

The Extent of Adopting a Hierarchical Interpretative Structure by the ILC in Arts 31-2 of the VCLT to Remove the Legal Uncertainty from Treaty Interpretation

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Abstract

Treaty interpretation is a matter of legal uncertainty because of not having a hierarchical structure to regulate implementing interpretative rules. Therefore, Some interpretative schools, such as the textual, the contextual and the objective and purpose are emerged; each school believes its approach the most effective to achieve the goal from treaty interpretation. Although the ILC sought to resolve this uncertainty through codifying interpretative norms in Articles 31 and 32 of the *VCLT*, it is argued that the ILC failed in achieving this goal because of not codifying a hierarchical structure to regulate applying interpretative norms. Nonetheless, reviewing ILC's relevant reports and the *United Nations Conference on the Law of Treaties* 1968 leads to reach a hierarchical structure regulates implementing interpretative rules. This structure stipulates firstly resorting to the textual approach; however, if the text is insufficient, the contextual approach shall be directly resorted to. Regarding the purpose and objective approach, it shall not be implemented in isolation from other approaches to avoid exploiting it to achieve self-interests. Regarding supplementary means, they can be exclusively used to either confirm reached interpretations by the aforementioned approaches or to decide which meaning is correct when these aforementioned approaches lead to either obscure or ambiguous meanings or to unreasonable or unclear result.

Introduction

Treaty interpretation aims to reach the correct meaning of conventional texts¹ that reflects members' common intention² by using various interpretative rules and principles.³ This topic has been a subject of debate among scholars who concern about applying the most proper interpretative rule to achieve the goal of treaty interpretation.⁴ Some scholars argue the correct meaning can be elucidated by discovering the common intention of treaty' members, while others believe the correct meaning can be reached by elucidating legal texts' ordinary meaning in the light of the agreements purpose and object.⁵ As a consequence of this debate, treaty interpretation was considered and sought to be tackled by the International Law Commission ('ILC') that codified some general interpretative principles in the *Vienna Convention on the Law of Treaties 1969* ('*VCLT*'), particularly in Articles 31 and 32⁶ that have been widely referred to by tribunals even they have been considered as a part of international customary law.⁷ Indeed, creating a unified interpretative mechanism is importance to avoid the fragmentation of international law because of proliferating treaties that constitute various legal institutions along with jurisdictions overlapping with each other⁸ which undermines the integrity of international law because of the lack of hierarchy to determine such jurisdictions' boundaries.⁹

Nonetheless, it is critiqued that the *VCLT* does not regulate the topic of treaty interpretation because of not providing a hierarchical structure with respect to apply interpretative rules. Therefore, this research paper considers this criticism by examining the implicit hierarchy that is adopted by Article 31 and 32 of the *VCLT* in accordance to the implementation of included interpretative in the light of international law's norms and principles and tribunals' practice. This research paper consists from three parts; firstly, discussing the attitude of the ILC with respect to codify interpretative rules in the *VCLT* as a consequence of the uncertain attitude of

¹ See, Martin Ris, 'Treaty interpretation and ICJ recourse to Travaux Préparatoires: towards a proposed amendment of articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14(1) *Boston College International and Comparative Law Review* 111.

² Lord McNair, *The law of treaties* (Oxford, 1961) 365.

³ James Crawford, *Brownlie's principles of public international law / by Crawford, James, SC, FBA* (UK: OUP, 8th ed, 2012) 379.

⁴ Ris, above n 1.

⁵ Ian McTaggart Sinclair, *The Vienna Convention on the Law of treaties* (MUP, 1984) 114-5.

⁶ Ian Brownlie, *Principles of public international law* (New York: OUP, 7th ed, 2008) 631.

⁷ See, Campbell McLachlan, 'THE PRINCIPLE OF SYSTEMIC INTEGRATION AND ARTICLE 31(3)(C) OF THE VIENNA CONVENTION' (2005) 54(2) *International and Comparative Law Quarterly* 279.

⁸ Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60(2) *Stanford Law Review* 595, 595.

⁹ Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60(2) *Stanford Law Review* 595, 595.

international tribunals in the context of treaty interpretation. The second part discusses the scope of interpretative rules that are codified in Article 31 and 32 of the *VCLT*; this discussion considers different views if scholars with respect to the application of interpretative rules by clarifying alleged restrictions on this application. The third part seeks to summarize the overall approach that is adopted by the *VCLT* in Articles 31 and 32 with regard to the implementation of interpretative rules. This aims to crystallize the implicit hierarchical structure that is adopted by the *VCLT* in Articles 31 and 32 with respect to apply interpretative rules; this can be achieved through referring to relevant reports of the ILC with respect to conclude the *VCLT* since these reports can be supportive in interpreting the *VCLT*.

