

The continuum between **consent to be bound** and **treaty interpretation**

In the International Court of Justice

soft law

subsequent agreements
subsequent practice
(VCLT)



Adv. Op. Certain Expenses

Adv. Op. Wall in the Occupied
Palestinian Territory

Nuclear Test Cases

Kasikili/Sedudu Island case

Vienna Convention on
the Law of Treaties

Dispute Regarding Navigational and
Related Rights (Costa Rica v Nicaragua)

Whaling in the Antarctic

ILC's draft conclusions on subsequent
agreements and subsequent practice in
relation to the interpretation of treaties

Article 31 General rule of interpretation

1. A treaty shall be interpreted in **good faith** in accordance with the **ordinary meaning** to be given to the terms of the treaty in their context and in the light of its **object and purpose**.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in 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.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention on the Law of Treaties

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Whaling in the Antarctic

Article VIII. I. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. (...)

International Convention for the Regulation of Whaling

First, **many IWC resolutions were adopted without the support of all States parties** to the Convention and, in particular, without the concurrence of Japan. **Thus, such instruments cannot be regarded as subsequent agreement** to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty **within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.**

Judgement on Whaling In The Antarctic
(Australia V. Japan: New Zealand intervening)

- Why does the Court need consent to interpret a treaty? (provided it has jurisdiction)
- Were the resolutions actual means of interpretation? Or were they an attempt to regulate the treaty?

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Article 39

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

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**Interpretation is concerned with determining the
normative message that arises from the text.**

See H. Kelsen, *Pure Theory of Law* 348 (Knight trans. from German, 2d ed. 1967); K.
Larenz, *Methodenlehre der Rechtswissenschaft* (5th ed. 1983)

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"The paragraph reminds the interpreter that agreements may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the 1969 Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a)"

(paragraph 21 of the commentary to draft conclusion 7)

“Indeed, the dividing line between the interpretation and the amendment or modification of a treaty is in practice sometimes ‘difficult, if not impossible, to fix’”

Paragraph 27