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TREATY INTERPRETATION

SECOND EDITION

RICHARD K. GARDINER

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Treaty Interpretation

Second Edition

RICHARD K GARDINER

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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First Edition published in 2008
Second Edition published in 2015
Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014959429

ISBN 978–0–19–966923–3

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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Foreword to the First Edition

This is a book I should like to have written. The subject of treaty interpretation is one of great fascination and of great practical importance. I first heard of it in the pre-Vienna days when studying international law with Professor Clive Parry. My interest was further stimulated upon reading Yasseen's masterful (if brief, and now somewhat dated) introduction to articles 31–33 of the Vienna Convention on the Law of Treaties.

With the huge expansion of the volume and importance of treaties in recent times, an understanding of the rules for the interpretation of treaties becomes ever more important. Indeed, a proper understanding of the rules and processes of treaty interpretation is an essential tool for any international lawyer, whether in government, in private practice, or in the academic world. But it is not only public international lawyers who need to understand treaty interpretation, which is so different from interpretation of national laws and contracts. Questions of treaty interpretation arise more and more frequently in national courts, including in the UK.

On one level, it might be thought that there is not so much to be said on the subject. Interpretation is an art, not a science, and aside from the text of the rules set out in the Vienna Convention itself there is not much one needs beyond good sense and experience. Yet this is a mistaken approach. In the 40 years that have passed since the adoption of the Vienna Convention in 1969 a wealth of practice has developed, and it is chiefly through studying the practice that one learns the art.

There are different 'levels' of treaty interpretation. When a question of interpretation comes up in litigation, whether before an international court or a domestic one, it is usually examined in great depth, with full study by the parties—if not the court—of *travaux préparatoires* and context. When, on the other hand, a question of treaty interpretation has to be answered on the spot—often the case in the day-to-day work of a foreign ministry—it will, of necessity, be dealt with swiftly and even superficially. And there will be many situations between these two extremes.

The importance of treaty interpretation in modern international relations can be seen from the fact that almost all cases that have come before the International Court of Justice (and its predecessor the Permanent Court of International Justice), and most public international law arbitrations (including all investment treaty arbitrations) turn on the interpretation of treaties. All modern courts and tribunals take as their starting point (either expressly or implicitly) the rules set forth in articles 31–33 of the Vienna Convention on the Law of Treaties (the 'Vienna rules'), which are well established as rules of customary international law and are nowadays applied to treaties old and new.

Richard Gardiner was for a number of years a legal adviser in the UK's Foreign and Commonwealth Office and with the Attorney General's Office. He has been a private practitioner as well as an academic, and is the author of a recent text-book

on international law. He has a particular interest in international aviation law, a field of international law dominated by bilateral and multilateral treaties and their interpretation. He is very well placed to write the present book analysing the Vienna rules, which is likely to become a classic in its field.

The merits of the book are manifold. Gardiner systematically analyses each element of the Vienna rules in detail, yet never loses sight of the overall approach to interpretation that is embodied in the Convention. It contains a meticulous, thorough, and sometimes critical study of the extensive case law that has developed on the Vienna rules. It contains enough theory to place the rules in context (explaining, for example, the heated debates in the International Law Commission and at the Vienna Conference), while remaining essentially a practical guide. And it contains a host of useful examples taken from real-life situations.

This book will be particularly useful for the practitioner, especially the practitioner involved in litigation or contemplating litigation. It will be consulted by judges and arbitrators, who may be moved to apply the Vienna rules more systematically as a result. And even (perhaps especially) the hurried interpreter, who needs to understand instinctively the process of treaty interpretation if he or she is to give good advice on the spot, will benefit greatly from Gardiner's exposition of the rules.

