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Understanding What the Vienna Convention Says About Identifying and Using 'Sources for Treaty Interpretation'

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Part IV The Regimes of the Sources of International Law, s.XXIV Sources of International Trade Law, Ch. 48 Sources of International Trade Law: Understanding What the Vienna Convention Says About Identifying and Using ‘Sources For Treaty Interpretation’

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(p. 1047) Chapter 48 Sources of International Trade Law

Understanding What the Vienna Convention Says About Identifying and Using ‘Sources For Treaty Interpretation’

I. Introduction

International trade law is overwhelmingly treaty-based. In the traditional sense of ‘sources of law’, the World Trade Organization (WTO) treaty is the unique source of WTO law, for practical purposes. Customary law and general principles play (p. 1048) virtually no role as independent sources of substantive law.¹ But the WTO treaty, like any treaty, requires interpretation, and there are vexed questions about what we might call the ‘sources for treaty interpretation’. What materials other than the treaty text may be used in *interpreting* the treaty? And how are they to be used? These questions arise both for materials *internal* to the WTO system, such as Committee decisions or the documents prepared by the Secretariat as part of the negotiating process, and for *external* materials such as customary law, general principles, and most controversially these days, non-WTO treaties.²

The Dispute Settlement Understanding (DSU) of the WTO says that the dispute settlement system is meant to clarify the meaning of the treaty ‘in accordance with customary rules of interpretation of public international law’;³ and the Appellate Body has said that the relevant articles of the Vienna Convention on the Law of Treaties (VCLT) embody those customary rules of interpretation.⁴ So to understand the ‘sources for interpretation’ of the WTO treaty, we need to know what the VCLT says about the use of materials other than the text. The Appellate Body has discussed and applied the VCLT in many opinions, but their jurisprudence on the VCLT is neither particularly clear nor particularly consistent. And it has been ably discussed by others.⁵ So I propose to pass over the Appellate Body’s discussions of the VCLT and look at the VCLT directly. My goal is to raise and answer a crucial and overlooked question about the structure of the VCLT: what is the rationale for the distinction between Article 31 and Article 32? This will cast light on what the Appellate Body should be doing. And the discussion should interest not just trade lawyers, but international lawyers in general.

Article 31 is captioned ‘General Rule of Interpretation’, and Article 32 ‘Supplementary Means of Interpretation’.⁶ The main project in both of those articles is to tell us what materials other than the text are relevant to interpretation, and how different materials are to be used—in other words, to tell us about the ‘sources for treaty interpretation’. Note that the question about ‘sources for treaty interpretation’ is not just the traditional question about ‘sources of law’. The VCLT mentions as materials for treaty interpretation things that never appear on any standard list (p. 1049) of the ‘sources of law’, such as subsequent practice and the *travaux préparatoires*. Similarly, the VCLT tells us more about how various materials for interpretation are to be *used* than does any standard list of ‘sources of law’. Indeed, I shall argue that it tells us more about how the materials are to be used than most readers notice.

A great deal has been written about individual provisions of Articles 31 and 32, but mine is a more general question: what is the principle of distinction between Articles 31 and 32? Why are there two separate articles at all? We cannot sensibly answer a specific question, such as whether some non-WTO treaty may be considered under Article 31 (3) (c) or only under Article 32, unless we understand the rationale of the distinction between Articles 31

and 32. And yet I am not aware of any literature or jurisprudence that clearly poses the question what that rationale is and confronts the question head on.

In section II: Article 31 and ‘Authentic’ Materials for Interpretation, we focus on Article 31. I shall argue that the materials of Article 31, which the drafters in the International Law Commission (ILC) often referred to as ‘authentic’ materials, are materials that the interpreter *must* find a way to integrate, *all* of them, into a coherent normative whole, if that is at all possible. Plainly, this ‘must’ calls for a narrow reading of Article 31. In contrast, there is no such ‘must’ attached to the ‘supplementary’ materials of Article 32, which can therefore be much broader. We shall see in section III: Article 32 and ‘Supplementary Means of Interpretation’ that Article 32 allows *any* relevant evidence of the parties’ intentions to be considered, and, if conclusive, to determine the meaning of a disputed term or provision.

Note that the breadth of Article 32 means that the narrowness of Article 31 will not exclude any significant materials from consideration. Because of space limitations, I can do no more than sketch the arguments and evidence here; a fuller version is available elsewhere.⁷

II. Article 31 and ‘Authentic’ Materials for Interpretation

1. ‘Ordinary Meaning’

Article 31 (1) of the VCLT famously says that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty (p. 1050) in their context and in the light of its object and purpose’. It is a commonplace that few words have a context-independent ordinary meaning. Article 31 (1) recognizes this explicitly when it speaks of the ordinary meaning ‘to be given’ to the terms in their context (and in the light of the treaty’s object and purpose). But the language of 31 (1) may still encourage a slightly more sophisticated misconception. Many people entertain a picture of interpretation in which the interpreter begins (notionally, if not explicitly) by compiling a list of the possible ‘ordinary meanings’ of a term (perhaps by consulting a dictionary), and then uses the context to select from this list the most appropriate ordinary meaning. But this picture is often as misleading as the cruder fantasy of context-independent ordinary meaning.

Consider an important WTO case, *EC—Asbestos*. Article III:4 of the GATT says that when a WTO Member has once admitted some product from another Member into its internal economy, then the importing Member shall accord to the imported product ‘treatment no less favorable than that accorded to like products of national origin’. A crucial question, obviously, is the meaning of ‘like products’. In *Asbestos*, the Appellate Body told us that products are ‘like’, for purposes of GATT III:4, if they are ‘in a competitive relationship’.⁸ This is not the ordinary meaning of ‘like’. It is not even *an* ordinary meaning.

