Annex 680

"Case 12.354, Merits, Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and their Members v Panama", Report No. 125/12, *Inter-American Commission on Human Rights*, 13 November 2012

REPORT No. 125/12
CASE 12.354
MERITS
KUNA INDIGENOUS PEOPLE OF MADUNGANDI AND EMBERA INDIGENOUS PEOPLE OF BAYANO AND THEIR MEMBERS
PANAMA

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PANAMA
November 13, 2012

I. SUMMARY

1. On May 11, 2000, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a petition submitted by the International Human Rights Law Clinic of the Washington College of Law, the Centro de Asistencia Legal Popular (CEALP), the Asociación Napguana, and Emily Yozell (hereinafter "the petitioners")[1], on behalf of the indigenous peoples Kuna of the Madungandí[2] and the Emberá of Bayano and their members (hereinafter "the alleged victims") against the Republic of Panama (hereinafter the "Panamanian State," "Panama," or "the State").

2. The petitioners alleged that in the wake of the construction of the Bayano Hydroelectric Dam (Represa Hidroeléctrica del Bayano) from 1972 to 1976, the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano were forced to abandon their ancestral territory, which was flooded by the reservoir of the dam. They argued that as they lacked any other alternative, they were forced to relocate to the new lands offered by the State, which it said were of better quality and greater quantity, and to accept the economic compensation that was to be paid in exchange for the destruction and flooding of their ancestral territory. They indicated that nonetheless the commitments were not carried out, for the compensation was not paid in its entirety, and the lands granted did not have the characteristics offered. As regards the Kuna indigenous people of Madungandí, they argued that while the State formally recognized their right to collective property over the lands they inhabit in 1996, it has not provided effective protection vis-à-vis the constant invasion by non-indigenous persons. With respect to the Emberá indigenous people of Bayano, they argued that to date the State has failed to title, delimit, and demarcate the territory they occupy, but to the contrary has granted property title to third persons and has allowed its illegal appropriation by peasants.

[1] In a note received on October 30, 2008, the International Human Rights Law Clinic of the Washington College of Law reported that cacique Félix Mato Mato, legal representative of the Comarca of Madungandí, had designated the law firm of Rubio, Álvarez, Solís & Abrego as their new representatives. Subsequently, in a note received on May 1, 2009, the International Human Rights Law Clinic of the Washington College of Law reported that the services of that firm had been rescinded. In that same communication, the granting of power-of-attorney by the General Cacique of the Congress of Madungandí to "International Human Rights Law Clinic of the Washington College of Law, Centro de Asistencia Legal Popular, a law firm in Panama, and the Organización Kuna de Madungandí (ORKUM)." In a brief of October 17, 2011, received by the IACHR on October 27, 2011, the petitioners submitted a note, issued by the General Kuna Congress of Madungandí and the Regional Emberá Congress of Alto Bayano, by which they reiterate the power-of-attorney conferred upon the International Human Rights Law Clinic of the Washington College of Law and granted power-of-attorney to attorney Horacio Rivera, for his representation in the case. By note received on March 2, 2012, the Emberá General Congress of Bayano reported that as regards their communities, the petitioner is CEALP, particularly attorney Héctor Huertas. In a brief received by the IACHR on July 13, 2012, a note was presented by which the General Congress of the Kuna Comarca of Madungandí authorizes Horacio Rivera as its representative for the instant case.

[2] The IACHR takes note of the brief submitted on October 19th, 2012, by the CEALP, representative of the Emberá communities of Bayano in this case, in which it informed that "according to a decision of the Gunas indigenous authorities of Panama, the alphabet of the Guna language was approved, where the letter "K" was removed, therefore official documents should refer, from 2010 onwards, to name the Kuna with the correct name, that is GUNA". Likewise, it informed that on November 22, 2010, Law 88 was enacted, "which recognizes the languages and alphabets of the indigenous peoples of Panama and lays down rules for Bilingual Intercultural Education". According to Article 2 and the Annex of the Law, the alphabet of the Kuna language does not contain the letter "K".

3. The State, for its part, argued that it has not violated the alleged victims' human rights, since the construction of the hydroelectric dam was preceded by technical studies to reduce its negative impact, and that it entered into agreements with the Kuna and Emberá indigenous peoples concerning their relocation, the granting of new lands, and the payment of compensation for the losses incurred. It states that for that reason, after the construction of the Bayano dam, the lands of these indigenous peoples were compensated for by other nearby lands that were declared not subject to adjudication and for their exclusive use by Decree No. 123 of May 8, 1969. It also alleged the Kuna District of Madungandí was created that by Law 24 of January 12, 1996, with which the collective property rights of the Kuna indigenous people of Bayano were legally recognized, and actions by non-indigenous persons or settlers were restricted. As regards the Emberá people of Bayano, the State argues that the approval of Law 72 of December 23, 2008, established a special procedure for recognizing the collective property rights of indigenous peoples, based on which the adjudication of their lands is in process. As regards the payment of compensation, it asserted that this matter was covered by Cabinet Decree 156 of 1971. It argued that pursuant thereto, payments were made to the alleged victims from 1974 to 1978 by the Corporación para el Desarrollo Integral del Bayano, a state agency in charge of compensation-related matters.

4. In Report No. 58/09, approved April 21, 2009, the Commission concluded that the petition was admissible in keeping with the provisions at Articles 46 and 47 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), with respect to Article 21 of the American Convention in conjunction with its Article 1(1). In addition, applying the principle of *iura novit curia*, the Commission concluded that the petition was admissible for the alleged violation of Articles 2, 8, 24, and 25 of the American Convention on Human Rights.[3]

5. In this report, after weighing the parties' arguments and analyzing the evidence presented, the Commission concludes, pursuant to Article 50 of the American Convention, that the State of Panama is responsible for violating the rights contained in Articles 8, 21, 24, and 25 of the Convention in relation to its Articles 1(1) and 2, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members.

II. PROCESSING BEFORE THE IACHR

6. On April 21, 2009, the Commission approved Report No. 58/09, in which it found admissible the petition regarding the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members. The decision was communicated to the parties by note of April 27, 2009, with which the term of two months began to run for the petitioners to submit observations on the merits. At the same time, the IACHR placed itself at the disposal of the petitioners to pursue a friendly settlement, in keeping with Article 48(1)(f) of the Convention.

7. By brief received May 1, 2009, the petitioners stated their interest in renouncing the friendly settlement process and pursuing the procedure before the IACHR. After being granted a one-month extension, requested June 25, 2009, on December 18, 2009, the petitioners presented their additional observations on the merits, whose pertinent parts were forwarded to the State on January 19, 2010. On that occasion, the IACHR gave the State three months to present its additional observations on the merits, in keeping with Article 37(1) of its Rules of Procedure. By

[3] In Report No. 58/09, the Commission found the petition inadmissible in relation to the alleged violations of the rights recognized in Articles 4, 7, 10, 12, 17, and 19 of the American Convention as well as in Articles I, III, V, VI, VII, XI, and XIII of the American Declaration. IACHR, Admissibility Report No. 58/09, April 21, 2009, Petition 12,354, Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members.

brief received May 3, 2010, the State submitted its observations on the merits, which were forwarded to the petitioners by note of May 13, 2010.

8. During this stage, the IACHR received additional information from the petitioners on the following dates: November 16, 2010, January 14, 2011, May 31, 2011, March 13, 2012, May 16, 2012, June 20, 2012, July 13, 2012 and October 17, 2012. The State sent additional information to the IACHR on the following dates: March 25, 2011, September 27, 2011, October 4, 2011, May 14, 2012 and September 24, 2012. The notes sent by the parties were duly forwarded to the other party.

9. From December 14 to 19, 2010, the Rapporteur on the Rights of Indigenous Peoples, Dinah Shelton, made a working visit to Panama for the purpose of collecting information on the instant case. During the visit, the Rapporteur met with government officials and travelled to the territory of the Kuna indigenous people of Madungandí and the Emberá of Bayano.

10. During the processing of this case before the Commission, two public hearings were held. The first, while the admissibility of the petition was being considered, was held on November 12, 2001, during the 113th regular period of sessions of the IACHR.[4] A second public hearing was held in the merits phase, with both parties present, on March 23, 2012, during the 144th regular period of sessions of the IACHR.[5] On this occasion, the petitioners presented the testimony of Manuel Pérez, Cacique General of the General Congress of the Comarca Kuna de Madungandí; and Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. In addition, they presented the expert testimony of Alexis Oriel Alvarado Ávila and Ultiminio Cabrera Chanapi.

A. Precautionary measures

11. On March 14, 2007, the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano, through the International Human Rights Law Clinic of the Washington College of Law, filed a request for precautionary measures asking that the State adopt the measures needed to prevent the invasion of settlers in their territories. They indicated that in January 2007 nearly 50 non-indigenous persons entered the indigenous territories and destroyed the tropical forest, cutting the trees and preparing the land for crops.

12. The IACHR requested information from the State, which answered by noting that a series of actions had been taken such as inspections with the participation of different state institutions to collect evidence, providing advisory services to the First Cacique of the Comarca Kuna de Madungandí for filing a complaint, detaining persons for ecological harm, and the signing of a technical cooperation agreement between the Comarca Kuna de Madungandí and the National Environmental Authority (Autoridad Nacional del Ambiente) to ensure the protection of natural resources and rational natural resources management. The requesters filed additional information on May 7, 2007.

13. On March 15, 2011, the Kuna indigenous people of Madungandí and the Emberá of Bayano, through the Centro de Asistencia Legal Popular, reiterated the request for precautionary measures. On that occasion, they indicated that in February and March 2011 there had been massive invasions of the territories of the Comarca Kuna de Madungandí and that the lands of the

[4] IACHR, Public hearing, November 12, 2001, on "Case 12,354 – Kuna of Madungandí and Emberá of Bayano, Panama," 113th regular period of sessions of the IACHR. See hearing at http://www.oas.org/es/cidh/.

[5] IACHR, Public hearing, March 23, 2012, on "Case 12,354 – Kuna of Madungandí and Emberá of Bayano, Panama," 144th regular period of sessions. See hearing at http://www.oas.org/es/cidh/.

Emberá communities were in the process of being titled to non-indigenous persons. They argued that "the settlers by violence took control of and destroyed virgin forests, crops, and lands of the Kuna and Emberá indigenous peoples of Bayano," without the State taking any actions to control the invasions. They also stated that the loss of their lands threatens the survival of the indigenous peoples, insofar as it places "at risk the food security of the indigenous children, women, and men."[6]

14. On April 5, 2011, the IACHR granted the precautionary measures requested, in keeping with Article 25(1) of its Rules of Procedure. In that decision, the Commission asked the State of Panama to adopt "the measures necessary to protect the ancestral territory of the communities of the Kuna people of Madungandí and the Emberá people of Bayano from invasions by third persons [and from the] destruction of their forests and crops, until such time as the IACHR reaches a final decision in Case 12,354."[7]

15. The IACHR received information from both parties on implementation of the precautionary measures granted. The petitioners filed information on the following dates: April 20, 2011, June 14, 2010, and October 21, 2011. The State, for its part, presented information to the IACHR on the following dates: April 27, 2011, June 15, 2011, September 14, 2011, February 1, 2012, and February 6, 2012. As of the date of adoption of this report, the IACHR continues to monitor the situation.

III. THE PARTIES' POSITIONS

A. The petitioners

16. The petitioners alleged that the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano inhabited the Upper Bayano Indigenous Reserve (Reserva Indígena del Alto Bayano) until 1976, when they were moved to new localities due to the construction of the Bayano Hydroelectric Complex (Complejo Hidroeléctrico de Bayano). They stated that at present, the members of the Kuna indigenous people of the Bayano region live in the Kuna Comarca of Madungandí, located in the eastern part of the province of Panamá. They indicated that the Emberá inhabit the communities of Ipetí and Piriatí, which have attempted to obtain legal recognition of their lands through numerous political and administrative initiatives; they have yet to attain any results.

17. The petitioners pointed out in that 1963 the Panamanian State and the United States Agency for International Development (USAID) proposed a project entailing the construction of a hydroelectric complex in the Bayano Region by building a "concrete" dam at the intersection of the Cañita and Bayano rivers, creating a reservoir that would cover approximately 350 km^2.

18. They alleged that in early 1969 the government of Panama negotiated several agreements with the alleged victims with the aim of transferring them to new lands. They indicated that their relocation was forced given that "they never had an option to prevent the construction of the hydroelectric dam and the flooding of their lands." They argued that considering that there was no other alternative, they had to accept the State's terms, which consisted of granting them new lands and paying them both individual and collective economic compensation. They indicated that the hydroelectric dam was under construction from 1972 to 1976, and that the indigenous peoples who lived in the area were moved from 1973 to 1977.

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[6] Brief requesting precautionary measures, March 14, 2011, received by the IACHR March 15, 2011.

[7] IACHR, Precautionary Measures MC 105/11, granted April 5, 2011, Kuna of Madungandí and Emberá de Bayano Indigenous Peoples.

19. According to the petitioners, the construction of the dam resulted in the flooding of 80% of the territory of the Kuna indigenous peoples, i.e. eight of the 10 villages that existed at that time, entailing the displacement of more than 2,000 persons. They argued, as regards the Emberá people of Bayano, that the village of Majecito was flooded, displacing its 500 inhabitants. They also noted that the project entailed the destruction of the ecosystem on which they depended for their physical and spiritual sustenance; the spread of diseases caused by plant decay, and the cultural deterioration of these indigenous peoples.

20. They alleged that the members of the Kuna people of Madungandí were relocated to less fertile and higher-altitude lands, and that the payment of collective monetary compensation for the loss of their lands ceased unilaterally in 1977, while the individual compensations for the crops and animals lost were not paid in their entirety. The petitioners argued that the State relocated the Emberá indigenous people of Bayano near the Membrillo river. Nonetheless, when it was shown that this place was inadequate, they were moved once again, this time to their current settlements of Ipetí and Piriatí. They reported that they were also promised monetary compensation for the loss of their crops, which was to be paid over three years, a commitment they state has not carried out.

21. They argued that in the years after their relocation the alleged victims took many initiatives to obtain legal recognition and protection for their territories and to pay adequate compensation. Nonetheless, they allege that the State has yet to fully carry out these commitments.

22. As for the recognition of their right to collective property, specifically, they indicated that the Kuna Comarca of Madungandí was established by Law 24, adopted January 12, 1996. With respect to the Emberá people, they indicated that to date they have not received legal recognition of their lands. They argued that only recently, with the adoption of Law 72 of December 23, 2008, has a procedure been established for adjudicating collective property rights over indigenous lands that are not included within the *comarcas*. Under that law, they indicated that in 2009 they presented a request to obtain title from the National Bureau of Agrarian Reform (Dirección Nacional de Reforma Agraria), an institution that was later replaced by the National Lands Authority (Autoridad Nacional de Tierras). Nonetheless, they argued that the request was not approved as said law was not regulated. They said that while the respective Regulation was approved by Executive Decree 223 of July 29, 2010, the request presented by the petitioner indigenous communities has not led, to date, to the legal recognition, delimitation, or demarcation of their lands.

23. In addition, the petitioners argued that the alleged victims have been impeded from effectively exercising their collective property rights due to the constant appropriation of their territory by settlers and illegal logging. In this respect, they stated that in the wake of the construction of the Pan American Highway, as of the mid-1970s non-indigenous persons began an ongoing invasion of the territories of the Kuna and Emberá peoples of Bayano. They added that taking advantage of the State's passivity in carrying out the demarcation, the settlers took part of the indigenous lands, along with their natural resources, and converted them to pasture. They stated that these persons are engaged in logging in their territories, which has negative repercussions for the conservation of the fragile ecosystem in the area. They argued that the present invasion by the settlers and the deforestation they have caused are threatening the life and security of the indigenous communities, who depend on the land for their survival, and have made it difficult to preserve their culture and ancestral traditions.

24. They noted that they have pursued administrative remedies since 1992, and that since 2007 they have lodged criminal complaints to confront the invasion by settlers, all of which proved ineffective, for the settlers have returned to the territory of the indigenous peoples and have continued their illegal activities. According to the petitioners, the complaints presented by the Public

Ministry are still in the investigative phase, without any individual being investigated or apprehended to date.

25. Based on these facts, the petitioners alleged the violation of Article 21 of the American Convention. In particular, they argued that the loss of the ancestral territories of the alleged victims due to the flooding provoked by the construction of the dam and the consequent displacement to new lands is *per se* a violation of Article 21 of the Convention. They also alleged that the lack of effective and timely payment of the compensation to the Kuna and Emberá peoples constitutes the violation of Article 21(2) of the Convention, insofar as their right to just compensation has not been guaranteed.

26. In addition, they argued that the State has breached its obligation to recognize, delimit, demarcate, and protect the territories currently inhabited by the Kuna and Emberá peoples. As regards the Kuna people of Madungandí in particular, they argued that the existence of Law 24, which creates the *comarcas*, is not sufficient to discharge the obligations of the State under the Convention, given that in practice there has been a lack of protection due to the constant invasion by the settlers, which constitutes a violation of Article 21 of the Convention.

27. With respect to the Emberá indigenous people, they argued that the lack of formal recognition of and effective protection for their collective lands violates the obligation contained in Article 21 of the Convention. They argue that while Law 72 provides the necessary legal framework, to date the request made for the titling of their lands has not been resolved, thus they do not yet have legal recognition of their collective property rights. They argued that Law 72 does not provide for a system for resolving land conflicts, which in their opinion means that "even if the request under Law 72 is approved, the Emberá [will continue] being vulnerable to violations of their property rights." They added that "the State has to ensure that the Emberá have an exclusive property right to their lands and should initiate the process of clarifying settlers' rights."

28. As regards Articles 8(1) and 25 of the Convention, the petitioners stated that the Panamanian legal order does not provide an effective mechanism, first, for obtaining the right to the recognition of collective property rights for indigenous peoples, and second, for protecting the territories of indigenous peoples in the face of the illegal occupation by settlers. As for the first, they indicated that the procedure established by Law 72 has proved ineffective, insofar as it has not been resolved in a reasonable time, considering the request was filed in 2009 and to date there has been no conclusion.

29. As for protecting the territories of indigenous peoples in the face of illegal occupation, they argued that the Kuna Comarca of Madungandí did not have a *corregidor*, an authority with the rank of administrative police with jurisdiction to order the eviction of invaders, and that it was not until June 2008 that legislative measures were adopted to allow for the appointment of this authority, by Executive Decree 247. They argued that nonetheless this authority has not actually been appointed, therefore they do not have access to an adequate an effective remedy for the protection of their lands by which to impede the incursions of settlers, and to relocate those who are illegally occupying indigenous lands. They indicated that all the administrative and judicial remedies pursued before the appointment of the *corregidor* to expel the settlers from their lands have suffered an unjustified delay, and indeed some of them have not even been resolved.

30. As for the violation of Article 24 of the Convention, the petitioners alleged that the difficulties experienced by the Kuna of Madungandí and Emberá indigenous peoples in securing access to justice and protection of their collective lands are due to their ethnic origin, given that the State offers different and more favorable treatment to the property claims of non-indigenous individuals.

31. In relation to the violation of Article 2 of the Convention, they alleged that the State has breached its obligation to have effective provisions of domestic law that are effective for the protection of their right to official recognition of their property rights. They added that "it does not suffice to have only one process for the recognition of rights," but rather the State must ensure the effective protection of the indigenous territories, overseeing the application of the provisions that protect them, and punishing violations, all of which are obligations that were breached by the State of Panama.

B. The State

32. The State argued that the construction of the Bayano hydroelectric complex was one of several public projects promoted to provide electricity to the Panamanian State so as to avoid dependence on imported and costly energy resources. The State noted that on addressing this demand for energy the project was implemented without repudiating the specific rights of the communities that were living in that region. It alleged that this project was carried out 42 years ago, and that it met the requirements of the time.

33. In particular, it argued that the construction of the hydroelectric complex was preceded by technical studies to limit its negative impact, and it indicated that agreements were entered into with the Kuna and Emberá indigenous peoples on their relocation and the conditions in which it would take place. It asserted that accordingly Cabinet Decree 123 of May 8, 1969, was approved, by which the lands of the indigenous were compensated for by neighboring lands that were declared not subject to adjudication and for their exclusive use.

34. According to the State, the resettlement of the Kuna was carried out from 1973 to 1975, and answered to the signing of the "Agreement of Farallón," signed on October 29, 1976, by the Government of the Republic of Panama and the Caciques of the Kuna people of Bayano. It argued that this agreement guaranteed that the communities affected by the construction of the hydroelectric complex would be resettled in the region of the present-day Kuna Comarca of Madungandí. It stated that the relocation of the Emberá people was preceded by the signing of the "Agreement of Majecito" of February 5, 1975, under which they were moved to the localities of Ipetí and Piriatí.

35. As regards the legal recognition of the territory of the Kuna of Madungandí, the State indicated that the Kuna Comarca of Madungandí, established by Law 24 of January 12, 1996, elaborated upon by Decree No. 228 of December 3, 1998, was created "as a show of the public policy of territorial security for the indigenous peoples." It stated that with this, the boundaries of the Kuna territory were recognized, and actions by settlers were restricted.

36. With respect to the Emberá, the State indicated that while they do not currently have a legally recognized *comarca*, the approval of Law 72 of December 23, 2008, makes it possible to recognize their collective property rights to their lands through a special procedure. It also indicated that based on that statute the lands of the Emberá are in the process of being adjudicated by the National Land Management Authority (Autoridad Nacional de Administración de Tierras).

37. As regards compensation for the alleged victims, the State asserted that they were included in Cabinet Decree 156 of 1971. It argues that pursuant to that decree, payments were made to the indigenous from 1974 to 1978 by the Corporación para el Desarrollo Integral del Bayano, a state entity entrusted with compensation matters. Accordingly, the Government argued that the agreements with the indigenous peoples of the Bayano basin have been carried out.

38. As for the invasion of settlers in indigenous territory, the State indicated that it has paid close attention to the requests of the traditional authorities to evict them, and it has undertaken actions aimed at protecting indigenous territories by evicting settlers through the corresponding administrative authorities. In particular, it asserted that "this position of the State is put forth in a context in which those who have invaded this territory subsequent to the creation of the Comarca must leave the territory of the Kuna jurisdiction of Madungandí."

39. As the response to these demands shows, the State indicated that the Panamanian legal order did not authorize the mayor of Chepo, the district closest to the Kuna Comarca of Madungandí, to appoint a *corregidor* for that *comarca*. Nonetheless, given that the *corregidor* would be the competent authority for ordering the eviction of the settlers, the legal rules necessary for allowing the appointment of this authority were adopted, and this authority has been carrying out the eviction of illegal occupants of indigenous territories. The State also asserted that it has undertaken an investigation into the actions taken by the settlers against the environment, which led to the detention of persons in March 2007.

40. In summary, the State indicated that over the years, since it was agreed to build the Bayano hydroelectric complex, it has maintained steady and periodic conversations with the members of the Kuna and Emberá peoples, fully seeing to it that, after the various agreements and statutes adopted, full respect for their integrity should be sought, referring to both their culture and their inalienable rights, and the ecological system in which these various cultures unfold.

41. The State did not present specific arguments on the articles of the American Convention declared admissible by the IACHR in its Report No. 58/09.[8]

IV. PROVEN FACTS[9]

42. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the parties and the information obtained during the public hearings held in the 113th and 144th regular periods of sessions of the IACHR. In addition, it will take into consideration publicly known information.[10]

43. In addition, mindful that the Commission was processing the file on precautionary measures on behalf of the Kuna indigenous people of Madungandí and the Emberá of Bayano and their members, the Commission considers it necessary to recall that the Inter-American Court has noted: "The evidence submitted during all stages of the proceeding has been included in a single body of evidence, for it to be considered as a whole, which means that the documents supplied by the parties with regard to the preliminary objections and the provisional measures are also part of the body of evidence in the instant case."[11]

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[8] IACHR, Admissibility Report No. 58/09, April 21, 2009, Petition 12,354, Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members.

[9] In this report, the IACHR uses as evidence documents submitted by the parties that make reference to "indians" or "tribes". Pursuant to the development of international law, the Inter-American Commission for decades has been referring to "indigenous peoples," and therefore does not endorse the terms used by the authors of the respective quotes.

[10] Article 43(1) of the IACHR's Rules of Procedure establishes: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

[11] I/A Court H.R., *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, para. 68. See *inter alia* Case of *Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 48.

44. Accordingly, the Commission considers that the State of Panama, as a party in both proceedings, has had the opportunity to controvert and object to the evidence produced by the petitioners and, therefore, there is a procedural balance as between the parties. Accordingly, the Commission includes in the evidence under consideration the evidence produced by the parties in the precautionary measures procedure.

A. Indigenous peoples in Panama and the applicable legal framework

45. Panama is a country with a high degree of ethnic and cultural diversity. Seven indigenous peoples currently live in Panama: Ngäbe, Buglé, Naso or Teribe, Bri-Bri, Kuna, Emberá, and Wounaan.[12] The Ngäbe, Buglé, Naso or Teribe, and Bri-Bri are found mainly in the western part of the country, while the Kuna, Emberá, and Wounaan are located mainly in the east.[13] According to the last national census, the indigenous population in Panama numbers 417,559 persons, equal to 12.26% of the total population.[14]

46. Each of these peoples has its own culture and history, social and political organization, economic and productive structure, cosmovision, spirituality, and ways of interacting with the environment. The indigenous peoples of Panama are traditionally organized in the following congresses and councils: Consejo General Bri-Bri, Consejo General Naso Tjër-di, Congreso General Comarca Ngäbe-Buglé, Congreso Nacional Wounaan, Congreso General Emberá de Alto Bayano, Congreso General Emberá y Wounaan de Tierras Colectivas, Congreso General Emberá y Wounaan, Congreso General Kuna de la Comarca Wargandi, Congreso General Kuna de la Comarca Madungandí, Congreso General Kuna de Dagargunyala, Congreso General de Kuna Yala, and Consejo Regional Buglé.

47. The territorial rights of the Kuna people of the Caribbean coast were recognized in 1938, in the wake of the grievances that led to the Tule Revolution of 1925. Since then, and up to 2000, other indigenous peoples of Panama have had recognition of ancestrally occupied territories, whose total area comes to nearly 20% of the national territory.[15] Within the indigenous territories the traditional authorities of each people take responsibility for different areas of government, administration of justice, education, and use of natural resources, among other matters. Nonetheless, at present there are still indigenous peoples in Panama who are on ancestral territories yet these territories have not been titled, demarcated, and/or delimited.[16]

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[12] The indigenous peoples in Panama come mainly from five linguistic groups: (i) the Guaymí, from whom are derived the Ngöbe; (ii) the Bokotá, from whom are derived the Buglé; (iii) the Talamanca, from whom are derived the Teribe and Bri-Bri; (iv) the Kuna or Tule; and (v) the Chocoes, from whom are derived the Emberá and Wounaan. The first three are situated in the eastern region, and the last two in the western region of Panama. Reina Torres de Araúz. In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. p. 58. Available at: http://bdigital.binal.ac.pa/bdp/tomos/XVI/.

[13] ALVARADO, Eligio. Perfil de los Pueblos de Panamá, Panama City, Regional Technical Assistance Unit (RUTA) and Ministry of Interior and Justice. 2001. p. 14. Available at: http://libertadciudadana.org/archivos/Biblioteca%20Virtual/Documentos%20Informes%20Indigenas/Nacionales/Juridico/Perfil%20Indigena%20de%20Panama.pdf.

[14] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, by province, indigenous *comarca*, indigenous group to which it belongs, and age groups. 2010.

[15] According to official figures, the total area of Panama is approximately 75,517 km^2, while the total area of the five *comarcas* comes to approximately 16,141 km^2. Source: National Institute of Statistics and Census. *Panamá en Cifras: años 2006-10.* 2010. Available at: http://www.contraloria.gob.pa/inec/cuadros.aspx?ID=170305. See also: International Labor Organization. Indigenous and Tribal Peoples: Panama. Available at: http://www.ilo.org/indigenous/Activitiesbyregion/LatinAmerica/Panama/lang--en/index.htm.

[16] The State makes reference, for example to the communities of "Piriatí Emberá, Ipetí Emberá, Maje Emberá, and Unión Emberá, and other indigenous territories (Wounaan) that are located in the eastern sector of the province of Panamá."

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48. Beginning with the 1904 Constitution, amended in 1925[17], the possibility of creating "*comarcas*" (special districts) was introduced in Panamanian domestic law; these are geographic areas that have a political-administrative regime governed by special laws. A similar provision is to be found in Article 5 of the 1972 Constitution, amended in 2004.[18] Based on this legal institution, the State has recognized the following "indigenous *comarcas*" through special laws: Comarca Kuna Yala[19], Comarca Emberá-Wounaan[20], Comarca Kuna de Madungandí[21], Comarca Ngöbe-Buglé[22], and Comarca Kuna de Wargandi.[23] [24] This recognition has been considered positive by the IACHR and other international human rights bodies.[25]

49. The domestic law of Panama also recognizes "indigenous reserves" ("*reservas indígenas*"), a category that allows the indigenous communities who live on them to possess the

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Brief by the State of September 26, 2011, received by the IACHR September 27, 2011. In addition, see thematic public hearing on "The right to collective property of the lands of the indigenous peoples in Panama," held during the 144th period of sessions, March 23, 2012. See hearing at http://www.oas.org/es/cidh/.

[17] Article 4 of the 1904 Constitution, amended by Legislative Act of March 20, 1925, and September 25, 1928. "The territory of the Republic is divided into Provinces and these are divided into Municipalities, in the number and with the boundaries established by the laws in force; but the National Assembly may increase or decrease the number of provinces or municipalities, or vary their boundaries. The National Assembly may create *comarcas* (special districts), governed by special laws, with territory separated from one or more provinces."

[18] Article 5 of the single text of the Constitution of Panama, published November 15, 2004. "The territory of the Panamanian State is divided politically into Provinces, which in turn are divided into Districts, and the Districts into Sub-districts (*Corregimientos*). The law may create other political divisions, either subject to special regimes or for reasons of administrative convenience or public service."

[19] Created by Law 2 of September 16, 1938 with the name of "Comarca de San Blas," by Law 16 of February 19, 1953 the Comarca de San Blas was organized; it came to be called "Comarca Kuna Yala" as provided in Law 99 of December 23, 1998, and it was declared an indigenous reserve by Law 20 of January 31, 1957.

[20] Created by Law No. 22 of November 8, 1983; the Organic Charter of the Comarca was adopted by Executive Decree 84 of April 9, 1999.

[21] Created by Law 24 of January 12, 1996; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 228 of December 3, 1998.

[22] Created by Law 10 of March 11, 1997; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 194 of August 25, 1999; its political-administrative boundaries were changed by Law 8 of February 14, 2006.

[23] Created by Law 34 of July 25, 2000; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 414 of October 22, 2008.

[24] According to official information, three indigenous *comarcas* (Kuna Yala, Emberá-Wounaan, and Ngöbe-Buglé) have the rank of a province, for they have a governor; while the two remaining *comarcas* (Kuna de Madungandí and Kuna de Wargandí) are at the level of a sub-district (*corregimiento*). National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Definiciones y explicaciones. 2010. Available at: http://www.contraloria.gob.pa/inec/Publicaciones/00-01-03/definiciones.pdf.

[25] In this respect, in the press release issued by the IACHR after the visit to Panama in June 2001, the IACHR stated that "it notes with satisfaction the legislative progress made in recent years, particularly those initiatives aimed at recognizing the territories of indigenous peoples and their cultural rights, in particular, the laws establishing the regions of Madungandí, Nöbe Buglé, and Kuna de Wargandi...." [IACHR, Press Release 10/01 - End of on site visit to Panama, June 8 2001. para. 35. Available at: http://www.cidh.org/Comunicados/Spanish/2001/10-01.htm]. In addition, the Committee on Economic, Social and Cultural Rights of the United Nations stated: "The Committee notes with appreciation the establishment by Act No. 10 of 1997, Act No. 69 of 1998 and Executive Decree 194 of 1999 of a territorial demarcation (*comarca*) for the Nöbe-Buglé indigenous community, which the Committee had recommended as a result of its 1995 technical assistance mission to Panama." Committee on Economic, Social and Cultural Rights. Consideration of Reports by State Parties under Articles 16 and 17 of the Covenant. Concluding observations. E/C.12/1/Add.64, September 24, 2001, para. 6.

lands and use the natural resources.[26] In contrast to a *comarca*, recognition as a *reserva* does not entail the State granting the community that inhabits it collective property rights to a geographically demarcated and delimited space, or official recognition of their traditional forms of political organization and decision-making.[27]

50. In addition, Article 127 of the Panamanian Constitution – a provision that exists in terms similar to those of the 1946 Constitution[28] -- recognizes the collective property rights of the indigenous communities and establishes that a determination will be made by law of the specific procedures for their recognition. That provision establishes as follows:

> The State shall guarantee the indigenous communities the reserve of the lands necessary and collective property rights to them for the attainment of their economic and social wellbeing. The Law shall regulate the procedures that should be followed for attaining this purpose, and the corresponding delimitations, within which the private appropriation of land is prohibited.

51. On December 23, 2008, Law 72 was adopted; it "establishes the special procedure for the adjudication of the collective property rights of the indigenous peoples who are not in the *comarcas*,"[29] and is regulated by Executive Decree 223 of July 7, 2010. According to Article 1, the purpose of that law is to establish the special procedure for the adjudication, free of charge, of the collective property rights to lands traditionally occupied by the indigenous peoples and communities, in furtherance of Article 127 of the Constitution.[30] The provision establishes the Ministry of Agricultural Development as the competent authority for carrying out that procedure.[31] Law 72 establishes among its provisions that collective title to the property rights over lands guarantees the economic, social, and cultural wellbeing of the persons who live in the indigenous community. It further provides that in case of usurpation or invasion of the lands recognized through the titling of collective property rights, the competent authorities should enforce the property rights over those areas. It also establishes that government and private agencies will coordinate with the traditional authorities regarding the plans, programs, and projects that will be developed in their areas so as to ensure the free, prior, and informed consent of the indigenous peoples and communities.[32]

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[26] In this respect, Article 98 of the General Law on the Environment establishes: "The right of the *comarcas* and indigenous peoples with respect to the use, management, and traditional tapping of the renewable natural resources located within the *comarcas* and indigenous reserves established by law is recognized. These resources should be used in keeping with the aims of environmental protection and conservation established in the Constitution, this statute, and all other national statutes."

[27] Among the statutes that recognize "indigenous reserves" is Law 59 of December 12, 1930, which declares as indigenous reserves "the barren lands in the Atlantic Coast region"; Law 18 of November 8, 1934, which declares indigenous reserves "the barren lands in the Provinces of Bocas del Toro and Panamá"; and Law 20 of January 31, 1957, which declares the Comarca of San Blas and some lands in the province of Darién to be indigenous reserves.

[28] See Article 94 of the 1946 Constitution; Article 116 of the 1972 Constitution; Article 123 of the 1972 Constitution as amended in 1978, 1983, and 1994; and Article 127 of the 1972 Constitution as amended in 2004.

[29] According to information known to the public, Law 72 was not consulted on with the indigenous peoples of Panama.

[30] For the purposes of this Law 72, the following terms shall be understand to have the following meanings:

> 1. Indigenous peoples (*Pueblos indígenas*). Human collectivities that descend from populations that inhabited the country or a geographic region to which the country belonged from the time of the conquest or colonization or establishment of the current boundaries of the state, and who, whatever their legal status, preserve their own social, economic, cultural, linguistic and political institutions.
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> 2. Traditional occupation (*Ocupación tradicional*). Tenure, use, conservation, management, possession, and usufruct of the lands of the indigenous peoples defined in this article, transmitted from generation to generation.

[31] Law 72, Article 4.

[32] See Articles 3, 12, and 14 of Law 72.

52. Subsequently, with the adoption of Law 59, on October 8, 2010, the National Bureau of Agrarian Reform was replaced in its authority by the National Land Management Authority (hereinafter "ANATI": Autoridad Nacional de Administración de Tierras).[33]

53. As regards international instruments, on June 4,1971, the Panamanian State ratified Convention 107 of the International Labor Organization on indigenous and tribal populations (hereinafter "ILO Convention 107"), adopted on June 26, 1957. Panama has not ratified ILO Convention 169 on indigenous and tribal peoples in independent countries (hereinafter "ILO Convention 169") adopted June 27, 1989, and in force since September 5, 1991.

B. The indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, their ancestral territory and mode of subsistence

54. The Bayano Watershed, or Bayano river region occupies a large part of the area of the District of Chepo (Distrito de Chepo), which is located in the province of Panamá, Republic of Panama. This district is divided, in turn, into eight *corregimientos* or sub-districts: Chepo, Cañita, Chepillo, El Llano, Las Margaritas, Santa Cruz de Chinina, Madungandí, and Tortí.[34]

55. The Bayano area is a section of the tropical rainforest ecosystem that extends from the southeastern part of the District of Chepo to the province of Darién, and which reaches into the department of Chocó in Colombia.[35]

1. The Kuna indigenous people of Madungandí

56. The Kuna indigenous people of Madungandí are from the Kuna linguistic group, also called Tule. According to the most recent national census, the Kuna population of Panama numbers 80,526 persons, accounting for 19.28% of the entire indigenous population, making it the second most numerous indigenous group of Panama.[36]

57. Since the 16th century the Kuna have inhabited the Bayano region, in what is today Panama, extending into the territory of Colombia.[37] As a result of Spanish colonization, most of the

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[33] Law 59, of October 8, 2010, "Law that creates the National Land Management Authority, unifies the competences of the General Bureau of Cadastre, the National Bureau of Agrarian Reform, the National Land Management Program, and the 'Tommy Guardia' National Geographic Institute."

[34] According to information provided by the parties, the district of Chepo covers 5,311.2 km^2, of which 3,777.5 km^2 correspond to the Bayano river basin. Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p. 27. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[35] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p. 27. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[36] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, province, indigenous *comarca*, indigenous group to which they belong, and age group. 2010.

[37] Annex 2. Informe Final de la Comisión Nacional de Límites Político-Administrativo sobre la Demarcación Física de la Comarca Kuna de Madungandí de 2000. Annex 3 to the petitioners' Brief of July 13, 2012, received by the IACHR that same day; Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. Annex 51 to the initial petition by the petitioners, May 11, 2000; Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p. 27. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

Kuna displaced to the San Blas archipelago. The group that remained in the area of the Bayano river were called the Kuna of Madungandí.[38] The Kuna population that was displaced to San Blas was recognized as a *comarca* by the Panamanian State by Law 2 of September 16, 1938.[39] The Kuna of Madungandí were not covered by this law.[40]

58. The land inhabited by the Kuna of Madungandí is currently bounded to the north by the Comarca Kuna Yala; to the south by the *corregimiento* de El Llano and the Tierra Colectiva Emberá Piriatí; to the east by the province of Darién; and to the west by the *corregimiento* of Cañitas and El Llano.[41]

59. The Kuna indigenous people of Madungandí are constituted by 12 communities: Akua Yala, Pintupo, Ikanti, Ipeti, Kapandi, Diwarsicua, Dian Wardumad, Kuinubdi, Nargandi, Piría, Arquidi, and Narasgandi.[42] The seat or main population center is situated in the community of Akua Yala. According to the census conducted by the National Institute of Statistics and Census in 2010, the Kuna of Madungandí number 4,271 persons.[43]

60. Traditionally, the Kuna practice slash-and-burn agriculture and a reforestation process that is highly compatible with environmental conservation.[44] Their mode of subsistence is closely linked to their habitat, for they depend on the natural resources they obtain from it.[45] This close relationship with the land is reflected in the Kuna's belief that "the forest is like a mother, and the Indians must live in harmony, like siblings, with all that is within. From the deep woods they get food, materials for housing and the leaves and roots with which their medicine men make potions."[46]

61. The traditional political organization of the Kuna of Madungandí has as its maximum authority a General Congress made up of "*sahilas*" or chiefs of each of the communities that make

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[38] Initial petition of the petitioners of May 11, 2000. p. 2.

[39] Created by Law 2 of September 16, 1938 with the name of "Comarca de San Blas," by Law 16 of February 19, 1953 the Comarca de San Blas was organized; it came to be called "Comarca Kuna Yala" as provided in Law 99 of December 23, 1998, and was declared an indigenous reserve by Law 20 of January 31, 1957.

[40] Annex 4. Atencio López. "Alto Bayano: Cronología de la lucha del pueblo Kuna," Este País, No. 36, 1992. Annex 15 to the petitioners' initial petition of May 11, 2000.

[41] Annex 5. Article 1 of Law 24 of January 12, 1996. Annex 11 to the petitioners' initial petition of May 11, 2000.

[42] Annex 6. Informe Técnico Socio-Económico sobre la Indemnización e Inversión de la Comarca Kuna de Madungandí y de las Tierras Colectivas Emberá Piriati, Ipeti y Maje Cordillera del año 2002. Appendix E to the petitioners' brief of January 19, 2007, received by the IACHR that same day.

[43] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, province, indigenous *comarca*, indigenous group to which they belong, and age group. 2010.

[44] The petitioners, citing an academic research study in this regard, explain this process in the following terms: "[The Kuna] grew plantain and corn as basic products, and fruit as a cash crop. In general, they allowed for the land to lie fallow for five to 10 years, and did not clear portions of the land whose size varied from two to three hectares, and they planted an annual crop, such as corn. Once the corn was harvested the field was not cultivated for some time, to allow the fruit trees and plantains to grow. In this way, the Kuna practiced reforestation as part of the slash-and-burn cycle." **Annex X.** Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama", 26 Westview Press, Boulder, Colorado 1989. p. 33. Annex 51 to the petitioners' original petition of May 11, 2000.

[45] Petitioners' initial petition of May 11, 2000.

[46] Annex 7. Nathaniel Sheppard Jr., Panama Indians Criticize Project As A Road To Ruin. Chicago Tribune, April 16, 1992. Annex 38 to petitioners' initial petition of May 11, 2000. The petitioners describe this relationship in the following terms: "the Kuna ... have a firm tradition and love for the earth, which has guided their whole cosmography." Annex 8. David Carrasco. "Panama: Indigenous Women demand rights & Political Space." Inter Press Service. July 9, 1993. Annex 43 to petitioners' initial petition of May 11, 2000.

up the indigenous people. The representation of the General Congress to the central government and the autonomous entities vests in a Cacique[47], who is elected by the General Congress. In addition, the *sahilas* may form regional congresses for coordination at this level, and local congresses entrusted with the administration of each community.[48]

2. The Emberá Indigenous People of Bayano

62. The Emberá of Bayano are found in the *corregimiento* of El Llano, district of Chepo, province of Panama, in the Republic of Panama.

63. The Emberá constitute a linguistic subgroup of the Chocó indigenous group, which comes from what is today the Colombian State. The second subgroup that derives from the Chocó are the Wounaan, also called Nonamá.[49]

64. According to the census conducted by the National Institute of Statistics and Census in 2010, the total Emberá population in Panama is 31,284, which accounts for 7.5% of the country's indigenous population. At present they constitute the third largest indigenous group of Panama.[50]

65. In the late 17th and early 18th centuries the Emberá and Wounaan migrated from Colombia to what is today Panamanian territory and settled on the banks of the rivers in the present-day province of Darién, in Panama. In the early 19th century a part of the Emberá group moved to the region of Bayano[51], situating themselves along the river, with a principal village called Majecito.[52] The Emberá and Wounaan who remained in the region of Darién were recognized by the

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[47] Annex 9. Doctoral thesis of Peter H. Herlihy entitled "Geografía cultural de los indígenas Emberá y Wounan (Choco) del Darién, Panamá, con énfasis en la formulación reciente de aldeas y la diversificación económica," of 1986. Annex 1 to petitioners' initial petition of May 11, 2000.

[48] Law 24, Articles 4 to 7; and Executive Decree 228, Articles 6 to 29.

[49] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. pp. 59-60. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. See also, Reina Torres de Araúz. "Cunas (Tules)." In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. p. 192.

[50] National Institute of Statistics and Census. Resultados Finales del XI Censo de Población y VII de Vivienda. Table 20: Indigenous population in the Republic, by sex, province, indigenous *comarca*, indigenous group to which they belong, and age group. 2010.

[51] Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. Annex 51 to petitioners' initial petition of May 11, 2000. This migration is explained as follows: "Those who have studied the phenomenon agree that in these same years the migratory flow of black Colombians from the Chocó to the Darién was on the rise, and likewise of peasants from western Panama, displaced in turn by the plantation crops and ranchers. The pressure brought to bear by these two human groups on the lands occupied by the indigenous probably sparked another response: '…as they lacked title, the indigenous did not have any more resources than to yield and to go look for new lands elsewhere…,', but we consider equally valid to postulate that the Chocóes, in a defensive posture on the part of this ethnic group, opted to seek new areas where they could maintain their traditional lifestyle. And so Emberá-speaking families began to situate themselves in the basin of the Bayano river and Wounaan-speaking groups relocated in the district of Chimán in the province of Panamá (*sic*)". Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 89. Annex C to the petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009.

[52] According to a study by the Bureau of Settlement of the Bayano Integral Development Project, done in 1973, the Chocó living in the Bayano river basin numbered 623 persons, who constituted 115 families. Specifically, it notes that as of 1973, there were in all 152 persons in the village of Majecito, in the Bayano River. **Annex X**. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. p.p. 91-92. Annex C to the petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009. In addition, in the public hearing before the IACHR, expert Ultiminio Cabrera Chanapi indicated: "Before the Bayano hydroelectric dam was built, the Emberá people of the Alto Bayano … were all around the river, from the

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State as a *comarca* by Law 22 of November 8, 1983.[53] The Emberá who remained in the Bayano zone were not included in this law.

66. The Emberá of Alto Bayano are presently organized in four communities: Ipetí Emberá, Piriatí Emberá, Maje Emberá, and Unión Emberá.[54] The land the Emberá of Bayano currently occupy is bounded to the north by the Pan American Highway, to the south by settlers' lands, to the east it follows the course of the Ipetí river to its headwaters, and to the west it follows the course of the Curtí river and borders on the perimeter of the lands of the Kuna indigenous people of Madungandí.[55]

67. The Emberá are traditionally given to farming, especially growing plantain, corn, and rice. They also hunt and fish.[56] For this group the wood provided by their jungle surroundings is one of the most important elements, for: "Of wood are made the dwellings and much of the furniture, the artisanal sugar crushers and mortars called '*pilón*' and the '*mano de pilón*' are used to hull the rice and grinding the corn. Balsam wood is used for the ritual staffs of the healer and for the anthropomorphic and zoomorphic figures for the same purpose."[57]

68. As a subgroup of the Chocó, the Emberá were traditionally known as a group that lacked a well-defined political organization and with a habitat in dispersed dwellings. Beginning in 1968, when the first National Indigenous Congress was held in Alto de Jesús, in Veraguas, the Chocó decided to adopt the Kuna model of organization and selected the first Emberá caciques.[58]

69. The current political-administrative structure consists mainly of the Emberá General Congress of Alto Bayano, considered the maximum Emberá authority, which has the legislative function; the Caciques Generales, or Caciques General, considered the leading Emberá political and administrative authorities, whose functions are to coordinate all the economic, social, and political activities to the benefit of the communities and to represent the Emberá people before the

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source to the mouth, they occupied the fertile territories ... there were [communities] in Río Diablito, there was one in Majecito, in Río Piragua, and along all the tributaries of the Bayano river." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi. See hearing at http://www.oas.org/es/cidh/.

[53] The Emberá-Wounaan Comarca was established by Law 22 of November 8, 1983; the Administrative Organic Charter of the Comarca was adopted by Executive Decree 84 of April 9, 1999.

[54] Petitioners' brief of May 25, 2011, received by the IACHR on May 31, 2011; and the petitioners' brief of May 16, 2012, received by the IACHR that same day.

[55] Brief of additional observations on the merits by the petitioners, received by the IACHR on December 18, 2009. In addition, Annex 10. Technical report "Gira de campo para la revisión de la propuesta de Tierras Colectivas en la provincia de Darién, Distrito de Chepigana, corregimientos de Santa Fe y la Provincia de Panamá, Distrito de Chepo, corregimiento de Tortí; según ley 72 de 23 de diciembre de 2008." Annex, State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[56] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. pp. 66-67. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[57] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 68. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[58] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 81. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Also in: Reina Torres de Araúz. "Cunas (Tules)." In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. pp. 239-240.

government and private institutions; and the Nocoes or local leaders, who represent the cacique in each community, and lead the activities in their respective communities.[59]

3. The non-indigenous population or "settlers" ("*colonos*") in Bayano

70. At the time of the relocation or move of the Kuna indigenous people of Madungandí and the Emberá of the Bayano, due to the construction of the hydroelectric complex, there were a few settlers in the Bayano region who reached compensation agreements with the State because they also had to move. After the construction of the hydroelectric dam and with the construction of the Pan American Highway, the number of settlers in the zone increased considerably.[60] Given the difference between the hunter and fisher way of life of the indigenous communities and the extensive practice of the peasants, who replace forest with pasture, expanding the agricultural frontier and degrading their natural habitat, conflicts and tensions have emerged over the use of the land and access to natural resources.[61] One of the main problems pointed out by the petitioners is the appropriation of lands by the settlers.[62] The settlers have formed the peasant communities of Wacuco, Curtí, and Loma Bonita, and are organized in the Federación de Trabajadores Agrícolas.[63]

C. Situation of the collective property rights of the Kuna Indigenous People of Madungandí and the Emberá of Bayano

1. Creation of the Indigenous Reserve of Upper Bayano, and the Comarca of Bayano and Darién (1930-1952)

71. In the early 1930s the Kuna situated in the Bayano basin carried out the first actions aimed at delimiting and recognizing their territory. According to the information presented by the parties, at the request of members of the indigenous people, in 1932 the government sent a surveyor to take the first measurements of the geographic space occupied by the Kuna.[64] The description of the expedition is in the record before the IACHR. It indicates that:

> For the purpose of measuring the lands that must be conserved as a reserve for the indigenous of the Bayano river and its tributaries, an arrangement was made with the chiefs (*ságuilas*) of the regions of Pintupo, Piriá, and Cañazas, by which the indigenous mentioned should contribute with the sum of One thousand five hundred balboas in cash (B/. 1,500.00) to the expenses incurred in the expedition by the topographic surveyors that the Government was going to send to those places. The obligations of the indigenous also included supplying

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[59] Reina Torres de Araúz. "Chocoes (Enberá y Wounaan)". In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. pp. 239-240. Citing a document by the Ministry of Justice and Interior. 1967. Unpublished. Also in: State's brief of October 3, 2011, received by the IACHR October 4, 2011; and State's brief of May 14, 2012, received by the IACHR that same day.

