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Preamble

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A. The Notion of a Preamble

1 Both bilateral and multilateral treaties may contain a preamble enumerating the contracting States involved in their conclusion. A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty. Generally a preamble consists of a sequence of secondary clauses (*considérants*) that commence with words such as 'Recognizing', 'Recalling', 'Mindful', 'Emphasizing', 'Conscious of', etc. The preamble may also incorporate the parties' motivations for concluding the treaty by describing the foundation of their past, present, and future relations in so far as it relates to the treaty. Preambles are thus *indicia* of the intention of the parties to a treaty.

B. Functions of Preambles in International Law

2 Preambular clauses can perform four distinct functions: interpretative, supplementary, incorporative, and binding (clauses-engagement). As a result a preamble may perform several functions, either simultaneously or alternatively.

1. The Interpretative Function of Preambles

3 It is widely accepted that a preamble has a very important role in the interpretation of treaties (Interpretation in International Law). For instance, the motives and aims mentioned in a preamble can be used to help to understand and interpret the provisions contained in the operative part of a treaty (*dispositif*). The interpretative function of a preamble is also recognized in the Vienna Convention on the Law of Treaties (1969) ('VCLT') which notes that, along with the text and other components of a treaty, the preamble may be relied upon for interpretative purposes. This is codified at Art. 31 (2) VCLT which states: 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes…' (emphasis added).

4 However, a preamble can only be used as an interpretative tool if the relevant provisions of the preamble are formulated with sufficient precision. If the provisions are too general or vague they cannot guide the interpretation of the treaty. Overall then, the preamble can be of great importance for establishing the meaning of treaty provisions and clarifying their purpose if it clearly sets forth the object and purpose of the treaty (Treaties, Object and Purpose) and expresses the intentions of the contracting parties. The importance of a preamble's interpretative function is reflected in the practice of various international dispute settlement bodies, including the International Court of Justice (ICJ), which in the Guardianship of Infants Convention Case (Netherlands v Sweden) (Merits) stated that: 'The 1902 Convention, *as indicated by its preamble*, was designed to "lay down common provisions to govern the guardianship of infants"' (emphasis added; [1958] ICJ Rep 67), as well as the Appellate Body of the World Trade Organization (WTO) (see also World Trade Organization, Dispute Settlement), which held in the US—Shrimp Case:

> While Article XX [of the GATT] was not modified in the Uruguay Round, *the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy*. The preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of sustainable development'…From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX (g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'… As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must *add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994* (paras 129–130, 153 emphasis added).

5 Similarly in the Beagle Channel Arbitration, the tribunal considered:

> Although Preambles to treaties do not usually—nor are they intended to—contain provisions or dispositions of substance—(in short they are not operative clauses)—it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to 'situate' it in respect of its *object and purpose* (emphasis added; 52 ILR 132).

2. The Supplementary Function of Preambles

6 Preambular provisions can fill lacunae or gaps in treaties in two ways and thus play a supplementary role. First, the preamble can contain supplementary provisions intended to fill the gaps in the treaty by recalling the general principles of law that inspired the treaty. Such clauses clarifying the will of the parties facilitate the interpretation of the operative part of a treaty. Such is the case with the preamble of the 1980 United Nations Convention on International Multimodal Transport of Goods (see also Traffic and Transport, International Regulation) which emphasizes:

> Agreeing to the following basic principles:
>
> …
>
> The freedom for shippers to choose between multimodal and segmented transport services;
>
> That the liability of the multimodal transport operator under this Convention should be based on the principle of presumed fault or neglect.…

7 Secondly, the preamble can be used to limit explicit treaty provisions by recognizing the application of other sources of international law to matters not regulated by a treaty. Examples of supplementary clauses can be found in preambles of the 1899 Hague Convention with Respect to the Laws and Customs of War on Land and of the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Land Warfare; humanitarian law, international) both of which read as follows:

> Until a more complete code of the laws of war is issued, the High contracting parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience…

8 The preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) also embodies such supplementary clauses when stating: 'rules of customary international law continue to govern matters not regulated by the provisions of the present Convention'.