Part ONE : Uncertain Practice of Tribunals & ILC

In the past, tribunals used to apply the restrictive interpretative approach because of granting the supremacy to the sovereignty of states during the stage of interpreting treaties; this led to prevail the sovereignty in the process of treaty interpretation.¹ This approach was evident in decisions of the Permanent Court of International Justice, the International Court of Justice and other tribunal arbitrations.² The Permanent Court of International Justice declared when the text was unclear to choose between various acceptable interpretations, the most acceptable interpretation would be the one that enforced the minimum level of responsibility on parties.³ It seems that this restrictive approach of treaty interpretation would aim to protect states' freedom.⁴ However, this approach has not been applied anymore because of changing the political perspective and prevailing international jurisdiction on domestic jurisdictions.⁵

Consequently, new interpretative approaches have been emerged⁶ along with the new attitude of international tribunals to adopt the textual approach in the light of not having hierarchy regarding the implementation interpretative rules.⁷ However, the legal uncertainty in the context of treaty interpretation has not been resolved because the practice of tribunals have been neither consistent nor harmony with respect to treaty interpretation. For instance, international tribunals have not exclusively relied on the textual approach in the process of treaty interpretation⁸ in the light of existing other interpretative rules; therefore, the implementation of any interpretative rule is relevant to the liberal standard because of the lack of hierarchy to regulate the application of these interpretative rules.⁹ Some scholars consider the intentional approach as the correct method in the field of treaty interpretation, while others believe that the contextual approach is the correct interpretative approach that can lead to discover the correct meaning.¹⁰ In fact, the gravity of this legal uncertainty lies in the probability of departing from the function of treaty interpretation to the unacceptable result of revising treaties¹¹ because of seeking to reach the common intention of parties not only from the text¹² by resorting to other interpretative rules.¹³ Accordingly, it is argued that the consequence of this uncertain attitude has raised the probability of shifting from the task of interpreting treaties to the task of modifying and revising treaties¹⁴ because of referring to external texts and considering external materials.¹⁵

Subsequently, the ILC has considered the necessity of tackling this uncertainty with respect to adopt interpretative rules; the ILC attributes this dilemma to the attitude of exploring the common intention of parties¹⁶ and referring to external materials other than the text of treaty in question such as circumstances of negotiating

¹ See, L. Crema and Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) *European journal of international law* 681, 681-5.

² See, *ibid*.

³ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Turkey v Iraq)* (Advisory Opinion) [1925] PICJ, No12, 25.

⁴ *Territorial Jurisdiction of Int'l Comm'n of River Oder (U.K. v. Pol.)* [1929] PCIJ (ser. A) No. 23 [71].

⁵ See, *Iron Rhine case, (Belgium v the Netherlands) (Award)* (Permanent Court of Interpretation, Case No 2003-02, 24 May 2005) [24], [53].

⁶ See, *ibid* [49].

⁷ Sinclair, above n 5, 114.

⁸ See, *Iron Rhine case, (Belgium v the Netherlands) (Award)* (Permanent Court of Interpretation, Case No 2003-02, 24 May 2005) [53].

⁹ See, Maarten Bos, 'Theory and Practice of Treaty Interpretation' (1980) 27(2) *Netherlands International Law Review* 135.

¹⁰ See, Peter Maki and C. Peter, 'Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System' (2000) 9 *Minnesota Journal of Global Trade* 34.

¹¹ McNair, above n 2, 366. See also, Robert R. Wilson, 'INTERPRETATION OF TREATIES' (1930) 24 (04/23) *Proceedings of the American Society of International Law at its annual meeting (1921)* 39.

¹² See, H. Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1935) 48(4) *Harvard law review* 549.

¹³ Ris, above n 1.

¹⁴ See, Lauterpacht, above n 23.

¹⁵ 'Law of Treaties' (1966) II (2) *YILC*, 221 [11].

¹⁶ *Ibid* 53.

treaties¹ to determine which interpretative norm would be more suitable to reach the correct meaning.² For instance, it is argued that either preparatory works or the purpose and object of treaty can be an effective method to determine the common intention of parties however this may lead to undermine the importance of the text.³ As a consequence to this legal uncertainty, treaty interpretation has been considered as a nightmare that can lead to unforeseen consequences and results⁴ that can directly affect the legal status of parties.⁵

As a result, the ILC in 1969 collected in Articles 31 and 32 of the *VCLT* some general interpretative principles⁶ that have been granted more recognition because of applying them by international tribunals and states practice,⁷ even Article 31 is declared as an international customary rule.⁸ Although the *VCLT* has a remarkable role in the context of treaty interpretation,⁹ it is critiqued that the *VCLT* has failed in providing a hierarchical structure with regard to adopt interpretative rules. It is argued that the ILC used the title 'general rule of interpretation' with Article 31 and this reflects the equivalence between all interpretative rules¹⁰ since this article does not exclusively adopt the textual interpretative rule.¹¹ Therefore, this research paper realizes the importance of discussing whether the *VCLT* implicitly adopts a hierarchical structure with respect to adopt the interpretative rules; this can be achieved through reviewing the attitude of the ILC along with international tribunals' practice since the implementation of interpretative rules can be considered as a consequence of the judicial creativeness and practice.¹²

Part two : Articles 31 & 32: Interpretative Rules

The significance of treaty interpretation has led to appear different interpretative approaches along with various views concern about which interpretative rule can be the most effective one to reach the correct meaning. These different views have been divided into three famous interpretative approaches that are the textual, the contextual and the purpose and object.¹³ *VCLT* refers to these approaches in Article 31(1) that asserts '[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'. Firstly, it is importance to discuss the scope and boundaries of these interpretative approaches in order to clarify the function of each rule along with the good faith principle.

