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(p. 161) 5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning

Treaty—good faith—ordinary meaning—terms—context—object and purpose

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. In approaching this task, it is critical to observe two things about the general rule … First, the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. …[1]

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.

…

This chapter is the first of those making an analytical study of the Vienna rules. This means taking them to bits and applying the rules to each term. It is necessary, therefore, to preface these chapters with the warning that in an exercise of treaty interpretation where application of the rules is to an actual dispute or issue, the Vienna rules are to be applied together, not in bits. Necessary here to make the exercise manageable in the circumstances of a detailed exposition of the rules, the risk of application of individual rules of treaty interpretation in isolation from one another was the main reason why the whole of article 31 is described as the (p. 162) (singular) 'general rule'.[2] Similarly, too often 'ordinary meaning' in the opening paragraph of that article is taken as a separate, or even the sole, interpretative element without its immediately associated reference to context and to object and purpose, while the latter (object and purpose) is sometimes taken as merely a mandate for a general teleological approach.

Concern for the need to safeguard against 'excessive molecularization' of the Vienna rules led to the formulation of the first paragraph of the rules placing in combination several elements rather than itemizing them separately.[3] A strong note of caution must be sounded over the extract from the arbitral award at the head of this chapter. Helpfully describing interpretation under article 31 as a process of 'progressive encirclement', and rightly pointing out that all three components of article 31(1) which the extract identifies must be used to close in on the proper meaning of terms, the extract should not be taken as putting the elements of the rest of the general rule in article 31 out of view. Quite the contrary, the 'progressive encirclement' description holds good for the whole of article 31, the 'crucible' analogy described in Chapter 1 requiring that *all* relevant elements identifiable by the Vienna rules, and presenting themselves in any given instance, are ultimately taken together in each exercise of treaty interpretation.

The second paragraph of article 31 is a definition of 'context' for the purposes of interpretation. What comes within paragraphs 2(a) and (b) of that definition (agreements and instruments in connection with conclusion of a treaty) has been considered in Chapter 3; the role which those agreements and instruments play in treaty interpretation is considered in Chapter 6. The principal elements of article 31(1)

which are considered here are: (1) 'a treaty'; (2) 'good faith'; (3) 'ordinary meaning of terms'; (4) 'context'; and (5) 'object and purpose'.

1. A 'Treaty'

The opening reference to 'a treaty' is to be interpreted by giving the term 'treaty' its particular or 'special' meaning established by the Vienna Convention in its definition provision (article 2).[4] This is required by article 31(4) of the Convention (a special meaning is to be given to a term if it is established that the parties so intended). In relation to this definition of 'treaty' a distinction is to be noted between application of the Vienna rules as provisions of a treaty and as a statement of customary international law. While it is now beyond question that the Vienna rules (ie articles 31–33) are rules of customary international law, the rest of the Vienna Convention has not all been confirmed as stating customary

References

(p. 163) law. Hence the Vienna Convention's definition of 'treaty' cannot necessarily be taken to be part of customary international law. Definitions perform an adjectival role, their content being contextually constricted, so that considering whether they are 'rules' of customary international law is actually a rather stilted exercise. The definitions are adjuncts to rules and the real question is therefore how far the definition of 'treaty' controls the extent of applicability of the Vienna rules.

Article 2 of the Vienna Convention introduces its definition with the limitation: 'For the purposes of the present Convention'. This negates any initial presumption that by reason of its link with use of the term in article 31(1) (acknowledged to be customary international law), the definition of 'treaty' could be taken to identify the content of that term for customary international law generally. This does not exclude a more general utility of this (and the other definitions in article 2) based on their good sense; nor does it rule out the possibility that the definitions may assume a defining role in usage of the terms in propositions of customary international law. In its commentary on the draft of article 2 the ILC records:

> This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meanings with which terms are used in the draft articles.[5]

This extract from the preparatory work is in line with the ordinary and clear meaning of the opening words of article 2. The correct interpretation, therefore, appears to be that application of the Vienna rules as a matter of treaty relations is limited to instruments falling within the definition in article 2. The ICJ has indicated that where rules are codified in a treaty, customary law continues to occupy a parallel field on the same subject matter.[6] While all treaties covered by the definition in the Vienna Convention are within any customary law meaning of a treaty, the definition adopted for the purposes of the Convention is more limited than the meaning ascribed by customary law. For example, the latter would not be limited to agreements between states but would include agreements governed by international law involving international organizations.[7] Oral agreements and some multilateral instruments involving states and other entities have also been assimilated to treaties.[8] There is no reason why tribunals should not apply customary rules of treaty interpretation (as stated in the Vienna rules) if they regard such instruments as of the character of treaties.

References

(p. 164) 1.1 The 'treaty' and its 'terms'

> **. . . the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.**[9]

The first paragraph of the general rule, which provides the immediate context in which the word 'treaty' is used, can be seen as formulated to differentiate between a treaty and its 'terms'. It is the *treaty* which is to be interpreted; it is the *terms* whose ordinary meaning is to be the starting point, their context moderating selection of that meaning, and the process being further illuminated by the treaty's object and purpose.

There is, however, an obvious ambiguity in the reference to 'the terms of the treaty'. 'Terms' could refer simply to the words or provisions of the treaty or it could mean the bargain struck by the parties. The context clearly suggests the former, but this is considered further in section 3.2 on 'ordinary meaning' below. However, a more controversial point is that the formulation of the complete first paragraph of the general rule seems to have been mainly the product of a difference in approach founded on a supposed contrast between text and intention. An underlying question in the ILC's initial debates on rules of interpretation was 'whether interpretation should be by reference to the text itself or to the intention of the parties'.[10] The ILC's approach favoured the text as the starting point on the basis that this was the best evidence of the finally agreed intent of the parties.

The first draft put to the ILC by its fourth Special Rapporteur on the law of treaties (Waldock) had opened by stating that the 'terms of a treaty' were to be interpreted in good faith, etc. The opening appears to have been changed in the course of the ILC's work to reflect more closely the 1956 Resolution of the Institute of International Law and the formulation of principles by Sir Gerald Fitzmaurice which together inspired the wording of the ILC draft.[11] The former had opened its proposed rules of interpretation by reciting the 'agreement of the parties having been reached on the text of the treaty …'. Fitzmaurice had described a principle of 'actuality (or textuality)', stating: 'Treaties are to be interpreted primarily … on the basis of their actual texts.' This he coupled with other principles including that

References

Helvering v Gregory, No 324, 69 F 2d 809 (2d Cir 1934), 19th March 1934, United States; Court of Appeals (2nd Circuit) [2d Cir]

(p. 165) of 'integration': 'Treaties are to be interpreted as a whole …'[12] The formulation ultimately adopted by the ILC thus reflects the idea that, while it is the text of the treaty that must be taken as the authentic expression of the agreement of the parties, the treaty is to be read as a whole and respect paid to its object and purpose, rather than simply taking words that are the subject of controversy and digging out their meaning solely from dictionary, grammar, and syntax.

The principle of textuality has been helpfully summarized:

> This aspect of the primacy of the text has been recognized by international tribunals in a number of recurring situations. First, it seems to be generally recognized that an interpretation that does not emerge from the text cannot be accepted, however plausible it may be in view of the circumstances, unless failure to do so would lead to an obviously unreasonable result. Accordingly, tribunals have usually rejected otherwise reasonable interpretations because to accept them would have been tantamount to rephrasing or otherwise altering the actual text. Second, interpretations suggested by means of interpretation not derived from the text cannot be justified by referring to general custom, usage, or even recognized rules of international law unless sufficiently supported by the text. Last, when two or more reasonable interpretations exist, all of which are consistent with the text, the one that appears to be the most compatible with the text should prevail in the absence of persuasive evidence in support of another interpretation.[13]

1.2. The sound of silence—absent and implied terms

Sometimes the absence of something means simply that it is not there.[14]

One of the most difficult areas of treaty interpretation is how to cope with silence, or absent terms. If the treaty does not expressly make provision for the matter in issue, must it be assumed that it is not covered? This depends on what 'it' is, on the nature of the treaty and the interaction of the various elements of the Vienna rules. If there is a list of items which the treaty covers, something which is not capable of coming within any meaning within the list is excluded, but even this can be infused with an element of flexibility by the *eiusdem generis* rule. The more complicated issue is where a treaty authorizes one thing but leaves it unclear whether the interpreter is to deduce that other similar matters are to be the subject of later negotiation or are not regulated by the treaty (therefore leaving the parties free to act as they will). The nature of the treaty may be a key factor here. For example, a constitution of an international organization may require a greater degree of

References

(p. 166) readiness to accept implied powers to exercise its functions, in contrast to a treaty in which precision is the key, such as one fixing a boundary.[15]

As to the nature of the treaty, this may have an effect on interpretation in different, and not always predictable, ways. The arbitral award in *Air Services Agreement (USA v France)* (1978)[16] shows this. Bilateral air services agreements in the second half of the twentieth century were treaties providing very detailed regulation of air services, at least until the concept of 'open skies' came to the fore. In this case an American airline proposed to operate large aircraft from the USA to London and then decant the passengers into smaller aircraft which the airline proposed to operate for onward travel to European destinations, including Paris. Such a switch from larger to smaller aircraft in operating an air service was known in the trade as 'change of gauge'. The French government asserted that the proposed change of gauge was not permitted. The bilateral agreement between France and the USA governing air services between the USA and Paris (with other possible points on the route, such as London), prohibited change of gauge *within the territory of the two parties*. Did the agreement allow change of gauge elsewhere? The majority held that the proposed change of gauge was permitted by the treaty. They found that there were many details of aviation practice which were not spelt out in the treaty and developments in aviation (such as the introduction of jet aircraft) and which had been accommodated without negotiation of amendments.[17] A contrary view was that the nature of the agreement as a whole suggested that what is not expressly granted is not permitted, at least in matters which the treaty regulated, though even this would need to be assessed in the light of practice.[18] Even though the dissenting opinion showed that a very different conclusion was possible, the significance of the award on this point is that the treaty's silence on the precise point required the whole treaty to be construed and not just the one provision that did touch on the subject.

In contrast, a different interpretative approach could be expected towards treaties which do not regulate fine detail but set out broad principles intended to apply in a wide range of circumstances and over a period long enough to expect social changes. Human rights treaties are an obvious example of this. Nevertheless, the general principle remains that the approach is a textual one:

> In interpreting the [European Convention on Human Rights], as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not
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> (p. 167) wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (Edwards v Attorney General for Canada [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration.[19]

The significance of absent terms is a matter which comes up at many points in treaty interpretation. In establishing the ordinary meaning of a term, the absence of defining or qualifying words can be significant.[20] At a more conceptual level, the choice of one word rather than another could amount to a telling omission of that other.[21] Good faith has been considered as a constraining factor on the scope for implying terms into a treaty.[22]

2. 'Good Faith'

When courts and tribunals refer to good faith in treaty interpretation, they tend to stress its fundamental importance.[23] In this vein Hersch Lauterpacht wrote: 'Most of the current rules of interpretation, whether in relation to contracts or treaties …

References

(p. 168) are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith.'[24] Yet in most instances it is difficult to see any precise application of it or independent role for it. This may be because good faith is subjective in the sense that it attaches to a person, rather than objectively forming an attribute of an interpretation. That good faith is an accompaniment to an activity may partly explain why it is difficult to extract from judgments a clear dividing line between interpretation and application. When judgments refer to good faith as an element in treaty interpretation they sometimes link this with the notion of abuse of rights, the latter relating to how a right is exercised rather than how its content is determined. The borderline between interpretation and application becomes blurred.

It is usually difficult to detect any evidence that an interpretation has been proffered in bad faith, still less that an interpretation in a judgment or arbitral award has been reached in bad faith. Where good faith is specifically included in the justification for an interpretation, this is usually to buttress some other line of reasoning without providing any obviously additional criterion. Sometimes it seems little more than a synonym for 'reasonable'; but good faith is also invoked to justify express references to finding the intention of the parties, an objective to which the Vienna rules are directed but which they do not explicitly state. The concept is also used in the Vienna rules as an umbrella for the specific principle that an interpretation of a term should be preferred which gives it some meaning and role rather than one which does not. In international practice this principle is often given its Latin form *ut res magis valeat quam pereat* (abbreviated here as *'ut res'*).

Good faith differs from most of the other elements of the Vienna rules in that, at least in the way it is expressed in the opening words of the rules, it applies to the whole process of interpreting a treaty rather than solely to the meaning of particular words or phrases within it. Although it is difficult to give precise content to the concept generally, it does include one principle that applies to interpretation of specific terms used in a treaty. This is commonly described as the principle of 'effectiveness', of which one meaning is the *ut res* rule (considered further in section 2.4.5 below). The other aspect of the principle of effectiveness—preferring an interpretation which fulfils the aims of the treaty—is considered in section 5.3.6, on 'object and purpose'. These two aspects of effectiveness are not always clearly distinguished.

2.1 History and preparatory work relating to 'good faith'

In the work of the ILC, when the Commission was still undecided on whether to include draft rules on treaty interpretation, the Special Rapporteur included a reference to existing rules in the description of the general principle of the law of treaties that a treaty is binding on the parties who must perform its obligations in (p. 169) good faith (*pacta sunt servanda*). The link between this proposition and the opening words of the Vienna rules ('A treaty shall be interpreted in good faith') was both conceptual and textual. It was conceptual in that interpretation is a stage comprehended in the proper and honest performance of a treaty. It was textual because the ILC's first elaboration of *pacta sunt servanda* linked interpretation with it:

> A treaty is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing interpretation of treaties.[25]

However, the inclusion of good faith in the Vienna rules seems to have been as much because of the difficulty of dealing with maxims and canons of interpretation, and because of the desire to respect the principle of effectiveness,[26] as the recognition of what seemed an obvious consequence of the role of good faith as underpinning the law of treaties.

The wording referring to good faith in the first draft of what was to become article 31 of the Vienna rules was derived from proposals in the 1954 Resolution of the Institute of International Law mentioned above. This was used by the Special Rapporteur (Waldock) in combination with six principles formulated by Sir Gerald Fitzmaurice, which in turn were derived from the jurisprudence of the 'World Court' (a term used by several writers to refer jointly to the ICJ and its predecessor, the PCIJ).[27] These principles did not

explicitly refer to good faith, but the Special Rapporteur linked good faith with two of them. Principle III was headed 'Principle of integration' and provided: 'Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.' The Special Rapporteur characterized this principle as 'one both of common sense and good faith'.[28] Principle IV was headed 'Principle of effectiveness (*ut res magis valeat quam pereat*)' and stated:

> Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.[29]

This principle of effectiveness provided the basis for a separate draft article 72 in the first set of draft articles on interpretation proposed by the Special Rapporteur.[30] However, he set out reasons for hesitating to include the principle of 'effective' interpretation among the general rules. One was that effective interpretation, correctly understood, could be said to be included in interpretation made in good (p. 170) faith, or to be implicit in that notion.[31] In ILC debate about draft article 72, speakers supported the inclusion of the principle of effective interpretation, but not as a separate provision. The consensus that emerged was that it should be included in the opening paragraph of the rules, the preponderant view being that: 'An interpretation given in good faith and taking account of the object and purpose of a treaty would always necessarily seek to give a meaning to the text.'[32]

Thus, not only was the scene set for a broad view of good faith but that concept was also linked from the start with other elements of the general rule, such as the role of object and purpose.

2.2 Ordinary meaning of 'good faith'

'Good faith' is an excellent example of a term whose 'ordinary meaning' is elusive. The dictionary reference to the phrase 'good faith' takes one to a separate entry for 'bona fides', via the definition (unhelpful in the present context) as 'fidelity, loyalty'.[33] 'Bona fides' is itself a relatively recent usage, the very much older one being the adverbial or adjectival 'bona fide'.[34] That notion of acting honestly, without fraud or intent to deceive, is too general and ill-fitting to help in the context of treaty interpretation. To find the proper interpretation of the term 'good faith', a fuller application of the Vienna rules to the term is necessary. The difficulty of finding an ordinary meaning does, however, lend confirmation to the view to which Professor Cheng drew attention:

> It is said that we cannot define 'impossibility' of discharging duties. Certainly not; any definition would be either so wide as to be nugatory, or too narrow to fit the ever-varying events of human life. Neither can we define other terms applicable to human conduct, such as 'honesty,' for instance, or 'good faith,' or 'malice'; … Such rudimentary terms elude *a priori* definition; they can be illustrated, but not defined; they must be applied to the circumstances of each case …[35]

The few cases illustrative of good faith in connection with treaty interpretation are considered below. More generally, the term has received varying amounts of attention in national legal systems,[36] but while looking for any approximation to an 'ordinary' meaning for the term 'good faith', the Latin origins suggest a further line of conceptual approach. Professor Schwarzenberger explained good faith, in this context, as a product of treaty rights to be contrasted with rights in international

References

(p. 171) customary law. Characterizing the latter as *jus strictum*, he described the rights in customary law as absolute in the sense that 'their exercise, however harsh, does not amount to an abuse of rights'.[37] Thus (in his example), the right of the diplomatic representative to immunity is absolute but is balanced by the absolute right of the host state's government to declare such a representative *persona non grata* without the requirement of any justification. In contrast, Schwarzenberger describes treaty rights as rules of *jus aequum*, signifying the typical intention of the parties, in creating treaty relations, that such rights should be equitably interpreted, that is 'in a spirit of good faith, common sense and reasonableness'.[38] Good faith, therefore, means more than simply *bona fides* in the sense of absence of *mala fides*, or rejection of an interpretation resulting in abuse of rights (though, of course, it includes such absence and rejection).[39] It signifies an element of reasonableness qualifying the dogmatism that can result from purely verbal

analysis. As discussed above, the term is also capable of a sufficiently broad meaning to include the principle of effective interpretation.

Translating the requirement of good faith into a practical outcome is only easy in the extreme case. Vattel instances the account of how Tamerlane, having agreed with those in the city of Sebastia that if they capitulated he would shed no blood, then, when they had fulfilled their part of the deal, caused all the soldiers of the garrison to be buried alive.[40] This extreme case illustrates the principle well but it does not throw much light on how a principle which is so dependent on particular circumstances can be reduced to a definition.

Good faith colours a key part of the general rule of treaty interpretation, giving the more generous approach to texts of treaties that characterizes many a decision of international tribunals, probably to the consternation of those lawyers who have a literalist disposition, but perhaps going some way to meet the vehement criticism of the New Haven school.[41]

2.3 'Good faith' in context and in the light of the Convention's object and purpose

The immediate context of the term 'good faith' is in the interpretation of a treaty as contrasted with the immediately following elements of article 31(1) which refer to how the treaty's terms—that is its words—are to be approached. Thus, the term 'in good faith' indicates *how* the task of interpretation is to be undertaken. This needs to be considered in conjunction with the position of the term, which is: (a) in the opening phrase of an article headed 'General rule of interpretation'; (b) in a paragraph which leads on to a broad definition of the context for the purposes of interpretation; and (c) in this paragraph, which ends with a reference to the object and (p. 172) purpose of the treaty, not just to particular terms in it. The significance of (a) is that the process of interpretation is seen as an accumulation of elements rather than a succession, all the items in article 31 constituting the general rule. Thus, good faith does not have an entirely independent function. The significance of (b) is that the opening and closing parts of article 31(1) are aligned with one another in looking to the whole treaty, balancing the central part of the paragraph which addresses the component terms of the treaty. The significance of (c) is that the combination of good faith and taking account of object and purpose results in an outcome that is more likely to reflect effectively the true intentions recorded in the text than would a purely literal approach.