3. The Incorporative Function of Preambles

9 Incorporative clauses in preambles aim at explicitly taking into account another treaty or a part of another treaty, customary international law, and resolutions of international organizations (International Organizations or Institutions, Secondary Law). An example of such incorporative preambular clauses can be found in the 1992 United Nations Framework Convention on Climate Change (Climate, International Protection) which states:

> *Recalling* the provisions of General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and General Assembly resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21

> December 1990 and 46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind…
>
> *Recalling further* the Vienna Convention for the Protection of the Ozone Layer, 1985, and the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987, as adjusted and amended on 29 June 1990…

10 Specific clauses may be incorporated in preambles of international treaties in order to avoid conflicts between different bodies of international norms or different treaties regimes (Treaties, Conflict Clauses; Treaties, Conflicts between). For instance, with regard to preambles of Multilateral Environmental Agreements ('MEAs') (Environment, Multilateral Agreements), there is an emerging and rather consistent practice in regulating through 'saving clauses' and 'mutual supportiveness' clauses the relationship between different international agreements and particularly environmental agreements and trade agreements (Trade and Environment). Such a *ratio legis* is reflected in many preambles of MEAs such as the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Prior Informed Consent) and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biological Safety; Biological Diversity, International Protection) which have the same wording:

> *Recognizing* that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
>
> *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,
>
> *Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements…

4. The Binding Content of Preambles

11 Generally, in international law preambles are not capable of creating binding legal effects upon parties. Preambles are part of the *narratio*, not of the *dispositio*, ie they do not have the function of laying down legal obligations. Thus, preambular provisions are formulated in general wording and are usually not intended to constitute substantive stipulations. As such, preambles contain only exhortative clauses and do not create any legal commitment above and beyond the actual text of a treaty. Rather, preambles express the goodwill of the parties, explain their intention to achieve certain aims and may even refer to natural law and justice (eg concept of justice). Thus, preambles often have primarily a political significance and are concerned with explaining the policy rationale that led to the conclusion of the treaty (Treaties, *Conclusion and Entry into Force*), including the historical, economic, and other policy considerations that led to its conclusion.

12 However, a preamble of a treaty may have more legal significance if both the motives and the aims of the treaty are mentioned in more specific terms, as was expressly recognized by the ICJ in the *South-West Africa cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase, Merits)* (South West Africa/Namibia [Advisory Opinions and Judgments]) where the court held:

> Throughout the case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations…The Court does not think so. It is a court of law, and takes account of moral principles only in so far as these are given *a sufficient expression in legal form*…Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an 'interest' does not of itself entail this interest is specifically juridical in

character. (Emphasis added; [1966] ICJ Rep 34)

Inthe United States Nationals in Morocco Case (France v United States) (Merits) the ICJ held that:

> It is common ground between the Parties that the characteristic of the status of Morocco, as resulting from the General Act of Algeciras of 7th April, 1906, is respect for the three principles *stated in the Preamble of the Act*, namely: 'the sovereignty and independence of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality'. The last-mentioned principle of economic liberty without any inequality must, in its application to Morocco, be considered against the background of the treaty provisions relating to trade and equality of treatment in economic matters existing at that time…This principle, in its application to Morocco, was thus already established, when it was reaffirmed…and inserted in the Preamble of the Act of 1906. Considered in the light of these circumstances, it seems clear that the principle *was intended to be of a binding character and not merely an empty phrase* (Emphasis added; [1952] ICJ Rep 183–4.)

13 Preamble statements may receive a relatively binding legal force if incorporated *expressis verbis* by treaty obligations.

14 The binding content of preambular clauses may also derive from the inclusion of principles of international law in their body. The preamble of the 2001 Stockholm Convention on Persistent Organic Pollutants (Persistent Organic Pollutants [POPs]), for instance, mentions the *precautionary approach/principle* and stresses that it is also contained in the operative part of the convention. Moreover, the preamble of this convention makes reference to the principle of the non-damageable use of the environment by States, which is part of customary international law (see also Trail Smelter Arbitration; Stockholm Declaration [1972] and Rio Declaration [1992]):

> *Acknowledging* that precaution underlies the concerns of all the Parties and is embedded within this Convention…
>
> *Reaffirming* that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction…

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