The ordinary meaning of ‘like’, the Appellate Body tells us, is ‘similar’. But, as the Appellate Body points out, that merely invites the questions: similar in what respects? Similar from whose point of view? Similar to what extent?⁹ Now, GATT III:1 tells us that all of GATT III is about restraining protectionism; and it is only possible to ‘protect’ a local product against a foreign product if the products are in competition; hence, the Appellate Body concludes, ‘like’ in III:4 must mean ‘in a competitive relationship’. In effect, the relevant point of view is the point of view of the consumer of the products. The Appellate Body is right, at least to the extent that ‘competitive relationship’ is a *necessary* condition for likeness in GATT III:4. But ‘competitive relationship’ is not part of any ‘ordinary meaning’ of ‘like’ in ordinary usage.

It might be said that ‘in a competitive relationship’ is in effect a *specification* of the ordinary meaning of ‘like’, telling us whose point of view is determinative (the consumer’s). That is plausible enough. But it does not alter the fact that ‘in a competitive relationship’ will not be found in any dictionary as a meaning of ‘like’. The role of context in this case is not to

select one ‘ordinary meaning’ from many, but rather to *create* the specific meaning that is called for. It is only the context that suggests thinking about economic competition at all.

Consider next another WTO case, *US—Clove Cigarettes*,¹⁰ the first case interpreting Article 2.1 of the Technical Barriers to Trade Agreement (TBT). Article 2.1 of the (p. 1051) TBT says that if a WTO Member enforces a ‘technical regulation’, that regulation must accord to products imported from other WTO Members ‘treatment no less favorable than that accorded to like products of national origin’. The quoted language is taken over verbatim from GATT III:4. The Appellate Body first decided that ‘like products’ in TBT 2.1 meant the same thing as it did in GATT III:4, which we just discussed. The next question was the meaning of ‘less favorable treatment’. An obvious possibility would be to take over the meaning of this phrase also from GATT III:4. In GATT III:4, ‘less favorable treatment’ is treatment that detrimentally alters the conditions of competition. But the Appellate Body did *not* take over this GATT III:4 meaning into TBT 2.1. Instead, they said that under TBT 2.1, an imported product was treated ‘less favorably’ than a like domestic product, if (a) it was disadvantaged vis-à-vis the like domestic product in the conditions of competition (so far just like GATT III:4), *and* (b) the competitive disadvantage did not ‘stem exclusively from legitimate regulatory distinctions’. Briefly, treatment is ‘less favorable’ under TBT 2.1 if it creates competitive disadvantage *that is not justified by a legitimate regulatory purpose*.

This meaning of ‘less favorable treatment’ is not even remotely an ‘ordinary meaning’ of the phrase. The reference to *justification* introduces an entirely new idea. To be clear, I think the meaning the Appellate Body gave to ‘less favorable treatment’ in TBT 2.1 is the *right* meaning in this context. Because the TBT contains no article analogous to Article XX of the GATT (‘General Exceptions’), the Appellate Body’s reading of ‘less favorable treatment’ in TBT 2.1 was the only way to preserve Members’ ability to regulate to protect health, and the environment, and so on. It was the only way to make TBT 2.1 consistent with the practical effect of GATT III:4 in *its* larger context (including GATT XX). Still, if we want to understand what the Appellate Body was doing, we must not let the fact that we approve the meaning they gave to ‘less favorable treatment’ deceive us into thinking it was an ‘ordinary meaning’ in any ordinary sense.

Let us have just one non-WTO case. In *Oil Platforms*,¹¹ the International Court of Justice (ICJ), interpreting Article XX (1) (d) of the 1955 Treaty of Friendship and Commerce between Iran and the United States, held that measures could only be ‘necessary’ under XX (1) (d) if they were consistent with the international law on the use of armed force. But a reference to the law of armed force is not part of any ‘ordinary meaning’ of the word ‘necessary’. The ICJ based their holding in part on Article I of the treaty, which called for ‘enduring peace and sincere friendship’ between the US and Iran,¹² and it may well be that in view of that context, they got the right result. But right or wrong, they were not using the context just to select among ordinary meanings of ‘necessary’.

(p. 1052) In none of our cases did the Court use context to select among the ‘ordinary meanings’ of a term. In all three cases, and in others we could multiply endlessly, the context *creates* the meaning that is required so that the provision under interpretation fits together with the context in a coherent normative whole. *Clove Cigarettes* is a particularly telling example. The Appellate Body had to choose between a meaning of ‘less favorable’ in TBT 2.1 that would make TBT 2.1 *linguistically* consistent with GATT III:4, and a meaning that would make it *normatively* consistent. It rightly chose normative consistency. The goal of interpretation under the VCLT is not a uniform assignment of meanings to individual words. The goal is to make of the treaty a *coherent normative whole* that realizes the parties’ common intentions.

One final point. We have seen that courts often do not give terms their ‘ordinary meaning’ in any ordinary sense. In fact, Articles 31–33 of the VCLT are a framework for *constructing* the ordinary meaning ‘to be given’ to the terms of the treaty. ‘Ordinary meaning’ is not an *input* into the interpretive process, to be found in dictionaries or other external sources. Rather, it is the final *output* of a good faith interpretive process, the end result.¹³

2. The Unity of the Article 31 Materials

We now expand our view to the whole of Article 31. A crucial point about Article 31 is this: Article 31 accords exactly the same status and authority to *all* the materials it mentions. To see this, it is only necessary to pay attention to what Article 31 explicitly says. First, paragraph 31 (1) is explicit that the interpreter can give no meaning to the words of the treaty until they are considered in conjunction with the context. So, the individual words or phrases can have no interpretive priority over the context, because they have no independent significance. Next, paragraph 31 (2) tells us explicitly that the ‘context’, without which no meaning can be assigned to the words, comprises not only the text of the treaty (including any preamble and annexes), but also certain other agreements or instruments accepted by all the parties. So if we are not allowed to assign meaning to the words without considering the context (as 31 (1) tells us), then we are also not allowed to stop at the limited ‘context’ provided by the text of the treaty itself. The materials named in 31 (2) are part of the very context referred to in 31 (1), and all the context must be considered together.

