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AND PRACTICE

ANTHONY AUST



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Marine Living Resources 1980.<sup>16</sup> Attached to the Final Act is a formal statement regarding islands within the area of application of the Convention. The purpose of the statement is to permit the islands to be taken out of the normal application of the Convention. The statement was read out by the chairman of the conference, and is known as the 'Chairman's Statement'. The Final Act records that no objection was made to the statement (it having been carefully negotiated during the conference). When the ENMOD Convention 1977 was negotiated, a series of 'Understandings' were agreed regarding the interpretation or application of the Convention.<sup>17</sup>

- (2) *Any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.* The Dayton Agreement 1995 included many such instruments.<sup>18</sup> The need for acceptance distinguishes this case from unilateral interpretative declarations made by a state when signing or ratifying.<sup>19</sup> It is common practice for treaties of the European Communities or the European Union to have various instruments associated with them which have been produced by one or more Member States, the texts having been agreed during the negotiation of the treaty.<sup>20</sup> They are also made in connection with bilateral treaties. The US-USSR 'START' Treaty 1991 was accompanied by many assurances and explanations in correspondence between the parties and in joint and national declarations.<sup>21</sup>

Such agreements and instruments are usually made on the conclusion of the treaty, or soon afterwards. They should not be seen only as an aid to interpretation, but as a valuable tool of the treaty-maker. There is often no reason why, as a matter of law, the content of the agreement or instrument could not have been put into the treaty. One reason for employing such devices is therefore political. One or more parties may insist on a particular point, but others, while accepting that it has to be made, may find it difficult politically to have it in the body of the treaty, but could agree to it being made in a separate document which is expressed to be made by certain negotiating states or by the chairman of the conference. The need

<sup>16</sup> 402 UNTS 71; ILM (1980), p. 840; UKTS (1982) 48; TIAS 10240.

<sup>17</sup> 1108 UNTS 151; ILM (1977), p. 16; TIAS 9614. See *Status of Multilateral Arms and Disarmament Agreements* (4th edn, UN, 1992), vol. 1.

<sup>18</sup> General Framework Agreement for Peace in Bosnia and Herzegovina 1995 (ILM (1996), p. 75).

<sup>19</sup> See p. 101 above.

<sup>20</sup> See the Declarations attached to the Europol Convention 1995 ((UK) European Communities Series No. 13 (1995)).

<sup>21</sup> Treaty on the Reduction and Limitation of Strategic Offensive Arms, 31 July 1991 (for references, see ILM (1992), p. 246).

for such devices has increased with the greater use of consensus in the adoption of treaties. But sometimes they are used simply for convenience. An agreed minute or exchange of letters regarding the detailed application of terms used in a treaty may be neater than overloading the treaty with lengthy definitions.<sup>22</sup>

The explanatory reports approved by the government experts involved in drafting conventions of the Council of Europe, and adopted at the same time as the conventions and published with them, provide an invaluable guide to their interpretation, and should be seen as part of the 'context' in which the conventions were concluded.<sup>23</sup> As such, they must be distinguished from 'official' commentaries which are later produced and, depending on the circumstances, may come to be regarded as authoritative. The *Handbook on Procedures and Criteria for Determining Refugee Status*, published by the UN High Commissioner for Refugees (UNHCR), is generally regarded as an authoritative commentary on the Refugee Convention, and much relied upon by domestic courts and tribunals. Commentaries published by other organisations, such as those by the ICRC on the Geneva Conventions of 1949, can be highly persuasive.<sup>24</sup>

### *Paragraph 3 (subsequent agreements and practice)*

Sub-paragraph (a) provides that, together with the context, there shall be taken into account any 'subsequent agreement' between the parties regarding the interpretation of the treaty or the application of its provisions. Given that the parties can agree later to modify the treaty, they can also subsequently agree on an authoritative interpretation of its terms, and this can amount, in effect, to an amendment. There is no need for a further treaty,<sup>25</sup> since the paragraph refers deliberately to an 'agreement', not a treaty. The agreement can take various forms,<sup>26</sup> including a decision adopted by a meeting of the parties, provided the purpose is clear.<sup>27</sup> In

<sup>22</sup> See the exchange of interpretative letters accompanying the UK-US Air Services Agreement 1977 (1079 UNTS 21 (No. 16509); UKTS (1977) 76).

<sup>23</sup> Sinclair, pp. 129-30. For an example, see ILM (1994), p. 943.

<sup>24</sup> J. Pictet (ed.), *The Geneva Conventions 1949, Commentary* (4 vols. 1952-60). But see also S. Rosenne, *Practice and Methods of International Law* (1984), pp. 50-1.

