

INTERPRETATION IN INTERNATIONAL LAW

- Interpretation in international law?
- Are there any principles concerning the interpretation of international law?
- What is the legal character of these principles?
- Do they relate to particular source of international law? Are of general application to any international norm?

GENERAL ISSUES OF TREATY INTERPRETATION

Points of reference for the process of treaty interpretation:

- whether a document is a treaty (in the sense of the VCLT, or public international law)
- scope of a treaty
- normative substance of a treaty
- direct applicability of a treaty

GENERAL ISSUES OF TREATY INTERPRETATION

Temporal element of interpretation

- **Static approach (principle of contemporaneity)**
 - the meaning of treaty provisions and the circumstances prevailing at the time of the conclusion of the treaty
- **Dynamic approach (principle of evolutionary interpretation)**
 - the meaning of a treaty at the time of its interpretation
 - generic terms, whose content the parties expected would change through time (intended to analyse its meaning in light of the circumstances prevailing at the time of interpretation)

CUSTOMARY CHARACTER OF THE RULES ON TREATY INTERPRETATION (ART. 31 AND 32 VCLT)

- Widely shared by other international courts → **ITLOS, ECtHR, CJEU** and the dispute settlement bodies of **WTO**, as well as by many **arbitral institutions**
- **treaty practice** (e.g. Free Trade Agreement concluded between European Union and its Member States, of the one part, and the Republic of Korea, of the other part)
- **Consequences of customary character ?**

GENERAL ISSUES OF TREATY INTERPRETATION

- **International judicial practice** – methodology followed during treaty interpretation (with regard to temporal element)
 - the static approach as a basic rule
 - and as a particular application of the doctrine of inter-temporal law
- **ICJ, Dispute Regarding Navigational and Related Rights**
 - the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion

GENERAL ISSUES OF TREATY INTERPRETATION

- the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so **can shed light on the parties' common intention**
- **ICJ, Namibia case**
 - Interpretation: "the strenuous conditions of the modern world", "the well-being and development" of the peoples concerned, the concept of the "sacred trust"
 - viewing the institutions of 1919, the Court must take into consideration the **changes which have occurred in the supervening half-century**, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law

GENERAL ISSUES OF TREATY INTERPRETATION

- an international instrument has to be interpreted and applied within the framework of **the entire legal system prevailing at the time of the interpretation**
- two-tier process:
 - whether a term is meant by the parties to be interpreted in a dynamic manner (intention)
 - whether a concept is embodied in the treaty that is, from the outset, evolutionary
 - meaning at the time of interpretation
 - development of linguistic usage
 - international law
 - other relevant circumstances up to that moment

- Please provide arguments in favour / against static as well as dynamic interpretation
 - Examples from Telders case 2017?
 - Examples form international practice? Cases? Real world?
- Which doctrine is closer to the characteristics of public international law?

GENERAL ISSUES OF TREATY INTERPRETATION

Specific rules of interpretation for certain treaties

- General rules of interpretation undergo some modifications when applied to certain types of treaties ?
- **Human rights treaties**
 - justification: beneficiaries, or even the true addressees, of the treaty provisions are individual
 - Interpretation process requires different rules ?
- **Constituent instruments of international organizations**
 - Specific interpretation problems owing to their character which is conventional and at the same time institutional (ICJ, Nuclear Weapons)
 - What should be taken into consideration while interpreting constituent instruments of international organization?

GENERAL ISSUES OF TREATY INTERPRETATION

- elements which may deserve special attention when the time comes to interpret constituent treaties
 - the very **nature** of the organization created,
 - the **objectives** which have been assigned to it by its founders,
 - the imperatives associated with the effective performance of its **functions**,
 - as well as its own **practice**. [ICJ, Nuclear Weapons]

GENERAL ISSUES OF TREATY INTERPRETATION

Interpretation rules outside VCLT ?

- **Principle in *dubio mitius***
 - treaties are to be interpreted in favour of State sovereignty
 - developed by PCIJ (Wimbledon case, Free Zones case)
 - subsidiary character - "it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States." (PCIJ, River Oder)
 - Limitation – „contrary to the plain terms of the article and would destroy what has been clearly granted"
 - Doubtful customary character

GENERAL ISSUES OF TREATY INTERPRETATION

• Principle of effectiveness

- treaty provisions are to be interpreted so as to give them their fullest weight and effect and in such a way that a reason and a meaning can be attributed to every part of the text
- ICJ, CERD case
 - „the words ought to be given appropriate effect“ to the phrase “which is not settled” in Art 22 of the Convention and discarded a reading of that phrase which would render it meaningless and devoid of any effect”
- particular application of the object and purpose test and the good faith rule

GENERAL ISSUES OF TREATY INTERPRETATION

• Principle of restrictive interpretation of exceptions

- a particular application of the object and purpose rule, relating to the telos of the general rule
- Contra proferentem rule
 - the rule according to which a text that is ambiguous must be construed against the party who drafted it
 - ICJ, Fisheries case – rule “may have a role to play in the interpretation of contractual provisions” [but ICJ denied its application to declarations of acceptance of the Court and reservations made thereto]
 - Is it actually possible to use the contra proferentem rule to interpretation of treaties?