Unlike paragraph 31 (2), paragraph 31 (3) does not purport to add to the ‘context’ as such. But it specifies that certain further agreements, practices, and rules of international law ‘shall be taken into account, together with the context’. If context must (p. 1053) be considered before we can assign any meaning to the words, then whatever else is to be taken into account ‘together with the context’—that is, the materials of 31 (3)—must also be considered before we can assign any meaning to the words. The ILC Commentary to the 1966 Draft Articles confirms this: ‘[t]he opening phrase of paragraph 3 “There shall be taken into account, *together with the context*” is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3’.¹⁴ Note well, the materials of 31 (3) are *incorporated in* 31 (1). (I shall refer frequently to the ILC and Vienna Conference deliberations, and to the ILC Commentary, so it is worth saying that in every case, the effect is merely to confirm the best and most natural understanding of the relevant VCLT provisions taken on their own.)

The ILC Commentary repeatedly denies that Article 31 creates a hierarchy of materials. For example: ‘[Article 31], when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties.’¹⁵ In sum, whatever the precise role of the Article 31 materials, it is the role of *all* of them *equally*.

3. The Role of the Article 31 Materials

The distinction between the materials of Articles 31 and 32 is not just a matter of degree—in particular, it is not just a matter of evidentiary weight. It is a *categorical* distinction. This is strongly suggested by the mere fact of the distinction between Article 31 and Article 32, especially if we remember that the ILC vehemently opposed an attempt in the Vienna Conference to collapse the two Articles into one.¹⁶ It is further confirmed in the text of the VCLT by the distinction between the mandatory nature of Article 31, listing sources that ‘shall’ be considered, and the permissive nature of Article 32, describing other materials the interpreter ‘may’ have recourse to.

The ILC Commentary and the deliberations of the Vienna Conference provide extensive additional confirmation of the categorical nature of the distinction. Sir Humphrey Waldock, the ILC's rapporteur on treaty issues during the relevant period, told the Conference that the Commission treated Articles 31 and 32 differently 'because the two sets of elements were founded on slightly different legal bases'.¹⁷ He (p. 1054) said that the Article 31 materials had 'an authentic and binding character in themselves'.¹⁸ In contrast, the ILC Commentary says that the materials of Article 32 are not 'alternative, autonomous, means of interpretation' but are only 'means to aid an interpretation governed by the principles [of Article 31]'.¹⁹ The ILC Commentary says that the materials of paragraph 31 (2) (and by necessary extension, all the materials of Article 31) 'should not be treated as mere evidence'.²⁰ In contrast, Waldock, in his third report to the ILC on the law of treaties, had said that the *travaux* 'are not, as such, an authentic means of interpretation but merely evidence'.²¹

So, the drafters of the VCLT were distinguishing between two fundamentally different types of source material for the interpretive process. But what precisely is the difference, and what difference does it make? One important clue is in the language the drafters used informally. In their discussions in the ILC and the Conference, the drafters used a variety of terms to distinguish between the materials of Article 31 and the materials of Article 32: 'primary' materials versus 'secondary' or 'subsidiary' materials; 'basic' materials versus 'further' materials; and so on. But the most revealing terminology was a pair of terms used repeatedly in the ILC discussions and Commentary: 'authentic' materials (Article 31) versus 'supplementary' materials (Article 32). For example: 'the Commission was of the opinion that the distinction made in articles [31 and 32] between authentic and supplementary means of interpretation is both justified and desirable'.²²

Clearly, the drafters of the VCLT thought of 'authentic' materials as having distinctive authority. There are two articles of the VCLT that are entirely about 'authenticity'. Article 10 tells us how a text is made 'authentic and definitive'; and the implication in context is that it is 'definitive' *because* it is authentic. Article 33 tells us about the consequences of having authenticated texts in multiple languages. It says the various texts are (presumptively) 'equally authoritative'. If they are to be equally authoritative, they must first be 'authoritative', in some significant sense. So, Articles 10 and 33 together tell us that the text is distinctively authoritative, indeed 'definitive', and that it gets that status from its authenticity. But the ILC refers to *all* the materials of Article 31 as 'authentic'. So, they all share the same authority and definitiveness.

It is a commonplace that the interpreter's task in reading the treaty text is to try to make sense of it as a coherent normative whole. But if all the Article 31 materials have the same authority as the text, then in fact the interpreter's task is to make a coherent whole out of *all* the Article 31 materials. The only rhetorically adequate (p. 1055) way to describe the interpreter's task is to say she *must* find a way to make all the Article 31 materials into a coherent whole. The ILC Commentary says something like this when it refers to the materials of paragraph 31 (3) (and by necessary extension, all the materials of Article 31) as 'of an obligatory character'.²³ And Waldock combined the ideas of authenticity and obligation when he told the Conference that the Article 31 materials had 'an authentic and binding character'.