<sup>25</sup> But see the 1996 Czech-UK Exchange of Notes regarding the interpretation of the Consular Convention 1975 'for the purposes of paragraph 3, Article 31 of the Vienna Convention on the Law of Treaties' (UKTS (1997) 5).

<sup>26</sup> See the example given in R. Gardiner, 'Treaties and Treaty Materials: Role, Relevance and Accessibility', ICLQ (1997), p. 643 at pp. 648-9. <sup>27</sup> See p. 214 below, note 9.

1993 the states parties to the Treaty on Conventional Forces in Europe (CFE) 1990 concluded a 'Document of the States Parties' which included an 'understanding' as to how certain provisions of the CFE Treaty would be interpreted and applied, and which are in effect amendments to the Treaty.<sup>28</sup> The Treaty of Rome establishing the European Economic Community, as amended, refers to the 'ECU' (European currency unit). When in 1995 the Member States decided to replace the ECU with the 'Euro', instead of amending the Treaty, which would have involved a lengthy ratification procedure and parliamentary scrutiny, the heads of state and government of the Member States recorded in the 'Conclusions' of their meeting in Madrid that:

The specific name Euro will be used instead of the generic term 'ECU' used in the Treaty to refer to the European currency unit. The Governments of the fifteen Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions.<sup>29</sup>

Under the (rather accident-prone) Ramsar Wetlands Convention 1971, as amended in 1982 to include an amendment clause, the acceptance of 'two thirds of the Contracting Parties' is needed for an amendment to come into force. However, it was not clear if the phrase referred to the contracting parties at the time the amendment was adopted, or at any given moment. Therefore at a conference of the parties in 1990 a resolution was adopted that it should be interpreted to refer to the time of adoption of the amendment.<sup>30</sup>

Article IX(1) of the Antarctic Treaty of 1959<sup>31</sup> provides for certain of the parties (known as 'Consultative Parties') to *recommend* to their governments *measures* in furtherance of the principles and objectives of the Treaty. Article IX(4) provides that the measures 'shall become effective' when they have been 'approved' by all of the Consultative Parties. Between 1961 and 1995 over 200 measures were recommended. But, until 1995 there had been a misunderstanding, and a consequent

<sup>28</sup> UKTS (1994) 21. See also UKTS (1993) 44 at pp. 97-108.

<sup>29</sup> Conclusions of the Madrid European Council 1995 (*Bulletin of the EU*, 12-1995, p. 10). For another example, see D. Howarth, 'The Compromise on Denmark', *Common Market Law Review* (1994), p. 765.

<sup>30</sup> 996 UNTS 245 (No. 14583); ILM (1972), p. 963; UKTS (1976) 34 (for the consolidated text see UKTS (1996) 13). See M. Bowman, 'The Multilateral Treaty Amendment Process - A Case Study', ICLQ (1995), p. 540 at p. 552. <sup>31</sup> 402 UNTS 71 (No. 5778); UKTS (1961) 97.

misapplication, of Article IX(1). From the very beginning the Consultative Parties had adopted instruments termed 'Recommendations', of which the majority were no more than exhortatory, ephemeral or procedural. Nevertheless, they were treated as measures subject to the full approval procedure of Article IX(4). This resulted in most Recommendations not becoming 'effective' until many years after their adoption. This unsatisfactory situation was corrected in 1995, when the Consultative Parties agreed that in future they would recommend under Article IX(1) only 'Measures' properly so-called (i.e., intended to be legally binding): in future other matters would be the subject of 'decisions' or 'resolutions', and would be effective on their adoption at the annual Antarctic Treaty Consultative Meeting (ATCM). This agreement was embodied in Decision 1 of the 1995 ATCM.<sup>32</sup> The new arrangements were explained by the proposers to be an agreement for the purposes of Article 31(3)(a).

This last example is more in the nature of corrective action; the earlier examples amounted more to modifications or amendments to the treaties. Foreign ministry legal advisers are familiar with the question of how to modify a treaty without an amending treaty? If the treaty does not have a built-in amendment procedure, the process of amendment can be lengthy and uncertain, and especially if it is a multilateral treaty subject to ratification.<sup>33</sup> Much will depend on the circumstances but, particularly where the modification is essentially procedural, it may be possible to embody it in an agreement as to the application of the treaty. This technique is particularly useful if there is a need to fill a lacuna, to update a term or postpone the operation of a provision. The time for the first election of judges of the International Tribunal for the Law of the Sea was specified in the UN Convention on the Law of the Sea 1982, but since the date turned out to be premature, the election was postponed by a consensus decision of a meeting of the parties, the decision being recorded in the record of the meeting.<sup>34</sup> But the use of such means should be done cautiously and sparingly. The distinction between application and amendment is not always easy to draw. Problems could be caused if such means are used for a purpose which is safer done by a formal amendment to the treaty.