[60] Petitioners' initial petition of May 11, 2000.

[61] Petitioners' initial petition of May 11, 2000. The members of the indigenous communities describe this practice as "devastation" ("*devastación*"), which in their words entails "clearing everything, felling the forest, the mountain, and then burning … and establishing themselves as owners, appropriating the land for themselves." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and the Emberá General Congress of Alto Bayano.

[62] Petitioners' initial petition of May 11, 2000; Brief of additional observations on the merits by the petitioners, received by the IACHR on December, 18, 2009.

[63] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to the petitioners' initial petition of May 11, 2000. p. 3.

[64] Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. p. 31. Annex 51 to petitioners' initial petition of May 11, 2000.

> food to all the members of the expedition and to clear the necessary dirt roads. The Government, for its part, had to contribute one thousand balboas (B/.1,000.00).
> On September 5, 1932, the Government communicated [illegible] Antonio Henríquez who had been designated chief of the commission that was to go to Bayano, district of Chepo, to take the measurements and [illegible] of the lands that are occupied by the indigenous tribes of that region, for whose work [illegible] the sum of B/. 290.90 monthly. [illegible] The measurement was to be 75 hectares for each head of family.
>
> On October 3 of the same year Mr. Henríquez was replaced by surveyor Blas Humberto D'Anello. In December I was asked by Mr. José E. [illegible] undersecretary of Agriculture and Public Works, that from that point I deal with Mr. D'Anello in relation to the work he was carrying out in the lands of Bayano and then, after I met with him, and with some chiefs and other indigenous persons, I drew up the following itinerary for him:
>
> Due to numerous difficulties and problems the Government was forced to increase by B/. [illegible] the sum of One thousand balboas that it had already spent for salaries and other expedition expenses. Mr. D'Anello and his helpers returned to Panama definitively in the middle of this year without having been able to close off the polygon on the piece of land; but the largest part of the perimeter was surveyed and today it is being drawn by the Technical Office of the Secretariat of Agriculture and Public Works by the same Mr. D'Anello[65].

72. On November 18, 1934, Law 18 on Indigenous Reserves was adopted, by which the State of Panama declared the Upper Bayano region to be an indigenous reserve ("*reserva indígena*"). That law provided as follows:

> ARTICLE 1: The barren lands in the following places in the Provinces of Bocas del Toro and Panamá are hereby declared indigenous reserves: ...
>
> Indigenous Region of Alto Bayano: The barren lands inhabited by the indigenous tribes of Maje, Pintupo, Piria, and Cañazas, in keeping with the official map drawn up in October 1932 by Official Surveyor Mr. Blas Humberto D'Anello, whose map bears the order number B 6-442, in the Archive of the Secretariat of the Public institution.
>
> ARTICLE 2: The lands addressed in the previous articles shall be possessed in common by the indigenous tribes who inhabit them and may not be sold or leased.
>
> ARTICLE 3: The Executive Branch is obligated to declare non-adjudicable an area in each of the Provinces of the Republic where there are Indian tribes and shall set them aside as indigenous reserves for them to work on them free of charge [*sic*][66].

73. The IACHR observes that as the text of the law indicates, the characterization of Upper Bayano as an "indigenous reserve" was based on the measurement work done in 1932 by surveyor Blas Humberto D'Anello, to whom the description of the expedition makes reference.

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[65] Annex 12. Annex 7 to petitioners' initial petition of May 11, 2000. The petitioners also filed academic articles in which reference is made to the same facts: "By 1931 an engineer had been sent to survey the land and mark out the boundaries of the reservation. The boundaries were marked out according to natural markers, such as rivers, tributaries of the Bayano, hills, or particular trees. A map was made out of the region based on the survey and finally, in 1935, a path was cleared to mark the reserve boundary. The collective Kuna community contributed labor, money and material to the delimitation of the work and they contributed labor to clear the trail. Additionally, according to a written history of the events preserved by the Kuna in their archives, the Kuna communities spent over $15,000 for the work." Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama", 26 Westview Press, Boulder, Colorado 1989. p. 31. Annex 51 to the petitioners' initial petition of May 11, 2000.

[66] Law 18, of November 18, 1934. Annex 7 of petitioners' initial petition of May 11, 2000; and Annex 1 to the communication from the State of June 29, 2001. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1930/1934/1934_092_0285.PDF.

According to information produced by the parties and other sources of public knowledge, the area of the Indigenous Reserve of the Upper Bayano was from 87,000 to 87,321 hectares.[67]

74. In addition, the IACHR finds that by Article 2 of that law, the Panamanian State granted the indigenous peoples who lived in the reserve the right to common possession of the lands, which could not be alienated or leased.

75. On February 14, 1952, the National Assembly of Panama passed Law 18, "by which Article 94 of the National Constitution is developed and other measures are issued."[68] By this law the State ordered the creation of four *comarcas*, including the "Comarca of Bayano and Darién." In addition, territories by which each *comarca* would be constituted were established. That law specifically provided as follows:

> Article 2: For administrative purposes, the regions occupied at present by the indigenous tribes shall be divided into four *Comarcas* thusly:
> Comarca of San Blas,
> Comarca of Bayano and the Darién,
> Comarca of Tabasará, and
> Comarca of Bocas del Toro
> Article 3: The Comarca of San Blas shall be made up of the indigenous reserves of San Blas.
> The Comarca of Bayano and the Darién shall include those regions currently occupied by the Nagandí and Chocó tribes and the indigenous reserve of Bayano.
> The Comarca of Tabasará shall be constituted by the regions occupied at present by the principal groups of the tribe of the Guaymíes in the Provinces of Veraguas and Chiriquí....
> The Comarca of Bocas del Toro shall be constituted by the indigenous reserves of the Province of Bocas del Toro.
> The physical boundaries of these Comarcas shall be set when the geodesic work currently under way is completed.

76. Accordingly, included in the Comarca of Bayano and Darién were the Kuna indigenous peoples who constituted the Indigenous Reserve of Bayano and the Chocó who inhabited the zone, a group to which the Emberá belong.[69] According to the information produced by the parties, the Reserve of Bayano and Darién occupied precisely the lands where the reservoir formed by the hydroelectric dam would sit.[70] Nonetheless, despite Law 18 the Comarca of Bayano and Darién was not constituted.

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[67] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. pp. 20-21; Annex 13. Report and Recommendation of the Inter-governmental Commission. Annex 21 of the communication from the State of June 29, 2001. In addition, academic documents make reference to an expansion of nearly 87,000 hectares. Reina Torres de Araúz. "Cunas (Tules)." In: *Panamá indígena*. Panama City: Panama Canal Authority. 1999. p. 174; Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 32. Annex C to the petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009; State's Brief of May 14, 2012, received by the IACHR on the same day; and Annex 2. Informe Final de la Comisión Nacional de Límites Político-Administrativo sobre la Demarcación Física de la Comarca Kuna de Madungandí de 2000. Annex 3 to the petitioner's brief of July 13, 2012, received by the IACHR the same day.

[68] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 21. p. 20; and Report and Recommendation of the Inter-governmental Commission. Annex 21 to the State's communication of June 29, 2001.

[69] Annex 2. Informe Final de la Comisión Nacional de Límites Político-Administrativo sobre la Demarcación Física de la Comarca Kuna de Madungandí de 2000. p. 1. Annex 3 to the Petitioner's brief of July 13, 2012, received by the IACHR the same day.

[70] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 46. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

2. Construction of the Bayano Hydroelectric Complex and the Pan American Highway; Agreements of Farallón, Cimarrón, and Majecito (1963-1979)

77. In 1963 the Panamanian State proposed the construction of a hydroelectric dam in the region of the Bayano, also called Ascanio Villalaz Hydroelectric Complex or Bayano Hydroelectric Complex. The construction of the hydroelectric facility was to entail the creation of an artificial lake in the area of the Bayano[71], consisting of the construction of a concrete dam at the intersection of the Cañitas and Bayano rivers, which created a reservoir that would cover approximately 350 km^2 at the surface.[72]

78. To carry out the project, on May 8, 1969, the State adopted Cabinet Decree 123. The IACHR observes that the considering paragraphs of this decree indicates, in part: "That due to the construction of the Bayano River Project part of the present-day Indigenous Reserve, in the Upper Bayano, will be flooded by the reservoir" and "[t]hat it is a duty of the State to provide the necessary area for the relocation of the inhabitants of said reserve evicted due to the construction of the dam."[73] Specifically, Article 1 of Cabinet Decree 123 provided as follows:

> Article one: The area necessary for the hydroelectric reserve of the Bayano Hydroelectric Project is hereby established as the area included in the polygon that appears in Map No. PB-T-02-67 of non-adjudicable areas of Bayano and whose description is as follows [sic]: Starting from point No. 1, whose approximate coordinated referring to the Universal Transverse Mercator Grid (zone 17), Datum NA of 1927, are: North: 1,009.073 km and East: 731.286 km. One continues to the true North for a distance of 10.9 km until reaching point No. 2, whose coordinates are: North, 1,019.970 km and East 731.286 km.; from this point to true East and a distance of 5.4 km one reaches point No. 3, whose coordinates are: North 1,019.970 km, East 736.678 km, from this point to true North and a distance of 4.9 km until reaching point No. 4, whose coordinates are: North 1,024.868 km and East 736.678 km; from here and to the true East and a distance of 29.7 km one reaches point No. 5, whose coordinates are: North 1,024.868 km and East 766.343 km; to the true South and a distance of 8.0 km one reaches point No. 6, whose coordinates are: North 1,016.866 km and East 766.343 km; to the true East and a distance of 8.6 km one reaches point No. 7, whose coordinates are: North 1,016.866 km and East 774.983 km; to the South 45°00'00'' East and a distance of 19.9 km one reaches point No. 8, whose coordinates are: North 1,002.792 km and East 789.028 km; to the South 45°00'00'' West and a distance of 18.5 km, until reaching point No. 9, whose coordinates are: North 989.708 km and East 775.923 km; from here North 45°00'00'' West and a distance of 18.3 km until reaching point No. 10, whose coordinates are: North 1,002.641 km and East 762.960 km from here to the true West and a distance of 25.2 km until reaching point No. 11, whose coordinates are: North 1,002.641 km and East 737.731 km to North 45°00'00'' West and a distance of 9.1 km until reaching point No. 1, that is the starting point, whose coordinates were stated above. The area within the polygon has been described as 1,124.24 km^2.

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[71] Annex 16. Alaka Wali, "The Transformation of a Frontier: State and Regional Relationships in Panama, 1972-1990." Human Organization, Vol. 52, No. 2 (1994). Annex 16 to petitioners' initial petition of May 11, 2000. Petitioners' initial petition of May 11, 2000. p. 3; and Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama," 26 Westview Press, Boulder, Colorado 1989. p. 50. Annex 51 to petitioners' initial petition of May 11, 2000.

[72] Petitioners' initial petition of May 11, 2000. p. 10; and State's brief of March 24, 2011, received March 25, 2011.

[73] Annex 14. Cabinet Decree 123, May 8, 1969. Annex 8 to petitioners' initial petition of May 11, 2000; and Annex 2 to the communication from the State of June 29, 2001.

79. The IACHR observes that by means of that article, the State alienated an area of 1,124.24 km^2, belonging to the "non-adjudicable areas of the Bayano," to set them aside for construction of the Hydroelectric Complex of the Bayano. In compensation for the dispossession of their ancestral territories, Articles 2 and 3 of Cabinet Decree 123 provided for granting new lands, which were declared non-adjudicable. Those provisions established as follows:

> Article two: The lands adjacent to the current Bayano Indigenous Reserve, between the boundaries of said Reserve and those of the Polygon described in Article One of this Decree, are hereby declared non-adjudicable. The area whose non-adjudicability is established in this Article is 457.11 km^2.
>
> Article three: Also declared non-adjudicable is the area situated to the East of the current Bayano Indigenous Reserve between the Bayano and Cañazas rivers, described next:
>
> Starting from point "A" in the town of Piriá, one follows along the Bayano river for a distance of approximately 45.33 km upriver to its source in the Serranía de San Blas, along the boundary between the Province of Panamá and the Comarca of San Blas, a point that is called "B"; from here one follows to the southeast along the continental divide of waters that constitutes that boundary, for a distance of approximately 14.48 km until reaching point "C," which is the interception of the boundaries of the Province of Panamá, the Comarca of San Blas, and the Province of Darién; from here one follows southward along the political boundary between Panamá and Darién, for a distance of approximately 21.33 km to the source of the Cañazas river, a point that is called "D"; from here one follows westward along the Cañazas river, downriver, for a distance of 19.91 km until reaching point "E" where this river intercepts the boundary of the current Bayano Indigenous Reserve and finally along the boundary of the Reserve, to the Northwest for a distance of approximately 23.28 until reaching the town of Piriá, point "A," which was the starting point. The area included in the zone that has been described is 426.33 km^2.
>
> Paragraph: The purpose of the non-adjudicability of these lands is to compensate for the area of the current Indigenous Reserve that will be flooded by the reservoir of the Bayano Hydroelectric Project.[74]

80. The IACHR calls attention to the last paragraph quoted, for it shows that the indigenous communities that were relocated due to the hydroelectric project of the Bayano were in effect within the Alto Bayano Indigenous Reserve.[75] Accordingly, the IACHR considers as proven that the Ascanio Villalaz Hydroelectric Project entailed the dispossession of the territories that were occupied by the Kuna indigenous people of Madungandí and the Emberá of Bayano, their transfer to new lands, and the subsequent flooding of their ancestral territories.[76]

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[74] Annex 14. Cabinet Decree 123, of May 8, 1969. Other relevant provisions of this decree include Article 5, which provides "The rights of the owners of lands duly registered in the Public Registry and who are in the areas declared non-adjudicable shall be recognized, with the limitations contained in the Law"; and Article 6, which establishes: "The implementation of soil conservation practices and the rational exploitation of forests is obligatory throughout the Bayano river basin."

[75] Similarly, the considering paragraphs of Cabinet Decree 156, of July 8, 1971, to which reference will be made subsequently, expressly recognize that "the indigenous groups who inhabit the current Bayano Indigenous Reserve shall have to abandon the lands they occupy due to the execution of the works of the Bayano Hydroelectric Project." In addition, it is noted that "these groups shall have to be situated in the areas established as non-adjudicable by Cabinet Decree 128 of May 8, 1969, in compensation for the area of the current indigenous reserve, which shall be flooded [sic]." Annex 15. Considering paragraphs of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[76] In addition to the text of Cabinet Decrees 123 and 156, in briefs filed in the proceeding before the IACHR the State made express reference to these facts. In this respect, it noted that "with the construction of the Ascanio Villalaz Hydroelectric Complex, 12 communities were resettled in the region of the Kuna Comarca of Madungandí" [State's brief of September 26, 2011, received by the IACHR September 27, 2011]. It also indicated that "The Emberá, with the construction of the Ascanio Villalaz Hydroelectric Complex, were resettled." [State's brief of September 26, 2011, received by the IACHR

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81. According to the information before the IACHR, in 1969 representatives of the Panamanian State – in particular Head of Government General Omar Torrijos Herrera[77] -- held meetings with authorities of the Kuna of Madungandí and some members of the Emberá communities situated in the Bayano watershed[78], in which he told them that they had to abandon the territories they were occupying. In exchange, he offered to grant them and give them title to new lands, of better quality and larger in extent; and the payment of economic compensation for the loss of lands, crops, and animals.[79]According to the information produced by the parties, the alleged victims were not informed in a manner and language that they understood of the consequences of the construction of the hydroelectric project in the Bayano region.[80]

82. As a result of the foregoing, the State agreed to pay economic compensation to the indigenous communities who would have to "abandon the lands they occupy due to the works of the Hydroelectric Project of the Bayano."[81] To this end, Cabinet Decree 156 of July 8, 1971, was promulgated, by which the State established a Special Fund for Compensation to help the Indigenous of Bayano.[82] The IACHR notes, in relation to the reason why the payment of economic

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September 27, 2011]. Other sources make reference to the displacement of 2,000 Kuna individuals and 500 Emberá individuals. Annex 16. Alaka Wali, "The Transformation of a Frontier: State and Regional Relationships in Panama, 1972-1990." Human Organization, Vol. 52, No. 2 (1994). Annex 16 to petitioners' initial petition of May 11, 2000; and State's brief of March 24, 2011, received March 25, 2011.

[77] IACHR, Public hearing, March 23, 2012 sobre "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Manuel Pérez, General Cacique of the General Congress of the Kuna Comarca of Madungandí. See hearing at http://www.oas.org/es/cidh/.

[78] In his expert testimony, Ultiminio Cabrera Chanapi noted in this regard that: "... [There were] individual consultations only of those families that could have access to a conversation with General Torrijos Herrera and perhaps compensation for those who were consulted at that moment. Yet many families disappeared from the Bayano river basin.... As there was no consultation with the communities under any leadership of the communities, under several leaderships, because the river is extensive and the families were scattered throughout the Bayano river basin." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi.

[79] Petitioners' initial petition of May 11, 2000. p. 11; and State's brief of June 29, 2001. p. 2. In the hearing before the IACHR, expert Ultiminio Cabrera Chanapi noted that: "... the consultation was only, OK, you want to occupy another territory because we are going to give you other lands of better quality and greater extent. That was the question at that time, but they did not say for sure what the consequences of that relocation would be, if they were going to offer us quality lands for production or whether they were going to displace settlers in the vicinity, it was only indicating that they were going to guarantee lands for you. That they were going to pay you compensation, that they would build schools, dwellings." IACHR, Public hearing, March 23, 2012 sobre "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi. See hearing at http://www.oas.org/es/cidh/.

[80] Bolívar Jaripio Garabato, a member of the Emberá community of Piriatí, describes the process as follows: "... at that moment when our people, our family, were forcibly evicted, because prior to that there was no consultation for the indigenous peoples. Although there is talk of agreements, as our ancestors were not on top of, were not people with an education, at that moment they took it to clear it, to do as they wished, to displace from that place.... I would sit down with my grandfather who was a cacique, he was present at that moment and he would say that the people are making it look good, my grandfather did not know how to read or write, they told him you are going to have a right to your land and no one is going to bother you, no one will take your lands from you. For that reason, as my father did not know how to read or write, they would say the government is offering us this, so in a meeting they said we can move, but no, they have not followed through on this." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. See hearing at http://www.oas.org/es/cidh/.

[81] Annex 15. Second considering paragraph of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[82] In particular, the first article provided as follows: "Hereby established within the Forestry Fund of the State shall be a Special Fund for Compensation and Assistance for the indigenous peoples who inhabit the area within the current
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compensation was established, that the fourth considering paragraph of that decree established: "The move to new areas implies for the indigenous great efforts, accompanied by considerable economic outlays, all of which justifies, for reasons of humanity, the assistance that the State agrees upon to benefit them."[83]

83. According to Article 2 of Cabinet Decree 156, the Special Fund would be constituted by 30% of the total revenues of the State Forestry Fund (Fondo Forestal del Estado), as of January 1, 1971, and by those that come in as of the promulgation of said Decree and for the three subsequent years. These revenues would be obtained from the permits or concessions granted by the Forestry Service of the Ministry of Agriculture for the extraction of timber in the area of the Indigenous Reserve of Bayano.[84] As for the conditions in which the payment must be made, Article 3 established that the Forestry Service of the Ministry of Agriculture would deliver the corresponding amount to the officially recognized representatives of the indigenous every six months, beginning on June 30, 1971.[85]

84. In addition, the State made a commitment to the Kuna of Madungandí and the Emberá of Bayano to grant individual monetary compensation that would cover the crops lost and the burden of relocation. The payment was to be made monthly for three years.[86]

85. In 1972 the State initiated the construction of the Bayano Hydroelectric Complex, which culminated on March 16, 1976.[87] In March 1973, when the construction was already under way, the Institute of Hydraulic Resources and Electrification (hereinafter "IRHE") created an emergency project for the Bayano, temporary in nature, for the purpose of "keeping the residents of the basin from leaving in a disorderly and uncontrolled manner when the moment of the flooding arrives."[88]

86. Once construction of the hydroelectric dam began, the residents were opposed to leaving the zone.[89] To address this situation, the State created the Bayano Integral Development

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Indigenous Reserve of Bayano and within the areas declared non-adjudicable by Cabinet Decree 123 of May, 1969" [sic]. Annex 15. Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[83] Annex 15. Considering paragraphs of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[84] Annex 15. Article 2 of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[85] Annex 15. Article 3 of Cabinet Decree 156 of July 8, 1971. Annex 10 to petitioners' initial petition of May 11, 2000; and Annex 3 to the State's communication of June 29, 2001.

[86] Annex 3. Alaka Wali, "Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama", 26 Westview Press, Boulder, Colorado 1989. Annex 51 to petitioners' initial petition of May 11, 2000. Annex 17. Sworn statement by the Kuna caciques. Annex 17 to petitioners' initial petition of May 11, 2000. Annex 6. Informe Técnico Socio-Económico sobre la Indemnización e Inversión de la Comarca Kuna de Madungandí y de las Tierras Colectivas Emberá Piriatí, Ipetí y Maje Cordillera de 2002. Annex E to petitioners' brief of January 19, 2007, received by the IACHR the same day.

[87] Petitioners' initial petition of May 11, 2000. pp. 11 and 16. Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 37. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR December 18, 2009; State's brief of March 24, 2011, received March 25, 2011.

[88] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 40. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[89] Expert Ultiminio Cabrera Chanapi stated: "The indigenous communities had no recourse but to relocate since the water was already rising, and there was nothing they could do but relocate to another site." IACHR, Public hearing, March

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Project, by Decree No. 112 of November 15, 1973.[90] As regards the indigenous peoples who were living in the area, Article 5(b) of that decree provided: "Carry out the transfer and relocation of the communities situated in the areas of the reservoir in the critical areas of the basin and other special areas that require maintaining a protective plant cover [*sic*]."[91]

87. From 1973 to 1975 the Kuna and Emberá peoples of Bayano were moved.[92] The IACHR notes that the resettlement process occurred as of 1973, when execution of the project had already begun.

88. The Kuna people of Madungandí were relocated in the non-flooded parts of the indigenous reserve. According to the information in the record before the IACHR, the State entered into two agreements with the traditional authorities of the Kuna indigenous people of Madungandí: the Agreement of Farallón of 1976 and the Agreement of Fuerte Cimarrón of 1977. The first was signed on October 29, 1976 by the Head of Government Omar Torrijos and authorized representatives of the Kuna people. This agreement established, among other points, that:

> 1. The National Government undertakes to demarcate the reserve and relocate the settlers and the Chocó Indians found in the area, which is prejudicial to Kunas; this relocation shall be done after consultation with the groups affected.
> The sites, which shall be islets and which will constitute the waters of the dam shall not be used without the prior consent of the Kunas.[93]

89. With respect to this article, the State alleged in the procedure before the IACHR that "it constituted a binding legal instrument by which the Government of the Republic of Panama undertook vis-à-vis the Kuna of Bayano to demarcate the land and relocate the settlers, among other points."[94] The IACHR considers it proven that at least since 1976 the State undertook expressly

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23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi. See hearing at http://www.oas.org/es/cidh/.

[90] Article 1 of Decree No. 112. "The project for the Development of the Bayano is hereby created, subject to the oversight and inspection of the Executive branch through the Ministry of Agricultural Development and the Ministry of Planning and Economic Policy, based in the population of Chepo. The Office of the Comptroller of the Republic shall perform the functions of oversight and control that the Constitution and laws establish. Decree 112 of November 15, 1973, *Official Gazette* No. 17,621 of June 24, 1974. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_026_2085.PDF. With respect to the creation of the Bayano Integral Development Project, in documentary evidence introduced into the record it is noted that: "In the face of the human situation and the urgency of performing the ecological studies and delimiting the area of protection of the lake, etc., the Government, in mid-1973, created the Bayano Integral Development Project." Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una Comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 40. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[91] Decree 112 of November 15, 1973, *Official Gazette* No. 17,621 of June 24, 1974. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_026_2085.PDF. Annex 4. Atencio López. "Alto Bayano: cronología de la lucha del pueblo Kuna," Este País, No. 36, 1992. Annex 15 to petitioners' initial petition of May 11, 2000.

[92] Petitioners' initial petition of May 11, 2000; and State's brief of March 24, 2011, received March 25, 2011.

[93] The Agreement of Farallón sets forth more specific commitments regarding the re-evaluation of the logging permits left for the Kuna (point 2), the commitment to bring drinking water to the communities (point 3), cancellation of any hunting permits (point 4), creation of a forestry and hunting police appointed by mutual agreement between the Head of Government and the Kuna caciques (point 7), and the construction of a health center (point 8). Annex 18. Agreement of Farallón of October 29, 1976. Annex 13 to petitioners' initial petition of May 11, 2000; and Annex 6 to the State's communication of June 29, 2001.

[94] State's brief of September 26, 2011, received by the IACHR September 27, 2011.

and irrefutably to demarcate the lands of the Kuna of Madungandí and to remove all other occupants on these lands.

90. In order to carry out the terms of the Agreement of Farallón, on January 29, 1977, the Agreement of Fuerte Cimarrón was signed by representatives of the Corporación del Bayano, the National Guard, and representatives of the Kuna people of Madungandí.[95] Point 2 of that Agreement established a new timetable for payment to bring up to date the commitments in arrears to pay compensation and build dwellings.[96] In addition, at point 5, the Corporación del Bayano undertook to recognize a sum of money to be paid to the indigenous communities for the extraction of timber.[97]

91. For their part, the Emberá communities who live in Bayano were transferred to near the Membrillo river, in the Darién region.[98] Nonetheless, this initial settlement proved inadequate, thus they were relocated to two villages, Ipetí and Piriatí, in the district of Chepo, province of Panamá. On February 5, 1975, the Agreement of Majecito was signed by which their relocation to these two new localities was recognized.[99]

92. Once construction of the hydroelectric facility was completed, the Panamanian State promulgated Law 93 of December 22, 1976, which created the "Corporación para el Desarrollo Integral del Bayano" (hereinafter "the Corporación del Bayano" or "the Corporation"), a wholly state-owned enterprise established to administer the hydroelectric complex.[100] Article 14 of that law provided that the Corporación del Bayano would subrogate the Bayano Integral Development Project

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[95] Annex 19. Agreement of Fuerte Cimarrón, January 29, 1977. Annex 12 to petitioners' initial petition of May 11, 2000.

[96] Article 2 of the Agreement of Fuerte Cimarrón. "The Corporación Bayano undertakes and the Indigenous Representatives accept the following program of payment for updating the commitments in arrears in terms of compensation and construction of housing. February (pay the months of September and October), March (pay the months of November and December), April (pay the months of January and February 1977), May (pay the months of March and April)." **Annex X.** Agreement of Fuerte Cimarrón, January 29, 1977. Annex 12 to petitioners' initial petition of May 11, 2000.

[97] Article 5 of the Agreement of Fuerte Cimarrón. "The Corporación Bayano undertakes to recognize a sum of money for the indigenous communities for the extraction of timber. This percentage shall be established mindful of the interests and investments of the Corporación Bayano and the interests of the indigenous communities. The Kuna leaders of Alto Bayano shall designate a representative to coordinate with the Bureau of Planning and Finance of the Corporation the amount of this sum [sic]." Annex 19. Agreement of Fuerte Cimarrón, January 29, 1977. Annex 12 to petitioners' initial petition of May 11, 2000.

[98] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica." Universidad Veracruzana, School of Anthropology, 1994. Annex C to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 20. Final Report of Conclusions and Action Plan from the Mesa de Concertación of the Bayano Zone of August 25, 1999. p. 5. Annex 32 to petitioners' initial petition of May 11, 2000 and Annex 20 to the State's communication of June 29, 2001; and Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000.

[99] According to information produced by the parties: "It was up to the IRHE [Institute of Hydraulic Resources and Electrification], together with the Corporación para el Desarrollo Integral de Bayano, to demarcate the lands for the Emberá, assigning to the community of Piriatí 2,650 hectares, and to the community of Ipetí, 2,490 hectares, lands that are situated alongside the Pan American Highway." Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 8; and Annex 20. Final Report of Conclusions and Action Plan of the Mesa de Concertación of the Bayano Zone of August 25, 1999. p. 5. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[100] Article 1 of Law 93 of December 22, 1976. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1976/1976_025_1251.PDF.

in all its rights and obligations.[101] With regard to the assets of the Corporation, Article 16 of Law 93, of December 22, 1976, established as follows:

> Article 16. Decree No. 123 of May 8, 1969 is hereby derogated, and all the lands upriver from the dam site, lands which constitute the Bayano River Watershed, are set aside as a forest area, and become part of the assets of the Corporación para el Desarrollo Integral del Bayano, with the exception of the lands earmarked for Indigenous Reserves.[102]

93. In the early 1970s the State decided to build a section of the Pan American Highway, the system of roads that was seeking to connect all the Americas. Specifically, it was proposed that the section between the bridge over the Cañitas river, in the district of Chepo, province of Panamá, to the border with Colombia be built. For this reason, Law 71 of September 20, 1973, was issued; it was amended by Law 53 of September 1, 1978. These provisions established the following:

> Article 1. The construction of the section of the Pan American Highway from the bridge over the Cañitas river in the District of Chepo, Province of Panamá and the border with the Republic of Colombia, is hereby declared to be of urgent social interest, as well as the use of the stable lands within a strip of eight (8 km) kilometers wide on each side of the central line of that highway....
> Article 4. The Executive Organ, consistent with the needs of public or social utility or based on the socioeconomic development projects, may regulate the adjudication of the lands within the zone described in Article 1 which are at present State property. Until such time as the Executive Organ issues the regulation referred to in this article, the adjudication shall be governed by the provisions.[103]

94. The IACHR observes that while the indigenous peoples were transferred to new lands, in subsequent years the State did not legally acknowledge their collective property rights nor did it physically delimit their territory. These factors plus the migration of peasants attracted by the construction of the Pan American Highway gave rise to the invasion of non-indigenous persons in the territories on which the alleged victims had been relocated.[104] In addition, according to the information presented by the parties, despite the promulgation of Cabinet Decree 156 the State did not effectively pay the total economic compensation agreed upon, but unilaterally halted those payments.[105]

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[101] Article 14 of Law 93 of December 22, 1976. "The Corporación para el Desarrollo Integral del Bayano subrogates to the Bayano Integral Development Project in all its rights and obligations. For these purposes, all the contracts entered into by the Bayano Integral Development Project shall be entered into with the Corporación para el Desarrollo Integral del Bayano.

[102] Subsequently, by Law 6 of February 3, 1997, all the assets of the Corporación Bayano were assigned to the Empresa de Generación Eléctrica Bayano S. A. Law 6 of February 3, 1997. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1997/1997_148_1785.PDF.

[103] Law 71 of September 20, 1973, amended by Law 53 of September 1, 1978. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_027_2252.PDF. Annex 13. Report and Recommendation of the Intergovernmental Commission. Annex 21 to the State's communication of June 29, 2001. p. 1; and petitioners' initial petition of May 11, 2000. p. 15.

[104] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[105] Petitioners' initial petition of May 11, 2000. p. 15; Annex 22. Diagnóstico de la situación legal de las tierras de las comunidades indígenas de Alto Boyano, 2nd part, 1999, p. 22. Annex 23 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001. In addition, subsequent statements by the State verify the failure to make the payments. At the second meeting to reach a friendly settlement agreement, it is stated: "One must verify the payments made to the indigenous and peasants because of the construction of the Bayano Hydroelectric Project, and based

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3. Inter-institutional Commission, Decree 5-A, and Agreements of Mutual Accord (1980-1990)

95. Due to the breach of the initial commitments, the indigenous peoples had to enter into new agreements with the State. The IACHR observes that this renegotiation process was marked by the constant failure of the State to carry out the commitments entered into, followed by public demonstrations and acts of discontent, such as roadblocks on highways and embargos of timber, which led to the State entering into new agreements, which it would once again fail to respect.

96. As regards the payment of compensation, in 1980 the Kuna people reached an agreement on the suspended compensation payments, signed by the Vice President of the Republic, Ricardo De La Espriella. According to the terms agreed upon, the payment of the compensation shall continue for five more years, thus the payments were to be made for a total of eight years. Nonetheless, this new commitment was not carried out in full either.[106]

97. Beginning in 1981, a series of meetings were held between the authorities of the Kuna people of Madungandí and the Emberá, leaders of the different already-existing settlements of peasants, representatives of the Corporación del Bayano and state institutions related to land tenure.[107] As a result of these meetings, it was found that it was a complex situation, thus an inter-institutional commission was established that took charge "of the comprehensive Land Use Management of the Upper Bayano river basin."[108] That Commission was proposed with the objective of taking a census of the population in the Emberá communities of Ipetí and Piriatí; in addition to an initial study of the land tenure situation in some areas that were already considered conflictive, a study that sought to define the limits between the lands of the Kuna of Madungandí and the settlers. In addition, the Commission drew up a list of the settlers who had to leave the zone. Nonetheless, they opposed the eviction, which led to a series of conflictive situations between indigenous and settler communities.[109]

98. On April 23, 1982, the Government promulgated Decree 5-A, which regulated the adjudication to occupants and settlers of the lands that were declared to be state-owned by Law 71 of September 20, 1973, amended by Law 53 of September 1, 1978. Decree 5-A provided for the

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on that information move towards viable solutions. A similar evaluation is needed for the Emberá of Ipetí and Piriatí." State's brief of February 18, 2002, received by the IACHR February 26, 2002.

[106] Petitioners' initial petition of May 11, 2000. p. 19; and State's brief of March 24, 2011, received March 25, 2011. p. 2. Other documentary evidence presented by the parties also makes reference to the prolongation for eight years of the compensation agreed upon: "Before the lake was flooded, the Government gave permits to exploit the timber in the area; with what is obtained from these resources compensation will be paid for eight years to the producers affected (indigenous and settlers)". Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 21. In addition, see Annex 6. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí the Emberá Collective Lands of Piriati, Ipeti and Maje Cordillera of 2002. Appendix E of the petitioners' brief of January 19, 2007, received by the IACHR on the same day; and Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí the Emberá Collective Lands of Piriati, Ipeti and Maje Cordillera of July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[107] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[108] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 23.

[109] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone of July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 23.

adjudication of lots, for sale, situated in the strip as wide as eight kilometers on either side of the central line of the Pan American Highway, from the Guayabo creek (quebrada Guayabo), parallel to the Wacuco river, in the *corregimiento* of El Llano, district of Chepo, and the border with Colombia.[110] That decree provided as follows in relation to the lands and natural resources of the indigenous peoples of the Bayano:

> Article 2. The adjudication under any guise of the state lands included and described is hereby prohibited: … (e) In the areas of the Kuna and Emberá indigenous *comarcas* whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of these communities. While that physical demarcation is being determined, the Kuna and Emberá communities may veto the requests for adjudication of plots that belong to the territories of those *comarcas* [*sic*].
> Article 5. In the territory of the *comarcas*, it shall be up to the National Bureau of Natural, Renewable Resources of the Ministry of Agricultural Development, together with the Kuna and Emberá indigenous communities, to see to the conservation and rational use of the natural, renewable resources such as the flora, or forest cover, the soils, fauna, and waters.
> In the event that a non-rational use is made of such renewable resources, the indigenous traditional authority shall so inform the competent authority of RENARE to beg that the corrective measures needed be taken.…
> Article 9. The Officer of the Agrarian Reform shall reject the filing the requests for Adjudication when referring to plots included within the non-adjudicable areas, which are named in Articles 2, 3, and 4 of this Decree, and shall indicate to the petitioner verbally and in writing the absolute prohibition on initiating any clearing work in these areas under threat of ordering their removal, with the assistance of the official forces; and also with the loss of their improvements, in the event of a violation. In the case of persons who earn their living solely from farming or stock-raising, the Officer of the Agrarian Reform is also obligated to indicate to said person the areas available for farming, stock raising, or agroforestry.

99. The IACHR observes that while Article 2 of Decree 5-A provided for the exclusion of the areas belonging to the Kuna and Emberá peoples, giving the National Bureau of Agrarian Reform the authority to adjudicate plots to occupants and settlers in the neighboring areas it aggravated the situation of risk to their territories, along with the failure to demarcate them, expressly recognized in the text of said Article 2.[111]

100. As the problematic situation lingered, in subsequent years the indigenous peoples continued their efforts to title, delimit, and demarcate their territories. On September 6, 1983, an agreement was signed among the Kuna people of Bayano, the Emberá community of Piriatí, and the Ministry of Interior and Justice, that the boundaries between the two indigenous peoples would be established.[112] Later, on August 3, 1984, the State and the Kuna people of Madungandí signed a

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[110] Decree 5-A of April 23, 1982. "Which regulates the Adjudication of Rural State Lands, from Guayabo stream (Quebrada Guayabo) parallel to the Wacuco river, it is the Sub-district (Corregimiento) of El Llano, district of Chepo, to the border with Colombia." Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1980/1982/1982_019_1538.PDF.

[111] Decree No. 5-A of April 23, 1982. Annex to the summary of the petitioners' intervention during the admissibility hearing, November 12, 2001. Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1980/1982/1982_019_1538.PDF.

[112] That agreement literally provided as follows:

> 1. The boundary between the Kuna Comarca of Bayano and the Indigenous Community of Piriatí shall be the old dirt road of the Kuna Comarca;
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> 2. To physically locate the dirt road that will serve as the boundary, it shall only be done by the participation of representatives of both indigenous groups jointly with the State representation;
>
> 3. The maintenance of the dirt road in question shall be done by the joint participation of both indigenous groups, as they deem advisable;

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commitment titled "Agreement of Mutual Accord" ("Convenio de Acuerdo Mutuo"). At the first point of that agreement the State, through the Corporación para el Desarrollo Integral del Bayano, reiterated its obligation to create a *comarca* for the Kuna people.[113]

101. On August 15, 1984, the authorities of the Emberá communities of Piriatí and Ipetí and the Corporación del Bayano signed an "Agreement of Mutual Accord" in which it was established that the Corporation undertakes to "take all steps necessary for attainment of the indigenous aspirations as regards the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriatí."[114]

102. Given that those commitments were not kept, the land continued to lack recognized and protected boundaries, which encouraged the continuing invasion of settlers on indigenous lands. Despite this situation, the IACHR observes that the State took few if any actions aimed at removing the non-indigenous persons from the territories of the Kuna of Madungandí and the Emberá of Bayano.[115]

103. According to the information provided by the parties, in 1989 the Kuna of Madungandí drew up a Preliminary Bill for recognition of their territory under the legal concept of

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4. The Emberá indigenous of the Community of Piriatí shall have free access to the lake to develop their day-to-day activities such as transportation, hunting, fishing, etc.

This land shall be assigned to the Indigenous Community by collective title and the boundaries agreed upon herein shall be considered for that purpose.

Annex 24. Agreement of September 6, 1983. Annex 14 to petitioners' initial petition of May 11, 2000; and Annex 7 to the State's communication of June 29, 2001.

[113] Specifically, the first article provided: "The Corporación para el Desarrollo Integral del Bayano undertakes with the Kuna Community of Madungandí to make every effort to proceed immediately to see the attainment of the aspirations of that community, so that the Comarca be established. By means of this Agreement, agreements are also established in relation to the conservation, protection, and rational use of the renewable natural resources such as the flora, fauna, and waters; which requires approval by the Corporación Bayano, the National Bureau of Renewable Resources (RENARE), and the authorities of the Kuna of Madungandí." Annex 25. Agreement of Mutual Accord of August 3, 1984. Annex 15 to petitioners' initial petition of May 11, 2000; and Annex 8 to the State's communication of June 29, 2001.

[114] That Agreement provided: "First. The Corporación Bayano undertakes to take all those steps necessary to see the attainment of the indigenous aspirations as regards the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriatí. Second. The works being carried out to attain the foregoing will be aimed at those lands being titled collectively, thus it will be the property of the indigenous population mentioned...." Annex 26. Agreement of Mutual Accord, August 15, 1984. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[115] The minutes of the meeting held with the authorities of the Kuna indigenous people and the Corporación del Bayano on August 7, 1984, appears in the record before the IACHR. There, reference was made to the payment of compensation to settlers for leaving the indigenous lands. [Annex 27. Annex 16 to petitioners' initial petition of May 11, 2000; and Annex 9 to the State's communication of June 29, 2001]. In addition, an official telegram sent by the Office of the Governor of the Province of Panamá to the Mayor of the District of Chepo, of July 18, 1995, appears in the record before the IACHR; that telegram gave notice that "in the case of Ipetí-Emberá and Kuna, national government made decision to remove the settlers indigenous areas as of April 1992. Messrs. Enock Ponte and Guadalupe de Pineda should carry out this decision immediately." [Annex 28. Official telegram of July 18, 1995. Annex 25 to petitioners' initial petition of May 11, 2000]. Also before the IACHR is Resolution No. 4, adopted by the Corporación del Bayano on March 16, 1989, by which it prohibited "hunting, indiscriminate logging, slash-and-burn in the area owned by the Corporación para el Desarrollo Integral del Bayano," with monetary sanctions imposed on violators. The IACHR notes that while the illegality of the activities carried out by the invaders in the zone is recognized, this measure was aimed at protecting the property of the Corporation, rather than that of the indigenous peoples. [Annex 29. Resolution No. 4 issued by the Director of the Corporation dated March 16, 1989. Annex 17 to petitioners' initial petition of May 11, 2000; and Annex 10 to the State's communication of June 29, 2001].

"*comarca indígena*," ("special indigenous district") which was submitted to the Ministry of Interior and Justice, and in 1990 to the Legislative Assembly.[116]

4. Aggravation of the invasion of non-indigenous persons, public protests, and creation of the Kuna Comarca of Madungandí (1990-1996)

104. The adjudication of plots to settlers in nearby lands, as well as the lack of any effective actions aimed at protecting the territory of the Kuna people of Madungandí and the Emberá from 1980 to 1990 led to an aggravation of the invasion by settlers on indigenous lands[117] and intensified the conflictive situation in the area.[118]

105. The State's response was to create an "Inter-Disciplinary Team" made up of the National Bureau of Local Governments, the Bureau of Indigenous Policy of the Ministry of Interior and Justice, and the Director of the Corporación del Bayano, among other state institutions. The team was in charge of drawing up an agreement, signed March 23, 1990, with two indigenous commissioners in addition to the authorities of the State, which states: "the possessory rights of the indigenous sector of the area of Bayano, as well as the ecological balance so necessary for the life of the Bayano Dam are today [suffering detriment due to] the incursion of settlers in the area."[119] Accordingly, Article 1 of the agreement prohibits burning in the protection zones, and in Article 2 it is resolved that: "The settlers who are within the limits of the Comarca, and in the upper part of the protection basin of the river, as well as those who arrived after December 20 of this year have to leave the area in dispute."[120]

106. To carry out the agreement signed March 23, 1990, on July 16, 1991, the indigenous peoples signed the "Working Agreement for the New Land Use Management of the Upper Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí, and other Communities," in which the state agencies involved undertake to "make efforts to relocate the invader settlers from the protected lands for the conservation of the flora and fauna of the Bayano watershed." To that end, September 15, 1991 was set as the deadline for carrying out what was provided for.[121] Nonetheless, the relocation did not take place on the date indicated. As a result of this new failure to perform, the Kuna people blocked the highway that goes around Lake Bayano.

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[116] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. pp. 23 and 25.

[117] According to information presented to the IACHR, in those years "[the settlers] arrived in the zone indiscriminately and without control due to the lack of authority in the area and in this way settlements began form along the Pan American Highway." Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 4.

[118] The situation is described by information produced by the parties as follows: "This moment is considered critical in the recent history of the events in the Bayano basin: the indigenous groups once again denounced to the Government the incursion in their lands, the settlers alleged that those lands 'are property of the State and specifically of the Corporación Bayano' and the Government responded by creating a new Commission made up of the pertinent institutions and the representatives of the indigenous and peasant sectors, the commission was to take charge of studying the problem of the invasions reported." Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 24.

[119] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001.

[120] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001.

[121] Annex 31. Working Agreement for Renewed Land Use Management of Alto Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí, and Other Communities, July 16, 1991. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

107. The result of this action was the issuance of Resolution 002 and Resolution 63. The first of these was adopted on January 24, 1992, by the Director General of the Corporación del Bayano, ordering the relocation of the "Ipetí Emberá settlers to undisputed areas" and the "recovery of all the lands that are property of the Corporación Bayano and that have been compensated or reoccupied."[122] In addition, Resolution 63, of March 17, 1992, adopted by the Ministry of Interior and Justice, it was resolved to confer to the office of the governor of the province of Panamá and to the office of the mayor of Chepo the powers, and the economic and logical support necessary for ordering the relocation of the settlers in the disputed areas to which Resolution 002 makes reference. In addition, instruction was offered to the police to facilitate the mobilization and protection of the settlers and to maintain order in the area.[123]

108. Despite such resolutions, once again the settlers were not removed. In the face of this situation, in May 1993 the Kuna and the Emberá staged public demonstrations demanding implementation of the agreements reached with the State, which led to a national strike organized by indigenous leaders from different parts of the country.[124]

109. Due to the pressure generated by these public demonstrations, President Guillermo Endara created a Mixed Commission entrusted to a presidential delegate, Miguel Batista, and made up of state and indigenous representatives. This Commission prepared a study on the reforms should have been implemented by January 1994. These included "the creation of a *reserva de comarca* for the Kuna of Madungandí and of the Bayano region" and the "demarcation of the collective lands of the 42 Emberá communities that were outside of the Comarca de Emberá-Drua, which was created by Law 22 of 1983."[125] The State did not carry out the actions needed to effectively implement these commitments.

110. On December 5, 1994, the Corporación del Bayano issued a resolution prohibiting the establishment of new human settlements, logging, burning, and the expansion of the agricultural frontiers on the existing farms.[126] On December 13, 1994, the Minister of Interior and Justice, through the National Bureau of Local Governments, instructed the mayor of the district of Chepo to carry out that resolution.[127] The IACHR was not informed of effective actions taken to carry out the resolution.

111. On March 31, 1995, an agreement was signed by the indigenous authorities and the settlers who were living at that time on lands of the Kuna of Madungandí, approved by the authorities of the national government. That agreement established that:

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[122] Annex 32. Resolution 002 of January 24, 1992. Annex 19 to petitioners' initial petition of May 11, 2000; and Annex 14 to the State's communication of June 29, 2001.

[123] Annex 33. Resolution 63 of March 17, 1992. Annex 20 to petitioners' initial petition of May 11, 2000; and Annex 13 to the State's communication of June 29, 2001.

[124] Petitioners' initial petition of May 11, 2000. p. 23. Annex 34. Articles titled "Panama: Indians say blood will flow unless they get land rights," Inter Press Service, May 18, 1993; "Antimotines enfrentan a los indígenas que se toman Puerto Obaldía," El Siglo, May 29, 1993; and "Panama: Tensions Between Government and Amerindians Subsides," Inter Press Service, June 3, 1993. Annexes 40, 41, and 42 to petitioners' initial petition of May 11, 2000.

[125] Petitioners' initial petition of May 11, 2000. pp. 24-25.

[126] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 25.

[127] Annex 35. Communication from the Minister of Interior and Justice, December 13, 1994. Annex 14 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

Taking into consideration the antecedents of other proposed Comarcas, the settlers remain where they are under certain special conditions:

- They may not expand their agricultural frontiers beyond where they are currently found.
- The lands that at this moment they usufruct may not be assigned or exchanged or sold to third persons.
- If a settler does what is indicated above or leaves the area, these lands revert to the *comarca*.
- All this shall be done under the conditions agreed upon and by documents signed with the authorities and the parties affected.[128]

112. On December 29, 1995, the law was passed that created the Kuna Comarca of Madungandí (Comarca Kuna de Madungandí), which was adopted as Law 24 of January 12, 1996. Articles 1 and 2 of this law provide:

> Article 1. The Kuna Comarca of Madungandí is hereby created, constituted by a geographic area in the province of Panamá, district of Chepo, sub-districts of El Llano and Cañitas, situated within the following boundaries [...] The polygon described has an area of approximately one thousand eight hundred (1,800) square kilometers or one hundred eighty thousand (180,000) hectares.[129]

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[128] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 5.