As has been noted above, good faith has both general application in the law of treaties and one specific interpretation. In its general role, good faith is included in the Vienna Convention's fundamental proposition on the law of treaties, in its article 26, that treaties establish binding obligations for the parties 'and must be performed by them in good faith'.[42] In its specific application to the interpretation of treaties, in article 31, *Oppenheim's International Law* notes that the concept of good faith strongly implies an element of reasonableness and that the requirement that a treaty is to be interpreted in good faith, as well as being necessary 'as a matter of general principle … follows from article 26 …'.[43]

2.4 Issues and practice

2.4.1 'Good faith' generally

The ICJ has had little to say about good faith as such in treaty interpretation beyond referring to it as part of its frequent reiteration of article 31(1) of the Vienna rules as customary law applicable to treaty interpretation. Thirlway accounts for this by observing that 'what may be in question is the good faith of the parties; an interpretation by the Court in which the Court itself was animated by something other than good faith is not to be thought of'.[44] Since that observation was written, however, Judge Schwebel has invoked good faith in a dissenting opinion to question whether an ICJ majority judgment had applied the Vienna rules properly when deciding whether Qatar and Bahrain had agreed that either state might refer their dispute to the ICJ. The majority had asserted that whatever may have been the motives of the parties, the Court would view the words used in certain Minutes (which formed an agreement) as expressing their

References

(p. 173) common intent, rather than looking to the preparatory work to elucidate their intent. Judge Schwebel wrote:

> The Court's choice of the word 'motives' is revealing of its devaluation of the intention of the Parties. But the fundamental flaw in its reasoning, as I see it, is the contention that it adheres to the actual terms of the Minutes 'as the expression of their common intention' when I believe that it is demonstrable—and has been demonstrated—that their common intention could not have been to authorize unilateral application to the Court.
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> Thus in my view the Court's construction of the Doha Minutes is at odds with the rules of interpretation prescribed by the Vienna Convention. It does not comport with a good faith interpretation of the treaty's terms … Moreover, the Court's failure to determine the meaning of the treaty in the light of its preparatory work results, if not in an unreasonable interpretation of the treaty itself, in an interpretation of the preparatory work which is 'manifestly … unreasonable'. …
>
> The Court provides no more explanation of why the travaux préparatoires do not provide it with conclusive supplementary elements for the interpretation of the text adopted than described above. But it also implies … that it discounts the travaux préparatoires on the ground that they do not confirm the meaning to which its analysis has led. In my view, *such a position, if it be the position, would be hard to reconcile with the interpretation of a treaty 'in good faith' which is the cardinal injunction of the Vienna Convention's rule of interpretation.* The travaux préparatoires are no less evidence of the intention of the parties when they contradict as when they confirm the allegedly clear meaning of the text or context of treaty provisions.[45]

The suggestion that an approach which does not give sufficient or proper weight to the preparatory work (or which gives that work an unreasonable interpretation) does not 'comport' with a good faith interpretation raises a diplomatically oblique challenge to the good faith of the majority's view, the essence of the charge seeming to be that it would be improper to disregard evidence merely because that evidence does not accord with an interpretation achieved by textual analysis.[46]

References

(p. 174) Bin Cheng points to a much earlier reference to good faith directly illustrating its role in an interpretative context. Venezuela had proposed to certain states ('the allied Powers'), and agreed with them, that 'all claims against Venezuela' should be the subject of special guarantees. The question then arose whether 'all claims' in the eventual Protocol meant that those of every creditor state should be given exactly the same guaranteed funding (including 'neutral Powers') or whether the allied Powers which had negotiated the treaty should be paid off first. Finding in favour of the latter interpretation, an arbitral tribunal stated:

> … The good faith which ought to govern international relations imposes the duty of stating that the words '*all claims* used by the representative of the Government of Venezuela in his conferences with the representatives of the allied Powers … could only mean the claims of these latter and could only refer to them. …[47]

In the more recent arbitration *Rhine Chlorides (Netherlands/France)* (2004), the tribunal paid considerable attention to the role of good faith in the interpretation of treaties. In the course of this the tribunal had to consider a French argument that although the Vienna rules reflected customary international law, where neither of the states involved in the arbitration was a party to the Vienna Convention, it was the actual rules of customary international law which applied rather than those of the Vienna Convention applied in an analytical and taxonomical fashion (*'façon analytiqe et cédulaire'*) as under the Convention's obligations.[48] In a careful analysis leading to the conclusion that the Vienna rules faithfully reflected customary international law and were applicable to the case, the Tribunal referred to an earlier award in which certain general rules for treaty interpretation had been formulated, including the proposition:

> In so far as the text is not sufficiently clear, it is allowable to have recourse to the intentions of the parties concerned. If, in this case, the intentions are clear and unanimous, they must prevail over every other possible interpretation. If, on the contrary, they diverge or are not clear, that meaning must be sought which, within the context [*dans le cadre du texte*], best gives either a reasonable solution of the controversy, or the impression which the offer of the party which took the initiative must reasonably and in good faith have made on the mind of the other party. …[49]

Here the approach is similar to the Venezuelan case, requiring the interpreter, in the case of uncertainty or divergent texts, to look to the proposal that led to the

References

(p. 175) text and the good faith of the parties in negotiating on that basis. The tribunal in the *Netherlands/France* case considered that this application of good faith was reflected in article 32 of the Vienna rules, with its reference to the preparatory work and surrounding circumstances.

It seems clear that the approach indicated above and in the Vienna rules aims to elucidate what is unclear in the text of a treaty, not to invoke good faith in order to fill gaps in a manner which would impose additional obligations. This was the theme in a decision in the UK by the House of Lords where good faith played a prominent role. In *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre*[50] a central issue was whether a provision in the Convention on the Status of Refugees required a person to be afforded an assessment of their status as a possible refugee in the country of intended asylum, the broader allegation being that by stationing immigration officers in the claimants' country of origin, the UK authorities had improperly circumvented the Convention to prevent potential refugees reaching the UK at all. Specific issues of interpretation, such as the meaning of the term 'return' ('*refoulement*') of individuals, were tackled with the help of the Vienna rules. However, though the judges did invoke the reference to good faith in Vienna article 31, rather than using it to find the meaning of terms such as 'return', they really used it in a more general way in assessing whether circumventing the Convention by preventing an individual entering the UK conflicted with implementation of the treaty in good faith. Thus, Lord Bingham, after quoting from some of the ICJ's observations on good faith, referred to articles 26 and 31 of the Vienna Convention and stated:

> Taken together, these rules call for good faith in the interpretation and performance of a treaty, and neither rule is open to question. But there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle that pacta sunt servanda cannot require departure from what has been agreed. This is the more obviously true where a state or states very deliberately decided what they were and were not willing to undertake to do.[51]

Lord Steyn also referred to the role of good faith in interpretation, indicating important limitations:

> … It is true, of course, that the Refugee Convention is a living instrument and must be interpreted as such. It must also be interpreted in accordance with good faith: article 31 of the Vienna Convention on the Law of Treaties. These are very important principles of interpretation. But they are not capable of filling gaps which were designedly left in the protective scope of the Refugee Convention. …[52]

References

(p. 176) Lord Hope also conflated good faith in treaty interpretation with its broader role:

> … in practice, this general principle of law has only marginal value as an autonomous source of rights and duties … good faith is always related to specific behaviour or declarations. What it does is invest them with legal significance and legal effects …
>
> The question then is whether the appellants are seeking to do no more by appealing to this principle than insist that the rights and obligations which the 1951 Convention creates are exercised within the law … or whether they are seeking to enlarge what it provides so as to impose new obligations on the contracting states. In my opinion the answer to this question must be found in the language of the Convention, 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, as article 31 of the Vienna Convention requires. The argument that good faith requires the state to refrain from actions which are incompatible with the object and purpose of the treaty can only be pressed so far. Everything depends on what the treaty itself provides.[53]

Thus, Lord Hope returned to the provisions of the treaty and saw good faith, context, and object and purpose as interpretative tools to be applied within the confines of the text rather than in an external and tangential setting.

2.4.2 'Good faith' meaning reasonableness

The ICJ has had to consider the role of good faith in other contexts in the law of treaties. In *Nicaragua v USA* the Court considered modification or withdrawal without notice of a declaration accepting the Court's jurisdiction, and said of such declarations:

> It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.[54]

Read in the same spirit of analogy, this bears out the suggestion that one component of good faith in interpretation is reasonableness.[55] The Court has also stated that although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations … it is not in itself a source of obligation where none would otherwise exist'.[56] Again this is not direct guidance on good faith in interpretation; but in its references to performance and to good faith not being a source of obligation, this extract illustrates the aspect of good faith that goes to the manner of performance of obligations and in relation to their

References

(p. 177) extent leaves scope for application of the test of good faith to the reasonableness of an interpretation that is being advanced and the approach to be adopted in evaluating such an interpretation.

A more specific suggestion that good faith may demand a form of balancing of rights and obligations, and hence reasonableness, is in relation to article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS Agreement) which sets objectives for the promotion and protections of intellectual property rights calling for them to be conducive to (inter alia) 'a balance of rights and obligations'.[57] Slade shows by examination of case law within the WTO dispute settlement system how this provision could act as 'a form of good faith principle', particularly in precluding arbitrary action and abusive use of rights.[58]

2.4.3 'Good faith' limiting interpretation of a power

In a separate opinion in the ICJ case *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* Judge Ajibola reviewed the role of good faith in treaty interpretation.[59] He referred to the situation where a treaty affects the exercise of a power by a state. In one example which he gave, an arbitral tribunal limited the state's power to make regulations on fishing off Canada by reference to good faith:

> But from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty.[60]

Clearly, it would be contrary to good faith to interpret the grant of powers as permitting their use to deny rights under the treaty.[61] However, the position appears to be somewhat different where interpretation of a power of derogation from a human rights treaty is in issue. By such treaties states 'submit themselves to a legal order within which they, for the common good, assume obligations not in relation to other States, but towards all individuals'.[62] Hence, rather than looking to the effect of relations between the parties, the application of the test of good faith is more directed to securing the object and purpose for individuals when,

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(p. 178) for example, interpreting rights to formulate reservations to human rights treaties or assessing exercise of powers such as those to suspend safeguards such as *habeas corpus*.[63]

2.4.4 'Good faith' requiring balancing of treaty elements

In the context of trade treaties, the WTO Appellate Body has referred to the principle of good faith in interpreting and applying a provision (article XX of GATT 1994), allowing members of the WTO to impose measures which would otherwise conflict with obligations of the GATT. This issue arose when the USA adopted a scheme to restrict imports of shrimps from states which did not ensure adequate protection against incidental taking of sea turtles in the course of commercial shrimp trawl-harvesting. Permitted exceptions listed in GATT, article XX included measures necessary to protect human, animal, or plant life or health, and those relating to the conservation of exhaustible natural resources. However, both these exceptions (as well as several others) were listed after an opening clause, or '*chapeau*', subjecting any excepted measure to the requirement that they were not to be applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. In interpreting and applying these provisions, the Appellate Body said:

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'[156] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.[157]
>
> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (eg Article XI) of the GATT 1994 …
>
> **156** B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London: Stevens and Sons, Ltd., 1953) , Chapter 4, in particular, p. 125 elaborates:
>
> > … A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right *(i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to
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> References
>
> > (p. 179) procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. … (emphasis added)
>
> Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407–410 , *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.
>
> **157** Vienna Convention, Article 31(3)(c).[64]

The opening words of this extract give further evidence that the boundary between relying on good faith as part of the process of interpretation and as part of performance of treaty provisions is not always readily drawn. Here the Appellate Body sees itself as carrying out a combined task of interpreting and applying the requirements of the chapeau with good faith as a guiding principle ensuring that the operation of the exceptions was reasonable.

2.4.5 'Good faith' and the principle of effectiveness (ut res magis valeat quam pereat)

The Latin maxim, requiring preference for an interpretation which gives a term some meaning rather than none, is the more specific limb of the principle of effectiveness. The other limb guides the interpreter towards an interpretation which realizes the aims of the treaty. The ILC took the view that insofar as the maxim amounts to a true general rule of interpretation, it is 'embodied' in article 31(1):

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[65]

The ILC subsumed both elements of the principle of effectiveness under two elements in article 31(1) jointly, that is 'good faith' and 'object and purpose'. It seems appropriate, however, for analytical purposes to consider the maxim in the context of good faith and realization of the aims of the treaty as an aspect of the object and purpose of a treaty. The dual aspect of the principle of effectiveness can be seen in the Court's judgment in *Territorial Dispute (Libyan Arab Jamahiriya/Chad).*[66] Libya argued that only certain boundaries were definitive among those identified in instruments listed in an Annex to a 1955 treaty between Libya and France (the latter being one of the colonial powers which had been responsible for territory adjacent to Libya). The ICJ applied the principle of effectiveness to confirm that

References

(p. 180) the reference in article 3 of the treaty to 'the frontiers' meant all the frontiers resulting from those instruments to which reference was made in the legal instruments: 'Any other construction would be contrary to the actual terms of article 3 and would render completely ineffective the reference to one or other of those instruments in Annex I.'[67] This application of the principle of effectiveness (in the maxim *ut res)* was supplemented by the Court's application of the more general principle of effectiveness in the context of the aim of the treaty.[68]

The principle *ut res* has been expressly recognized as part of the general rule for treaty interpretation in the decisions of the Appellate Body of the WTO: 'A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness *(ut res magis valeat quam pereat).*'[69] This has received continuing and expanding application in the WTO:

> … We have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties *(ut res magis valeat quam pereat)* which requires that a treaty interpreter:
>
> > '… must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'
>
> In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole. Article II:2 of the *WTO Agreement* expressly manifests the intention of the Uruguay Round negotiators that the provisions of the *WTO Agreement* and the Multilateral Trade Agreements included in its Annexes 1, 2 and 3 must be read as a whole.[70]

The principle extends to interpretation of related treaties. Where the 'Agreement on Safeguards' and a provision of GATT 1994 were both in issue, the Appellate Body held:

> … a treaty interpreter must read *all* applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of this 'inseparable

References

> (p. 181) package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements.[71]

3. 'Ordinary Meaning'

> **In accordance with the general rule on interpretation … the object of treaty interpretation is to give their 'ordinary' meaning to the terms of the treaty … The difficulty about this approach to the issue is that almost any word has more than one meaning. The word 'meaning' itself, has at least sixteen different meanings.**[72]
>
> **. . . the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.**[73]

First and foremost, in considering the role of the 'the ordinary meaning to be given to the terms of the treaty', it is necessary to stress that the ordinary meaning is not an element in treaty interpretation to be taken separately when the general rule is being applied to a particular issue involving treaty interpretation. Nor is the first impression as to what is the ordinary meaning of a term anything other than a very fleeting starting point. For the ordinary meaning of treaty terms is immediately and intimately linked with context, and then to be taken in conjunction with all other relevant elements of the Vienna rules.

For present purposes, however, the notion of an ordinary meaning is taken separately for ease of analysis and exposition. Further, identifying the starting point in no way detracts from the importance of the other elements of the general rule. One has to start somewhere. Given that the starting point is reading the words in the treaty, the act of reading almost axiomatically involves giving them the meaning which the reader takes to be usual (at least initially) or as one of a range of meanings. This section is therefore concerned with identifying what the Vienna rules direct is to be taken as the starting point, always with the caveat in mind that this is not the complete or independent interpretative process.

References

(p. 182) 3.1 History and preparatory work

A distinctly literal approach may have found its place in some past approaches to treaty interpretation, particularly at the hands of lawyers whose national legal systems placed great sanctity on the text of legal instruments. This was buttressed by earlier writers, probably the most quoted being Vattel in the exposition following his heavily criticized statement in 1758 that 'it is not allowable to interpret what has no need of interpretation'.[74] He characterized this as the first maxim of interpretation and explained it thus:

> When a deed is worded in clear and precise terms,—when its meaning is evident, and leads to no absurd conclusion,—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it. If this dangerous method be once admitted, there will be no deed which it will not render useless. However luminous each clause may be,—however clear and precise the terms in which the deed is couched,—all this will be of no avail, if it be allowed to go in quest of extraneous arguments, to prove that it is not to be understood in the sense which it naturally presents.[75]

Earlier, however, Grotius had stated: '*If there is no implication which suggests a different conclusion*, words are to be understood in their natural sense, not according to the grammatical sense which comes from derivation, but according to current usage' (emphasis added).[76] Thus Grotius's opening words effectively support the approach taken in the Vienna rules in that they start with the ordinary meaning but allow for different implications. Further, Vattel linked primacy of the text to the intention of the parties and allowed for the ordinary meaning to be modified.[77] The dictum in his first maxim included the immediate qualifier 'when the meaning is evident *and leads to no absurd conclusion*' (emphasis added). This must also be read in the context of his sixty paragraphs on treaty interpretation, many of which are in line with the Vienna rules and which end with the statement: 'All the rules contained in this chapter ought to be combined together, and the interpretation be made in such manner as to accord with them all, so far as they are applicable to the case.'[78]

The ILC in its preparation of the draft Vienna Convention adopted the same principle of an accumulation rather than a prescribed sequence of rules but saw (p. 183) the starting point as a combination of the ordinary meaning, context, and object and purpose:

> The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article. Once it is established—and on this point the Commission was unanimous—that the starting point is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned.[79]

3.2 Ordinary meaning of 'ordinary meaning to be given to the terms of the treaty'

Since it is the 'terms' in this phrase that attract an ordinary meaning, it is necessary to consider what the word 'terms' encompasses. Are 'terms' simply synonymous with 'words', or is 'terms' a collective expression for the bargain reflected in the treaty? Whichever is the case, 'terms' is apt to point to the recorded matter, which under the Vienna Convention's definition of 'treaty' in article 2(1) is what has been written down. In giving meaning to what has been written down, defining words, construing and parsing them must be prerequisites to identifying the content of the stipulations.

In the Vienna Convention, the context (in the form of the complete text of the Convention), gives good guidance on the meaning of 'terms'. In the immediate context of article 31, paragraph (4) provides for a special meaning to be ascribed to a term if the parties so intended. The most obvious evidence of such an intention is inclusion of a definition article. In the same section of the Vienna Convention dealing with interpretation, article 33(3) provides for 'terms' to be presumed to have the same meaning in each authentic text. That article deals with treaties in different languages. Both these provisions are clearly addressed to the meaning of words used, or perhaps their particular significance as terms of art. Further afield, the definitions in article 2 come under the heading 'Use of Terms' and are couched in the form of single words or pairs within quotation marks, followed by a definition. The same article provides in its paragraph (2) that the provisions of paragraph (1) on use of terms in the Convention are 'without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State'. The cumulative effect of the references to 'terms' in their context in the Vienna Convention is that the word is concerned with meanings of words and phrases rather than bargains or packages of stipulations.

It is precisely because 'ordinary' includes the meaning 'regular, normal or customary'[80] that such importance must attach to context. For 'regular', 'normal',

References

(p. 184) and 'customary' do not in any way indicate that there is necessarily a *single* meaning that is the ordinary meaning of a word (as that triple definition of ordinary—itself only one of several definitions—shows). Nevertheless, courts and tribunals often make an attempt at finding a meaning for a term by use of a dictionary or, particularly in technical areas, specialist books that define the term in issue.

That the rule is formulated as indicating the ordinary meaning 'to be given' to the terms of the treaty suggests an approach in line with the second definition of interpretation noted by Professor Falk (see Chapter 1, section 3.6), that is 'the way in which a thing ought to be interpreted; proper explanation', suggesting a normative approach to selecting ordinary meanings. This, however, is a point of marked difficulty, the plain, normal, or ordinary meaning being a thing of potential variety rather than objectively ascertainable in most cases. Further, the word 'given' in the phrase 'to be given' is apt to emphasize that the meaning is not inherent in the text but something to be attributed by the interpreter, albeit using the text in the manner required by the rules. Whether the reader is an expert in the terminology and whether the meaning is what is ordinary at the time of interpretation or at the time of conclusion of the treaty are among the obvious issues that these words raise.