<sup>32</sup> ILM (1996), p. 1188.

<sup>33</sup> See pp. 212–13 below.

<sup>34</sup> SPLOS/3 of 28 February 1995.

*Subsequent practice*

Sub-paragraph (b) provides that, together with the context, there shall be taken into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. This is a most important element in the interpretation of any treaty, and reference to practice is well established in the jurisprudence of international tribunals. However precise a text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean, provided the practice is consistent, and is common to, or accepted by, all the parties.<sup>35</sup> In its Award in the US–UK Heathrow User Charges Arbitration, the Tribunal found that a 1983 UK–US MOU was of value as ‘consensual subsequent practice’ by the parties.<sup>36</sup>

Article 37(1) of the Vienna Convention on Diplomatic Relations 1961 refers to the ‘members of the family of a diplomatic agent forming part of his household’.<sup>37</sup> The phrase is not defined, and even in 1961 there was doubt as to which persons formed part of a diplomat’s household: did it include a 30-year-old perpetual student son or daughter? Given the changes in society since then (and to which even diplomats are not entirely immune) might other persons be considered as members of the family? Does it now include unmarried partners? And, if so, what about partners of the same sex? In interpreting the phrase great weight must necessarily be given to the practice of states. Most states have had to face such problems, either as a sending or receiving state, or both.<sup>38</sup>

On the face of it, Article 5 of the Chicago Convention, which governs charter air services, does not require a charter airline to obtain permission to land en route, provided it does not pick up or set down passengers or cargo. However, the practice of the parties over many years has been to require charter airlines to seek permission to land in all cases, and the article is now so interpreted.<sup>39</sup>

Perhaps the best, and most oft-quoted, example of interpretation by subsequent practice is the way in which Members of the United Nations have interpreted and applied Article 27(3) of the Charter. This provides

<sup>35</sup> See the US–France Air Services Arbitration 1963 (54 ILR 303).

<sup>36</sup> 102 ILR 261, p. 353, paras. 6.7–6.8. <sup>37</sup> 500 UNTS 95 (No. 7310); UKTS (1965) 19.

<sup>38</sup> See further E. Denza, *Diplomatic Law* (2nd edn, 1998), pp. 321–8.

<sup>39</sup> 15 UNTS 295 (No. 102); UKTS (1953) 8. See B. Cheng, ‘Air Law’, *Max Planck Encyclopaedia of Public International Law* (1989), vol. 11, pp. 8–9.

that decisions of the Security Council on non-procedural matters shall be made by the 'affirmative' vote of nine of its members 'including the *concurring votes* of the permanent members'. Although at first sight this would appear to mean that all five permanent members must cast an affirmative vote, the practice of the Council from as early as 1946 was to interpret 'concurring' as meaning 'not objecting'. Therefore, if a permanent member wishes to block a decision it is not enough for it to abstain, or even be absent; it must cast a negative vote (known colloquially as 'the veto'). Thus during the early stages of the Korean war in 1950 the Soviet representative was, by staying away from meetings of the Council, not able to prevent the Council taking action.<sup>40</sup> The practice was upheld by the International Court of Justice in the *Namibia* case,<sup>41</sup> even though, ironically, it would seem from the *travaux* of the Charter that it was not what had been originally intended by the permanent members.<sup>42</sup>

It is not necessary to show that each party has engaged in a practice, only that all have accepted it, albeit tacitly. But, if a clear difference of opinion between the parties exists, the practice may not be relied upon as a supplementary means of interpretation.

#### *Relevant rules of international law*

Sub-paragraph (c) provides that, together with the context, there shall be taken into account any relevant rules of international law applicable in the relations between the parties. For example, in certain cases reaching an interpretation which is consistent with the intentions (or perceived intentions) of the parties may require regard to be had to not only international law at the time the treaty was concluded (the 'inter-temporal rule'), but also to contemporary law.<sup>43</sup> In interpreting today a reference in a treaty of 1961 to the continental shelf, it would probably be necessary to consider not only the Geneva Convention on the Continental Shelf 1958, but also the United Nations Convention on the Law of the Sea 1982.<sup>44</sup>

<sup>40</sup> Bailey and Daws, *The Procedure of the United Nations Security Council* (3rd edn, 1998), at p. 257. <sup>41</sup> *ICJ Reports* (1971), p. 16, at paras. 20–2.

<sup>42</sup> See Goodrich and Hambro, *Charter of the United Nations* (1969), at p. 229.