[129] Article 1 of Law No. 24 described the following boundaries of the *Comarca*: starting from point No. 1, situated 400 meters beyond the intersection of the Pan American Highway and the road that leads to the Viejo Pedro dam, situated 34.4 km from the Garita de Chepo, one follows along the Pan American Highway towards Darién until reaching the monument C.R. 107C line 3 of the "Tommy Guardia" Geographic Institute. From this monument C.R. 107C line 3, one continues along the Pan American Highway towards Darién 200 meters, until encountering point No. 2. From this point one follows, along the dirt road to the Southwest until reaching the bed of the stream of Sardian or Caracolito; one continues along this stream, downriver, until its mouth at Lake Bayano, distinguished as point No. 3. From this point one follows an imaginary straight line to the Southwest, crossing Lake Bayano, to Point Majecito (Maje Island), distinguished as point No. 4. From this point, more to the East, one follows to Point Read, distinguished as point No. 5. From this point one continues along an Imaginary straight line, crossing Lake Bayano, to the Southeast, until reaching Point Pueblo Nuevo, distinguished as point No. 6. From here one follows along the curve at 63 meters altitude (maximum level of Lake Bayano, to the East until Point Ugandi or Point Nilo, distinguished as point No. 7. From this point one follows along a dirt road to the Southeast until reaching point No. 8, located in the population center of Quebrada Cali, at a distance of approximately 2,125 meters from the bridge over the Aibir River. From here one follows 883 meters along the Pan American Highway towards Darién, until encountering the intersection with the dirt road that is to the left, distinguished as point No. 9. From here one follows the dirt road to the Southeast, a distance of 9.1 km, until encountering the mouth of the Catrigandi River in Lake Bayano, distinguished as point No. 10; from point No. 9 to point No. 10 it shares a boundary with the Emberá-Piriati collective lands. One then follows the Catrigandi river upriver a distance of 3.1 km until encountering P. I. No. 117, where point No. 11 is located. From here one continues along the dirt road to the Curti River, identified as point No. 12. From this point one follows upriver, to the bridge over the Curti River on the Pan American Highway, identified as point No. 13. One then follows the Pan American Highway towards Darién to the bridge over the Wacuco River or Dianwardumad, identified as point No. 14. From this point one follows the river or Dianwardumad, downriver, and at a distance of 70 meters one reaches the dirt road, identified as point No. 15. From here one follows that dirt road in the Southern direction 71° East and at a distance of 11.1 km one reaches point No. 16, situated in the Playa Chuso or Dibirdirrale river. From this point to the South 79° East at a distance of 9 km one reaches point No. 17. From here one follows that dirt road to the South 39° East and at a distance of 3.1 km, one reaches point No. 18. From this point straight South, at a distance of 600 meters, one reaches point No. 19, situated in the Higueronal or Dirudi stream. From this point at a distance of approximately 5.1 km, one reaches point No. 20, situated at the intersection with the road that leads from the population center of La Ocho to Pingadicito. From this point Northward 66° East, at a distance of 5.5 km, one reaches point No. 21, situated in the Pingadicito river. From this point, following the dirt road to the Northeast, passing the Pingandi river, one reaches point No. 22. From this point to the North 36° East, one reaches point No. 23, situated at a distance of 400 meters from the road that connects the towns of Sábalo and Wala. From this point, to the North 85° East, one reaches point No. 24, situated along the road from Sábalo to Wala. From this point to the South 60° East, one covers a distance of approximately 2.6 km to point No. 25, situated along the road from Sábalo to Wala. Following the road we encounter point No. 26, situated at the border between the provinces of Darién and Panamá. From there one continues along that border to the North to point No. 27, situated in the Serranía de San Blas. From here one follows to the Northwest along the entire boundary of San Blas and the province of Panamá, to point No. 28, situated to the North of the Espavé or Bunorgandi river. From here one continues straight South to the headwaters of the Espavé or Bunorgandi river, then along that river, downriver, covering a distance, from the Serranía, of 9.9 km, to reach point No. 29. Then to the South 47° West, at a distance of approximately 5 km, one reaches point No. 30 in the Playita or

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> Article 2. The lands described in the previous article are the collective property of the Kuna Comarca of Madungandí, whose tenure, conservation, and use shall be regulated in keeping with the Constitution, the national laws in force, and the provisions of this law.
> The subsoil, which belongs to the State as per Article 254 of the Constitution, may be exploited as determined by section 5 of that article, the laws that govern the matter, and by agreement of the authorities and communities of the Kuna Comarca of Madungandí (General Congress).[130]

113. Article 21 of that law established as follows: "The Agreement of March 31, 1995, signed by indigenous and peasants who live in the Kuna Comarca of Madungandí and approved by the authorities of the national government, shall be respected."[131]

5. Coordinating the Mesas de Concertación of the Darién Sustainable Development Program and the new Inter-Governmental Commission (1996-2001)

114. Despite the adoption of Law No. 24 the invasion in territories of the Comarca continued.[132] This led in August 1996 to members of the Kuna people of Madungandí blocking the Pan American Highway, which eventually led to a confrontation with the National Police, the result being that several persons were wounded.[133]

115. In view of this situation, on August 8 and 29, 1996, indigenous and peasants were called to meetings at the offices of the IRHE in which it was agreed to create an Inter-Institutional Commission to verify the changes that occurred with the arrival of new settlers.[134] Once the results were obtained, on December 16, 1996, a meeting was held between the Minister and Vice-Minister of Interior and Justice, the governor of the province of Panamá, the mayor of Chepo, and the representatives of the Kuna Comarca of Madungandí. On that occasion, the following conclusion was reached:

> Maintain the commitment to respect Law 24 of 1996, as well as examining the application of the agreement to which that law refers in Article 21 to implement it.
> The Government undertook to take the steps and make the legal efforts so that the persons identified as settlers who were in the *comarca* illegally would be evicted on January 30, 1997.[135]

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Dinalugandi river. From this point, to the South 82° West, at a distance of approximately 4.1 km, one reaches point No. 31, situated in the Chuluganti river. From here one follows that river, downriver, to point No. 32, situated at the mouth of Emilio or Acuasibudian stream in Lake Bayano. From this point one follows the contour of the lake in the direction of the Viejo Pedro dam, at a distance of approximately 3.7 km, until reaching point No. 33, situated at the mouth of Emilio or Acuasibudian stream in Lake Bayano. From this point in a straight line to point 1, which was the starting point of this description.

[130] Annex 5. Law 24 of January 12, 1996. Annex 11 to petitioners' initial petition of May 11, 2000; Annex to brief submitted by the petitioners, January 19, 2001; and Annex 15 to the State's communication of June 29, 2001.

[131] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 6.

[132] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 5.

[133] Annex 36. Article "Choque armado entre Indios y Policías," Periódico Crítica, August 7, 1996; "Defenderemos a muerte la Comarca," La Prensa, August 8, 1996; "Indígenas denuncian maltrato de policías y firman tregua," El Universal de Panamá, August 10, 1996. Annexes 47, 48, and y 49 to petitioners' initial petition of May 11, 2000, respectively.

[134] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. p. 28. Annex 31 to petitioners' initial petition of May 11, 2000.

[135] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. p. 28. Annex 31 to petitioners' initial petition of May 11, 2000.

116. Following up on this agreement a new meeting was held in December 1997 at the Municipal Council of Chepo. In the presence of various state offices – such as Agrarian Reform, INRENARE, and IRHE – indigenous leaders reported on the continuation of the situation.[136]

117. Given the permanence of the invasion of settlers and the systematic failure of the State to respect the agreements reached, on June 13, 1999, the Special Kuna General Congress of Madungandí issued Resolution No. 1, which provides:

> To demand of the Panamanian authorities the enforcement of Law 24 of 1996, subject to the following actions: ...
> 2. With respect to the settlers
> a. Total eviction of the settlers found in the Kuna Comarca of Madungandí for failure to carry out the agreements entered into between the authorities of Madungandí and the settlers, and above all Law 24 of January 12, 1996.
> b. To determine the authority of the sub-district, mayor's office, governor's office who will be in charge of seeing to the implementation of the agreements entered into.[137]

118. After that resolution, a meeting was held on July 21, 1999, at the National Bureau of Indigenous Policy with the presence of the National Environmental Authority, the mayor of Chepo, the Bureau of Agrarian Reform, the office of the governor of Panamá province, among other agencies and offices. The purpose was "to seek a definitive solution to the land conflict between the Kuna indigenous ethnicity of Madungandí and the peasants who have emigrated from the central provinces, settling in the communities of Wacuco, Loma Bonita, and Curtí."[138]

119. Subsequently, the Ministry of Economy and Finance, through the "Darién Sustainable Development Program," financed by the Inter-American Development Bank, carried out the project of "Mesas de Concertación of the Bayano Zone."[139] In the context of this program meetings were held for dialogue with the authorities of the Kuna people and of the Emberá communities of Ipetí and Piriatí.[140] According to the information produced by the parties, on August 18, 1999, a meeting was held that included the participation of the indigenous authorities; leaders of the peasants who had settled in Loma Bonita, Curti, and Wacuco; and governmental authorities. As a result of that meeting, on August 19, 1999, an "Agreement of Commitments" ("Acuerdo de Compromisos") was signed. It established as follows:

> 1. That a rapid study of land tenure and appraisal of the disputed lands be carried out.
> 2. This study should be presented to the Secretariat for Inter-Institutional Coordination of the Sustainable Development Program through a Multidisciplinary team with the

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[136] In particular, the then-Cacique General of the Comarca, José Oller, stated: "the problems have worsened because the settlers are building houses of concrete on the lands of the Comarca, in addition to having a negative impact on indigenous production, burning coffee groves, cutting the plantains and plantings of fruit trees, and other violations of the agreements signed such as the use of mechanized equipment on their crops, ... Destroying the barbed wire fences by Wacuco." Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. p. 29. Annex 31 to petitioners' initial petition of May 11, 2000.

[137] Annex 37. Resolution No. 1 of the Extraordinary Kuna General Congress of Madungandí, June 13, 1999. Annex E to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[138] Annex 38. Minutes of the meeting held July 21, 1999, at the National Bureau of Indigenous Policy. Annex to the State's brief of July 9, 2001, received by the IACHR July 13, 2001.

[139] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 3.

[140] Annex 21. Executive summary of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000.

participation of Agrarian Reform, technical personnel, and commissioners of the Kuna Comarca of Madungandí and from the peasant sector.

3. Request of the Technical Coordinating body and the Inter-American Development Bank (IDB) that the necessary for carrying out the land tenure study be secured.
4. The study will take as a basis the other studies performed previously and should be done on a priority basis. In addition one should take into consideration the censuses previously agreed upon by both parties.[141]

120. In addition, on August 25, 1999, the Ministry of Economy and Finance, through the Darién Sustainable Development Program, issued a "Final Report of Conclusions and Plan of Action."[142] Among the recommendations, it was concluded that:

> Based on the results obtained by the consultancy on the process of assessment and ranking of the land tenure conflicts in the upper basin of the Bayano river, it is deemed fundamental that the Government assume the corresponding responsibility and establish clear rules and criteria for the use of the territory in this fragile area....
> It is deemed necessary to begin implementation of a Land Use Management Plan in the zone from a holistic, democratic, and participatory perspective....
> In addition, it is deemed fundamental to establish a normative framework that covers the concept of 'Collective Lands' for the indigenous communities, in which one regulates the actions that had to be taken with these lands that are the property of the indigenous communities situated outside of the already established Comarcas, as is the case of the commitments acquired since 1975 with the Emberá of Ipetí and Piriatí.[143]

121. That program of the Ministry of Economy and Finance recommended the following as a plan of action: (i) the demarcation, delimitation, and marking of the lands of each indigenous community (Ipetí, Piriatí, and Comarca of Madungandí), and the fulfillment of the commitments acquired in the Agreements of Majecito and Farallón; (ii) in relation to the clearing up of land titles in the community of Ipetí, promote the purchase of the settlers' improvements; (iii) in relation to the clearing up of land titles in the community of Piriatí, undertake a study by the Agrarian Reform, by Manuel Poveda and José María García Quintero, an on-the-ground inspection, and the consultation on receiving compensation; (iv) the issuance by the Bureau of Agrarian Reform of a resolution to recognize the collective usufruct rights of the Emberá of Ipetí and Piriatí, while promoting the law that recognizes the rights to Collective Lands; and (v) a land tenure study of the land occupied by the communities of Loma Bonita, Curti, and Wacuco within the Kuna Comarca of Madungandí to get a clear picture of the physical situation of the lands.[144]

122. After the assessment by the Sustainable Development Program a new Inter-Governmental Commission was created to resolve the land dispute. In its "Report and

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[141] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[142] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[143] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. pp. 20-21. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

[144] Annex 20. Final Report of Conclusions and Plan of Action of the Mesa de Concertación of the Bayano Zone, August 25, 1999. p. 21. Annex 32 to petitioners' initial petition of May 11, 2000; and Annex 20 to the State's communication of June 29, 2001.

Recommendation," submitted to the proceeding before the IACHR, possible solutions were put forth that were put to the consideration of the National Government.[145]

123. The IACHR observes that as a result of the *mesas de concertación* with the indigenous peoples, a plan of action was drawn up that recommended specific measures that would resolve the land dispute, and the Inter-Governmental Commission recommended actions to be taken to solve the indigenous land question. The measure that has come to the attention of the IACHR is the physical demarcation of the Kuna Comarca of Madungandí by the National Commission on Political-Administrative Boundaries[146], done from April to June 2000. In this respect, the Commission observes that this action was carried out as it was considered a condition for mitigating the impact of the paving of the highway from Puente Bayano to Yaviza, which was part of the Darién Sustainable Development Program. The information available to the IACHR also indicates that the demarcation process was done in coordination with the traditional authorities and members of the Comarca.[147]

124. In summary, as of the date the petition was presented, on May 11, 2000, none of the commitments acquired by the State of Panama regarding the titling, demarcation, and delimitation of the territories of the Emberá communities of Bayano had been carried out; the Kuna Comarca of Madungandí, recognized as such in 1996, was in the process of being demarcated; and the occupation by settlers on the indigenous territories persisted in both cases. As of that date, the State had not carried out the commitment assumed in relation to the payment of the compensation stemming from the hydroelectric facility, acquired through the Decrees and the many agreements mentioned.[148]

6. Pursuit of a friendly settlement agreement before the IACHR: The Indigenous-Government Commission (2001-2006)

125. In May 2000, the petition was filed with the IACHR. In their brief of December 12, 2001, the petitioners expressed their willingness to reach a friendly settlement agreement. From that moment, until early 2007, a friendly settlement agreement was pursued, with several interruptions in the negotiations as a result of differences between the parties. At the outset of this stage, the alleged victims presented Resolution No. 0028-01 of November 24, 2001, adopted by

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[145] As the State indicated, such alternatives can be summarized as follows: "Compensate the settlers and return the lands to the indigenous communities; exchange the lands occupied by the settlers; [or that] the settlers remain as per the terms of the agreement of January 31, 1995, i.e. that they were there prior to said date, and that all those who entered afterwards must leave." State's brief of June 29, 2001, received by the IACHR July 2, 2001. p. 5. Annex 13. Report and Recommendation of the Inter-governmental Commission. Annex 21 to the State's communication of June 29, 2001.

[146] The National Commission on Political-Administrative Boundaries was created by Law 58 of July 29, 1998. According to Articles 101 and 102 of that law, the Commission is permanent and is authorized to "advise and recommend the advisable and definitive solution to the conflicts and discrepancies that may exist between boundaries of sub-districts, districts, and provinces of the Republic. As for the demarcation of indigenous *comarcas*, it shall coordinate with the Bureau of Indigenous Policy of the Ministry of Interior and Justice."

[147] Annex 2. Final Report of the National Commission on Political-Administrative Boundaries on the Physical Demarcation of the Kuna Comarca of Madungandí of 2000. Annex 3 to the petitioners' brief of July 13, 2012, received by the IACHR that same day.

[148] That is why on that date the petitioners stated: "For 25 years, the Kuna and Emberá indigenous peoples have attempted to maintain their cultural integrity on peacefully negotiating and re-negotiating with the government of Panama, for the purpose of preventing new harms and the growing risk of annihilation of their culture, caused by the construction of the Bayano Hydroelectric Dam. For 25 years, the Panamanian government has ignored the protests of the Kuna and the Emberá, has renounced its obligation with them, and has deliberately treated their interests and rights as inconsequential. The Kuna and the Emberá now seek to present this injustice to the Commission." Petitioners' initial petition of May 11, 2000. p. 4.

the General Congress of the Comarca, in which they made known the more important aspects of their claims.[149]

126. In order to pursue a friendly settlement, an Indigenous-Government Commission was established with the participation of the traditional authorities of the Kuna and Emberá of Bayano, and of authorities from the national, provincial, and local governments. In the framework of this Commission, it was determined that three sub-commissions would be formed: (i) Sub-commission on Lands and Territories, "in charge of coordinating the clearing of title to the lands of the Kuna Comarca of Madungandí and of the collective lands of the communities of Ipetí, Piriatí, and Alto Bayano"; (ii) Sub-commission on Compensation and Expenses, with "the purpose of reviewing the compensation for the Kuna Comarca of Madungandí and to quantify the new compensation payments to be made to the Kuna and Emberá on an individual, *comarca*, and community basis"; and (iii) Sub-commission on Social Investments, "in charge of determining the amount of social investments for the Kuna Comarca of Madungandí and the indigenous communities as collective compensation."[150]

127. In this stage the State took some actions such as circulating signs with the notice for invaders signed by the Minister of Interior and Justice[151]; the training by the National Environmental Authority of 30 indigenous persons as forest rangers[152]; and coordination between the National Environmental Authority and indigenous authorities for granting permits for community exploitation of the forests for the benefit of the Comarca of Madungandí.[153]

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[149] That resolution provided as follows:

That the Government of Panama publicly recognizes the harm to the human rights of the Kuna of Madungandí and Emberá indigenous peoples caused by the construction of the Bayano Hydroelectric Complex.

That the Government of Panama undertakes to carry out the Agreement of Farallón and subsequent agreements, such as:

1. Clearing the title to the lands of the Kuna Comarca of Madungandí and of the collective lands of the communities of Ipetí, Piriatí, and Alto Bayano.

2. The approval as a matter of immediate legal obligation of a law on collective lands for the Emberá communities, especially Ipetí, Piriatí, and Alto Bayano.

3. The payment of the compensations to which we have a right due to losses of lands, forests, fauna, and alteration of the ecosystem related to our lifestyles; which should be individual, community-based, and *comarca*-based.

4. The payment of the expenses of the Kuna and Emberá indigenous communities towards carrying out the agreements, including the legal action.

5. The payment of expenses, costs, and fees to our representatives or legal representatives.

6. The commitment of annual investments to benefit the communities of the Emberá *comarca* of Piriatí, Ipetí and Alto Bayano.

In addition to others as the representatives deem pertinent.

State's brief of December 14, 2001, received by the IACHR December 19, 2001.

[150] Petitioners' brief of January 16, 2002, received by the IACHR January 18, 2002.

[151] Annex 39. Note titled "Advertencia" ("Notice"), signed by the Minister of Interior and Justice. State's brief of June 18, 2002, received by the IACHR July 1, 2002. p. 14.

[152] Annex 40. Certification of the National Environmental Authority ARAPE-01-631-02 of November 8, 2002. Annex to State's brief of November 25, 2002, received by the IACHR December 2, 2002.

[153] State's brief of November 25, 2002, received by the IACHR November 29, 2002; and petitioners' brief of July 8, 2003, received by the IACHR on August 4, 2003.

128. Among the actions taken to reach a friendly settlement, the petitioners had the "Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera" prepared; it was presented to the Ministry of Interior and Justice on May 12, 2003.[154] This report details the amount of compensation pending payment, which came to US$7,824,714.19 (seven million eight hundred twenty-four thousand seven hundred fourteen and 19/100 U.S. dollars). That report also presented an assessment of the different needs of the Kuna Comarca of Madungandí and the Emberá communities of Bayano.[155]

129. Also, during this stage Executive Decree 267 of October 2, 2002 was adopted, extending the scope of application of the aforementioned Decree 5-A of April 23, 1982, Article 2 of which provided[156]:

> An exception is made, as regards the application of this Decree, of the following lands:
> 1. The Comarca of Madungandí.
> 2. The collective lands of the Emberá population of Ipetí and Piriatí, in the district of Chepo, province of Panamá.
> 3. The lands declared non-adjudicable by Cabinet Decree 123 of May 8, 1969.

130. The process of negotiation culminated definitively on August 19, 2006, the date on which the authorities of the Kuna and Emberá peoples of Bayano issued a communiqué stating their willingness to continue the processing of the petition before the IACHR, considering: "The national government has no intention of resolving our just demands."[157] This decision was communicated to the IACHR in a writing received on January 19, 2007.[158]

7. Creation of the High-Level Presidential Commission and establishment of a procedure for the adjudication of collective property rights in indigenous lands (2007-2012)

131. The IACHR observes that in the following years the agreements adopted by the State continued to go unimplemented. Given the lack of government attention to their claims, in October 2007, members of the Kuna indigenous people staged a public protest, which was repressed by police agents, resulting in several indigenous persons being wounded and detained.[159]

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[154] Annex 41. Letter from authorities of the Kuna Comarca of Madungandí to the Vice Minister of Interior and Justice by which they formally submit the Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera. Petitioner's brief of July 8, 2003, received by the IACHR August 4, 2003.

[155] Annex 6. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera of 2002. Annex E to petitioners' brief of January 19, 2007, received by the IACHR the same day.

[156] Annex 42. Executive Decree 267 of October 2, 2002, "which extends the scope of application of Decree 5-A of April de, 1982, to the Adjudication, with Consideration, of the State Plots situated in the part of the National Territory that goes from the Quebrada Cali, to the Quebrada Guayabo, in the Sub-district of Tortí, district of Chepo, province of Panamá," (G.O. 24,652 of October 3, 2002). State's brief of October 3, 2011, received by the IACHR on October 4, 2011.

[157] Annex 43. Communiqué from the indigenous communities of Bayano regarding the construction of the Bayano hydroelectric complex, August 19, 2006. Annex to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[158] Petitioner's brief of January 19, 2007, received by the IACHR the same day.

[159] Annex 44. News articles in Annex 2 to the brief of November 13, 2007, received by the IACHR the same day.

132. Executive Decree No. 287, of July 11, 2008, "creates the High-Level Commission to attend to the problems of the Indigenous Peoples of Panama."[160] According to the information available to the IACHR, in May 2008 this Commission made a visit to the areas of the Kuna Comarca of Madungandí invaded by settlers.[161] That Commission also proposed a framework law for the collective titling of the property of indigenous peoples, which was taken up by the Cabinet Council and presented to the Legislative Assembly, contained in Draft Law 411. On December 23, 2008, the government proposal was approved by Law No. 72 "which establishes the special procedure for the adjudication of the collective property rights to lands of the indigenous peoples who are not in the *comarcas*,"[162] which was regulated by Executive Decree No. 223 of July 7, 2010.

133. On January 26, 2009, the government promulgated Executive Decree No. 1, by which Article 2 of Decree No. 5-A of April 23, 1982 was amended, regarding the adjudication of rural state lands in the district of Chepo. As regards the indigenous peoples of the Bayano, Executive Decree No. 1 established:

> Article 2: The adjudication under any guise of the state lands included and described: ...
> (c) In the areas of the Kuna and Emberá indigenous Comarcas, whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of those communities. While said physical demarcation is completed, the communities of Kuna and Emberá may veto the requests for adjudication of plots that go deep into the territories of those comarcas.[163]

134. With respect to the compensation due, in July 2009, at the request of the authorities of the Kuna Comarca of Madungandí and of the Emberá of Bayano, a report was prepared entitled "Socio-Economic Technical Report on Compensation and Investment: the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriati, Ipeti, and Maje Cordillera."[164] According to the information collected for the preparation of this report, the total amount of compensation for the losses caused by the construction of the hydroelectric facility still pending payment came to B/. 9,512,804.30 (nine million five hundred twelve thousand eight hundred four and 30/100 balboas).[165]

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[160] According to information that is a matter of public knowledge, this decision was preceded by the adoption, on April 28, 2007, of a Declaration of the Indigenous Peoples of Panama.

[161] Additional observations on the merits submitted by the State by brief of April 27, 2010, received by the IACHR on May 3, 2010; and thematic hearing on the right to private property of the indigenous peoples of Panama, held in the 133rd period of sessions, October 28, 2008.

[162] Law 72, "which establishes the special procedure for the adjudication of the collective property of indigenous peoples who are not within the *comarcas*," published in Official Gazette No. 26193, December 30, 2008.

[163] Executive Decree 1 of January 26, 2009, "By which Article 2 of Decree No. 5-A of April 23, 1982 is amended." Source: National Assembly of Panama. Legispan: Database of Legislation of the Republic of Panama. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2000/2009/26238_2009.PDF.

[164] Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera. July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[165] Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera, July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

135. Subsequently, based on the above-mentioned Law 72, the Emberá communities of Piriatí and Ipetí filed a request for adjudication of lands on October 27, 2009, which was reiterated on January 26, 2011, without this request having been resolved.[166]

136. In view of the delay in recognition of their collective property rights, the Emberá and Wounaan indigenous peoples, including the Emberá communities of the Upper Bayano, engaged in acts of protest.[167] As a result, on November 18, 2011, the respective authorities of these peoples signed an "Agreement on Action and Decision" with representatives of ANATI and of the Ministry of Interior and Justice. The IACHR observes that by that agreement the state authorities undertook to title the collective lands of the communities of the Emberá and Wounaan peoples, which included the Emberá communities of Piriatí and Ipetí.[168]

137. On January 30, 2012, there was an invasion of settlers numbering 150 to 185 persons in the Emberá community of Piriatí.[169] Accordingly, members of the Emberá people of the Bayano engaged in acts of protest and their traditional authorities publicly denounced the continuing invasion by settlers in their territories, and the lack of attention to their requests by the competent authorities.[170]

138. As a result, on February 8, 2012, the State signed a new agreement called the "Agreement on Piriatí Emberá," which established the creation of "a commission for monitoring the processes of collective titling until their complete adjudication" and reiterated "to the ANATI the commitment acquired by agreement signed on November 18, 2011 to expeditiously process all the requests for collective titling and deliver the first title no later than March 2012."[171] According to the information available to the IACHR, to date the State has not granted collective title to the lands claimed by the communities of Piriatí and Ipetí of the Emberá people of Bayano.

139. During the processing before the IACHR, the petitioners repeatedly asserted that the State was granting property titles to non-indigenous persons on the lands claimed by those Emberá communities of Bayano. The State, for its part, did not reject that statement nor did it present information that would allow one to controvert it. To the contrary, there is information in the record before the IACHR that indicates that on January 26, 2009, a private person asked the National

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[166] Annex 45. Application for the Adjudication of Collective Lands of the communities of Piriatí and Ipetí, submitted by the Emberá General Congress of Alto Bayano on January 26, 2011. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

[167] Petitioners' brief of July 13, 2012, received by the IACHR the same day.

[168] Annex 46. Agreement of Action and Decision – ANATI/MINGOB/Pueblo de Tierras Colectivas Emberá y Wounaan, November 18, 2011. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012 and Annex 6 to the petitioners' brief of July 13, 2012, received by the IACHR the same day.

[169] Bolívar Jaripio Garabato, member of that community, describes the events as follows: "2012 this year, on January 30 more than 150 persons came into our community, it had a major impact for our community, we even had to get a lawyer which, we don't have, to do this, because if we did not do so we cannot remove these people…." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. See hearing at http://www.oas.org/es/cidh/. See also, petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012 and petitioners' brief of July 13, 2012, received by the IACHR the same day.

[170] Communiqué from the Emberá and Wounaan People of Panama, brought together in the General Congress of the Emberá and Wounaan Comarca, the General Congress of the Emberá and Wounaan Collective Land, National Congress of the Wounaan People, the Emberá General Congress of Alto Bayano, the Bribri General Council, and the Bugle General Congress. January 31, 2012. Available at: http://www.prensaindigena.org.mx/?q=content/panam%C3%A1-comunicado-del-pueblo-Emberá. In addition, petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

[171] Annex 47. Agreement of Piriatí Emberá of February 8, 2012. Petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

Bureau of Agrarian Reform to individually adjudicate, with consideration, a part of the land claimed by the Emberá community of Piriatí, situated in the locality of Quebrada Cali; that institution that did not reject the request.[172] In response, on September 8, 2009, authorities of that community filed an opposition brief with the National Bureau of Agrarian Reform, which was forwarded to the 15th Circuit Court for Civil Matters of the First Judicial Circuit. In the process, a motion of appeal was filed, which is pending before the First Superior Court.[173]

140. The IACHR observes that through various acts the State undertook to suspend the recognition and adjudication of possessory rights requested by third persons. In this respect, it notes that in said Agreement of Action and Decision of November 18, 2011, the indigenous authorities request "that recognition of the Possessory Rights that are being requested by indigenous and non-indigenous persons from elsewhere be suspended." Along these lines, at point 3 the General Administrator of ANATI stated "that as of this moment it will suspend the recognition and adjudication of possessory rights within the polygons that take in the collective lands requested by the people through their traditional authorities."[174] The IACHR also notes that at the third point of the "Agreement of Piriatí Emberá," of February 8, 2012, signed by state authorities, it is noted: "That despite the requests for adjudication of collective titles by the Emberá and Wounaan communities, the lands considered for titling are invaded by settlers or persons not authorized to do so, adducing possessory rights recognized by the municipal authorities of the provinces of Darién and Panamá."[175] In view of the foregoing situation, the ANATI issued resolutions to suspend the processing of requests for adjudication of private titles in the areas claimed by the Emberá communities of Bayano.[176] In view of the information available to it, the IACHR considers as proven that property title has been granted to persons on lands claimed by the Emberá communities of Ipetí and Piriatí.

D. Administrative and judicial actions taken by the Kuna and Emberá indigenous peoples to protect their lands and to secure payment of the compensation due for the loss of their ancestral territories

141. Throughout the process of claims described above, the Kuna indigenous people of Madungandí and the Emberá of Bayano directed, through their traditional authorities and/or legal representatives, many communications to authorities at the national, provincial, and local levels; and they filed numerous administrative and criminal actions with the objective of obtaining legal recognition of their territories, securing the payment of the compensation owed, and achieving the effective protection of their territories in the face of the invasion of non-indigenous persons and the harm caused by them to their natural resources.

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[172] Annex 48. Application submitted to the National Bureau of Agrarian Reform. Petitioners' brief of May 16, 2012, received by the IACHR the same day.

[173] Annex 49. Official Note No. 824 of March 23, 2012, by which the 15th Circuit Court for Civil Matters of the First Judicial Circuit referred Case file 2010-5622. Petitioners' brief of May 16, 2012, received by the IACHR the same day.

[174] Annex 46. Agreement of Action and Decision – ANATI/MINGOB/Pueblo de Tierras Colectivas Emberá y Wounaan, November 18, 2011. Petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

[175] Annex 47. Agreement of Piriatí Emberá of February 8, 2012. Petitioners' brief of May 22, 2012, received by the IACHR on June 20, 2012.

[176] Annex 50. ANATI Resolution No. ADMG-058-2011 of December 1, 2011, first article; Annex 51. Resolution of ANATI No. ADMG-001-2012 of February 8, 2012, first article; and Annex 52. Certification issued by the ANATI, March 12, 2012. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

1. Communications and initiatives with authorities at the national, provincial, and local levels

142. According to the information provided by the parties, at least since 1990 the alleged victims sent a large number of communications, letters, and requests to different government authorities seeking actual implementation of the promises to formalize the collective property rights over their territories, and to remove the illegal occupants who are living within their boundaries.

143. As appears in the record before the IACHR, with the objective of calling for the creation of a *comarca* for the Kuna people of Madungandí, their traditional authorities, in addition to many efforts to sign the above-mentioned agreements with the State, sent numerous communications to the highest level state authorities such as the President of the Republic [177] and the Minister of Interior and Justice.[178]

144. In addition, the authorities of the Kuna Comarca of Madungandí sent numerous letters and communications demanding protection for their lands vis-à-vis the illegal occupation by peasants. In the record before the IACHR one finds letters sent to the *Procuradora General de la Administración*[179], to the office of the governor of the province of Panamá[180], to the mayor of the district of Chepo[181], among other state authorities.[182]

145. By the same token, the IACHR observes that the traditional authorities of the Kuna Comarca of Madungandí on numerous occasions sent letters to the Presidency of the Republic

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[177] Annex 53. Letter from the Kuna Regional Congress to President Guillermo Endara, June 11, 1990, in which it asks that Decree 156 be implemented, and that the Kuna Comarca of Madungandí be established. Annex E to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[178] Annex 54. Letter from the Cacique General, Second Cacique, and Kuna Secretary General to the Minister of Interior and Justice of June 21, 1991, requesting the establishment of the Kuna Comarca of Madungandí. Annex 11 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 55. Letter from the Cacique General, Second Cacique, and Kuna Secretary General to the Minister of Interior and Justice, January 20, 1992, requesting his good offices to resolve the problem of the Bayano basin. Annex 12 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 56. Letter from the Kuna General Congress to the Minister of Interior and Justice, March 12, 1992, requesting that the actions aimed at protecting the Comarca be expedited. Annex 13 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[179] Anexo 57. Letter from CEALP, on behalf of the *Comarca* of Madungandí, to the *Procuradora General de la Administración*, requiring the observamce of the Law 24 of 1996 and of the agreement of December 16, 1996 signed between the Minister of Interior and Justice, and the authorities of the Kuna *Comarca*, undated. Annex 17 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[180] Annex 58. Letter from the Kuna General Congress of Madungandí to the Governor of the Province of Panamá, April 27, 1997, denouncing the illegal occupation of lands in the zone of Wacuco. Annex 18 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001. Annex 59. Letter to the Governor of the Province of Panamá from the Kuna Comarca of Madungandí, February 13, 2003, by which they report that settlers who live within the community in Viejo Pedro are threatening indigenous persons with firearms, accordingly it is requested that she act in her capacity as Governor. Annex D to the petitioners' brief of additional observations on the merits received by the IACHR December 18, 2009; Annex 60. Letter from the Kuna General Congress of Madungandí to the Governor of the province of Panamá, July 8, 2003, requesting a solution to the problem of the invasion by settlers. File 212, folio 39. Annex to the petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[181] Annex 64. Letter from the authorities of the community of Ipetí to the mayor of the district of Chepo, October 5, 1997 in which they inform him of the invasion of settlers in the region of Curti. Annex 20 to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[182] Annex 60. Communication to the IRHE, Office of the Mayor of Chepo, Agrarian Reform, and Office of the Governor of the Province of Panamá, July 19, 1998. File 212, folios 42-43. Annex to the petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

asking that actions be taken in relation to the invasion of settlers[183] and calling for payment of the compensation for damages caused by the construction of the hydroelectric complex.[184] The record also includes evidence of the numerous actions brought before the Ministry of Interior and Justice to win protection for their lands.[185]

146. In addition to the foregoing are the many efforts made to sign the agreements, resolutions, and decrees mentioned in the preceding section. Nonetheless, these agreements or commitments were repeatedly ignored by the State.[186]

147. In summary, the IACHR finds that by means of their representative institutions, for more than four decades the alleged victims have taken initiatives of different sorts vis-à-vis the authorities of the national, provincial, and local government requesting compensation for their resettlement, legal recognition of their lands, and protection for their lands in the face of the invasions by non-indigenous persons.

2. Administrative procedures followed by the alleged victims

a) Administrative procedures for eviction of illegal occupants

148. The documents produced by the petitioners that are part of the record before the IACHR include numerous administrative steps for the purpose of countering the settlers' actions.

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[183] Annex 63. Communication from the General Congress of the Kuna Comarca of Madungandí to the President of the Republic, February 21, 2000. Annex D to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Communication to the presidential adviser of September 28, 2002, asking that a census be conducted to determine the number of settlers on lands within the Comarca. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Communication to the President of the Republic, December 2, 2002. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Letter to the President of the Republic, November 18, 2004. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 65. Communication from the community of Wacuco to the President of the Republic, March 17, 2005. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[184] Annex 63. Communication to the President of the Republic, December 2, 2002. Annex D to Petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 63. Letter to the President of the Republic, November 18, 2004. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[185] Annex 59. Letter from the authorities of the Kuna Comarca of Madungandí to the Minister of Interior and Justice, February 13, 2003, accusing several individuals of helping the settlers with illegal transactions to buy and sell lands of the Comarca. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 60. Letter from the Kuna General Congress of Madungandí to the Minister of Interior and Justice, August 14, 2003, requesting that he seek a solution to the invasion of settlers. File 212, folio 39. Annex to the petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 61. Communication to the Vice Minister of Interior and Justice of January 10, 2006. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[186] This is expressed in the Resolution, "By which the Extraordinary General Congress of Madungandí, in the use of its legal authorities, approves the filing of the legal action against the Panamanian State before the Commission on Human Rights, an organ of the Organization of American States," September 1999, whose seventh and eighth considering paragraphs indicate: "That in these 23 years the traditional authorities of the Comarca of Madungandí have held hundreds of meetings, and entered into agreements with various national, provincial, and local governmental authorities for the solution and responses to the problems of the Comarca of Madungandí," "That it has been a systematic mockery and a denial of justice on the part of the governmental agencies on not carrying out the agreements signed to resolve the problems of land invasion. In addition the Ascanio Villalaz Hydroelectric Complex has not represented any benefit whatsoever to our communities, but only problems." Annex 62. Resolution of the Extraordinary Kuna General Congress of Madungandí, September 1999. Annex E to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

149. In effect, on April 5, 2002, the traditional authorities of the Kuna Comarca of Madungandí initiated an administrative proceeding of eviction of illegal occupants before the mayor of the district of Chepo, based on Article 1409 of the Judicial Code of Panama.[187] Given the lack of response after nearly a year had transpired since the filing of the request, on February 17, 2003, the authorities of the Kuna Comarca of Madungandí began an administrative proceeding of eviction before the governor of the province of Panamá.[188] In the context of that proceeding, on March 7, 2003, the representatives of the Kuna Comarca of Madungandí presented a brief reiterating the beginning of the procedure[189] and on March 12, 2003, they produced the certification issued by the National Bureau of Indigenous Policy that accredited the representativity of the authorities of the Kuna Comarca of Madungandí who initiated the eviction process.[190]

150. According to the information in the record before the IACHR, the first act by the governor of the province of Panamá was to issue the resolution of June 6, 2003, ordering the correction of the eviction action so as to include the information on the Caciques General of the Kuna Comarca of Madungandí.[191] That order was answered by the requesters a few days later, by brief of June 26, 2003.[192]

151. Subsequently, the authorities of the Comarca reported on new invasions in the areas of Wacuco and Tortí Abajo[193], and presented a request expedite the procedure, asking that the corresponding authorities be ordered to protect the property of the Kuna Comarca of Madungandí. In addition, in that brief they request referral to the criminal courts of the Secretary General of the Federación de Trabajadores Agrícolas, who was said to be promoting the invasion of new lands and distributing flyers instigating persons to invade the Comarca.[194]

152. On March 10, 2004, one year after the request for eviction was filed, the office of the governor sent consultative note No. 033-04 to the *Procuraduría de la Administración* requesting its legal opinion on the authority of the governor's office to entertain the request submitted.[195] By note C-No. 73 of March 31, 2004, the *Procuraduría de la Administración* answered the consultation, concluding that the authority vests in the Presidency of the Republic, as the president is the maximum chief of police of the nation.[196]

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[187] Annex 63. Annex to the petitioners' brief of July 8, 2003, received by the IACHR August 4, 2003; and Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[188] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[189] Annex 63. Annex to petitioners' brief of July 8, 2003, received by the IACHR August 4, 2003; and Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[190] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[191] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[192] Annex 63. Annex to petitioner's brief of July 8, 2003, received by the IACHR August 4, 2003; and Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[193] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[194] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[195] Annex 63. Brief for pursuing an administrative proceeding submitted to the President of the Republic of Panama, January 24, 2005. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[196] Annex 60. File 212, folios 44 to 54. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

153. In view of that, by resolution of August 2004, the office of the governor of the province of Panamá declared itself to lack the authority and ordered the record archived, considering that it should have been forwarded to the Presidency of the Republic. Nonetheless, five months after this decision was made, the record had not been forwarded to the Presidency.[197] For that reason, on January 24, 2005, the traditional authorities of the Kuna Comarca of Madungandí filed the request for eviction of illegal occupants with the Presidency of the Republic.[198]

154. According to the information produced by the parties, the President referred the matter to the Ministry of Interior and Justice, which led the authorities of the Kuna Comarca to present a letter rejecting this decision on February 16, 2005, given that the matter had been brought the attention of this authority previously, without it coming up with a solution to the problem. Subsequently, by note presented to the Presidency on October 31, 2006, the authorities of the Comarca requested information on the status of the procedure and the actions taken, a communication for which there was no response according to the information available to the IACHR.[199]

155. Subsequently, in order to appoint an administrative authority for the Comarca, on June 4, 2008, Executive Decree 247, added Articles 66a and 66b to Article 66 of Executive Decree No. 228 of 1998, the Organic Charter of the Comarca of Madungandí.[200] Executive Decree No. 247 provided as follows:

> Article 1. Article 66a is added to Executive Decree 228 of December 3, 1998, as follows:
> Article 66a. The administration of administrative police justice, within the special political division of the Kuna Comarca of Madungandí, shall be entrusted to a *Corregidor de Policía*, who shall meet the requirements established by Law for the exercise of that position, and shall have the functions and powers established by the Law for those who occupy the post of *Corregidor de Policía*, and shall enjoy the support of the National Police when required. The decisions of the *Corregidor de Policía* shall be appealable to the Ministry of Interior and Justice.
>
> Article 2. Article 66b is added to Executive Decree 228 of December 3, 1998, as follows:
> Article 66b. The Corregidor de Policía of the Kuna Comarca of Madungandí shall be appointed by the President of the Republic, jointly with the Minister of Interior and Justice. The *Corregiduría* shall have its office in the seat of the Comarca and the operating costs shall be charged to the budget of the Ministry of Interior and Justice.

156. After the issuance of this provision, a Corregidor was appointed for the Kuna Comarca of Madungandí; he held this office in 2008 and 2009.[201] According to the information

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[197] Annex 63. Brief for pursuing an administrative proceeding submitted to the President of the Republic of Panama, January 24, 2005. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[198] Annex 63. Annex D to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[199] Annex 66. Communication to the President of the Republic, February 15, 2005. Annex E to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. Annex 67. Communication to the President of the Republic, October 26, 2006, presented on October 31, 2006. Petitioners' brief of May 16, 2012, received by the IACHR the same day. In addition, petitioners' brief of July 13, 2012, received by the IACHR the same day.

[200] Annex 68. Annex B to the petitioners' brief of May 25, 2011, received by the IACHR May 31, 2011; and State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[201] It appears in the record before the IACHR that on July 29, 2008, the National Director of Indigenous Policy sent the Minister of Interior and Justice a communication requesting "that the slate of candidates to occupy the position of

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produced by the parties, in 2008 two eviction actions were filed with this authority, and on March 23, 2009, the Corporación de Abogados Indígenas, acting on behalf of the Kuna Comarca of Madungandí, filed an administrative action for "protection of lands" against the persons who were invading areas of the Comarca.[202] The petitioners and the State agreed that this authority took some eviction actions in relation to the invasion of settlers.[203] This Corregidor was removed in 2009 and in October 2011 a new person was appointed to the position.[204]

157. According to the information produced by the parties, the petitioners submitted at least two requests for eviction to the new Corregidor.[205] The information available to the IACHR indicates that as a result, working visits were made in January 2012 in different sectors of the Comarca, investigative measures in which the presence of settlers was confirmed; and two administrative hearings were held, in December 2011 and January 2012.[206] The information contained in the case file indicates that an agreement was reached with the settlers to evacuate the invaded lands, by March 31, 2012 at the latest. Given the failure to comply by the agreed date, through Resolution No. 5 of April 2, 2012, the *Corregidor* ordered "the eviction, as intruders, of the persons who are illegally occupying *comarca* lands in the Lago, Río Piragua, Río Seco, Río Bote, Wacuco, Tortí, and other sectors of the Kuna of Mandungandí *Comarca*," against which the settlers presented an appeal, which was admitted on May 31, 2012, and submitted to the Ministry of Government, in accordance with article 1 of Executive Decree No. 247. Through Resolution No. 197-R-63 of August 22, 2012, that Ministry decided to "[a]ffirm, in its entirety, Resolution No. 5 of April 2, 2012 [...]."[207] According to the statements of the State in its last submission to the IACHR, the eviction based on this decision is currently being carried out.

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Corregidor of the Kuna Comarca of Madungandí ... be presented." Annex 69. Annex to the brief by the requesters in the precautionary measures proceeding of June 14, 2010, received by the IACHR June 14, 2011.

[202] Annex 70. Administrative action for protection of lands, filed March 23, 2009. Annex to the brief by the requesters in the precautionary measures proceeding of June 14, 2010, received by the IACHR June 14, 2011.

[203] The petitioners asserted that "during his administration some evictions were carried out" [petitioners' brief of May 16, 2012, received by the IACHR the same day], and that "two eviction actions were presented, one in the area of Tortí Abajo and another in Wacuco, both in 2008. With these actions, some persons were evicted – not the majority – and that was able to control the entry of more settlers (illegal occupants). When the term of the first Corregidor concluded, the invasions resumed" [petitioners' brief of July 13, 2012, received by the IACHR the same day]. The State indicated that the Corregidor "has impeded the massive invasion by peasants from Torti, Margarita de Chepo, Chiman, and central provinces, among others." [State's brief of May 14, 2012, received by the IACHR the same day.]

[204] In a brief filed June 14, 2011, the petitioners note that after his removal, no *corregidor* has been appointed for the Comarca, even though the authorities asked the indigenous for names as of October 2009 [brief of requesters in precautionary measures proceedings of June 14, 2010, received by the IACHR June 14, 2011]. Subsequently, in a brief of October 12, 2011, the petitioners reiterated that the appointment of the Corregidor had not yet been made [petitioners' brief of May 25, 2011, received by the IACHR May 31, 2011. p. 4]. Those facts were not denied by the State but rather, to the contrary, in a brief submitted September 27, 2011, it noted that a *corregidor* was appointed for the 2008-2009 period, and that as of that date, for various reasons, a new Corregidor had not been appointed for the Kuna Comarca of Madungandí [State's brief of September 26, 2011, received by the IACHR September 27, 2011; and State's brief of October 3, 2011, received by the IACHR October 4, 2011]. According to the State's subsequent statements, on October 20, 2011 a person was appointed to the position of Corregidor or councilman. [Submission of the State of September 17, 2012, received on September 24, 2012.]

[205] Petitioners' brief of May 16, 2012, received by the IACHR the same day; and petitioners' brief of July 13, 2012, received by the IACHR the same day.

[206] Annex 71. Annex 13 to petitioners' brief of July 13, 2012, received by the IACHR the same day; and Annex 4 of the State's submission of September 17, 2012, received by the IACHR on September 24, 2012.

[207] Annex 72. Resolution No. 5 of April 2, 2012 issued by the Special *Corregidor* of the Kuna of Mnadungandí comarca. Annex 4 to the submission of the State of September 17, 2012, received by the IACHR of September 24, 2012; and Annex 73. Resolution No. 197-R-63 of August 22, 2012, issued by the same Ministry of Government. Annex 1 to the submission of the State of September 17, 2012, received by the IACHR on September 24, 2012.

b) Administrative proceedings for ecological harm pursued before the National Environmental Authority

158. According to the information produced by the parties, the alleged victims pursued procedures before the National Environmental Authority (hereinafter "ANAM": Autoridad Nacional del Ambiente) in view of the ecological harm caused by the settlers' activities in different zones located within their territories.

159. Specifically, in early January 2007, members of the Kuna Comarca of Madungandí denounced the Regional Administration of Eastern Panama (Administración Regional de Panamá Este) of the ANAM of engaging in clear-cutting in their territory.[208] The ANAM made an inspection visit on January 30, 2007, in which it verified the facts alleged, as appears in Inspection Report No. 006-2007.[209] Based on that visit, it concluded that there was a violation of Law No. 1, of February 3, 1994, "which establishes the forestry legislation in the Republic of Panama, and other provisions are issued" (hereinafter "Forestry Law"). By Interlocutory Order No. ARAPE-ALR-008-2007 of February 8, 2007, the Regional Administration of Eastern Panama of the ANAM admitted the complaint filed by the members of the Kuna Comarca of Madungandí and began an administrative investigation. By Resolution ARAPE–AGICH-030-2007, of May 21, 2007, the persons found in the inspection visit were considered responsible for unauthorized clearing of forest, accordingly they were ordered to pay the sum of B/. 500.00 (five hundred balboas), to be paid severally to four persons.[210] Nonetheless, the IACHR was not informed that this sanction was enforced. To the contrary, according to the petitioners, and based on information not controverted by the State, it has not been enforced.[211]

160. Subsequently, the Corporación de Abogados Indígenas filed a complaint with the ANAM for illegal logging in the area of La Playita, Playa Chuzo, in the Kuna Comarca of Madungandí. The ANAM made a visit on March 14 and 15, 2007, in which it observed three areas of secondary forest that had been logged, with an area of approximately three hectares, thus it concluded in Technical Report No. 18 that there had been a violation of Article 80 of the Forestry Law, and it was recommended to reinforce oversight by the ANAM and the Police.[212] The record does not include any evidence of the application of a sanction vis-à-vis the mentioned violation of the Forestry Law. To the contrary, in response to the request for information in this respect by the IACHR, the petitioners stated: "We have persistently requested information from the ANAM yet they have not responded as to whether they sanctioned Messrs. Irineo, Iván, and Arnulfo Batista and Pascual Abrego (*sic*)" and "as for the technical report, it does not provide us any information on it."[213]

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[208] Annex 74. Communication from the mayor of Chepo to the Minister of Interior and Justice, January 8, 2007. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[209] Annex 75. Inspection Report No. 006-2007 issued by the National Environmental Authority, January 30, 2007. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[210] That sanction was based on Law 1, of February 3, 1994, "by which the forestry legislation is established in the Republic of Panama, and other provisions are issued" and Board of Directors Resolution No. 05-98 of January 22, 1998. In particular, Article 106(2) of this Resolution provides: "When logging or the destruction of forest resources impedes evaluating the volume of timber and/or the number of trees affected, a minimum sanction shall be applied of …. For young secondary forest (stubble) … (B/.1,000.00). When the infraction consists of the destruction of the undergrowth the fines shall correspond to 50% of the foregoing figures…." Annex 76. Resolution ARAPE – AGICH-030-2007 issued by the ANAM May 21, 2007. State's brief of July 17, 2007, received by the IACHR August 14, 2007.

[211] Petitioners' brief of July 13, 2012, received by the IACHR the same day.

[212] Annex 77. Technical Report No. 18 issued by the National Environmental Authority. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[213] Petitioners' brief of May 16, 2012, received by the IACHR the same day.

c) Administrative proceedings for the adjudication of collective property rights

161. The Emberá of Bayano took several initiatives over the years, particularly before the President of the Republic, to obtain recognition of their collective property rights over their lands. Certainly in the documents produced by the parties that are part of the record before the IACHR it appears that on June 13, 1995, the Emberá communities of Ipetí and Piriatí filed a request for demarcation and titling of collective lands before the Cabinet Council of the President of the Republic of Panama, for the purpose of obtaining legal recognition of their lands. That request was filed under Article 12 of the Agrarian Code, which provides that: "For adjudications or transfers that exceed 500 hectares, the approval of the Cabinet Council shall be necessary."[214]

162. In response to this petition, the chief counsel to the Presidency issued Note No. 159-95-LEG of August 2, 1995, by which, making reference to Article 123 of the Constitution – Article 127 of the current Constitution – he demanded that certain requirements, not expressly contained in this provision, be met.[215] Accordingly, Aresio Valiente, member of the Indigenous Program of CEALP, requested an appointment to address that matter, but did not obtain a response, according to the information available to the IACHR.[216]

163. According to the information produced by the parties, on January 27, 1999, a new request for recognition of lands was presented to the Presidency of the Republic from the Emberá community of Ipetí on behalf of the "Organización de Unidad y Desarrollo de Ipetí-Emberá," an association that has legal status granted by the Ministry of Interior and Justice by Resolution No. 118-PJ-35.[217] On the same date, a request for recognition of lands from the Emberá community of Piriatí was presented to the Cabinet Council of the Presidency of the Republic. By means of this request, it was asked that titling be done in the name of the "Asociación para el Desarrollo de la Comunidad de Piriatí – Emberá Alto del Bayano," a representative organization of the community of Piriatí with legal status granted by the Ministry of Interior and Justice by Resolution No. 583-PJ-256.[218] No response to these two requests appears in the record before the IACHR.