Sir Michael Wood, KCMG.
London, February 2008

Preface to the Second Edition

The need for a user's guide to the rules of treaty interpretation has not greatly diminished in the years since the first edition of this book. The book's message remains the same: the rules on treaty interpretation in the 1969 Vienna Convention on the Law of Treaties are a starting point and guide for treaty interpretation and to use them properly requires being aware of their entirety. In the most visible instances of reasoned interpretation – the decisions of courts and tribunals – increased reference to these rules has nevertheless shown some continuing and quite widespread misunderstanding and misuse of them. The two most prominent misconceptions are that the opening reference in the Vienna Convention to the ordinary meaning of terms in a treaty constitutes the whole of the general rule and that in all cases any consideration of a treaty's preparatory work is subject to the same restrictive preconditions. There is, however, also much more in the rules which needs explanation and illustration.

The focus of the changes in this second edition is expansion of examples and of the explanations of practicalities of treaty interpretation. The number of cases in which specific mention is made of the Vienna rules on treaty interpretation has grown greatly. Likewise, there has been growth in the number of cases in which treaties have been interpreted without specific reference to the rules but which nevertheless illuminate understanding of them. Those included here are cases which illustrate particular points, but there are now countless others. Since the first edition there has also been much investigation of treaty interpretation, both of a general nature and in relation to particular areas. On topics such as the law of international trade, human rights, investment agreements, and international tax issues, valuable studies have been published making far more extensive analysis of cases in those particular areas than is possible here, but providing great assistance in illustrating the rules by extensive examples.

Further, there is the work of the International Law Commission which has completed its Guide to Practice on Reservations to Treaties. This includes guidelines and commentaries on interpretative declarations, a topic inadequately addressed in the Vienna rules. Some notice has also been taken in this edition of the Commission's work on subsequent agreements and subsequent practice in relation to interpretation of treaties; but the Commission's conclusions remain in draft and those seeking more detail on these topics would do well to consult the extensive reports and draft commentaries already produced and, in due course, the completed work.

In response to the helpful suggestions of reviewers, concluding summaries have been added to each of the analytical chapters in Part II and a new chapter has been added to give some pointers to particular trends and issues in treaty interpretation, and to provide some conclusion to the whole work.

Thanks are due to those who have provided ideas, indications of material, and other aid and assistance for this and the previous edition. These include Rukhsana Ali,

Julian Arato, Anthony Aust, Danai Azaria, Craig Barker, Frank Berman, Eirik Bjorge, Eileen Denza, Christian Djeffal, Jörg Fedtke, Shireen Fisher, Malgosia Fitzmaurice, Douglas Guilfoyle, Duncan Hollis, David Hutchinson, Tomoko Ishikawa, John Avery Jones, Kenneth Keith, Rahim Moloo, Gemma Pountney, Anneliese Quast, Catherine Redgwell, Sam Ricketson, Philippe Sands, Dan Sarooshi, Antonios Tzanakopoulos, Ingo Venzke, Michael Waibel, John Walters, Colin Warbrick, Christopher Whomersley, Ralph Wilde, Elizabeth Wilmshurst, Michael Wood, all those involved in the Nottingham Treaty Project directed by Michael Bowman and Dino Kritsiotis, as well as many others who have offered comments and suggestions. Responsibility remains entirely with the author.

Richard Gardiner
28 February 2015

Acknowledgements

The case study of *Hitchcock v Outhwaite* in Chapter 1 is adapted from text by R K Gardiner, 'Interpreting Treaties in the United Kingdom' in M Freeman (ed), *Legislation and the Courts* (Aldershot: Dartmouth Publishing Company Limited, 1997), by permission of Michael Freeman.

Abbreviations

AJIL	*American Journal of International Law*
ATNIF	Australian Treaties not in Force
ATS	Australian Treaty Series
B C Int'l & Comp L	*Boston College International and Comparative Law Review*
BITs	Bilateral Investment Treaties
BYBIL	*British Year Book of International Law*
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body of the WTO
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EJIL	*European Journal of International Law*
EL Rev	*European Law Review*
EPC	European Patent Convention
GATS	General Agreement on Trade in Services 1994
GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILDC	International Law in Domestic Courts
IMCO	Inter-Governmental Maritime Consultative Organization
J Church & St	*Journal of Church and State*
LDA	London Debt Agreement
MFN	Most Favoured Nation
Mich J Int'l L	*Michigan Journal of International Law*
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Association/Agreement
NILR	*Netherlands International Law Review*
OECD	Organization for Economic Co-Operation and Development
OED	*Oxford English Dictionary*
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCIJ	Permanent Court of International Justice
TRIPS	Trade-Related Aspects of Intellectual Property Right
UKTS	UK Treaty Series
UNHCR	UN High Commissioner for Refugees
UNTS	UN Treaty Series