Waldock, invited to the Vienna Conference as the former Special Rapporteur most familiar with the work of the ILC on the law of treaties, emphasized that the reference to 'ordinary meaning' did not mandate a narrow dictionary approach:

> With regard to the expression 'ordinary meaning', nothing could have been further from the Commission's intention than to suggest that words had a 'dictionary' or intrinsic meaning in themselves. The provisions of article 27, paragraph 1, [now article 31(1) VCLT] clearly indicated that a treaty must be interpreted 'in good faith' in accordance with the ordinary meaning of the

words 'in their context'. The Commission had been very insistent that the ordinary meaning of terms emerged in the context in which they were used, in the context of the treaty as a whole, and in the light of the object and purpose of the treaty. So much so that, quite late in the Commission's deliberations, it had even been suggested that paragraph 4 of article 27 [now article 31(4)] could safely be omitted. It was said with some justice during those discussions that the so-called 'special' meaning would be the natural meaning in the particular context.[81]

3.3 Issues and practice

3.3.1 Role of ordinary meaning

Even before the conclusion of the Vienna Convention, the role of the ordinary meaning of the terms of a treaty was not understood as producing an interpretation

References

(p. 185) divorced from context. The ordinary meaning might have a determinative role but only if the context confirmed this and if there were no other factors leading away from that conclusion. This was confirmed in 1991 by the ICJ at a time when the Vienna rules were advancing to their present governing role. In *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*[82] the ICJ considered whether an arbitral tribunal had acted in manifest breach of the competence conferred on it by an arbitration agreement. The Court endorsed observations on the role of 'ordinary meaning' in judgments it had given before the Vienna Convention was concluded. The Court indicated that those observations represent the position under the Vienna rules:

> An arbitration agreement (*compromis d'arbitrage*) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. In that respect
>
> > 'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.' (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion*, I.C.J. Reports 1950, p. 8.)
>
> The rule of interpretation according to the natural and ordinary meaning of the words employed
>
> > 'is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.' (*South West Africa, Preliminary Objections, Judgment*, I.C.J. Reports 1962, p. 336.)
>
> These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point.[83]

It must immediately be parenthetically noted that the ICJ has in other cases firmed up its view in the last part of this extract so that the Vienna rules are now accepted as the generally applicable law on treaty interpretation, even if it was controversial at the time of conclusion of the Vienna Convention whether the Vienna rules were actually a codification. However, the main thrust of the extract is that the ordinary meaning is the starting point of an interpretation, but only if it is confirmed by investigating the context and object and purpose, and if on examining all other relevant matters (such as whether an absurd result follows from applying a literal interpretation) no contra-indication is found, is the ordinary meaning determinative.

References

(p. 186) 3.3.2 Dictionaries and other sources of definitions

Dictionaries and other sources of definitions play their part in three ways:

(i) the basic discovery of ordinary meanings of a term;

(ii) the identification of a 'functional' meaning, in the sense of a meaning appropriate to the subject matter be it international law, hydrology, or whatever; and

(iii) ascertaining different language meanings, either to seek concepts peculiar to a language or as a prelude to comparing texts (in substance, the province of article 33 of the Vienna Convention).

An example of dictionary function (i) is in the WTO Appellate Body's start of its interpretation of 'a benefit' as part of the definition of a subsidy:

> In addressing this issue, we start with the ordinary meaning of 'benefit'. The dictionary meaning of 'benefit' is 'advantage', 'good', 'gift', 'profit', or, more generally, 'a favourable or helpful factor or circumstance'.[85] Each of these alternative words or phrases gives flavour to the term 'benefit' and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that 'the ordinary meaning of "benefit" clearly encompasses some form of advantage.'[86] Clearly, however, dictionary meanings leave many interpretive questions open.
>
> **85** *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 214 ; *The Concise Oxford Dictionary*, (Clarendon Press, 1995), p. 120 ; *Webster's Third New International Dictionary* (unabridged), (William Benton, 1966), Vol. I, p. 204 .
>
> **86** Panel Report, para. 9.112.[84]

The note of caution at the end of this extract was amplified in the WTO's *US—Measures Affecting Gambling* case, where the core issue was whether 'sporting' includes gambling:

> … But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation,[192] as they typically aim to catalogue *all* meanings of words—be those meanings common or rare, universal or specialized … In this case, in examining definitions of 'sporting', the Panel surveyed a variety of dictionaries and found a variety of definitions of the word. …[193]
>
> **192** Appellate Body Report, *US—Softwood Lumber IV*, para. 59; Appellate Body Report, *Canada —Aircraft*, para. 153; and Appellate Body Report, *EC—Asbestos*, para. 92.

References

(p. 187)

> **193** The 13 different dictionary definitions consulted by the Panel are set out in paragraphs. 6.55–6.59 of the Panel Report. Some of the definitions appear to contradict one another. For instance, the *Shorter Oxford English Dictionary* definition quoted by the Panel defines 'sporting' as both 'characterized by sportsmanlike conduct'; and '[d]esignating an inferior sportsman or a person interested in sport from purely mercenary motives'. (Panel Report, para. 6.55).[85]

Function (ii) is more complicated. It presupposes that it is appropriate to find something more than an 'ordinary' dictionary definition as a starting point; yet the degree of specialism in the term being interpreted is not such as to warrant an argument that the parties intended it to have a special meaning of the kind to which article 31(4) of the Vienna Convention refers. An example of this is the ICJ's use of specialist works in its attempt to find an ordinary meaning of the 'main channel' of a river (the Chobe):

> The Court finds that it cannot rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another. The scientific works which define the concept of 'main channel' frequently refer to various criteria: thus, in the Dictionnaire français d'hydrologie de surface avec équivalents en anglais, espagnol, allemand (Masson, 1986), the 'main channel' is 'the widest, deepest channel, in particular the one which carries the greatest

> flow of water' (p. 66); according to the Water and Wastewater Control Engineering Glossary (Joint Editorial Board Representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association and Water Pollution Control Federation, 1969), the 'main channel' is 'the middle, deepest or most navigable channel' (p. 197). …[86]

The difficulty of using such works to produce an interpretation is illustrated further below. Yet courts and tribunals show some willingness to make use of specialist dictionaries, with or without 'ordinary' dictionaries, if they feel this to be useful in the circumstances.[87]

Function (iii) above is a twofold one: where the authoritative text of a treaty is in a different language from that of the court or tribunal, a dictionary or specialist work may show the meaning of the term or the concept it signifies; otherwise, or additionally, investigation of meanings in another language may be a prelude to application of article 33 of the Vienna Convention to resolve differences between authentic texts in different languages.

In the *Golder* case, the European Court of Human Rights had to consider whether the provision ensuring a fair and public hearing (under article 6 of the European Convention on Human Rights) 'in the determination of his civil rights and obligations' entitled a prisoner to consult a lawyer so as to institute

References

(p. 188) civil proceedings or only gave the right to a hearing in proceedings that were already in train. After stating that the Vienna rules applied, the Court accepted a dictionary definition of a French term advanced by the British government, but expanded this with a further 'ordinary' sense of the word from another dictionary:

> The clearest indications are to be found in the French text, first sentence. In the field of 'contestations civiles' (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way—'équitablement' (fairly), 'publiquement' (publicly), 'dans un délai raisonnable' (within a reasonable time), etc.—but also and primarily 'à ce que sa cause soit entendue' (that his case be heard) not by any authority whatever but 'par un tribunal' (by a court or tribunal) within the meaning of Article 6 para. 1 … (Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 95). The Government have emphasised rightly that in French 'cause' may mean 'procès qui se plaide' (Littré, Dictionnaire de la langue française, tome I, p. 509, 5°). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension 'l'ensemble des intérêts à soutenir, à faire prévaloir' (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2°). …[88]

Courts in the USA have made use of dictionaries in seeking the 'plain' meaning of terms expressed in treaties in a foreign language, one such court optimistically stating that:

> One of the simplest methods 'of determining the meaning of a phrase appearing in a foreign legal text' is 'to consult a bilingual dictionary'.[89]

However, while accepting the use of dictionaries as a primary method for defining terms, the US Supreme Court has recognized that 'dictionary definitions may be too general for purposes of treaty interpretation'.[90]

The ICJ has also had occasion to conclude, by reference to dictionary meanings of different language texts, that the search for the meaning of 'without delay', in the context of consular contact with a prisoner under a consular convention, would not be assisted by dictionaries:

> Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase 'without delay'. Moreover, in the different language versions of the Convention various terms are employed to render the phrases 'without delay' in Article 36 and 'immediately' in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term 'without delay' (and also

References

(p. 189) of 'immediately'). It is therefore necessary to look elsewhere for an understanding of this term.[91]

At risk of seeming over-repetitive, it must be stressed that the multiplicity of meanings offered by dictionaries for most words serves to answer criticisms levelled against the Vienna rules for their alleged over-reliance on the 'ordinary meaning'. That there are so many dictionary meanings makes almost inevitable immediate recourse to context and the other aids prescribed by the rules for selection of the appropriate ordinary meaning. This was graphically illustrated by Judge Anderson at the International Tribunal for the Law of the Sea when considering the word 'bond'. He found twelve different meanings in Webster's Dictionary and fourteen in the *Oxford English Dictionary* (including, he noted, the name of the type of special paper used for the originals of the judgment in the case which the Court was deciding). These he could narrow down to the two meanings having a financial and a legal connotation as these were the ones directly pertaining to the issues in the case, with a specific focus on the latter because the use of a bond to enable release of an arrested vessel was clearly part of a legal process rather than a purely financial transaction.[92]

3.3.3 Literal meanings of single terms

The description 'single terms' refers here to a word or words which constitute a single concept as the starting point for an issue of interpretation. That the meaning of a single term is clear does not lead to the conclusion that the task of interpretation is complete. If, for example, a dictionary (used in the manner of dictionary function (i) above), or a common understanding of a term, produces an apparently incontrovertible meaning, it is still necessary to locate this in its context to see if the result could be different from what the ordinary meaning produces. Examples which have already been examined, where a clear meaning seemed to exist, are 'alcoholics' and 'make (an arbitral award)'.[93] In both these cases the apparently clear meaning was ultimately displaced. It may, of course, be that the clear meaning remains clear, as in *Luedicke, Belkacem and Koç v Germany* at the European Court of Human Rights.[94] The applicants had been tried in criminal proceedings conducted in a language foreign to them so that they had needed interpretation. This had been provided at no cost to them before conviction. Afterwards, they were sent the bill, the cost of interpretation being added to their penalties and court costs (or *other* court costs). The Court had to interpret article 6(3)(e) of the European Convention on Human Rights, which provides that one of the minimum rights of everyone charged with a

References

Avena and Other Mexican Nationals, Mexico v United States, Judgment, jurisdiction, admissibility and merits, ICJ GL No 128, [2004] ICJ Rep 12, ICGJ 8 (ICJ 2004), (2004) 43 ILM 581, 31st March 2004, International Court of Justice [ICJ] **ICGJ**

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14 (Council of Europe) 213 UNTS 222, ETS No 5, UN Reg No I-2889

Section I Rights and Freedoms, Art.6(3)(e)

Hiscox v Outhwaite (No 1), Hiscox v Outhwaite, [1992] 1 AC 562, [1991] 3 WLR 297, [1991] 3 All ER 641, [1991] 2 Lloyd's Rep 435, [1992] XVII YB Com Arb 599, 24th July 1991, United Kingdom; House of Lords [HL]

Litwa v Poland, Merits, App No 26629/95, ECHR 2000-III, IHRL 2860 (ECHR 2000), [2000] ECHR 141, (2001) 33 EHRR 53, (2002) 63 BMLR 199, [2000] MHLR 226, 4th April 2000, European Court of Human Rights [ECHR] **IHRL**

Luedicke and ors v Germany, Merits, App No 6210/73, App No 6877/75, App No 7132/75, A/29, [1978] ECHR 5, (1980) 2 EHRR 149, IHRL 20 (ECHR 1978), [1979] EuGRZ 34, 28th November 1978, European Court of Human Rights [ECHR] **IHRL**

Volga Case, Russian Federation v Australia, Prompt release, ITLOS Case No 11, [2002] ITLOS Rep 10, ICGJ 344 (ITLOS 2002), (2003) 42 ILM 159, (2005) 126 ILR 433, 23rd December 2002, International Tribunal for the Law of the Sea [ITLOS] **ICGJ**

(p. 190) criminal offence is 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. The Court found the meaning of 'free' to be unambiguous, but nevertheless (in application of the Vienna rules) went on to investigate whether there were any circumstances that might displace the clear meaning of 'free' (but concluded there were not):

> The Court finds, as did the Commission, that the terms 'gratuitement'/'free' in Article 6 para. 3 (e) … have in themselves a clear and determinate meaning. In French, 'gratuitement' signifies 'd'une manière gratuite, qu'on donne pour rien, sans rétribution' (Littré, Dictionnaire de la langue française), 'dont on jouit sans payer' (Hatzfeld et Darmesteter, Dictionnaire général de la langue française), 'à titre gratuit, sans avoir rien à payer', the opposite of 'à titre onéreux' (Larousse, Dictionnaire de la langue française), 'd'une manière gratuite; sans rétribution, sans contrepartie' (Robert, Dictionnaire alphabétique et analogique de la langue française). Similarly, in English, 'free' means 'without payment, gratuitous' (Shorter Oxford Dictionary), 'not costing or charging anything, given or furnished without cost or payment' (Webster's Third New International Dictionary).
>
> Consequently, the Court cannot but attribute to the terms 'gratuitement' and 'free' the unqualified meaning they ordinarily have in both of the Court's official languages: these terms denote neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration. It nevertheless remains to be determined whether, as the Government contend, the context as well as the object and purpose of the provision in issue negative the literal interpretation.[95]

The Court found that there were no such negative indications.

3.3.4 No ordinary meaning or no single one?

In *Kasikili/Sedudu Island (Botswana/Namibia)*,[96] the ICJ interpreted a treaty of 1890 between Great Britain and Germany which stated:

> In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded: … To the east by a line … [which] runs eastward … till it reaches the river Chobe, and descends the centre of the main channel [Thalweg des Hauptlaufes] of that river to its junction with the Zambesi. …[97]

The Court considered that

> the real dispute between the Parties concerns the location of the main channel where the boundary lies … the Court will therefore proceed first to determine the main channel. In so doing, it will seek to determine the ordinary meaning of the words "main channel" by reference to the most commonly used criteria in international law and practice, to which the Parties have referred.[98]

References

Kasikili/Sedudu Island, Botswana v Namibia, Judgment, ICJ GL No 98, [1999] ICJ Rep 1045, ICGJ 57 (ICJ 1999), 13th December 1999, International Court of Justice [ICJ] **ICGJ**

(p. 191) The problem was choosing between two channels around an island. Both changed substantially in different seasons and the river generally did not allow for through navigation. One channel was narrower and shallower, though with the recent growth in tourism is now used by flat-bottomed boats. The other was not always identifiable because at times of flood it merged with a great spread of water; but it was larger and deeper.

The Court found differing dictionary definitions of 'main channel', including 'the widest, deepest channel, in particular the one which carries the greatest flow of water' and 'the middle, deepest or most navigable channel', as well as other potentially relevant factors.[99] It therefore purported to apply all the criteria proffered by the parties. In her declaration concurring in the result, Judge Higgins cast doubt on the approach in the judgment:

> In my view, although there are commonly used international law criteria for understanding, e.g., the term 'thalweg', the same is not true for the term 'main channel'. And it seems that no 'ordinary meaning' of this term exists, either in international law or in hydrology, which allows the Court to suppose that it is engaging in such an exercise. The analysis on which the Court has embarked is in reality far from an interpretation of words by reference to their 'ordinary meaning'. The Court is really doing something rather different. It is applying a somewhat general term, decided upon by the Parties in 1890, to a geographic and hydrographic situation much better understood today.[100]

Agreeing that the Court was entitled to look at all the suggested criteria, Judge Higgins indicated that this was not 'to discover a mythical "ordinary meaning" within the Treaty, but rather because the general terminology chosen long ago falls to be decided today'.[101] While the narrower channel was edged by a ridge which would provide a very visible frontier, Judge Higgins agreed that the other channel met the proper interpretation of the treaty, being the broader and more important channel and thus the main one 'in the generalized sense intended by the Parties'.[102]

It is difficult to tell in the circumstances of this case whether the criticism to be made of the approach of the majority was that it was trying to find a mythical 'ordinary meaning' or that it was in fact trying to find a single or unified ordinary meaning, being a single set of obvious or accepted criteria fulfilling the sense of the term. For this reason Judge Higgins' characterization of the majority's quest for a 'mythical' ordinary meaning seems apt, and thus raised to greater significance the object and purpose (to choose a channel which would mark clearly the limits of the parties' interests), also making the case an appropriate one for taking into account supplementary means (the circumstances of conclusion indicating the parties' interests).

(p. 192) 3.3.5 Generic terms

In *Aegean Sea Continental Shelf (Greece v Turkey)*[103] at issue was a Greek reservation in its accession to the 1928 General Act for Pacific Settlement of International Disputes. Part of this reservation excluded from Greece's acceptance of jurisdiction of the Permanent Court and its successor the ICJ 'disputes relating to the territorial status of Greece'. Greece had a dispute with Turkey over the extent of its continental shelf in the Aegean where Turkey was exploring for oil in areas claimed by Greece. Was a dispute over the extent of continental shelf excluded from the jurisdiction of the Court by the term 'territorial status' as used in a treaty before the concept of the continental shelf had become known? The ICJ characterized 'territorial status' as a 'generic term denoting any matters properly to be considered as comprised within the concept of territorial status under general international law'.[104] The Court viewed such a term as being of continuing application and keeping pace with the development of the law. This was supported by the nature of the commitment in the treaty as one which was designed to last for a long period. Hence the Court took the view:

> Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.[105]

The case concerning the river Chobe provides a contrast. Judge Higgins pointed out:

> The term 'the main channel' is not a 'generic term' (cf. *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, para. 77)—that is to say, a known legal term, whose content the Parties expected would change through time. Rather, we find ourselves closer to the situation of the Arbitral Tribunal in the *Laguna del Desierto* case of 1994 (see para. 20 of the Court's Judgment). The Tribunal there stated that it could not accept Chile's argument:
>
> > 'that to apply the 1902 Award in light of geographical knowledge acquired subsequently would be equivalent to its revision through the retrospective consideration of new facts. The 1902 Award defined, in the sector with which this Arbitration is concerned, a frontier which follows a natural feature that, as such, does not depend on accurate knowledge of the area but on its true configuration. The ground remains as it has always

> been … [t]his Judgment is … faithfully applying the provisions of the Award of 1902.' (*International Law Reports*, Vol. 113, p. 76, para. 157.)

This dictum retains a certain relevance, notwithstanding that the fact situation in the *Laguna* case is somewhat different from ours.[106]

References

Aegean Sea Continental Shelf, Greece v Turkey, Judgment, jurisdiction of the Court, ICJ GL No 62, [1978] ICJ Rep 3, ICGJ 128 (ICJ 1978), 19th December 1978, International Court of Justice [ICJ] **ICGJ**

Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy, Argentina v Chile, (1994) XXII RIAA 3, (1999) 113 ILR 1, (1999) 113 ILR 17, [1996] 2 RGDIP 592, 21st October 1994, Arbitration

Filleting within the Gulf of St Lawrence, Canada v France, Decision, (1990) XIX RIAA 225, (1990) 90 RGDIP 713, (1990) 82 ILR 591, 17th July 1986, Arbitration

General Act for the Pacific Settlement of International Disputes (League of Nations (historical) [LoN]) 93 LNTS 343, [1929] LNTSer 220, LNTS Reg No 2123

Kasikili/Sedudu Island, Botswana v Namibia, Judgment, ICJ GL No 98, [1999] ICJ Rep 1045, ICGJ 57 (ICJ 1999), 13th December 1999, International Court of Justice [ICJ] **ICGJ**

(p. 193) The point of broader significance which this extract offers is that the concept of a 'generic term' includes 'a known legal term, whose content the Parties expected would change through time'.

3.3.6 'Ordinary' to whom?