164. As mentioned, on December 23, 2008, Law No. 72 was adopted. It "establishes the special procedure for the adjudication of collective property rights to their lands for the indigenous

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[214] Annex 78. Request for demarcation and titling of collective lands, June 13, 1995. Annex 26 to petitioners' initial petition of May 11, 2000.

[215] In particular, it is indicated that the request should meet the following requirements: (i) steps to measure the area in order to obtain the cartographic expression; (ii) bureaucratic transactions, formalities, and other requirements of the property titles that are granted administratively by the Bureau of Agrarian Reform, which should issue the Resolution on Adjudication if it considers it appropriate; (iii) number of members relocated from the Ipeti-Emberá Community especially its productive population and (iv) certification of Mr. Bonarge Pacheco as cacique of the Ipeti-Emberá community. Annex 96. Note No. 159-95-LEG of August 2, 1995 issued by the Director of Legal Counsel to the Presidency. Annex 27 to the petitioners' initial petition of May 11, 2000.

[216] Annex 79. Letter of September 8, 1995. Annex 28 to petitioners' initial petition of May 11, 2000.

[217] According to that communication, the following were attached to justify the request: (i) proof of the juridical personality of the Organización de Unidad y Desarrollo de la Comunidad de Ipeti-Emberá, (ii) a population census, and (iii) a map produced by persons authorized to perform this type of technical work. Annex 80. Letter of January 27, 1999, sent by Marcelino Jaén on behalf of the Ipeti-Emberá community. Annex 29 to petitioners' initial petition of May 11, 2000.

[218] According to that communication, the following were attached to justify the request: (i) proof of the juridical personality of the Organización de Unidad y Desarrollo de la Comunidad de Ipeti-Emberá, (ii) a population census, and (iii) a map produced by persons authorized to perform this type of technical work. Annex 80. Letter of January 27, 1999, sent by Marcelino Jaén on behalf of the Ipeti-Emberá community. Annex 29 to petitioners' initial petition of May 11, 2000.

peoples who are not in the *comarcas*."[219] According to its Article 4, the competent authority for carrying out that procedure was the National Bureau of Agrarian Reform of the Ministry of Agricultural Development.[220]

165. Based on that law, on October 27, 2009, the representatives of the Emberá indigenous communities of Ipetí and Piriatí filed a request for adjudication of lands with the National Bureau of Agrarian Reform by which they requested the collective titling of 3,191 hectares in the name of the community of Ipetí and 3,754 in the name of the community of Piriatí.[221] On that occasion, it was also requested that "in keeping with Article 111 of the Agrarian Code, and as a matter that must be ruled on before the underlying claim can be decided, the suspension should be ordered at any stage of any request for or processing of property titles or certification of alleged possessory rights over the lands or any administrative application that is aimed at obtaining property title over those lands."[222]

166. On October 8, 2010, Law 59 was adopted by which it is ordered that the National Bureau of Agrarian Reform be replaced in its authority by the ANATI.[223] On January 26, 2011, the General Cacique of the Emberá General Congress of Alto Bayano reiterated to the ANATI the request for adjudication of land in favor of the Emberá communities of Piriatí and Ipetí.[224]

167. The titling process included, in August 2011, a field visit by the Ministry of Interior, the National Bureau of Local Governments, the National Commission on Political-Administrative Boundaries, the National Bureau of Indigenous Policy, and the traditional authorities of the Emberá communities of Piriatí and Ipetí.[225] According to the information available to the IACHR, to date this titling procedure has not concluded; rather, it has been necessary, as referenced earlier, to sign two new agreements.[226]

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[219] Law 72, "which establishes the special procedure for the adjudication of the collective property rights over the land of the indigenous peoples who are not within the *comarcas*," regulated by Executive Decree No. 223 of July 7, 2010.

[220] Law 72, Article 4.

[221] Annex 81. Process of requesting free adjudication of the collective property rights to lands granted in compensation to the communities of Ipetí and Piriatí for their displacement for construction of the Bayano Dam. Annex to petitioners' brief of May 16, 2012, received by the IACHR the same day.

[222] Annex 81. Process of requesting free adjudication of the collective property rights to lands granted in compensation to the communities of Ipetí and Piriatí for their displacement for construction of the Bayano Dam. Annex to petitioners' brief of May 16, 2012, received by the IACHR the same day.

[223] Law 59, of October 8, 2010, "Law that creates the National Land Management Authority, unifies the authority of the General Bureau of Cadastre, the National Bureau of Agrarian Reform, the National Land Management Program, and the 'Tommy Guardia' National Geographic Institute."

[224] Annex 45. Application for Adjudication of Collective Lands of the communities of Piriatí and Ipetí, submitted by the Emberá General Congress of Alto Bayano, January 26, 2011. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012 and Annex 4 to the petitioners' brief of July 13, 2012, received by the IACHR the same day.

[225] Annex 10. Technical report "Gira de campo para la revisión de la propuesta de Tierras Colectivas en la provincia de Darién, Distrito de Chepigana, corregimientos de Santa Fe y la Provincia de Panamá, Distrito de Chepo, corregimiento de Tortí; según ley 72 de 23 de diciembre de 2008," and technical report "Gira de campo para la revisión del ante proyecto y aprobación de tierras colectivas a nivel nacional según ley 72." Annex to State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[226] In the last brief filed by the State, received by the IACHR May 14, 2012, it states: "... the delivery date of the Collective Property Titles of the Territories of Ipetí Emberá, Piriati Emberá, and Maje Emberá Drua [was agreed upon] as May 17, 2012.... In addition, the National Land Authority shall issue a certification of the indigenous territories of Piriati, Ipeti, and Maje-Emberá that are in the process of adjudication...." State's brief of May 14, 2012, received by the IACHR the same date. In its last submission to the IACHR, the State affirmed that a request presented by the authorities of the Emberá people of Bayano to the ANATI on August 13, 2012, is currently in "process of adjudication" "in accordance with an agreement between the State and the Traditional Authority in this region." State's brief of September 17, 2012, received on September 24, 2012. In addition, according to what was reported by the petitioners in their last brief, received by the IACHR June 20,

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3. Criminal proceedings concerning the invasion by peasants and crimes against the environment

168. In addition, the alleged victims initiated criminal actions against settlers for ecological crimes and invasion of their territories. In the documents produced by the parties that are part of the record before the IACHR one finds five criminal complaints against settlers for different crimes, some of which were joined.

a) Complaint for the crime of illicit association to engage in criminal conduct, usurpation, harm to property, illicit enrichment, ecological crime, and others before the Fifth Prosecutorial Circuit

169. On December 20, 2006, the Corporación de Abogados Indígenas de Panamá presented, on behalf of the General Caciques of the Kuna Comarca of Madungandí, a criminal complaint before the Attorney General of the Nation against 127 persons for the crime of illicit association to engage in criminal conduct, usurpation, harm to property, illicit enrichment, ecological harm, and all others that result from the illegal occupation of the lands of the Comarca. By means of that complaint the corregidors of El Llano and Tortí, the mayor of Chepo, the governor of the province of Panamá, and the President of the Republic were all alleged to be liable for the delict of abuse of authority and infraction of the duties of public servants.[227]

170. By resolution of January 29, 2007, the Office of the Attorney General of the Nation ordered that the investigation be removed to the Prosecutorial Circuit of the First Circuit of Panama.[228] By resolution of February 13, 2007, the Office of the 15th Prosecutor of the First Circuit of Panama undertook to study the complaint and declared that the investigation was open.[229] On February 28, 2007, the 15th Prosecutor's Office forwarded the investigation to the Office of the Specialized Prosecutor on the Environment, as it was considered a specialized matter.[230] On March 14, 2007, the Office of the Fifth Prosecutorial Circuit, specialized in environment, initiated its consideration of the preliminary inquiry.[231] In response to the request by the Commission regarding this investigation, the State informed the Commission that "the Attorney General of the Nation has state that it has not been possible to locate this criminal complaint [...]."[232]

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2012, the adjudications applied for have not been carried out. In particular, they noted that "to date no collective title has been granted, the settlers have not been evicted, nor has protection been given to the indigenous territories of Darién not to mention the Emberá of Alto Bayano [*sic*]." Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

[227] As background to this allegation, mention is made of the lack of a response in the administrative sphere, given that as of December 20, 2006; the legal action presented to the President of the Republic on January 24, 2005, had not been admitted or dismissed. Annex 60. File 212, folios 1 to 10. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[228] Annex 60. Resolution of the Office of the Attorney General of the Nation, January 29, 2007. File 212, folios 74 and 75. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[229] Annex 60. File 212, folio 77. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[230] Annex 60. File 212, folios 78 and 79. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[231] The last action of which the IACHR has knowledge is that on April 9, 2007, the 11th Prosecutor of the Circuit communicated with the Office of the Fifth Prosecutor of the First Judicial Circuit to report that a complaint was lodged with his office by the Caciques General of the Kuna Comarca of Madungandí for various offenses. In his last communication Héctor Huertas stated that it was joined to the criminal proceeding described next.] Annex X. File 212, folio 81. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[232] Submission of the State of September 17, 2012, received on September 24, 2012.

b) Criminal proceeding for crimes against the environment before the Office of the 11th Prosecutor of the First Judicial Circuit

171. On January 16, 2007, the Caciques General of the Kuna Comarca of Madungandí filed a complaint for crime against the environment before the Specialized Unit on Crime against the Environment of the Technical Judicial Police, which received number 002-07. It was based on Article 394 of Law 5 of January 28, 2005, which punishes with imprisonment of two to four years and with a fine of 50 to 150 days "one who, breaching the established norms on environmental protection, destroys, extracts, contaminates, or degrades the natural resources, causing irreversible adverse effects, direct or indirect." Specifically, they denounced that unknown persons were devastating forest areas of the Kuna Comarca of Madungandí, especially the areas of Loma Bonita, Curtí, Wacuco, and Tortí Abajo. The complaint identified two persons who were said to be leading the movement of peasants to the territory of the Comarca.[233]

172. On January 23, 2007, the Chief of the Unit on Crimes against the Environment took steps to determine the identity of the persons allegedly responsible, requests for information that were answered on January 25, 2007.[234] In addition, on January 23, 2007, it sent a request for information to the ANAM in order to determine whether the Comarca was part of the Bayano watershed, which was answered in the affirmative.[235] By resolution of January 25, 2007, the Chief of the Unit on Crimes against the Environment opened the corresponding preliminary investigation.[236]

173. After taking supplemental statements from the first and second caciques of the Kuna Comarca of Madungandí, by resolution of January 30, 2007, it was ordered to forward the proceedings up until that moment to the Office of the Special Prosecutor for Environmental Crimes, considering that the complaint should have been filed with the Circuit Judges, according to Article 159 of the Judicial Code. The complaint was forwarded the same day.[237]

174. In tandem with the foregoing process, on February 1, 2007, the Corporación de Abogados Indígenas de Panamá, in representation of the Kuna Congress of Madungandí, filed a criminal complaint for crimes against the environment with the 11th Prosecutor of Panama against three individuals.[238] On February 2, 2007, it was decided to assign to the Office of the 11th Prosecutor of the First Judicial Circuit of Panama the investigation in the context of the above-mentioned complaint 002-07.[239] Accordingly, on February 28, 2007, the Office of the 11th Prosecutor admitted as private accuser the Cacique General of the Comarca, and on April 24, 2007,

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[233] Annex 82. File 0118, folios 1 and 2. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[234] Annex 82. File 0118, folios 12-14 and 17-25. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[235] Annex 82. File 0118, folio 15. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[236] Annex 82. File 0118, folio 30. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[237] Annex 82. File 0118, folios 44 and 46. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[238] Annex 82. File 0118, folios 49 and 50. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[239] Annex 82. File 0118, folio 47. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

incorporated three persons as defendants.[240] According to the information produced by the parties, on August 22, 2007, and September 7, 2007, that prosecutorial office conducted field inspections.[241] According to the evidence before the IACHR, on May 29, 2008, the 11th Prosecutor's Office issued Prosecutorial Review no. 151, in which it concluded that:

> [...] despite the various technical evaluations carried out by the experts of the National Envrionmental Authority, the [accused] cannot be considered responsible of this fact, given that the experts have concluded that these devastations have taken place approximately 10 to 15 years, so no one can be held responsible even through they have been found in the lower Curtí sector[.] [S]imilarly, it was concluded that in this site there was not environmental affectation, and in the area where some degree of environmental affectation was found, Playa Yuso beach and Viejo Pedro, there is no evidence to establish the responsibility of the accused.[242]

175. According to the foregoing, the Prosecutor's Office requested the Second Circuit Court of the First Judicial Circuit of the Panama Province to order the temporary stay of the investigation.

c) Criminal proceeding before the Office of the Fifth Specialized Prosecutor of the First Circuit of Panama

176. On January 30, 2007 Héctor Huertas, attorney for the alleged victims, filed a complaint with the Technical Judicial Police of the district of Chepo, that on that same day he was going through the Comarca with personnel from ANAM when, in the zone of Tortí Abajo, they surprised four persons indiscriminately felling trees. The complaint was identified as CHE-029-2007.[243] On that same day, January 30, 2007, these persons were detained preventively by members of the Police of Tortí, and the next day they were handed over to the Technical Judicial Police.[244]

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[240] Annex 82. File 0118, folios 67-68 and 86. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[241] The first was in the sector of Viejo Pedro, Sub-district of El Llano; in the community of Loma Bonita, district of Chepo; and in the sub-district of Tortí, district of Chepo. [Annex 83. Transcript of the Field Inspection made by the 11th Prosecutor of the First Judicial Circuit of Panama, September 28, 2007, folios 464-466. Petitioners' brief of November 13, 2007, received by the IACHR the same day]. The second was in the sectors of Playa Chuzo, Tortí Abajo, Curtí, and Wacuco. [Annex 84. Transcription of the Field Inspection made by the 11th Prosecutor of the First Judicial Circuit of Panama, September 17, 2007, folios 461-462. Petitioners' brief of November 13, 2007, received by the IACHR the same day].

[242] Annex 85. Fiscal Review no. 151 of May 29, 2008 issued by the Eleventh Prosecutor's Office of the First Judicial Circuit of Panama. Annex 3 to the submission of the State of September 17, 2012, received on September 24, 2012.

[243] Annex 86. File 258, folios 1 to 5. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[244] Annex 86. File 258, folios 14 to 32. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

177. After taking a series of investigative measures[245], on January 31, 2007, the Technical Judicial Police of Chepo forwarded the file to the *Personería Municipal* of Chepo, the investigative agency of the Public Ministry, indicating that the accused continued in custody.[246] That officer known as the Personera Municipal took statements from the persons detained and by resolution of February 1, 2007, she ordered the application of measures to appear before the authorities instead of preventive detention.[247] On February 12, 2007, the Personera Municipal of Chepo ordered that due to her own lack of jurisdiction, the preliminary investigation should be forwarded to the corresponding Agency of the Public Ministry[248], assigning it to the Office of the Fifth Specialized Prosecutor of the First Judicial Circuit of Panama by resolution of February 23, 2007.[249] According to information provided by the parties, the Office of the Fifth Prosecutor took investigative measures in March and April 2007.[250]

178. The information available to the IACHR indicates that by Prosecutorial Proceeding No. 140 of July 29, 2007, that investigative agent recommended to the judge, the Tenth Circuit Criminal Court Judge of the First Judicial Circuit of the Province of Panama that he issue a provisional order to dismiss. According to the information produced by the parties, on December 27, 2007, the principal judge of that court ordered provisional dismissal No. 436-07, based on Article 2208(1) of the Judicial Code.[251] [252]

d) Criminal proceeding before the Office of the Deputy Director for Judicial investigation of the Agency of Chepo

179. On August 16, 2011, Tito Jiménez, administrative *sahila* of the community of Tabardi, filed a complaint for crime against property before the Office of the Deputy Director for Judicial Investigation, Agency of Chepo. The complaint, identified by the number AID-FAR-CHE-

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[245] Annex 86. Statement by Ernesto Castillo Castillo, regional administrator of the ANAM. File 258, folios 8 to 12. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Statement of Miguel Bonilla, sergeant of the Police Zone of Chepo who arrested the four persons. File 258, folios 33 to 34. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Request to the Regional Bureau of the ANAM for the complete report and photographic views of the place where the clear-cutting was found in the sector of Tortí Abajo. File 258, folios 14 and 36. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Request for identification of persons allegedly responsible to the Department of Judicial Identification. File 258, folio 35. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007. Annex 86. Investigative measure in the sector of Tortí Abajo, along with officials of the ANAM. File 258, folios 64-66. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[246] Annex 86. File 258, folios 68-69. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[247] Annex 86. File 258, folios 76-87 and 88-91. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[248] Annex 86. File 258, folio 124. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[249] Annex 86. File 258, folio 128. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[250] The record includes a request for information from the National Bureau of Indigenous Policy of the Ministry of Interior and Justice, folio 139; requests for information to the General Administrator of the National Environmental Authority, folios 161-163; witness statements, folios 164-169; social work visits to the home of the persons prosecuted, folios 174 to 219. Annex 86. Annex to petitioners' brief of May 7, 2007, received by the IACHR on May 10, 2007.

[251] Article 2208(1) of the Judicial Code - "The dismissal shall be without prejudice: 1. When the means that justify it, collected in the proceeding, are not sufficient to prove the punishable act...."

[252] Annex 87. Tenth Circuit Court for Criminal Matters of the First Judicial Circuit of the Province of Panamá. Dismissal without prejudice No. 436-07 of December 27, 2007. Petitioners' brief of May 22, 2012, received by the IACHR June 20, 2012.

298-11, refers to the invasion of and logging in the Kuna communities of Tabardi, Ikandi, and Pintupu, in an estimated area of 400 hectares.[253] According to the information available to the IACHR, Tito Jiménez subsequently made a statement and filed an amendment to the complaint in the face of new invasions in the sector of Tabardi.[254] The authority in charge of the process made two inspections to the areas in question, in August and September 2011.[255]

180. On September 26, 2011, the file was forwarded to the Office of the Municipal Ombudsperson of Chepo[256], in response to which Tito Jiménez filed a new amended complaint on October 17, 2011.[257] According to the information available to the IACHR, this process is continuing, without any clarification of the facts alleged or any punishment for those responsible.[258]

E. Impact of the Bayano Hydroelectric Complex and the Pan American Highway on the the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members

181. As the IACHR has considered proven in preceding paragraphs, the construction of the dam meant the flooding and consequent destruction of the territory inhabited ancestrally by the Kuna and Emberá peoples of Bayano, and on whose ecosystem they depended for their physical and spiritual survival, which itself represented a grave impact on the alleged victims' traditional way of life.[259] This impact is described by a member of the Emberá community as follows:

> … I suffered a brusque change as a child also at that time and I know that my whole family suffered the same at that moment when the water was rising behind the dam, flooding their houses, I saw it with my own eyes; we were the last family to abandon that place. Since then I was waiting on the other side of the river for us to move to the place where we were first relocated, when we reached that place, our community was ill, that I will never forget, and my community became ill and went crazy, my family ran fleeing into the street, to the mountains, those are things that stay with us … even the children, like they went mad, perhaps due to the very impact that we suffered. Perhaps we didn't have any way to live with our nature….(*sic*)[260]

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[253] In particular, denounced was "a group of persons who entered the Kuna Comarca of Madungandí and in which they established themselves, invaded and harmed approximately 400 hectares and that they have felled a large number of trees for timber, specifically ESPAVE, in addition they have burned and felled a large quantity of natural resources, and are residing in the place." Annex 88. Annex to the brief by requesters in the proceeding for precautionary measures, October 12, 2011, received the same day.

[254] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folios 8-9 and 22-24. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[255] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folios 11-12 and 29-31. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[256] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folio 37. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[257] Annex 89. Proceeding in response to complaint AID-FAR-CHE-298-11, folios 46-48. Annex 16 to petitioners' brief of July 13, 2012, received by the IACHR the same day.

[258] In that regard, the State affirmed in its last submission to the IACHR that "[a]t this time, according to information of the Municipal Government, the reopening of the investigation will be requested, since there is new evidence that supports doing so." Submission of the State of September 17, 2012, received on September 24, 2012.

[259] In this respect, the petitioners note: "The flooding of their ancestral lands no longer allows any tribe to continue its traditional way of life, and keeps them from passing on their cultural knowledge to future generations. For these indigenous groups, religious and cultural sites and bound up with the lands already flooded under Lake Bayano that cannot be replaced." Brief of additional observations on the merits by the petitioners, received by the IACHR on December 18, 2009. p. 23.

[260] IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano. Along similar lines, the Cacique General of the Kuna Comarca of Madungandí

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182. The construction of the hydroelectric complex led to an increase of diseases in the indigenous communities, caused mainly by the decomposition of the plant cover due to the creation of the reservoir.[261] According to the information produced, "the lake is also responsible for the proliferation of malaria by means of mosquitoes that transmit it and other flies that bite in the area, a major health problem for the indigenous peoples.""[262] In this respect, the record before the IACHR includes an epidemiological report produced May 12, 2009, in communities of the Kuna Comarca of Madungandí, which verifies that presence of "parasitic diseases of water origin" such as "malaria..., yellow fewer [and] leishmaniasis plasmodium vivax."[263] In addition, in a medical report produced based on a visit to three communities of the Kuna Comarca on May 10, 2009, it was found that the most common pathologies include respiratory, gastrointestinal, and dermatological infections.[264]

183. The IACHR also observes that the construction of the hydroelectric complex had a harmful impact on the traditional forms of subsistence of the indigenous peoples of Bayano. With the flooding of their ancestral lands the ecosystem on which they depended for hunting, fishing, and farming, and for obtaining traditional medicines was destroyed.[265] According to information produced by the parties, "most of the lands of the region [of the Bayano], with the exception made of the alluvial entisols [soils formed by the rising waters of the rivers] are of little or limited agricultural value.... A large part of the best soils, the alluvial ones, have been lost under the waters of the reservoir."[266] On that point, said epidemiological report of May 12, 2009, indicates that:

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noted on this incident that: "... I felt the sensation of the invasion of Bayano and also ... I feel very sad because lately, and in addition that I ... experienced, I felt the pain with this reservoir on the Bayano river ... has lost sacred sites, burial grounds, among others, and lack of cultural values." IACHR, Public hearing, March 23, 2012 sobre "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Manuel Pérez, Cacique General of the General Congress of the Kuna Comarca of Madungandí. See hearing at http://www.oas.org/es/cidh/

[261] Petitioners' initial petition of May 11, 2000. pp. 3-4. Annex 17. Sworn statement by the Kuna caciques. Annex 17 to petitioners' initial petition of May 11, 2000. p. 26; and petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. pp. 7-8.

[262] Annex 17. Sworn statement of the Kuna caciques. Annex 17 to petitioners' initial petition of May 11, 2000. p. 26; and petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. pp. 7-8.

[263] Annex 90. Epidemiological report produced May 12, 2009. Annex F-3 to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[264] Annex 90. Medical report produced May 10, 2009. Annex F-3 of petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. In addition, according to information produced by the alleged victims: "At present after more than 30 years skin diseases, rashes, malaria, fever, cough, among others, have followed and only one health post has been constructed in two communities, medical visits are sporadic, and they only go for a couple of hours ... [*sic*]". Annex 23. Technical Socio-Economic Report on the Compensation and Investment of the Kuna Comarca of Madungandí and the Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera, July 2009. Annex F to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[265] Petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. pp. 7-8; and petitioners' brief of January 19, 2007, received by the IACHR the same day.

[266] Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. p. 29. Citing Salamín Aguila, Edith Argelia. La Represa del Bayano y las Transformaciones Geoeconómicas de la Región (Panamá). Thesis for degree. UNAM. Mexico City. 1979. p. 23. Annex C to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009. In addition, Bolívar Jaripio Garabato, in his testimony before the IACHR, noted: ... when our land was flooded, the best lands that were fertile and through that loss, at that moment, we did not perhaps have the best quality of life, our population cannot produce from the land as it did before. There are many pests, the plantains, for example, do not produce as they did before, one must be planting every year, whereas before in that territory we would plant just once and we would have crops from generation to generation." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano.

> The hunting lands, which are now the main channel of Lake Bayano, source of protein for the population's diet, changed drastically to the consumption of vegetables, with scant meat consumption. To this situation has been added that the lands that have been available for agriculture have few nutrients or minerals (rocky and calcareous without organic matter at the surface), which makes it impossible for farming to replace the nutritional demand, resulting in severe malnutrition among children and adults over 50 years of age [*sic*].[267]

184. Consistent with this information, according to a report from the Ministry of Health on the Kuna Comarca of Madungandí produced by the State, as of December 2011 there was malnutrition in 80% of children under 5 years of age.[268] Along the same lines, the petitioners stated: "The poor quality of the land impacts on the food security of the indigenous communities, which affects the health of the population; diseases such as malaria, diarrhea, malnutrition, and tuberculosis are common."[269]

185. In addition, according to the information presented by the parties, the alleged victims do not have basic services such as water[270] and electricity.[271] The IACHR observes that paradoxically, the Bayano Hydroelectric Project does not benefit the indigenous peoples who were evicted from their lands and moved to make this construction possible who must purchase electrical generators at their own cost to have electricity.[272]

186. In addition, as has been noted, the construction of the hydroelectric project and the Pan American Highway led to the arrival in the Bayano region of groups of non-indigenous persons who began to establish themselves at the ends of the basin.[273] Once the highway running through indigenous lands was completed, this new road facilitated the internal migration of settlers who appropriated the indigenous lands, producing drastic changes in the social composition of the area.[274] The possession of lands and the use of natural resources by non-indigenous persons generated a climate of permanent tension that persists to this day. The IACHR observes that confrontations have even occurred on several occasions between indigenous persons and settlers,

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[267] Annex 90. Epidemiological report done May 12, 2009. Annex F-3 to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

[268] Annex 91. Report by the Ministry of Health on the activities carried out in the Kuna Comarca of Madungandí in 2000-2001. Annex to State's brief of June 15, 2007, received by the IACHR June 18, 2007.

[269] Petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. p. 7.

[270] Annex 92. Informe ejecutivo preliminar de las actividades realizadas por el Gobierno de Panamá en la Comarca Kuna de Madungandí y las Comunidades Piriati Empera e Ipeti Emberá hasta el año 2001 [Preliminary executive report of the activities carried out by the Government of Panama in the Kuna Comarca of Madungandí and the Emberá communities of Piriati and Ipeti up to 2001]. Annex to State's brief of November 25, 2002, received by the IACHR December 2, 2002.

[271] Petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. p. 7; and petitioners' brief of January 19, 2007, received by the IACHR the same day.

[272] In this respect, the Cacique General of the Kuna Comarca of Madungandí noted: "with this problem of the reservoir that appeared, new diseases also appeared affecting the population, and of late I wish to tell you the lack of electricity in the indigenous area, because the benefit is for the Panamanian people…." IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Manuel Pérez, Cacique General of the General Congress of the Kuna Comarca of Madungandí. See hearing at http://www.oas.org/es/cidh/. See also petitioners' brief of September 21, 2001, received by the IACHR September 24, 2001. p. 7.

[273] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[274] The petitioners state: "At the time the dam was built, nearly 2,000 settlers had already settled in the Bayano region. Drawn to the zone by the extension of the Pan American Highway in the 1950s, these settlers had come to the Bayano region from western Panama in search of lands to cultivate…. The additional construction of the highway in the 1970s accelerated the invasion." Petitioners' initial petition of May 11, 2000. p. 15 and pp. 25-26.

which impede the normal development of the alleged victims.[275] Accordingly, the presence of non-indigenous persons represents a constant threat to the traditional way of life and cultural identity of the Kuna and Emberá peoples.[276]

187. When they arrived the settlers began deforesting wooded areas to grow crops, engaging in extensive agriculture by which, through slash-and-burn practices, they have converted forests to pastureland, expanding the agricultural frontier and removing their natural resources from indigenous lands to convert them to pasture.[277] Indeed, according to the information produced by the parties, many settlers do not live in the lands of the comarca, but carry on economic activities in their territory or rent them to other persons to obtain better earnings.[278] The practice of eliminating the natural plant cover to grow crops is "diametrically opposed to the modes of conservation and protection of the petitioners' natural resources."[279]

V. LEGAL ANALYSIS

A. Preliminary matters

1. Delimitation of the legal dispute with respect to the territories of the alleged victims

188. The ancestral or traditional presence of the Kuna indigenous people of Madungandí and the Emberá in the Bayano zone has not been controverted by the State, nor has it presented evidence that contradicts or challenges the evidence that shows their long-standing ties to the land. To the contrary, the State has expressly recognized that the indigenous peoples who are the alleged victims have property rights over the lands they occupy. Accordingly, the State has repeatedly expressed – albeit with interruptions – its express will to formally adjudicate that property in the case pending, and to provide "territorial security" ("*seguridad territorial*") to the indigenous peoples, in keeping with the provisions of the Constitution, the domestic legislation, and the commitments that were explicitly made to the alleged victims. In this regard, the IACHR understands that what is at issue in the instant matter is not the property rights of these indigenous peoples over the territories they occupy, but the delivery of a legal title – in the case of the communities of the Emberá people – as well as their delimitation, demarcation, and effective protection.

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[275] Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 21, pp. 29-30.

[276] Petitioners' initial petition of May 11, 2000.

[277] Petitioners' initial petition of May 11, 2000. IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Testimony of Bolívar Jaripio Garabato, member of the Emberá community of Piriatí and of the Emberá General Congress of Alto Bayano; and Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 22.

[278] Annex 93. Survey done in the community of Curtí, November 21, 1998. Annex 17 to the State's communication of June 29, 2001, received by the IACHR July 2, 2001; and IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Ultiminio Cabrera Chanapi.

[279] Petitioners' brief of September 23, 2002, received by the IACHR September 25, 2002. According to information produced by the parties: "As there is an intimate relationship between the natural life processes, flora and fauna coexist and reproduce. With exuberant and rich vegetation, animal life is equally varied and abundant. If the flora is destroyed, the animal species also succumb. The jungle provides refuge and food to the fauna in its environment. This symbiotic and functional union is only altered by man.... Flora and fauna were for centuries a source of sustenance for the life of the indigenous groups that inhabited the basin, nonetheless their presence did not cause a rupture of the ecosystem given their low technological level, which enabled them to conserve the jungle." Annex 1. Esther Urieta Donos, thesis "Ipeti-Choco: Una comunidad Indígena de Panamá afectada por una Presa Hidroeléctrica". Universidad Veracruzana, School of Anthropology, 1994. pp. 30-31. Annex C to petitioners' brief of additional observations on the merits, received by the IACHR on December 18, 2009.

189. In addition, the IACHR observes that one aspect around which the parties' arguments have revolved refers to the rights that non-indigenous third persons who occupy territories claimed by the alleged victims could have, based on the agreement of March 31, 1995, signed with traditional authorities of the Kuna people of Madungandí and approved by the national government, and on Article 21 of Law 24 of January 12, 1996, which creates the Kuna Comarca of Madungandí. It is not up to the IACHR to determine the rights of the non-indigenous inhabitants of the area, who are not a party in the instant case, nor to rule on the specific way in which the process of eviction and relocation of the non-indigenous persons who remain in the zone should be carried out. What the IACHR considers it appropriate to indicate is that the State of Panama must guarantee, for the alleged victims in the instant case, an exclusively indigenous territory that is formally recognized, demarcated, delimited, and effectively protected, in keeping with its international obligations.

2. Considerations on the competence of the IACHR *ratione temporis*

190. Throughout the years relevant to the present case, as will be noted in the following paragraphs, the State of Panama had obligations relating to indigenous property rights both internationally, under the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, ILO Convention 107 on indigenous and tribal populations; as well as internally, under its own legal and constitutional regime.

191. Based on the evidence in the record, the IACHR has considered as proven a number of facts that occurred prior to May 8, 1978, the date on which Panama ratified the American Convention, which refer mainly to the eviction of the population and the flooding of the ancestral territories of the alleged victims. The IACHR considers that while those facts occurred prior to the State's ratification of the American Convention, the obligations which emerged from these acts, which consist of the payment of economic compensation and the recognition of rights to the lands granted, persist even after that date, and have been complemented by subsequent state acts to which reference has been made, as well as by international commitments assumed by the State. Accordingly, this case is centered on the failure to comply with such obligations, as well as the lack of a response by the State in light of the impact on indigenous territories subsequent to the agreements and initial recognitions.

B. Indigenous property rights – Articles 8, 21, and 25 of the Convention, in relation to its Articles 1(1) and 2

1. The territorial rights of indigenous peoples in the inter-American human rights system

192. The case-law of the inter-American human rights system has repeatedly recognized indigenous peoples' property rights over their ancestral territories, and the duty of protection that emanates from Article 21 of the American Convention and Article XXIII of the American Declaration, interpreted in light of the provisions of the International Labour Organization (ILO) Convention No. 169, the United Nations Declaration of the Rights of Indigenous Peoples, the Draft American Declaration of the Rights of Indigenous Peoples and other relevant sources, all of which compose a coherent corpus iuris that defines the obligations of OAS Member States with regard to the protection of indigenous property rights.[280] In this respect, the IACHR has stated that

[280] See *inter alia* IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States), December 27, 2002, para. 127; IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of Toledo District v. Belize, October 12, 2004, para. 87; IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30,

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indigenous and tribal peoples have a communal property right over the lands they have used and occupied traditionally, "and that the character of these rights is a function of … customary land use patterns and tenure."[281] Along these same lines, the Inter-American Court has indicated: "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[282]

193. In addition to their collective conception of property rights, the indigenous peoples have a special, unique, and internationally protected relationship with their ancestral territories, which is absent in the case of non-indigenous communities. This special and unique relationship between indigenous peoples and their traditional territories enjoys international legal protection. As the IACHR and the Inter-American Court have argued, preserving the particular connection between the indigenous communities and their lands and resources is bound up with the very existence of these peoples, and therefore "warrants special measures of protection."[283] The right to property of indigenous and tribal peoples protects this close tie they maintain with their territories and with the natural resources linked to their culture that are found there.[284]

194. The right to territory includes the use and enjoyment of the natural resources found in the territory, and is directly tied to, indeed is a prerequisite for, the rights to a dignified existence, food, water, health, and life.[285] For this reason, the IACHR has indicated that "an indigenous community's 'relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.'"[286]

…continuation
2009, para.6; I/A Court H.R. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 127-129.

[281] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of Toledo District v. Belize, October 12, 2004, para. 151. See *inter alia* IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States), December 27, 2002, para. 130; IACHR, Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 160. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 75.

[282] I/A Court H.R. *Case of the Awas Tingni Mayagna (Sumo) Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79. para. 149. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 131; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146. para. 118; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214, paras. 85-87; *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 85; *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 145.

[283] IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann v. United States, December 27, 2002, para. 128. I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79. Para. 149. See also: I/A Court H.R., Case of the Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006. Series C No. 146, para. 222.

[284] IACHR, Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 156. I/A Court H.R.. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148. I/A Court H.R.. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R.. Case of Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121.

[285] IACHR, Democracy and Human Rights in Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1076-1080.

[286] IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, 2010, para. 184.

195. Similarly, the IACHR and the Inter-American Court have established that indigenous peoples, as collective subjects distinguishable from their individual members, are rightsholders recognized by the American Convention. In that respect, in its recent judgment in *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, the Inter-American Court stated that "international legislation concerning indigenous or tribal communities and peoples recognizes their rights as collective subjects of International Law and not only as individuals." In addition, the Court stated that "[g]iven that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective."[287] In that sense, and as in previous cases,[288] the IACHR will analyze the present case from a collective perspective.

2. The indigenous territorial claim in the instant case

196. The Commission notes that, pursuant to the international and domestic rules mentioned above, even at the time of the construction of Hydroelectric Bayano, Panama was required to not disposess the property, even for a public purpose, without the payment of fair and adequate compensation, and without discrimination.

2.1. Breach of the duty to pay just and prompt compensation for the alienation of the ancestral territories of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members – Article 21 of the Convention, in relation to its Article 1(1)

197. The IACHR and the Court have recognized that indigenous and tribal peoples have a right to reparation in those exceptional cases in which there are objective and justified reasons that make it impossible for the State to restore their territorial rights. It has been explained by the Inter-American Court in the following terms:

> when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.[289]

198. In the instant case, the IACHR has accepted as proven that on May 8, 1969, the State adopted Cabinet Decree 123 by which it alienated an area of 1,124.24 km^2, belonging to the non-adjudicable areas of the Bayano Reserve, which constituted the ancestral territory of the Kuna people of Madungandí and the Emberá people of Bayano. From 1972 to 1976 the State built the

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[287] I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 231.

[288] See, e.g., IACHR, Case presented to the Inter-Am. Court H.R. in the Case of Mayagna (Sumo) Community Awas Tingni vs. Nicaragua, June 4, 1998; IACHR, Case presented to the Inter-Am. Court H.R. in the case of Yakye Axa Indigenous Community vs. Paraguay, March 17, 2003; Report No. 40/04, Case 12.053, Maya Indigenous Community of the District of Toledo v. Belize, October 12, 2004; IACHR, Case presented to the Inter-Am. Court H.R. in the Sawhoyamaxa Indigenous Community v. Paraguay, February 2005; IACHR, Case presented to the Inter-Am. Court H.R. in the Case of the Saramaka People vs. Suriname, June 23, 2006; IACHR, Case presented to the Inter-Am. Court H.R. in the Case of Yákmok Kásek Indigenous Community v. Paraguay, July 3, 2009; IACHR, Case presented to the Inter-Am. Court H.R. in the Case of the Kichwa Indigenous People of Sarayaku and its members v. Ecuador, April 26, 2010.

[289] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 135.

Ascanio Villalaz Hydroelectric Complex, which entailed the creation of a manmade lake of approximately 350 km^2.

199. Based on the information available to it and as has been affirmed by the parties, the IACHR observes that said project entailed the flooding of the ancestral territory of the Kuna people of Madungandí and the Emberá of Bayano. In that regard, the IACHR understands that restitution of those territories would not be materially possible, as they are under the manmade lake created by the dam. If restitution of their ancestral territories to the indigenous peoples of Bayano is impossible, the state obligation to grant them reparation through alternative lands and/or by payment of just and prompt compensation takes on special relevance. As determined in the facts proven in this report, the State undertook precisely to grant such compensation. The IACHR will refer to economic reparations at this point and to the performance of its obligations in relation to the lands granted in the following section.

200. As has been considered proven, the State repeatedly agreed to pay individual and collective compensation to the Kuna people of Madungandí and the Emberá of Bayano, and their members. Nonetheless, in the face of the petitioners' allegation regarding the failure of the State to pay such compensation, the State did not show that it was carrying out this commitment; to the contrary, the information available to the IACHR leads it to conclude that those amounts were not actually paid, constantly breaching the legal commitements made between 1973 and 2010.

201. In this respect, the IACHR observes that on July 8, 1971, Cabinet Decree 156 was issued, which established a "Special Compensation Assistance Fund for the Indigenous of Bayano" that established the payment of 30% of the total amount of the revenues of the Forestry Fund of the State, established as of January 1, 1971, and those revenues that come in from the promulgation of that Decree and for three years from that date. In addition, as has been considered proven, point 2 of the Agreement of Fuerte Cimarrón – signed by representative of the Corporación del Bayano, the National Guard, and representatives of the Kuna people of Madungandí – established a new timetable for updating the commitments to pay compensation on which the government was delinquent. In addition, in 1980 the Kuna indigenous people of Madungandí signed an agreement with the then-Vice President of the Republic, Ricardo De La Espriella, which extended the payment of compensation to eight years. The IACHR understands that the signing of subsequent agreements is evidence of the failure to carry out the first ones.

202. Along these lines, during the stage of the procedure before the IACHR when a friendly settlement was being pursued, an Indigenous-Government Commission was established with the participation of traditional authorities of the Kuna and Emberá peoples of Bayano, and authorities from the national, provincial, and local governments. The IACHR notes that one of the sub-commissions formed referred precisely to "Compensations and Costs," whose objective was "to review the compensation for the Kuna Comarca of Madungandí and to quantify the new compensation for the Kuna and the Emberá on an individual, *comarca*, and community basis."

203. In addition, as the IACHR has considered proven, as part of the actions for reaching a friendly settlement agreement, the petitioners commissioned the preparation of the "Technical Socio-Economic Report on Compensation and Investment: Kuna Comarca of Madungandí and Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera," submitted to the Ministry of Interior and Justice on May 12, 2003. Subsequently, in July 2009, a new study called "Technical Socio-Economic Report on Compensation and Investment: Kuna Comarca of Madungandí and Emberá Collective Lands of Piriatí, Ipetí, and Maje Cordillera" was prepared at the request of the authorities of the Kuna Comarca of Madungandí and of the Emberá of Bayano.

204. The Commission also notes that the State indicated, based on a report by the director general of the Corporación del Bayano, that compensation was paid from 1974 to 1978 to

seven communities (Maje, Pintupo, Aguas Claras, Río Diablo, Saderhuila, Ibebsigana, and Ipetí).[290] It added that in 1999 "the Darién sustainable development program, for example, found that the compensation payments were made for three years, of the eight promised."[291]

205. In view of the foregoing, the IACHR considers that the relationship between the alleged victims and the state authorities in respect of the payment of compensation was a relationship the contours of which were determined by legally recognized rights. Moreover, it observes that the 1946 Constitution of Panama, at Article 46[292], and subsequently the 1972 Constitution, at Article 44, contained the state obligation to pay compensation for the expropriation of private property.[293] Nonetheless, as has been proved, these legal obligations, with the rights that derived from them, were not carried out; rather, the State has not shown, after four decades, that it has paid just and prompt compensation in its entirety to the alleged victims.

206. The IACHR also recalls that even though referring to individual property the Inter-American Court has explained that "just compensation" presupposes that it be "prompt, adequate and effective."[294] In addition the Court has understood that in cases of expropriation of private property – whether individual or collective, indigenous or non-indigenous – by the State, the payment of just compensation is not only a right under Article 21 of the American Convention, but also a general principle of international law, widely reiterated by the international case-law.[295]

207. It is not up to the IACHR to determine the amount to be paid the alleged victims, but to recall that, as the Inter-American Court has noted: "Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State."[296] Rather, such a decision should be reached by consensus with the indigenous peoples affected, ensuring their effective participation in keeping with their own procedures for consultation, values, uses, and customary law.

208. According to the standards in the Inter-American system, to this end one must consider that the alienation of the ancestral territories of the Kuna people of Madungandí and the Emberá of Bayano entailed the loss of sacred places, forests, dwellings, crops, animals, and medicinal plants that not only had a material value for these indigenous peoples but that were an essential part of their cultural identity and traditional way of life. Based on the facts proven in this report, the IACHR is of the view that their loss entailed not only material losses, but also cultural and spiritual losses impossible to recover, for which compensation is due.

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[290] Communication from the State of June 29, 2001. p. 6.

[291] Communication from the State of June 29, 2001. p. 6.

[292] 1946 Constitution, Article 46. "For reasons of public utility and social interest defined in the Law, there may be expropriation, by judicial judgment and prior compensation."

[293] 1972 Constitution, Article 44. "Private property implies obligations for the owner by reason of the social function it must perform. For reasons of public utility or social interest defined in the Law, there may be expropriation by means of special proceedings and compensation." The IACHR observes that the equivalent of this provision was included in the subsequent constitutions, namely: Article 45 of the 1972 Constitution, with amendments in 1978, 1983, and 1994; and Article 48 of the 1972 Constitution, with amendments in 2004.

[294] I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179. para. 96.

[295] I/A Court H.R., *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179. paras. 96-97.

[296] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 151.

209. Therefore, the Commission concludes that the failure to make reparations to the alleged victims in the terms described above, more than 40 years after their ancestral territories were alienated, constitutes a violation of Article 21 of the American Convention in relation to its Article 1(1).

2.2. Breach of the obligations relating to the territorial rights of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members - Article 21 of the Convention in relation to Articles 1(1) and 2

b) Obligation to title, demarcate, and delimit the collective property of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members

210. The 1972 Constitution of the Republic of Panama, amended in 2004, recognizes at Article 90 the ethnic diversity of the Panamanian population[297], although it refers to the historical existence of the indigenous peoples in a folkloric sense, as per Article 87.[298] In addition, the Constitution provides for a set of specific norms on indigenous peoples which refer, in particular, to the study, conservation, and dissemination of "folkloric traditions"[299]; to the study, conservation, and dissemination of the indigenous languages ("*lenguas aborígenes*"), and to "bilingual literacy"[300]; to the development of education and promotion programs to achieve their active participation as citizens[301]; and to receiving special attention for their economic, social, and political participation in the national life.[302]

211. Article 127 of the Panamanian Constitution recognizes the collective property rights of the indigenous communities and establishes that the specific procedures for recognizing them shall be determined by law.[303] In addition, Article 126 of the Constitution, which refers to the agrarian regime, establishes at the relevant part:

> To carry out the purposes of agrarian policy the State shall develop the following activities:
> 1. Endow the peasants with the necessary lands to work, and regulate the use of water resources. The Law may establish a special collective property regime for the peasant communities that so request.
> ...
> 4. Establish means of communication and transport to link the peasant and indigenous communities to the centers of storage, distribution, and consumption.
> 5. Settle new lands and regulate their tenure and use, and the tenure and use of those that are integrated to the economy as the result of the building of new roads.
> 6. Stimulate the development of the agrarian sector through technical assistance and fostering organizing, training, protection, technification, and other forms as determined by Law.
> ...
> The policy established for this Chapter shall be applicable to the indigenous communities in keeping with the scientific methods of cultural change.

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[297] Constitution of Panama, Article 90.

[298] Constitution of Panama. Article 87.

[299] Constitution of Panama. Article 87.

[300] Constitution of Panama. Article 88.

[301] Constitution of Panama. Article 108.

[302] Constitution of Panama. Article 124.

[303] Constitution of Panama. Article 127.

212. While the Panamanian Constitution recognizes ethnic diversity and protects certain fundamental rights of the indigenous peoples, such as their collective property rights, it maintains provisions that evidence an integrationist approach that stands in contrast to the constitutional trend of recent decades in the Americas, and to the development of the human rights of indigenous peoples internationally.

213. In addition, Panama is one of the states for which ILO Convention 107 still holds, as it has not ratified ILO Convention 169. Article 11 of Convention 107 provides:

> Article 11. The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

214. In addition to the constitutional recognition of the fundamental rights of indigenous peoples in Panama, there are several provisions in the domestic legal order on those rights, especially the five laws establishing *comarcas*, which recognize the collective property rights of certain indigenous peoples over their ancestral territories.

215. The Commission considers that in this case the right to property enshrined in Article 21 of the Convention includes the right to community property, in keeping with what is stipulated in the Constitution and legislation of Panama. This consideration is consistent with what the Inter-American Court held on this point:

> Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.[304]

216. In view of the foregoing, it is established that the Panamanian legal order expressly recognizes and obligates the State to guarantee the property rights of the indigenous peoples, including the Kuna of Madungandí and the Emberá of Bayano. Pursuant to Articles 21 and 29 of the American Convention, that regulation is protected by the Convention.

217. In the instant case, the State of Panama signed, over nearly three decades, a series of agreements with the Kuna of Madungandí and the Emberá of Bayano, and also promulgated decrees and resolutions formalizing the commitment to recognize, in their benefit, a title to the collective ownership of the lands granted in compensation for the alienation of their ancestral territories.

218. Specifically with respect to the Emberá indigenous people of Bayano, recognition by the State of the collective property rights to their lands, and the commitment to formally recognize this right was set forth, in at least the following: (i) the 1975 Agreement of Majecito, which ordered the resettlement of the Emberá communities that inhabited the Bayano region before the construction of the dam to the localities of Piriatí and Ipetí; (ii) Article 2(e) of Decree 5-A of 1982,

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[304] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118.

which ruled out the adjudication of plots established that their "demarcation is a responsibility of the National Bureau of Indigenous Policy"[305]; (iii) the agreement of September 6, 1983, among the Kuna of Madungandí, the Emberá of Piriatí, and a representative of the Ministry of Interior and Justice by which it was agreed to establish boundaries between the territories occupied by those indigenous peoples[306]; (iv) the Mutual Agreement of August 15, 1984, in which the Corporación Bayano undertook to "take all steps necessary to see the attainment of the indigenous aspirations as regards the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriatí"[307]; (v) the Plan of Action adopted in 1999 by the Darién Sustainable Development Program, under the Ministry of Economy and Finance, which recommended the demarcation, delimitation, and marking of the lands of the indigenous communities of Ipetí and Piriatí; (vi) Article 2 of Executive Decree 267 of 2002, extending the scope of application of Executive Decree 267, which carves out an exception for the adjudication of the collective lands of the Emberá population of Piriatí and Ipetí[308]; (vii) Resolution No. D. N. 132-2003 of the National Bureau of Agrarian Reform of 2003, which suspends all processing of requests for adjudication and transfers of possessory rights to lots situated within the area occupied by the Emberá populations of Ipetí and Piriatí[309]; and (viii) the "Agreement on Action and Decision" signed in November 2011, among the authorities of the Emberá people and representatives of the ANAT and the Ministry of Interior and Justice, by which the state authorities undertake to proceed with the collective titling of their lands.

219. The IACHR cannot fail to note that despite the existence of acts that recognized, directly and indirectly, the collective property rights of the Emberá communities over the lands of Piriatí and Ipetí, the State, throughout the procedure before the IACHR, maintained contradictory positions that went from expressly recognizing their territorial rights to denying the existence of a "special regime for the purposes of tenure, conservation, and use by the indigenous population."[310] This ambivalence is a reflection of its actions domestically, which, as the IACHR has been able to observe, have been characterized by the signing of commitments, and the subsequent denial of them, which has resulted in the situation of formal non-recognition of their property rights that continues to affect them, constantly breaching its commitments.

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[305] Article 2(e) of Decree No. 5-A of April 23, 1982. "Adjudication under any guise is prohibited of the state lands included and described: … (e) In the area of the Kuna and Emberá indigenous comarcas whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of those communities. While that physical demarcation is determined, the Kuna and Emberá communities may veto requests for adjudication of plots that belong to the territories of those *comarcas*."

[306] Annex 24. Agreement of September 6, 1983. Annex 14 to petitioners' initial petition of May 11, 2000; and Annex 7 to the State's communication of June 29, 2001.

[307] Annex 26. Agreement of Mutual Accord, August 15, 1984. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001.