Va J Int'l L	*Virginia Journal of International Law*
VCLT	Vienna Convention on the Law of Treaties, 1969
WHO	World Health Organization
WTO	World Trade Organization

Note on Citations

Citations follow OSCOLA (*Oxford Standard for Citation of Legal Authorities*) (4th Edn, 2012), with modifications, at: http://www.law.ox.ac.uk/publications/oscola.php.

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www.icj-cij.org

European Court of Human Rights:
http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/

World Trade Organisation Dispute Settlement Body:
http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

International Centre for Settlement of Investment Disputes:
https://icsid.worldbank.org/

North American Free Trade Agreement:
http://www.state.gov/s/l/c3439.htm

Treaties are accessible in the UN's electronic collection: https://treaties.un.org/. This is very cumbersome to search. Preference is therefore given here to citation in the Australian Treaty Series (ATS) or Australian Treaties not in Force (ATNIF):
http://www.austlii.edu.au/au/other/dfat/

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PART I

OVERVIEW, HISTORY, MATERIALS, AND *DRAMATIS PERSONAE*

'The Vienna Rules'[1]

Section 3. Interpretation of Treaties

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.
3. There shall be taken into account, together with the context:
   (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty atnd the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable.

[1] Rules for treaty interpretation from the Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969: UN Doc A/Conf 39/28; UNTS 1155, p 331; UKTS 58 (1980), Cmnd 7964; ATS 1974 No 2; (1969) 8 ILM 679; text here as in UN print of 2005 at <http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

1

A Single Set of Rules of Interpretation

Principles of general application—interpretation as single combined operation with supplementary means—rules endorsed and applicable internationally and nationally—key treaty concepts and nature of rules—illustrative cases

The reason why the United Nations had entrusted it [the International Law Commission] with the codification of international law, and in particular the law of treaties, was that the main objective was certainty of the law; and certainty of the law of treaties depended mainly on certainty of the rules of interpretation.[1]

1. Introduction

The increasing number and significance of treaties has given added importance to the art of their interpretation. The assertion that interpretation is an art has been criticized as having been made 'rather too glibly'. 'The question', as the author of that criticism noted, 'was whether there were any rules for practising that art'.[2] There is now no doubt that there are such rules. These are set out in a treaty: the Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969.[3] The Convention entered into force on 27 January 1980; but its rules on interpretation

[1] R Ago, Chairman of International Law Commission, 726th Meeting, 19 May 1964, [1964] *Yearbook of the ILC*, vol I, p 23, para 34. The International Law Commission (ILC) is the body established by the General Assembly of the United Nations to fulfil its mandate 'to initiate studies and make recommendations for the purpose of…encouraging the progressive development of international law and its codification' (Charter of the United Nations, article 13). The prominent role of the ILC in drawing up the rules on treaty interpretation is considered throughout this book.

[2] Ago, vol I, p 23, para 34. This book is concerned with the practice of interpretation. Whether an art can usefully be the subject of rules is not investigated here but is assumed to be the case; cf M K Yasseen, indicating that the ILC had confined itself to 'stating a few rules which could be considered the scientific basis of the art of interpretation', ILC's 871st Meeting, 16 June 1966, [1966] *Yearbook of the ILC*, vol I, p 197, para 48.

[3] UN Doc A/Conf 39/28; UNTS 1155, 331; UKTS 58 (1980), Cmnd 7964; ATS 1974 No 2; 8 ILM 679. References in this work to the abbreviated form 'the Vienna Convention' are to this treaty, other conventions signed at Vienna being given their full titles. Similarly, references to 'articles' without attribution to a treaty are references to provisions of this Vienna Convention. The rules of treaty interpretation are in articles 31–33 of the Vienna Convention; these are referred to here as 'the Vienna rules', the term 'rules' in this context being the common usage; on the meaning of 'rule' and 'rules', see further section 4.3 below.