In some cases the ordinary meaning of a term may only be apparent to someone who has some knowledge of the field. For example, not everyone would immediately understand (though they might guess) that 'iontophoretically' sampling a substance from a living human or animal body for diagnostic purposes has to be considered a 'diagnostic method' within the ordinary meaning of that term in article 52(4) of the European Patent Convention.[107] More equivocally, in a case requiring interpretation of an extradition treaty, the court had to decide whether the German definition of a crime amounting to fraud and the English crime of obtaining by false pretences (the latter being limited to misrepresentations as to existing facts) were sufficiently close to satisfy the treaty's double criminality rule where the alleged misrepresentation was as to a future fact. Finding that the core element of dishonesty was present in both types of crime, and that the general nature of the defined crimes in the two national legal systems was sufficiently close, Lord Chief Justice Widgery said:

> The words used in a treaty of this kind are to be given their general meaning, general to lawyer and layman alike. They are to be given, as it were, the meaning of the diplomat rather than the lawyer, and they are to be given their ordinary international meaning and not a particular meaning which they may have attracted in England, or in certain branches of activity in England.[108]

While the exclusion of any meaning peculiar to England or English law clearly follows from the international character of treaty relations, this extract seems internally inconsistent, describing the test as the meaning which would be ascribed to a term by a lawyer, diplomat, and layman alike but giving pre-eminence to the meaning a diplomat would find ordinary. There may be some wisdom to this approach in the case of many treaties which show greater signs of diplomatic than legal drafting, but in the case of extradition treaties it could be expected that lawyers would be more likely to have a key input than in many treaties not so focused on legal matters. In any event, the observation is directed to 'a treaty of this kind'. Whether or not the test of what a diplomat would understand to be the ordinary

References

Arton (No 2), Re, [1896] 1 QB 509, United Kingdom; England and Wales; High Court [HC]

Convention on the Grant of European Patents (as amended) 1065 UNTS 199, UKTS No 20 (1978), Cmd 7090

Part II Substantive Patent Law, Ch.I Patentability, Art.53, (c)

Device and method for sampling of substances using alternating polarity, Cygnus Incorporated, App No 95924591.1, Case No T 0964/99 - 3.4.1, Publication No 0766577, IPC: A61N 1/30, 29th June 2001, European Patent Organisation [EPOrg]; European Patent Office [EPO]

Heysell Stadium Case, Belgium v Postlethwaite, Appeal, [1988] AC 924, [1987] 3 WLR 365, [1987] 2 All ER 985, United Kingdom; House of Lords [HL]

R., ex parte Ecke v Governor of Pentonville Prison, [1974] Crim LR 102, (1981) 73 Cr App R 223, United Kingdom

Riley (Robert Leslie) v Commonwealth, [1985] HCA 82, (1985) 159 CLR 1, (1985) 62 ALR 497, (1992) 87 ILR 144, 18th December 1985, Australia; High Court [HCA]

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(3)(c) **IC**

(p. 194) meaning is most apt for an extradition treaty, at least it purports to take into account the kind of treaty involved thus, in effect, reflecting the formula in the Vienna rules that the ordinary meaning is directly linked to context and the object and purpose of the treaty. Thus the test is not necessarily what the ordinary person would understand a term to mean but could take account of the subject matter of the treaty so as to seek what a person reasonably informed in that subject, or having access to evidence of what a reasonably informed person would make of the terms as a starting point.

This was the approach taken by the European Court of Human Rights in *Bankovic and Others v Belgium and Others:*

> ## (b) The meaning of the words 'within their jurisdiction'
>
> As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States. …[109]

3.3.7 Treaty language and terms

International law does not prescribe a linguistic style for treaties, but there are usages that are too well-established to be changed. Some seem pointless, while others have a real and useful significance. Examples of the former are 'High Contracting Party' for 'party' (the latter being used in the Vienna Convention), or 'State' for 'state'.[110] These have little bearing on the essentially practical character of treaties and are to be contrasted with established terminology which serves to distinguish the provisions of a treaty as characteristically mandatory.

As instruments of obligation rather than vehicles for propaganda, treaties use the distinctive mandatory language which mirrors or adopts the approach of some domestic legislative acts. Thus in *OSPAR Arbitration (Ireland v UK)* an arbitration concerning access to information on effects of nuclear reprocessing on the marine environment, the tribunal stated:

> For the achievement of these aims the framers of the OSPAR Convention have carefully applied differential language to provide for stipulated levels of engagement of treaty obligation to achieve these objectives. There is a cascading standard of expression providing for the particular

obligations imposed on a Contracting Party. For example, there are mandatory provisions that provide for Contracting Parties:

— to take some act ('shall apply', 'shall include', 'shall undertake', 'shall co-operate' or 'shall keep');

References

Banković and ors v Belgium and ors, Admissibility, App No 52207/99, ECHR 2001-XII, IHRL 3273 (ECHR 2001), [2001] ECHR 890, (2007) 44 EHRR SE5, 11 BHRC 435, (2001) 123 ILR 94, (2002) 41 ILM 517, 12th December 2001, European Court of Human Rights [ECHR]; Grand Chamber [ECHR] **IHRL**

MOX Plant Case, Ireland v United Kingdom, Final award, (2005) XXIII RIAA 59, ICGJ 377 (PCA 2003), (2003) 42 ILM 1118, (2005) 126 ILR 334, 2nd July 2003, Permanent Court of Arbitration [PCA] **ICGJ**

(p. 195)

— actively to work towards an objective ('take all possible steps', 'implement programs', 'carry out programs');

— to deal with issues of planning for the objective ('establish programs', 'adopt', 'define', 'draw up', 'develop', 'take account of'); and

— to take measures ('take', 'adopt', 'plan', 'apply', 'introduce', 'prescribe', 'take into account').

At a lesser level of engagement, other provisions provide for information to be dealt with ('collect', 'access information') or that systems be set up ('provide for', 'establish').

When read as a whole (including the Annexes), it is plain to the Tribunal that the entire text discloses a carefully crafted hierarchy of obligations or engagement to achieve the disparate objectives of the OSPAR Convention. Those who framed the OSPAR Convention expressed themselves in carefully chosen, rather than in loose and general, terms. They plainly identified matters for mandatory obligation for action by Contracting Parties. …[111]

While this extract shows the variety of levels of mandatory requirements in the particular case, further study of the OSPAR Convention text which the Award was considering reveals the more general point that the mandatory term 'shall' is used in conjunction with each verb to indicate an obligation to perform, the term 'may' being the auxiliary used for acts that are permitted but optional.

There are numerous instances in which courts and tribunals have referred to the use of a term in other treaties as indicative of possible meanings. Whether this is in pursuit of the 'ordinary' meaning of a term, is a practice adopted in implementation of the Vienna rules, is an application of rules of international law applicable in relations between the parties (article 31(3)(c)), is part of the circumstances of the adoption of the treaty (article 32), or is some other supplementary means of interpretation, often may not be explained.[112] At least two things are clear. First, it happens. Second, in a number of instances the word or words in issue do have an identifiable meaning in several treaties on the same subject, and if on the same or a similar subject may help in selecting an ordinary meaning.[113]

3.3.8 Terms and concepts

While the ordinary meaning of a term in a treaty may seem clear, interpretation may lead into investigation of the concept which the term embraces. Thus, for example, where individual applicants had been deprived of their property by

References

Churchill Mining Plc and Planet Mining Pty Limited v Indonesia, Decision on jurisdiction, ICSID Case No ARB/12/14, ICSID Case No ARB/12/40, IIC 634 (2014), 24th February 2014, World Bank;

International Centre for Settlement of Investment Disputes [ICSID] **IC** **IIC**

Convention for the Protection of the Marine Environment of the North-East Atlantic 2354 UNTS 67, UKTS 14 (1999), Cm 4278

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(3)(c) **IC**

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.32 Supplementary means of interpretation **IC**

(p. 196) operation of law (a statute allowing occupants of property for a term (lease) to buy the property against the owner's wishes) the European Court of Human Rights had to consider a provision in a Protocol stating:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[114]

The applicant property owners argued that 'no-one' was a term with only one meaning and that therefore they could not deprived of their property except under conditions including those provided for by the 'general principles of international law'. The general principles of international law do indeed set down minimum standards for state-directed deprivation of property, but only in protection of the rights of aliens; nationals have not traditionally been protected by general international law against expropriation by their own state. Thus, while the body of rules that was indicated by the term 'general principles of international law' was clear enough, only by entering into the content of that law and its internal limiting factors, could the correct interpretation be achieved (viz, that the protection of the minimum standard of treatment under international law is only applied by the Protocol to protect aliens). The Court found that to interpret the phrase in question as extending the general principles of international law beyond their normal sphere of applicability was less consistent with the ordinary meaning of the terms used in the Convention.[115]

In another European human rights case, whether the applicant was entitled to the protection of a provision of the Convention depended on whether the 'regulatory offence' of which the applicant had been convicted was a 'criminal offence'. German law had been amended to remove petty offences, such as certain motoring offences, from the sphere of the criminal law. Nonetheless, the European Court of Human Rights noted that, while the changes in German law represented more than a simple change of terminology, in interpreting the Convention:

> … according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.[116]

Hence the Court found the concept of criminal law clear enough to cover an offence punishable by a fine even if it was categorized in domestic law as 'regulatory' rather than 'criminal'.[117]

References

First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe) 213 UNTS 262, UKTS 46 (1954), ETS No 9, UN Reg No I-2889, Cmd 9221

Art.1

James and ors v United Kingdom, Merits, App No 8793/79, Case No 3/1984/75/119, A/98, IHRL 55 (ECHR 1986), [1986] ECHR 2, (1986) 8 EHRR 123, [1986] RVR 139, (1987) 75 ILR 396, 21st February 1986, European Court of Human Rights [ECHR] **IHRL**

Lithgow and ors v United Kingdom, Merits, App No 9006/80, App No 9262/81, App No 9263/81, App No 9265/81, App No 9266/81, App No 9313/81, App No 9405/81, Case No 2/1984/74/112, A/102, [1986] ECHR 8, (1986) 8 EHRR 329, (1987) 75 ILR 438, 8th July 1986, European Court of Human Rights [ECHR] **IHRL**

Öztürk v Germany, Merits and just satisfaction, App No 8544/79, A/73, IHRL 45 (ECHR 1984), [1984] ECHR 1, (1984) 6 EHRR 409, [1985] EuGRZ 62, (1984) 5 HRLJ 293, (1999) 5 ÖIM-Newsletter 160, 21st February 1984, European Court of Human Rights [ECHR] **IHRL**

(p. 197) 4. ‘Context’

No one has ever made an ‘acontextual’ statement. There is always some context to any utterance, however meagre.[118]

There are two main roles for the references to ‘context’ in the Vienna rules and two principal aspects of use of context in treaty interpretation under the rules. The first role of the reference to context is as an immediate qualifier of the ordinary meaning of terms used in the treaty, and hence context is an aid to selection of the ordinary meaning and a modifier of any over-literal approach to interpretation. The second role is the identification in the Vienna rules of the material which is to be taken into account as forming context. Context is defined by spelling out this second role, directing attention to the whole text of the treaty, its preamble, and any annexes.

The fact that context is spelt out broadly in this latter role does not exclude the common meaning of reading something in context as meaning reading words in their immediate surroundings. If a word forms part of a phrase, that is the obvious initial contextual assessment that must be made. The second aspect of use of context is in application of the wider definition. This directs the interpreter to look to many factors ranging from those that are fairly immediate, such as the wording of surrounding provisions, headings of articles and punctuation, to more remote elements such as comparisons with other provisions on similar matters or using similar wording, extending to the function of the context as a bridge to the further element in the first paragraph of the general rule, that is ‘the object and purpose’.

An important preliminary point is that in article 31 the Vienna Convention is using the term ‘context’ in the role and extent described in the provision. The looser usage sometimes made of ‘context’ to indicate surrounding circumstances is not what this article concerns. The Vienna rules use a separate term for the more general investigation of pertinent matters relating to a treaty by permitting recourse, as a supplementary means of interpretation, to ‘the circumstances of its conclusion’ (article 32).

The distinction needs to be emphasized or the terminology can be confused. In *Czech Republic v European Media Ventures SA* a statement of the Vienna rules was followed by careful consideration of the interpretative elements in the general rule.[119] However, the focus on context slipped from assessing the treaty’s terms in

References

Convention on the Grant of European Patents (as amended) 1065 UNTS 199, UKTS No 20 (1978), Cmd 7090

Part II Substantive Patent Law, Ch.III Effects of the European Patent and the European Patent Application, Art.69

European Media Ventures SA v Czech Republic, Judgment on jurisdiction, [2007] EWHC 2851 (Comm), IIC 313 (2007), [2008] 1 Lloyd's Rep 186, [2008] 1 All ER (Comm) 531, 5th December 2007, United Kingdom; England and Wales; High Court [EWHC]; Queen's Bench Division [QBD]; Commercial Court **IC** **IIC**

Kirin-Amgen Incorporated v Hoechst Marion Roussel Limited, [2004] UKHL 46, [2005] 1 All ER 667, (2005) 122 RPC 169, (2005) 28(7) IPD 28049, 21st October 2004, United Kingdom; House of Lords [HL]

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.32 Supplementary means of interpretation **IC**

(p. 198) their context to rather vaguer reference to 'evaluating a treaty's context' and the heading 'Contextual Material'.[120] Under the latter heading were included references to 'material relating to the politico-economic background' and other items which, in terms of the Vienna rules, were clearly within the realm of 'circumstances of conclusion', not context. That the Court implicitly recognized this is shown by the judge's statement (dismissing this material) in his 'Conclusion on Contextual Material' that: 'It seems to me that the court or tribunal's task is to interpret the treaty rather than to interpret the *supplementary means of interpretation*'.[121] To avoid confusion in following the scheme of the Vienna rules, it seems preferable to confine the terms 'context' and 'circumstances of conclusion' to their allocated content and functions.

4.1 Background and context

The immediate context in which reference to 'context' is made in the Vienna rules is that of closest connection with the 'ordinary meaning'.[122] This indicates that the primary reason for looking to the context is to confirm an ordinary meaning if a single contender emerges or to assist in identifying the ordinary meaning if two or more possibilities come forward. In performing these roles the context, once linked with one or more ordinary meanings, is to be considered under the guidance provided by the object and purpose of the treaty. This exercise may be somewhat short-circuited if a provision in the treaty, that is the wider context, provides in a definition the meaning of a term which is not displaced by any other of the Vienna rules. Special meanings, such as those provided by definition provisions, are considered in the last part of Chapter 7 below.

Little time was spent in the deliberations of the ILC on the general role of context in interpretation. This was probably because, as the Special Rapporteur (Waldock) noted: 'the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur'.[123] This was one of the principles which he found to have 'repeatedly been affirmed by the World Court'.[124]

Comprised within the meaning of context are the agreements and instruments identified in article 31(2) of the Vienna Convention. What constitutes the agreements and instruments to which the paragraph refers, is considered in Chapter 3 above. The role of article 31(2) is to define 'context' for the purpose of the Vienna rules, thus furnishing a special meaning of the kind envisaged in article 31(4).

References

Commissioner of Internal Revenue v National Carbide Corporation, Docket No 20749-20751, No 161-163, 167 F.2d 304 (2d Cir. 1948), 31st March 1948, United States; Court of Appeals (2nd Circuit) [2d Cir]

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(2) **IC**

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(4) **IC**

(p. 199) 4.2 Issues and practice

4.2.1 Immediate context—grammar and syntax

The immediate context includes the grammatical construction of the provision or phrase within which a word in issue is located. An ICJ judgment illustrating this, and the more extensive role of the context, is *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, where an issue was whether a Chamber of the ICJ had authority to delimit disputed maritime boundaries.[125] For this the Chamber had to have been given a mandate to do so, either in express words, or according to the true interpretation of the Special Agreement made by the parties to confer jurisdiction on the Court. The

question on the wording was whether the phrase in the Agreement 'determination of a legal situation …' ('*Que determine la situación jurídica …*') could be equated with 'delimitation', the latter being the usual term for a tribunal drawing boundaries. The ICJ Chamber stated:

> … If account be taken of the basic rule of Article 31 of the Vienna Convention on the Law of Treaties … No doubt the word 'determine' in English (and, as the Chamber is informed, the verb '*determinar'* in Spanish) can be used to convey the idea of setting limits, so that, if applied directly to the 'maritime spaces' its 'ordinary meaning' might be taken to include delimitation of those spaces. But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands.
>
> This conclusion is also confirmed if the phrase is considered in the wider context, first of the Special Agreement as a whole, and then of the 1980 General Treaty of Peace, to which the Special Agreement refers. The question must be why, if delimitation of the maritime spaces was intended, the Special Agreement used the wording 'to delimit the boundary line …' *('Que delimite la línea fronteriza …')* regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to 'determine [their] legal situation …' *('Que determine la situación jurídica …')*. The same contrast of wording can be observed in Article 18 of the General Treaty of Peace, which, in paragraph 2, asks the Joint Frontier Commission to 'delimit the frontier line in the areas not described in Article 16 of this Treaty', while providing in paragraph 4, that 'it shall determine the legal situation of the islands and maritime spaces'. Honduras itself recognizes that the islands dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory. It is difficult to accept that the same wording 'to determine the legal situation', used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces.[126]

This extract shows how a possible meaning of a word, if taken in isolation, is excluded by the immediate grammatical context, a conclusion reinforced by contrasting the wording with the term's use elsewhere (the wider context as defined by the Vienna rules). This is carried yet further to include a comparison with the

References

General Peace Treaty between El Salvador and Honduras relating to the establishment of the El Salvador/Honduras Joint Frontier Commission 1310 UNTS 213, UN Reg No I-21856

Title IV Frontier Questions, Ch.I Definition of Frontier, Art.16

Title IV Frontier Questions, Ch.II Joint Frontier Commission, Art.18

Title IV Frontier Questions, Ch.II Joint Frontier Commission, Art.18, (2)

Land, Island and Maritime Frontier Dispute, El Salvador and Nicaragua (intervening) v Honduras, Judgment, merits, ICJ GL No 75, [1992] ICJ Rep 351, ICGJ 100 (ICJ 1992), 11th September 1992, International Court of Justice [ICJ] **ICGJ**

(p. 200) analogous wording of a related treaty, linked by a reference to it in the Special Agreement. This further treaty does not form part of the context within the opening words (chapeau) of article 31(2) of the Vienna Convention. Nor does it fit well within article 31(2)(a) since that is worded to cover the case of an agreement made at the time of, or after, the one that is being interpreted. In contrast, the Special Agreement appears to have been contemplated by the Treaty of Peace, and could itself therefore be viewed as within article 31(2)(a) if sufficiently proximate to have been made 'in connection with the conclusion' of that treaty. Nevertheless, if the wording of a treaty links it to another one, it is clear that consideration must be given to the express linkage and consequently to concordant interpretation, as appropriate, between the two instruments. Reliance for this on a specific provision of the Vienna Convention is made unnecessary by the express reference.

In the same case there was still further reference to context in the assertion by Honduras that the ordinary meaning of the term 'maritime spaces' in the context of the modern law of the sea must have extended to delimitation of maritime areas, including, for example, the territorial sea and the exclusive economic zone. In the light of this, the rights of coastal states over areas off their coasts, and the asserted object and purpose of the Special Agreement being to dispose completely of long-standing disputes, Honduras argued that the principle of effectiveness, or of effective interpretation, required delimitation if any judgment was to attain its objective of the final solution for the dispute between the parties. It seems that an attempt to bring in the modern law of the sea as part of the context was inappropriate, relevant rules of international law being the subject of article 31(3)(c) of the Vienna Convention. In the event, the Chamber considered that what Honduras was arguing amounted to recourse to the 'circumstances of the conclusion' of the Special Agreement, a supplementary means of interpretation under article 32 of the Vienna rules which was only accessible on the specified conditions being met.[127]

The potential and varied consequences of syntax forming part of the context are too obvious to warrant copious examples, syntax being very much allied to construing phrases and thus fixing the ordinary meaning of terms in their context.[128]

4.2.2 Title, headings, and chapeaux

Contextually, the title may be the obvious starting point for identifying the ambit of a treaty, or a section or provision in it. However, titles are often too general to provide precise guidance, though they may occasionally contribute to a specific interpretation. For example, in the jurisdictional phase of the *Oil Platforms* case[129] one issue before the ICJ was whether 'commerce' in the relevant 1955 treaty meant

References

Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products, Argentina v Chile, Report of the Panel, WT/DS207/R, Doc No 02-2373, World Trade Organisation [WTO]; Panel Reports

Oil Platforms, Iran v United States, Preliminary objection, ICJ GL No 90, [1996] ICJ Rep 803, ICGJ 73 (ICJ 1996), 12th December 1996, International Court of Justice [ICJ] **ICGJ**

Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran 284 UNTS 93, TIAS 3853, 8 UST 899

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(2) **IC**

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(2)(a) **IC**

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(3)(c) **IC**

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.32 Supplementary means of interpretation **IC**

(p. 201) only acts of purchase and sale or could include associated activities. After looking at dictionary definitions, the Court noted that

> in the original English version, the actual title of the Treaty of 1955 (contrary to that of most similar treaties concluded by the United States at the time, such as the treaty of 1956 between the United States and Nicaragua) refers, besides 'Amity' and 'Consular Rights', not to 'Commerce' but, more broadly to 'Economic Relations'.[130]

This supported a wider reading.