[308] Annex 42. Article 2 of Executive Decree 267 of October 2, 2002. "The following lands shall be exempted from the application of this Decree: … 2. The collective lands of the Emberá population of Ipetí and Piriatí, in the district of Chepo, province of Panamá."

[309] By Resolution No. D. N. 132-2003 of March 18, 2003, the Agrarian Reform Bureau of the Ministry of Agricultural Development established as follows: "To suspend all processing of applications for adjudication and transfers of possessory rights over lands situated within the area occupied by the Emberá populations of Ipetí and Piriatí, in the district of Chepo, province of Panamá." State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[310] Specifically, the State in briefs before the IACHR argued: "The Emberá people of Bayano inhabit state lands and those lands do not have a special regime for purposes of their tenure, conservation, and use by the indigenous population." Communication of the State of May 18, 2007, received by the IACHR May 22, 2007; and Additional observations on the merits presented by the State by brief of April 27, 2010, received by the IACHR May 3, 2010. In another brief the State noted: "The case of the Emberá of Ipetí and Piriatí is very different because they are two communities which in conjunction with other Emberá communities are attempting to define their legal situation over the land, administration, and organization, a proposal that is in the Legislative Assembly by the initiative of the interested parties. The legal definition has involved persons of black [ethnicity] and peasants who share, with the Emberá the area known as the province of Darién."

220. In addition, it has been considered proven that on October 27, 2009, the Emberá communities of Bayano filed a request for adjudication of lands with the National Bureau of Agrarian Reform, based on Law 72. As the IACHR has verified, while some steps were taken by the administrative agencies in charge of processing that request, approximately three years after the procedures required were initiated, to date their property rights over their traditional territory have not received effective protection.

221. Yet in addition to breaching the commitments acquired to formally recognize their territorial rights, which the IACHR has considered proven, state authorities adjudicated plots situated in the territory claimed by the Emberá people of Bayano to third persons, granting them individual property titles. In the opinion of the IACHR, this entails a total repudiation of the legal obligations assumed by the State, and the aggravation of the situation of juridical insecurity in which these communities find themselves. As the IACHR has indicated, the legal order, should provide the indigenous communities effective security and legal stability with respect to their lands.[311] Legal insecurity with respect to these rights renders indigenous and tribal peoples "especially vulnerable and open to conflicts and violation of rights."[312] The existence of property titles that are in conflict with titles has been specifically identified by the IACHR as a factor that causes legal insecurity for the indigenous communities.[313]

222. In summary, the unilateral denial of the legal rights contained in commitments assumed by the State since 1975 and its own Constitution, laws and international obligations, and the consequent repudiation of the right that the indigenous communities of the Emberá people of Bayano to the effective performance and implementation of the agreements that recognized their property rights, constituted a violation of Article 21 of the American Convention, in connection with Articles 1(1) and 2.

223. As regards the Kuna indigenous people of Madungandí, the IACHR observes that recognition of their collective property rights over their lands and the obligation of the State to formally recognize this right was expressed, at least, in: (i) Cabinet Decree 123 of 1969, which provided for the granting of new lands, as an area of 1,124.24 km^2 was being alienated, that belonged to the Indigenous Reserve of Bayano of the construction of the hydroelectric dam; (ii) the Agreement of Farallón of 1976 in which the "National Government undertakes to demarcate the reserve and relocate the settlers and Indians"; (iii) Article 2(e) of Decree 5-A of 1982, which ruled out the adjudication of lots within their territories and established that their "demarcation is entrusted to the National Bureau of Indigenous Policy"[314]; (iv) the agreement of September 6, 1983, among the Kuna of Madungandí, Emberá of Piriatí, and a representative of the Ministry of Interior and Justice by which it was agreed to establish boundaries between those indigenous groups[315]; (v)

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[311] IACHR, *Second Report on the Situation of Human Rights in Peru.* Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, para. 19.

[312] IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, Chapter XI, para. 57.

[313] IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, para. 57. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 8.

[314] Article 2(e) of Decree No. 5-A of April 23, 1982. ""Adjudication under any guise is prohibited of the state lands included and described: … (e) In the area of the Kuna and Emberá indigenous *comarcas* whose demarcation is entrusted to the National Bureau of Indigenous Policy and the leaders of those communities. While that physical demarcation is determined, the Kuna and Emberá communities may veto requests for adjudication of plots that belong to the territories of those *comarcas*."

[315] Annex 24. Agreement of September 6, 1983. Annex 14 to petitioners' initial petition of May 11, 2000; and Annex 7 to the State's communication of June 29, 2001.

the "Agreement of Mutual Accord" of 1984 in whose first point the State reiterated, through the Corporación para el Desarrollo Integral del Bayano, its obligation to create a *comarca* for the Kuna people of Bayano. In addition, as has been proven, there were multiple agreements and resolutions that stipulated the commitment to evict the non-indigenous persons who were illegally occupying their territories, which recognized that collective property rights that would prevail over third persons.[316]

224. The titles and rights that were derived from the agreements signed with the State pursuant to the Constitution and international obligations were not formally recognized until 30 years later, by Law 24 of January 12, 1996. The IACHR notes that this long process of claiming indigenous territory was marked by the successive signing of commitments and their systematic repudiation and failure to perform by the State. In addition to these agreements giving rise to legal rights, they gave rise to a series of legitimate expectations in the leaders and members of the indigenous people that were constantly frustrated.

225. The IACHR also observes that while Law 24 granted formal recognition to the collective property rights of the Kuna indigenous people of Madungandí, the boundaries of the Comarca were not demarcated or physically delimited until four years later. In this respect, the IACHR recalls that, as the Court has noted, the failure to delimit and effectively demarcate indigenous territories, even when there is formal recognition of the right to communal property of their members, causes "a climate of constant uncertainty" in which the community members "do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property."[317]

226. Similarly, as the IACHR has indicated, based on Article 2 of the American Convention, the indigenous peoples have a right to effective implementation of the law. Under this provision, the states must ensure the practical implementation of the constitutional, statutory, and regulatory provisions of their domestic law that enshrine the rights of indigenous and tribal peoples and their members, so as to ensure the effective enjoyment of those rights.[318] While attaching a positive value to the adoption of legal provisions on the collective rights of indigenous peoples, the IACHR has insisted that the adoption of legal provisions does not suffice to carry out the international obligations of the states.[319] Similarly, the Inter-American Court has explained that

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[316] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001; Annex 31. Working Agreement for the Renewed Land Use Management of Alto Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí, and other Communities of July 16, 1991. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 32. Resolution 002 of January 24, 1992. Annex 19 to petitioners' initial petition of May 11, 2000; and Annex 14 to the State's communication of June 29, 2001; Annex 33. Resolution 63 of March 17, 1992. Annex 20 to petitioners' initial petition of May 11, 2000; and Annex 13 to the State's communication of June 29, 2001.

[317] I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 153.

[318] IACHR, *Democracy and Human Rights Venezuela*, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1062. See also: IACHR, *Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, paras. 220, 297 - Recommendation 4. IACHR, *Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, paras. 134, 149.

[319] See, among others: IACHR, *Democracy and Human Rights in Venezuela*, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1052-1061. IACHR, *Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, paras. 218, 219. IACHR, Arguments before the Inter-American Court of Human Rights in the case of Yakye Axa v. Paraguay. Referred to in: I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 120(b). See also: IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*. Doc. OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, para. 36. IACHR, *Third Report on the Situation of Human Rights in Paraguay.* Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, para. 28.

"legislation alone is not enough to guarantee the full effectiveness of the rights protected by the Convention, but rather, such guarantee implies certain governmental conducts to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights."[320]

227. As regards specifically the right to property over their territory, the mere abstract recognition of the right to community property of indigenous and tribal peoples does not suffice; rather, the states must adopt concrete measures to ensure it is observed in practice.[321] In the words of the Court, "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[322] As affirmed by the IACHR and the Court, under Article 21 it is necessary for the statutory and constitutional provisions that recognize the right of the members of indigenous communities to their ancestral territory be translated into the restitution and effective protection of those territories.[323] Even if the territorial rights and other rights of indigenous and tribal peoples are formally enshrined, the failure of the states to take the measures necessary for recognizing and ensuring those rights gives rise to situations of uncertainty among the members of their communities.[324]

228. Accordingly, the IACHR considers that the State of Panama has not guaranteed the right to property of the Kuna of Madungandí and the Emberá of Bayano, and their members, to their ancestral and traditional territory, therefore depriving them not only of the material possession of their territory, but also of the fundamental basis for developing their culture, spiritual life, integrity, and economic survival. Based on the foregoing considerations, the Commission considers that the State violated Article 21 of the American Convention to the detriment of the Kuna people of Madungandí and the Emberá people of Bayano, and their members, in relation to Articles 1(1) and 2 of the Convention.

c) Obligation of protection vis-à-vis third persons of the territory and natural resources of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, and their members

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[320] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 167. I/A Court H.R.. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 142.

[321] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 141.

[322] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143.

[323] IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, para. 50, Recommendation 1.

[324] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 170. Applying these rules, in the case of the community of Awas Tingni the Inter-American Court said that "it [is] necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community." [I/A Court H.R.. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 138]. In the same terms, in the case of the Sawhoyamaxa community v. Paraguay, the Inter-American Court explained that in light of the obligation derived from Article 1(1) of the American Convention on Human Rights, read together with Article 21: "Even though the right to communal property of the lands and of the natural resources of indigenous people is recognized in Paraguayan laws, such merely abstract or legal recognition becomes meaningless in practice if the lands have not been physically delimited and surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right by the members of the Sawhoyamaxa Community are lacking." [I/A Court H.R.. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 143]

229. The IACHR has indicated that indigenous and tribal peoples have the right to be protected from conflicts with third persons over the land through the prompt granting of title, and the delimitation and demarcation of their lands without delay, so as to prevent conflicts and attacks by others.[325] In this same vein, indigenous and tribal peoples and their members have a right to have their territory reserved for them, without there being settlements or the presence of non-indigenous third persons or settlers on their lands. The State has a correlative obligation to prevent the invasion or settlement of the indigenous or tribal territory by other persons, and to take initiatives and actions necessary to relocate those non-indigenous inhabitants who may have settled there from the territory.[326]

230. Following this line, the IACHR has established that the States are under an obligation to "Carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the [indigenous] people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the [indigenous] people."[327] The IACHR has characterized the illegal invasions and intrusions of non-indigenous persons as threats, usurpations, and reductions of the rights to property and effective possession of the territory by indigenous and tribal peoples that the State is obligated to control and prevent.[328]

231. In addition, the case-law of the inter-American human rights system on indigenous peoples' right to communal property has explicitly incorporated within the material scope of this right the natural resources traditionally used by the indigenous peoples and bound up with their cultures, including for spiritual or cultural uses. In this respect, the Inter-American Court has indicated:

> [T]he right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life.[329]

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[325] IACHR, *Democracy and Human Rights in Venezuela.* Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 1137 – Recommendation 2. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 113.

[326] IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 114.

[327] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 197 – Recommendation 2.

[328] IACHR, *Report on the Situation of Human Rights in Brazil*. Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, Chapter VI, paras. 33, 40. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 114.

[329] I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 124, 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121. I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 146.

232. According to the case-law of the Inter-American Court, "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake."[330] Accordingly, the right of indigenous peoples to property over, access to, and the use of the natural resources present in their traditional territories is closely bound up with the survival of the indigenous peoples as differentiated peoples, mindful of aspects that go to both their material sustenance and their cultural survival. As the Court has affirmed, this connection between the territory and the natural resources that the indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival, as well as the development and continuity of their cosmovision, must be protected under Article 21 of the Convention to guarantee that they can continue their traditional way of life and that their cultural identity, social structure, economic system, customs, beliefs, and distinct traditions will be respect, ensured, and protected by the states.[331]

233. In addition, although neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights includes any express reference to the protection of the environment, it is clear that several fundamental rights enshrined therein require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. The IACHR has emphasized in this regard that there is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity.[332] These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm on their ancestral territories.[333]

234. The IACHR considers that the States have the duty to adopt measures to prevent harm to the environment in indigenous and tribal territories and to adopt the measures necessary to protect the habitat of the indigenous communities, taking into account the special characteristics of indigenous peoples, and the special and unique relationship that they have with their ancestral territories and natural resources found therein. In adopting these measures, as the IACHR has pointed out, the states should place "special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities."[334] Similarly, the IACHR has

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[330] I/A Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172. para. 121. See also: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 118. I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 147.

[331] I/A Court H.R. *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245. para. 146. See also: I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 125 and 135. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 18 and 21.

[332] IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

[333] See IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997. IACHR – The Situation of Human Rights in Cuba, Seventh Report. Doc. OEA/Ser.L/V/II.61, Doc.29 rev. 1, October 4, 1983, paras. 1, 2, 41, 60, 61.

[334] IACHR, Third Report on the Situation of Human Rights in Paraguay. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, Chapter IX, paras. 38, 50 – Recommendation 8.

previously expressed that States are under an obligation to control and prevent illegal extractive activities such as logging, fishing, and illegal mining on indigenous or tribal ancestral territories, and to investigate and punish those responsible.[335]

235. The IACHR observes that along these same lines the Constitution of Panama prohibits, at Article 127, the private appropriation of indigenous lands, and that the legal provisions referring to recognition of the collective property rights of indigenous peoples exists in the Panamanian domestic legal order. It also notes that the Panamanian legal order includes legal provisions that protect forest resources and allow for the imposition of sanctions for illegal logging and environmental harm, in particular the Forestry Law of February 3, 1994, and the General Law on the Environment of July 1, 1998.[336]

236. In light of the foregoing considerations the IACHR considers that the State of Panama was under the international obligation to prevent the invasion and illegal logging, and to effectively protect the territory and natural resources of the alleged victims. In the instant case, the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members constantly and consistently denounced that settlers were continuously appropriating their territories, and that non-indigenous persons were engaged in the logging and illegal extraction of timber and other natural resources, resulting in environmental degradation due to deforestation.

237. The indigenous inhabitants informed the state authorities of these facts in timely fashion, in different forums. In particular, successive agreements were signed whereby the State acquired formal commitments in which the state authorities announced that they would perform the work of controlling the invasion of the territory and the illegal extraction of timber.[337] Nonetheless, it was not shown before the IACHR that those actions had been adopted in an effective manner proportional to the dimension of the invasion of settlers, and to the serious danger of deforestation caused by the irregular loggers in their territories.

238. Similarly, the State was informed of those facts through administrative and criminal remedies pursued before the competent authorities. Specifically, as has been found in the facts proven, the alleged victims filed, at the administrative level, requests for the eviction of occupants with the mayor of the district of Chepo, the governor of the province of Panamá, and the Presidency of the Republic. In addition, once a *corregidor* was established and appointed for the Kuna Comarca of Madungandí, they filed that request with this authority. Furthermore, as has been considered proven, the alleged victims denounced on more than one occasion the illegal extraction of timber and the ecological harm caused to the National Environmental Authority. In the criminal justice realm, many complaints were filed with the competent authorities referring to both the illegal occupation of the indigenous territory and the environmental harm caused by the illegal logging.

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[335] IACHR, Report on the Situation of Human Rights in Brazil. Doc. OEA/Ser.L/V/II.97, Doc. 29 rev. 1, September 29, 1997, para. 33; IACHR, Democracy and Human Rights in Venezuela, 2009. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009.

[336] Article 98 of the General Law on the Environment provides: "The right of the *comarcas* and indigenous peoples in relation to the use, management, and sustainable traditional tapping of the renewable natural resources situated within the *comarcas* or indigenous reserves created by law is recognized. These resources must be used in keeping with the purposes of environmental protection and conservation established in the Constitution, this Law, and all other national laws."

[337] See Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; Annex 29. Resolution No. 4 issued by the Director of the Corporation dated March 16, 1989. Annex 17 to petitioners' initial petition of May 11, 2000; and Annex 10 to the State's communication of June 29, 2001. Annex 11. Final assessment document of the Mesa de Concertación of the Bayano Zone, July 2, 1999. Annex 31 to petitioners' initial petition of May 11, 2000. p. 25.

239. The IACHR observes that despite the numerous administrative and judicial initiatives and actions attempted by the alleged victims to obtain the relocation of the settlers, impede the continuation of the invasions, and halt the illegal logging, the State did not adopt measures aimed at protecting the territories and natural resources of the alleged victims. It also notes that the State has recognized the existence of this problem in the processing of this case, and has affirmed that it will take action to prevent and control its occurrence. Nonetheless, as reported repeatedly to the IACHR, the constant presence of settlers and illegal logging continue devastating the environmental integrity of the territories occupied by the Kuna of Madungandí and the Emberá of Bayano, generating a permanent state of uncertainty and anxiety among their members.

240. In the opinion of the IACHR, the illegal occupation of settlers and the illegal logging on indigenous lands was due to the failure of the State to adopt timely and effective measures to prevent the occurrence of these acts. It also considers that the lack of effective protection of the territories and natural resources vis-à-vis outside interventions, through the application of its own constitutional and statutory provisions, impeded the Kuna indigenous people of Madungandí and the Emberá of Bayano and their members from freely enjoying their property, in keeping with their community tradition, and also hindered the use and enjoyment of the natural resources in their territory.

241. The IACHR also notes that the instant case is illustrative of the ties that the timely recognition, demarcation, and delimitation have for the purpose of preventing and protecting the indigenous territory and its natural resources. In effect, the breach by the State of its obligations to recognize, delimit, and demarcate the territories claimed by the alleged victims in timely fashion made possible the invasion of settlers on indigenous lands, and brought with it the change in the normal development of the spiritual and cultural life of the alleged victims, as well as the development of their traditional economic survival activities.

242. The IACHR considers it should recall that the fact that these indigenous peoples do not have title to their territory formally recognized by the authorities does not relieve that State of international responsibility, thus as the case-law of the system has established, the guarantees of protection of the right to property under the inter-American human rights instruments can be fully enforced by the indigenous and tribal peoples with respect to the territories that belong to them but that have not yet been formally titled, demarcated, or delimited by State.[338] Indeed, for the IACHR the states have a special obligation to protect untitled indigenous territories from any act that may affect or diminish the existence, value, use or enjoyment of goods, including existing natural resources, since those peoples have communal property rights over lands and natural resources based on traditional patterns of ancestral use and occupation.[339]

243. Accordingly, the IACHR considers that on having failed to take effective actions to prevent the invasion and illegal deforestation of the indigenous territory, and to effectively protect the territory and natural resources of the alleged victims, the State of Panama triggered its international responsibility for violating Article 21 of the American Convention in relation to its Article 1(1), to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members.

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[338] IACHR, Application submitted to the I/A Court H.R. in the case of the Kichwa People of Sarayaku and their members v. Ecuador, April 26, 2010, para. 125. IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, paras. 142 and 153.

[339] IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 68.

2.3. Failure to provide an adequate and effective procedure for access to territorial property rights and protection vis-à-vis third persons – Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2

a) Obligation to provide an adequate and effective procedure for the recognition, titling, demarcation, and delimitation of the collective property rights of the indigenous peoples

244. As established by the Inter-American Court in its case-law in respect of indigenous peoples, the obligations contained in Articles 8 and 25 of the Convention presuppose that the States granted effective protection that takes account of their own particularities, their economic and social characteristics, and their situation of special vulnerability, their customary law, values, and uses and customs.[340] In addition, the case-law of the inter-American human rights system has determined that indigenous and tribal peoples have a right for there to be effective and expeditious administrative mechanisms to protect, ensure, and promote their rights over ancestral territories by which they can carry out the processes of recognition, titling, demarcation, and delimitation of their territorial property.[341]

245. The procedures in question should abide by the rules of due process of law enshrined in Articles 8 and 25 of the American Convention.[342] In this respect, the Inter-American Court has specified that due process should be followed both in administrative proceedings and in any other proceeding whose decision may affect the rights of persons.[343] In light of this requirement, the case-law of the inter-American system has identified a series of characteristics that these administrative mechanisms should have under Articles 8, 25, 1(1), and 2 of the American Convention.

246. These special mechanisms and procedures should be effective. The Inter-American Court has examined, in light of the requirements of effectiveness and reasonable time established in Article 25 of the American Convention, whether the states have established administrative procedures for the titling, delimitation, and demarcation of indigenous lands, and if they do have

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[340] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 63. I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83.

[341] I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 138. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 335.

[342] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 81, 82.

[343] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 62. I/A Court H.R.. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 127. I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83. The effective remedy that the states should offer under Article 25 of the American Convention "must be substantiated according to the rules of due legal process (Article 8 of the Convention)" [I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 62]. The Inter-American Court has indicated that among the domestic administrative procedures that should ensure the guarantees of due process are, for example, procedures for recognizing indigenous leaders, procedures for recognition of juridical personality, and the procedures for restitution of lands [I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 81, 82].

them, whether they implement those procedures in practice[344]; and it has explained that it is not sufficient, to meet the requirements established in Article 25, for there to be legal provisions that recognize and protect indigenous property rights – there must be specific procedures, clearly regulated, for matters such as the titling of lands occupied by the indigenous groups or their demarcation, in view of their particular characteristics[345], and that such procedures must be effective in practice to allow for the enjoyment of the right to territorial property – that is, that in addition to the formal existence of the procedures, they must yield results or responses to the violations of legally recognized rights.[346]

247. In the instant case, the IACHR considers that the analysis of those obligations should be done analyzing, first, the formal existence of a procedure for the titling, demarcation, and delimitation of the collective property rights of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano that has the characteristics indicated above. Second, one should consider whether the remedies pursued by the Emberá people of Bayano under Law 72, adopted December 23, 2008, were resolved in keeping with Articles 8 and 25 of the Convention.

248. As for the first aspect, the IACHR observes that, as indicated, Article 127 of the 1972 Constitution of Panama recognizes the collective property rights of the indigenous communities and establishes that the specific procedures for their recognition shall be determined by law.[347] The IACHR finds that the domestic legal order has included a similar provision since the 1946 Constitution.[348]

249. Nonetheless, up until the adoption of Law 72, the procedure available in the Panamanian legal order that would allow for the practical application of such constitutional recognition was to be designated a "*comarca*" through a statute adopted by the Legislative Assembly. In the opinion of the IACHR, that entailed a lengthy process for pressing the claim that was mainly political in nature – and inherently discretional – that the indigenous peoples and their members had to pursue to win recognition of their territorial rights. As the IACHR has noted in the previous section, five *comarcas* were created from 1938 to 2000, leaving out numerous indigenous communities which, though sharing the ethnic origin of the peoples favored by statutes creating *comarcas*, were not included in them.

250. In the case of the Kuna of Madungandí and the Emberá of Bayano, as the IACHR considers has been shown, the process of claiming territorial rights began no later than 1976 and 1975, respectively, with the signing of the first agreements with the State. Given the breach of these initial agreements, the alleged victims, through their representative institutions, have for more than three decades taken innumerable steps vis-à-vis state authorities at the national, provincial, and local levels aimed at obtaining legal recognition for their territories; the Commission considers this period excessive.

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[344] I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 115.

[345] I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 122, 123.

[346] I/A Court H.R.. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, para. 140.

[347] That provision provides as follows: "The State shall guarantee the indigenous communities reservation of the lands necessary and collective property rights in them for attaining their economic and social wellbeing. The Law shall regulate the procedures to be followed to attain this aim and the corresponding delimitations within which the private appropriation of land is prohibited."

[348] Article 94 of the 1946 Constitution; Article 116 of the 1972 Constitution; Article 123 of the 1972 Constitution, amended in 1978, 1983, and 1994; and Article 127 of the 1972 Constitution amended in 2004.

251. The IACHR notes that the lack of a clearly regulated suitable and effective procedure for access to indigenous property rights on occasion led the indigenous peoples to adopt measure that would allow them to gain sufficient notoriety and muster enough political pressure to have their claims addressed. The IACHR observes that based on the facts proven, on repeated occasions those actions resulted in the State adopting new commitments or taking measures that did not provide a comprehensive and sustainable response to the underlying claims with the objective of putting an end to the actions taken by the indigenous peoples, thereby fostering the use of these practices, instead of creating permanent legal means for claiming their rights.

252. As regards the Kuna indigenous people of Madungandí, this long process of making territorial claims resulted in the adoption, on January 12, 1996, of Law 24 "by which the Kuna Comarca of Madungandí is established," 20 years after signing the first agreement with the State. Nonetheless, in the case of the Emberá indigenous people of Bayano, the innumerable efforts made did not result in the recognition of their territorial rights. In addition, in both cases their territories went without being effective and promptly demarcated or delimited.

253. The IACHR also observes that given the lack of a suitable and effective mechanism for the recognition of indigenous property rights, on June 13, 1995, the communities of the Emberá people of Bayano presented a request for demarcation and titling to the Cabinet Council of the Presidency of the Republic, under Article 12 of the Agrarian Code, which was reiterated subsequently on January 27, 1999 to the Presidency of the Republic. The IACHR has considered it proven that none of those requests obtained a response.

254. The IACHR considers that in addition to having proved ineffective, that procedure cannot be considered suitable for the recognition of indigenous property rights, since it does not constitute a specific mechanism that permits the titling of lands occupied by indigenous peoples or their demarcation or delimitation, taking into account their particular characteristics, based on the historic occupation of the land. It is, on the contrary, a general titling mechanism for individual property, based on the productive use of the land, which ignores the special, unique, and internationally protected relationship that indigenous peoples have with their ancestral territories. In effect, as the Court has noted, in procedures involving indigenous territorial claims that refer to agrarian legislation "the yardstick is whether or not the claimed lands are rationally exploited, regardless of considerations specific to the indigenous peoples, such as what lands mean for them."[349]

255. In summary, in the instant case the non-existence of a procedure in Panamanian legislation to enforce the right to property of the indigenous peoples has meant specifically that the State does not guarantee the right to property of the Kuna and Emberá peoples of Bayano to their ancestral territory. Consequently, the Commission considers that at least until the adoption of Law 72, the Panamanian legal order lacked a suitable and effective mechanism for the recognition, titling, demarcation, and delimitation of the territorial property of the indigenous peoples that took account of their particular characteristics, in violation of Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2.

256. As for the second aspect of the analysis, as indicated above, on December 23, 2008, Law 72 was approved. It "establishes the special procedure for the adjudication of collective property rights over the lands of the indigenous peoples who are not in the *comarcas*."

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[349] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 104. See also *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214. para. 146.

Subsequently, that law was regulated by Executive Decree 223 of July 7, 2010. While Article 4 of Law 72 establishes that the National Bureau of Agrarian Reform of the Ministry of Agricultural Development is the competent authority to carry out that procedure, with the adoption of Law 59 of October 8, 2010, this Bureau was replaced, in terms of its authority, by the ANATI.[350]

257. As has been shown, based on that law, on October 27, 2009, the representatives of the communities of the Emberá people of Bayano filed a request for adjudication of lands with the National Bureau of Agrarian Reform. After this entity was replaced by the ANATI, the alleged victims reiterated that request on January 26, 2011. Nonetheless, nearly three years after the procedure was initiated pursuant to Law 72, the communities that make up the Emberá people of Bayano have not obtained formal recognition of their territories, nor have they been effectively demarcated and delimited. In the opinion of the IACHR, the procedure established in that law has proven ineffective in the instant case in relation to the Emberá people of Bayano, insofar as it has yet to provide a definitive and satisfactory solution to their claim.

258. The IACHR emphasizes that as established repeatedly in the case-law of the inter-American human rights system, the obligations of the State in relation to the territorial rights of indigenous peoples entail not only formal recognition of their collective property rights, but also the delimitation and demarcation of their territories, for "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[351] Nonetheless, Law 72 and its regulation established only a "procedure of adjudication of the collective property rights of indigenous peoples' lands," without making reference to obligations of physical demarcation once the property was adjudicated.

259. In addition, the IACHR considers it appropriate at this stage to note that despite the failings pointed out of the process of adopting statutes creating *comarcas* to recognize territorial rights, from the material standpoint, in addition to the collective titling of the territories ancestrally occupied by the indigenous peoples, these laws presuppose the recognition and guarantee of their traditional authorities in the context of the respective *comarca* in different areas of government[352], administration of justice[353], education[354], and use of natural resources[355], among others. While the IACHR attaches a positive value to the establishment of a legal mechanism to make possible the formal recognition of the collective property rights of indigenous peoples in Panama – although it bears in mind that said mechanism was not first consulted with the indigenous peoples – it understands that the mechanism cannot exclude rights of indigenous peoples that are associated

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[350] Law 59, of October 8, 2010, "Law that creates the National Land Management Authority, unifies the competences of the General Bureau of Cadastre, the National Bureau of Agrarian Reform, the National Land Management Program, and the 'Tommy Guardia' National Geographic Institute."

[351] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 143.

[352] See Articles 5 to 7 of Law 24, creating the Kuna Comarca of Madungandí, Article 10 of Law 22 that creates the special legal regime of the Emberá Comarca of Darién; Articles 3 to 6 of Law 34, creating the Kuna Comarca of Wargandi; Articles 17 to 39 of Law 10 of March 11, 1997, which creates the Ngöbe-Buglé Comarca.

[353] See Article 12 of Law 16 by which "the Comarca of San Blas is organized," subsequently called Comarca of Kuna Yala; Article 15 of Law 22, which creates the special legal regime for the Emberá Comarca of Darién; Articles 40 and 41 of Law 10, which creates the Ngöbe-Buglé Comarca; Article 7 of Law 34, which creates the Kuna Comarca of Wargandi.

[354] See Articles 17 to 20 of Law 16 by which "the Comarca de San Blas is organized," subsequently called Comarca of Kuna Yala; Article 21 of Law 22, which creates the special legal regime of the Emberá Comarca of Darién; Article 16 of Law 24, which created the Kuna Comarca of Madungandí; Article 54 of Law 10, which creates the Ngöbe-Buglé Comarca; Article 14 of Law 34, which creates the Kuna Comarca of Wargandi.

[355] See Article 19 of Law 22, which creates the special legal regime for the Emberá Comarca of Darién; Article 9 of Law 24 which creates the Kuna Comarca of Madungandí; Article 50 of Law 10, which creates the Ngöbe-Buglé Comarca; Articles 9 to 13 of Law 34, which creates the Kuna Comarca of Wargandi.

mainly with the right to self-government according to their traditional uses and customs, safeguarded through the laws establishing *comarcas* or other instruments which, as mentioned, have won international recognition.

260. In light of Articles 8(1) and 25 of the Convention, the Panamanian State has the obligation to provide the indigenous communities of the Emberá people of Bayano an effective and efficient remedy for solving their territorial claim, the duty to ensure that those communities are heard with the proper guarantees, and the duty to make a determination, in a reasonable time, in order to guarantee the rights and obligations of the persons subject to its jurisdiction.

261. In view of the foregoing, the Commission considers that the State has not guaranteed an effective and efficient remedy for the recognition, titling, demarcation, and delimitation of the territories claimed by the alleged victims, keeping them from being heard in a process with the proper guarantees. Therefore, the Commission concludes that the State of Panama violated Articles 25 and 8 of the American Convention to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members, in relation to Articles 1(1) and 2.

b) Obligation to provide an adequate and effective procedure for protection of the territories and natural resources of the indigenous peoples vis-à-vis third persons

262. According to the case-law of the inter-American system, the States are under an obligation to adopt measures to guarantee and give legal certainty to the rights of indigenous and tribal peoples with respect to ownership of their properties, among other means by establishing special, swift, and effective mechanisms or procedures to resolve legal claims over such property. As the Inter-American Court has indicated, the procedures in question must comply with the rules of due process as in any other procedure whose decision may affect the rights of persons. The effective remedies that the States must offer under Article 25 of the American Convention "must be substantiated according to the rules of due legal process (Article 8 of the Convention)."[356]

263. In addition, the IACHR has indicated that when land disputes emerge with third persons, indigenous and tribal peoples have the right to obtain protection and reparation through adequate and effective procedures; to be guaranteed the effective enjoyment of their right to property; to have an effective investigation and punishment of those responsible for such attacks; and to having swift special mechanisms established that are effective for solving the legal disputes over the ownership of their lands.[357]

264. In the instant case, as the IACHR has found, the failure to take effective actions to prevent the invasion and illegal deforestation of the indigenous territory, and to effectively protect the territory and natural resources of the alleged victims, made possible the interference in and gradual appropriation of non-indigenous persons in the territories claimed by the alleged victims, as well as the illegal logging by third persons.

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[356] I/A Court H.R.. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 62. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 82, 83.

[357] IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 113. IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, paras. 1062-1066; 1071; 1137 – Recommendations 1 to 4. IACHR, *Third Report on the Human Rights Situation in Colombia*. Doc. OEA/Ser.L/V/II.102, Doc. 9 rev. 1, February 26, 1999, paras. 21-27 and Recommendation 3.

265. This happened despite the fact that the alleged victims signed numerous agreements with state authorities and despite the issuance of resolutions that sought the eviction of the non-indigenous persons and the halt of the illegal logging.[358] Nonetheless, such agreements and resolutions did not provide effective protection for the territories of the Kuna and Emberá peoples of Bayano. The alleged victims also pursued administrative remedies and filed criminal complaints with the objective of obtaining protection for their territories and natural resources, whose conformity with the obligations contained in the American Convention is analyzed next.

Administrative remedies for the protection of the indigenous territory and natural resources vis-à-vis the invasion of third persons

266. As regards the administrative remedies filed by the alleged victims, the IACHR has found that on April 5, 2002, the traditional authorities of the Kuna Comarca of Madungandí began a procedure for evicting illegal occupants with the office of the mayor of Chepo. According to the information in the record before the IACHR, that authority did not offer any response to this request. The IACHR observes that the legal basis for the request filed was found in Article 1409 of the Judicial Code of Panama, which established as follows:

> When the property is occupied without a lease agreement with the owner or his representative or administrator, any of these persons may request that the chief of police have it cleared and hand it over to him or her. If the occupant or occupants do not show title that explains the occupation, the eviction shall take place immediately.

267. The IACHR has answered that after a year without obtaining a response from the local authority, on February 17, 2003, the representatives of the Comarca filed a similar request with the office of the governor of the province of Panamá. The Commission observes that no significant steps were taken in this administrative procedure. In effect, even though that provision establishes that "the eviction shall be carried out immediately" if they do not have titles that explain the occupation – as in the instant case – the first action of the provincial authority was taken on June 6, 2003. It was not until over 11 months had elapsed, since the request, that the provincial governor sought a legal opinion from the Procuraduría de Administración concerning her authority. Nonetheless, as has been proven, the alleged victims reiterated the request for eviction, denounced new invasions, and asked that procedural impetus be given to the matter.

268. That procedure was considered concluded with the resolution of August 2004 by which the provincial authority found itself to lack authority, based on the note issued by the Procuraduría de Administración on March 31, 2004, and ordered the matter archived, considering that it should be forwarded to the Presidency of the Republic. Nonetheless, according to the information available to the IACHR, the record was not forwarded, but rather it was the petitioners who on January 24, 2005, filed the request for eviction of illegal occupants with the Presidency of the Republic. Nonetheless, according to the information before the IACHR, this request did not receive any response whatsoever.

269. In view of those considerations, the IACHR considers that the proceedings initiated by the Kuna Comarca of Madungandí before the national, provincial, and local authorities under

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[358] Annex 30. Agreement of March 23, 1990. Annex 18 to petitioners' initial petition of May 11, 2000; and Annex 11 to the State's communication of June 29, 2001; Annex 31. Working Agreement for the Renewed Land Use Management of Alto Bayano signed by the Provincial Government of Panamá and the Kuna People of Wacuco, Ipetí and other Communities of July 16, 1991. Annex to the summary of the petitioners' intervention during the admissibility hearing of November 12, 2001; Annex 32. Resolution 002 of January 24, 1992. Annex 19 to petitioners' initial petition of May 11, 2000; and Annex 14 to the State's communication of June 29, 2001; Annex 33. Resolution 63 of March 17, 1992. Annex 20 to petitioners' initial petition of May 11, 2000; and Annex 13 to the State's communication of June 29, 2001.

Article 1409 of the Judicial Code of Panama did not constitute special, opportune and effective mechanisms that would have enabled the alleged victims to obtain effective protection for their territory; indeed, that state action was at odds with the obligations contained in Articles 8 and 25 of the American Convention.

270. The IACHR also observes that the request for eviction of illegal occupants would have been presented to the Presidency of the Republic, given the lack of a *corregidor* with authority in the Kuna Comarca of Madungandí; a *corregidor* is an authority with the rank of administrative police authorized to order the eviction of illegal occupants. In effect, as the State argued in various briefs submitted to the IACHR, Article 862 of the Panamanian Administrative Code notes who are the chiefs of police in each region.[359] Nonetheless, Law 24, which established the Kuna Comarca of Madungandí, establishes that the General Congress is the maximum authority, without providing for police authorities.[360] The Third Chamber of the Supreme Court of Justice issued a judgment along the same lines on March 23, 2001, which the State also mentioned in the procedure before the IACHR.[361]

271. As was considered proven, by Executive Decree 247 of June 4, 2008, the provisions necessary for the establishment of a *corregidor* were added to the Organic Charter of the Comarca of Madungandí. The IACHR notes that this was done more than seven years after the judgment of the Third Chamber of the Supreme Court of Justice, and more than four years after the issuing of the legal opinion of the Procuraduría de Administración, acts which irrefutably verified the lack of a competent authority for addressing the question of the invasion of settlers in the territory of the Kuna Comarca of Madungandí.

272. In addition, the IACHR takes note of the time periods in which, even though the provisions necessary for appointing a *corregidor* were adopted, this authority had not actually been designated. In particular, it observes that after the adoption of Executive Decree 247, the Kuna Comarca of Madungandí did not have, for at least another year and nine months, a competent authority legally authorized to carry out the eviction of settlers from the indigenous territory. In addition, according to the information available to the IACHR, even when a *corregidor* has already been appointed for the Comarca, this authority did not take decisive actions to obtain a definitive solution to the claim brought by the alleged victims, the remedies pursued proving ineffective.

273. As the expert witness Alexis Oriel Alvarado Ávila explained, this was related to the failure to provide material resources for that authority to be able to devote attention to the actions filed.[362] Without denying that, the State explained to the IACHR that "the Panamanian State approves

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[359] Article 862 of the Administrative Code. "The following are chiefs of Police: The President of the Republic in the entire national territory, the Governors in their Provinces, the Mayors in their Districts; the Corregidors in their Sub-districts and Neighborhoods, the Night Police judges when they are on duty, the *Regidores* in their *Regidurías*, and the *Comisarios* in their sections."

[360] Communication from the State of May 18, 2007, received by the IACHR May 22, 2007; Additional observations on the merits submitted by the State by brief of April 27, 2010, received by the IACHR May 3, 2010. In addition, in the thematic hearing on the right to private property of indigenous peoples in Panama, the State noted that the High-Level Presidential Commission in May 2008 made a visit to areas invaded by settlers in the Kuna Comarca, on which occasion the lack of an administrative authority to handle the requests for eviction was verified, thus it was considered necessary to appoint a *corregidor*. Thematic hearing on the right to private property of indigenous peoples in Panama, held during the 133rd period of sessions, October 28, 2008. See hearing at http://www.oas.org/es/cidh/.

[361] In that judgment, the Supreme Court of Justice affirmed that the Kuna Comarca of Madungandí is not part of the district of Chepo, and that to be part of it, this would have to be expressly provided for in a law. State's brief of October 3, 2011, received by the IACHR October 4, 2011.

[362] IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Panama," 144th regular period of sessions. Expert testimony of Alexis Oriel Alvarado Ávila.

through the law, the main law that the National Assembly adopts, the Law on the Budget, and five months ago when the *corregidor* was appointed the only thing the Ministry [of Interior and Justice] could do was to approve his salary."[363] The Commission takes note of the information presented by Panama, but recalls that the States cannot allege domestic matters to fail to carry out their international obligations. In addition, the IACHR recalls that the Inter-American Court has referred to:

> ... the duty to ensure an accessible and simple procedure [referring to the procedure for processing claims related to the lands of indigenous peoples] and to provide competent authorities with the technical and material conditions necessary to respond timely to the requests filed in the framework of said procedure.[364]

274. The IACHR considers as positive developments the issuance of Resolution No. 5 of April 2, 2012 by the Special *Corregiduria* of the Kuna of Mandungandí Comarca, as well as Resolution No. 197-R-63 of August 22, 2012 by the Ministry of Governance; but it recalls that, in addition, it is necessary to adopt concrete measures that effectively materialize what was ordered in those resolutions, so as to ensure the existence of an effective guarantee of the free and full exercise of the rights of the alleged victims.

Administrative penalizing procedures and criminal actions for the protection of the indigenous territory and natural resources

275. As the Court has indicated repeatedly, the duty to investigate is a duty of means, and not of results, and must assumed by the state as a legal obligation of its own, and not as a mere formality preordained to be ineffective.[365] In that vein, the investigation should be carried out with due diligence, in an effective, serious, and impartial manner[366], and within a reasonable time.[367] The Inter-American Court has also established that "domestic proceedings must be considered as a whole and the duty of the international tribunal is to find out if all proceedings were carried out in compliance with international provisions,"[368] given that the right to effective judicial protection therefore "requires that the judges direct the proceeding in such a way as to avoid undue

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[363] IACHR, Public hearing, March 23, 2012 on "Case 12,354 -- Kuna of Madungandí and Emberá of Bayano, Panama, 144th regular period of sessions. See hearing at http://www.oas.org/es/cidh/.

[364] I/A Court H.R.. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 109. The IACHR has also indicated that the states are obligated to ensure the funds and resources necessary for carrying out their constitutional and international obligations with regard to the territorial rights of indigenous and tribal peoples. IACHR, *Third Report on the Situation of Human Rights in Paraguay*. Doc. OEA/Ser./L/VII.110, Doc. 52, March 9, 2001, para. 50 – Recommendation 2.

[365] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 131; and I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador.* Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

[366] I/A Court H.R. *Case of García Prieto et al. v. El Salvador.* Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101; I/A Court H.R., *Case of the Brothers Gómez Paquiyauri v. Peru*. Judgment of July 8, 2004. Series C No. 110, paras. 146; I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz v. Peru.* Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 130.

[367] I/A Court H.R. *Case of Bulacio v. Argentina*. Judgment of September 18 2003. Series C No. 100, para. 114; I/A Court H.R., *Case of the Rochela Massacre v. Colombia*. Judgment of May 11, 2007. Series C. No. 163. Para. 146; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, para. 382.

[368] I/A Court H.R. *Case of Baldeón García v. Peru*. Judgment of April 6, 2006. Series C No. 147, para. 142.

delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights."[369]

276. The IACHR has considered it proven that the alleged victims filed at least five criminal complaints for the purpose of having those responsible for the attacks on their territories and natural resources investigated and punished: (i) criminal complaint filed December 20, 2006, before the Attorney General of the Nation for the crimes of illicit association to engage in criminal conduct, usurpation, harm to property, illicit enrichment, ecological crime, and all others that result from the illegal occupation of the lands of the Comarca; (ii) complaint filed January 16, 2007, by the General Caciques of the Kuna Comarca of Madungandí with the Specialized Unit on Crimes against the Environment of the Technical Judicial Police, for crime against the environment; (iii) complaint filed on February 1, 2007, by the Corporación de Abogados Indígenas de Panamá, in representation of the Kuna Congress of Madungandí for crime against the environment; (iv) complaint filed January 30, 2007, by Héctor Huertas, attorney for the Kuna Comarca, with the Technical Judicial Police of the District of Chepo; and (v) complaint filed August 16, 2011, by Tito Jiménez, administrative *sahila* of the community of Tabardi, for the invasion and illegal logging in the Kuna Comarca of Madungandí.

277. Regarding the first complaint, the IACHR was not informed of actions taken to investigate effectively the alleged facts and establish the corresponding responsibilities; instead, the State itself informed that it did not have a record of the complaint. According to the information available to the IACHR, the two subsequent complaints were joined in a single proceeding, which has been before the Office of the 11th Prosecutor of the First Judicial Circuit of Panama since February 2007. As of that date, various proceedings took place which concluded with the issuance of Prosecturorial Review No. 151, on May 29, 2008, which requests the provisional stay of the investigation. As regards the fourth complaint filed, according to the evidence in the record before the IACHR, it culminated with the temporary dismissal of the case issued on December 27, 2007, by the Judge of the Tenth Criminal Circuit of the First Judicial Circuit of the Province of Panamá. As for the fifth complaint, the IACHR has no information other than that it was filed and that certain measures were taken, yet it has not been informed, to date, of the existence of further proceedings, or of a definitive decision in the matter.

278. As regards the administrative penalizing procedures pursued for the protection of the natural resources located in indigenous territories, the IACHR has found that the Kuna of Madungandí and the Emberá of Bayano and their members denounced illegal logging to the National Environmental Authority on at least two occasions, in January and March 2007. The IACHR notes that on both occasions that authority made inspection visits in which it verified the illegal logging. In particular, the images that the IACHR has before it evidence the inequality between the forested area and the area invaded by settlers.[370] According to the information available to the IACHR, in the first case the ANAM ordered the persons found responsible to pay a fine of B/.500.00 (five hundred balboas). In the second case, there is no evidence whatsoever in the record that any sanction was applied, even though it was found that Article 80 of the Forestry Law was violated, as affirmed in the respective technical report. It should be noted that Article 81 of that law provides for a prison sentence of 30 days to six months for the violation of said Article 80.

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[369] I/A Court H.R. *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, para. 210. I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para.115.

[370] Annex 94. Photographic images of the field inspection carried out September 14, 2007, by the Office of the 11th Prosecutor of the First Judicial Circuit of Panama, folios 506-513; Photographic images of the field inspection conducted August 22, 2007, by the Office of the 11th Circuit Prosecutor of the First Judicial Circuit of Panama, folios 468-503. Petitioners' brief of November 13, 2007, received by the IACHR the same day. In addition, in the procedure on precautionary measures, images were produced of logging in the zone. Annex 95. Annexes to the brief requesting precautionary measures of March 14, 2011, received by the IACHR March 15, 2011.

279. In this respect, what has been indicated by the Inter-American Court should be recalled, namely:

> ... proceedings followed through up until their conclusion and that fulfill their purpose are the clearest sign of zero tolerance for human rights violations, contribute to the reparation of the victims, and show society that justice has been done. The imposing of an appropriate punishment duly founded and proportionate to the seriousness of the facts, by the competent authority, permits verification that the sentence imposed is not arbitrary, thus ensuring that it does not become a type of de facto impunity. In this regard, the Court has emphasized that administrative or criminal sanctions play an important role in creating the type of institutional culture and competence required to deal with the factors that explain certain structural contexts of violence.[371]

280. In light of the foregoing, the IACHR observes that the prolonged and repeated nature of the acts of invasion and illegal logging, as well as the close association of the natural resources present in the traditional territories of the indigenous peoples in aspects fundamental for their material and cultural subsistence, indicate that the procedures followed turned out to be insufficient in the alleged victims' search for protection and justice. The IACHR notes that, despite the several complaints filed by the alleged victims, the authorities failed to carry out a serious and effective investigation aimed at finding out the truth and the determination of responsibility that would allow the cessation of the serious invasion of the indigenous territory and the illegal extraction of natural resources[372].

281. The IACHR considers that the lack of attention to their particular characteristics, together with the improper and ineffective prolongation of the procedures initiated left the alleged victims in a situation of lack of protection in light of the constant invasion of their territories and the destruction of their natural resources. It has not gone unnoticed by the IACHR that this situation places the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members in a permanent state of uncertainty, anxiety, and fear, thereby negatively affecting their right to possess and control their territory without any type of external interference.

282. In view of the foregoing considerations, the IACHR concludes that the administrative remedies initiated by the alleged victims for the protection of their ancestral territories and natural resources did not constitute special, opportune or effective mechanisms for the protection of the rights of the Kuna of Madungandí or the Emberá of Bayano or their members, in violation of the obligations contained in Articles 8(1) and 25(1) of the Convention, in relation to Articles 1(1) and 2.

C. Right to equality before the law and non-discrimination – Articles 24[373] and 1(1) of the American Convention

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[371] I/A Court H.R.. *Case of Manuel Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 26, 2010. para. 153.

[372] The ineffectiveness of the actions submitted led to the petitioners to affirm in their request of precautionary measures before the IACHR that "They have filed legal actions internally to impede the illegal entry to their territories both administrative and legal established in the Panamanian jurisdiction; however, these invasions have continued and have increased (....) Desperate and due to the lack of authority in the area, the indigenous have resorted to criminal justice, knowing both the penalty, and the sanctions are laughable to intimidate settlers who have invaded more than a thousand hectares of indigenous forests and crops. " Brief requesting precautionary measures, March 14, 2011, received by the IACHR March 15, 2011.

[373] Article 24 of the American Convention provides: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

283. The American Convention prohibits discrimination of any type, a notion that includes unwarranted distinctions on the basis of race, color, national or social origin, economic position, birth, or any other social condition. The principle of equality and non-discrimination is a protection that underlies the guarantee of other rights and liberties, since in the terms of Article 1(1) of the American Convention, every person is entitled to the human rights enshrined in those instruments, and has the right to have the State respect and ensure their free and full exercise, without discrimination of any kind. In the words of the Inter-American Court: "Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights."[374]

284. The scope of Article 24 of the Convention, which enshrines the right to equality before the law and to receive equal protection of the law, without discrimination, has been described by the Inter-American Court in the following terms:

> Although [the concepts] are not conceptually identical ... Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.[375]

285. In this regard, the Inter-American Court has also referred to the obligations that arise for the States from the principle of equality and non-discrimination, affirming that:

> States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws"[376], and that "[i]n compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.[377]

286. One specific manifestation of the right to equality is the right of all persons not to be victims of racial discrimination. This form of discrimination constitutes an affront to the equality and essential dignity of all human beings and has been the subject of the unanimous reproach of the international community[378], and of an express prohibition in Article 1(1) of the American Convention.

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[374] I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 83. The Human Rights Committee has also noted: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights." UN Human Rights Committee. *General Comment No. 18. Non-Discrimination.* November 10, 1989. para. 1.

[375] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 54. Along the same lines, see IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, paras. 162 ff.

[376] I/A Court H.R.. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 88.

[377] I/A Court H.R.. *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 103.