(throughout this book abbreviated as 'the Vienna rules') apply to treaties generally, including those made before 1980, as is explained below.[4] Those who would practise the art need to understand the rules. This book explains the Vienna rules, mainly using examples of interpretations reached by applying them. No claim is made that the Vienna rules resolve all problems of interpretation or lead directly to a necessarily 'correct' result in every case. Nor are the rules an exclusive compilation of guidance on treaty interpretation, other skills and principles that are used to achieve a reasoned interpretation remaining admissible to the extent not in conflict with the Vienna rules. What is suggested here is that the Vienna rules, constituting a single framework for treaty interpretation, can now be identified as generally applicable and that those rules should be understood and used by all engaged in treaty interpretation. They are now an essential infrastructure, although using them in particular circumstances requires skills and techniques which go well beyond their brief prescriptions.

Probably the most common response to the question 'How are treaties to be interpreted?' is along the lines that 'You must look for the intention of the parties.' If the questioner presses for more detail, the further answer that is often given is that one should look for the 'spirit' of the treaty. Neither element—the intention of the parties or the spirit of the treaty—is remote from the objective of treaty interpretation; but neither element is explicitly mentioned in the Vienna rules as a guiding principle.[5] While a central idea is that interpretation has a focus on the agreement of the parties expressed in the treaty, the general rule of interpretation does refer in its opening propositions to the 'object and purpose' of the agreement, which could be viewed as an objective repository of the collective intentions of the parties, although this reference is in the context of a specific element of the rules. Ascertainment of intention is one consequence of the exercise if the Vienna rules are properly applied; but this is intention in the sense of the meaning of the treaty as properly interpreted. This refers to the meaning within the *agreement* of the parties rather than their intention distinct from their agreement (although all too often a specific intention on a point in issue could never be ascertained as the point was not considered by the negotiators or their principals). Nevertheless, an 'intention' is commonly ascribed in the course of interpretation.[6] As stated by the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations, a treaty provision must be interpreted 'in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation'.[7]

[4] Section 2 below.

[5] Intention is only mentioned in the Vienna rules in article 31(4); but that is in the context of a very specific rule, indicating that a treaty term is to be given a 'special' meaning 'if it is established that the parties so intended'.

[6] For an account of current work of the ILC relating 'presumed intent' to a meaning evolving over time, see Chapter 10, section 3.3.

[7] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Reports 214, at 237, para 48.

The approach of the Vienna rules was explained in the International Law Commission's (ILC) Commentary which accompanied its draft articles for the 1968–69 Vienna Conference at which the text of the Convention was adopted:

> …the text must be presumed to be an authentic expression of the intention of the parties;…in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties.[8]

At the Vienna conference one of the delegates, noting that many of the issues that arise in treaty interpretation are not ones which the treaty's originators had ever even contemplated, and that many parties which accede to a treaty have not participated in its preparation, stated:

> …it was wiser and more equitable to assume that the text represented the common intentions of the original authors and that the primary goal of interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors.[9]

The ICJ has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties. This proposition now constitutes a statement of customary international law, with the effect that the rules apply to any treaty interpretation whether the states involved are parties to the Vienna Convention or not.[10] As the cases cited in this book show, this position has also been accepted by other international tribunals, by states pleading before such courts and tribunals, and by several courts considering treaties within national legal systems.[11]

In view of this general acceptance and application of the Vienna Convention's rules, why is it necessary to do more than invite lawyers, legislators, diplomats, arbitrators, and judges to read and apply them? The short answer is that the rules are not a set of simple precepts that can be applied to produce a scientifically verifiable result. More guidance is needed to set the ground for a 'correct' result, or at least one which has been correctly ascertained. Somewhat controversial when drawn up, the rules leave some important issues incompletely resolved. Much is left to nuance and the ILC itself saw the rules as quite general: '…the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties.'[12]

[8] UN Conference on the Law of Treaties, Official Records: Documents of the Conference, A/CONF.39/11/Add2, p 40, para 11, and [1966] *Yearbook of the ILC*, vol II, p 220, para 11. The Vienna Conference took place in two stages (1968–69) but for convenience is described below as 'the Vienna Conference, 1969' where the date is merely necessary to distinguish it from the many other Vienna conferences.

