The Vienna Conventions on the Law of Treaties

A Commentary

VOLUME I

Edited by
OLIVIER CORTEN
PIERRE KLEIN

OXFORD UNIVERSITY PRESS
the fact that the General Agreement should not be read 'in clinical isolation from public international law'. It therefore makes the legal and commercial interpretation of Article 31(3)(c) of the Vienna Convention. In the same way, without expressly mentioning this Article, the DSAB has always insisted on

46. Case law reveals that subsequent practice is classified as an element for the interpretation of a treaty, but that it is out of the question to envisage an amendment or a termination of the treaty by lapse, with the help of this procedure—an approach confirmed by the ICJ in its judgment of 1997 in the Gadhililo-Yangamere Project case. 152

47. As for Article 31(3)(c), which allows interpretation to be situated amongst the relevant rules of international law, the ECtHR has long seemed to be one of the few courts to make explicit use of it. Since the Goller case, the Court has thus referred to the general principles of law as envisaged by Article 38 of the ICJ Statute, in order to interpret Article 6(1) of the Convention. Even since, there have been numerous examples where the ECtHR has drawn from the international normative environment with the aim of interpreting the Convention. 153 Today, however, it is no longer the only court to do so. In its judgment of 6 November 2003 in the case of the Oil Platforms against Iran and the United States, the ICJ decided to interpret Article XX of the Friendship Treaty concluded between these two States in the light of the 'relevant rules of international law on the use of force', in conformity with Article 31(3)(c) of the Vienna Convention. 154 In the same way, without expressly mentioning this Article, the DSAB has always insisted on


151 Judgments of 21 February 1986, Jahn and others, Series A, no. 98, para. 65.

152 Judgments of 26 October 1986, Mitratsaone, Series A, no. 43, para. 54.

153 See the case of Leventis v Turkey, supra n 96, paras 79-80, where the Court thus spoke of 'a practice denoting practically universal agreement amongst Contracting Parties'.

154 For examples, see Case 232/78, Judgment of 23 September 1979, Commission v EEC, ECR 1979, p. 2729, in which the conduct of the States and the absence of application of secondary law by the States or institutions were not considered as an element of interpretation of the treaty. Cases 21-24/72, 12 December 1972, ECR 1972, p. 1219.


156 Judgment of 21 February 1975, supra n 99, para. 35.

157 See, amongst others, the judgments of 27 July 1990, Swearing, Series A, no. 109, para. 88; the Judgments of Multanawila v Akrou and Turkey, ECR 2000-L, paras 111; the judgments of 30 June 2005, Bulgaria v Ireland, paras 8 and 81; and the Judgments of 29 January 2008, Saudi v United Kingdom, Application no. 13232/03, para. 57.


159 See the report of 29 August 2006, supra n 81, paras. 77-79: the Panel recognized that customary international law can be taken into consideration in the relationship between WTO members, but only on condition that WTO Agreements do not conflict with customary provisions. See also the case of Morocco Affecting Government Procurement, WT/DS119/BR, WT/DS119/R, WT/DS119/MR, Panel Report of 29 September 2006, paras. 7-75: in spite of an interpretation of Art. 16-20, the Panel refused, in this particular case, to take into consideration the Carrotel Protocol, given that none of the complainant parties was a party to this treaty.

160 See the detailed developments of 'the so-called 1964 Declaration on international Humanitarian Law', Right International (Paris: IHRP-UNESCO, 2006), pp. 213 and 220. Also see studies relating to the use of the statements of 'relations of international law' carried out by the ICL, and notably the report from its 75th session (2005), AS/40, pp. 204 ff.

the fact that the General Agreement should not be read ‘in clinical isolation from public international law’.

Yet even though Article 31(5)(c) has not been totally forgotten, the DSB nevertheless applies it moderately. This provision however appears essential in the opinion of some authors who regret its ‘under use’, since it would in fact allow the ‘operationalization’ of the link between conventional international law and customary international law, and thus, the avoidance of fragmentation in international law.

Reintegration of the intention of the parties (paragraph 4)

48. The Vienna Convention places priority on textual interpretation. Nevertheless, as reflected by the history of the ILC travaux, proponents of interpretation based on the intention of the parties (or ‘subjective’ interpretation) have not surrendered. Moreover, it is not always obvious in practice to distinguish between the ‘declared’ intention of the parties resulting from a reading of the text, and the search for the true intention of the parties, a much more subjective exercise. The compromise represented by Article 31 therefore makes space for the intention of the parties in a somewhat subsidiary manner, but that space has proven crucial for certain courts. Indeed, while logic may imply that the discovery of a ‘special meaning’ should lead to an analysis of the intention of the parties, the reality is sometimes limited to affirming the existence of a ‘special meaning’ to privilege this intention, without always paying attention to the veracity of this specificity.

The ECJ has notably been a fine example of this approach.

49. In conformity with its line of conduct privileging textual interpretation, the ICJ has accorded minimal space for the intention of the parties. The Court has applied this method in a strictly supplementary manner in order not to give fodder to critics. Therefore, in the case of the Land, Island and Maritime Frontier Dispute of 1992, the Court sought the intention of the parties in the 1980 general Peace Treaty referred to by the Special Agreement bringing the case before the Court. As the Special Agreement contained several vague provisions, the Court did not hesitate to ‘have regard to the common intention as it is expressed in the words of the Special Agreement’, while continuing to underline that this analysis should ‘constitute no more than a supplementary means of interpretation’. Nevertheless, it did not hesitate to seek the intention of the parties in order to confirm an interpretation, a relatively prudent approach which has been...