Of course, making all the materials into a coherent normative whole may just be impossible in some cases. It may become unmistakably clear that the text includes a scrivener's error. Or the interpreter may be driven to conclude that at some point, the parties just changed their minds, but never completely excised from the text the traces of their original view. And so on. Therefore, we cannot understand our 'must' as perfectly strict. But the interpreter must begin with a very strong presumption that all the Article 31 materials,

properly understood, make a coherent whole. Deciding that a coherent whole is impossible is a last resort.

We are now able to see why the VCLT says that the various materials in Article 31 'shall' be taken into account, while Article 32 is about materials that the interpreter 'may' have recourse to. It may seem at first that Article 31 is saying to the interpreter, 'here are some things you must consider', while Article 32 is saying, 'here are some things you may consider or not, as you choose'. But that cannot be right. If in some case the Article 31 materials leave the meaning of some treaty term obscure, and if there is material in the *travaux* that makes the meaning clear, then surely the interpreter *must* rely on the *travaux* (under Article 32) to clarify the meaning. More broadly, the interpreter *must* surely be willing to *consider* whatever material a disputant brings forward that the interpreter may have recourse to under Article 32 and that has any plausible relevance. This is all just a matter of good faith adjudication. Therefore, the 'may' of Article 32 cannot mean that the interpreter can attend to these materials or not, at its whim. But then, what is the distinction marked by 'shall' and 'may'? The answer is that the 'authentic' materials of Article 31 are materials the interpreter must make something of, if possible. In contrast, the interpreter may decide that specific material adduced under Article 32 just does not cast light on the issues, because it is incomplete, irrelevant, garbled, suspect, or whatever.

4. Identifying and Applying the 'Criteria for Admission' to Article 31

The final question is what materials come under Article 31, and why. There are some utterly easy cases, and some more difficult.

(p. 1056) a. Paragraphs 31 (1) and 31 (2)

The utterly easy cases are the materials of 31 (1) and 31 (2). The text (including its preamble and annexes, as 31 (2) says) is the paradigmatic authentic means of interpretation. It is an explicit statement in writing, assented to by all the parties, intended to be a definitive statement of the agreement. But then it is easy to see why the materials of paragraph 31 (2) are authentic as well. Both 31 (2) (a) and 31 (2) (b) involve agreements or instruments accepted by all the parties, relating to the treaty, and made in connection with the conclusion of the treaty. Paragraph 31 (2) (a) explicitly refers to an agreement between 'all the parties'. Paragraph 31 (2) (b) implicitly refers to all the parties, by saying the instrument is made by 'one or more parties' and accepted by 'the other parties'. Even if not formally annexes, these contemporaneous agreements (in 31 (2) (a)) or instruments (in 31 (2) (b)) are in effect extensions of the treaty text.

b. Paragraph 31 (3) (a)

Paragraph 31 (3) (a) is also about an agreement of all the parties. The text of 31 (3) (a) refers simply to a subsequent agreement between 'the parties', but by far the most natural reading of this is 'all the parties'. The ILC Commentary says explicitly about paragraph 31 (3) (b) that 'the phrase "the understanding of the parties" [changed in the Conference to "the agreement of the parties"] necessarily means "the parties as a whole"'.²⁴ There is no reason to doubt that the same applies to 31 (3) (a). (Our discussion of 31 (3) (b) will reveal why it was especially necessary to say this completely explicitly about 31 (3) (b), but for reasons that do not suggest that the requirement of universal agreement is a *distinctive* feature of 31 (3) (b).)

On a separate point, it is worth emphasizing that the agreement under 31 (3) (a) must be 'regarding the interpretation of the treaty or the application of its provisions'. This means the parties must regard it as binding, a point to remember when we are asking, for

example, about the relevance of Ministerial Declarations or Committee Decisions in the WTO.

Paragraph 31 (3) (a) raises one new issue, which was not presented by 31 (1) or 31 (2). Must the subsequent agreement ‘regarding the interpretation of the treaty . . .’ be one that clarifies what the treaty *originally* meant; or can it establish a new meaning, reflecting a change of heart by the parties? In other words, can a subsequent agreement under 31 (3) (a) be used to ‘update’ the treaty? This is an issue of considerable interest, debated both within the ILC and by scholars, but we shall not discuss it, because it cuts across our main concern, which is what materials should be regarded as ‘authentic’ sources for establishing the parties’ intentions. Whatever purposes we think are permissible for a subsequent agreement, an explicit subsequent agreement of all the parties, intended to be binding, should be regarded as (p. 1057) ‘authentic’ evidence for the relevant purpose. (The ‘updating’ issue can also arise in connection with 31 (3) (b) and 31 (3) (c). We will not try to settle the issue there either, nor even mention it again.)²⁵

c. Paragraph 31 (3) (b)

Article 31 (3) (b) presents a different complication. Article 31 (3) (b) says that the interpreter shall take into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. It is clear why practice is important. The point of the treaty is to direct behaviour. But the treaty is in words, and words are never perfectly clear. In contrast, behaviour is the very stuff the treaty is about. The ILC Commentary says the practice is ‘objective evidence’ of the understanding of the parties, and it quotes the Permanent Court of Arbitration, saying that practice is ‘*le plus sûr commentaire du sens*’ of the agreement.²⁶

So, it is easy to see why concordant practice should be an authentic source *if it is engaged in by all the parties*. But Article 31 (3) (b) does not say the practice must be engaged in by all the parties; it says only that it must establish the agreement of all the parties. The ILC Commentary is very clear both that it must be the *agreement* of all, and that it need not be the *practice* of all.²⁷ Now, we will see below that even if 31 (3) (b) contemplated only the practice of *all* the parties, a practice that was engaged in by some parties, but not all, could still be introduced under Article 32; and the interpreter would then consider how strong the partial practice was as evidence of a common understanding. That raises the question: given that the ‘authentic’ materials described in the provisions before 31 (3) (b) are unambiguously the acts of *all* the parties, why does 31 (3) (b) bend that rule, allowing the interpreter to take the *acts of some* for the *agreement of all*? The answer must be in two parts. First, as noted above, practice is a distinctively revealing indicator of the parties’ intentions (at least of those who participate), arguably an even better indicator than the text. Secondly, it may be that the reason the practice is not universal among the parties is just that some of the parties have not had the occasion to engage in the practice. So, the practice may fail of universality for fortuitous reasons that do not seriously undermine its significance as evidence of a universal understanding.