[9] I Sinclair, UN Conference on the Law of Treaties, First Session (26 March–24 May 1968), Official Records: Summary Records, p 177, para 6.

[10] Cases of the ICJ stating the general applicability of the rules are cited and considered in sections 2.1 and 2.2 below. On the rules in a treaty applying to agreements between states and international organizations and between international organizations, see Chapter 4, section 2.2. The preamble to the Vienna Convention affirms that the rules of customary international law continue to govern questions not regulated by the Convention's provisions.

[11] See section 2 below and Chapter 4, section 4.2.

[12] [1966] *Yearbook of the ILC*, vol II, pp 218–19, paras 4–5. As to 'canons' of interpretation or construction and 'maxims', see Chapter 2, section 3 for some of their history and Chapter 8, section 4.5.4 for the modern position.

Examination of the growing case law suggests that systematic use of the rules as a practical means of treaty interpretation still has scope for improvement. In some instances the case law shows that they are paid no more than lip service, even giving rise to the suspicion that some lawyers and judges perhaps lack familiarity with their actual content and manner of application. Likewise, selection of a particular rule to bolster an argument without application of the rules as a whole may indicate lack of awareness of their status as the applicable body of rules and of their manner of application, although in other instances the rules are correctly applied, specific mention of them being made only where there is some point of controversy about the interpretative process.

The core of this book is a set of chapters in Part II giving an account of the rules, with guidance for their practical application from examples of how they have actually been applied so as to provide precedent (in a loose sense) and analogy.[13] A full understanding of the rules also requires some awareness of the rest of the law of treaties, at least as regards the processes of their formation and implementation. Preparatory material, records of negotiations, ancillary instruments, interpretative declarations, reservations, amendments (and so on), can all be relevant to interpretation. Chapter 3 addresses these matters and gives a brief guide to relevant aspects of treaty-making. Necessary elements of general international law and general principles are introduced as and when appropriate.[14]

The obvious starting point is to consider articles 31–33 of the Vienna Convention. These are so short that to pick out key features risks doing harm to the holistic approach which the ILC intended to pervade their structure and use. They should therefore be read, or re-read, as a prelude to the detailed analysis in Part II. For present purposes it is only necessary to note that (reduced to broad terms) the 'general rule' (that is, the whole of article 31[15]) requires: good faith in giving the ordinary meaning to the words used in their context and in the light of the object and purpose of the treaty; consideration of related instruments of defined types; attention to agreement of the parties as to the meaning, whether specifically recorded or demonstrated through practice; giving special meaning to terms where this is intended; and application of relevant rules of international law. Further, the preparatory work and circumstances of conclusion of a treaty may be taken into consideration as usually the most significant of supplementary means of interpretation, to be used in the manner and circumstances directed by the rules (though in practice often more readily taken into account than that). Provision is also made in the rules for dealing with issues which may arise when treaty terms are in different languages. All these elements are grouped in the three articles set out on pp. 3–4 above and entitled: Article 31 'General rule of interpretation'; Article

[13] See Chapters 5–9 below.

[14] See further J Crawford, *Brownlie's Principles of Public International Law* (Oxford: OUP, 8th edn, 2012), R Gardiner, *International Law* (Harlow: Pearson/Longman, 2003), and A I Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 3rd edn, 2013).

[15] On the use of the singular in the term 'general rule', see section 4.2 below.

32 'Supplementary means of interpretation'; and Article 33 'Interpretation of treaties authenticated in two or more languages'.