[378] See, among others, United Nations Declaration on the Elimination of All Forms of Racial Discrimination of November 20, 1963 [resolution 1904 (XVIII) of the General Assembly], which solemnly affirms the need to quickly eliminate racial discrimination everywhere in all its forms and manifestations, and to ensure understanding and respect for the dignity

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287. Other instruments of international law applicable to the State of Panama contain the principle of non-discrimination, such as the International Covenant on Civil and Political Rights[379], the Inter-American Democratic Charter[380], and the American Declaration of the Rights and Duties of Man, the preamble to which notes that "[a]ll men are born free and equal, in dignity and in rights" and its Article II provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Specifically, the International Convention on the Elimination of All Forms of Racial Discrimination – to which the Panamanian State is party[381] – defines discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life," and binds the states parties, *inter alia,* "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

288. Accordingly, in light of the applicable international law, persons have a fundamental right not to be victims of discrimination on grounds of their ethnic or racial origin. In addition, the states are internationally bound to refrain from engaging in acts of racial discrimination, and to prohibit such discriminatory acts.

289. Indigenous persons and peoples also have fundamental rights to equality and to be free from all forms of discrimination – in particular all forms of racial discrimination based on their ethnic origin. These rights acquire additional specific content in the case of indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples establishes at Article 2 that "[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity"; and at Article 9 it provides that "[i]ndigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with

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of the human person. In addition, the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights on July 12, 1993 establish that: "Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community. Governments should take effective measures to prevent and combat them. Groups, institutions, intergovernmental and non-governmental organizations and individuals are urged to intensify their efforts in cooperating and coordinating their activities against these evils." (para. 15.)

[379] Article 2(1) of the International Covenant on Civil and Political Rights establishes the obligation of each State Party to respect and ensure to all individuals who are in their territory and subject to their jurisdiction the rights recognized in the Covenant, without any distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, economic position, birth, or any other social condition. The United Nations Human Rights Committee has understood that the term "discrimination" entails "...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms." UN Human Rights Committee. *General Comment No. 18. Non-Discrimination.* November 10, 1989. para. 7. Panama ratified the International Covenant on Civil and Political Rights on March 8, 1977.

[380] The preamble to the Inter-American Democratic Charter indicates that the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy. In addition, Article 9 of the Charter establishes: "The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation."

[381] Panama ratified it on August 16, 1967.

the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."[382]

290. In addition, the Committee on the Elimination of Racial Discrimination "has consistently affirmed that discrimination against indigenous peoples falls under the scope of the [International] Convention [on the Elimination of All Forms of Racial Discrimination] and that all appropriate means must be taken to combat and eliminate such discrimination,"[383] which is why it has called on the states to "[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity."[384] In this way, every indigenous person has a fundamental human right, recognized and protected internationally, to effectively enjoy the rights of every human being on an equal footing, and not to be a victim of discrimination in the exercise of those rights on grounds of his or her ethnic origin.

291. With respect to the indigenous peoples in Panama in particular, the Committee on the Elimination of Racial Discrimination, in its Report of Concluding Observations of May 2010, stated:

> 9. The Committee notes with concern the persistence of racial discrimination and its historical roots, which have led to the marginalization, impoverishment and vulnerability of ... indigenous peoples.
> ...
> 11. The Committee expresses its concern at the fact that, in spite of the adoption of policies and the creation of national institutions, in practice ... indigenous peoples still encounter considerable difficulties in exercising their rights and are the victims of *de facto* racial discrimination and marginalization and that they are particularly vulnerable to violations of human rights. The Committee is also concerned by the structural causes which perpetuate discrimination and denial of access to social and economic rights and development, in particular in the areas of employment, housing and education....

292. In connection with the foregoing, that Committee indicated:

> 12. The Committee expresses its serious concern about the information received that, despite the existence of the indigenous region (*comarca*) as an entity, with provision for self-government and communal ownership of land by indigenous peoples, there are some indigenous communities that have not obtained a region or entity of similar status.... The Committee further wishes to express its concern at the very low standard of living in the indigenous regions, such as the area of Darién where there is poor access to basic services and to governmental poverty-elimination policies. The Committee recommends that the State party finalize the procedures still pending to ensure that all Panamanian indigenous communities secure a region or entity of similar status. It also urges the State party to do its utmost to ensure that its governmental poverty-elimination policies are effective throughout the country, and in particular in the indigenous regions.[385]

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[382] United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly, with the favorable vote of Panama, through Resolution A/61/295, 61st period of sessions (September 13, 2007).

[383] UN Committee on the Elimination of Racial Discrimination. *General Recommendation No. XXIII on the rights of indigenous peoples*. August 18, 1997. para. 1.

[384] UN Committee on the Elimination of Racial Discrimination. *General Recommendation No. XXIII on the rights of indigenous peoples*. August 18, 1997. para. 4(b).

[385] UN Committee on the Elimination Discrimination. *Consideration of reports submitted by States Parties under article 9 of the Convention. Concluding observations.* CERD/C/PAN/CO/15-20. May 19, 2010. paras. 9-12.

293. The Human Rights Committee, in its Report of Concluding Observations of April 2008, noted:

> The Committee expressed its concern at the information included in the State party's report and received from non-governmental sources on the existence among the general population of racial prejudices against indigenous people and also on the many problems that affect indigenous communities, including serious shortcomings in health and education services; the lack of an institutional presence in their territories; the absence of a process of consultation to seek the prior, free and informed consent of communities to the exploitation of natural resources in their territories; the ill-treatment, threats and harassment to which members of the communities have reportedly been subjected on the occasion of protests against hydroelectric infrastructure construction projects, mining operations or tourism facilities on their territory; and the non-recognition of the special status of indigenous communities that are not within a *comarca* (articles 1, 26 and 27 of the Covenant).[386]

294. Similarly, the Committee on Economic, Social and Cultural Rights noted in its Report of Concluding Observations on Panama, in September 2001, that:

> 12. [...] The Committee is deeply concerned about the persisting disadvantage faced in practice by members of indigenous communities in Panama, and in particular about the marked disparities in the levels of poverty and literacy and access to water, employment, health, education and other basic social services. The Committee is also concerned that the issue of land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands.
> ...
> 28. ... [The Committee] urges the State party to pay particular attention to improving poverty and literacy rates and access to water, employment, health, education and other basic social services for indigenous peoples. The Committee recommends that the issue of land rights of indigenous peoples be fully resolved so as to avoid their coming under threat by mining and cattle ranching activities that result in their displacement from their traditional ancestral and agricultural lands.[387]

295. In the instant case, the petitioners alleged that the repeated refusal to carry out the obligations with respect to the territorial rights of the Kuna indigenous people of Madungandí and the Emberá of Bayano constituted discrimination based on their ethnic origin. They noted the existence of distinct and more preferential attention to individual private property, which contrasts with the situation of lack of protection of indigenous property rights. The State, for its part, did not controvert the allegations specifically related to the violation of the right to non-discrimination.

296. Similarly, the Inter-American Commission approved the prejudicial impact on the traditional forms of subsistence of the Kuna de Madungandí and Emberá de Bayano indigenous peoples, caused by the Bayano Hydroelectric and the Panamerican Highway. Specifically, it referred to the lack of basic services, such as water and electricity, the proliferation of diseases such as malaria, the high malnutrition rates among children under five years old, and the deforestation of the territory, among others.

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[386] UN Human Rights Committee. *Consideration of Reports Submitted by the States Parties under Article 40 of the Covenant. Concluding Observations*. CCPR/C/PAN/CO/3. April 17, 2008. para. 21.

[387] UN Committee on Economic, Social and Cultural Rights. *Consideration of Reports by States Parties under Articles 16 and 17 of the Covenant. Concluding Observations*. E/C.12/1/Add.64. September 24, 2001. paras. 12 and 28.

297. In connection with the obligation of the State to eliminate discriminatory regulations from the legal framewok, the Commission noted that the Constitution of Panama contains provisions that recognize certain rights of indigenous peoples, such as the right to collective property. Similarly, it noted that in the Constitution itself, article 126, which relates to agrarian policy, establishes in its last sub-paragraph that such policy "would be applicable to indigenous communities in accordance with scientific methods of cultural change."

298. In the opinion of the IACHR, this legal framework presupposes the persistence of discriminatory factors in the legal order in relation to protection of the right to property over the ancestral territory and natural resources of indigenous peoples. The application of provisions from the agrarian regime, based on the logic of the productive use of the land, gives rise to a situation of lack of protection in which the special, unique, and internationally protected relationship of indigenous peoples with their ancestral lands is ignored, a relationship that is absent in the case of the non-indigenous population. Moreover, that framework is not compatible with the right of indigenous peoples and their members to belong to a differentiated ethnic group with its own social and cultural characteristics, traditions, and customs; and rather, it points to their assimilation with the objective of attaining the ends of the agrarian policy.

299. In connection with the obligation of the State to combat discriminatory practices, the IACHR notes in this case that the domestic law did not have adequate and efficient remedies for the protection of community and collective property right of indigenous peoples, what explains the numerous obstacles encountered by the Kuna people of Madungandí and the Emberá people of Bayano to the attainment of their rights, and the obstacles they have encountered gaining access to justice.

300. Additionally, the Commission has already ruled with respect to the systematic repudiation and breach of the commitments acquired with the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, after nearly 40 years from the dispossession and flooding of their ancestral territories, to make way for the construction of the Ascanio Villalaz Hydroelectric Complex, ignoring the alleged victims' claims for decades. The IACHR has found that in addition to depriving the indigenous peoples who are the alleged victims of their right to recognition, delimitation, and demarcation of the territory, the State did not adopt measures of prevention and protection in response to the permanent invasion of settlers, and the continuous illegal extractive activities.

301. The Commission observes that this occurred despite the numerous communications sent and the numerous administrative and judicial remedies pursued, thus placing the alleged victims in a situation of lack of protection and permanent uncertainty. The IACHR considers that in the instant case the lack of equal protection was expressed, *inter alia*, in the failure to address the numerous notes sent by the highest-level indigenous authorities, the lack of an effective response by the administrative institutions in response to the requests submitted, the late or non-existent response of the judicial authorities to the constant and prolonged violation of the alleged victims' territory and natural resources, and the failure to designate or late designation of authorities to protect the indigenous lands. This course of action on the part of the State stands in contrast to the measures adopted to favor the appropriation of lands by non-indigenous persons that directly and indirectly affected the territories of the Kuna people of Madungandí and the Emberá of Bayano, such as the construction of access roads into the zone inhabited by these indigenous peoples and the adjudication of lands under individual title in areas previously declared to be state-owned and on others claimed by the alleged victims.

302. The IACHR and the Inter-American Court have consistently held, preserving the particular connection between indigenous communities and their lands and resources is tied to the very existence of these peoples, and therefore "warrants special measures of protection."[388] Accordingly, it is necessary for the right to property of indigenous and tribal peoples to protect this close bond they maintain with their territories and the natural resources linked to their culture that are found there.[389]

303. In this respect, the IACHR recalls that the rights to equality before the law, equal treatment, and non-discrimination require that states establish the legal mechanisms necessary to clarify and protect the right of indigenous peoples to communal property, and property rights in general under the domestic legal system.[390] States violate the right to equality before the law, equal protection of the law, and non-discrimination when, as in this case, they do not grant indigenous peoples "the protections necessary to exercise their right to property fully and equally with other members of the … population."[391]

304. Similarly, the Human Rights Committee has referred to the right to equality before the courts, indicating: "[a] situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence [which addresses that right]."[392] In addition, the current UN Special Rapporteur on the Rights of Indigenous Peoples has noted as part of a context characterized by the lack of effective access of indigenous peoples to the system of justice "the existence of a clear disparity between the institutional response to the complaints against members of the indigenous communities and the impunity of many of the reported acts of abuse, harassment, and physical violence…."[393]

305. In view of the foregoing considerations, the Commission concludes that the State of Panama is responsible for violating its obligation to ensure and respect the rights, without any discrimination based on race or ethnic origin, and the right to equal protection before the law,

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[388] IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann v. United States, December 27, 2002, para. 128. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79. Para. 149. See also: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C No. 146, para. 222.

[389] IACHR, Follow-up Report to the Report on Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser/L/V/II.135, Doc. 40, August 7, 2009, para. 156. I/A Court H.R.. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148. I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 137. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121.

[390] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 155. IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 61.

[391] IACHR, Report No. 40/04, Case 12,053, Maya Indigenous Communities of the Toledo District v. Belize, October 12, 2004, para. 171. IACHR. Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009, para. 61.

[392] UN. Human Rights Committee. *General Comment 32 – Article 14. Right to equality before courts and tribunals and right to a fair trial.* UN doc. CCPR/C/GC/32, August 23, 2007, para. 9.

[393] UN. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. *Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories.* A/HRC/18/35/Add.3. June 7, 2011. para. 65. In addition, see UN Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen. *Human rights and indigenous issues*. E/CN.4/2004/80. January 26, 2004. paras. 9-43.

enshrined in Articles 24 and 1(1) of the American Convention, to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members.

VI. CONCLUSIONS

306. In view of the considerations of fact and law established in this report, the Inter-American Commission on Human Rights concludes that:

1. The State of Panama violated Article 21 of the Convention, in relation to Article 1(1) of the same instrument, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members on having failed to grant just and prompt compensation, more than 40 years after their ancestral territories were alienated.

2. The State of Panama violated the right to property enshrined in Article 21 of the American Convention on Human Rights in relation to Articles 1(1) and 2, to the detriment of the Emberá people of Bayano and its members, for not having providing them effective access to collective property title to their territories; and for having failed to delimit, demarcate, and effectively protect their territories.

3. The State of Panama violated the right to property enshrined in Article 21 of the American Convention on Human Rights, in relation to its Articles 1(1) and 2, to the detriment of the Kuna indigenous people of Madungandí and its members, on having failed to promptly recognize, delimit, and demarcate their territory; and on having failed to provide effective protection for the territories of the Kuna Comarca of Madungandí vis-à-vis third persons.

4. The State of Panama violated Articles 8 and 25 of the American Convention, in connection with Articles 1(1) and 2, due to the failure to provide for an adequate and effective procedure for acceding to their property rights over the ancestral territory, and for their protection vis-à-vis third persons, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members.

5. The State of Panama violated Article 24 of the American Convention, in connection with Article 1(1) of the Convention, for breaching its obligation to ensure and respect the rights, without any discrimination based on ethnic origin, and to provide equal protection before the law, to the detriment of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members.

VII. RECOMMENDATIONS

307. Based on the analysis and conclusions of this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF PANAMA THAT IT:

1. Promptly conclude the process of formalizing, delimiting, and physically demarcating the territories of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members, bearing in mind the inter-American standards noted in this report.

2. Grant the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members prompt and just compensation for the removal, resettling, and flooding of their ancestral territories; the amount owed should be determined through a process that ensures their participation, in keeping with their customary law, values, and uses and customs.

3. Adopt the measures necessary for ensuring the effective protection of the territory of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano for the purpose of guaranteeing their physical and cultural survival, as well as the development and continuity of their cosmovision, so that they can continue living their traditional way of life and preserve their cultural identity, social structure, economic system, customs, beliefs, distinct traditions and justice system. Similarly, adopt the necessary measures to ensure that the Kuna de Madungandí and Embera peoples of Bayano have access to culturally pertinent health and education programs.

4. Halt the illegal entry of non-indigenous persons in the territories of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and move the current occupant settlers to territories that do not belong to the indigenous peoples. In addition, ensure the free, prior, and informed consent of the the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano to the plans, programs, and projects sought to be developed in their territories.

5. Establish an adequate and effective remedy that protects the rights of the indigenous peoples of Panama to claim and accede to their traditional territories, and protect their territories and natural resources from third persons, including respecting the right of indigenous peoples to enforce their customary laws through their justice systems.

6. Make individual and collective reparations for the consequences of the violations of human rights found in this report. In particular, repair the lack of protection of ancestral territories of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano, the lack of effective and prompt response by the authorities, and the discriminatory treatment to which they were subjected.

7. Adopt the measures necessary to prevent similar events from occurring in the future, in keeping with the duty to prevent violations and ensure the exercise of the fundamental rights recognized in the American Convention.

Annex 681

R. Held, et al. v the State of Montana, the Supreme Court of the State of Montana, 2024 MT 312, DA 23-0575, 18 December 2024

FILED
12/18/2024
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 23-0575

DA 23-0575

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 312

RIKKI HELD; LANDER B., by and through his guardian Sara Busse; BADGE B., by and through his guardian Sara Busse; SARIEL SANDOVAL; KIAN T., by and through his guardian Todd Tanner; GEORGIANNA FISCHER; KATHRYN GRACE GIBSON-SNYDER; EVA L., by and through her guardian Mark Lighthiser; MIKA K., by and through his guardian Rachel Kantor; OLIVIA VESOVICH; JEFFREY K., by and through his guardian Laura King; NATHANIEL K., by and through his guardian Laura King; CLAIRE VLASES; RUBY D., by and through her guardian Shane Doyle; LILIAN D., by and through her guardian Shane Doyle; TALEAH HERNÁNDEZ,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, GOVERNOR GREG GIANFORTE, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA DEPARTMENT OF TRANSPORTATION,

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV 2020-307
Honorable Kathy Seeley, Presiding Judge

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Argued and Submitted: July 10, 2024

Decided: December 18, 2024

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 The State of Montana, Governor Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Natural Resources and Conservation, and Montana Department of Transportation (State) appeal from the August 14, 2023 Findings of Fact, Conclusions of Law, and Order (Order) of the First Judicial District Court. The District Court declared §§ 75-1-201(2)(a), and -201(6)(a)(ii), MCA, unconstitutional and enjoined the State from acting in accordance with them. We affirm.

¶2 We restate the issues on appeal as follows:

Issue One: Whether the Montana Constitution's guarantee of a "clean and healthful environment" includes a stable climate system that sustains human lives and liberties.

Issue Two: Whether Plaintiffs have standing to challenge the constitutionality of the MEPA Limitation.

Issue Three: Whether the MEPA limitation is unconstitutional under the Montana Constitution's right to a clean and healthful environment.

Issue Four: Whether the District Court abused its discretion by denying the State's motion for a psychiatric examination under Rule 35.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The world is experiencing a fast rise in temperature that is unprecedented in the geologic record, with the average global temperature increasing by 2.2°F in the last 120 years.[1] Montana is heating faster than the global average and the rate of warming is

[1] The statement of facts comes from the District Court's Order. The State acknowledges in briefing that it does not dispute or challenge the District Court's findings of fact on the science and impacts of climate change and they are entitled to deference. M. R. Civ. P. 52(6); *see also Dunnington v. State Compensation Ins. Fund*, 2000 MT 349, ¶¶ 6, 15, 303 Mont. 252, 15 P.3d 475 (declining to review findings of fact not challenged on appeal).

increasing. Overwhelming scientific evidence and consensus shows that this warming is the direct result of greenhouse gas (GHG) emissions that trap heat from the sun in the atmosphere, primarily from carbon dioxide (CO2) released from human extraction and burning of fossil fuels such as coal, oil, and natural gas. *See also 350 Mont. v. Haaland*, 50 F.4th 1254, 1261–62 (9th Cir. 2022); *Massachusetts v. EPA*, 549 U.S. 497, 521–22, 127 S. Ct. 1438, 1455–56 (2007). These emissions accumulate in the atmosphere and may persist for hundreds of years—causing atmospheric CO2 levels to increase from 280 parts per million (ppm) in pre-industrial times to above 424 ppm today.

¶4 These emissions result in extreme weather events that are increasing in frequency and severity, including droughts, heatwaves, forest fires, and flooding. These extreme weather events will only be exacerbated as the atmospheric concentration of GHGs continues to rise. Projections indicate that under a business-as-usual emissions scenario, Montana will see almost ten additional degrees of warming by 2100 compared to temperatures in 2000. By 2050, Montana will have 11–30 additional days per year with temperatures exceeding 90 degrees and a similar loss of days below freezing. Montana has already seen (and will increasingly see) adverse impacts to its economy, including to recreation, agriculture, and tourism caused by a variety of factors including decreased snowpack and water levels in summer and fall, extreme spring flooding events, accelerating forest mortality, and increased drought, wildfire, water temperatures, and heat waves.

¶5 On March 13, 2020, Plaintiffs—a group of 16 youths between the ages of 2 and 18 at the time—sued the State of Montana, the Governor, and multiple state agencies alleging

that the State's actions exacerbated the harm they were feeling from climate change and seeking declaratory and injunctive relief. Specifically, they sought a declaration that certain provisions of Montana's State Energy Policy Act, § 90-4-1001(1)(c)–(g), MCA (2011), and the Montana Environmental Policy Act (MEPA), § 75-1-201(2)(a), MCA (2011) (MEPA Limitation), were unconstitutional. At the time, the Montana State Energy Policy Act promoted the development and use of fossil fuels, and the MEPA Limitation stated that, except for narrowly defined exceptions, "an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature." Sections 75-1-201(2)(a), 90-4-1001(1)(c)–(g), MCA (2011).

¶6 The State authorizes and permits the extraction, transportation, and consumption of fossil fuels. Many of these activities result in large amounts of GHG emissions such as the mining and extraction of coal, oil, and gas; processing, refinement, and transportation of fossil fuels; and consumption of fossil fuels such as in generating stations. Prior to permitting any of these activities, the State is required to conduct environmental reviews under MEPA. Section 75-1-201(1)(b)(iv), MCA. The State used to consider GHG emissions for these types of projects prior to 2011, but agencies stopped analyzing impacts from GHG emissions that would result from permitted activities pursuant to the MEPA Limitation.

¶7 Plaintiffs also sought a declaration that the Montana Constitution's fundamental right to "a clean and healthful environment" includes a stable climate system that sustains human lives and liberties and that this right was being violated. Additionally, if awarded

the declaratory relief that they sought, Plaintiffs sought injunctive relief as follows: (1) enjoining the State from acting in conformance with the unconstitutional laws; (2) an order requiring a full accounting of Montana's GHG emissions; (3) an order requiring the State to develop a remedial plan to reduce GHG emissions and to submit the plan to the court; (4) an order for a special master to be appointed to review the remedial plan; and (5) an order retaining jurisdiction until the State has fully complied with the plan.

¶8 On April 24, 2020, the State filed a motion to dismiss under M. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3), arguing Plaintiffs lack case-or-controversy standing, that the political question doctrine precluded Plaintiffs' requested remedial plan, and that Plaintiffs had failed to exhaust administrative remedies. The District Court granted in part and denied in part the State's motion to dismiss. It concluded that Plaintiffs had established legal standing but that their requested injunctive relief of a remedial plan, a standing master, and retained jurisdiction was beyond its authority. The court thus dismissed all requested injunctive relief except that seeking to enjoin the State from acting in accordance with laws declared unconstitutional. As relevant to this appeal, the State thereafter answered the complaint, and the parties engaged in discovery.

¶9 On July 19, 2022, the State moved for a psychiatric examination of eight of the youth plaintiffs under M. R. Civ. P. 35. It sought to thoroughly interview eight of the plaintiffs about their "psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma." The District Court denied the motion because Plaintiffs' mental health was not genuinely in controversy, nor had the State established good cause for the examinations as required under Rule 35.

¶10 After discovery concluded, the State filed a motion for summary judgment, primarily focusing on the same arguments it made in its motion to dismiss. On March 16, 2023, House Bill 170 (2023 Mont. Laws ch. 73) was signed into law, repealing the Montana State Energy Policy. The State filed a motion to dismiss the claims based on this statute, arguing that its repeal mooted Plaintiffs' claims, which the District Court granted.

¶11 On April 6, 2023, the Thirteen Judicial District Court ruled in a separate case that the plain language of § 75-1-201(2)(a), MCA (2011), did not absolve DEQ of its MEPA obligation under § 75-1-201(1)(b)(iv)(A), MCA, to evaluate a project's environmental impacts—including impacts from GHG emissions—within Montana. *See* Order at 29, *Mont. Env't Info. Ctr. v. Dep't Env't Quality*, No. DV-21-1307 (Mont. Thirteenth Judicial Dist. Apr. 6, 2023). In response, House Bill 971 (2023 Mont. Laws ch. 450) was signed into law, which clarified that, except for narrowly defined exceptions, "an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders." Section 75-1-201(2)(a), MCA (2023). Based on the amendment, the State again filed a motion to dismiss Plaintiffs' MEPA Limitation claims.

¶12 On May 19, 2023, MEPA was again amended to add a new subsection, § 75-1-201(6)(a)(ii), MCA, which provides:

> An action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review

> is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

The State argued that this new provision foreclosed redressability in this case.

¶13 On May 23, 2023, the District Court denied the State's motion for summary judgment. On June 5, the State filed an Emergency Petition for Writ of Supervisory Control and Stay of June 12, 2023 Trial with this Court. The State argued: (1) striking down the MEPA limitation would not redress Plaintiffs' injuries; (2) the originally pleaded MEPA Limitation was no longer law, and Plaintiffs had not pleaded the unconstitutionality of the amended MEPA Limitation; and (3) the facts at issue for trial are not material to the constitutionality of the MEPA Limitation. This Court denied and dismissed the Petition, holding that the State would have an adequate remedy on appeal and that House Bill 971's amendments to the MEPA Limitation had not altered the allegations Plaintiffs had made in their Complaint: "Since the Complaint was filed, the theory of this claim has been that prohibiting consideration of the impacts of climate change in environmental review violated the Montana Constitution. The State does not explain how HB 971 changes that issue for trial." *State v. Mont. First Judicial Dist. Ct.*, No. OP 23-0311, 412 Mont. 554, 531 P.3d 546 (June 6, 2023). A bench trial was held from June 12 to June 20, 2023.

¶14 The District Court found that the fundamental constitutional right to a clean and healthful environment includes climate as part of the environmental life support system; that Plaintiffs had legal standing to bring their claims; that the MEPA Limitation (§ 75-1-201(2)(a), MCA) violated the Constitution's right to a clean and healthful environment and permanently enjoined its enforcement; that § 75-1-201(6)(a)(ii), MCA

(2023), which the State had argued prevented review of the MEPA Limitation, was unconstitutional and permanently enjoined it; and the court enjoined the State from acting in accordance with the statutes declared unconstitutional. The State appeals only Plaintiffs' legal standing to bring the case; the constitutionality of the MEPA Limitation; and the District Court's denial of the Rule 35 motion for psychiatric examinations.

STANDARD OF REVIEW

¶15 Standing is a justiciability doctrine that limits Montana courts to deciding cases and controversies. *Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 6, 389 Mont. 122, 406 P.3d 427. The determination of a party's standing is a question of law that we review de novo. *Mitchell*, ¶ 6.

¶16 "'This Court's review of constitutional questions is plenary.'" *Planned Parenthood v. State*, 2024 MT 178, ¶ 15, 417 Mont. 457, 554 P.3d 153 (quoting *Williams v. Bd. of Cnty. Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88). Statutes are presumed to be constitutional, and the challenging party bears the burden of proving the statute is unconstitutional. *Planned Parenthood*, ¶ 16. Nevertheless, if the challenging party shows that a law implicates a fundamental constitutional right, the presumption of constitutionality disappears, and the burden necessarily shifts to the State to demonstrate that the law survives strict scrutiny. *Planned Parenthood*, ¶ 16; *see also Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 416 Mont. 44, 545 P.3d 1074.

¶17 We have held that the right to a clean and healthful environment is a fundamental constitutional right under the Montana Constitution. *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (*MEIC 1999*). Thus, a

statute that implicates the right to a clean and healthful environment must be strictly scrutinized and will only be upheld if the State establishes a compelling state interest which is narrowly tailored and is the least onerous path to achieve the State's objective. *MEIC 1999*, ¶ 63.

¶18 We review a district court's findings of fact for clear error. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241. A finding of fact is clearly erroneous if not supported by substantial evidence, the court misapprehended the effect of the evidence, or we are convinced upon our review of the record that the district court is mistaken. *Larson*, ¶ 16. However, where the appellant does not challenge the district court's findings of fact, we confine our review to the correctness of the district court's conclusions of law challenged on appeal. *E.g.*, *State v. Root*, 2003 MT 28, ¶ 7, 314 Mont. 186, 64 P.3d 1035; *Dunnington*, ¶ 6.

¶19 We determine whether a district court abused its discretion by denying a party's request for a physical or mental examination pursuant to Rule 35. *Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶ 16, 332 Mont. 116, 135 P.3d 797. A court abuses its discretion if it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Pumphrey*, ¶ 16.

DISCUSSION

¶20 *Issue One: Whether the Montana Constitution's guarantee of a "clean and healthful environment" includes a stable climate system that sustains human lives and liberties.*

¶21 Because we resolve standing on Plaintiffs' alleged violation of a constitutional right, we find it necessary to address the parties' arguments relating to whether the Constitution's

inalienable right to a clean and healthful environment and environmental life support system includes a stable climate system before addressing the remaining arguments relating to standing.

¶22 Article II, Section 3, of the Montana Constitution guarantees all persons certain inalienable rights, "includ[ing] the right to a clean and healthful environment." Significantly, Article IX, Section 1, of the Montana Constitution further provides that:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

¶23 We have previously addressed these constitutional provisions—including a detailed historical review of the 1972 Montana Constitutional Convention—and have "determined that the framers of the Montana Constitution intended it to contain 'the strongest environmental protection provision found in any state constitution'" that is "'both anticipatory and preventative.'" *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288 (quoting *MEIC 1999*, ¶¶ 66, 77); *see generally MEIC 1999*, ¶¶ 65–77. As relevant here, Delegate McNeil discussed the "environmental life support system" provision found in Article IX, Section 1(3):

> Subsection (3) mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" *is all-encompassing, including but not limited to air, water, and land*; and whatever interpretation

> is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded.*

MEIC 1999, ¶ 67 (quoting Montana Constitutional Convention, Verbatim Transcript, March 1, 1972, Vol. IV, p. 1201 [hereinafter Convention Transcript]) (first emphasis added).

¶24 The descriptive adjectives "clean and healthful" were not in the original committee proposal because the committee thought that the proposal provided stronger environmental protections without them: "'The majority felt [including "clean and healthful"] would permit degradation of the present Montana environment to a level as defined in Illinois, which may be clean and healthful. *And our intention was to permit no degradation* from the present environment and affirmatively require enhancement of what we have now.'" *MEIC 1999*, ¶¶ 66, 69 (quoting Convention Transcript at 1205) (emphasis in original). Others discussed their concern for "'an environment that is better than healthful. If all we have is a survivable environment, then we've lost the battle. We have nothing left of importance.'" *MEIC 1999*, ¶ 74 (quoting Convention Transcript at 1243–44). The Framers agreed that it was the convention's intent to adopt whichever language was stronger: "[T]he strongest constitutional environmental section of any existing state constitution." *MEIC 1999*, ¶ 75; Convention Transcript at 1200. Six days after approving Article IX, Section 1, the Framers added the right to a clean and healthful environment provision to Article II, Section 3, of the Montana Constitution by a vote of 79 to 7 to interrelate with Article IX, Section 1, to give force to the language of the preamble, and "to recognize that this [right] is, for the time in which we're living and for the foreseeable

future, one of the inalienable rights that we hope to assure for our posterity." *MEIC 1999*, ¶ 76; Convention Transcript at 1637.

¶25 We concluded that the Framers' intent was to provide environmental protections which are "both anticipatory and preventative" and did not intend to prevent only environmental degradation that could be conclusively linked to ill health or physical endangerment. *MEIC 1999*, ¶ 77. Indeed, the Constitution's "farsighted environmental protections can be invoked" prior to harmful environmental effects. *MEIC 1999*, ¶ 77. The right's preventative measures "ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books." *Park Cnty.*, ¶ 62.

¶26 The State argues that the Framers could not have intended to include an environment undegraded from the effects of climate change within the right to a clean and healthful environment because they did not specifically discuss climate change or other global issues when adopting the provision but instead focused on issues such as "'the clear, unpolluted air near Bob Marshall wilderness; it's the clear water and the clear air in the Bull Mountains; and it is the stench in Missoula.'"[2] Quoting Convention Transcript at 1205.

¶27 But our Constitution does not require the Framers to have specifically envisioned an issue for it to be included in the rights enshrined in the Montana Constitution: "A Constitution is not a straight-jacket, but a living thing designed to meet the needs of a

[2] We note that the State makes the opposite argument in another case now before us. *See O'Neill v. Gianforte*, No. DA 23-0555, Appellant's Opening Brief at 17–20 (Jan. 12, 2024) (arguing the district court "cannot be right" that a privilege can be recognized in the Constitution only if the Framers explicitly referred to it in the constitutional convention transcripts).

progressive society and capable of being expanded to embrace more extensive relations." *Goodell v. Judith Basin Cnty.*, 70 Mont. 222, 236, 224 P. 1110, 1114 (1924); *cf. State ex rel. Fenner v. Keating*, 53 Mont. 371, 379–81, 163 P. 1156, 1158 (1917) (discussing that voting machines, while not contemplated by the framers, were still protected under the Constitution which adapts "to future as well as existing emergencies" so that, if consistent with the object and true principles of the Constitution, it "can be extended to other relations and circumstances which an improved state of society may produce"). Another example includes the right to be free from warrantless searches under Article II, Section 11, of the Montana Constitution (originally Article III, Section 7, of the 1889 Montana Constitution), which protects from future technological advancements surely not contemplated by the Framers of the 1889 Montana Constitution such as electronic listening and recording, *cf. State v. Williams*, 153 Mont. 262, 269, 455 P.2d 634, 638 (1969) (collecting cases), thermal imaging, *State v. Siegal*, 281 Mont. 250, 257, 934 P.2d 176, 180 (1997), *overruled in part on other grounds by State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, 970 P.2d 556, video recordings, *e.g.*, *State v. Solis*, 214 Mont. 310, 693 P.2d 518 (1984), and cell phone communications and data stored on cell phones such as a digital photo library, *State v. Mefford*, 2022 MT 185, ¶ 15, 410 Mont. 146, 517 P.3d 210, among others. Similarly, there is no debate that the freedom of speech protects online speech, videos, or other speech that could not have been contemplated when Article III, Section 10, of the 1889 Montana Constitution was enacted (now Article II, Section 7, of the Montana Constitution). *Cf. Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) ("Accordingly, we hold that the opportunity to pursue employment, *while not specifically enumerated as*

a fundamental constitutional right under Article II, section 3 of Montana's constitution is, notwithstanding, necessarily encompassed within it." (emphasis added)). The State does not address why we should treat the inalienable right to a clean and healthful environment any differently. Should pollutants not in existence or fully understood in 1972 be exempted from the right to a clean and healthful environment just because the Framers did not specifically contemplate them? We think not. New advancements, consistent with the object and true principles of the Constitution, are provided for within Montana's living Constitution.

¶28 The right to a clean and healthful environment is "forward-looking and preventative." *Park Cnty.*, ¶ 62. It does not require the Framers to have contemplated every environmental harm that is protected under "'the strongest environmental protection provision found in any state constitution'" *Park Cnty.*, ¶ 61 (quoting *MEIC 1999*, ¶ 66).

¶29 Plaintiffs showed at trial—without dispute—that climate change is harming Montana's environmental life support system now and with increasing severity for the foreseeable future. The State and its agencies have previously acknowledged such current and future impacts to the Montana environment stemming from climate change, many of which can already be increasingly seen today.[3] Plaintiffs showed that climate change *does*

[3] *See, e.g.*, Final Environmental Impact Statement Highwood Generating Station 3-46 (Mont. Dep't Env't Quality, Jan. 2007) (available at https://archive.legmt.gov/content/Publications/MEPA/2007/deq0202_2007004.pdf [https://perma.cc/AAP4-8EQA]). For example, the State noted concerns over future harms stemming from GHG emissions particular to Montana such as:

- A loss of glaciers within Montana. *See, e.g.*, *Glacier Repeat Photos*, Nat'l Park Serv. (last updated Aug. 12, 2024), https://www.nps.gov/glac/learn/nature/glacier-repeat-photos.htm [https://perma.cc/L5B7-5L9H].
- Declining snowpack and stressed water supplies for human use (including for crop production) and cold-water fish. *See, e.g.*, *Governor's Drought and Water Supply Advisory*

impact the clear, unpolluted air of the Bob Marshall wilderness; it *does* impact the availability of clear water and clear air in the Bull Mountains; and it *does* exacerbate the wildfire stench in Missoula, along with the rest of the State. The District Court made extensive, undisputed findings of fact that GHG emissions are drastically altering and degrading Montana's climate, rivers, lakes, groundwater, atmospheric waters, forests, glaciers, fish, wildlife, air quality, and ecosystem: "Anthropogenic climate change is impacting, degrading, and depleting Montana's environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss."

Committee Snowpack and Water Supply Forecast Update May 9, 2024, Nat. Res. Conservation Serv., https://drought.mt.gov/_docs/DWSAC-Materials/NRCS-SnowpackReport-May-2024.pdf [https://perma.cc/MB2D-VQB9] (showing significantly below median snowpack levels for much of Montana, including many areas lowest on record); Amanda Eggert, *Montana asserts its water rights to protect fisheries, recreation on several major rivers*, Mont. Free Press (Aug. 21, 2024), https://montanafreepress.org/2024/08/21/montana-asserts-its-water-rights-to-protect-fisheries-recreation-on-several-major-rivers/ [https://perma.cc/5E9C-TSL2].

- Difficulties for ski areas to survive. *See, e.g.*, Teton Pass Ski Area (@skitetonmt), Instagram (Feb. 8, 2024), https://www.instagram.com/p/C3GRJ_tO4lX/?img_index=6 [https://perma.cc/G5YE-TR45] (announcing closure for rest of season due to "insurmountable" lack of snow); Turner Mountain Ski Area, Facebook (Jan. 25, 2024, through March 5, 2024), https://www.facebook.com/TurnerMountain/ [https://perma.cc/N826-EP9K] (showing repeated closures due to low snow).
- Loss of wildlife habitat.
- Effects on human health from extreme heat waves and expanding diseases such as West Nile. *See, e.g.*, *West Nile Virus*, Mont. Dep't of Health & Hum. Servs. (last accessed Dec. 11, 2024), https://dphhs.mt.gov/publichealth/cdepi/diseases/westnilevirus [https://perma.cc/LA5G-E3RZ] (noting the first case of West Nile in Montana occurred in 2002 with outbreaks now occurring roughly every five years).

¶30 We reject the argument that the delegates—intending the strongest, all-encompassing environmental protections in the nation, both anticipatory and preventative, for present and future generations—would grant the State a free pass to pollute the Montana environment just because the rest of the world insisted on doing so. The District Court's conclusion of law is affirmed: Montana's right to a clean and healthful environment and environmental life support system includes a stable climate system, which is clearly within the object and true principles of the Framers inclusion of the right to a clean and healthful environment.

¶31 *Issue Two: Whether Plaintiffs have standing to challenge the constitutionality of the MEPA Limitation.*

¶32 Parties are entitled to bring a direct action to enforce their inalienable right to a clean and healthful environment but must still meet minimum criteria to establish standing. *MEIC 1999*, ¶¶ 28, 45. Standing is a threshold question of justiciability, required by Article VII, Section 4(1), of the Montana constitution, that focuses on whether the claimant is a proper party to assert a claim. *Larson*, ¶ 45. A plaintiff has legal standing to assert a claim if (1) the claim is based on an alleged wrong or illegality that has caused, or is likely to cause, the plaintiff to suffer a past, present, or threatened injury to person, property, *or* exercise of civil or constitutional right and (2) the harm is of a type that legal relief can effectively alleviate, remedy, or prevent. *Larson*, ¶ 46 (citing *Schoof v. Nesbit*, 2014 MT 6, ¶¶ 20–21, 373 Mont. 226, 316 P.3d 831); *Schoof*, ¶ 15 (requiring a "personal stake" in the outcome of the controversy). Justiciability requires only one plaintiff to have standing

to seek the same equitable relief as another plaintiff. *Larson*, ¶ 47 n.21; *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 45, 356 Mont. 41, 230 P.3d 808.

¶33 Alleging the unconstitutionality of a statute generally or in the abstract is insufficient to confer standing. *Larson*, ¶ 46; *Schoof*, ¶¶ 20–21. But alleging facts stating a claim that a statute violates a plaintiff's constitutional right is sufficient to show an injury, and seeking to vindicate those constitutional rights confers standing. *See generally Schoof*, ¶¶ 17–23; *see also Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶ 15, 379 Mont. 142, 347 P.3d 1287; *Weems v. State*, 2019 MT 98, ¶ 9, 395 Mont. 350, 440 P.3d 4 ("'A plaintiff's standing may arise from an alleged violation of a constitutional or statutory right.'" (quoting *Mitchell*, ¶ 11)); *Advocs. for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 28, 408 Mont. 39, 505 P.3d 825.

¶34 In *Schoof*, we overruled *Fleenor v. Darby School District*, 2006 MT 31, 331 Mont. 124, 128 P.3d 1048, which required a plaintiff to allege an injury beyond that of a constitutional violation and to distinguish the plaintiff's constitutional harm from that of the public. *Schoof*, ¶¶ 17, 20. We overruled *Fleenor* because these requirements imposed standing thresholds incompatible with the constitutional rights to know and participate. *Schoof*, ¶ 17.

¶35 We held that under the right to know and right to participate guaranteed in Article II, Sections 8 and 9, of the Montana Constitution, Schoof's "personal stake" in the case was the opportunity to participate in the challenged government action. *Schoof*, ¶ 19. To vindicate those rights, we held that Schoof need not demonstrate a personal stake in the specific policy at issue or an injury beyond being deprived of his constitutional rights:

"Otherwise, the constitutional rights to know and participate could well be rendered superfluous because members of the public would be unable to satisfy traditional standing requirements to properly enforce [their constitutional rights]." *Schoof*, ¶ 19.[4]

¶36 Here, Plaintiffs have shown a sufficient personal stake in their inalienable right to a clean and healthful environment. Mont. Const. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ."). We have said that this right must be read together with the right guaranteed by Article IX, Section 1, of the Montana Constitution:[5] "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." *MEIC 1999*, ¶ 77. Plaintiffs definitively showed at trial, without dispute, that climate change is causing serious and irreversible harms to the environment in Montana—assuring them and future Montanans a "harmful" rather than "healthful" environment as guaranteed by the Constitution. As discussed above, climate change is a serious threat to the constitutional guarantee of a clean and healthful environment in Montana. "Montanans' right to a clean and healthful environment is contemplated by an affirmative duty upon their government to take active steps to realize

[4] Additionally, we have noted that the Uniform Declaratory Judgment Act, § 27-8-202, MCA, recognizes the justiciability requirements for standing: "Any person interested . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." *See Larson*, ¶ 45 n.19.

[5] And with the preamble: "We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution." *MEIC 1999*, ¶ 77.

this right." *Park Cnty.*, ¶ 63. Plaintiffs alleged that the MEPA Limitation infringed on their right to a clean and healthful environment and the State's affirmative duty to take active steps to realize this right by providing a blanket prohibition on reviewing GHG emissions in all projects, including those that will have a significant effect on the quality of the human environment. *Accord MEIC 1999*, ¶¶ 21, 45 (holding plaintiffs had "standing to challenge conduct which has an arguably adverse impact" on the river notwithstanding that the arsenic load of the discharged water would "be close to nondetectable"). This was sufficient for standing purposes; whether it is sufficient to show a violation of their constitutional right requiring application of strict scrutiny is a separate issue. *MEIC 1999*, ¶ 45.

¶37 Further, Plaintiffs have an additional personal stake under the plain language of MEPA, which states that the Legislature, mindful of its constitutional obligations to a clean and healthful environment, provides for an adequate review of state actions to ensure that "environmental attributes are *fully considered* by the legislature in enacting laws to fulfill constitutional obligations" and "the public is informed of the anticipated impacts in Montana of potential state actions." Section 75-1-102(1), MCA (emphasis added). Additionally, a purpose of MEPA "is to assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies." Section 75-1-102(3)(a), MCA. Plaintiffs have a personal stake in being fully informed of the anticipated impacts of potential state actions.

¶38 The general rule is that a "plaintiff's injury must be 'distinguishable from the injury to the public generally.'" *Schoof*, ¶ 20 (quoting *Fleenor*, ¶ 9). *Schoof* clarified the purpose of this rule is to ensure that the plaintiff's alleged injury is "concrete" rather than "abstract." *Schoof*, ¶ 20. For example, a common concern that the State obey the law is an abstract injury, whereas even a widely shared harm can confer standing if it is concrete. *Schoof*, ¶ 20. "'[T]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.'" *Schoof*, ¶ 21 (quoting *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 374, 922 P.2d 1140, 1144 (1996)).

¶39 Thus, when an alleged injury is premised on the violation of constitutional rights, standing depends on whether the right could be understood as granting persons in the plaintiff's position a right to judicial relief. *Schoof*, ¶ 21; *see also Shockley v. Cascade Cnty.*, 2014 MT 281, ¶¶ 16, 22, 376 Mont. 493, 336 P.3d 375. We held that the constitutional harm in *Schoof* was concrete—though widely shared by others—because the constitutional and statutory rights were directed at the public and persons, and thus all citizens had suffered a concrete injury. *Schoof*, ¶ 21 ("Importantly, the governing provisions in this case are directed to the citizen: 'The public' . . . 'No person' . . . ." (quoting Mont. Const. art. II, §§ 8, 9)).

¶40 In the same way, the constitutional rights at issue here are directed at the public and persons generally. Article II, Section 3, of the Montana Constitution guarantees that "*[a]ll persons* are born free and have certain inalienable rights," including the right to a clean and healthful environment. (Emphasis added.) *See also* Mont. Const. art. IX, § 1

("each person . . . for present and future generations"). The language of the constitutional provisions guaranteeing a clean and healthful environment speak for themselves. They apply to all persons of the state, including "present *and future* generations." Mont. Const. art. IX, § 1 (emphasis added); *accord Park Cnty.*, ¶ 62 ("*Montanans'* inalienable right to a 'clean and healthful environment'" (emphasis added)); *Seven Up Pete Venture v. Mont.*, 2005 MT 146, ¶ 46, 327 Mont. 306, 114 P.3d 1009 ("'[t]he right to a clean and healthful environment' is an inalienable right of *every person*." (emphasis added)); *see also* Convention Transcript at 1639 (Article II, Section 3, of the Montana Constitution "does present the right of every person."). The governing constitutional provisions are directed at the citizen and can be understood as granting persons in the Plaintiffs' position a right to judicial relief. Thus, the constitutional harm discussed above is concrete, though it is widely shared.[6] *Cf. Schoof*, ¶ 21; *see also Massachusetts*, 549 U.S. at 522, 127 S. Ct. at 1456 ("That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."). Additionally, MEPA is directed at the citizen: one of its purposes is to fully inform "the public" of anticipated environmental impacts of potential state actions. Section 75-1-102(1)(b), MCA; *see also* § 75-1-103(3), MCA ("The legislature recognizes that *each person* is entitled to a healthful environment." (emphasis added)). Like *Schoof*, Plaintiffs have shown a

[6] The State cites federal caselaw holding that plaintiffs in distinguishable but similar cases did not have standing. The federal constitution notably does not include an inalienable right to a clean and healthful environment. Additionally, the State's citation to *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020), is inapposite as the claims in *Juliana* were similar to claims the District Court dismissed in this case that are not on appeal before this Court.

sufficiently concrete injury to their constitutional right to a clean and healthful environment—that the MEPA Limitation prevents the State from considering GHG emissions in all projects that may have an impact on the Montana human environment.

¶41 The Dissent argues "Plaintiffs' stories are not legally unique" and "are not distinguishable from the general public at large," Dissent, ¶ 83, but fails to acknowledge *Schoof*, ¶¶ 20–21, which clarified the test for what types of injuries are distinguishable from the public at large. As discussed above, just like in *Schoof*, the rights at issue here are sufficiently concrete as they "can be understood as granting persons in the plaintiff's position a right to judicial relief." *Schoof*, ¶ 21. The Dissent acknowledges that similarly compelling stories could be drawn from "one million other Montanans." Dissent, ¶ 83. But holding that there is no sufficient injury for *any* Montanan to bring a claim asserting their constitutional right to a clean and healthful environment just because *every* Montanan is harmed by climate change—as the Dissent agrees—would return us to the misapplication of standing requirements from *Fleenor* that we overruled in *Schoof*. *Schoof*, ¶¶ 19–20 (holding that Schoof had standing to assert an interest in observing the Commissioners' actions: a "like-compelling stor[y]" that could "be found within the collective experience of the entire Montana population," Dissent, ¶ 83, who were similarly deprived of their constitutional rights to know and participate). The Dissent's argument would foreclose standing in other environmental harm cases where we have long recognized a plaintiff's standing. *See MEIC 1999*, ¶ 43 (recognizing that "the injury need not be exclusive to the litigant" because to so hold "'would effectively immunize the statute from constitutional review.'" (quoting *Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997))). For

example, in *MEIC 1999*, plaintiffs lived and recreated in the Clark Fork drainage—as many thousands of other people likewise do—yet we did not deny them standing to bring their claims even though thousands of other people could have likewise brought claims for the same injuries. *MEIC 1999*, ¶¶ 4, 45. Just because the harm and the area of harm here is larger should likewise not preclude standing to litigants who have demonstrated a sufficient stake in an infringement on their constitutional rights.[7] Indeed, to so hold "would mean that the *most* injurious and widespread Government actions could be questioned by nobody." *Schoof*, ¶ 21 (emphasis added).

¶42 The Dissent acknowledges that climate change directly impacts each and every Montanan, Dissent, ¶ 83, yet argues that no government action has directly impacted any Montanan in this case. But the Dissent conflates the alleged injury in the case—that the MEPA Limitation unconstitutionally infringes on Montanans' right to a clean and healthful environment—with climate change, Dissent, ¶ 89, which is a separate injury that we do not rely on in our standing analysis. *See* Opinion, ¶¶ 52, 55. Nor is the injury here merely "that the statute fails to protect the citizen against environmental harm," Dissent, ¶ 86, or merely "allowed by a statute," Dissent, ¶ 88, but instead actively causes the constitutional harm by statutory mandate. *See* § 75-1-201(2)(a), MCA ("an environmental review . . . *may not* include an evaluation of greenhouse gas emissions . . . ." (emphasis added)). Plaintiffs allege the MEPA Limitation is an unconstitutional infringement on their

[7] The Dissent would preclude standing here "even if [climate change] has affected [Plaintiffs] more than others," Dissent, ¶ 83, which, even before *Schoof* clarified the rule, would have been enough to show that their injury was distinguishable from the general public.

right to a clean and healthful environment because it prevents government agencies, in *all* cases, from analyzing harmful GHG emissions. Plaintiffs here have shown "a concrete current or impending violation of the[ir] constitutional right . . . by way of the government's application of the [MEPA Limitation] to the Plaintiffs." Dissent, ¶ 89. They showed at trial that since the MEPA Limitation was enacted in 2011, state agencies have stopped considering (and will continue to not consider) GHG emissions in all cases because of the MEPA Limitation's prohibition, even though the Constitution guarantees them a right to a stable climate system and MEPA is necessary to "help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment." *Park Cnty.*, ¶ 70.