(p. 1058) d. Paragraph 31 (3) (c)

That leaves us with Article 31 (3) (c), which makes an authentic source of ‘any relevant rules of international law applicable in the relations between the parties’. This is by far the most problematic provision of Article 31, the most discussed, and the most complicated to discuss. The first question is what other rules of international law 31 (3) (c) picks out. The second question is why those other rules should count as ‘authentic’ materials.

i. What other law comes within 31 (3) (c)?

Regarding the question what ‘other law’ 31 (3) (c) picks out, there are two main problems: the meaning of ‘applicable’ and the meaning of ‘the parties’. Regarding ‘applicable’, does it mean ‘binding’ on the parties, or just ‘addressing the subject matter in issue’? Regarding ‘the parties’, does it mean ‘the parties to the instant dispute’, or ‘all the parties’, or ‘a substantial number of the parties, sufficient in the circumstances to indicate the understanding of all’? (I shall call the corresponding positions the ‘dispute parties’ view, the ‘all parties’ view, and the ‘many parties’ view.) There is an enormous debate around these issues, which it would be pointless to rehash here.²⁸ So I shall limit myself to summary remarks, emphasizing a few points that have been overlooked, or received insufficient emphasis, in the literature.

Whatever materials come within 31 (3) (c) will be treated as authentic, so the criteria for admission to 31 (3) (c) ought to justify that treatment. Remember that every other provision in Article 31 requires *universal agreement* of the parties about some aspect of the treaty, and hence about what the parties are bound to. To line up 31 (3) (c) with these other provisions, we need to read ‘applicable’ to mean ‘binding’ and ‘the parties’ to mean ‘all the parties’. To save space, I shall simply assume that ‘applicable’ means ‘binding’. This seems much the most natural reading, especially since the alternative, ‘addressing the subject matter in issue’, seems to be already covered by ‘relevant’. The *travaux* are inconclusive, but they point towards the reading of ‘binding’ if anything.²⁹

So we turn to the meaning of ‘the parties’. In the early years of the VCLT, the debate about ‘the parties’ focused on the ‘dispute parties’ view and the ‘all parties’ view. The ‘many parties’ view is a later entrant. We shall focus first on the two traditional views. Regarding the ‘dispute parties’ view,³⁰ the obvious and crushing (p. 1059) objection is that there may not be a dispute.³¹ The most common form of treaty interpretation is auto-interpretation. Another powerful objection is that, even when there are disputes, the primary treaty should not mean different things depending on the identity of the disputing parties.³² The other law which one party wants to rely on might, in appropriate circumstances, be regarded as an *inter se* modification, but that is different from using it to interpret the treaty itself. (Whether the WTO allows *inter se* modification is a contested question;³³ but details of the WTO are irrelevant to a proper understanding of the VCLT.)

If we look in the negotiating history, there is almost nothing about the ‘dispute parties’ approach; but what there is tells against it. In the ILC deliberations, Erik Castrén of Finland proposed revising the provisions that became 31 (2) (b) and 31 (3) (b) so that they talked about the agreement of ‘the parties in question’, meaning thereby the *dispute* parties. Neither proposal attracted any discussion, and both, obviously, failed. Castrén did not even make the proposal about the provision that became 31 (3) (c).³⁴

The proponent of the ‘dispute parties’ view argues that this view is necessary to avoid an unfair consequence of the ‘all parties’ view. The worry is that the ‘all parties’ view will allow a complainant to bring a complaint under some primary treaty, and then resist invocation of a defence created by an ‘other treaty’ *that both the complainant and the respondent are parties to*, on the ground that some non-disputing party to the primary treaty is not a party to the other treaty. There are several possible responses to this problem. First, the other treaty can be considered under Article 32, and if enough parties to the primary treaty are parties to the other treaty, there may be persuasive evidence that *all* the parties to the primary treaty meant to recognize the relevant defence within the primary treaty (including even the present complainant, before the specific case arose in which it now opportunistically takes the opposite view). But even if the primary treaty does not recognize the defence, the VCLT provides its own answer to many instances of this problem, in Article 30 on successive treaties. (As with *inter se* modifications, it is a contested question whether defendants can rely on Article 30 before WTO tribunals.³⁵ But Article 30 is part of the VCLT, and relevant to understanding the other articles, regardless.) There may also be a solution

for many instances of the problem in the general (p. 1060) principle that the complainant should act in good faith and not abuse its right under the primary treaty.

The most common criticism of the 'all parties' view is that it cuts off large multilateral treaties like the WTO from the rest of international treaty law, because it will so rarely be the case that *all* the parties to the WTO are parties to any other treaty.³⁶ But this is a *non sequitur*. The 'all parties' view addresses the interpretation of 31 (3) (c). As we shall see in section III: Article 32 and 'Supplementary Means of Interpretation', even other treaties that do not come within 31 (3) (c) can always be considered under Article 32. And they can always be given whatever effect they deserve, according to their strength as evidence of the parties' intentions, even to the extent of determining the interpretation of a disputed term.