Articles of treaties frequently have titles or descriptive headings. These are clearly part of the context for the purposes of interpretation, unless otherwise indicated.[131] The term 'chapeau' is not defined or used in the Vienna Convention. It is, however, in vogue, mainly to describe the opening words of a provision which consists of a subset of terms.[132] The importance of titles as part of the context is well illustrated in the Vienna rules themselves. The use of the singular in the title of article 31 of the Vienna Convention 'General rule of interpretation' was carefully adopted to make it clear that the whole of the article was to be applicable to the extent that as many of its components as are relevant in any particular case, they must be applied together. This title also links to that of article 32 'Supplementary means of interpretation' in that the latter not only indicates that the means of interpretation described in that provision were additional to those in article 31, but that the general rule had primary sway in determining the meaning of terms in issue.

A title or heading may, of course, be relevant because it is used as a reference point in a treaty's text; but the content of the heading may also help with interpretation. Both aspects were apparent in *Plama v Bulgaria*, an ICSID arbitration.[133] In making a decision on its jurisdiction the tribunal had to consider the Energy Charter Treaty (ECT), a multilateral convention for cooperation in the energy sector. Part III of the ECT gives protection to investors engaged in energy-related activities in the territory of states parties of a different nationality than their own. Part V of the ECT contains provisions for dispute settlement in article 26. Article 17 (in Part III) is entitled 'Non-Application of Part III in Certain Circumstances'. Under this provision parties reserve 'the right to deny the advantages of this Part' (ie the substantive protection for investors under Part III) to any legal entity owned or controlled by nationals of a state not party to the ECT if that entity has no substantial business activities in a party in which it is set up. Objecting to the tribunal's jurisdiction, Bulgaria argued that because it was entitled to deny the claimant

References

Energy Charter Treaty (Energy Charter Conference) 2080 UNTS 100, [1994] OJ L380/24, (1995) 10 ICSID Rev-FILJ 258 **IC** OXIO

Part III Investment Promotion and Protection **IC**

Part III Investment Promotion and Protection, Art.17 Non-Application of Part III in Certain Circumstances **IC**

Part V Dispute Settlement **IC**

Part V Dispute Settlement, Art.26 Settlement of Disputes Between an Investor and a Contracting Party **IC**

Framework Convention on Climate Change (United Nations [UN]) 1771 UNTS 107, UN Reg No I-30822

Art.1

MOX Plant Case, Ireland v United Kingdom, Final award, (2005) XXIII RIAA 59, ICGJ 377 (PCA 2003), (2003) 42 ILM 1118, (2005) 126 ILR 334, 2nd July 2003, Permanent Court of Arbitration [PCA] **ICGJ**

Plama Consortium Limited v Bulgaria, Decision on jurisdiction, ICSID Case No ARB/03/24, (2005) 20 ICSID Rev-FILJ 262, IIC 189 (2005), (2008) 13 ICSID Rep 272, (2005) 44 ILM 721, 8th February 2005, World Bank; International Centre for Settlement of Investment Disputes [ICSID] **IC** **IIC**

Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran 284 UNTS 93, TIAS 3853, 8 UST 899

Turbon International GmbH v Oberfinanzdirektion Koblenz, Judgment, reference for a preliminary ruling, Case C-250/05, [2006] ECR I-10531, 26th October 2006, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]; European Court of Justice (2nd Chamber)

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.32 Supplementary means of interpretation **IC**

(p. 202) the advantages of Part III in application of article 17, there could be no relevant 'advantages' under Part III capable of giving rise to any claim and hence no ground for jurisdiction under Part V.

The tribunal relied on the heading to Part III to confirm its interpretation that denial of protection under article 17 would only exclude the advantages of Part III and would not preclude it exercising jurisdiction under Part V to determine whether on the facts article 17 had been properly invoked:

> In the Tribunal's view, the Respondent's jurisdictional case here turns on the effect of Articles 17(1) and 26 ECT, interpreted under Article 31(1) of the Vienna Convention. The express terms of Article 17 refer to a denial of the advantages 'of this Part', thereby referring to the substantive advantages conferred upon an investor by Part III of the ECT. The language is unambiguous; but it is confirmed by the title to Article 17: 'Non-Application of *Part III* in Certain Circumstances' (emphasis supplied). All authentic texts in the other five languages are to the same effect. From these terms, interpreted in good faith in accordance with their ordinary contextual meaning, the denial applies only to advantages under Part III. It would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT. Nonetheless, the Tribunal has considered whether any such manipulation is permissible in the light of the ECT's object and purpose.[134]

4.2.3 Context showing structure or scheme

As well as referring to the context in the sense of immediate surroundings and the more extensive meaning as defined in article 31(2), context may be taken as including any structure or scheme underlying a provision or the treaty as a whole.[135] The exploration of context leading to such a structure is shown in the WTO Appellate Body's decision in *Canada—Measures Affecting the Export of Civilian Aircraft*.[136] This tribunal had to consider the argument of Canada (the appellant) that evaluation of a 'benefit', which was part of the definition of 'subsidy' in the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), should include the cost to a government. Canada agreed with the finding of the Panel (the tribunal whose decision was under appeal) that the ordinary meaning of the term 'benefit' is 'advantage'; but Canada argued that the Panel had not applied the Vienna rules properly when assessing whether there had been a benefit in that it used commercial benchmarks to the exclusion of the cost to the government.

After considering dictionary definitions, the Appellate Body looked to the immediate context in the definition of 'benefit' in article 1 of the SCM Agreement, then expanding this inquiry into investigation of other relevant elements of the Agreement and the structure of the provision. In its analysis, the Appellate Body stated:

> A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a

References

Agreement on Subsidies and Countervailing Measures (World Trade Organization [WTO]) WTO Doc LT/UR/A-1A/9, 1869 UNTS 14

Part I General Provisions, Art.1

Canada - Measures Affecting the Export of Civilian Aircraft, Canada v Brazil, Appellate Body Report, WT/DS70/AB/R, Report No AB-1999-2, Doc No 99-3221, ITL 108 (WTO 1999), DSR 1999:III, 1377, 2nd August 1999, Appellate Body ITL

Energy Charter Treaty (Energy Charter Conference) 2080 UNTS 100, [1994] OJ L380/24, (1995) 10 ICSID Rev-FILJ 258

Part III Investment Promotion and Protection **IC**

Part III Investment Promotion and Protection, Art.17 Non-Application of Part III in Certain Circumstances **IC**

Part III Investment Promotion and Protection, Art.17 Non-Application of Part III in Certain Circumstances(1) **IC**

Part V Dispute Settlement **IC**

Part V Dispute Settlement, Art.26 Settlement of Disputes Between an Investor and a Contracting Party **IC**

Filleting within the Gulf of St Lawrence, Canada v France, Decision, (1990) XIX RIAA 225, (1990) 90 RGDIP 713, (1990) 82 ILR 591, 17th July 1986, Arbitration

Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331

Part III Observance, Application and Interpretation of Treaties, Section 3 Interpretation of Treaties, Art.31 General rule of interpretation(2) **IC**

(p. 203) group of persons, has in fact received something. The term 'benefit', therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the *SCM Agreement* should be on the recipient and not on the granting authority. The ordinary meaning of the word 'confer', as used in Article 1.1(b), bears this out. 'Confer' means, *inter alia*, 'give', 'grant' or 'bestow'. The use of the past participle 'conferred' in the passive form, in conjunction with the word 'thereby', naturally calls for an inquiry into *what was conferred on the recipient*. Accordingly, we believe that Canada's argument that 'cost to government' is one way of conceiving of 'benefit' is at odds with the ordinary meaning of Article 1.1(b), which focuses on the *recipient* and not on the *government* providing the 'financial contribution'.[137]

The Appellate body then considered the context in the sense of a related provision in the same treaty:

> We find support for this reading of 'benefit' in the context of Article 1.1(b) of the *SCM Agreement*. Article 14 sets forth guidelines for calculating the amount of a subsidy in terms of 'the benefit to the recipient'. Although the opening words of Article 14 state that the guidelines it establishes apply '[f]or the purposes of Part V' of the *SCM Agreement*, which relates to 'countervailing measures', our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b). The guidelines set forth in Article 14 apply to the calculation of the 'benefit *to the recipient* conferred *pursuant to paragraph 1 of Article 1'*. (emphasis added) This explicit textual reference to Article 1.1 in Article 14 indicates to us that 'benefit' is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to 'benefit *to the recipient'* in Article 14 also implies that the word 'benefit', *as used in Article 1.1*, is concerned with the 'benefit *to the recipient'* and not with the 'cost to government', as Canada contends.[138]

The clinching contextual reasoning of the Appellate Board took up the structure of article 1 of the SCM Agreement which defined 'subsidy' as existing if: '(a) there is a financial contribution by a government or any public body within the territory of a Member … and (b) a benefit is thereby conferred'. The Board reasoned:

> The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the 'benefit' to the recipient, and not with the 'cost to government'. The definition of 'subsidy' in Article 1.1 has two discrete elements: 'a financial contribution by a government or any public body' and 'a benefit is thereby conferred'. The first element of this definition is concerned with whether the *government* made a 'financial contribution', as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the 'financial contribution'. That being so, it seems to us logical that the second element in Article 1.1 is concerned with the 'benefit … conferred' on the *recipient* by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a 'subsidy' by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that 'cost to *government'* is relevant to the question of whether there is a 'benefit' to the *recipient* under Article 1.1(b) disregards the overall structure of Article 1.1.[139]

References

Agreement on Subsidies and Countervailing Measures (World Trade Organization [WTO]) WTO Doc LT/UR/A-1A/9, 1869 UNTS 14

Part I General Provisions, Art.1

Part I General Provisions, Art.1, 1.1

Part I General Provisions, Art.1, 1.1, (a)

Part I General Provisions, Art.1, 1.1, (b)

Part V Countervailing Measures

Part V Countervailing Measures, Art.14

(p. 204) Another good example of the significance of the context as defined in the Vienna rules is in the judgment of the House of Lords in *R v Secretary of State for the Home Department, Ex parte Read.*[140] This case shows how use of context leads to clarification of particular terms by comparison with those in other provisions of the treaty, and how the underlying scheme of the treaty can buttress an emerging interpretation. A man was convicted in Spain of an offence of introducing there counterfeit currency to an approximate value of £4,000. He was sentenced to imprisonment of 12 years and one day, the minimum term for that offence under Spanish law. He was transferred to the UK to serve his sentence under arrangements governed by a Convention.[141] Pursuant to the Convention, the UK Secretary of State fixed the period of sentence to be served by adapting the Spanish sentence to one of 10 years' imprisonment which was the maximum term prescribed for a similar offence committed in the UK. The prisoner argued that in applying the Convention's provisions the Secretary of State should have adapted the sentence to the much lesser period of imprisonment that a court would have given had the same offence been committed in Britain.

The House of Lords looked at the scheme in the Convention which was that the authorities in the state to which the prisoner was being transferred would either 'continue the enforcement of the sentence' of the convicting state's court or 'convert the sentence' to its own equivalent sentence. The UK had exercised its right under the Convention to opt in all cases for 'continuation' of sentence rather than 'conversion'. The Convention spelt out the modalities of continuation as including the requirements that the administering state was to be bound 'by the legal nature and duration of the sentence as determined by the sentencing state'; but if the sentence was 'by its nature or duration incompatible with the law of the administering state' that state could 'adapt the sanction to the punishment or measure prescribed by its own law for a similar offence'. However, the punishment had, as far as possible, to 'correspond with that imposed by the sentence to be enforced', though it was not to 'exceed the maximum prescribed by the law of the administering state '.[142]

Further, an administering state using the 'continuation' approach was bound by 'the duration of the sentence as determined by the sentencing state' with the equivalent prescription in the case of 'conversion' that the administering state was to be 'bound by the findings as to the facts in so far as they appear explicitly or implicitly from the judgment imposed in the sentencing state'. The latter envisaged the particular characteristics of the acts of the prisoner to be in the frame, the former did not. If circumstances particular to the prisoner's acts had been taken into account, that would have eliminated any significant distinction between the continuation and the conversion schemes. Hence the power to adapt the punishment to one prescribed by law in the UK for a 'similar offence' did not mean looking to the circumstances of the particular prisoner's acts but rather to an offence having

References

Convention on the Transfer of Sentenced Persons (Council of Europe) ETS No 112, 1496 UNTS 91

Art.10

R., ex parte Read v Secretary of State for the Home Department, [1989] AC 1014, [1988] 3 WLR 948, 3rd November 1988, United Kingdom; House of Lords [HL]

(p. 205) similar legal characteristics. It can be seen that the contrasting wording and the very framework of having two distinct schemes played their part in the interpretation of the provision, an interpretation which was confirmed by the 'Explanatory Report' adopted at the time of conclusion of the Convention.[143]

4.2.4 Related and contrasting provisions

Even where the provisions in issue do not form a distinct scheme in themselves, their relationship, or a comparison of their roles, may assist in their interpretation. In relation to a dispute between Nicaragua and Honduras, the ICJ had to consider two provisions of a treaty which made provision for the Court to have jurisdiction.[144] Article XXXI of the Pact of Bogotà was in a form which seemed to amount to a declaration by states parties to the Pact that they accepted the jurisdiction of the ICJ under the provision in the ICJ's Statute for such declarations ('the Optional Clause'). Article XXXII provided that if the conciliation procedure of the Pact had not led to resolution of a dispute and if the disputants did not agree to submit the matter to arbitration, either of the parties could have recourse to the ICJ, whose jurisdiction was in those circumstances to be compulsory under the Statute's provision for accepting jurisdiction in a treaty. An issue was whether these provisions were to be read together, the former establishing the jurisdiction of the Court and the latter setting out the prerequisites for reference of the particular dispute, or whether they provided two separate bases for jurisdiction. The Court was able to contrast the two provisions, noting (among other points) that the provisions fitted in with separate ways of accepting its jurisdiction in accordance with its Statute.[145]

4.2.5 Preamble

The preamble (where there is one) usually consists of a set of recitals.[146] These recitals commonly include motivation, aims, and considerations which are stated as having played a part in drawing up the treaty. Specifically mentioned as an element of the context as defined in the Vienna rules, preambles are of both textual and teleological significance. Their textual significance is as part of the apparatus for selecting and modifying the ordinary meaning of terms used.[147] By stating the

References

American Treaty on Pacific Settlement (Organization of American States [OAS]) 30 UNTS 55, UN Reg No I-449

Ch.4 Judical Procedure, Art.XXXI

Ch.4 Judical Procedure, Art.XXXII

Border and Transborder Armed Actions, Nicaragua v Honduras, Judgment, jurisdiction and admissibility, ICJ GL No 74, [1988] ICJ Rep 69, ICGJ 102 (ICJ 1988), 20th December 1988, International Court of Justice [ICJ] **ICGJ**

Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France, Judgment, ICJ GL No 136, [2008] ICJ Rep 177, ICGJ 1 (ICJ 2008), 4th June 2008, International Court of Justice [ICJ] **ICGJ**

Statute of the International Court of Justice (United Nations [UN]) 33 UNTS 993, UKTS 67 (1946) Cmd 7015, 3 Bevans 1179, 59 Stat 1055, 145 BSP 832, TS No 993 OXIO **IC**

(p. 206) aims and objectives of a treaty, as preambles often do in general terms, they can help in identifying the object and purpose of the treaty.[148] It should not, however, be assumed that all preambles are of equal value. Some are very carefully negotiated, others cobbled together more or less as an afterthought. In the case of major modern multilateral treaties, where there are usually good records of the negotiating history, the preparatory work will reveal whether there has been thorough attention to the content of the preamble.[149]

The recitals in the preamble are not the appropriate place for stating obligations, which are usually in operative articles of the treaty or in annexes. However, they may impose interpretative commitments, such as in a Protocol 'EMPHASIZING that this Protocol shall not be interpreted as implying a change in the

rights and obligations of a Party under any existing international agreements'.[150] Hence if the terms of a substantive provision offered a choice of meanings, those which ran counter to rights and obligations under other instruments would be excluded. Put more generally, the substantive provisions will usually have greater clarity and precision than the preamble; but where there is doubt over the meaning of a substantive provision, the preamble may justify a wider interpretation, or at least rejection of a restrictive one.[151]

4.2.6 Punctuation and syntax

A reader that pointeth ill, a good sentence may often spill.[152]

The essential link between the meaning of a single word and its immediate context also requires considering punctuation and syntax. Probably one of the best known instances where punctuation was crucial to the interpretation of a treaty concerned article 6 of the Nuremberg Charter, 1945.[153] The provision listed the crimes over which the International Military Tribunal was to have jurisdiction. Paragraphs (a) and (b) listed crimes against peace and war crimes. Paragraph (c) covered two groups of crimes against humanity:

> Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war;*
>
> References
>
> (p. 207) or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The semi-colon (marked here with an asterisk) appeared in the English and French texts, but in the equally authentic Russian text there was a comma at this point. A semi-colon would have marked a firm separation between the defined group of 'persecutions' in the second half and the group of 'inhumane acts' listed in the first half. Yet the requirement of a connection with one of the specified crimes, and the clarification that domestic law was irrelevant, appears only in the second half of the paragraph. A semi-colon would have strongly suggested (if not dictated) that this requirement and clarification related solely to persecutions rather than both groups of crimes against humanity. One decidedly odd consequence would have been that the specific exclusion of domestic defences (such as superior orders) would have been linked only to persecutions and not the inhumane acts (such as murder, extermination, enslavement, etc). Equally, the Tribunal would have had jurisdiction over the specified inhumane acts at large, rather than only when committed in conjunction with crimes against peace and war crimes. Accordingly, an amending Protocol was concluded by which a comma was substituted for the semi-colon in the English text to bring this in line with the Russian version.[154]

Punctuation and syntax are (it goes without saying) only part of the picture. They may be of assistance but, as is the case with the other elements of treaty interpretation, are only one part of the whole. This is illustrated by the approach taken by the ICJ in *Aegean Sea Continental Shelf (Greece v Turkey).*[155] At issue was a Greek reservation in its accession to a 1928 treaty for pacific settlement of disputes. This reservation, which was lodged in French, excluded from Greece's acceptance of the jurisdiction of the Court 'disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular [Fr: *et, notamment,*] disputes relating to the territorial status of Greece …'. Greece had a dispute with Turkey over the extent of its continental shelf in the Aegean where Turkey was exploring for oil in areas claimed by Greece. Greece argued that the dispute over delimitation of its continental shelf was not excluded by the quoted reservation because territorial disputes were only excluded if they raised questions which by international law were solely within the domestic jurisdiction of Greece. Since its dispute with Turkey was international in character it could not (Greece argued) fall within the exclusion.