Textual Approach

The textual approach concentrates on the text's terms and phrases¹⁴ to reach the ordinary meaning of the this text¹⁵ by considering the text as an essential method in the process of interpretation through reflecting the common intention of treaties' drafters.¹⁶ This ordinary meaning is relevant to the grammatical and the literal interpretation that constitutes the language of treaty in the authentic version.¹⁷ This is compatible with Article 31(1) of the *VCLT* that stipulates interpreting treaties shall be consistent with the ordinary meaning;¹⁸ this has been reflected in the context of the textual approach that is referred to as a first step in treaty interpretation by arguing that the textual approach prevails on other interpretative approaches¹⁹ to elucidate the meaning of the

¹ Gillian Triggs, *International Law: Contemporary Principles and Practices* (New South Wales: LexisNexis Butterworths, 2nd ed, 2011) 121.

² 'Law of Treaties' (1966) II (2) *YILC*, 218.

³ *Ibid.*

⁴ Sinclair, above n 5, 114.

⁵ Martin Dixon, *Cases and Materials on International Law* / by Martin Dixon, Robert McCorquodale, Sarah Williams (OUP, 5th ed, 2011) 81. See, McNair, above n 2, 364.

⁶ See, Brownlie, above n 6, 631.

⁷ See, Briggs, above n 7.

⁸ See, McLachlan, above n 8.

⁹ Crema and Crema, above n 12, 692.

¹⁰ Ris, above n 1.

¹¹ *Ibid.* See, *Vienna Convention on the Law of Treaties 1969* art 31(1).

¹² Sinclair, above n 5, 114.

¹³ Stephen Hall, *Principles of international law* (Chatswood, N.S.W.: LexisNexis Butterworths 3rd ed, 2011) 108.

¹⁴ *Treaty Interpretation: General Principles of International Law*, International Judicial Monitor.

¹⁵ Mark Eugen. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, c2009., 2009) 421.

¹⁶ Ulf Linderfalk, 'Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation' (2007) 54(01) (05) *Netherlands International Law Review* 133, 29-30. See, Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (MUP, 1984) 134.

¹⁷ *Polish Postal Service in Danzig (Advisory Opinion)* [1925] PICJ (ser B) No11, 37. See. Francis G. Jacobs and Francis G. Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18(2) *The International and comparative law quarterly* 318, 138.

¹⁸ *Vienna Convention on the Law of Treaties 1969* art 31(1).

¹⁹ See, David S. Jonas, 'The object and purpose of a treaty: three interpretive methods' (2010) 43(3) (05/01) *Vanderbilt Journal of Transnational Law* 565.

text¹ that reveals the common intention as long as this meaning is consistent with the purpose and the object of the agreement.²

Proponents of the textual approach argues that other interpretative approaches may not be resorted to, when the textual approach achieves the goal of treaty interpretation.³ Consequently, proponents of the textual approach invoke that investigating the common intention of parties can be targeted,⁴ when the textual approach leads to ambiguous and unforeseen meaning.⁵ On the other hand, it is argued that resorting to the textual approach in isolation from other interpretative rules to discover the ordinary meaning of the text's phrases and terms may lead to various meanings.⁶ Therefore, other interpretative rules and approaches such as preparatory works shall be resorted to in order to decide which meaning is correct.⁷ However, the *VCLT* tackles this issue in Article 31(1) that stipulates that the ordinary meaning shall be consistent with the agreements' context.⁸ Therefore, the contextual approach shall be resorted to, when the textual approach leads to various meanings.

Contextual Approach

It is noticeable that the textual approach may lead to various ordinary meanings therefore there is a need to consider the contextual approach that is based on the notion of contextualizing the meaning of terms instead of relying only on their ordinary meanings. Contextualizing the meaning of the text's phrases and terms requires considering the entire treaty to activate its provisions⁹ instead of limiting the scope of interpretation to specific conventional provisions or specific parts of this treaty in isolation from other contents.¹⁰ This is because terms and phrases do not have meaning by themselves¹¹ since they are not drafted in isolation from other parts of their treaty.¹² Accordingly, the treaty in question shall be considered as one unit by considering different parts of this treaty during the time of interpreting its provisions.¹³ Accordingly, it is argued that contextual approach is effective to avoid reaching various interpretations that are resulted from exclusively using the textual approach therefore a single interpretative norm shall not be used without considering other norms.¹⁴

Paragraphs 2 and 3 of Article 31 considers the scope of the contextual approach by indicating:

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 connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection 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.

The contextual approach expands the scope of interpretation by considering the entire agreement to reach the precise meaning instead of limiting this scope to specific provision; this therefore leads to reach

¹ Law of Treaties' (1966) II (2) *YILC*, 220.

² *Vienna Convention on the Law of Treaties 1969* art 31(1). See, *Competence of the General Assembly for the Admission of a State to the U.N* (Advisory opinion) [1950] ICJ 4 N 9, 9-10.