<sup>43</sup> See H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989', *BYIL* (1991), pp. 57–60; R. Higgins, 'Some Observations on the Inter-Temporal Rule in International Law', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, (1996), pp. 173–81; R. Higgins, 'Time and the Law: International Perspectives on an Old Problem', *ICLQ* (1997), pp. 501–20.

<sup>44</sup> See Sinclair, pp. 138–40; and *Oppenheim*, p. 1281.

### *Special meaning*

A special meaning must be given to a term if it is established that the parties so intended (paragraph 4). Notwithstanding the apparent meaning of a term in its context, it is open to a party to invoke any special meaning, but the burden of proof of the special meaning will rest on that party.<sup>45</sup> In the passage in the 'Chairman's Statement'<sup>46</sup> which refers to islands 'over which the existence of state sovereignty is recognised by all Contracting Parties', the word 'existence' was carefully chosen to indicate that the passage covered also islands where sovereignty is disputed, such as South Georgia and the South Sandwich Islands.<sup>47</sup>

### *International organisations*

When interpreting the constituent instrument of an international organisation, one may need to take into account also the relevant rules of the organisation (see Article 5).<sup>48</sup> In most cases this will not be necessary; Articles 31, 32 and 33 are adequate for the purposes of the constituent instruments of the United Nations and other (classic) international organisations, being copied word for word in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986.<sup>49</sup> However, the situation may well be different in the case of regional international organisations, especially when the organisation has powers over the social or economic structure of its member states. The Court of Justice of the European Communities, on the basis of its understanding of the object and purpose of the Treaty of Rome, has certainly adopted an effective or teleological approach in interpreting and applying the Treaty.<sup>50</sup> Similarly, the European Court of Human Rights has seen the object and purpose of the European Convention on Human Rights as requiring it to broaden the ordinary meaning of the terms of that Convention.<sup>51</sup>

<sup>45</sup> See Sinclair, pp. 126-7; Thirlway, 'Law and Procedure', pp. 27-9 (note 43 above).

<sup>46</sup> See p. 190 above.

<sup>47</sup> A British territory to which Argentina asserts a claim, as well as disputing this interpretation.

<sup>48</sup> See p. 9 above. <sup>49</sup> ILM (1986), p. 543.

<sup>50</sup> See p. 99 above; and J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (1993).

<sup>51</sup> Sinclair, pp. 131-5; J. Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, 1993), pp. 76-81.



## Article 32

### *Supplementary means of interpretation*

The preparatory work (*travaux préparatoires*, or *travaux* for short) of a treaty is not a primary means of interpretation, but is an important supplementary means. International tribunals have for long had recourse to the *travaux* for the purpose of *confirming* the meaning arrived at by the application of the general rule as set out in Article 31.<sup>52</sup> In order to try to come to an understanding of what those who negotiated the treaty had intended, they may have recourse to supplementary means of interpretation, in particular the *travaux* and the circumstances of the conclusion of the treaty,<sup>53</sup> and this is recognised by Article 32. In the *Lockerbie* case the United Kingdom maintains that it was not intended that the UN Charter should give the International Court of Justice a power of judicial review over Security Council decisions, and that this is supported by the *travaux* of the Charter.<sup>54</sup> The rest of Article 32 provides that recourse may also be had to the same supplementary means of interpretation when reliance on the primary means produces an interpretation which (a) leaves the meaning 'ambiguous or obscure' or (b) leads to a result which is 'manifestly absurd or unreasonable'. In this case the purpose is not to confirm, but to determine, the meaning.

It has been suggested that, even when the ordinary meaning appears to be clear, if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, the primary duty in Article 31(1) to interpret a treaty in good faith requires a court to 'correct' the ordinary meaning.<sup>55</sup> This is no doubt how things work in practice; for example, the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with all the other material put before it. The suggestion is therefore a useful addition to the endless debate on the principles of interpretation.<sup>56</sup>

The International Law Commission did not seek to define what is

<sup>52</sup> See, for example, McNair, p. 413, note 3, and p. 422, note 4. <sup>53</sup> O'Connell, p. 263.

<sup>54</sup> See *Libya v. United Kingdom (Preliminary Objections)*, ICJ Reports (1998), p. 9, paras. 4.17–4.18; ILM (1998), p. 587; and the submissions of the Lord Advocate (CR 97/17, para. 5.46), and the dissenting opinion of President Schwebel (all available on the ICJ website, <http://www.icj-cij.org>).

<sup>55</sup> S. Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?', in Makarczyk (see note 43 above), at pp. 541–7.

<sup>56</sup> See p. 234–5 below about withdrawal from the UN; and p. 201 below regarding implied terms.