References

(p. 208) In reaction to Greece's citation of French dictionaries to show that 'et, notamment,' were words 'most often used to draw attention to one or more particular objects forming part of a previously designated or understood whole',[156] the ICJ noted that what it described as the 'grammatical argument' advanced by Greece had the peculiar legal consequence of integrating into one category 'territorial disputes' and 'domestic jurisdiction', which were two separate legal concepts (and reflected as separate in the 1928 treaty), with the consequence that the former concept was deprived of any significance. The Court found that the 'grammatical argument' was not compelling:

> In the first place, the grammatical argument overlooks the commas placed both before and after '*notamment*'. To put the matter at its lowest, one possible purpose of these commas might have been to make it clear that in the phrase 'et, *notamment, les différends*' etc., the word '*et*' is intended to be a true conjunctive introducing a category of '*différends*' additional to those already specified.
>
> Another point overlooked by the argument is that the meaning attributed to 'et, *notamment*,' by Greece is grammatically not the only, although it may be the most frequent, use of that expression. Robert's *Dictionnaire* itself goes no further than to say of the word *notamment* that it is 'most often' used to draw attention to one of several particular objects forming part of a collectivity previously indicated or implied. The question whether in the present instance the expression 'et, *notamment*,' has the meaning attributed to it by Greece thus depends on the context in which those words were used in Greece's instrument of accession and is not a matter simply of their preponderant linguistic usage. Even a purely grammatical interpretation of reservation *(b)*, therefore, leaves open the possibility that the words '*et, notamment, les différends ayant trait au statut territorial de Ia Grèce*' were intended to specify an autonomous category of disputes additional to those concerning matters of domestic jurisdiction, which were also specifically 'excluded from the procedures described in the General Act'.
>
> In any event, 'the Court cannot base itself on a purely grammatical interpretation of the text' *(Anglo–Iranian Oil Co., I.C.J. Reports 1952*, p. 104).[157]

Where purely grammatical analysis produces an untenable result, the narrowly grammatical interpretation may have to be ignored. For example, in the *US–UK Heathrow Airport User Charges Arbitration* a provision in an Air Services Agreement required that '[user charges imposed or permitted to be imposed by a Party on the designated airlines of the other Party] are equitably apportioned among categories of users'.[158] The tribunal rejected a construction of this which required apportionment by the UK authorities to be equitable merely as among US airlines rather than equitably among different types of users of all nationalities. The tribunal also noted that although grammatically the apportionment was to take place after the charges had been imposed, this was clearly not what was meant. 'For both these reasons, a narrowly grammatical interpretation of the "equitable apportionment" condition must be discarded as untenable.'[159]

References

(p. 209) 4.2.7 Different meanings of same term in a single instrument

It is a general principle in interpretation of a well-drafted document to expect the same term to have the same meaning throughout a single instrument. A related, or perhaps obverse, principle is that different terms can be expected to have different meanings. Neither of these is an absolute rule and departures may be more likely in the case of treaties, particularly where there have been many negotiators, sometimes with different groups working on different parts of the text, and sometimes using several languages, some of which may have a greater and more nuanced range of words on a particular topic than do other languages. In the Award in the *Rhine Chlorides* case, the Tribunal noted that:

> … the mere fact that a treaty uses two different terms (but which are very close in meaning) does not mean that it must immediately conclude, without further analysis, that the parties intended to create a significant distinction. Naturally, each treaty is presumed to be consistent in the way it uses its terms, but this presumption cannot be regarded as an absolute rule.[160]

Context, as an element of the general rule of interpretation in the Vienna Convention, is defined to include the whole of the treaty although the primary use of context is as an aid to identifying the ordinary meaning

of terms. This is a wider use of context that a common usage in relation to a word or phrase, where it refers to the most immediate surroundings. However, the greater definition of context includes the lesser. In the absence of any specific indication in a treaty that a term has a particular meaning in a specific part of the treaty (such as a definition provision for a particular part), it is both the immediate context and the wider context which will be significant determinants of the meaning.

A good example of context suggesting different meanings of the same term is in the references in the general rule of interpretation to 'in connection with conclusion' of a treaty, which at one point suggests a single moment and at another seems more apt to refer to a process.[161] An example of different terms in one language being found to have been used interchangeably, or at least haphazardly in other languages, is in the Award in the *Rhine Chlorides* case (above). In that case it was in large measure the context which led the Tribunal to reject an argument that references to expenses (with various qualifiers) meant the sums specified in the treaty in relation to each ton of chlorides stored, rather than the actual cost of storage.[162]

References

(p. 210) 4.2.8 Link with object and purpose

The linking factor in the first paragraph of the general rule of treaty interpretation between the context and the object and purpose of the treaty is that these are elements pertinent to finding the ordinary meaning of terms used in the treaty. Context in the Vienna rules denotes the idea of the focus of the interpreter's attention expanding out from the provision under consideration to the broader vision provided by the context as described by article 31, and then using this wider view to help home back in on the meaning of the term or terms in issue. While the object and purpose of the treaty, as analysed below, is a distinct element assisting the interpreter towards giving meaning to the relevant term in a similar way to the assistance provided by the context, a role for the object and purpose of a particular treaty provision (as distinct from the object and purpose of the treaty as a whole) is not singled out in the general rule.

The expansive role for context includes consideration of matters identified above, such as titles or headings, structure or scheme, contrasting provisions etc. These all offer pointers to what a provision is trying to convey. It is therefore no surprise that, in this process of examination of context, interpreters sometimes look to the object of a particular provision. Thus, in a case where it identified articles 31 and 32 of the Vienna Convention as governing the matter as customary international law, the ICJ looked to such an object:

> it would be contrary to the object of the provision [article VI of the Genocide Convention] to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter.[163]

Although the Court did not link this approach to a particular provision in the general rule of interpretation, it is consistent with reading a provision in its context to take account of the provision's object and purpose.[164] It is difficult to see any reason why this should not apply in treaty interpretation generally.

References

(p. 211) 5. 'Object and Purpose'

> **It is by no means easy to put together in a single formula all the elements to be taken into account, in each specific case, in determining the object and purpose of the treaty. Such a process undoubtedly requires more 'esprit de finesse' than 'esprit de géométrie', like any act of interpretation, for that matter—and this process is certainly one of interpretation.**[165]

The final words of article 31(1) of the Vienna Convention bring the teleological element into the general rule. These words can also be seen as allowing for consideration of the principle of 'effectiveness' in its more general sense. In English case law since *Fothergill v Monarch*,[166] the label 'purposive approach' has

often been given to this element of treaty interpretation and that label has sometimes been used to describe the whole approach to be taken by courts in the UK to treaty interpretation.[167] However, in the Vienna rules, object and purpose function as a means of shedding light on the ordinary meaning rather than merely as an indicator of a general approach to be taken to treaty interpretation. The main issues relating to 'object and purpose' are what these terms signify, how they are to be identified, and what use is to be made of them. Also within the ambit of this concept is the second meaning of the 'principle of effectiveness'. This is the notion that an objective of treaty interpretation is to produce an outcome that advances the aims of the treaty, a notion which is obviously dependent on identifying the object and purpose of the treaty. It is to be noted, however, that this element of the rule is not one allowing the general purpose of a treaty to override its text. Rather, object and purpose are modifiers of the ordinary meaning of a term which is being interpreted, in the sense that the ordinary meaning is to be identified in their light. However, the precise nature, role, and application of the concept of 'object and purpose' in the law of treaties present some uncertainty and it has been described in the title of the leading study of the topic (to which reference should be made for a full account of its history and the concepts involved) as an 'enigma'.[168]

References

(p. 212) 5.1 History and preparatory work relating to 'object and purpose'

The use of this phrase in the Vienna rules had its origins in the link made with treaty interpretation in the original version of the provision reflecting the obligation of states to implement treaties in good faith (*pacta sunt servanda*), now article 26 of the Vienna Convention. That first draft included a requirement that 'a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects'.[169] Use of the term 'objects' was in turn drawn from another draft provision concerning the obligation of a state which had signed but not yet ratified a treaty. Such a state was to be under an obligation 'to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance'.[170] The combining of 'object' and 'purpose' appears to have been the result of the observation made by a member of the ILC in relation to the draft article on the obligation to comply with treaties ('*pacta sunt servanda*'):

> Mr Reuter … thought that in paragraph 2 of the article, the English word 'objects' might be better rendered in French by the expression '*l'objet et la fin;* that was the wording used by the International Court of Justice in connexion with the reservations to the Convention on the Prevention and Punishment of Genocide; in other cases it had used the French word *'but'* alone as the equivalent of the English word 'object'. If it adopted that suggestion, the Commission would be introducing a teleological nuance … But that question of form also affected the substance, for the object of an obligation was one thing and its purpose was another.[171]

Rather tantalizingly, the distinction thus observed was not further exposed in the work of the ILC but may have reflected the distinction in French public law (considered below).

5.2 Ordinary meaning of 'object and purpose' in context

It is difficult in English to distinguish the terms 'object' and 'purpose', which may explain why these words are commonly treated as a composite item when referring

References

(p. 213) to their use in the Vienna rules. Dictionary definitions include for 'object' 'goal, purpose, or aim', and for 'purpose' 'the object which one has in view'.[172] Given, however, the apparent French source for the language ultimately used for this phrase in the Convention, not to mention the equal authenticity of the French text, it is particularly appropriate to consider the terminology in French and any equivalence which should be provided in English.

Buffard and Zemanek explain that French public law has developed a distinction between '*l'objet*' of a legal act or instrument, that is what it does in the sense of creating a particular set of rights and obligations, and '*le but*' as the reason for establishing '*l'objet*':

> According to this French doctrine the term 'object' indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty's purpose, and this purpose is, in turn, the general result which the parties want to achieve by the treaty. While the object can be found in the provisions of the treaty, the purpose may not always be explicit and be prone to a more subjective understanding.[173]

One of the commonly mentioned sources of guidance on the object and purpose of a treaty is its preamble. However, in keeping with the approach of the Vienna rules generally, and their definition and use of context in particular, it is the whole text (and associated matter as indicated in article 31(2)) which is to be taken into account. Courts and tribunals sometimes simply state the object and purpose without explaining precisely how they have deduced these, but presumably it is simply from their reading of the text. Some treaties have provisions in their substantive articles specifically listing the treaty's object and purpose. Article 1 of the United Nations Charter, stating the purposes of the UN in conjunction with provisions for their fulfilment in article 2, is a good example of this.[174] Sometimes the treaty may be of a type which itself attracts an assumption of a particular object and purpose. For example, treaties resolving boundary disputes may be taken by courts and tribunals as intended to produce a final fixing of frontiers; and agreements establishing jurisdiction over a particular dispute may be taken as having final determination of the dispute as their end. However, the examples given below show that this does not mean that such object and purpose are to be taken as affording the court or tribunal a very general interpretative mandate. The inclusion in the Vienna rules of this reference to object and purpose is so as to shed light on the terms actually used in their context, rather than introduce an alternative option for finding the meaning. A further form in which much the same idea is sometimes clothed in treaty interpretation is that guidance on interpretation and

References

(p. 214) application is to be gained from the 'spirit' of the treaty. Caution, however, is advisable on this as the 'spirit' may suggest a nebulous formulation of what animates the treaty. 'Object and purpose' is a more specific point of reference.

The term 'object and purpose' is used in several other provisions of the Vienna Convention. In the immediate context of interpretation, article 33(4) uses regard for the object and purpose of the treaty as the means for reconciling texts where a treaty has been authenticated in two or more languages, no text has been agreed to prevail in the case of divergence, and comparison of authentic texts discloses a difference of meaning which is not resolved by application of the rest of the Vienna rules. More remotely the term is used in:

- Article 18—obligation 'not to defeat the object and purpose of a treaty prior to its entry into force' in the case of a state which has signed but not yet ratified a treaty, or which has given consent but the treaty has not yet come into force.
- Article 19—entitlement to make a reservation if doing this is not 'incompatible with the object and purpose of the treaty', where the reservation is not prohibited by the treaty and the treaty does not limit entitlement to only specified reservations.
- Article 20 (2)—a reservation requires acceptance by all the parties when it appears from the limited number of the negotiating States and 'the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of consent of each one to be bound by the treaty'.
- Article 41—modification of multilateral treaties between certain of the parties only in specified circumstances and if the modification 'does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.
- Article 58—suspension of the operation of a multilateral treaty by agreement between certain of the parties only in specified circumstances and if the modification 'is not incompatible with the object and purpose of the treaty'.

Examination of the practice in the application of these other provisions could extend the range of examples of how the object and purpose of a treaty is to be ascertained; but there are sufficient examples for present purposes arising in the specific context of interpretation.

Practice shows that courts and tribunals have tended to treat the term 'object and purpose' as a single but broad remit, in the sense that it is difficult to find any reasoned distinction being drawn between the object and purpose of a treaty, and sometimes there seems no particularity in distinguishing between the object and purpose of the treaty and the purpose of particular provisions. These may, of course, be justifiably elided; but the purpose of a particular provision, in the sense of its role in the structure of the treaty and its delineating function in the scheme of the treaty is as much (or more) part of the context as an aid to identifying the ordinary meaning. The 'object and purpose' of a treaty is a phrase which is also to be distinguished from

References

(p. 215) the 'circumstances of its conclusion' in article 32 of the Vienna Convention, the latter being a supplementary means of interpretation. Such supplementary material may, however, shed light on the object and purpose if these are difficult to ascertain from the text.[175]

5.3 Issues and practice

5.3.1 Singular object and purpose

In the judgments of the ICJ there has been a hint that object and purpose will not always be regarded as a combined concept. At the preliminary objection phase of the *Oil Platforms* case the ICJ at several points referred to objects and purposes together (having made specific reference to the Vienna Convention); but it also refers to 'object' separately, 'objective', 'spirit', and what the 'whole of these provisions is aimed at.[176] In that case the ICJ was concerned with an argument over the meaning of provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, Tehran, 1955. Iran argued that 'in adopting a patently hostile and threatening attitude towards the Islamic Republic that culminated in the attack and destruction of the Iranian oil platforms, the United States breached the object and purpose of the Treaty of Amity, including articles I and X (1) …'. The Court examined article I which provided that '[t]here shall be firm and enduring peace and sincere friendship' between the two states. The Court considered that 'such a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted".[177] It contrasted treaties of friendship generally with the present Treaty of Amity. The former tended to follow such a provision as the article I in issue with clauses aimed at clarifying the conditions of application of such a general formulation. The Court noted that the 1955 treaty was not the same type, its fuller title of the present treaty was a treaty of 'Amity, Economic Relations and Consular Rights' whose object was, according to the terms of the Preamble, the 'encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally' as well as 'regulating consular relations' between the two states.[178] After identifying the scope of particular provisions the Court found:

> It follows that the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense … Rather, by incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of

References

(p. 216) their commercial, financial and consular relations and that such a development would in turn reinforce that peace and that friendship. It follows that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied.

This conclusion is in conformity with that reached by the Court in 1986, when, on the occasion of its interpretation of the Treaty of Friendship of 1956 between the United States and Nicaragua, it stated in general terms that:

> 'There must be a distinction … in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective

> implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.' (I.C.J. Reports 1986, p. 137, para. 273.)[179]

It can be seen that in this case the object and purpose was viewed as a singular feature, helping to classify the treaty as different from more general treaties of friendship and peace and assisting the Court to the conclusion that the general pronouncement in article I of the 1955 treaty stated a treaty objective but not the basis for the Court's jurisdiction:

> In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.[180]

It would be unrealistic, however, to assume that because article 31(1) directs the interpreter to a singular object and purpose, such an object and purpose will be identifiable (or useful) in every case. The view of the Appellate Body at the WTO is a realistic generalization:

> … most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the *WTO Agreement*. Thus, while the first clause of the preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the *WTO Agreement* should allow for 'optimal use of the world's resources in accordance with the objective of sustainable development', and should seek 'to protect and preserve the environment'. The Panel in effect took a one-sided view of the object and purpose of the *WTO Agreement* when it fashioned a new test not found in the text of the Agreement.[181]

5.3.2 Finding object and purpose from preamble and substantive provisions

The phase of the *Oil Platforms* case described above provides an example of how the object and purpose of the 1955 treaty was taken from the treaty's preamble, at least as a starting point. This was confirmed by reference to the full text where a further

References

(p. 217) formulation of the 'objective' was found with significance for interpretation. While the preamble may seem an obvious starting point for ascertaining the object and purpose of the treaty, caution is necessary because preambles are not always drafted with care and a preamble itself may need interpreting. Thus, for example, in a dispute over the boundaries between territories previously affected by colonial activities, an issue was whether a particular treaty provision related only to land boundaries covered maritime boundaries too. The relevant preamble stated that the parties were 'desirous of defining the boundaries between the Netherlands possessions in the island of Borneo and the States in that island which are under British protection'. The ICJ rejected the contention that this indicated an objective of defining all boundaries in the area:

> The Court considers that the object and purpose of the 1891 Convention was the delimitation of boundaries between the parties' possessions within the island of Borneo itself, as shown by the preamble to the Convention, which provides that the parties were 'desirous of defining the boundaries between the Netherland possessions *in* the Island of Borneo and the States *in that island* which are under British protection' (emphasis added by the Court). This interpretation is, in the Court's view, supported by the very scheme of the 1891 Convention.[182]

Judge Weeramantry has described earlier practice of the ICJ and of arbitral tribunals:

> An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions. Article 31(2) of the Vienna Convention sets this out specifically when it states that context, for the purpose of the interpretation of a treaty, shall comprise in addition to the text, the preamble and certain other materials. The jurisprudence of this Court also indicates, as in the case concerning *Rights of*

Nationals of the United States of America in Morocco[3] and the *Asylum (Colombia/Peru)* case,[4] that the Court has made substantial use of it for interpretational purposes. In the former case, a possible interpretation of the Madrid Convention was rejected for its lack of conformity with the preamble's specific formulation of the purposes of the Convention. In the latter case the Court used the objects of the Havana Convention, as indicated in its preamble, to interpret Article 2 of the Convention. Important international arbitrations have likewise resorted to the preamble to a treaty as guides to its interpretation.[5]

3 *I.C.J. Reports 1952*, p. 176, at p. 196.

4 *I.C.J. Reports 1950*, p. 266, at p. 282.

5 See paras. 19 and 20, *the Beagle Channel Arbitration*, 1977, Wetter, *The International Arbitral Process*, 1979, Vol. 1, p. 276, at pp. 318–319.[183]

References

(p. 218) While, however, the preamble may be used as the source of a convenient summary of the object and purpose of a treaty, both the Vienna Convention (article 31(2)) and practice make it clear that an interpreter needs to read the whole treaty. Thus, the substantive provisions will provide the fuller indication of the object and purpose. The Appellate Body at the WTO has referred to preambles on a number of occasions, but it does so in the course of very detailed consideration of the relevant treaty's substantive provisions.[184]

5.3.3 Can the object and purpose be used to counter clear substantive provisions?

The *Oil Platforms* case considered above is but one of several ICJ cases which have been concerned with the extent of the jurisdiction conferred upon it, or another tribunal, by the parties to a dispute. The Court has in this context considered the object and purpose of the parties as requiring great care not to stretch jurisdiction beyond that specifically conferred by those parties. In doing so, and for the purposes of treaty interpretation more generally, it has answered in the negative the question that heads this section. Thus, in *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal),* where the dispute was whether an arbitral tribunal's award was invalid because of failure to resolve all the issues as put before the tribunal, the ICJ stated:

> … when states sign an arbitration agreement they are concluding an agreement with a very specific object and purpose: to entrust an arbitral tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits.[185]

However, the arbitral tribunal had been asked two specific questions: the first on the validity of an agreement determining the boundary, and the second as to where the boundary should be drawn if the agreement were found invalid. Thus, the second function of the tribunal, drawing the line itself, only arose if it found the line had not been determined by the previous agreement. Finding that the previous agreement was valid and binding on the parties, the tribunal had nevertheless found that the agreement only dealt with sea areas as known at the time of the earlier agreement. Hence the line was incomplete, but the tribunal did not proceed to draw the rest of it. The ICJ found that this was not a failure of the tribunal to act as required by the reference to arbitration:

> … although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2.[186]

References

(p. 219) Similarly in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* a chamber of the ICJ did not accept the argument by Honduras that jurisdiction was sufficiently established by a general reference in a preamble to the special agreement on jurisdiction to the object and purpose as being to dispose completely of very long-standing disputes; regard must be had to the common intention of the parties actually expressed in the words of the agreement. The Court saw

Honduras as really invoking the 'circumstances of conclusion' of the special agreement, such circumstances being a supplementary means of interpretation in article 32 of the Vienna rules and therefore an inappropriate basis on which to enlarge the meaning of the express terms.[187]

That the object and purpose of a treaty cannot be used to alter the clear meaning of a term of treaty is also well illustrated by an award of the US–Iran Claims Tribunal over a requirement that Iran maintain funds in a 'Security Account' with a third party bank at a certain level:

> Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.[188]

5.3.4 Object and purpose identifying general scope of treaty

While the general rule in article 31 of the Vienna Convention sees the treaty's object and purpose as shedding light on the ordinary meaning of terms used in their context, interpretation of a treaty may raise issues of more general applicability. This is interpretation of terms in a somewhat broader sense than that apparent in the general rule.