³ McNair, above n 2, 366. See, *Territorial Dispute (Libya v. Chad)* (Judgment) [1994] ICJ 6 N 83, 25 [51].

⁴ McNair, above 2, 367. See, *Exchange of Greek and Turkish Populations (Greece v. Turkey)* (Advisory Opinion) [1925] PCIJ (ser B) No 10, [50].

⁵ See, *Competence of the General Assembly for the Admission of a State to the U.N* (Advisory opinion) [1950] ICJ No 9, 7-8.

⁶ See above n 44.

⁷ *Ibid.*

⁸ Mark E. Villiger, *Customary international law and treaties : a study of their interactions and interrelations, with special consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht; Boston: M. Nijhoff ; Hingham, MA : Distributors for the U.S. and Canada, Kluwer Academic, 1985) 343.

⁹ Sinclair, above n 5, 127.

¹⁰ McNair, above n 2, 381. See, *Competence of the Int'l Labour Org. in regard to Int'l Regulation of Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion) [1922] PICJ (ser B) No 2, [24].

¹¹ Jacobs and Jacobs, above n 44.

¹² Villiger, above n 42, 427. See, *Polish Postal Service in Danzig* (Advisory Opinion) [1925] PICJ (ser B) No11, 39.

¹³ Linderfalk, above n 43, 30. See, *Treaty Interpretation: General Principles of International Law*, International Judicial Monitor.

¹⁴ See, Hall., above n 40, 109. See, McTaggart Sinclair, above n 43, 127-130.

meanings more compatible with the agreement. Accordingly, an agreement's preamble and its purpose are considered significant to determine the common intention and to elucidate provisions' meanings,¹ as well as the treaty's annexes are helpful to elucidate terms' meaning, when the text is insufficient.² Moreover, the contextual approach embraces external relevant instruments that are subsequent³ or concurrent⁴ to the time of establishing the treaty⁵ as long as parties established these instruments or accepted them if they are established by one or more parties.⁶ However, these external instruments shall be authentic, binding, reliable, unified and established by either all members or for all members;⁷ nonetheless, it shall taken into account that these external instruments do not form a part of the agreement which is subject to the interpretation.⁸

The contextual approach includes instruments or agreements that are established either between all parties or 'by one or more parties in connection with the conclusion of the treaty and accepted by the other parties'⁹ as an instrument related to the treaty¹⁰ for the purpose of either implementing the latter or interpreting its provisions,¹¹ and explanatory reports and conferences' final acts.¹² Furthermore, the contextual approach embraces subsequent agreements between parties with respect to either interpret or implement the treaty, and any subsequent practice with respect to apply the treaty.¹³ It shall be noticed that the subsequent practice shall be frequent, consistent and either performed by all parties or acquiesced by them, when specific parties have performed it.¹⁴ However, the subsequent practice can be resorted to for determining the common intention of parties, only when the text is unclear;¹⁵ this is important to avoid the possibility of misusing this instrument by a way leads to revise the treaty by modifying obligations and rights¹⁶ because this result is irrelevant to treaty interpretation.¹⁷

Additionally, the context shall be operated along with applicable relevant norms and general principle of international law, agreements and international customs regarding relations between parties;¹⁸ therefore, subsequent development in international law and international custom shall be taken into account.¹⁹ Indeed, these instruments are effective in supporting the unity and harmony of international law to avoid fragmenting the latter.²⁰ However, these instruments shall be applicable and binding to all parties of the treaty at the moment of interpreting it,²¹ even if this treaty does not relate to these instruments.²² Nevertheless, these instruments shall not be used to deviate from the treaty in question since other agreements may have different circumstance, even if they have identical texts, context and preparatory works.²³ As a result, the contextual approach is the cornerstone of interpretation since it leads to reach the correct meaning of the text through considering external instruments and agreements. However, it shall be considered that '[a] special meaning shall be given to a term if it is established that the parties so intended';²⁴ this special meaning however may be incompatible with the ordinary meaning.²⁵

¹ Sinclair, above n 5, 127-128.

² *Territorial Dispute (Libya v. Chad)* (Judgment) [1994] ICJ 6 No 83, [48].

³ *Vienna convention on the law of treaties 1969* art 31(3).

⁴ *Ibid* art 31(2).

⁵ *Ibid* art 31 (2) and (3).

⁶ Villiger, n 42, 429.

⁷ *Ibid*. See, 'Law of Treaties' (1964) I *YILC*, 313 [53].

⁸ *Ibid* 221.

⁹ *Ibid*. See, Villiger, above n 42, 430.

¹⁰ *Vienna convention on the law of treaties 1969* art 31(2).

¹¹ Villiger, above n 42, 430.

¹² *Ibid*.

¹³ *Vienna convention on the law of treaties 1969* art 31(3).

¹⁴ Villiger, above n 42, 432. See, *Corfu Channel Case (UK v Albania)* (Judgment, Advisory opinion and Orders) [1949] ICJ 171 No 1, 25.

¹⁵ See, *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Turkey v Iraq)* (Advisory Opinion) [1925] PICJ (ser B) No12, 24; *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)* (Judgment) [1929] PCIJ (ser A) No. 20, [79].