We turn now to the 'many parties' view, which says that 31 (3) (c) covers an 'other treaty' if enough of the parties to the primary treaty adhere to the other treaty so that we can take it as reflecting the agreement of all. In effect, we should be content with the *consent of many* when it reveals the *understanding of all*.³⁷ There is a version of universality here, which is to the good; and it may seem that the 'many parties' view is supported by an analogy to 31 (3) (b). But the cases are not the same. The best reason for letting the practice of some stand for the agreement of all under 31 (3) (b) is that the ILC Commentary explicitly advanced that interpretation. But the Commentary says nothing similar about 31 (3) (c). The analogy is also unpersuasive in its own terms. In 31 (3) (b) we relax the requirement of explicit universal agreement to constitute authentic sources because practice under the treaty is distinctively revealing evidence of the parties' intentions, and because the reason some party has not engaged in the practice may be just fortuitous lack of opportunity. Neither of these arguments applies to 31 (3) (c). An 'other treaty', which need not be explicitly related to the treaty at all, is not *distinctively* revealing evidence of the parties' intentions. And if a party to the primary treaty is not a party to the other treaty, that cannot be mere fortuity. It must be either because the party is not sufficiently in sympathy with the substance of the other treaty so that it wants to join, or else because it has been denied the opportunity to join. Either explanation should prevent reliance on the other treaty under 31 (3) (c).

ii. Why is any other law an 'authentic' source?

It may seem that if we have limited 31 (3) (c) to 'other law' that is binding on all the parties, it is clear enough why this should be treated as an authentic source. We have the parties' universal consent. But this is not completely persuasive. The principal focus of the other law is likely to be different from that of the primary treaty. Hence if there (p. 1061) is difficulty integrating the other law into a coherent whole with the other authentic materials, there is a presumption for disregarding the other law. But this would introduce a hierarchy into the Article 31 materials (contrary to what the ILC said). Given limitations of space, I shall say no more about this, nor about possible differences between the treatment of custom and other treaties. Instead, two other possible explanations for 31 (3) (c) deserve brief comment.

First, it is noteworthy that the only justification advanced by the drafters for any provision like 31 (3) (c) was the usefulness of other law as a reference on vocabulary. For example, Mustafa Kamil Yasseen said in an ILC meeting that 'the reference to the rules of international law was indispensable', because 'in using certain terms, the parties had in mind concepts and meanings established by the legal order'.³⁸ But if the other law (usually a treaty) is not binding on all the parties, the desire to use it as a vocabulary source does not justify bringing it *under* 31 (3) (c). On the one hand, relying on 31 (3) (c) is unnecessary, because we can always consider the other law under Article 32. On the other hand, relying on 31 (3) (c) does more than just make the other law available as a vocabulary source. It makes the other law an 'authentic' source and imposes on the interpreter an obligation to align the primary treaty with the *normative commitments* of the other law (which is a major step beyond using it as a vocabulary source). This is inappropriate, if the other law is not

binding on all the parties to the primary treaty. Of course, under Article 32 the other law can be considered as evidence about *both* linguistic usage *and* the likely normative preferences of the parties to the primary treaty. But it will often be much stronger evidence about the former than about the latter. Linguistic habits (within a specific language community) are likely to be more widely shared than normative views on contestable issues. Indeed, if that were not true, settling anything by a treaty, which is formulated in words, would not be possible.

Finally, many people argue for using 31 (3) (c) to bring in subsequent customary law,³⁹ or widely adopted multilateral treaties that are not adhered to by all the parties to the primary treaty,⁴⁰ as a way of achieving ‘systemic integration’ of international law norms. But nothing in the drafting history suggests that 31 (3) (c) was meant to achieve such systemic integration. There was virtually universal agreement among the drafters of the VCLT, in both the ILC and the Vienna Conference, that the object of treaty interpretation is to identify the common intentions of the parties to the treaty.⁴¹ There is no reason to regard 31 (3) (c) (p. 1062) as an exception. Article 31 is indeed concerned with a sort of ‘systemic integration’, but the ‘system’ in question is the various expressions of *the parties’ intentions*. Even in *Oil Platforms*, a favourite case of the ‘integrationists’, the reason the Court gives for considering the law of armed force under 31 (3) (c) is that it clarifies the parties’ intentions. The sentence after the reference to 31 (3) (c) says: ‘[t]he Court cannot accept that Article XX [of the US/Iran treaty] . . . was intended to operate wholly independently of the relevant rules of international law on the use of force . . .’.⁴²

III. Article 32 and ‘Supplementary Means of Interpretation’

We have seen that the ‘authentic’ materials in Article 31 are ‘obligatory’ and ‘binding’. The interpreter *must* integrate them all into a coherent normative understanding of the treaty, if possible. It therefore makes sense to take a narrow view of Article 31. In contrast, the ‘supplementary means’ under Article 32 are not obligatory or binding in the same way. They are mere evidence of the parties’ intentions. So, there is not the same reason for restrictiveness under Article 32. In fact, Article 32 properly understood imposes *no restriction at all* on (i) *what* materials the interpreter may consult as evidence of the parties’ intentions; or (ii) *when* it may consult those materials; or (iii) *for what purpose* it may consult them. Of course, the supplementary materials are to be treated with care. For example, the ILC reminds us: ‘records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation’.⁴³ Even so, the guarantee for sensible use of supplementary materials that the VCLT relies on is the interpreter’s competence and good faith, not any restrictive rules.