Thus, in *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* a principal issue was whether a bilateral treaty between Denmark and Norway which identified principles for delimitation of continental shelf boundaries between them (such as use of the 'median line') was applicable to *all* such boundaries, including those between their remoter territories viz Danish Greenland and the Norwegian Jan Mayen island to the north of Iceland. The ICJ considered that despite the generality of the provision referring to the areas of the continental shelf over which Denmark and Norway had sovereign rights to explore and exploit, the fact that their agreement specifically identified points on the boundary in the North Sea, coupled with the manner in which both states had implemented the Geneva Convention on the Continental Shelf, 1958,

References

(p. 220) showed that the object and purpose of the bilateral agreement had been to achieve a delimitation in the North Sea in terms of the continental shelf, as then defined, and that the parties could not have had in mind the possibility of a shelf delimitation between Greenland and Jan Mayen island.[189]

A further example of such a case is *Islam v Home Secretary*, in which Lord Hoffmann used the object and purpose to identify the general scope of the treaty so as to identify groups of people who might come within the 1951 Geneva Convention relating to the Status of Refugees as amended by the 1967 Protocol:

> The travaux préparatoires for the Geneva Convention shed little light on the meaning of 'particular social group.' It appears to have been added to the draft at the suggestion of the Swedish delegate, who said that 'experience had shown that certain refugees had been persecuted because they belonged to particular social groups.' It seems to me, however, that the general intention is clear enough. The preamble to the Convention begins with the words:
>
> > '*Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination …'
>
> In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect …

> In choosing to use the general term 'particular social group' rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.[190]

5.3.5 Object and purpose in a particular provision

Sometimes courts give the appearance of taking the object and purpose of the treaty as something that is so obvious as to be brought into consideration directly in the context of a particular provision. Thus in a case concerning consular access to prisoners:

> As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of

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> (p. 221) the Convention as normally understood, nor its object and purpose, suggest that 'without delay' is to be understood as 'immediately upon arrest and before interrogation'.[191]

A somewhat similar approach has been taken by the Appellate Board of the WTO:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[192]

5.3.6 Principle of effectiveness (general)

Realization of the object and purpose of a treaty, or securing the effectiveness of the general objectives of the treaty, appears to fulfil a larger aim than interpreting terms in the light of the object and purpose of the treaty. Nevertheless, the ICJ has harnessed the idea underlying the principle of effectiveness to the task of interpretation of treaties. The dual aspect of this can be seen in the Court's judgment in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*.[193] The Court's application of the principle in the maxim *ut res* has been described in the section on good faith above. This led to the conclusion that the reference in article 3 of a 1955 treaty to frontiers recognized as being 'those that result from the international instruments' defined in the Annex to the treaty, meant all the frontiers resulting from those instruments. This application of the principle of effectiveness in its narrow (or 'technical') form was supplemented by the Court's application of the more general principle of effectiveness. The Court saw the aim of the treaty as being to resolve all the issues over the frontiers:

> … The text of Article 3 clearly conveys the intention of the parties to reach a definitive settlement of the question of their common frontiers. Article 3 and Annex I are intended to define frontiers by reference to legal instruments which would yield the course of such frontiers. Any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness (see, for example, the *Lighthouses Case between France and Greece, Judgment, 1934, P.C.I.J. Series A/B. No. 62, p.* 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), I.CJ. Reports 1971,* p. 35, para. 66; and *Aegean Sea Continental Shelf I.C.J. Reports 1978,* p. 22, para. 52).
>
> Reading the 1955 Treaty in the light of its object and purpose one observes that it is a treaty of friendship and good neighbourliness concluded, according to its preamble, 'in a spirit of mutual

understanding and on the basis of complete equality, independence and

References

(p. 222) liberty'. The parties stated in that Preamble their conviction that the signature of the treaty would 'serve to facilitate the settlement of all such questions as arise for the two countries from their geographical location and interests in Africa and the Mediterranean', and that they were 'Prompted by a will to strengthen economic, cultural and good-neighbourly relations between the two countries'. The object and purpose of the Treaty thus recalled confirm the interpretation of the Treaty given above, inasmuch as that object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its boundaries. …[194]

Thus the Court applied this principle of effectiveness in the framework of the object and purpose of a treaty establishing frontiers, relying on earlier case law showing that the aim of any treaty of that kind should be interpreted to establish a precise, complete, and definitive frontier. Referring to the preamble of the particular treaty, the Court found that the same object and purpose led naturally to the definition of the territory of Libya, and thus the definition of its frontiers: 'To "define" a territory is to define its frontiers.'[195]

6. Conclusions

Article 31(1) has probably been cited more than any other of the Vienna rules. This may be because cursory attention to the Vienna Convention's provisions might lead some to think this paragraph is the general rule, whereas use of it is only a starting point for interpretation. Underlying its architecture is the relationship between the treaty's terms and the treaty as a whole. An issue may centre on one or more provisions. Any such provision is to be read selecting the ordinary meaning for the words used. But finding the ordinary meaning typically requires making a choice from a range of possible meanings. The immediate and more remote context is the next textual guide to making this choice, with the treaty's object and purpose as a further aid to this phase of an exercise in interpretation. The rest of the general rule, set out in the later paragraphs of the same article, must be taken into account. They are not subordinate or subsidiary provisions, but are equally elements of the general rule. Good faith is required throughout the exercise.

Footnotes:

[1] *Aguas del Tunari v Bolivia* (ICSID ARB/02/03), Award of 21 October 2005, para 91.

[2] See further Chapter 1, section 4.2 above.

[3] See Observations of the Government of Israel [1966] *Yearbook of the ILC*, vol II, p 92.

[4] For definition and comment on it, see Chapter 1, section 3.1 above.

[5] United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF.39/11/Add.2., p 39, para 8 and [1966] *Yearbook of the ILC*, vol II, p 188, para 1.

[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Reports 14, at paras 174–79.

[7] Such treaties are governed by the same rules as the Vienna rules: see the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 1986: see Chapter 4, section 2.2 above.

[8] See A Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 3rd edn, 2013), at 7–8, 16, and 55 ff, and Agreements between Belgium (Brussels-Capital, Flanders, Wallonia Regional Governments), France, and Netherlands on the Protection of the Rivers Meuse and Scheldt, Charleville Mezieres, 1994, (1995) 34 ILM 851.

[9] Judge Learned Hand in *Helvering v Gregory Revenue* 69 F 2d 809, at 810–11 (US Court of Appeals, 2nd Circuit) (1934).

[10] Mr de Luna [1964] *Yearbook of the ILC*, vol I, p 276, para 16; see also Mr Bartos, at p 279, para 64: 'The draft articles were based on the general concept, so dear to the English school of legal thought, that

interpretation meant interpretation of the text rather than of the spirit of a treaty.'

[11] See Third Report of Special Rapporteur (Waldock) [1964] *Yearbook of the ILC*, vol II, pp 55–6 and Chapter 2, section 8 above; see also the observation of Mr Amado that 'in fact, a treaty consisted of a number of texts, contexts and terms; what had to be interpreted was the treaty itself, not its terms …', [1964] *Yearbook of the ILC*, vol I, p 277, para 28.

[12] See Chapter 2, section 8.

[13] R H Berglin, 'Treaty Interpretation and the Impact of Contractual Choice of Forum Clauses on the Jurisdiction of International Tribunals: the Iranian Forum Clause Decisions of the Iran–United States Claims Tribunal' (1986) 21 *Texas International Law Journal* 39, at 44 (footnotes omitted).

[14] *Canada—Term of Patent Protection* Report of WTO Appellate Body, WT/DS170/AB/R (2000), para 78; and see J Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 *Nordic JIL* 405, at 418 , criticizing rule-governed interpretation, but commending this statement.

[15] See *Certain Expenses of the United Nations* [1962] ICJ Reports 151.

[16] *Case concerning the Air Services Agreement of 27 March 1946 (United States v France)* 54 ILR 304.

[17] The majority did, however, acknowledge that because of the limited time available they had not been able to make a detailed examination of comparable agreements and relevant practice of the parties, although to the extent that they had seen these, they did not appear inconsistent with the tribunal's conclusion: *Case concerning the Air Services Agreement of 27 March 1946 (United States v France)* at 335, para 71.

[18] See Reuter (dissenting), 54 ILR 304, at 343; see also L F Damrosch, 'Retaliation or Arbitration—Or Both? The 1978 United States–France Aviation Dispute' (1980) 74 AJIL 785, and R K Gardiner, 'UK Air Services Agreements 1970–80' (1982) 8 *Air Law* 2, at 9–10 .

[19] *Brown v Stott* [2003] 1 AC 681, at 703 (UK, Privy Council); see also *In re B (FC) (2002), R v Special Adjudicator ex parte Hoxha* [2005] UKHL 19, at para 9, opinion of Lord Hope linking the approach in *Brown v Stott* to article 31(1) of the Vienna Convention and stating: 'There is no warrant in this provision for reading into a treaty words that are not there. It is not open to a court, when it is performing its function, to expand the limits which the language of the treaty itself has set for it'; and *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55, at para 18 per Lord Bingham: 'It is in principle possible for a court to imply terms even into an international convention. But this calls for great circumspection …'; and see further Chapter 6, section 4.6 below.

[20] See, eg, *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625, at 648, para 42, where an issue was whether a line in a treaty establishing the line of a boundary across an island could be interpreted as extending beyond the coast: 'The Court observes that any ambiguity could have been avoided had the Convention expressly stipulated that the 4° 10' N parallel constituted, beyond the east coast of Sebatik, the line separating the islands under British sovereignty from those under Dutch sovereignty. In these circumstances, the silence in the text cannot be ignored. It supports the position of Malaysia.'

[21] See, eg, *Hiscox v Outhwaite* in Chapter 1, section 5.4 above, where the use of 'made' rather than 'signed' in the New York Convention on Recognition etc of Arbitral Awards, would have led the courts to acknowledge that the former did not necessarily mean the latter.

[22] See, eg, *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre*, above; and see further section 2.4.1 below.

[23] On good faith in international law generally, see J F O'Connor, *Good Faith in International Law* (Dartmouth: Aldershot, 1991) .

[24] H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) XXVI BYBIL 48, at 56 .

[25] Waldock, Third Report, [1964] *Yearbook of the ILC*, vol II, p 7 , draft article 55(1). That draft included elements of the content of good faith, a paragraph which did not survive into the Vienna Convention: 'Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.'

[26] Waldock, Third Report, [1964] *Yearbook of the ILC*, vol II, p 7, at 55 .

[27] Waldock, Third Report, at 55 and see Chapter 2, section 8 above.

[28] Waldock, Third Report, at 56 .

[29] Waldock, Third Report, at 55 .

[30] Waldock, Third Report, at 53 , article 72 and commentary at 60–61.

[31] Waldock, Third Report, at 60 , para 27, and 61 para 29.

[32] Chairman of ILC (Yasseen, speaking as a member of the Commission), [1964] *Yearbook of the ILC*, vol I, p 290, para 106.

[33] *Shorter Oxford English Dictionary* (1973 revised edn) .

[34] *Shorter Oxford English Dictionary* .

[35] *Russell v Russell* [1897] AC 395, at 436 per Lord Hobhouse; and see Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London: Stevens and Sons, 1953) , Part Two, 'The Principle of Good Faith' at 105 ff.

[36] For a general account of good faith both in different national laws and international law, see that of Lord Hope in *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55, at paras 57–63.

[37] G Schwarzenberger, 'Myths and Realities of Treaty Interpretation' (1968) 9 *Va J Int'l L* 1, at 9 .

[38] Schwarzenberger at 9–10 .

[39] Schwarzenberger at 10 .

[40] *The Law of Nations* (1758 edn, trans C G Fenwick) (Washington: Carnegie Institution, 1916), Book II, ch XVII, § 273 .

[41] See Chapter 2, section 9 above.

[42] Article 26 uses as its heading the Latin maxim in relation to treaties '*Pacta sunt servanda*'. This is fleshed out in the text of the article as: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

[43] Jennings and Watts (eds), *Oppenheim's International Law* (London: Longman, 9th edn, 1992), 1272, § 632 and note 7 .

[44] H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 Part Three' (1991) LXII BYBIL 1, at 17 . He further considered it 'difficult to conceive circumstances in which the Court would find it necessary to reject an interpretation advanced by a party on the sole ground that it was not made in good faith'.

[45] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* [1995] ICJ Reports 6, at 35–37 and 39 (emphasis added); for further consideration of this case, see Chapter 8, section 4.2.2 below.

[46] Other dissenting judges have referred to the requirement of good faith. In *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045, a core issue was which of two branches of a river was 'the main channel' for the purposes of a treaty of 1890 which had specified the centre of that channel as the boundary between two states. Judge Fleischhauer, in his dissenting opinion, considered that where the expectation in 1890 of large-scale navigability of the river had proved mistaken over the subsequent century, it would not be an interpretation in good faith for that mistaken belief to be held against a party so as to deprive it of an equitable share of the channel which has in recent years been of some use for tourism (Dissenting Opinion of Judge Fleishhauer, 1196, at 1203–204, para 9). It is difficult to see how this appeal to good faith substantially buttresses a conclusion which is dependent on contested issues as to the navigability of the channels and whether navigability was, in any event, the correct test in a treaty addressing the respective spheres of influence of Britain and Germany in Africa. Good faith has also been invoked by a dissenting judge in interpreting a state's declaration accepting the jurisdiction of the ICJ: see Judge Torres Bernárdez in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), (Preliminary Objections)* [1998] ICJ Reports 275, at 670–71, paras 237–39.

[47] *Venezuelan Preferential Claims Case* (1904) 1 HCR 55, at 60–61; and see Bin Cheng, *General Principles*, at 107–8. Note also, however, that in preferring the claims of the allied Powers, the tribunal appears to have placed great weight on the negotiating history and surrounding circumstances, which provided evidence not revealed on the face of the treaty.

[48] *Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976* (*Netherlands v France*), Arbitral Award of 12 March 2004, 144 ILR 259, at 290–300, paras 54–79 (unofficial translation from authentic French): <http://www.pca-cpa.org>; see further Chapter 1, section 5.2.

[49] *Rhine Chlorides* 144 ILR 259, at 298, para 74, quoting the award in the *Georges Pinson Case France v Mexico* (Mixed Claims Commission) 19 October 1928, § 50 as translated in Annual Digest of Public International Law Cases (now ILR) 1927–28, p 426.

[50] [2004] UKHL 55, [2005] 2 AC 1.

[51] *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55, at para 19; and cf *Cox v Canada* (1994) UN Human Rights Committee, 114 ILR 347, at 372–73.

[52] [2004] UKHL 55, at para 43.

[53] [2004] UKHL 55, at paras 62–63, attributions and citations omitted.

[54] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Reports 420, para 63.

[55] See R Jennings and A Watts (eds), *Oppenheim's International Law*, vol I (London: Longman, 9th edn, 1992), 1272 .

[56] *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69, at 105, para 94. This proposition was reaffirmed in *In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1998] ICJ Reports 275, at 297, para 39.

[57] A Slade, 'Good Faith and the Trips Agreement: Putting Flesh on the Bones of the Trips "Objectives"' (2014) 63 ICLQ 353 .

[58] Slade, 'Good Faith and the Trips Agreement' .

[59] [1994] ICJ Reports 6, at 51, paras 79–87.

[60] *North Atlantic Coast Fisheries (USA v Great Britain)* (1910) 4 AJIL 948, at 967; see also *Rights of Nationals of the USA in Morocco* [1952] ICJ Reports 212.

[61] Cf article 5 of the Convention on International Civil Aviation, Chicago, 1944, where the power of a state party to impose 'such regulations, conditions or limitations as it may consider desirable' on non-scheduled commercial flights was interpreted by the Council of the International Civil Aviation Organization as allowing parties to impose what restrictions they chose, but that it was understood that this right to restrict non-scheduled flights 'would not be exercised in such a way as to render the operation of this important form of air transport impossible or non-effective' (ICAO Doc 7278/2).

[62] *Effect of Reservations on the Entry into Force of the American Convention* (OC-2/82) Inter-American Court of Human Rights, Advisory Opinion of 24 September 1982, 67 ILR 559, at 568, para 29.

[63] See *Habeas Corpus in Emergency Situations* (OC-8/87) Inter-American Court of Human Rights, Advisory Opinion of 30 January 1987, 96 ILR 392, at 397, para 16, applying *Effect of Reservations* Opinion in preceding note.

[64] *United States—Import Prohibition of Certain Shrimp and Shrimp Products* WTO Report of Appellate Board AB-1998–4, WT/DS58/AB/R, 12 October 1998, paras 158–59.

[65] Commentary on draft articles, [1966] *Yearbook of the ILC*, vol II, p 219, para 6.

[66] *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Merits)* [1994] ICJ Reports 6.

[67] [1994] ICJ Reports 6, at 23, para 47. See also a straightforward application of the principle in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation), (Preliminary Objections)*, [2011] ICJ Reports, at paras 133–34, where the ICJ considered that in a provision granting a right to submit 'a dispute' qualified by the words 'which is

not settled' by certain specified peaceful means of resolution, reliance on the mere fact there was a subsisting dispute did not afford the latter phrase any useful effect and hence it was necessary to show there to have been some resort to the specified means; cf *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* [2011] ICJ Reports 644, at 673, para 92 where the ICJ rejected the contention that a phrase lacked legal effect unless interpreted in the manner proposed because there was an alternative possible meaning having 'legal significance'.

[68] See further consideration of this case in the practice under 'object and purpose' below.

[69] *Japan—Taxes on Alcoholic Beverages*, AB-1996–2, WT/DS8, 10 &11/AB/R (1996).

[70] *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999–8, WT/DS98/AB/R, p 24, paras 80–81(1999) (emphasis in original, footnotes omitted).

[71] *Argentina—Safeguard Measures on Imports of Footwear*, AB-1999–7, WT/DS121/AB/R, p 27, para 81 (1999) (emphasis in original, footnote omitted). The Board also in that decision held that the principle *ut res* does not apply to require meaning to be given to an omission: 'We believe that, with this conclusion, the Panel failed to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*, contrary to the principle of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of treaties. The Panel states that the "*express omission* of the criterion of unforeseen developments" in Article XIX:1(a) from the *Agreement on Safeguards* "must, in our view, have meaning." On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not' (at para 88 (emphasis in original, footnotes omitted)).

[72] G Schwarzenberger, 'Myths and Realities of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties' (1968) 9 *Va J Int'l L* 1, at 13 , where he cites dictionaries and recalls: 'In the Note Verbale of October 10, 1967, from the Permanent Representative of the United States of America at the United Nations, it is justly pointed out that the "basic problem is that words can have many meanings, and what may be an ordinary meaning in one set of circumstances may be an extraordinary one in another." U.N. Doc. A/CONP 3915, vol 1 at 205'.

[73] ILC Commentary on draft articles, [1966] *Yearbook of the ILC*, vol II, p 221, para 12.

[74] Vattel placed the origins of this principle in the more general idea of the intent behind a law; see *The Law of Nations* (1758 edn, trans C G Fenwick) (Washington: Carnegie Institution, 1916) , Book II, ch XVII § 263.

[75] Vattel, § 263 .

[76] H Grotius, *De Jure Belli ac Pacis* (F W Kelsey trans) (New York: Oceana, reprint 1964), Bk II, Ch XVI at 409 (footnote omitted), and see Chapter 2, section 3 above.

[77] This was in his antidote to 'quibbles on words': 'All these pitiful subtleties are overthrown by this unerring rule: When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning. The intention, sufficiently known, furnishes the true matter of the convention,—what is promised and accepted, demanded and granted. A violation of the treaty is rather a deviation from the intention which it sufficiently manifests, than from the terms in which it is worded: for the terms are nothing without the intention by which they must be dictated.' Vattel, *The Law of Nations* at § 274 .

[78] Vattel, at § 320 .

[79] [1966] *Yearbook of the ILC*, vol II, p 220, para 9.

[80] *Oxford English Dictionary* (1989) .