¹⁶ See, Villiger, above n 54, 429, 432; G. G Lawrie, 'Application and Interpretation of the Vienna Convention on the Law of Treaties;' (1972) 2 *Hong Kong Law Journal* 261.

¹⁷ See, Maarten Bos, 'Theory and Practice of Treaty Interpretation' (1980) 27(2) *Netherlands International Law Review* 135.

¹⁸ *Vienna convention on the law of treaties 1969* art 31(3)(c). See, Linderfalk, above n 43.

¹⁹ Villiger, above n 54, 269. See, McTaggart Sinclair, above n 43, 138-140.

²⁰ See, McLachlan, above n 8; *Case Concerning Oil Platforms (Iran v. U.S.)* (Judgment) [2003] ICJ 161, [41].

²¹ *Vienna on the Law of Treaties 1969* art 2.(g). See, Villiger, above n 54, 433.

²² *Ibid* 432.

²³ See, *Mox Plant case (Ireland v. the United Kingdom) (Order)* (2001) International Tribunal for the Law of The Sea No 10, [50]-[51].

²⁴ *Vienna Convention on the Law of Treaties 1969* art 31(4).

²⁵ Villiger, above n 54, 343.

The Purpose and Object Approach

In accordance to the *VCLT*, the ordinary meaning shall be compatible with the purpose and object of the treaty¹ that can be determined through considering the whole treaty.² The purpose and objective determine covered matters by the treaty and the reason behind covering them.³ This has been embodied in the purpose and object approach that is called the teleological approach; it is invoked that this approach can be liberally resorted to for the purpose of reaching the correct meaning that reflects the common intention of parties; this common intention is embodied in the treaty's objective⁴ which is reflected in its preamble.⁵ It is debated that this approach is significant to limit using the contextual approach that ignores the common intention of parties.⁶ However, it is critiqued that various common intentions may be reached regarding multilateral agreements that have many members by relying on the purpose and objective approach⁷ or the latter may impact the legal status of acceding parties who may face unforeseen responsibilities.⁸ Also, it is argued that the purpose and the object of an agreement may be ineffective to reach the common intention of parties that is reflected in the ordinary meaning of the text as long as this meaning is compatible with purpose and object;⁹ therefore, the text shall not be ignored by resorting to the objective and purpose approach.¹⁰ This argument reflects the objective and purpose approach shall be resorted to as either a secondary or supplementary instrument,¹¹ not as a primary approach,¹² when the text is ambiguous.¹³ Accordingly, these conditions restrict and limit the purpose and object approach¹⁴ in order to not use this approach to deviate from the text and its goal by a way that leads to revise the treaty.¹⁵

Supplementary Means of Interpretation

The *VCLT* conforms in Article 32 that supplementary means of interpretation such as preparatory works can be resorted to either 'confirm the meaning resulting from the application of article 31, or to determine the meaning when reached interpretation according to article 31 either leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable'. The treaty's preparatory work compromise belonged materials to the treaty either before or after the time of concluding it such as negotiations and other formal circumstances at the time of concluding it, minutes of conference, memoranda and drafts of the treaty.¹⁶ It is worthy noting that, considering preparatory works excludes negotiations that are either confidential or limited to non-disputant parties.¹⁷ Nonetheless, those supplementary means can be resorted to, when the aforementioned interpretative approaches which are referred to in Article 31 lead to either obscure, manifest, unreasonable or ambiguous meaning.¹⁸ Accordingly, resorting to those supplementary means is unacceptable, if the text is sufficient and clear¹⁹ unless for supporting and confirming the interpretation that is reached through relying on rules that are referred to in Article 31.²⁰

In contrast, the intentional school which begins the interpretation by determining the common intention's members²¹ argues that the approach of supplementary means is a lawful method to interpret treaties²² therefore it prevails on the text because it is effective to explore the common intention of parties²³ by referring to

¹ *Vienna Convention on the Law of Treaties 1969* art 31(1).

² Asif H. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (CUP, 2006) 18, 20.

³ *Ibid.*

⁴ See, Crema and Crema, above n 12; Lauterpacht, above n 24; McNair, above n 2, 381; McTaggart Sinclair, above n 43, 130-8.

⁵ *Siemens v. the Argentina Republic (Decision of Jurisdiction)* (2004) ICSID No ARB/02/8, [81].

⁶ Sinclair, above n 5, 131.

⁷ *Ibid* 130.

⁸ *Ibid* 130-131.

⁹ *Ibid* 105, 131. See, 'Law of Treaties' [1966] II (2) *YILC*, 220.

¹⁰ Sinclair, above n 5, 134.

¹¹ *Ibid* 130. See, Villiger, above n 54, 427.

¹² *Noble Venture (Inc. v. Romania) (Award)* (2005) ICSID Washington No ARB/01/11, [52].

¹³ Crawford, above n 3, 379.

¹⁴ *Treaty Interpretation: General Principles of International Law*, International Judicial Monitor.