¶43 Turning to causation and redressability, the State acknowledges in briefing that "Plaintiffs [are] not suing to stop climate change. They [are] suing to challenge the constitutionality of [a] specific provision of MEPA: section 75-1-201(2)(a)." Yet, the State then argues that Plaintiffs must prove that the MEPA Limitation has in fact caused climate change. The State's argument is misplaced. The focus instead is whether the challenged statute is a cause of, or is likely to cause, an unconstitutional infringement on Plaintiff's right to a clean and healthful environment.

¶44 Thus, like in *Schoof*, to have standing here Plaintiffs must show that the challenged law impacts their right to a clean and healthful environment. They showed that the State's policies, including the MEPA Limitation (and, before it was repealed, the state energy policy), impacts their right by prohibiting an analysis of GHG emissions, which

blindfolded the State, its agencies, the public, and permittees when an analysis is necessary to inform the State's affirmative duty to take active steps to realize the right to a clean and healthful environment.

¶45 The State next argues that the MEPA Limitation is merely a procedural statute and that substantive permitting statutes, if any, are the statutes that "cause" Plaintiffs' constitutional harms. The State also argues that, because it is procedural, declaring the MEPA Limitation unconstitutional will not redress Plaintiffs' injuries.[8] But the State acknowledges that multiple sources may cause an injury and that redressability is not defeated if the statute at issue at least partially caused the injury. Acknowledging this, the State cites to *Juliana*, 947 F.3d at 1169 (finding causation notwithstanding multiple non-hypothetical links in the chain because the "host of federal policies" that were challenged were likely a substantial factor in causing plaintiffs' injuries) and *WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury.").

¶46 We rejected a similar argument in *Weems*. There, the State argued that, irrespective of the challenged statute, plaintiffs could not perform abortions. *Weems*, ¶ 10. We concluded plaintiffs had sufficiently alleged for standing purposes that, "but for the existence of the statutory restriction," the plaintiffs "would be able" to perform abortions.

[8] Additionally, Plaintiffs argue state agencies will have discretion to deny permits under substantive permitting statutes when the procedural MEPA Limitation is declared unconstitutional while the State argues it will not. Those substantive permitting statutes are not before us, and we decline to address their constitutionality on this record.

Weems, ¶ 13. Similarly here, at trial Plaintiffs showed that but for the MEPA Limitation, state agencies *would be able* to conduct evaluations of GHG emissions in their environmental reviews—namely, as discussed further below, state agencies used to perform them prior to the 2011 MEPA Limitation. *Cf. Advocs. for Sch. Trust Lands*, ¶ 28 (claim was ripe "where the statute itself allegedly deprived the plaintiffs of a constitutional right"). Now however, because the State is not solely responsible for climate change, it avoids its responsibility when conducting environmental reviews and asks us to sidestep a potential constitutional harm because it cannot reverse climate change alone.

¶47 Like *Weems*, ¶ 14, the State's argument here is circular: it maintains that Plaintiffs cannot challenge the MEPA Limitation unless they also challenge the substantive permitting statutes, but acknowledges that MEPA's purpose is to "provide for the adequate review of state actions in order to ensure that: (a) environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations; and (b) the public is informed of the anticipated impacts in Montana of potential state actions." Section 75-1-102(1), MCA. Substantive permitting statutes are not at issue here and we reject the parties' attempts to insert advisory opinions on their constitutionality into this litigation. Plaintiffs have made a sufficient showing for standing that the MEPA Limitation violates a constitutional right and infringes on both the state agency's constitutional obligations and the Legislature's duty to use MEPA as a source of information when substantive statutes are not fulfilling constitutional obligations. *Park Cnty.*, ¶¶ 69, 89; *see also* § 27-8-201, MCA ("Courts of record within their respective jurisdictions shall

have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed*." (emphasis added)); § 27-8-202, MCA.

¶48 The State's citation to *Donaldson v. State*, 2012 MT 288, 367 Mont. 228, 292 P.3d 364, is also inapposite. In that case, plaintiffs did not seek a declaration that any particular law was unconstitutional. Rather, they sought a declaration that an entire statutory scheme was unconstitutional—without reference to any statute—potentially impacting many statutes in unknowable and unintended ways. *Donaldson*, ¶ 4. The district court concluded, and we agreed, that the proper way to deal with their concerns were with specific suits directed at specific, identifiable statutes. *Donaldson*, ¶ 4. While we acknowledged that we have directed the Legislature to comply with specific constitutional duties while holding specific statutes unconstitutional, *Donaldson*, ¶ 8 (citing *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (school funding); *Snetsinger v. Mont. Univ. System*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (provision of employment benefits)), we held that in a case without specific statutes alleged unconstitutional, the broad injunction and declaratory judgment sought would just lead to further confusion and litigation: "Broadly determining the constitutionality of a 'statutory scheme' that may, according to [p]laintiffs, involve hundreds of separate statutes, is contrary to established jurisprudence." *Donaldson*, ¶¶ 8–10. Here, Plaintiffs brought a challenge to specific statutes—namely the MEPA Limitation and the State Energy Policy. The State and Dissent seemingly posit that other substantive permitting statutes cause Plaintiffs additional constitutional harm and that they should have also challenged those statutes. *See* Dissent, ¶¶ 85, 88, 90, 96, 99 (asserting that the MEPA Limitation *alone* does

not cause Plaintiffs' injuries nor will declaring it unconstitutional redress the injuries). True or not, "[w]e will not avoid our responsibility to resolve the dispute actually before us by hypothesizing about whether other disputes might arise at a future time." *Park Cnty.*, ¶ 56. To require an act to be the *sole* cause of an injury before it could be redressed, Dissent, ¶ 90, would upend decades of jurisprudence from this Court and the United States Supreme Court that hold an injury caused in part by a challenged action is redressable even if it does not redress the injury in full. *See, e.g.*, Opinion, ¶¶ 45, 52 (citing to federal caselaw). Declaring the MEPA Limitation unconstitutional will redress the constitutional injury caused by that statute, regardless of whether or not other statutes also cause constitutional harms. To hold otherwise would close the doors of the courts to plaintiffs trying to vindicate personal constitutional rights unless they could identify every other instance where their rights might be infringed and sought to litigate those at the same time.

¶49 The State repeatedly tries to redirect our focus to *global* climate change and the staggering magnitude of the issue confronting the world in addressing it. The State argues that it should not have to address its affirmative duty to a clean and healthful environment because even if Montana addresses its contribution to climate change, it will still be a problem if the rest of the world has not reduced its emissions. This is akin to the old ad populum fallacy: "If everyone else jumped off a bridge, would you do it too?" *See also 350 Mont.*, 50 F.4th at 1266 (rejecting environmental assessment's analysis that even though the project would "add more fuel to the fire [of global warming]," it would have no significant impact because "its contribution w[ould] be smaller than the worldwide total of all other sources of GHGs"). Plaintiffs may enforce their constitutional right to a

clean and healthful environment against the State, which owes them that affirmative duty, without requiring everyone else to stop jumping off bridges or adding fuel to the fire. *Cf. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). Otherwise, the right to a clean and healthful environment is meaningless.

¶50 Similarly, the State argues that even if the MEPA Limitation is unconstitutional, and the State begins analyzing GHG emissions and factoring that analysis into its substantive permitting decisions, Montana's resulting lower GHG emissions will have a negligible effect on global climate change: "At bottom, no single judicial action in Montana can meaningfully reduce climate change, and thus redress Plaintiffs' injuries." Like with causation, the State misconstrues what redressability looks like in a case that challenges a statute as violating a constitutional right.

¶51 It may be true that the MEPA Limitation is only a small contributor to climate change generally, and that declaring it unconstitutional will do little to reverse climate change. But our focus here, as with Plaintiffs' injuries and causation, is not on redressing climate change, but on redressing their constitutional injuries: whether the MEPA Limitation unconstitutionally infringes on Plaintiffs' right to a clean and healthful environment. *Cf. Schoof*, ¶ 17 (acknowledging that *Fleenor* erred by expanding the focus of a constitutional injury to require a greater showing of injury than the constitutional injury itself). Furthermore, we have rejected a similar argument regarding whether adding more pollutants to an already polluted waterbody or extending the time that the waterbody would remain polluted constituted material damage. *See Mont. Env't Info. Ctr. v. Westmoreland*

Rosebud Mining, LLC, 2023 MT 224, ¶ 57, 414 Mont. 80, 545 P.3d 623. To hold as the State argues today would mean that plaintiffs in *Westmoreland* may not have had standing because the waterbody was already polluted and addressing their concerns related to mining would not bring the waterbody back to a non-polluted state.

¶52 Thus, the question is whether legal relief can effectively alleviate, remedy, or prevent Plaintiffs' constitutional injury, not on whether declaring a law unconstitutional will effectively stop or reverse climate change. *Larson*, ¶ 46. To make that a requirement for standing would effectively immunize the State from any litigation over whether its laws are in accordance with the "affirmative [constitutional] duty upon the[] government to take active steps to realize" Montanans' right to a clean and healthful environment. *Park Cnty.*, ¶ 63. Even so, "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Massachusetts*, 549 U.S. at 525–26, 127 S. Ct. at 1458; *see also Massachusetts*, 549 U.S. at 524–25, 127 S. Ct. at 1457–58 ("That a first step might be tentative does not by itself support the notion that . . . courts lack jurisdiction to determine whether that step conforms to law. . . . While it may be true that regulating [GHG] emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether [the State] has a duty to take steps to *slow* or *reduce* it." (emphases in original)). Plaintiffs allege that the MEPA Limitation causes a violation of their constitutional rights, which is their injury. Declaring *that* law unconstitutional and enjoining the State from acting in accordance with it will effectively alleviate *that* constitutional injury—that the State is acting in opposition to its affirmative constitutional duty through the MEPA Limitation—even if other statutes not at issue here

also cause constitutional injuries. *Accord Franklin v. Massachusetts*, 505 U.S. 788, 803, 112 S. Ct. 2767, 2777 (1992) ("[W]e may assume it is substantially likely that [executive and legislative] officials would abide by an authoritative interpretation" of a statute and the Constitution, even when injunctive relief is not appropriate.).

¶53 Moreover, we recognize that denying Plaintiffs standing under the State's arguments would effectively immunize from review an important constitutional question to the public. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (citing *Missoula City-County Air Pollution Control Bd. v. Bd. of Env't Review*, 282 Mont. 255, 260, 937 P.2d 463, 466 (1997); *Gryczan*, 283 Mont. at 446, 942 P.2d at 120). We note that at oral argument, counsel for the State stressed that there was no specific permit challenged below and that, if there were, Plaintiffs might have standing. Yet the State as intervenor makes the same standing arguments in a case challenging the constitutionality of the 2011 MEPA Limitation as applied to a particular permit. *See, e.g.*, *Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, No. DA 23-0225, Intervenor State of Montana's Response Brief at 11–12 (Dec. 13, 2023). Thus, whether Plaintiffs challenge the MEPA Limitation on its face or as applied to a specific permit, accepting the State's arguments in both cases would effectively immunize review of an important constitutional question to the public. *Accord MEIC 1999*, ¶ 71 ("'[I]f you're really trying to protect the environment, you'd better have something whereby you can sue or seek injunctive relief before the environmental damage has been done.'" (quoting Convention Transcript at 1230)); *Park Cnty.*, ¶ 62 ("Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but

to be free of its occurrence in the first place."). Plaintiffs have standing for the declaratory and injunctive relief they seek because they allege that the MEPA Limitation violates their right to a clean and healthful environment and declaring it unconstitutional will alleviate the harm that that statute causes to their constitutional right. *Accord Schoof*, ¶¶ 12–23.

¶54 Finally, the Dissent also takes issue with the fact that Plaintiffs have not brought their challenge to the MEPA Limitation in the context of a specific permit. While this would be necessary if Plaintiffs had brought this as an "as applied" constitutional challenge (i.e., the statute is unconstitutional as applied to the specific circumstances presented), here Plaintiffs alleged the statute was facially unconstitutional—that no set of circumstances exists where the State could prohibit state agencies from analyzing GHG emissions in all permitting actions. This is inapposite to *Broad Reach Power, LLC v. Montana Department of Public Service Regulation, Public Service Commission*, which the Dissent relies on. *See Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, 410 Mont. 450, 520 P.3d 301. In *Broad Reach*, appellants brought their due process challenge essentially in a vacuum because they brought their constitutional challenge "as applied" to their circumstances, without demonstrating how their rights were violated with any facts particular to them. *Broad Reach*, ¶ 13. Unlike their as applied challenge, "facial challenges are not dependent on the facts of a particular case, because the statute would be unconstitutional *in all cases*." *Broad Reach*, ¶ 11 (citing *City of Missoula v. Mt. Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685) (emphasis added); *see also Park Cnty.*, ¶ 86 ("our conclusion that § 75-1-201(6)(c) and (d), MCA, is unconstitutional flows *from the content of the statute itself, not the particular*

circumstances of the litigants." (emphasis added)). Why then the Dissent would require Plaintiffs to bring their facial challenge to the MEPA Limitation within the context of a particular permit is unclear.[9] *Compare MEIC 1999*, ¶ 80 (limiting the Court's holding as applied to the facts in that case). This Opinion "meaningfully attach[es] to provide redress" by declaring § 75-1-201(2)(a), MCA, unconstitutional and "barring or limiting . . . government action" by enjoining the State from acting in accordance with the unconstitutional MEPA Limitation. Dissent, ¶ 95; *see* Opinion, ¶¶ 56–69. Like the District Court's Order, this Opinion is not limited to any particular set of facts as Plaintiffs facially challenge the constitutionality of the MEPA Limitation.

¶55 Although not necessary for our constitutional standing analysis, we summarize the multitude of personal, aesthetic, economic, and property injuries Plaintiffs showed at trial stemming from Montana's energy and permitting policies. *See Barrett v. State*, 2024 MT 86, ¶ 31, 416 Mont. 226, 547 P.3d 630 (declining to address whether plaintiffs had standing for alleged injuries to constitutional rights when individualized injuries were sufficient). Generally, the District Court found that children are uniquely vulnerable to the impacts and consequences of climate change (including the impacts from heatwaves, droughts, air pollution, and other extreme weather events on young bodies) because their bodies and minds are still developing. More specifically, Plaintiffs discussed at trial: the fear they feel

[9] Of course, as shown in the above analysis—and in agreement with the Dissent—plaintiffs must still have standing to challenge a statute as facially unconstitutional. Plaintiffs here demonstrated standing not by alleging facts that the MEPA Limitation was unconstitutional because of how the State applied it to a particular permit but because they sufficiently alleged that the MEPA Limitation unconstitutionally infringes on their right to a clean and healthful environment. This is distinct from a common, abstract interest in the constitutionality of a law. *Accord Schoof*, ¶ 20.

from disappearing glaciers in Montana (both aesthetically and from the dependence many communities place on the water they provide throughout the summer); the impacts climate change is having on culturally important native wildlife, plants, snow, and practices; summer smoke and extreme heat preventing Plaintiffs from enjoying outdoor activities and sports which are important to them; the economic effects that less snowpack and more drought are having on ranches owned by Plaintiffs' families and the resulting emotional harm; the emotions they face when confronted with growing up in this quickly changing state and the prospect of raising the next generation in increasingly dangerous weather patterns; and many other harms to their recreational, work, and physical and emotional wellbeing. *See also generally* Brief of Amici Curiae Public Health Experts and Doctors, No. DA 23-0575 (Mont. March 21, 2024) (corroborating harms with peer-reviewed medical literature). These aesthetic, recreational, and economic injuries are also sufficient to satisfy the constitutional requirements for personalized injury, even though widely shared. *See Park Cnty.*, ¶ 20.

¶56 *Issue Three: Whether the MEPA limitation is unconstitutional under the Montana Constitution's right to a clean and healthful environment.*

¶57 "[T]he right to a clean and healthful environment is a fundamental right . . . [and] any statute or rule which implicates that right must be strictly scrutinized." *MEIC 1999*, ¶ 63. Strict scrutiny applies to laws that implicate either Article II, Section 3, or Article IX, Section 1, of the Montana Constitution. *MEIC 1999*, ¶ 64. Under strict scrutiny, the State must demonstrate a compelling state interest and that the statute is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's

objective. *MEIC 1999*, ¶ 63. Thus, we must first decide whether the MEPA Limitation implicates the right to a clean and healthful environment and, if it does, whether the statute survives strict scrutiny.

¶58 Whether a statute implicates the right to a clean and healthful environment does not depend on whether a plaintiff demonstrates that public health is threatened or that current statutory standards are affected to such an extent that a significant impact has been shown on the environment. *MEIC 1999*, ¶¶ 77–78. We held in *MEIC 1999* that a statute violated the right to a clean and healthful environment when it arbitrarily excluded certain activities from nondegradation review without regard to the nature or volume of discharge. *MEIC 1999*, ¶ 80. Similarly, we held unconstitutional a law that removed equitable relief as a form of legal relief to a MEPA violation—akin "to a mandatory aircraft inspection after takeoff." *Park Cnty.*, ¶ 72.

¶59 MEPA requires environmental review prior to government actions that may significantly affect the human environment. *Park Cnty.*, ¶ 65 (citing § 75-1-201, MCA). In 2003, MEPA's purpose statement was amended to clarify that MEPA was enacted by the Legislature "mindful of its constitutional obligations under Article II, section 3 and Article IX of the Montana constitution," that MEPA is procedural, and that the purpose of environmental review is to ensure that "environmental attributes are fully considered." *Park Cnty.*, ¶ 66 (quoting § 75-1-102(1), MCA). In 2011, MEPA's policy statement was again amended "to clarify that the purpose of environmental review under MEPA is to better enable the Legislature 'to fulfill [its] constitutional obligations' and to 'assist the legislature in determining whether laws are adequate to address impacts to Montana's

environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies.'" *Park Cnty.*, ¶ 66 (quoting § 75-1-102(1), (3), MCA (2011)). Since its enactment, the Legislature has shaped MEPA as a vehicle for pursuing its constitutional mandate to prevent environmental harms and its forward-looking mechanisms are encompassed by the Legislature's constitutional obligations. *Park Cnty.*, ¶¶ 67–69. The 2011 amendments also added the first MEPA Limitation.

¶60 Although MEPA is essentially procedural, "'[p]rocedural' of course, does not mean 'unimportant.' The Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought." *Park Cnty.*, ¶ 70. MEPA enables "fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment." *Park Cnty.*, ¶ 70. The ability to avert potential environmental harms through informed decision making makes MEPA unique among other environmental statutes—and complementary to, rather than duplicative of, them. *Park Cnty.*, ¶ 76.

¶61 The State argues that the MEPA Limitation does not implicate the right to a clean and healthful environment because under our precedent in *Bitterrooters for Planning, Inc. v. Montana Department of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712, state agencies do not have authority to evaluate GHG emissions regardless. The State reads *Bitterrooters* too broadly. Bitterrooters challenged DEQ's failure to consider the secondary impacts that would result from constructing and operating a retail facility when

it issued a wastewater discharge permit for a separate, smaller wastewater processing facility. *Bitterrooters*, ¶¶ 12–13.

¶62 Under MEPA, agencies must "take a hard look" at environmental impacts of contemplated agency actions. *Bitterrooters*, ¶ 17. A more detailed evaluation is required of actions that will significantly affect the human environment compared to those that do not. *Park Cnty.*, ¶ 31 (citing *Bitterrooters*, ¶ 20). Environmental assessments must include an evaluation of cumulative and secondary impacts that have a "reasonably close causal relationship" between the triggering state action and the subject environmental effect, including "the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type" and "a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action."[10] *Park Cnty.*, ¶ 32; *Bitterrooters*, ¶¶ 21–22, 25, 33; Admin. R. M. 17.4.603(7), (18), 609(3)(d)–(e) (1989); *see also* Admin. R. M. 18.2.239(3)(d)–(e) (1988); Admin. R. M. 36.2.525(3)(d)–(e) (1988).

¶63 We held that the construction and operation of the separate retail store was not a secondary impact subject to MEPA review for the wastewater treatment system permit.

[10] The Dissent imports *Bitterrooters'* causation requirement into its standing analysis. Dissent, ¶ 91. The State also asks us to import this requirement into our standing analysis. We decline to do so. *Bitterrooters* did not involve an issue of standing but instead discussed whether a party could challenge a permit under MEPA for failing to analyze the effects of an independent project from the permitted project. This case is not a challenge to an agency's environmental review under MEPA, § 75-1-201(5)(a)(i), MCA, but rather a facial constitutional challenge to a statute within MEPA.

Bitterrooters, ¶¶ 34–35. First, the retail store did not need a permit to proceed, except as required by general land use regulations issued by the local government, which DEQ had no authority under. *Bitterrooters*, ¶ 34. Additionally, the retail store was the cause-in-fact of the wastewater treatment facility; the wastewater treatment facility was not a cause-in-fact of the retail facility. *Bitterrooters*, ¶¶ 25, 35. Thus, even if the wastewater treatment facility was not permitted, the retail facility and any associated impacts would still occur. Obviously then, those impacts were not secondary to the wastewater treatment facility and DEQ did not need to conduct a MEPA analysis of impacts that would occur even without the permitted activity.

¶64 Here, the State's argument that GHG emissions do not have a "reasonably close causal relationship" to permitting a coal mine or an electrical generation plant—both of which need a permit under the Clean Air Act under the agreed facts in the District Court—is disingenuous at best. This argument is distinguishable from the facts in *Bitterrooters*, which contemplated that DEQ had no authority to permit a separate retail facility from the one being built to treat wastewater, which was subject to a completely different regulatory authority. In the permitting context discussed here by the State, there is no reasonable argument that GHG emissions are not a "direct and secondary environmental impact[] that will likely result from the specific activity conducted or permitted by the agency" within their authority in permitting these types of facilities. *Bitterrooters*, ¶ 34.

¶65 We have looked to federal authority construing related provisions of the National Environmental Policy Act (NEPA) that discuss cumulative and secondary impacts as persuasive. *Bitterrooters*, ¶ 18. Even post *Department of Transportation v. Public Citizen*,

541 U.S. 752, 124 S. Ct. 2204 (2004), which we based our decision in *Bitterrooters* on, Circuit Courts of Appeals routinely reject NEPA permits for failing to include analysis on the downstream effects of GHG emissions. For example, the Ninth Circuit rejected a permit for a coal mine expansion as faulty for failing to include an analysis of cumulative impacts of GHG emissions from the eventual burning of coal that would be mined in the expanded permit area, even though that coal would be burned in other countries. *See 350 Montana*, 50 F.4th at 1272; *see also, e.g.*, *Ctr. for Biological Diversity*, 538 F.3d at 1217 ("The impact of [GHG] emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."); *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C.C. 2017) ("We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so."). A blanket prohibition on GHG emissions review in all MEPA analyses clearly implicates the right to a clean and healthful environment and must be analyzed under strict scrutiny. *See also MEIC 1999*, ¶¶ 30–31, 77–79 (rejecting argument that strict scrutiny does not apply to projects that demonstrate no significant changes to pollutant levels).

¶66 The State argues that the total amount of Montana's permitted GHG emissions is insignificant when evaluated against the total amount of global GHG emissions. But just because one permitted project may seem insignificant when compared to worldwide emissions from every source and every project, it does not mean the project's emissions will not "significantly affect the quality of the human environment," requiring an

environmental impact statement under MEPA, *see Park County*, ¶ 31, or result in an unconstitutional degradation to a clean and healthful environment. Mont. Const. art. II, § 3. This argument would be akin to DEQ arguing that, because 95% of selenium enters Lake Koocanusa from Canadian coal mines, dischargers in Montana should not be regulated for selenium pollution if they discharge comparatively smaller amounts, which is verifiably false. *See* Final Written Findings for the Site-Specific Water Column Selenium Standard for Lake Koocanusa, MT at 5, Dep't Env't Quality (June 2022) (available at https://deq.mt.gov/files/Water/WQPB/Standards/Koocanusa/Selenium_WrittenFindings_Final.pdf [https://perma.cc/QF4Y-YTDK]) (discussing that no current permittee will be impacted by the selenium rule because none have selenium in their discharges but, if future permittees do, they will be able to meet or exceed the standards with current best practices). Canadian coal mines causing water quality exceedances in Montana would not insulate a Montana-based mine or discharger from an appropriate MEPA review that included selenium as a factor. Similarly, global GHG emissions do not insulate the State from its affirmative constitutional duties with regards to projects that it permits. *Accord 350 Montana*, 50 F.4th 1254 (rejecting faulty environmental assessment of coal mine expansion for failing to consider emissions that would result from the combustion of the mined coal and for finding no significant impact when considering global emissions as a whole). The fact that climate change impacts extend beyond Montana's borders, as does selenium pollution and other environmental harms, does not allow the State to disregard its contributions to environmental degradation within Montana.

¶67 The State's circular argument fails: it acknowledges that "MEPA exists to inform the Legislature and the public about the environmental impacts of government actions," yet argues that it and the public need not be informed of the potentially catastrophic cumulative impacts from its actions. MEPA mandates that the State take a "hard look at the environmental consequences of its actions" before it leaps, which is impossible when the State intentionally refuses to consider an entire area of significant environmental consequences. *Ravalli Cnty. Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1369 (1995). Obviously, a clean and healthful environment cannot occur unless the State and its agencies can make adequately informed decisions. *Park Cnty.*, ¶ 70; *accord Schoof*, ¶ 17. Nor can Plaintiffs be informed of anticipated impacts to the environment when the Legislature forecloses an entire area of review proven to be harmful to Montanans' right to a clean and healthful environment. Section 75-1-102(1)(b), MCA. Nor will the Legislature be informed of whether laws are adequate to address climate change when MEPA precludes an environmental review addressing the impacts from potential state actions. Section 75-1-102(3)(a), MCA.

¶68 The State says it has a compelling interest in balancing private property rights with the right to live in a clean and healthful environment. We need not discuss this because even if the State's asserted interest is compelling, the State does not overcome its burden to show that the MEPA Limitation was narrowly tailored to this interest. The State argues that because it did not amend any substantive regulatory statutes to prohibit regulations or permitting decisions based on GHG emissions, the MEPA Limitation was narrowly tailored. Regardless of other substantive permitting statutes, "MEPA is unique in its ability

to avert potential environmental harms through informed decision making." *Park Cnty.*, ¶¶ 75–76. Foreclosing environmental review of GHG emissions under MEPA prevents state agencies from using any information garnered during this process to inform and strengthen substantive permitting or regulatory decisions or any mutual mitigation measures or alternatives that might be considered when the environmental harms of the proposed project are fully understood. The MEPA Limitation arbitrarily excludes all activities from review of cumulative or secondary impacts from GHG emissions without regard to the nature or volume of the emissions absent a requirement by federal law. *Accord MEIC 1999*, ¶ 80. The MEPA Limitation thus violates those environmental rights guaranteed by Article II, Section 3, and Article IX, Section 1, of the Montana Constitution. The District Court is affirmed: section 75-1-201(2)(a), MCA, is unconstitutional and the State is permanently enjoined from acting in accordance with it. We decide only that the Constitution does not permit the Legislature to prohibit environmental reviews from evaluating GHG emissions. Other issues will be discussed in the context of specific permitting cases.[11] Our decision is limited to the constitutionality of § 75-1-201(2)(a), MCA.

¶69 The District Court also declared § 75-1-201(6)(a)(ii), MCA (2023), unconstitutional. This section purported to limit judicial remedies for MEPA challenges "based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders." Section 75-1-201(6)(a)(ii), MCA (2023).

[11] *E.g. Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, No. DA 23-0225 (whether evaluating GHG emissions under MEPA review is required for natural gas electric generating facility).

Accord Park Cnty., ¶¶ 55, 78, 88–89 (finding a law that precluded equitable remedies under MEPA unconstitutional). The State does not appeal that part of the Order and has thus conceded the law's unconstitutionality on appeal. *Barrett*, ¶ 42. Section 75-1-201(6)(a)(ii), MCA (2023), is unconstitutional and permanently enjoined.

¶70 *Issue Four: Whether the District Court abused its discretion by denying the State's motion for a psychiatric examination under Rule 35.*

¶71 Psychiatric examinations are "particularly invasive of an individual's right to privacy. It is an extraordinary form of discovery which is permitted under Rule 35 only when the plaintiff's mental condition is in controversy, and then only when good cause has been shown." *State ex rel. Mapes v. Dist. Court*, 250 Mont. 524, 532, 822 P.2d 91, 96 (1991).

¶72 The State sought an order in the District Court allowing it to conduct a psychological evaluation of eight plaintiffs, including interviews focused on their "psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma." The State argues that these eight plaintiffs put their mental health "in controversy" as required under Rule 35 because of its "concern that the issue of standing may turn on the question of psychological harm." We need not resolve this issue, as our standing analysis focused on Plaintiffs' injury to a constitutional right rather than to any mental, emotional, physical, aesthetic, or property interests harmed by the State's actions. The District Court also concluded Plaintiffs had standing even without considering their psychological harms. Additionally, we note that the State only wanted to examine eight of the plaintiffs. Even absent those eight plaintiffs, the District Court concluded other plaintiffs had standing to

challenge the MEPA Limitation. One plaintiff with standing is sufficient. *Aspen Trails Ranch*, ¶ 45. The State has failed to show the District Court abused its discretion in finding no good cause to order the Rule 35 examinations.

CONCLUSION

¶73 Plaintiffs have standing to challenge the injury to their constitutional right to a clean and healthful environment. Montanans' right to a clean and healthful environment was violated by the MEPA Limitation, which precluded an analysis of GHG emissions in environmental assessments and environmental impact statements during MEPA review. The MEPA Limitation, § 75-1-201(2)(a), MCA, is unconstitutional and the State is enjoined from acting in accordance with it. Additionally, the State did not appeal the District Court's finding that § 75-1-201(6)(a)(ii), MCA (2023), is unconstitutional and its order enjoining the State from acting in accordance with it and it is thus affirmed.

¶74 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON

Justice Dirk Sandefur, concurring.

¶75 For the following reasons only, I concur at bottom with the Court's ultimate issue holdings in this case.

¶76 I first concur with the Majority on the easy question of whether Mont. Const. art. II, § 3 (right to "clean and healthful environment"), generically includes the right to a stable climate system that sustains human lives and liberties. However, the harder and more complex question unaddressed by the Majority, and the conspicuously absent *particularized* causation evidence in this case, is how that fundamental Montana constitutional right possibly can or should apply to restrictive MDEQ MEPA-compliance review of the gubernatorial energy policies originally at issue below, not to mention particular projects that otherwise comply with all applicable air quality review and permitting standards and requirements of the controlling federal Clean Air Act and subordinate Montana Air Quality Act regulatory scheme, in the face of the very real and uniquely complex global warming problem plaguing the entire planet, not just the slice of sky over Montana.

¶77 In regard to the indiscriminately universal global warming problem, it is undisputed and indisputable that even the complete elimination of all fossil fuel related human activities in the State of Montana will not, and simply cannot, appreciably mitigate or reduce the only generalized injuries claimed by Plaintiffs, and which are common to all Montanans and inhabitants of planet Earth, as consequences of global warming. To that point, the undisputed, but inconvenient, record facts in this case are:

(1) atmospheric carbon dioxide (CO2) loading resulting from fossil fuel burning is the most significant source of the human-caused greenhouse gas (GHG) emissions attributed by scientists as the most significant cause of the accelerated global warming currently occurring on this planet;

(2) as of 2019, however, fossil fuel related human activities in Montana contributed only "about 32 million tons" of additional atmospheric CO2 emissions into the global climate system;

(3) the 32 million tons of annual atmospheric CO2 loading attributable to fossil fuel related human activities in Montana is less than 1% of the total annual worldwide atmospheric CO2 loading; and thus

(4) even complete elimination of the total annual atmospheric CO2 loading attributable to fossil fuel related human activities in Montana will not and simply cannot appreciably mitigate or reduce, much less avoid, the only generalized injuries experienced by Plaintiffs as a consequence of global warming.

The overly simplistic focus of Plaintiffs and the Majority of this Court on the undisputed and indisputable fact that global warming "is harming Montana's environmental life support system now and with increasing severity for the foreseeable future" is no more than a political and public policy statement of the obvious. As such, it further serves as a smokescreen diverting attention away from those inconvenient facts of record and the other similarly indisputable fact: accelerated global warming caused by fossil fuel burning and other human sources of greenhouse gases is a highly complex global problem, any solution or meaningful mitigation to or of which lies exclusively in the domain of federal and international public policy choices and cooperation, rather than in a flashy headline-grabbing rights-based legal case in Montana.

¶78 Second, I generally agree with the State that the complete lack of *particularized* causation evidence in this case calls into serious question the threshold jurisprudential

standing of the Plaintiffs to assert the broad-scope legal claims for relief asserted and litigated in the district court below. I further disagree with and reject the Majority's strained and thinly-veiled attempt to distinguish the pertinent principle recognized in *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env't Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712 (holding in pertinent essence that MEPA did not require MDEQ review of adverse environmental impacts resulting from causes-in-fact beyond the authority of MDEQ to regulate under existing state or federal and environmental protection laws), based on patently inaccurate or inconsequential distinctions. However, I nonetheless agree with the Majority at bottom that Plaintiffs had minimally sufficient standing under our liberal jurisprudential standing requirements to assert the claims at issue, and that the recent legislative attempts at issue to pare-back the generally required scope of MEPA review are unconstitutional in violation of the Mont. Const. art. II, § 3, right to a "clean and healthful environment."

¶79 I finally wholeheartedly concur with the Majority holding that the District Court did *not* abuse its discretion in denying the State's patently ridiculous and overly-intrusive request for court-ordered psychological evaluations of a selected eight Plaintiffs in this case. For the foregoing reasons only, I thus concur at bottom with the Court's ultimate issue holdings in this case.

/S/ DIRK M. SANDEFUR

Justice Jim Rice, dissenting.

¶80 Cumulative studies now indicate that the climate of vast areas is warming rapidly . . . . Though these new developments provide evidence of intensified interest in long-term climate trends, and will undoubtedly prove of great value, we already know that the earth is warming, and swiftly . . . . One thing is certain. This is more than a brief, superficial change . . . with a multitudinous variety of clues: the migration of flora and fauna, the melting of the world's ice, changes in oceanic and atmospheric conditions and temperatures, barometric pressures, rainfall and diminishing salinity of the seas . . . . Climatologists estimate that a three-degree rise in the planet's average mean annual temperature would be sufficient to melt all accumulated ice within a relatively short span of years and prevent winter ice that formed thereafter from remaining throughout the summers . . . . Some scientists calculate that melting of all the planet's ice would raise the oceans no more than ninety feet; others assert the rise would be in the neighborhood of 500 feet. In either event, all present seaports would be seriously affected while the majority would be completely inundated . . . .

> In the last generation, changes that have had a decisive influence on all social life have occurred . . . . A new era has begun.

Scientists have discovered and demonstrated that the earth's climate is changing, and that it is doing so at an increasing pace, bringing about significant and potentially catastrophic environmental and social consequences. Climate change, and the potential impacts upon the lives of the people of the world, were alertly raised and discussed in detail in the above-quoted article, published by the ubiquitous mainstream Saturday Evening Post, *in 1950*. *See* Albert Abarbanel & Thorp McClusky, *Is the World Getting Warmer?*, The Saturday Evening Post, July 1, 1950, at 22; *see also Earliest Coverage of Climate Change*, The Saturday Evening Post, September/October 2021, at 58 ("Decades before the warming of the planet became headline news—and a political hot button," the Post's 1950 report was one of the first to "warn of rising sea levels, melting glaciers, and shifting agricultural

zones"). Along with the rising sea levels, concern has likewise heightened in the succeeding 74 years since the Post's reporting about the issue.

¶81 Even so, this growing urgency affords no discretion or authority for the Court to excuse the constitutional requirement that Plaintiffs bring a concrete case or controversy before the Court—a case or controversy that must be defined by constitutional principles governing justiciability and standing, not by policy significance or vogue. These other measures may well move the executive and legislative branches to action, but they are not permitted to so compel the judicial branch. Failure to enforce constitutional case or controversy requirements inevitably turns a court into an *ad hoc* legislative body. Without a doubt, the debate about climate change, and related topics such as possible geoengineering solutions—from the enormous carbon dioxide vacuum facility in Hellisheidi, Iceland, to the massive direct carbon dioxide air-capture facility in Odessa, Texas, to stratospheric aerosol injection technology designed to deflect more and capture less sunlight and thus cool the earth, to enhancement of the capability of the oceans' phytoplankton habitat to draw and absorb carbon dioxide—are both fascinating and controversial, but courts must nonetheless resist the temptation to depart from their lane, and refrain from entering these matters except upon clear demonstration of a justiciable case or controversy as required by the constitution.[1]

[1] *See* David Gelles, *The New Climate Tech*, N.Y. Times (April 1, 2024), https://www.nytimes.com/2024/04/01/briefing/climate-technology-carbon-capture.html [https://perma.cc/8RYG-SJA9].

¶82 That does not exist here. The Court emphasizes the breadth of the Constitution's environmental protections, but that, of itself, does not create a case or controversy. Many constitutional provisions are considered to be "broad." All of the environmental cases relied upon by the Court involved a government action that operated upon, and thus directly impacted, the subject plaintiffs, who brought an action in each of those cases to challenge the particular government action affecting them. Here, as further analyzed below, there is no such operative government action—no project, no application, no decision, no permit, no enforcement of a statute—which directly impacted the Plaintiffs. Rather, the only government action raised here is an enactment of a statute that *could* operate to affect Plaintiffs if applied in an actual case. The District Court struck down these statutes as unconstitutional, even though the statutes had never operated upon the Plaintiffs, and then struggled to define what this result meant, because there was no actual pending dispute to which its ruling could attach. Consequently, instead of a "decree of conclusive character," *Broad Reach*, ¶ 10 (citing *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)), the District Court entered a floating judgment of generic unconstitutionality.

¶83 As much as we want to encourage young people to involve themselves in the political process, that desire itself cannot turn Plaintiffs' compelling stories into constitutional standing. That is because Plaintiffs' stories are not legally unique. Like-compelling stories could also be drawn from the more than one million other Montanans who are likewise affected by climate change—about how climate change has impacted them, affected their wellbeing, and created fear and concern about their future. Indeed, it is not only young people who have been impacted by climate change and are very

concerned about it. "In the last generation, [climate] changes that have had a decisive influence on all social life have occurred"—was a description of the impact of climate change upon the generation that also endured the Great Depression and fought World War II. *Is the World Getting Warmer?*, *supra*, at 23. Climate change is universal in effect and nondiscriminatory; it affects everyone. And even if it has affected some persons more than others, that impact does not erase the population-wide effect of climate change. Because there is nothing about Plaintiffs' stories that could not also be found within the collective experience of the entire Montana population, their allegations are not distinguishable from the general public at large, and thus erode a claim to standing. What is necessary for standing is a Montana government action that has directly impacted a member of the Montana population, which is absent here. As explained more specifically herein, the Court's ruling opens the courts for litigants, upon a hypothetical set of facts, to seek and obtain redress from courts by advisory opinions. I thus turn to the governing constitutional principles.

¶84 Justiciability is a threshold issue that must be met for the Court to exercise jurisdiction over a claim and in turn adjudicate a dispute. *Broad Reach*, ¶ 10 (citing *State v. Whalen*, 2013 MT 26, ¶ 40, 368 Mont. 354, 295 P.3d 1055). "The purpose of an action under the Uniform Declaratory Judgments Act (UDJA or Act) is 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.' Section 27-8-102, MCA. Any interested party may seek a declaratory judgment to determine questions about their rights, status, or other relations regarding their interests. Section 27-8-202, MCA. While the UDJA is construed liberally to effectuate these

purposes, the Act's use is 'tempered by the necessity that a *justiciable controversy* exist before courts exercise jurisdiction.'" *Broad Reach*, ¶ 9 (emphasis in original) (citing *Northfield Ins. Co. v. Mont. Ass'n of Cntys.*, 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813). "Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364.

¶85 There are two recognized parts to standing: the constitutionally imposed case or controversy requirement, as well as other judicially imposed prudential limitations. *Heffernan*, ¶ 31. When case or controversy standing is at issue, the question is whether the complaining party is the proper party before the court, not whether the issue itself is justiciable. *See Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. "To have case-or-controversy standing, 'the complaining party must clearly allege past, present, or threatened injury to a property or civil right.'" *Bullock*, ¶ 31 (citing *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430). "The alleged injury must be: *concrete*, meaning actual or imminent, and *not abstract, conjectural, or hypothetical*; *redressable*; and *distinguishable from injury to the public generally*." *Bullock* ¶ 31 (emphasis added); *see also Broad Reach*, ¶ 10 (explaining that a controversy must be "definite and concrete such that it touch[es] legal relations of parties having adverse legal interests and be a real and substantial controversy that enables relief through [a] decree of conclusive character" and be "distinguishable from an opinion advising what the law would be upon a hypothetical state of facts or upon an abstract proposition.")

(internal citations omitted; internal quotations omitted). We have analogized to federal jurisprudence regarding constitutional standing, explaining that "'the irreducible constitutional minimum of standing' has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)." *Heffernan*, ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)). We thus explained that the claimed injury "must be one that would be alleviated by successfully maintaining the action." *Heffernan*, ¶ 33. In my view, the Court's analysis of injury related to causation and redressability is incorrect. Although Plaintiffs have indeed alleged an injury, it is critical to correctly understand what that injury is. When the injury is correctly defined, it is clear that the primary statute at issue, § 75-1-201(2)(a), MCA, or the "MEPA Limitation," *alone* cannot be said to have caused the injury to Plaintiffs within this case, nor does judicial voiding of the MEPA Limitation provide redress of the injury alleged by Plaintiffs. Thus, they do not have individual standing to bring the action.

I. Injury

¶86 The Court relies on *Schoof*, and *MEIC 1999* to reason that Plaintiffs' contention that "climate change is causing serious and irreversible harms to the environment in Montana—assuring them and future Montanans a 'harmful' rather than 'healthful' environment" is itself "a sufficient personal stake" to establish standing to bring their constitutional claims against the MEPA Limitation. Opinion, ¶ 36. Thus, the Court now grants standing to a citizen to bring a challenge to a statute as violative of the Constitution's environmental

provisions upon the mere assertion that the statute fails to protect the citizen against environmental harm, to be followed by an opportunity to prove a case at trial, despite the fact that the selected statute was never applied to the citizen by any government action. Neither *Schoof* nor *MEIC 1999* supports this proposition.

¶87 The Court applies *Schoof* beyond the parameters of its holding. Critically, *Schoof* addressed our precedent's failure to recognize the unique "nature of the 'injury' at issue *in a right to know or right of participation case*," and held that requiring a right to participate plaintiff to allege an injury under the usual "standing thresholds," such as a personal stake in the loss of the participation right, was "incompatible with the nature of *the particular constitutional rights at issue*." *Schoof*, ¶ 17 (emphasis added). "Under the plain language of Article II, Sections 8 and 9, and the implementing statutes, the personal stake that Schoof has here is the reasonable 'opportunity' to observe and participate in the Commissioners' decision-making process, including submission of information or opinions. To vindicate these rights Schoof should not be required to demonstrate a personal stake . . . or an 'injury' *beyond being deprived of adequate notice* of the Commissioners' proposed action and the corresponding opportunity to observe and participate as a citizen in the process." *Schoof*, ¶ 19 (emphasis added). Consequently, we held that "a citizen *in Schoof's position*"—a citizen who had been deprived of notice of the meeting and who desired to attend—had a personal stake and thus standing to allege a violation of the right to know and the right to participate. *Schoof*, ¶ 25 (emphasis added). Schoof had established an injury for which he sought, and could obtain, redress from the judiciary: he had been deprived of the right to

participate in a meeting and requested—in *that* case, for *that* meeting—to be granted the opportunity to do so.

¶88 However, the Court's attempt—indeed, the analytical lynchpin of its Opinion, *see* Opinion, ¶ 51—to overlay *Schoof's* right to know and right of participation standing analysis upon constitutional challenges brought under the environmental provisions clearly does not fit, as environmental cases neither present the same injury nor the same standing issues that necessitated the holding in *Schoof*. *See* Opinion, ¶ 40 ("Like Schoof, Plaintiffs have shown a sufficiently concrete injury . . . ."). While I agree the clean and healthful provision is an expansive right that is intended to apply to every citizen of Montana, Opinion, ¶ 40, it does not follow that *any* impact, current or imminent, upon a clean and healthful environment allegedly allowed by a statute alone constitutes a sufficiently concrete injury to every citizen for standing purposes, such that an action can be brought without demonstration of a personal stake in the litigation—that is, the government's application of the statute in a controversy affecting the citizen. In *Schoof*, the alleged constitutional right to know violation was triggered by the mere lack of notice of government action; here, notice is not the issue, and a real injury is required.

¶89 The Court's analysis seemingly conflates injury with causation and redressability, reasoning that a *Schoof* constitutional violation is present here because "the MEPA Limitation prevents the state from considering GHG emissions in all projects that may have an impact on the Montana human environment." Opinion, ¶ 40. However, standing requires that the MEPA Limitation be a *cause* of the *injury*, which is the degradation of a clean and healthful environment. An alleged injury cannot be a theoretical observation that

the challenged MEPA framework is insufficient; rather, for standing purposes, a concrete current or impending violation of the constitutional right to a clean and healthful environment—the injury—by way of the government's application of the framework to the Plaintiffs—the cause—is required.

¶90 The Court's reliance on *MEIC 1999* illustrates this principle. There, plaintiffs challenged "the exploration license that had been issued by DEQ to [the mining company] for pump tests to be performed at the site of its proposed gold mine," which the uncontroverted allegations of their complaint demonstrated an "arguably adverse impact on the area in the headwaters of the Blackfoot River in which they fish and otherwise recreate, and which is a source for the water which many of them consume." *MEIC 1999*, ¶¶ 1, 45. Plaintiffs alleged that, to the extent that § 75-5-317(2)(j), MCA, allowed discharges of water from watering wells or monitoring well tests that could degrade high quality waters without sufficient review under Montana's non-degradation policy, the statute violated the Montana Constitution. Thus, the plaintiffs there, who alleged that the government's action of issuing a permit pursuant to the statute would imminently cause harm to them personally, had standing to bring the action under the environmental provisions that the Court described as "anticipatory and preventative." *See MEIC 1999*, ¶¶ 45, 77. The injury for standing purposes was the threatened degradation of a clean and healthful environment, and our analysis considered whether the challenged statute was a cause of that injury by way of the government's application of the statute in issuing an exploration permit which authorized *conduct* that would imminently damage the plaintiffs. *See MEIC 1999*, ¶ 80. Here, in contrast, the government has not issued a permit or taken

other action that applied the MEPA Limitation such that conduct directly affecting the Plaintiffs has been authorized; rather, only a theoretical damage is alleged. Under the lawsuit as brought, the correct standing analysis must ask whether the challenged statute, the MEPA Limitation, *solely* has caused the alleged degradation of a clean and healthful environment. I believe that contention to be insufficient to satisfy constitutional case or controversy requirements, which is furthered by a demonstration that a repeal of the MEPA Limitation alone could not redress the Plaintiffs' claimed injury.

II. Causation & Redressability

¶91 Causation for constitutional standing purposes is established by "a fairly traceable connection between the *injury* and the *conduct* complained of." *Heffernan*, ¶ 32 (emphasis added); *see also 350 Mont. v. State*, 2023 MT 87, ¶ 15, 412 Mont. 273, 529 P.3d 847 ("[A] general or abstract interest in the constitutionality of a statute . . . is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered by the plaintiff."). And, relevant here in a challenge to the MEPA Limitation, for purposes of the permissible scope of a MEPA review, MEPA "requires a reasonably close causal relationship between the triggering state action and the subject environmental effect." *Bitterrooters*, ¶ 33.

¶92 As discussed above, in *MEIC 1999*, the non-degradation review statute challenged by plaintiffs was connected to the injury because a mineral exploration license (the conduct) allowing discharge containing arsenic and zinc was authorized by the government pursuant to the statute. *MEIC 1999*, ¶ 50. Likewise, in *Schoof*, the closed-door meeting

without prior notice directly caused the plaintiff to be deprived of the right to know and participate in the decision made by the County Commission. *Schoof*, ¶ 21.

¶93 In *Larson*, the Montana Democratic Party challenged the validity of a Green Party ballot eligibility petition for an upcoming election. Addressing standing, we found "a direct causal connection in fact between the alleged illegality and definite, specific, and substantial resulting harm to the Democratic Party itself," given that failure to address the challenge to the ballot petition would "in fact cause the Montana Democratic Party to incur otherwise unnecessary expense and burden in the form of: (1) additional campaign expenditures; (2) revision of its voter file; (3) undertaking additional fundraising efforts; (4) procuring and deploying additional staff, volunteers, and literature; and (5) conducting more expensive and complicated political polling." *Larson*, ¶ 47. And, addressing redressability, we said that "[t]he alleged harm was clearly of a type effectively diminished, curable, or preventable by the available and requested declaratory and injunctive relief." *Larson*, ¶ 47.

¶94 In *Park Cnty.*, we reiterated that plaintiffs must "clearly allege a past, present, or threatened injury" that must be "distinguishable from the injury to the public generally," which can be "alleviated by successfully maintaining the action." *Park Cnty.*, ¶ 20 (citing *Heffernan*, ¶ 33). The Court determined that the plaintiffs had standing because they alleged recreational, property-based, and aesthetic injuries that were "the *direct result* of DEQ's approval of Lucky's exploration permit and could be alleviated by a successful action resulting in an order vacating the permit." *Park Cnty.*, ¶ 22 (emphasis added).

¶95 The Court's constitutional standing analysis in all previous cases has connected the plaintiffs' personal harm to the government's action in a specific case, for which a judicial holding could meaningfully attach to provide redress by barring or limiting the government action. Here, neither the Plaintiffs nor the Court connects the MEPA Limitation to any government action currently directly harming or threatening to directly harm Plaintiffs, and instead offer only a theory that harm is being caused to them because of a statute, and that, if the statute were now voided, the personal harm they have suffered would be eliminated—an assertion requiring multiple speculative causal steps that fail to "clearly allege" a personal injury that is "distinguishable from the injury to the public generally," and which can be "alleviated by successfully maintaining the action." *Park Cnty.*, ¶ 20 (citing *Heffernan*, ¶ 33); *see also 350 Mont.*, ¶ 15 ("[A] general or abstract interest in the constitutionality of a statute . . . is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered by the plaintiff."). This is injury and redress in an essential vacuum.