ELEMENTS OF ART. 31 VCLT

- On the basis of VCLT – what is the general rule of treaty interpretation?
- Is there any hierarchical or chronological order of treaty interpretation?

ELEMENTS OF ART. 31 VCLT

- The general rule of treaty interpretation based on the textual approach
 - text is presumed to be the authentic expression of the intentions of the parties
- three separate principles, combined in **one single rule of interpretation**
 - interpretation in good faith [*pacta sunt servanda*]
 - recourse to the ordinary, as opposed to a special, meaning of the terms used in the treaty
 - the ordinary meaning is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose

ELEMENTS OF ART. 31 VCLT

Ordinary meaning of the terms:

- linguistic and grammatical analysis of the text of the treaty
- the grammatical form of a treaty term encompasses the tense in which a specific provision has been phrased
 - WTO Appellate Body „In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present.“
- In determining **ordinary meaning of terms**, two aspects are to be taken into consideration:
 - temporal aspect of the ordinary meaning
 - each authentic treaty language

ELEMENTS OF ART. 31 VCLT

Context:

- General rule of interpretation does not allow establishing
 - an abstract ordinary meaning of a phrase
 - divorced from the place which that phrase occupies in the text to be interpreted
- Systematic structure of a treaty is thus of equal importance to the ordinary linguistic meaning of the words use

ELEMENTS OF ART. 31 VCLT

- **Elements of context:**

- **the title of a treaty** → ICJ, Oil Platform case: Oil Platforms case: “For the meaning of the word ‘**commerce**’ in a bilateral treaty concluded by Iran and the US, the Court turned, inter alia, to the actual title of treaty which referred rather broadly to ‘**economic relations**’ and thereby suggested a wider reading of the term.”
- **punctuation and syntax** → ICJ, Aegean Sea Continental Shelf case, the French phrase “et, notamment,” and explicitly pointed to the commas used [“et, notamment, les différends ayant trait au statut territorial de la Grèce”]

ELEMENTS OF ART. 31 VCLT

- **structure of the sentence** → ICJ, Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) while interpreting the phrase “**to determine the legal situation**”
 - 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.

ELEMENTS OF ART. 31 VCLT

- **the use of the same term elsewhere in the treaty** or different phrases of the same treaty dealing with the **same issue in different wordings** → ICJ, Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)
 - 'to delimit the boundary line [. . .]' ('Que delimite la linea 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 [. . .]'

ELEMENTS OF ART. 31 VCLT

- **Comparison of the term in question with the analogous wording of a related treaty**
 - ICJ, Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) → „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'.
- **the role of extrinsic material in the process of interpretation** (art. 31 (2) and (3) VCLT)

ELEMENTS OF ART. 31 VCLT

Object and purpose (teleological interpretation)

- Principle of effectiveness
 - the terms of a treaty are to be interpreted in a way that **advances** the latter's aims
 - any interpretation that would render parts of the treaty **superfluous** or **diminish** their **practical effects** is to be avoided
- both elements are usually amalgamated into one single test applying the *telos* of the treaty

ELEMENTS OF ART. 31 VCLT

- How to determine „object and purpose“?
 - general clauses specifically stating treaty's purposes
 - title of the treaty
 - preamble of a treaty
 - type of treaty
 - reading of the whole treaty
 - contrasting the treaty in question with relevant treaties of the same kind

ELEMENTS OF ART. 31 VCLT

- The consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty
 - Iran-US Claims Tribunal once pointed out:
 - “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.**”

ELEMENTS OF ART. 31 VCLT

Good faith principle

- the most fundamental rule of the law of treaties, every treaty must be performed “in good faith”
- **requirement of reasonableness**
 - qualifying the dogmatism that can result from purely verbal or, for that purpose, excessively teleological analysis
- obligation of result (to avoid manifestly absurd or unreasonable)
- Example: the reference in Art 23 (1) of the UN Charter to the “Republic of China” and the “Union of Soviet Socialist Republics” must today reasonably be taken to refer to the People’s Republic of China and to the Russian Federation, respectively

ELEMENTS OF ART. 31 VCLT

Elements of context (art. 31 (2) VCLT)

- ⊙ **Assumption:** a unilateral document cannot as such be regarded as part of the “context” but has, in order to attain that status, to receive some kind of acceptance by the other parties → authentic interpretation
- ⊙ **Legal status of documents extrinsic to a treaty:**
 - ⊙ a document is part of the actual treaty consensus [object, not an instrument of interpretation]
 - ⊙ documents outside the treaty consensus, but related to its development [interpretative instruments]
 - ⊙ mere travaux préparatoires [supplementary means art. 32 VCLT]

ELEMENTS OF ART. 31 VCLT

- ⊙ conditions for related material to become extrinsic context of a treaty:
 - object of general consensus of all parties
 - consensus must be born by all “parties”
 - Material must “relate” to the substance of the treaty
 - Specyfing or clarfyng certain concepts used therein, limiting its field of aplication (relation must be of substance)
 - “in connexion with” the conclusion of the treaty
 - Nexus in purpose and substance
 - Cretain temporal proximity to the conclusion