¹⁵ See, Gidon Gottlieb, 'The Interpretation of Treaties by Tribunals' (1969) 63 (4) *Proceedings of the American Society of International Law at its annual meeting (1921)* 122..

¹⁶ Villiger, above n 54, 345. See, McNair, above n 2 411; Hall, above n 40, 110.

¹⁷ Lauterpacht, above n 23.

¹⁸ *Vienna Convention on the Law of Treaties 1969* art 32 (a) and (b). See, Dixon, above n 32, 73.

¹⁹ *Case of the S.S. "Lotus" (Judgment)* [1927] PICJ (ser A) 5 No 10, 16. See, Brownlie, above n 6, 634; Hall, above n 40, 110.

²⁰ Crawford, above n 3, 383. See, McNair, above n 2, 415; Jacobs and Jacobs, above n 44; *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Turkey v Iraq)* (Advisory Opinion) [1925] PICJ (ser B) No12, 22.

²¹ Dixon, above n 32, 81.

²² See, Ris, above n 1.

²³ McNair, above n 2, 411.

negotiations of concluding treaties, even when the text is clear.¹ However, proponents of the textual approach argue that supplementary means such as preparatory works are a secondary rule and the authentic common intention that shall be sought to is reflected in the text,² while preparatory works can be resorted to for the goal of confirming the ordinary meaning of the text or clarifying the unclear text.³ This is attributed to the attitude of the textual approach to adopt a hierarchical structure that distinguishes between primary and secondary interpretative rules⁴ therefore they consider preparatory works as a secondary rule that shall not be used to derogate from the textual rule.⁵ Nonetheless, Article 32 of the *VCLT* enforces no time-based restriction on resorting to preparatory works⁶ and it does not give preparatory works less status than other interpretative rules that are resorted to in Article 31,⁷ however, the *VCLT* restricts using supplementary means of interpretation through determining the conditions of resorting to them in Article 32.⁸ Therefore, it seems that supplementary means of interpretation implicitly fall within the scope of secondary interpretative norms since they cannot be used in isolation from the text,⁹ otherwise this can be inadmissible.¹⁰

Good Faith Principle

Treaty interpretation, in accordance to paragraph 1 of Article 31, has to be consistent with the doctrine of good faith¹¹ that falls within the arena of international customary law¹² and attributed to the legal doctrine of *pacta sunt servanda*.¹³ It is indicated that ambiguity in the field of treaty interpretation is due to the absence of the principle of good faith¹⁴ that is significant to regulate adopting interpretative rules.¹⁵ This regulatory function makes the good faith principle as a flexible instrument that is more consistent with circumstances of cases¹⁶ to enhance the quality of implementing rules and norms.¹⁷ Accordingly, the standard of case-by-case is adopted, rather than a hierarchical structure, to regulate adopting interpretative rules; therefore, cases' circumstances shall be considered to determine which interpretative rules shall be used.¹⁸ Nonetheless, it is possible to reach more than one incompatible interpretation by employing different interpretative rules; however, this shall be resolved through relying on the good faith principle that requires adopting the interpretation that makes the treaty more effective instead of other interpretations that make some parts of this treaty useless or without meaning.¹⁹ This is more compatible with the effectiveness principle²⁰ that requires granting an effective meaning to the entire treaty without exceeding the contents of its texts.²¹

Indeed, giving the entire treaty effective meaning during the process of interpretation is compatible with the doctrine *pacta sunt servanda* that requires the compliance with conventional responsibility in a good faith²² to protect members' lawful expectations.²³ However, this requires not considering incompatible subsequent practices with written texts, otherwise subsequent practice can lead to modify conventional provisions²⁴ that can be departed and derogated from by invoking subsequent practices.²⁵ Therefore, modifying conventions shall be

¹ See above n 44.

² Sinclair, above n 5, 141.

³ See, Ris, above n 1.

⁴ Ibid.

⁵ Crawford, above n 3, 383. See, Faitzamura, above n 5, 15-7.

⁶ See, Briggs, above 7.

⁷ Sinclair, above n 5, 116.

⁸ 'Law of Treaties' (1966) II (2) *YILC*, 223..

⁹ Sinclair, above n 5, 116.

¹⁰ 'Law of Treaties' (1966) II (2) *YILC*, 223.

¹¹ Ibid 219. See, *Vienna Convention on the Law of Treaties 1969* art 31(1).

¹² See, *ibid*.

¹³ 'Law of Treaties' (1966) II (2) *YILC*, 221. See, *Vienna Convention on the Law of Treaties 1969* art 26.

¹⁴ See, Michael P. Alstine, 'The death of good faith in treaty jurisprudence and a call for resurrection' (2005) 93(6) *The Georgetown law journal* 1885.

¹⁵ See, Bos, above n 77.

¹⁶ Ibid.

¹⁷ Ibid 246.

¹⁸ 'Law of Treaties' (1966) II (2) *YILC*, 218.

¹⁹ Ibid 219-20.

²⁰ Ibid 219.

²¹ Ibid.

²² *Vienna Convention on the Law of Treaties 1969* art 26. See, Triggs, above n 29, 99.

²³ See, Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited' (2012) 25(4) *Leiden Journal of International Law* 909.