[81] Waldock, United Nations Conference on the Law of Treaties, First Session (26 March–24 May 1968), Official Records: Summary Records, p.184, para 70.

[82] [1991] ICJ Reports 53.

[83] [1991] ICJ Reports 53, at 69–70, para 48.

[84] *Canada—Measures Affecting the Export of Civilian Aircraft*, WTO Appellate Body Report AB-1999–2 of 2 August 1999, WT/DS70/AB/R, p 39, para 154. See also *Marvin Feldman v Mexico* ICSID Case No. ARB(AF)/99/133–34, para 96. See also: Chang-Fa Lo, 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding' (2010) 1 *J Int'l Dispute Settlement*

431 ; I Van Damme, 'On 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding'—A Reply to Professor Chang-Fa Lo' (2011) 2 *J Int'l Dispute Settlement* 231 ; Chang-Fa Lo, 'A Clearer Rule for Dictionary Use Will Not Affect Holistic Approach and Flexibility of Treaty Interpretation—A Rejoinder to Dr Isabelle Van Damme' (2012) 3 *J Int'l Dispute Settlement* 89 ; D Pavot, 'The Use of Dictionary by the WTO Appellate Body: Beyond the Search of Ordinary Meaning' (2014) 4 *J Int'l Dispute Settlement* 29 .

85 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, p 54, paras 164–65.

86 *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045, at 1064, para 30.

87 [1999] ICJ Reports 1045 and cf dissenting opinion of Arbitrator Pharand in *Dispute concerning Filleting within the Gulf of St Lawrence ("La Bretagne")(Canada/France)* (1986) 82 ILR 591, at 660, using a French dictionary of international law terms and the *Oxford English Dictionary* to assist in giving a meaning to 'equal footing'.

88 *Golder v United Kingdom* ECHR App no 4451/70 (Judgment of 21 February 1975), para 32.

89 *Ehrlich v American Airlines* 360 F 3d 366, at 377 (US Court of Appeals, 2nd Circuit, 2004), and using dictionaries to explore the meaning of words in the phrase '*dommage survenu en cas*' in the 'Warsaw Convention' system treaties on carriage by air: see at 376–78. In referring to the Vienna Convention in a context which did not expressly include the Vienna rules, the court noted: 'Although the United States has never ratified the Vienna Convention, we "treat the Vienna Convention as an authoritative guide to the customary international law of treaties"' (at 373, fn 5).

90 *Eastern Airlines v Floyd* 499 US 530, at 537 (1991).

91 *Case concerning Avena and other Mexican Nationals (Mexico v USA)* Judgment of 31 March 2004 [2004] ICJ Reports 12, at 48, para 84. Consideration of the object and purpose of the treaty (see below), and the preparatory work, assisted the Court towards a meaning in this case.

92 Judge Anderson (dissenting) in *The 'Volga' case (Russian Federation v Australia) (2002)*, (2003) 42 ILM 159, at 188–90 and 192.

93 See Chapter 1, sections 5.1 and 5.4 above, describing *Witold Litwa v Poland* ECtHR App no 26629/95 (Judgment of 4 April 2000) and *Hiscox v Outhwaite* [1992] 1 AC 562. (In the latter case an interpretation in line with the Vienna rules was achieved by legislatively reversing the judicial decision.)

94 Application nos 6210/73, 6877/75, 7132/75 (1978) 2 EHRR 149 (Judgment of 28 November 1978).

95 Application nos 6210/73, 6877/75, 7132/75 [1978] 2 EHRR 149 (Judgment of 28 November 1978), at 160–161, para 40.

96 *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045.

97 [1999] ICJ Reports 1045, at 1060, extracted from para 21, with German text added from that paragraph.

98 [1999] ICJ Reports 1045, at 1062–63, para 27.

99 [1999] ICJ Reports 1045, at 1064–65, para 30; and see section 3.3.2 above.

100 Declaration of Judge Higgins [1999] ICJ Reports 1113, para 1.

101 [1999] ICJ Reports 1113, at 1114, para 3.

102 [1999] ICJ Reports 1113, at 1115, para 10.

103 [1978] ICJ Reports 3; for consideration of generic terms in the context of evolutionary interpretation, see Chapter 10, section 4 below.

104 [1978] ICJ Reports 3, at 31–32, para 76.

105 [1978] ICJ Reports 3, at 32, para 77.

106 *Kasikili/Sedudu Island (Botswana/Namibia)*, Declaration of Judge Higgins [1999] ICJ Reports 1113–14, para 2. Cf *Dispute concerning Filleting within the Gulf of St Lawrence ("La Bretagne") (Canada/France) (1986)* 82 ILR 591, at 619 where, using slightly different wording, the arbitrators found that 'the authors of the 1972 Agreement used the term "fisheries regulations" as a generic formula covering all the rules applicable to fishing activities …' (emphasis added). See also Chapter 7, sections 1.2 and 4.2,

where 'generic terms' were considered in the context of the Vienna Convention's article 31(3)(c) and the application of the 'inter-temporal law' in an arbitral award (the *Iron Rhine* case).

[107] European Patent Office, Technical Board of Appeal, 29 June 2001, Case no T 0964/99–3.4.1.

[108] *R v Governor of Pentonville Prison ex parte Ecke* (1981) 73 Cr App R 223, at 227 (the judgment was given in 1973 but included in these reports belatedly). This case does not refer to the Vienna rules but the quoted proposition was an extrapolation from *Re Arton (No 2)* [1896] 1 QB 509. A tenuous link is made via reference to the latter judgment in an Australian case in a context which did refer to the Vienna rules: Deane J in *Riley and Butler v The Commonwealth* 87 ILR 144, at 153. On interpretation of extradition treaties in the UK, see *Government of Belgium v Postlethwaite* [1988] AC 924 (HL).

[109] Application no 52207/99, Decision on Admissibility, 12 December 2001, para 59.

[110] See further, Gardiner, *International Law*, at 19–20 .

[111] *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)* (PCA) (2003) 42 ILM 1118, at 1142, paras 129–30, concerning the Convention for the Protection of the Marine Environment of the North-East Atlantic,1992. For the interpretation of 'shall', see *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (Decision on Jurisdiction, 24 February 2014), at paras 162–231, and see Chapter 9, section 4.4 below.

[112] See F D Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 *Yale Journal of International Law* 315, at 317 .

[113] This is particularly common in the case of treaties following a model or having closely comparable objectives: see, eg, treaties on tax, F Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBDF Publications BV, 2004) .

[114] Article 1 of the First Protocol to the European Convention on Human Rights.

[115] Judgment of 22 January in *James and Others v UK*, ECtHR case no 3/1984/75/119, at para 61 and judgment of 22 January 1986 in *Lithgow and Others v UK,* ECtHR case no 2/1984/74/112–118, para 114.

[116] Judgment of 25 January 1984 in *Öztürk v Germany,* ECtHR case no 8544/79, para 53.

[117] ECtHR case no 8544/79, para 53.

[118] Lord Hoffmann in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, at para 64; in the context of the Protocol on the Interpretation of article 69 of the European Patent Convention, Lord Hoffmann continued: '"Acontextual meaning" can refer only to the conventional rules for the use of language, such as one finds in a dictionary or grammar. But then, to compare acontextual meaning in that sense with contextual meaning is to compare apples with pears. The one refers to a general rule about how words or syntax should be used and the other to the fact of what on a specific occasion the language was used to mean. So, to make any sense of the terms "primary, literal or acontextual meaning" in the Protocol questions, it must be taken to mean a construction which assumes that the author used words strictly in accordance with their conventional meanings.'

[119] [2007] EWHC 2851 (Comm), para 14 ff.

[120] [2007] EWHC 2851, at paras 20 and 24.

[121] [2007] EWHC 2851, at para 31 (emphasis added); on circumstances of conclusion, see Chapter 8, section 4.5.

[122] Cf Judge Learned Hand in *Commissioner of Internal Revenue v National Carbide Corp* 167 F 2d 304, at 306 (US Court of Appeals, 2nd Circuit) (1948): '… but words are chameleons, which reflect the color of their environment …'.

[123] [1964] *Yearbook of the ILC*, vol II, p 56. This was affirmed in the ILC's Commentary on the draft articles which formed the Vienna rules: [1966] *Yearbook of the ILC*, vol. II, p. 221, para (12).

[124] [1964] *Yearbook of the ILC*, vol II, p 56.

[125] [1992] ICJ Reports 351.

[126] [1992] ICJ Reports 351, pp 582–4, paras 373–74.

[127] [1992] ICJ Reports 351, at paras 375–76.

[128] See, eg, the analysis by the WTO Appellate Body of contrasting tenses as context in its Report in *Chile —Price Band System and Safeguard Measures Relating to Certain Agricultural Products* WT/DS207/R (3 May 2002), at paras 205–11.

[129] *Oil Platforms (Islamic Republic of Iran v United States of America), (Preliminary Objections)* [1996–II] ICJ Reports 803.

[130] *Oil Platforms (Islamic Republic of Iran v United States of America), (Preliminary Objections)* [1996–II] ICJ Reports 803, at 819, para 47.

[131] The role of titles to articles may be specifically limited as in the United Nations Framework Convention on Climate Change, New York, 1992. In that treaty, a note to the title of Article 1 (Definitions) states: 'Titles of articles are included solely to assist the reader.' See also consideration of specific instructions in a treaty as to use of headings in it in *Turbon International GmbH v Oberfinanzdirektion Koblenz* (Case C-250/05) [2006] All ER (D) 384.

[132] See the example in section 2.4.4 above; and see *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)* (2003) 42 ILM 1118, at para 163, where the Tribunal took into account the title in considering the scope of article 9.

[133] ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005.

[134] ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, at para 147.

[135] For an example of an arbitral award which carefully distinguishes the immediate context and the context in the sense of the entire text of the treaty, see *Dispute concerning Filleting within the Gulf of St Lawrence ("La Bretagne")(Canada/France)* (1986) 82 ILR 591, at 620–21, paras 38–39.

[136] Decision AB-1999–2 of 2 August 1999, WT/DS70/AB/R.

[137] Decision AB-1999–2 of 2 August 1999, at pp 39–40, para 155 (emphasis in original).

[138] Decision AB-1999–2 of 2 August 1999, at p 40, para 156 (emphasis in original).

[139] Decision AB-1999–2 of 2 August 1999, at p 40, para 157 (emphasis in original).

[140] [1989] AC 1014.

[141] Convention on the Transfer of Sentenced Persons, Strasbourg, 1983.

[142] Convention on the Transfer of Sentenced Persons, Strasbourg, 1983, article 10.

[143] On the status of the Explanatory Report, see Chapter 6, section 2.1.1 below.

[144] *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69.

[145] *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* at 88–89, paras 42–45; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, [2008] ICJ Reports 177, at 232–3, paras 154–56.

[146] See generally E Suy, 'Le Préambule', in E Yakpo and T Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague: Kluwer, 1999), at 253–69 .

[147] See, eg, *Border and Transborder Armed Actions (Nicaragua v Honduras), (Jurisdiction and Admissibility)* [1988] ICJ Reports at 106, para 97, where the ICJ relied on a draft of the preamble and its similar wording in the Final Act of a conference adopting a treaty to show that dispute settlement procedures in the treaty were not intended to exclude the right of recourse to other competent international forums; see also WTO Appellate Body in *Canada—Term of Patent Protection* WT/DS170/AB/R (2000), para 59; and see Suy, 'Le Préambule', at 258–63 .

[148] See section 5.3.2 above.

[149] See Suy, 'Le Préambule', at 256 .

[150] Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 5 June 1992, Montreal, 2000 [2000] *Australian Treaties Not In Force* 4.

[151] This loosely paraphrases Suy, 'Le Préambule', at 262 : '*De façon générale, le dispositive offrira, en raison de sa plus grande précision, plus de clarté, de sorte qu'un recours à l'interprétation au moyen du préambule s'avérera sans effet réel. Mais en cas de doute quant à la portée du dispositive, le préambule*

peut en justifier une interprétation extensive—ou au moins justifier le rejet d'une interprétation restrictive.'

152 *Oxford English Dictionary*, sub nom 'point', attribution there to G Chaucer, *The Romaunt of the Rose* ('A reder that poyntith ille, A good sentence may ofte spille').

153 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945, in *Trial of Major War Criminals before the International Military Tribunal*, Vol 1, Documents (London: HMSO, 1947) . See further E Schwelb, 'Crimes Against Humanity' (1946) 23 BYBIL, 178 at 188 and 193–95 .

154 Protocol Rectifying Discrepancy in Text of Charter, Berlin, 6 October 1945, in *Trial of Major War Criminals* … (see preceding note). The Protocol made the same change in the French text, but also altered that text in a way which made it clear that inhumane acts and persecutions were both conditioned by the two elements noted in the text above.

155 [1978] ICJ Reports 3; cf *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625, at 646–47, paras 39–40, where the equally authentic texts in English and Dutch differed in punctuation as to a colon or semi-colon; but the Court found that the difference in punctuation did not assist in elucidating the meaning with regard to the point in issue.

156 [1978] ICJ Reports 3, at 21, para 51 (stating the ICJ's translation of an entry in Robert's *Dictionnaire*).

157 [1978] ICJ Reports 3, at 22, para 53; see also problems of punctuation in different languages considered in Chapter 9, section 4.8.

158 102 ILR 215, Award of 30 November 1992, at 307.

159 102 ILR 215, at 307.

160 *Case Concerning the Auditing of Accounts (Netherlands v France)*, Arbitral Award of 12 March 2004, 144 ILR 259, at 305, para 91.

161 See Chapter 6, section 2.1 below; see also the example of 'responsibility' meaning to have an obligation ('responsibility to ensure') and 'responsibility' meaning liability ('responsibility and liability for damage') in *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (Advisory Opinion) (2011) ITLOS Case No 17, paras 64–71, and see Chapter 9, section 4.7 below.

162 See Chapter 1, section 5.2 above.

163 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, at 227, para 445 and stating, at 110, para 160, that the Court was applying articles 31 and 32 of the Vienna Convention; see also: *Case concerning Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Reports 279, at 312, para 109; *Nuclear Tests (Australia v France)*, [1974] ICJ 253, at 332, para 41, and *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* [1964] ICJ. 6, at136: 'The ratio legis, the object, of these two provisions of the Statute is the same …'; the Court has also made numerous references to the object and purpose of particular rules in its Rules of Court.

164 Cf the commentary in the Guide to Practice on Reservations to Treaties (considered in Chapter 3, section 3.1 above) where there are examples of objections to reservations on the basis of inconsistency with the object and purpose of particular provisions: Addendum to Report of the International Law Commission, Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1, p 486, fn 2270 and p 514, fn 2400.

165 Addendum to Report of the International Law Commission, Sixty-third session (2011), UN General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10/Add.1, pp 359–60, guideline 3.1.5.1, commentary para (1), footnote omitted; see also the full commentary on this guideline for a useful analysis of the practice of the ICJ and other courts and tribunals on this matter <http://legal.un.org/ilc/reports/2011/english/addendum.pdf>.

166 [1981] AC 251.

167 More recently, however, these courts have adopted a somewhat closer focus on the Vienna rules, at least to the extent of invoking article 31(1); see, eg, in the opinion of Lord Hope *In re B (FC) (2002), R v Special Adjudicator ex parte Hoxha* [2005] UKHL 19, at paras 8–9, before referring to article 31(1): 'A large and liberal spirit is called for when a court is asked to say what the Convention means. But there are

limits to this approach. The court must recognise the fundamental fact that the Convention is an agreement between states. The extent of the agreement to which the states committed themselves is to be found in the language which gives formal expression to their agreement. The language itself is the starting point …'.

168 I Buffard and K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austrian Review of International and European Law* 311 .

169 Waldock, Third Report on the Law of Treaties [1964] *Yearbook of the ILC*, vol II, p 7, draft article 55(2) .

170 Waldock, Special Rapporteur, First Report on the Law of Treaties [1962] *Yearbook of the ILC*, vol II, p 46 , draft article 9(2)(c). The original reference to 'objects' may have been derived from the Special Rapporteur's acknowledged inspiration for the draft articles in the 1956 Resolution of the Institute of International law and in the work of Sir Gerald Fitzmaurice formulating major principles of treaty interpretation. The 1956 Resolution included among the 'legitimate means of interpretation' in the case of a dispute brought before an international tribunal: 'the consideration of the objects of the treaty'. Sir Gerald Fitzmaurice's Principle IV '*Principle of Effectiveness*' included the proposition: 'Treaties are to be interpreted with reference to their declared or apparent objects and purposes …' (Waldock, Third Report on the Law of Treaties [1964] *Yearbook of the ILC*, vol II, p 55).

171 [1964] *Yearbook of the ILC*, vol I, p 26, footnotes omitted; the usage by the Court in the *Reservations to the Genocide Convention* case appears in fact to have been slightly different: it did refer to '*les fins poursuivies*', translated as 'objects pursued', [1951] ICJ Reports 15, at 23; but in conjunction with '*l'objet*' the Court used '*et le but*', translated as 'the object and purpose', at 24. Thus the French text came to use '*but*' rather than '*fin*' in each place where 'object and purpose' occurs in the English version, the term '*fin*' being used in the Vienna Convention mainly in phrases signifying 'termination' of a treaty (see, eg, articles 45, 60, etc), the exception being article 8 (representation for a particular '*fin*' or 'purpose').

172 *Oxford English Dictionary* (1989) .

173 Buffard and Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?', at 326 , and see 325–28 for a fuller explanation.

174 For an example in a bilateral treaty, see article I of the US–Iran Treaty of Amity, Economic Relations and Consular Rights, Tehran, 1955, and extracts from ICJ judgments in *Oil Platforms (Iran v USA)* below in section 5.3.1.

175 The ILC seems to have assumed that the main guidance on identifying the object and purpose of a treaty would be its preamble: 'Again the Court has more than once had recourse to the statement of the object and purpose of the treaty in its preamble in order to interpret a particular provision' (Commentary on draft articles [1968] *Yearbook of the ILC*, vol II, p 41 (footnotes omitted). It must, however, be emphasized that the ILC was there stressing the importance of considering the treaty as a whole.

176 [1996–II] ICJ Reports 803, at paras 27, 28, 31; 52; and 36, respectively.

177 [1996–II] ICJ Reports 803, at para 27.

178 [1996–II] ICJ Reports 803.

179 [1996–II] ICJ Reports 803, at para 28.

180 [1996–II] ICJ Reports 803, at para 31.

181 *US—Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998), para 17.

182 *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625, para 51; for further judgments and opinions of the PCIJ and ICJ referring to the preamble in treaty interpretation, see Suy, 'Le Préambule' at 255, note 6 .

183 *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Dissenting Opinion [1991] ICJ Reports 53, at 142.

184 See, eg, *US—Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R, paras 12 and 17; *EC—Measures Concerning Meat and Meat Products (Hormones)* (1998) WT/DS26/AB/R and WT/DS48/AB/R, para 70; *Chile—Price Band System* (2002) WT/DS207/AB/R, paras 196–97; see also Reports of the Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (2006) WT/DS291/R, WT/DS292/R, WT/DS293/R, para 4.162.

185 [1991] ICJ Reports 53, at 70, para 49.

186 [1991] ICJ Reports 53, at 72, para 56.

187 [1992] ICJ Reports 351, at 584, paras 375–76.

188 *USA, Federal Reserve Bank v Iran, Bank Markazi* Case A28, (2000–02) 36 Iran–US Claims Tribunal Reports 5, at 22, para 58 (footnotes omitted).

189 [1993] ICJ Reports 38, at 50–51, paras 26–28.

190 [1999] 2 AC 629, at 650–51.

191 *Case concerning Avena and other Mexican Nationals (Mexico v USA)* Judgment of 31 March 2004, para 85, and see section 3.3.2 above.

192 *United States—Import Prohibition of Certain Shrimp and Shrimp Products* WTO Report of Appellate Board AB-1998–4, WT/DS58/AB/R, 12 October 1998, para 114 (footnote omitted).

193 *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Merits)* [1994] ICJ Reports 6.

194 [1994] ICJ Reports 6, at pp 25–6, paras 51–52.

195 [1994] ICJ Reports 6, at pp 25–6, paras 51–52; and see also at p 23, para 47.