This book is not about theory. It is about the practical use of the Vienna rules. Much theory can, however, be readily tracked down from the sources cited in Chapter 2 below, on the history and development of the rules, and also in the concluding chapter. In fact, a fairly simple theory or scheme underlies the Vienna rules (though not expressed by the ILC in the way that follows). Three general approaches were considered by the ILC. Their general nature is clear from the labels commonly given to them: (1) literal; (2) teleological; (3) intention. In a very general sense, the ILC adopted a combination of the literal and teleological approaches, viewing application of these as yielding up the intention—that is, (1) + (2) = (3).

Of course, the elaboration of the rules, of their dynamics and nuances, is much more complex than this may suggest; but the general significance of the approach is that by combining consideration of all relevant elements mandated by the Vienna rules, the resulting interpretation should achieve due respect for the intentions of the parties as recorded in the treaty text, taking account of the treaty's object and purpose, but without making a wide-ranging search for intentions from extraneous sources. The danger, however, in using the labels 'literal', 'teleological', and seeking 'intention' in treaty interpretation is that these become shorthand substitutes for understanding and applying the actual Vienna rules. Use of such substitutions continues to impair practical treaty interpretation, but the concepts do have an analytical value which is given some evaluation in the concluding chapter of this book.

The ILC's approach was much criticized at the Vienna Conference in 1969 by Professor McDougal, speaking for the American delegation. He saw the scheme of the articles on interpretation as relegating context (to which he gave a wider meaning than do the Vienna rules) too far into the background. He also saw the approach in the Vienna rules as evading a search for the true intentions of the parties, that is intentions which he considered could be derived from a greater range of sources than those specified in the rules.[16] His approach seeks what has been described by some as the 'subjective' intention, as contrasted with 'objective' intention (or its substitute when absent) inherent in the agreed text as properly interpreted. One theme of this book is that the Vienna rules as interpreted and applied in practice have generally not proved so restrictive as to preclude investigation of sufficient material to reveal the properly recorded intentions of the negotiators as carried through into the treaty. But that is not the whole story…

1.1 Guide to analytical approach

As the Vienna rules are set out in a treaty, they are themselves to be interpreted by application of the very rules that they state. The primary aim here is to show how

[16] See further Chapter 2, section 9.

the Vienna rules are, and are to be, interpreted and applied. Interpretation of rules by applying them to themselves may sound rather circular and formulaic: but the result need not be too artificial if the flexibility which the rules were intended to retain is respected.[17] However, as the rules are not here being applied to a specific issue (as would usually be the case in a particular dispute), some adjustments in approach are required.

A key to understanding how to use the Vienna rules is grasping that the rules are not a step-by-step formula for producing an irrebuttable interpretation in every case. They do indicate what is to be taken into account (in the sense of text, preamble, annexes, related agreements, preparatory work, etc) and, to some extent, how to approach this body of material (using ordinary meanings in context, in the light of the treaty's object and purpose, distinguishing a general rule from supplementary means, and so on). There is in the rules a certain inherent logical sequence. They are not, however, all of use every time or always sequentially applicable. The idea underlying a 'general rule' composed of several elements was expressed in the ILC's Commentary on the draft articles on interpretation:

> All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.[18]

This 'crucible' approach, in rejection of any hierarchy within the general rule, is designed to result in 'a single combined operation'.[19] It is, therefore, somewhat in opposition to this design to take the rules to bits and examine each component in isolation. In the absence of specific disputes over particular terms of an identified treaty, however, presentation of the Vienna rules is as much a descriptive and analytical exercise as one of treaty interpretation. For these reasons, in the 'core' chapters below (Chapters 5–9), where the elements of the rules are examined in detail, these elements are necessarily treated in a manner which is somewhat different from the approach that would be taken in resolving a dispute or advising on a specific problem over interpretation. The general approach in those chapters is to outline the main features and history, the issues that may arise in understanding

[17] It has been noted as a curious feature of the Vienna Convention's rules on interpretation that they have themselves to be interpreted, which requires application of pre-existing rules, and so on in infinite regression: J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) 50 NILR 267, at 270. Fortunately, however, rules of treaty interpretation are also part of customary law and the Vienna rules are now generally recognized as stating those customary rules.