²⁴ Villiger, above n 54, 253.

²⁵ *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968), 208 [60].

occurred through concluding other conventions,¹ whereas allowing the modification by invoking the subsequent practice may cause loosening treaties' contents.² However, subsequent practices may constitute international customs that lead to modify treaty since international customs cannot be excluded by invoking the principle *pacta sunt servanda*.³ Nonetheless, international customs may be excluded, when the same treaty determines the method of modification.⁴

As a result, interpretative rules that are referred to in Articles 31 and 32 shall be considered along with the good faith principle. This part discusses different approaches and views with respect to implement these interpretative rules in regard to alleged restrictions on implementing them. Nonetheless, the *VCLT* does not tackle this argument because of not adopting an explicit hierarchical structure regarding the implementation of interpretative rules. However, this hierarchical structure can be derived from reviewing relevant reports of the ILC that can assist in interpreting the *VCLT* along with the *United Nations Conference on the Law of Treaties* 1968.

Part THREE: Hierarchical Structure of Interpretative Rules

The *VCLT* has a remarkable status in international law since its provisions are widely adopted by tribunals therefore the *VCLT* has been considered as an essential part of the contemporary international law.⁵ It is indicated that Articles 31 and 32 of the *VCLT* are codified to reach the correct interpretation,⁶ resolve the argument between proponents of various interpretative rules and enhance the predictability about treaty interpretation.⁷ Nevertheless, it is argued that the *VCLT* has failed in resolving these issues because it does not regulate operating and adopting interpretative rules;⁸ this is attributed to the attitude of codifying general interpretative principles⁹ without providing a hierarchical structure of adopting interpretative rules.¹⁰ It is argued that the lack of the hierarchical structure is obvious in Article 31(3) that requires considering external materials to the treaty in question at the same level of the treaty itself at the time of interpretation.¹¹ This criticism is based on deciding whether the *VCLT* provides a hierarchical structure with regard to adopt and apply interpretative rules; however, this can be clarified through referring to relevant reports of the ILC with respect to conclude the *VCLT* since these reports are assistant in the process of interpreting the *VCLT*.¹²

Initially, it shall be noticed that Article 31 is recognized as an interpretative rule of international custom¹³ and it comprises the main interpretative approaches in one conventional provision¹⁴ with the heading 'General rule of interpretation' to operate all paragraphs and sub-paragraphs of Article 31 together in the process of interpretation.¹⁵ It seems that this codification is the reason behind critiquing the failure of the *VCLT* to regulate the adoption of interpretative rules. However, the ILC indicates that this codification of Article 31 is logical because this Article includes extrinsic elements in separate paragraphs that follow other interpretative rules in previous paragraphs.¹⁶ By examining Article 31, paragraph 1 embraces the textual, the contextual and the objective and purpose approaches along with the principle of good faith, while paragraphs 2 and 3 comprise external elements that shall be considered along with the contextual approach and paragraph 4 refers to the intention of parties. Accordingly, external elements are not inferior of other interpretative approaches that are considered in paragraph 1 of Article 31¹⁷ because this codification is logical therefore it cannot be adopted as a hierarchical structure, according to the ILC's view.¹⁸

Nonetheless, examining the attitude of the ILC leads to conclude that the textual approach is the first rule in the hierarchical structure with regard to adopt interpretative rules. The conventional text, in the view of ILC, is the most effectual way to discover the common intention of parties¹⁹ and other interpretative rules can be

¹ Ibid.

² Ibid 208 [62]-[63].

³ Villiger, above n 54, 219.

⁴ See, Hall above 40, 31.

⁵ Villiger, above n 54, 110, 309-10.

⁶ Linderfalk, above n 43.

⁷ See, Maki and Peter, above n 21.

⁸ 'Law of Treaties' (1966) II (2) *YILC*, 218.

⁹ Ibid.

¹⁰ Ibid 220.

¹¹ Ibid.

¹² See, Briggs, above n 7.

¹³ See, McLachlan, above n 8.

¹⁴ Dixon, above n 32, 87.

¹⁵ 'Law of Treaties' (1966) II (2) *YILC*, 219-20.

¹⁶ Ibid 220.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Dixon, above n 32, 87. See, Brownlie, above n 6, 631; Law of Treaties' (1966) II (2) *YILC*, 219.

resorted to, when this text is ineffectual to achieve the purpose of determining this common intention.¹ Therefore, the ILC emphasizes that treaty interpretation shall be launched by referring to the text² which embraces members' common intention.³ Additionally, the contextual approach is the second rule in the hierarchical structure; the ILC confirms that the logical approach stipulates that the contextual approach shall be directly resorted to, when the text is insufficient to achieve the goal of interpretation⁴ and this has been adopted by the vast majority of jurists and tribunals.⁵ As, the codification of the contextual approach in separate paragraphs (2-3) of Article 31 is compatible with the nature of the contextual approach that is broad and embraces other interpretative elements.⁶ With regard to the purpose and objective approach, the purpose and objective of treaties cannot be used in isolation to discover the common intention which is crystalized in the ordinary meaning of texts.⁷ In fact, codifying the objective and purpose approach along with the contextual approach in Article 31(1) instead of codifying the former in a separate provision is more satisfactory because this precludes from exploiting the former approach to achieve self-interests.⁸ Consequently, this implicit hierarchical structure can be summarized as:

