In considering this issue, it is necessary to distinguish between two different effects which subsequent developments in international law may have on a treaty:

(a) they may affect its *application*, since the treaty may have to be applied to a situation created by norms which were not in existence at the time it was concluded. This has been described as the process of *actualization* or *contemporization*;[151] or,
(b) they may affect the *interpretation* of the treaty itself, where the concepts in the treaty are themselves 'not static but evolutionary'.[152]

20. As has been seen, one of the main reasons that Waldock included the first precursor to Article 31(3)(c) in his draft of the Vienna Convention was to entrench a principle of contemporaneity: that treaties were to be interpreted in accordance with the law applicable at the time at which they were concluded. However, Waldock's proposals did not find favour with the Commission, which decided that a strict principle of contemporaneity would be unduly restrictive. Article 31(3)(c) therefore omits any key to the problem of intertemporality. Yet, of course, as Judge Weeramantry (amongst others) has pointed out, without any guidance on inter-temporality, the provision has limited utility.

21. When Thirlway returned to examine the jurisprudence of the International Court of Justice in the light of Fitzmaurice's principles of interpretation in 1991, he suggested that the principle of contemporaneity should, on the authority of the Court's jurisprudence, be qualified by a proviso in the following terms:

> Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention.[153]

[151] OSPAR Tribunal Arbitral Award in *Mox Plant*, above n 71 para 103 1138. Waldock anticipated this point in his initial draft formulation of Art 56 of the VCLT: see text above at n 59. This phenomenon is well developed in the case of domestic statutory interpretation by Bradley, above n 36.

[152] *Oppenheim* above n 139 1282.

[153] Thirlway, above n 14 at 57. See also: Thirlway 'The Law and Procedure of the International Court of Justice 1960–1989 (Part two), (1989) 60 BYIL 1 at 135–43 and Rosalyn Higgins 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501, 515–19.

22. In essence, this was the point which had been made in the discussions in the Commission by Jiménez de Aréchaga in 1964. He put the matter thus:[154]

> The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concept that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belong. The free operation of the will of the parties should not be prevented by crystallising every concept as it had been at the time when the treaty was drawn up.

23. However, consistent with the overall approach adopted by the Vienna Convention, it is submitted that a safe guide to decision on this issue will not be found in the chimera of the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties' intentions in this regard in the material sources referred to in Articles 31–2, namely: in the terms themselves; the object and purpose of the treaty; the rules of international law; and, where necessary, in the *travaux*. The International Court of Justice has, on several occasions, accepted that this process may be permissible where the parties insert provisions into their treaty which *by their terms or nature* contemplate evolution.[155] This was done most recently in the *Gabčikovo-Nagymaros* judgment.[156]

24. The enquiry is thus into whether the concept is, in the context in which it is used, a mobile one. Examples of when this may be so include:

(a) use of a term which carries with it an evolving meaning in general international law, and where the parties by their language intend to key into that evolving meaning in the process of conferring specific rights and duties upon each other, without adopting their own idiosyncratic definition (such as in the use of 'expropriation' or 'fair and equitable treatment' in bilateral investment treaties);
(b) the use of language in the treaty, especially as regards its object and purpose, by which the parties commit themselves to a programme of progressive development (which was the case in *Gabčikovo-Nagymaros*);
(c) the description of obligations in very general terms, which must take account of changing circumstances. Thus, the general exceptions in the GATT Article XX, discussed in *Shrimp-Turtle*, in permitting measures

[154] *Yearbook* (1964) vol I 34 para 10.
[155] See, eg, *Namibia (Legal Consequences)* Advisory Opinion, ICJ Rep (1971) 31; *Aegean Sea Continental Shelf Case (Greece v Turkey)* ICJ Rep (1978), 3.
[156] *Case concerning the Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) ICJ Rep (1997), 7 at 76–80; See also Separate Opinion of Judge Weeramantry, ibid 113–15.

> 'necessary to protect human, animal or plant life or health' or 'relating to the conservation of exhaustible natural resources', must inherently adjust their application according to the situation as it develops over time. The measures necessary to protect shrimp may evolve depending upon the extent to which the survival of the shrimp population is threatened. Thus, the broad meaning of Article XX may remain the same. But its actual content will change over time (as the words indicated must have been intended). In that context, reference to other rules of international law, such as multilateral environment treaties, becomes a form of secondary evidence supporting the scientific enquiry which the ordinary meaning of the words, and their object and purpose, invites.

In the final analysis, then, to what extent may the principle of systemic integration, recognised and given voice through Article 31(3)(c), be said to reduce fragmentation? Contrary to the perception which seems to be developing in some quarters, the principle is certainly not a universal panacea. Indeed, it is not equipped on its own to resolve true conflicts of norms in international law. No principle which relies on techniques of interpretation alone can do that.[157] The principle of systemic integration must take its place alongside a wider set of techniques which resolve such conflicts by choosing between two rival norms.[158]

But systemic integration nevertheless offers a prospect which may in the long term have deeper significance in the promotion of coherence within and among the 'impressive federation of special areas'[159] which make up the modern international legal system. As Judges Higgins, Buergenthal and Kooijmans recently wisely observed, in considering the balance to be struck between the conflicting dictates of state immunity and liability for international crimes:[160]

> International law seeks the accommodation of this value [the preservation of unwarranted outside interference in the domestic affairs of states] with the fight against impunity, and not the triumph of one norm over another.

The principle of systemic integration in treaty interpretation operates before an irreconcilable conflict of norms has arisen. Indeed, it seeks to avert apparent conflicts of norms, and to achieve instead, through interpretation, the harmonisation of rules of international law. In this way, the principle furnishes

[157] A point made by Pauwelyn, above n 6 at 272.

[158] These include the other rules being discussed by the ILC Study Group on the Fragmentation of International Law, discussed in the text above at nn 32–5.

[159] Brownlie (2001), above n 28 at 14.

[160] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (International Court of Justice, General List no 121, 14 Feb 2002), Joint Separate Opinion, para 79, (2002) 41 ILM 536 590.

the interpreter with a master key which enables him, working at a very practical level, to contribute to the broader task of finding an appropriate accommodation between conflicting values and interests in international society, which may be said to be the fundamental task of international law today.[161]

[161] These broader ideas are developed by the author in: 'After Baghdad: Conflict or Coherence in International Law?' (2003) 1 NZJPIL 25.