[18] 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, pp 219–20, para 8. The Commentary accompanied the draft articles considered by the Vienna Conference in 1969 as the starting point for its preparation and adoption of the Vienna Convention. The role of such a commentary is considered further in the context of preparatory work in Chapters 3 and 8.

[19] Commentary above, para 8, and in para 9: 'it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article'; see further Chapter 5, section 3.1. Any suggestion that elements of the general rule beyond the ordinary meaning, or stated subsequent to the opening paragraph of the general rule, are subordinate is inconsistent with the proper interpretation of the rules and with the ILC's clear explanation of how they are to be used.

the rules, and to describe how such issues are handled in practice. However, just as one instance of a 'live' interpretation of a treaty provision does not precisely follow the form of another, so in the analysis of the rules, an identical sequence of treatment is not always the best one (nor is it required by the Vienna rules).

One way in which this approach differs from that mandated by the Vienna Convention is that in the Vienna rules the preparatory work is a supplementary means of interpretation of the treaty, to be used to confirm the meaning resulting from application of the general rule, or to determine the meaning when interpretation according to the general rule leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. In principle, therefore, preparatory work has a supporting role. Even if recounted at an earlier stage, preparatory work assumes its function after the application of the general rule, that is, after application of the whole of article 31, including examination of the practice in implementing the treaty. In an analytical consideration of the present kind, however, it would be impractical when presenting an account of a rule to postpone all the history of a provision until after showing the practice in application of the rule.

An attempt is also made here to demonstrate that practice in use of preparatory work has, in any event, already shown a marked divergence from a strict reading of the Vienna rules. In the practice of some tribunals, the history of a treaty provision is stated as part of the relevant law, after setting out the facts in a case. Thus, the preparatory work is clearly already present in the minds of those deciding on the interpretation, even if in their reasoning they formally draw on the preparatory work only after applying the general rule, as indicated by article 32 of the Vienna Convention. This is illustrated by the first of the five complete examples included at the end of this chapter to show the rules at work rather than taken to bits as they are later.[20] These examples show practice in both international and domestic courts and tribunals.

The Vienna rules provide for account to be taken of subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation. A difference of approach adopted here is that the practice (in the, admittedly incomplete, sense of reported decisions) is set out to illustrate how a particular element of the rules has been or may be used, rather than to show that there is concordant practice establishing definitively the interpretation of the rule. Although there are now many reported decisions which allude to the Vienna rules, there has been insufficiently long practice in their application to show that points of detail have received uniform interpretation under the Vienna Convention. It is nevertheless useful to be aware of what reasoning and decisions there have been in relation to a particular point. Such practice may provide a useful starting point and give helpful guidance. If progressively and sufficiently supported, a clear enough trend may emerge in the practice to establish the approach as correct.

[20] See section 5 below.

Of course, treaty interpretation is not only undertaken in disputes before courts and tribunals. It takes place much more frequently in the day-to-day work of governments, legislatures, government departments (increasingly not just Ministries of Foreign Affairs), and of legal advisers and lawyers generally. Only a small amount of that surfaces into the public domain. When it does so it is likely to be because there is some controversy. Where such controversy is between states, most differences on points of treaty interpretation are settled between the parties by negotiation. This happens with most legal disputes within national systems of law, but with the important difference that those in dispute internationally over a treaty are commonly representatives of the actual originators of the treaty terms in issue, or are at least later parties to the treaty. Hence their interpretation has a special value (considered below, particularly in connection with the role of subsequent practice).[21]

All these instances of treaty interpretation form part of general practice in treaty interpretation, but those instances outside case reports are not readily accessed or assimilated into clear guidance. There is, however, at least a substantial body of material in case law to point to the approach that is to be taken. Such case law is not only that of international courts and tribunals. Some decisions of national courts contain useful indications of how treaty interpretation is to be approached.