... the interpreter has to start with the hard core of the operation, which is the *text* to be interpreted (that is, the words and language of the provision); before moving from the text, if need be ... , but still by way of internal inference ('internal' to the instrument bearing the interpreted text), to *context*, which consists of the structure and the other provisions of the instrument (and related instruments), to the '*object and purpose*' of this instrument, if the object and purpose can be fathomed from its provisions, including its preamble where they are frequently expressly stated.⁹

In addition, it is argued whether the codification of supplementary interpretative means in a separate Article 32¹⁰ constitutes a hierarchical structure¹¹ that either distinguishes between primary, secondary and supplementary interpretative rules of Articles 31 and 32¹² or in favor the textual approach.¹³ The nature of supplementary means such as preparatory works requires codifying these means in a separate Article 32 because this is necessary to consider the situation of countries that did not participate in drafting the treaty in question¹⁴ because such countries would need to examine this treaty' preparatory works before adopting it, if the interpretative rule of preparatory works is granted more weight than the text.¹⁵ Nonetheless, these countries cannot avoid the impact of considering preparatory works in the process of interpretation by invoking their not participation in drafting and codifying the treaty in question.¹⁶ Nonetheless, it is emphasized in the *United Nations Conference on the Law of Treaties* that this codification in two separate provisions does not exclude the supplementary interpretative means from the interpretation, subsequently, both Articles 31 and 32 shall be simultaneously operated.¹⁷ Nonetheless, the *VCLT* explicitly regulates and restricts the employment of supplementary interpretative means in Article 32. The latter limits resorting to these supplementary instruments for the goal of either confirming the result of interpretation that is reached by adopting interpretative rules of Article 31 or deciding which meaning is correct when Article 31 leads to either obscure or ambiguous meaning or unreasonable result, according to Article 32. Accordingly, the superiority is implicitly granted to interpretative

¹ See, McLachlan, above n 8.

² 'Law of Treaties' (1966) II (2) *YILC*, 220.

³ *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968) [63].

⁴ 'Law of Treaties' (1966) II (2) *YILC*, 220.

⁵ *Ibid* 218. See, Maki and Peter, above n 21.

⁶ *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968) [66].

⁷ 'Law of Treaties' (1966) II (2) *YILC*, 220.

⁸ *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968) [67].

⁹ Julian Davis Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107(4) *The American Journal of International Law* 780, 782.

¹⁰ See, Linderfalk, above n 43.

¹¹ *Ibid*.

¹² *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968) [38]-[39].

¹³ Jacobs and Jacobs, above n 44, 138. See, *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968) [65].

¹⁴ *Ibid*.

¹⁵ *Ibid* [10].

¹⁶ Crawford, above n 3, 384. See, Sinclair, above n 5, 144

¹⁷ *United Nations Conference on the Law of Treaties*, Un Doc A/CONF.39/SR.1- SR.5, 1st -83rd comms, 1st sess, (26 March-24 May 1968) [66].

approaches that are referred to in Article 31, while the supplementary instruments of Article 32 have to be limited to the function that is determined in Article 32; as a result, such supplementary instruments can be considered supportive and secondary;¹ consequently, they shall not be widely used to depart from the text² and derogate from obligations.³ As a result, the *VCLT* adopts an overall approach with respect to treaty interpretation; it is debated 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*'.⁴

Conclusion

This research discusses whether the *VCLT* adopts a hierarchical structure to regulate the adoption of interpretative rules that are codified in Articles 31 and 32 in order to resolve the uncertainty with respect to applying these rules. This paper discusses the attitude of the ILC to codify interpretative rules in the *VCLT* as a response to the uncertainty of applying interpretative rules by international tribunals; in addition, it refers to controversies between scholars with respect to the implementation of interpretative rules by considering views of the main interpretative schools that are the textual, the contextual and the objective and purpose. Nonetheless, this paper reviews ILC's relevant reports to the *VCLT* along with the *United Nations Conference on the Law of Treaties* 1968 in order to facilitate the interpretation of the *VCLT*; this review, which is referred to in the third part of this research, leads to conclude that the *VCLT* implicitly adopts a hierarchical structure that regulates the adoption of interpretative rules. This hierarchical structure stipulates resorting to the textual approach at the first step of treaty interpretation to discover the common intention, while other interpretative rules can be resorted to when the text is insufficient. Therefore, the contextual approach shall be directly, when the text is insufficient to fulfill the purpose of treaty interpretation. With regard to the purpose and objective approach, the latter cannot be used in isolation from other approaches to avoid exploiting it to achieve self-interests. Nonetheless, supplementary means shall be exclusively employed to either confirm reachable interpretation by the aforementioned approaches or to decide which meaning is correct, when these aforementioned approaches lead to either obscure or ambiguous meaning or unreasonable meaning, according to Article 32 of the *VCLT*.

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¹ Dixon, above n 32, 197.

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