Now for more detail. First, regarding *what* materials the interpreter may consult, Article 32 begins: ‘[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion . . .’. Preparatory work and circumstances are mentioned here, but only as *examples* of the ‘supplementary means’ that may be consulted. As Roberto Ago said in the ILC deliberations, ‘the word “including” made it clear that recourse could be (p. 1063) had to means other than the preparatory work or the circumstances of the conclusion of the treaty . . .’.⁴⁴

The next point is that Article 32 imposes no limit at all on the *circumstances* in which the interpreter may resort to supplementary means. It is often suggested that Article 32 restricts consideration of supplementary means to cases where the application of Article 31 leaves the meaning of some provision ‘ambiguous or obscure’, or where it produces a result that is ‘manifestly absurd or unreasonable’. But Article 32 also says explicitly that supplementary means of interpretation may be resorted to ‘in order to confirm the meaning resulting from the application of Article 31’. So even if the application of Article 31 appears

to produce a clear meaning, neither obscure nor absurd, the interpreter can always consider supplementary means of interpretation for 'confirmation'.⁴⁵

There is one final question on which the drafters never achieved a clear resolution. What is the interpreter supposed to do if it finds a clear meaning for some provision in its application of Article 31, and looks to supplementary materials to confirm that clear meaning, and discovers that the supplementary materials (read in conjunction with the Article 31 materials, of course) conclusively *disconfirm* the supposedly clear meaning? If the interpreter adopts the meaning indicated by the supplementary materials, it will be using the supplementary materials, not to *confirm* the 'clear meaning' inferred from the Article 31 materials, but rather to *correct* that meaning, a use that is not mentioned in Article 32. On the other hand, it seems absurd to ask the interpreter to simply ignore what the supplementary materials conclusively reveal. That is no way to honour the parties' intent.

If we look for an answer to this question in the drafting and negotiating history of Article 32, we find only one mention of the question, and no discussion, and no answer.⁴⁶ But for many drafters, the reason for including the confirmatory use of supplementary materials in Article 32 was simply to reflect the actual practice of interpreters, so it is natural to ask, what do interpreters do when they look to supplementary materials for confirmation and find disconfirmation instead? There is no answer to this question either, because there are no known instances of the relevant dilemma. Neither any member of the ILC, nor any delegate in Vienna, nor any scholar who has discussed this issue has identified an actual case where an interpreter following the VCLT approach confessed to looking to supplementary materials for confirmation of a clear meaning and finding the opposite. This is hardly surprising. Since most interpreters have all the materials before them from the beginning of their deliberations, it is psychologically nearly impossible that they (p. 1064) should find in some subset of the materials a 'clear' meaning that they can already see is undermined by the materials as a whole. Reinforcing this point, it is vanishingly improbable that there should be a case where the supplementary materials conclusively establish some meaning, and there is not even a suggestion of that meaning in the Article 31 materials. Any suggestion of that meaning in the Article 31 materials would prevent a cautious interpreter from finding that Article 31 made a contrary meaning 'clear'.

So, the debate about the 'corrective' use of supplementary materials may be a tempest in a teapot. The issue does not arise in practice. But notice that our explanation of why it does not arise in practice implies that the interpreter will always feel able to follow a conclusive inference from the supplementary materials. And this also seems the right theoretical answer to the question about the corrective use of supplementary materials. The interpreter cannot be required to promulgate an interpretation that it firmly believes violates the parties' intentions, *when it has been led to that belief by following faithfully the VCLT process*.⁴⁷

Our discussion of Article 32 has shown that: (i) the interpreter can, and should, consider *any evidence*, of whatever kind, that helps to establish the parties' intentions; (ii) the interpreter can consider this evidence *in all cases*, without meeting any threshold requirement that consideration under Article 31 fails to produce a clear and reasonable meaning; and (iii) the interpreter is *always* free to do what the supplementary materials require, even if that means 'correcting' a meaning that might have seemed clear in the absence of the supplementary materials.

IV. Summary

We have established that Article 31 of the VCLT should be read narrowly, and Article 32 very broadly. We have no space to return to specific questions about WTO interpretation here, such as the role of Committee decisions or non-WTO treaties. But we now have the proper framework for addressing these questions, and for addressing similar questions arising under other treaties. A better theory of the VCLT may not alter many results. But it may alter some; and better understanding is desirable for itself.

(p. 1065) Research Questions

- If this chapter's account of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* is persuasive, then the obvious direction for further research by trade lawyers is to apply the account to specific problems in interpreting the WTO treaty, such as the relevance of Committee decisions, Secretariat documents, non-WTO treaties, and so on.
- The broader community of international lawyers may wish to investigate how far the current practice of various international tribunals in applying the VCLT reflects this account of the Convention's vision.

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Footnotes:

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¹ The Appellate Body has sometimes treated general principles as an independent source of procedural rules like the burden of proof. See e.g., WTO, *US—Shirts and Blouses*, *Appellate Body Report* (23 May 1997) WT/DS33/AB/R.

² Joost Pauwelyn has provided us with an excellent general survey of these issues; see chapter 47 in this volume.

³ Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU) (Marrakech, 15 April 1994, 1869 UNTS 401).

⁴ Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331).

⁵ See e.g., Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009); Petros Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts', *American Journal of International Law* 102 (2008): 421–74.

⁶ We will largely ignore Art. 33, and even Art. 31 (4), which are about narrow issues with limited theoretical interest.

⁷ A fuller version of this chapter, which addresses more arguments against my theses and includes more detail on the ILC and Vienna Conference deliberations, may be found at <http://repository.law.umich.edu/book_chapters/102/>.

⁸ WTO, *EC—Asbestos, Appellate Body Report* (5 April 2001) WT/DS135/AB/R, para. 99.

⁹ *ibid.*, paras 90–2.

¹⁰ WTO, *US—Clove Cigarettes, Appellate Body Report* (24 April 2012) WT/DS406/AB/R.