Precedent does not have the same formal and binding character in international tribunals as in some national legal systems. There is no hierarchy of courts extending throughout the international legal system. However, it seems likely that the accounts of the practice of many international courts and tribunals may prove to be the most helpful guide to understanding the Vienna rules and to their use in connection with new issues of interpretation that arise. The best examples of their application are offered here from wherever they may be found. Attempting to avoid the invidious task of evaluating the merits of different judges and arbitrators, where possible majority views of the ICJ have been given pride of place, but some references to potentially useful or clarificatory opinions given by individual judges separately or in dissent have been included. Decisions of other bodies have been included without assessing them on the basis of the standing of the particular

[21] This was stated, perhaps somewhat starkly, by Mr J M Ruda in the ILC's work on the draft Vienna rules: 'Interpretation occurred at two different levels. First, as between States the only legally valid interpretation of a treaty was the authentic interpretation by the parties to the treaty. The other level was that of arbitration, for which there were fundamental principles…'. ILC's 765th Meeting, 14 July 1964, [1964] *Yearbook of the ILC*, vol I, p 277, para 34. However, the ILC's Special Rapporteur (Waldock) encountered the same problem noted in the text here, remarking in his introduction of the first draft of what became the Vienna rules that he 'had tried to take into account State practice, though evidence of it was difficult to obtain as not much was to be found in publications of State practice which for the most part were content to reproduce the decisions of international tribunals and were not concerned with the interpretation of treaties by States themselves'. *Yearbook of the ILC*, vol I, p 275, para 2. Cf S Rosenne, *An International Law Miscellany* (Dordrecht: Nijhoff, 1993), at 441: 'Most international interpretation is not the fruit of judicial action, but is performed through the diplomatic channel. Furthermore, probably the greater part of it is undertaken not as part of the settlement of a dispute, but as part of the negotiating and drafting processes and often with the object of trying to avoid future disputes.' See further Chapters 3 and 4.

court or tribunal but rather selecting them for the cogency of their argument or effective deployment of the Vienna rules. Similarly, in the case of decisions of national courts, generally only those of the highest courts have been included, but judgments of lower courts receive occasional mention. Chapter 4 gives a general outline of where treaty interpretation takes place and of the main factors to be taken into account where particular courts, tribunals, or other bodies may show individual characteristics.

Even taking this rather flexible approach to selection of cases, examples making specific reference to the Vienna rules have not been found illustrating all points to be addressed. Some cases from before the adoption of the Vienna rules are therefore used where they provide particularly good examples which, it is believed, would be likely to prove useful in reasoning out an interpretation under the Vienna rules. However, because the focus here is on the Vienna rules, no attempt is made to provide a comprehensive guide to all the previous case law. Even if remotely feasible, such an account would make for an extremely long work; and there are already many thorough studies of the earlier law. What is included here is an overview of the earlier material (Chapter 2) leading up to, and including an account of, the work of the ILC in preparing the draft treaty for consideration at the Vienna conference in 1969.

2. Applicability of the Vienna Rules Generally

It is now well established that the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law, and thus may be (unless there are particular indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980. The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the Vienna Convention, to a treaty concluded in 1955 . . . and to a treaty concluded in 1890, bearing on rights of States that even on the day of Judgment were still not parties to the Vienna Convention . . . *There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act.*[22]

[22] *Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway (Belgium/Netherlands)*, Award of 24 May 2005, XXVII RIAA 35, p 62, para 45, (emphasis added). For the history of endorsement by the ICJ and other courts and tribunals, see below for a range of cases in which the Vienna rules have been used in international and domestic courts and tribunals, see L Crema, 'Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention', chapter 2 in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford: OUP, 2013), at 14–15 fns 6–8. For rejection of a suggestion that when being invoked as a matter of customary law the Vienna rules should not 'be applied with the same kind of minute and analytical rigour as would be the case if it were itself binding as between the Parties', see *Case Concerning the Auditing of Accounts (Netherlands/France)*, Award of 12 March 2004, para 77 (Permanent Court of Arbitration's unofficial translation at <http://pca-cpa.org/showpage.asp?pag_id=1156>), considered further in section 5.2 below.