¹¹ *Oil Platforms (Islamic Republic of Iran v United States)* (Judgment) [2003] ICJ Rep 161.

¹² *ibid.*, p. 182, para. 41.

¹³ Dictionaries and other sources such as other treaties may be consulted as evidence about meaning, but the warrant for this is Art. 32, discussed below.

¹⁴ Draft Articles on the Law of Treaties, with commentaries, *YILC* (1966) vol. II, p. 220, para. 8 (emphasis in the original of the Commentary).

¹⁵ *ibid.*, para. 9.

¹⁶ Julian Mortenson tells the story of this crucial episode with great dramatic flair in 'The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?', *American Journal of International Law* 107 (2013): 780–822.

¹⁷ *United Nations Conference on the Law of Treaties (UNCLOT), First Session, Official Records* (1968), UN Doc. A/CONF.39/11, p. 184, para. 73.

¹⁸ *ibid.*, p. 184, para. 68.

¹⁹ Draft Articles on the Law of Treaties, with commentaries, *YILC* (1966) vol. II, p. 223, para. 19.

²⁰ *ibid.*, p. 221, para. 13.

²¹ Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, *YILC* (1964) vol. II, p. 58, para. 21.

²² Draft Articles on the Law of Treaties, with commentaries, *YILC* (1966) vol. II, p. 220, para. 10. See also *ibid.*, p. 221, paras 11, 14.

²³ *ibid.*, p. 220, para. 9.

²⁴ *ibid.*, p. 222, para. 15.

²⁵ The ILC has been doing important recent work on identifying and interpreting 'subsequent agreements' and 'subsequent practice'. A descriptive listing of the relevant ILC documents is available at <http://legal.un.org/ilc/guide/1_11.shtml#fout>, accessed 22 November 2016. The ILC's discussion is fully consistent with the theses of this chapter, but

with a different focus, and with extensive discussion of the jurisprudence on Article 31 (3) (a) and (b) of the VCLT.

26 Draft Articles on the Law of Treaties, with commentaries, *YILC* (1966) vol. II, p. 221, para. 15, quoting from the *Russian Indemnity Case (Russia v Turkey)* (1911) 11 RIAA 421, 433.

27 *ibid.*, p. 222, para. 15.

28 In addition to sources cited elsewhere in this section, see e.g., Richard K. Gardiner, *Treaty Interpretation*, 2nd edn (Oxford: Oxford University Press, 2015); Campbell McLachlan, 'The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention', *International and Comparative Law Quarterly* 54 (2005): 279–320.

29 See in particular *YILC* (1966) vol. I, part 2, p. 188, para. 43 (Paul Reuter's question, and the lack of response), and p. 190, para. 71 (Jiménez de Aréchaga's remarks).

30 Advanced in e.g., Report of the Study Group of the International Law Commission on the Fragmentation of International Law, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, pp. 237–8.

31 See e.g., Ulf Linderfalk, 'Who Are "The Parties"? Article 31, Paragraph 3 (c) of the Vienna Convention and the "Principle of Systemic Integration" Revisited', *Netherlands International Law Review* 55 (2008): 343–64.

32 After some inconclusive remarks in previous cases, the WTO Appellate Body seems to have rejected the 'dispute parties' view on this ground in WTO, *Peru—Agricultural Products, Appellate Body Report* (31 July 2015) WT/DS457/AB/R, para. 5.95 (although it also says in para. 5.105 that it is not actually called upon to decide what 'the parties' means in 31 (3) (c), after which it again expresses scepticism about the 'dispute parties' view in para. 5.106).

33 See chapter 47 by Joost Pauwelyn in this volume, text at nn. 39–40.

34 *YILC* (1966) vol. I, part 2, p. 189, paras 51, 54. See also Mustafa Kamil Yasseen's much-quoted assertion of the 'all parties' view, *ibid.*, p. 197, para. 52.

35 See chapter 47 by Joost Pauwelyn in this volume, text at nn. 28–9.

36 See e.g., ILC, Fragmentation Report, pp. 237–8.

37 See e.g., Benn McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes', *Journal of World Trade* 42 (2008): 589–618.

38 *YILC* (1966) vol. I, part 2, p. 197, para. 51. See also Waldock's discussion of paragraph 70 (1) (b) in his original draft, Third Report on the Law of Treaties (1964), pp. 52, 56–7.

39 See e.g., Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law', *Yale Human Rights and Development Law Journal* 1 (1998): 85–105.

40 See e.g., ILC, Fragmentation Report, p. 234.

41 See e.g., the ILC Commentary, which explains the importance of the text on the ground that it is presumed to be 'the authentic expression of the intentions of the parties'. ILC, Draft Articles on the Law of Treaties, with commentaries, *YILC* (1966) vol. II, p. 220, para. 11.

42 ICJ, *Oil Platforms*, p. 182, para. 41.

43 ILC, Draft Articles on the Law of Treaties, with commentaries, *YILC* (1966) vol. II, p. 220, para. 10.

⁴⁴ *YILC* (1966) vol. I, part 2, p. 202, para. 50. The broad reach of Art. 32 was evident in its predecessors from the very beginning. See Art. 71 (2) of Waldock's original draft and his commentary on it, *Third Report on the Law of Treaties* (1964), pp. 52, 58.

⁴⁵ For a full discussion, see Mortenson, 'The *Travaux* of *Travaux*'.

⁴⁶ UNCLOT, *First Session*, pp. 182-3, para. 56.

⁴⁷ See Stephen Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the "Clear Meaning" of a Treaty Provision?', in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague: Kluwer, 1996), 541-9.