¶96 The Court reasons, "[Plaintiffs] showed that the State's policies, including the MEPA Limitation . . . impacts their right by prohibiting an analysis of GHG emissions, which blindfolded the State, its agencies, the public, and permittees when an analysis is necessary to inform the State's affirmative duty to take active steps to realize the right to a clean and healthful environment." Opinion, ¶ 44. Further, "MEPA enables 'fully informed and considered decision making thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.'" Opinion, ¶ 60. "MEPA is

unique in its ability to avert potential harms through informed decision making." Opinion ¶ 68 (citing *Park Cnty.*, ¶¶ 75–76). "Plaintiffs have a personal stake in being fully informed of the anticipated impacts of potential state action." Opinion, ¶ 37. These statements illustrate the disconnected causation: "the MEPA Limitation impacts . . . by prohibiting an analysis . . . which blindfolded . . . when an analysis is necessary . . . to inform . . . the duty to take active steps . . . to realize the right." The MEPA Limitation is thus offered, stated above, as determining "when analysis is necessary," to minimize "irreversible mistakes," to inform "decision making," and for Plaintiffs to be informed of "potential state action." All of these statements describe a broad process to guide *potential future* government actions, and do not identify any action, imminent or proposed, that has ever been taken by the government that directly impacted Plaintiffs. Further, by MEPA's own terms, an agency "may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter." Section 75-1-201(4)(a), MCA. We held in *Bitterrooters*, from which the Court must now retreat, that "requiring a state agency to consider environmental impacts it has no authority to lawfully prevent *would not serve MEPA's purposes* of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority." *Bitterrooters*, ¶ 33 (emphasis added). Consequently, by its own terms, MEPA *alone* cannot have caused the Plaintiffs' alleged injury, and further because it does not govern the substantive requirements of a final government action or decision, its voiding alone will not redress Plaintiffs' asserted injury.

¶97 In an effort to establish application of the MEPA Limitation to them, Plaintiffs point to permits issued in prior MEPA cases. Plaintiffs were not parties in those cases, and do not challenge them or the review processes undertaken therein, which would be required to establish standing in those matters. But more, we rejected a similar argument in *Broad Reach*. There, Broad Reach, LLC, and NorthWestern Energy brought an action seeking a declaration that a procedural statute governing contested case procedures before the Public Service Commission was unconstitutional because it violated their "due process right to a fair and impartial tribunal and a fair hearing." *Broad Reach*, ¶ 3. We held that the Plaintiffs failed to establish standing for a constitutional challenge because they brought their challenge "in a vacuum." *Broad Reach*, ¶ 13. Plaintiffs cited to the PSC's application of the statute in other hearing cases, but we held "these do not establish application of the statute by the PSC to [Plaintiffs] and, further, the contents of the orders primarily indicate the PSC 'may' employ certain hearing actions pursuant to the statute. This does not establish how the PSC acted with regard to [Plaintiffs], and to what prejudice." *Broad Reach*, ¶ 13. We thus rejected plaintiffs' attempt to bring an as-applied challenge without a case record, because entering declaratory relief on the statute would be "speculative, and would require issuance of an advisory opinion" entered upon "a hypothetical state of facts." *Broad Reach*, ¶ 13 (citing *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 13, 408 Mont. 187, 507 P.3d 169). Such a hypothetical case vacuum also exists here. The Court holds that when a permit is sought for a project that would emit GHGs, the MEPA Limitation violates the Plaintiffs' constitutional rights. However, such circumstances have plainly never occurred in this case.

¶98 The Court reasons that accepting the State's standing argument "would effectively immunize" the constitutional issue here, but does so with a *non sequitur*. Opinion, ¶ 53.[2] Noting the State "makes the same standing arguments in a case challenging the constitutionality of the 2011 MEPA Limitation as applied to a particular permit," the Court states that "accepting the State's arguments in both cases would effectively immunize review of an important constitutional question." Opinion, ¶ 53, citing *Mont. Env't Info. Ctr. v. Mont. Dept. of Env't Qual*, No. DA 23-0225. However, it simply does not follow that, if the State is correct here, it must also be correct there—it is certainly not unique for a party to make inconsistent arguments, even within a case, let alone over separate cases. And, of course, the Court is not required to accept a party's arguments made in separate cases. Indeed, if the State's standing argument is correct here, but wrong in DA 23-0225, then the constitutional question may well be preserved in that case by way of an actual case or controversy. But, in any event, another case does not control here, and the issue is not immunized from review.

¶99 In *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), the Supreme Court of Alaska was presented with a like challenge rooted in climate change, with "young Alaskans" alleging that State's policies and actions violated both the Alaska Constitution's natural

[2] The Court frames this issue by stating, "[w]e note that at oral argument, counsel for the State stressed that there was no specific permit challenged below and that, if there were, Plaintiffs might have standing. Yet the State as intervenor makes the same standing arguments in a case challenging the constitutionality of the 2011 MEPA Limitation as applied to a particular permit." Opinion, ¶ 53. The State may well be right; had the Plaintiffs challenged a government action specific to them in this case, they could have established constitutional standing under our precedent.

resource provisions and their individual rights. *Sagoonick*, 503 P.3d at 782. The plaintiffs there broadly "sought a declaratory judgment stating that: (1) plaintiffs have 'fundamental and inalienable constitutional rights . . . including the right to a stable climate system that sustains human life and liberty'; (2) the State has a public trust duty to protect Alaska's natural resources; (3) the State has violated plaintiffs' various constitutional rights by exacerbating climate change through its statutory energy policy; (4) the State has put plaintiffs in danger by not reducing Alaska's carbon emissions; (5) the State has discriminated against plaintiffs as members of a protected age-based class through its statutory energy policy; and (6) the State has violated its public trust duty to protect Alaska's natural resources." *Sagoonick*, 503 P.3d at 799. They also sought injunctive relief. Despite recognizing "that article VIII [environmental provision] is not a complete delegation of power to the legislature," the Court nonetheless reasoned:

> Plaintiffs essentially seek to impose *ad hoc judicial natural resources management based on case-by-case adjudications of individual fundamental rights.* Judges would be deciding the extent of individual Alaskans' constitutional right to some level of development or conservation under article VIII based on those individual Alaskans' arguments about what would provide them "a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry" under article I. But the Constitution expressly delegated to the legislature the duty to balance competing priorities for the collective benefit of all Alaskans. It thus is impossible to grant plaintiffs' requested injunctive relief without also infringing on an area constitutionally committed to the legislature, abandoning our "hard look" standard of review for natural resource decisions, and disrespecting our coordinate branches of government by supplanting their policy judgments with our own normative musings about the proper balance of development, management, conservation, and environmental protection.

Sagoonick, 503 P.3d at 796 (emphasis added). While the District Court here similarly dismissed some of the relief sought by Plaintiffs, the claim that remains likewise opens the door for "ad hoc judicial natural resources management" by this Court. *Sagoonick*, 503 P.3d at 796.[3] The Alaska Supreme Court also reasoned that Plaintiffs' requested declaratory relief was not an obtainable remedy because it "would not compel the State to take any particular action," and would not "protect the plaintiffs from the injuries they allege." *Sagoonick*, 503 P.3d at 801. Similarly here, and for the reasons discussed above, declaring the MEPA Limitation to be a generic violation of the right to a clean and healthful environment, and enjoining the State from applying it would not attach to any action taken here by the State, or compel the State to take any particular action, and would not alone protect the Plaintiffs from the injuries they allege.

¶100 This is well illustrated by a recent youth-plaintiff Ontario climate case. In *Mathur v. Ontario*, 2024 ONCA 762, young Canadians have brought a "second generation" climate case against the government, alleging that the government's plan to address climate change, the 2016 Climate Change Mitigation and Low-carbon Economy Act, which Ontario adopted statutorily but voluntarily, provides insufficient standards and requirements to protect the environment and plaintiffs' constitutional rights. *See Mathur v. Ontario*, 2024 ONCA 762. Under the Court's decision today, such future second or third

[3] As noted by the Court, the District Court ruled that the political question doctrine precluded injunctive relief of "an order requiring the State to develop a remedial plan to reduce GHG emissions and to submit the plan to the court; [] an order for a special master to be appointed to review the remedial plan; and [] an order retaining jurisdiction until the State has fully complied with the plan." Opinion, ¶ 7.

or fourth generation lawsuits, challenging any future action or statute adopted by the State as insufficient, could be brought in Montana courts without those plans ever having been applied to the plaintiffs. The Court's thumps up or thumbs down decisions in response to such lawsuits will truly allow the Court to act as an *ad hoc* legislative body for policy ideas never directly applied in a concrete way to the litigants—the consequence about which *Sagoonick* warned.

¶101 These concerns lead to broader justiciability issues, which go beyond the constitutional standing requirements discussed herein, and can be considered prudential standing issues. This elephant in the room should be noted. "Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a [climate] plan is beguiling, it ignores that an Article III court will thereafter be required *to determine whether the plan is sufficient* to remediate the claimed constitutional violation of the plaintiffs' right to a 'climate system capable of sustaining human life.' We doubt that any such plan can be supervised or enforced by an Article III court." *Juliana*, 947 F.3d at 1173 (emphasis added). "[S]eparation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Juliana*, 947 F.3d at 1172 (citing *Lujan*, 504 U.S. at 559–60). Separation of powers requires that policy changes be decided by the legislative and executive branches. "[I]nevitably, this kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs' view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate

change than the plaintiffs believe is necessary." *Juliana,* 947 F.3d at 1172. While the Montana Constitution contains environmental provisions that must be enforced, there are other, sometimes competing, constitutional provisions to also be enforced—akin to the competing "economic and defense considerations" described in *Juliana*—and the policies enacted to balance these constitutional interests must ultimately be formulated by the executive and legislative branches, not the judicial branch, "however inappropriately in the plaintiffs' view." *Juliana*, 947 F.3d at 1172.

¶102 In sum, I would decide this case on the constitutional standing principles articulated herein. Plaintiffs here present us with an abstract injury that is indistinguishable from that to the public as a whole and is not legally concrete to them personally. Even if the injury would be found to be sufficient, the case is presented in a vacuum whereby the provision challenged, the MEPA Limitation, has not been shown to cause the specific constitutional harm alleged, and therefore, the Court's holding does nothing to redress the Plaintiffs' injuries. They thus lack standing.

¶103 I would reverse.

/S/ JIM RICE

Annex 682

"Draft Articles on the Law of Treaties with commentaries", Report of the Commission to the General Assembly on the work of its eighteenth session, Yearbook of the International Law Commission, vol. II, *International Law Commission*, 1966, pages 217-218

Draft Articles on the Law of Treaties with commentaries

1966

Text adopted by the International Law Commission at its eighteenth session, in 1966, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 38). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1966*, vol. II.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty;

(*b*) Any subsequent practice in the application of the treaty which establishes the understanding 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. [122]

Article 28. [123] **Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Commentary

Introduction

(1) The utility and even the existence of rules of international law governing the interpretation of treaties are sometimes questioned. The first two of the Commission's Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any general rules for the interpretation of treaties. Other jurists, although they express reservations as to the obligatory character of certain of the so-called canons of interpretation, show less hesitation in recognizing the existence of some general rules for the interpretation of treaties. Sir G. Fitzmaurice, the previous Special Rapporteur on the law of treaties, in his private writings deduced six principles from the jurisprudence of the Permanent Court and the International Court which he regarded as the major principles of interpretation. In 1956, the Institute of International Law [124] adopted a resolution in which it formulated, if in somewhat cautious language, two articles containing a small number of basic principles of interpretation.

(2) Jurists also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to:

(*a*) The text of the treaty as the authentic expression of the intentions of the parties;

(*b*) The intentions of the parties as a subjective element distinct from the text; and

(*c*) The declared or apparent objects and purposes of the treaty.

Some place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation. Some give great weight to the object and purpose of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority, however, emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation. It is this view which is reflected in the 1956 resolution of the Institute of International Law mentioned in the previous paragraph.

(3) Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts. Treaty interpretation is, of course, equally part of the everyday work of Foreign Ministries.

(4) Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.

(5) Any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the inter-

[122] 1964 draft, article 71.

[123] 1964 draft, article 70.

[124] *Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 359.

pretation of treaties. Admittedly, the task of formulating even these rules is not easy, but the Commission considered that there were cogent reasons why it should be attempted. First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. Secondly, having regard to the divergent opinions concerning methods of interpretation, it seemed desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles adopted by the Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties. In addition the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.

(6) Some jurists in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties, and it is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case (e.g. the *contra proferentem* principle or the use of *travaux préparatoires*). But for the purpose of formulating the general rules of interpretation the Commission did not consider it necessary to make such a distinction. Nor did it consider that the principle expressed in the maxim *ut res magis valeat quam pereat* should not be included as one of the general rules. It recognized that in certain circumstances recourse to the principle may be appropriate and that it has sometimes been invoked by the International Court. In the *Corfu Channel* case,[125] for example, in interpreting a Special Agreement the Court said:

> "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a Special Agreement should be devoid of purport or effect."

And it referred to a previous decision of the Permanent Court to the same effect in the *Free Zones of Upper Savoy and the District of Gex*[126] case. The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose.* When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of "effective interpretation". The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *ut res magis valeat* for this purpose. In the *Interpretation of Peace Treaties* Advisory Opinion[127] it said:

> "The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which... would be contrary to their letter and spirit."

And it emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty.

(7) At its session in 1964 the Commission provisionally adopted three articles (69-71) dealing generally with the interpretation of treaties, and two articles dealing with treaties having plurilingual texts. The Commission's attempt to isolate and codify the basic rules of interpretation was generally approved by Governments in their comments and the rules contained in its draft appeared largely to be endorsed by them. However, in the light of the comments of Governments and as part of its normal process of tightening and streamlining the draft, the Commission has reduced these five articles to three by incorporating the then article 71 (terms having a special meaning) in the then article 69 (general rule of interpretation). and by amalgamating the then articles 72 and 73 (plurilingual treaties) into a single article. Apart from these changes the rules now proposed by the Commission do not differ materially in their general structure and substance from those transmitted to Governments in 1964.

(8) Having regard to certain observations in the comments of Governments the Commission considered it desirable to underline its concept of the relation between the various elements of interpretation in article 27 and the relation between these elements and those in article 28. Those observations appeared to indicate a possible fear that the successive paragraphs of article 27 might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present

[125] *I.C.J. Reports 1949*, p. 24.

[126] *P.C.I.J.* (1929), Series A, No. 22, p. 13; cf. *Acquisition of Polish Nationality, P.C.I.J.* (1923), Series B, No. 7, pp. 16 and 17, and *Exchange of Greek and Turkish Populations, P.C.I.J.* (1925), Series B, No. 10, p. 25.

[127] *I.C.J. Reports 1950*, p. 229.

Annex 684

"Commentaries on the Draft articles on Prevention of Transboundary Harm from Hazardous Activities", Report of the Commission to the General Assembly on the work of its fifty-third session, Yearbook of the International Law Commission, A/CN.4/SER.A/2001/Add.1 (Part 2), *International Law Commission*, 10 August 2001

Draft articles on
Prevention of Transboundary Harm from Hazardous Activities, with commentaries

2001

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

2. Text of the draft articles with commentaries thereto

98. The text of the draft articles adopted by the Commission at its fifty-third session with commentaries thereto is reproduced below.

PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

General commentary

(1) The articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage might actually occur, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability.

(2) The concept of prevention has assumed great significance and topicality. The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident. Discharge of the duty of prevention or due diligence is all the more required as knowledge regarding the operation of hazardous activities, materials used and the process of managing them and the risks involved is steadily growing. From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm. In any event, prevention as a policy is better than cure.

(3) Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration on Environment and Development (Rio Declaration)[857] and confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[858] as now forming part of the corpus of international law.

(4) The issue of prevention, therefore, has rightly been stressed by the Experts Group on Environmental Law of the World Commission on Environment and Development (Brundtland Commission). Article 10 recommended by the Group in respect of transboundary natural resources and environmental interferences thus reads: "States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant."[859] It must be further noted that the well-established principle of prevention was highlighted in the arbitral award in the *Trail Smelter* case[860] and was reiterated not only in principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[861] and principle 2 of the Rio Declaration, but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment. This principle is also reflected in principle 3 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, adopted by the Governing Council of UNEP in 1978, which provided that States must:

> avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might:
>
> (*a*) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
>
> (*b*) threaten the conservation of a shared renewable resource;
>
> (*c*) endanger the health of the population of another State.[862]

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[857] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[858] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), pp. 241–242, para. 29; see also A/51/218, annex.

[859] *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham and Trotman/Martinus Nijhoff, 1987), p. 75, adopted by the Experts Group. It was also noted that the duty not to cause substantial harm could be deduced from the non-treaty-based practice of States, and from the statements made by States individually and/or collectively. See J. G. Lammers, *Pollution of International Watercourses* (The Hague, Martinus Nijhoff, 1984), pp. 346–347 and 374–376.

[860] *Trail Smelter* (see footnote 253 above), pp. 1905 et seq.

[861] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

[862] UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978), p. 2. The principles are re-

(5) Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution.[863]

Preamble

The States Parties,

Having in mind **Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,**

Bearing in mind **the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,**

Bearing also in mind **that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,**

Recalling **the Rio Declaration on Environment and Development of 13 June 1992,**

Recognizing **the importance of promoting international cooperation,**

Have agreed **as follows:**

Commentary

(1) The preamble sets out the general context in which the topic of prevention is elaborated, keeping in view the mandate given to the Commission to codify and develop international law. Activities covered under the present topic of prevention require States to engage in cooperation and accommodation in their mutual interest. States are free to formulate necessary policies to develop their natural resources and to carry out or authorize activities in response to the needs of their populations. In so doing, however, States have to ensure that such activities are carried out taking into account the interests of other States and therefore the freedom they have within their own jurisdiction is not unlimited.

(2) The prevention of transboundary harm from hazardous activities should also be seen in the context of the general principles incorporated in the Rio Declaration and other considerations that emphasize the close interrelationship between issues of environment and development. A general reference in the fourth preambular paragraph to the Rio Declaration indicates the importance of the interactive nature of all the principles contained therein. This is without prejudice to highlighting specific principles of the Rio Declaration, as appropriate, in the commentaries to follow on particular articles.

Article 1. Scope

The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Commentary

(1) Article 1 limits the scope of the articles to activities not prohibited by international law and which involve a risk of causing significant transboundary harm through their physical consequences. Subparagraph (*d*) of article 2 further limits the scope of the articles to those activities carried out in the territory or otherwise under the jurisdiction or control of a State.

(2) Any activity which involves the risk of causing significant transboundary harm through the physical consequences is within the scope of the articles. Different types of activities could be envisaged under this category. As the title of the proposed articles indicates, any hazardous and by inference any ultrahazardous activity which involves a risk of significant transboundary harm is covered. An ultrahazardous activity is perceived to be an activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions.

(3) Suggestions have been made at different stages of the evolution of the present articles to specify a list of activities in an annex to the present articles with an option to make additions or deletions to such a list in the future as appropriate. States could also be given the option to add to or delete from the list items which they may include in any national legislation aimed at implementing the obligations of prevention.

(4) It is, however, felt that specification of a list of activities in an annex to the articles is not without problems and functionally not essential. Any such list of activities is likely to be under inclusion and could become quickly

produced in ILM, vol. 17, No. 5 (September 1978), p. 1098. See also decision 6/14 of 19 May 1978 of the Governing Council of UNEP, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 25* (A/33/25), annex I. For a mention of other sources where the principle of prevention is reflected, see *Environmental Protection and Sustainable Development …* (footnote 859 above), pp. 75–80.

[863] For a collection of treaties arranged according to the area or sector of the environment covered and protection offered against particular threats, see E. Brown Weiss, D. B. Magraw and P. C. Szasz, *International Environmental Law: Basic Instruments and References* (Dobbs Ferry, N.Y., Transnational, 1992); P. Sands, *Principles of International Environmental Law*, vol. 1: *Frameworks, Standards and Implementation* (Manchester University Press, 1995); L. Boisson de Chazournes, R. Desgagné and C. Romano, *Protection internationale de l'environnement: recueil d'instruments juridiques* (Paris, Pedone, 1998); C. Dommen and P. Cullet, eds., *Droit international de l'environnement. Textes de base et références* (London, Kluwer, 1998); M. Prieur and S. Doumbé-Billé, eds., *Recueil francophone des textes internationaux en droit de l'environnement* (Brussels, Bruylant, 1998); A. E. Boyle and D. Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999); F. L. Morrison and R. Wolfrum, eds., *International, Regional and National Environmental Law* (The Hague, Kluwer, 2000); and P. W. Birnie and A. E. Boyle, *International Law and the Environment*, 2nd ed. (Oxford University Press, 2002) (forthcoming).

dated from time to time in the light of fast evolving technology. Further, except for certain ultrahazardous activities which are mostly the subject of special regulation, e.g. in the nuclear field or in the context of activities in outer space, the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. It is felt that a generic list could not capture these elements.

(5) It may be further noted that it is always open to States to specify activities coming within the scope of the articles in any regional or bilateral agreements or to do so in their national legislation regulating such activities and implementing obligations of prevention.[864] In any case, the scope of the articles is clarified by the four different criteria noted in the article.

(6) The *first criterion* to define the scope of the articles refers to "activities not prohibited by international law". This approach has been adopted in order to separate the topic of international liability from the topic of State responsibility.[865] The employment of this criterion is also intended to allow a State likely to be affected by an activity involving the risk of causing significant transboundary harm to demand from the State of origin compliance with obligations of prevention although the activity itself is not prohibited. In addition, an invocation of these articles by a State likely to be affected is not a bar to a later claim by that State that the activity in question is a prohibited activity. Equally, it is to be understood that non-fulfilment of the duty of prevention at any event of the minimization of risk under the articles would not give rise to the implication that the activity itself is prohibited.[866] However, in such a case State responsibility could be engaged to implement the obligations, including any civil responsbility or duty of the operator.[867] The articles are primarily concerned with the management of risk and emphasize the duty of cooperation and consultation among all States concerned. States likely to be affected are given the right of engagement with the State of origin in designing and, where appropriate, in the implementation of a system of management of risk commonly shared between or among them. The right thus envisaged in favour of the States likely to be affected however does not give them the right to veto the activity or project itself.[868]

(7) The *second criterion*, found in the definition of the State of origin in article 2, subparagraph (*d*), is that the activities to which preventive measures are applicable "are planned or are carried out" in the territory or otherwise under the jurisdiction or control of a State. Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments,[869] the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(8) For the purposes of these articles, *territorial jurisdiction* is the dominant criterion. Consequently, when an activity covered by the present articles occurs within the *territory* of a State, that State must comply with the *obligations of prevention*. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially based jurisdiction prevails. The Commission, however, is mindful of situations where a State, under international law, has to accept limits to its territorial jurisdiction in favour of another State. The prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm

[864] For example, various conventions deal with the type of activities which come under their scope: the Convention for the Prevention of Marine Pollution from Land-based Sources; the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources; the Agreement for the Protection of the Rhine against Chemical Pollution; appendix I to the Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc., are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention; the Convention on the Protection of the Marine Environment of the Baltic Sea Area; the Convention on the Transboundary Effects of Industrial Accidents; annex II to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities; this Convention also has a list of dangerous substances in annex I.

[865] *Yearbook ... 1977*, vol. II (Part Two), p. 6, para. 17.

[866] See M. B. Akehurst "International liability for injurious consequences arising out of acts not prohibited by international law", NYIL, 1985, vol. 16, pp. 3–16; A. E. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", *International and Comparative Law Quarterly*, vol. 39 (1990), pp. 1–26; K. Zemanek, "State responsibility and liability", *Environmental Protection and International Law*; W. Lang, H. Neuhold and K. Zemanek, eds. (London, Graham and Trotman/Martinus Nijhoff, 1991), p. 197; and the second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by the Special Rapporteur, Pemmaraju Sreenivasa Rao, *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/501, paras. 35–37.

[867] See P.-M. Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle* (Paris, Pedone, 1976); Brownlie, *System of the Law of Nations …* (footnote 92 above); A. Rosas, "State responsibility and liability under civil liability regimes", *Current International Law Issues: Nordic Perspectives (Essays in honour of Jerzy Sztucki)*, O. Bring and S. Mahmoudi, eds. (Dordrecht, Martinus Nijhoff, 1994), p. 161; and F. Bitar, *Les mouvements transfrontières de déchets dangereux selon la Convention de Bâle*: *Étude des régimes de responsabilité* (Paris, Pedone, 1997), pp. 79–138. However, different standards of liability, burden of proof and remedies apply to State responsibility and liability. See also P.-M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?", RGDIP, vol. 101, No. 4 (1997), pp. 873–903; T. A. Berwick, "Responsibility and liability for environmental damage: a roadmap for international environmental regimes", *Georgetown International Environmental Law Review*, vol. 10, No. 2 (1998), pp. 257–267; and P.-M. Dupuy, "À propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l'environnement", *Les hommes et l'environnement: quels droits pour le vingt-et-unième siècle? Études en hommage à Alexandre Kiss*, M. Prieur and C. Lambrechts, eds. (Paris, Frison-Roche, 1998), pp. 269–282.

[868] On the nature of the duty of engagement and the attainment of a balance of interests involved, see the first report on prevention of transboundary damage from hazardous activities, by the Special Rapporteur, Pemmaraju Sreenivasa Rao, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1, paras. 43, 44, 54 and 55 (*d*).

[869] See, for example, principle 21 of the Stockholm Declaration (footnote 861 above); article 194, paragraph 2, of the United Nations Convention on the Law of the Sea; principle 2 of the Rio Declaration (footnote 857 above); and article 3 of the Convention on Biological Diversity.

emanates from the foreign ship, the flag State, and not the territorial State, must comply with the provisions of the present articles.

(9) The concept of "territory" for the purposes of these articles does not cover all cases where a State exercises "jurisdiction" or "control". The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(10) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The Geneva Conventions on the Law of the Sea and the United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(11) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(12) The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by ICJ in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia. The Court held:

> The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[870]

(13) The *third criterion* is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without the possibility of any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

[870] See footnote 176 above.

(14) As to the element of "risk", this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk. The mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no properly informed observer was or could have been aware of that risk at the time the activity was carried out. On the other hand, an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

(15) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e. unless otherwise stated, they apply to activities as carried out from time to time. Thus, it is possible that an activity which in its inception did not involve any risk (in the sense explained in paragraph (14)), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(16) The *fourth criterion* is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(17) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type—a consequence which does or may arise out of the very nature of the activity or situation in question. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet, this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

Article 2. Use of terms

For the purposes of the present articles:

(*a*) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and

a low probability of causing disastrous transboundary harm;

(*b*) "Harm" means harm caused to persons, property or the environment;

(*c*) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;

(*e*) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

(*f*) "States concerned" means the State of origin and the State likely to be affected.

Commentary

(1) *Subparagraph* (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression of "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect inspiration is drawn from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[871] adopted by ECE in 1990. Under section I, subparagraph (*f*), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude". A definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and *the combined effect should reach a level that is deemed significant*. The obligations of prevention imposed on States are thus not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition refers to two types of activities under these articles. One is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other one is where there is a high probability of causing significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "includes" is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) The term "significant" is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "*significant" is something more than "detectable" but need not be at the level of "serious" or "substantial"*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories, States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable.

(6) The idea of a threshold is reflected in the *Trail Smelter* award, which used the words "serious consequence[s]",[872] as well as in the *Lake Lanoux* award, which relied on the concept "seriously" (*gravement*).[873] A number of conventions have also used "significant", "serious" or "substantial" as the threshold.[874] "Significant" has also been used in other legal instruments and domestic law.[875]

[871] United Nations publication, Sales No. E.90.II.E.28. See also G. Handl, *Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch* (Berlin, Duncker und Humblot, 1992), pp. 15–20.

[872] See footnote 253 above.

[873] *Lake Lanoux* case, UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

[874] See, for example, article 4, paragraph 2, of the Convention on the Regulation of Antarctic Mineral Resource Activities; articles 2, paragraphs 1 and 2, of the Convention on Environmental Impact Assessment in a Transboundary Context; section I, subparagraph (*b*), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (footnote 871 above); and article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

[875] See, for example, article 5 of the draft convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965 (OAS, *Ríos y lagos internacionales (utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.1/VI, CIJ-75 Rev.2) (Washington, D.C., 1971), p. 132); article X of the Helsinki Rules on the Uses of the Waters of International Rivers (International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 496); paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; paragraph 6 of the annex to OECD Council recommendation C(74)224 of 14 November 1974 on Principles concerning transfrontier pollution (OECD, *OECD and the Environment* (Paris, 1986), p. 142, reprinted in ILM, vol. 14, No. 1 (January 1975), p. 246); the Memorandum of Intent Concerning Transboundary Air Pollution, between the Government of the United States and the Government of Canada, of 5 August 1980 (United Nations, *Treaty Series*, vol. 1274, No. 21009, p. 235) and article 7 of the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and

(7) The term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered "significant" because at that specific time scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) *Subparagraph* (b) is self-explanatory in that "harm" for the purpose of the present articles would cover harm caused to persons, property or the environment.

(9) *Subparagraph* (c) defines "transboundary harm" as meaning harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". However, it makes clear that the intention is to be able to draw a line and clearly distinguish a State under whose jurisdiction and control an activity covered by these articles is conducted from a State which has suffered the injurious impact.

(10) *In subparagraph* (d), the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.[876]

(11) In *subparagraph* (e), the term "State likely to be affected" is defined to mean the State on whose territory or in other places under whose jurisdiction or control there is the risk of significant transboundary harm. There may be more than one such State likely to be affected in relation to any given activity.

(12) In *subparagraph* (f), the term "States concerned" refers to both the State of origin and the State likely to be affected to which some of the articles refer together.

Improvement of the Environment in the Border Area, of 14 August 1983 (reprinted in ILM, vol. 22, No. 5 (September 1983), p. 1025). The United States has also used the word "significant" in its domestic law dealing with environmental issues; see *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1987), vol. 2, pp. 111–112.

[876] See paragraphs (7) to (12) of the commentary to article 1.

Article 3. Prevention

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Commentary

(1) Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration,[877] reading:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental 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.

(2) However, the limitations on the freedom of States reflected in principle 21 are made more specific in article 3 and subsequent articles.

(3) This article, together with article 4, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent significant transboundary harm or at any event to minimize the risk thereof. The article thus emphasizes the primary duty of the State of origin to prevent significant transboundary harm; and only in case this is not fully possible it should exert its best efforts to minimize the risk thereof. The phrase "at any event" is intended to express priority in favour of the duty of prevention. The word "minimize" should be understood in this context as meaning to pursue the aim of reducing to the lowest point the possibility of harm.

(4) The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof. The phrase "all appropriate measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm. Article 3 is complementary to articles 9 and 10 and together they constitute a harmonious ensemble. In addition, it imposes an obligation on the State of origin to adopt and implement national legislation incorporating accepted international standards. These standards would constitute a necessary reference point to determine whether measures adopted are suitable.

(5) As a general principle, the obligation in article 3 to prevent significant transboundary harm or minimize the risk thereof applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences to States likely to be affected by activities within the scope of these articles. On the other hand, the obligation to "take all appropriate measures" to prevent harm, or to minimize the risk thereof, cannot be

[877] See footnote 861 above. See also the Rio Declaration (footnote 857 above).

confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(6) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1. The *modalities* whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State of origin has adopted.[878]

(7) The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required, as noted above, to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur.[879]

(8) An obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international conventions[880] as well as from the resolutions and reports of international conferences and organizations.[881] The obligation of due diligence was discussed in a dispute which arose in 1986 between Germany and Switzerland relating to the pollution of the Rhine by Sandoz. The Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.[882]

(9) In the *"Alabama"* case, the tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

> [A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will.[883]

The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[884] The tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The tribunal stated that:

> [the] British case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient.[885]

(10) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them. Thus, States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof arising out of activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof and, secondly, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(11) The standard of due diligence against which the conduct of the State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultrahazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance. What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(12) It is also necessary in this connection to note principle 11 of the Rio Declaration, which states:

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[878] See article 5 and commentary.

[879] For a similar observation, see paragraph (4) of the commentary to article 7 of the draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission on second reading, *Yearbook … 1994*, vol. II (Part Two), p. 103. As to the lack of scientific information, see A. Epiney and M. Scheyli, *Strukturprinzipien des Umweltvölkerrechts* (Baden-Baden, Nomos-Verlagsgesellschaft, 1998), pp. 126–140.

[880] See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea; articles I and II and article VII, paragraph 2, of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; article 2 of the Vienna Convention for the Protection of the Ozone Layer; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[881] See principle 21 of the World Charter for Nature (General Assembly resolution 37/7 of 28 October 1982, annex); and principle VI of the draft principles of conduct for the guidance of States concerning weather modification, prepared by WMO and UNEP (M. L. Nash, *Digest of United States Practice in International Law* (Washington, D.C., United States Government Printing Office, 1978), p. 1205).

[882] See *The New York Times*, 11, 12 and 13 November 1986, pp. A1, A8 and A3, respectively. See also A. C. Kiss, "'Tchernobâle' ou la pollution accidentelle du Rhin par les produits chimiques", *Annuaire français de droit international*, vol. 33 (1987), pp. 719–727.

[883] *"Alabama"* (see footnote 87 above), pp. 572–573.

[884] *Ibid*., p. 612.

[885] *Ibid*., p. 613.

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.[886]

(13) Similar language is found in principle 23 of the Stockholm Declaration. That principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community".[887] The economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to dispense the State from its obligation under the present articles.

(14) Article 3 imposes on the State a duty to take all necessary measures to prevent significant transboundary harm or at any event to minimize the risk thereof. This could involve, *inter alia*, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage. This is well articulated in principle 15 of the Rio Declaration and is subject to the capacity of States concerned (see paragraphs (5) to (8) of the commentary to article 10). An efficient implementation of the duty of prevention may well require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity.

(15) The operator of the activity is expected to bear the costs of prevention to the extent that he is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in article 5.

(16) States are engaged in continuously evolving mutually beneficial schemes in the areas of capacity-building, transfer of technology and financial resources. Such efforts are recognized to be in the common interest of all States in developing uniform international standards regulating and implementing the duty of prevention.

(17) The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.[888] Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.[889]

(18) The required degree of care is proportional to the degree of hazard involved. The degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm. The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.

Article 4. Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

Commentary

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent significant transboundary harm or at any event to minimize the risk thereof. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation are stipulated in subsequent articles. They envisage the participation of the State likely to be affected in any preventive action, which is indispensable to enhance the effectiveness of any such action. The latter State may know better than anybody else, for instance, which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem.

(2) The article requires States concerned to cooperate in *good faith*. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The 1969 and 1978 Vienna Conventions declare in their preambles that the principle of good faith is universally recognized. In addition, article 26 and article 31, paragraph 1, of the 1969 Vienna Convention acknowledge the essential place of this principle in the law of treaties. The decision of ICJ in the *Nuclear Tests* case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[890] This dictum of the Court implies that good faith applies also to unilateral

[886] See footnote 857 above.

[887] See footnote 861 above.

[888] See A. C. Kiss and S. Doumbé-Billé, "La Conférence des Nations Unies sur l'environnement et le développement (Rio de Janeiro, 3–14 June 1992)", *Annuaire français de droit international*, vol. 38 (1992), pp. 823–843; M. Kamto, "Les nouveaux principes du droit international de l'environnement", *Revue juridique de l'environnement*, vol. 1 (1993), pp. 11–21; and R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, Kluwer, 1996), p. 65.

[889] See the observation of Max Huber in the *British Claims in the Spanish Zone of Morocco* case (footnote 44 above), p. 644.

[890] See footnote 196 above.

acts.[891] Indeed, the principle of good faith covers "the entire structure of international relations".[892]

(3) The arbitration tribunal, established in 1985 between Canada and France in the *La Bretagne* case, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[893]

(4) The words "States concerned" refer to the State of origin and the State or States likely to be affected. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, no legal obligations are imposed upon them to do so.

(5) The article provides that States shall "as necessary" seek the assistance of one or more international organizations in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words "as necessary" are intended to take account of a number of possibilities: First, assistance from international organizations may not be necessary in every case. For example, the State of origin or the States likely to be affected may, themselves, be technologically advanced and have the necessary technical capability. Secondly, the term "international organization" is intended to refer to organizations that are competent and in a position to assist in such matters. Thirdly, even if there are competent international organizations, they could extend necessary assistance only in accordance with their constitutions. In any case, the article does not purport to create any obligation for international organizations to respond to requests for assistance independent of its own constitutional requirements.

(6) Requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not free individual States from the obligation to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend, for instance, on the nature of the request, the type of assistance involved and the place where the international organization would have to perform such assistance.

Article 5. Implementation

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

Commentary

(1) This article states what might be thought to be the obvious, viz. that under the present articles, States are required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Implementation, going beyond formal application, involves the adoption of specific measures to ensure the effectiveness of the provisions of the present articles. Article 5 has been included here to emphasize the continuing character of the obligations, which require action to be taken from time to time to prevent transboundary harm or at any event to minimize the risk thereof arising from activities to which the articles apply.[894]

(2) The measures referred to in this article include, for example, the opportunity available to persons concerned to make representations and the establishment of quasi-judicial procedures. The use of the term "other action" is intended to cover the variety of ways and means by which States could implement the present articles. Article 5 mentions some measures expressly only in order to give guidance to States; it is left up to them to decide upon necessary and appropriate measures. Reference is made to "suitable monitoring mechanisms" in order to highlight the measures of inspection which States generally adopt in respect of hazardous activities.

(3) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 15.

(4) The action referred to in article 5 may appropriately be taken in advance. Thus, States may establish a suitable monitoring mechanism before the activity in question is approved or instituted.

Article 6. Authorization

1. The State of origin shall require its prior authorization for:

(*a*) any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;

[891] M. Virally, "Review essay: good faith in public international law", AJIL, vol. 77, No. 1 (1983), p. 130.

[892] See R. Rosenstock, "The declaration of principles of international law concerning friendly relations: a survey", AJIL, vol. 65 (1971), p. 734; see, more generally, R. Kolb, *La bonne foi en droit international public*: *contribution à l'étude des principes généraux de droit* (Paris, Presses Universitaires de France, 2000).

[893] ILR, vol. 82 (1990), p. 614.

[894] This article is similar to article 2, paragraph 2, of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads: "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in appendix II."

(*b*) any major change in an activity referred to in subparagraph (a);

(*c*) any plan to change an activity which may transform it into one falling within the scope of the present articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.

3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Commentary

(1) This article sets forth the fundamental principle that the prior authorization of a State is required for activities which involve a risk of causing significant transboundary harm undertaken in its territory or otherwise under its jurisdiction or control. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) The requirement of authorization noted in article 6, *paragraph 1* (a), obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and implies that the State should take the measures indicated in these articles. It also requires the State to take a responsible and active role in regulating such activities. The tribunal in the *Trail Smelter* arbitration held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". The tribunal held that, in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington".[895] Article 6, paragraph 1 (*a*), is compatible with this requirement.

(3) ICJ in the *Corfu Channel* case held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[896]

(4) The words "in its territory or otherwise under its jurisdiction or control" are taken from article 2. The expression "any activity within the scope of the present articles" introduces all the requirements specified in article 1 for an activity to fall within the scope of these articles.

(5) Article 6, *paragraph 1* (b), makes the requirement of prior authorization applicable also for a major change planned in an activity already within the scope of article 1 where that change may increase the risk or alter the nature or the scope of the risk. Some examples of major changes are: building of additional production capacities, large-scale employment of new technology in an existing activity, re-routing of motorways, express roads or re-routing airport runways. Changing investment and production (volume and type), physical structure or emissions and changes bringing existing activities to levels higher than the allowed threshold could also be considered as part of a major change.[897] Similarly, article 6, *paragraph 1* (c), contemplates a situation where a change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization.

(6) *Paragraph 2* of article 6 emphasizes that the requirement of authorization should be made applicable to all the pre-existing activities falling within the scope of the present articles, once a State adopts these articles. It might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. A suitable period of time might be needed in that case for the operator of the activity to comply with the authorization requirements. The decision as to whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization is left to the State of origin. In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity.

(7) The adjustment envisaged in paragraph 2 generally occurs whenever new legislative and administrative terms are put in place because of safety standards or new international standards or obligations which the State has accepted and needed to enforce.

(8) *Paragraph 3* of article 6 notes the consequences of the failure of an operator to comply with the requirement of authorization. The State of origin, which has the main responsibility to monitor these activities, is given the necessary flexibility to ensure that the operator complies with the requirements involved. As appropriate, the State of origin shall terminate the authorization and, where appropriate, prohibit the activity from taking place altogether.

Article 7. Assessment of risk

Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Commentary

(1) Under article 7, a State of origin, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an

[895] *Trail Smelter* (see footnote 253 above), pp. 1965–1966.

[896] *Corfu Channel* (see footnote 35 above), p. 22.

[897] See ECE, *Current Policies, Strategies and Aspects of Environmental Impact Assessment in a Transboundary Context* (United Nations publication, Sales No. E.96.II.E.11), p. 48.

activity and consequently the type of preventive measures it should take.

(2) Although the assessment of risk in the *Trail Smelter* case may not directly relate to liability for risk, it nevertheless emphasized the importance of an assessment of the consequences of an activity causing significant risk. The tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke".[898]

(3) The requirement of article 7 is fully consonant with principle 17 of the Rio Declaration, which provides also for assessment of risk of activities that are likely to have a significant adverse impact on the environment:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[899]

The requirement of assessment of adverse effects of activities has been incorporated in various forms in many international agreements.[900] The most notable is the Convention on Environmental Impact Assessment in a Transboundary Context.

(4) The practice of requiring an environmental impact assessment has become very prevalent in order to assess whether a particular activity has the potential of causing significant transboundary harm. The legal obligation to conduct an environmental impact assessment under national law was first developed in the United States of America in the 1970s. Later, Canada and Europe adopted the same approach and essentially regulated it by guidelines. In 1985, a European Community directive required member States to conform to a minimum requirement of environmental impact assessment. Since then, many other countries have also made environmental impact assessment a necessary condition under their national law for authorization to be granted for developmental but hazardous industrial activities.[901] According to one United Nations study, the environmental impact assessment has already shown its value for implementing and strengthening sustainable development, as it combines the precautionary principle with the principle of preventing environmental damage and also allows for public participation.[902]

(5) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or as parties to international instruments. However, it is presumed that a State of origin will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(6) The article does not specify what the content of the risk assessment should be. Obviously, the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. This corresponds to the basic duty contained in article 3. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.[903] The 1981 study of the legal aspects concerning the environment related to offshore mining and drilling within the limits of national jurisdiction, prepared by the Working Group of Experts on Environmental Law of UNEP,[904] also provides, in its conclusion No. 8, in detail the content of assessment for offshore mining and drilling.

(7) The specifics of what ought to be the content of assessment is left to the domestic laws of the State

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[898] *Trail Smelter* (see footnote 253 above), pp. 1973–1974.

[899] See footnote 857 above.

[900] See, for example, article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution; articles 205 and 206 of the United Nations Convention on the Law of the Sea; the Regional Convention for the Conservation of the Environment of the Red Sea and Gulf of Aden; article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region; article 4 of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 8 of the Protocol on Environmental Protection to the Antarctic Treaty; article 14, paragraphs 1 (*a*) and (*b*), of the Convention on Biological Diversity; and article 4 of the Convention on the Transboundary Effects of Industrial Accidents.

[901] For a survey of various North American and European legal and administrative systems of environmental impact assessment policies, plans and programmes, see ECE, *Application of Environmental Impact Assessment Principles to Policies, Plans and Programmes* (United Nations publication, Sales No. E.92.II.E.28), pp. 43 et seq.; approximately 70 developing countries have environmental impact assessment legislation of some kind. Other countries either are in the process of drafting new and additional environmental impact assessment legislation or are planning to do so; see M. Yeater and L. Kurukulasuriya, "Environmental impact assessment legislation in developing countries", *UNEP's New Way Forward: Environmental Law and Sustainable Development*, Sun Lin and L. Kurukulasuriya, eds. (UNEP, 1995), p. 259; and G. J. Martin "Le concept de risque et la protection de l'environnement: évolution parallèle ou fertilisation croisée?", *Les hommes et l'environnement …* (footnote 867 above), pp. 451–460.

[902] See footnote 897 above.

[903] Article 4 of the Convention provides that the environmental impact assessment of a State party should contain, as a minimum, the information described in appendix II to the Convention. Appendix II (Content of the environmental impact assessment documentation) lists nine items as follows:

"(*a*) A description of the proposed activity and its purpose;

"(*b*) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

"(*c*) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

"(*d*) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

"(*e*) A description of mitigation measures to keep adverse environmental impact to a minimum;

"(*f*) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

"(*g*) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

"(*h*) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

"(*i*) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)."

[904] See UNEP/GC.9/5/Add.5, annex III.

conducting such assessment.[905] For the purposes of article 7, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. In order for the States likely to be affected to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them.

(8) The assessment should include the effects of the activity not only on persons and property, but also on the environment of other States. The importance of the protection of the environment, independently of any harm to individual human beings or property, is clearly recognized.

(9) This article does not oblige the State of origin to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their use in any activity may in itself be an indication that those activities might involve a risk of significant transboundary harm.[906] There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these articles.[907]

Article 8. Notification and information

1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Commentary

(1) Article 8 deals with a situation in which the assessment undertaken by a State of origin, in accordance with article 7, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 9, 11, 12 and 13, provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 8 calls on the State of origin to notify States likely to be affected by the planned activity. The activities here include both those that are planned by the State itself and those planned by private entities. The requirement of notification is an indispensable part of any system designed to prevent transboundary harm or at any event to minimize the risk thereof.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the *Corfu Channel* case, where ICJ characterized the duty to warn as based on "elementary considerations of humanity".[908] This principle is recognized in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.[909]

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects, for example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context[910] and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. Principle 19 of the Rio Declaration speaks of timely notification:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.[911]

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[905] For the format of environmental impact assessment adopted in most legislations, see M. Yeater and L. Kurukulasuriya, *loc. cit*. (footnote 901 above), p. 260.

[906] For example, the Convention for the Prevention of Marine Pollution from Land-based Sources provides in article 4 an obligation for the parties to eliminate or restrict the pollution of the environment by certain substances, and the list of those substances is annexed to the Convention. Similarly, the Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited; see also the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources; and the Agreement for the Protection of the Rhine against Chemical Pollution.

[907] See footnote 864 above.

[908] *Corfu Channel* (see footnote 35 above), p. 22.

[909] For treaties dealing with prior notification and exchange of information in respect of watercourses, see paragraph (6) of the commentary to article 12 (Notification concerning planned measures with possible adverse effects), of the draft articles on the law of the non-navigational uses of international watercourses (*Yearbook ... 1994*, vol. II (Part Two), pp. 119–120).

[910] Article 3, paragraph 2, of the Convention provides for a system of notification which reads:

> "This notification shall contain, *inter alia*:
>
> "(*a*) Information on the proposed activity, including any available information on its possible transboundary impact;
>
> "(*b*) The nature of the possible decision; and
>
> "(*c*) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity;
>
> "and may include the information set out in paragraph 5 of this Article."

[911] See footnote 857 above.

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, the annex to OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have an adverse impact on man or the environment where such measures could have significant effects on the economies and trade of the other States.[912] The annex to OECD Council recommendation C(74)224 of 14 November 1974 on "Some principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution.[913] The principle of notification is well established in the case of environmental emergencies.[914]

(6) Where assessment reveals the risk of causing significant transboundary harm, in accordance with *paragraph 1*, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 7. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm. The reference to the available data includes also other data which might become available later after transmitting the data which was initially available to the States likely to be affected.

(7) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels.

(8) Paragraph 1 also addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify *all* the States which may be affected prior to authorizing the activity and gains that knowledge only after the activity is undertaken. In accordance with this paragraph, the State of origin, in such cases, is under an obligation to notify the other States likely to be affected as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine the States concerned.

(9) *Paragraph 2* addresses the need for the States likely to be affected to respond within a period not exceeding six months. It is generally a period of time that should allow these States to evaluate the data involved and arrive at their own conclusion. This is a requirement that is conditioned by cooperation and good faith.

Article 9. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Commentary

(1) Article 9 requires the States concerned, that is, the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent significant transboundary harm, or at any event to minimize the risk thereof. Depending upon the time at which article 9 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) There is a need to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. Secondly, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article does not provide a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties should consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent significant transboundary harm, or at any event to minimize the risk thereof.

(3) The principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the *Lake Lanoux* award where the tribunal stated that:

[912] OECD, *OECD and the Environment* (see footnote 875 above), annex, p. 91, para. 1.

[913] *Ibid*., p. 142.

[914] See paragraph (1) of the commentary to article 17.

Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers.[915]

(4) With regard to this particular point about good faith, the judgment of ICJ in the *Fisheries Jurisdiction* case is also relevant. There the Court stated that "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other".[916] In the *North Sea Continental Shelf* cases the Court held that:

(*a*) [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[917]

Even though the Court in this judgment speaks of "negotiations", it is believed that the good-faith requirement in the conduct of the parties during the course of consultation or negotiations is the same.

(5) The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm, or at any event to minimize the risk thereof. The words "acceptable solutions", regarding the adoption of preventive measures, refer to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of agreement.

(6) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Under the terms of article 4, the parties are required, moreover, to cooperate in the implementation of such measures. This requirement, again, stems from the assumption that the obligation of due diligence, the core base of the provisions intended to prevent significant transboundary harm, or at any event to minimize the risk thereof, is of a continuous nature affecting every stage related to the conduct of the activity.

(7) Article 9 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 8, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm, or in the course of the exchange of information under article 12 or in the context of article 11 on procedures in the absence of notification.

(8) Article 9 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 8 or exchange information under article 12 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(9) *Paragraph 2* provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in the light of article 10. Neither paragraph 2 of this article nor article 10 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(10) *Paragraph 3* deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the *Lake Lanoux* award may be recalled where the tribunal noted that, in certain situations, the party that was likely to be affected might, in violation of good faith, paralyse genuine negotiation efforts.[918] To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated, as measure of self-regulation, to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in a better position to seriously take them into account in carrying out the activity. The last part of paragraph 3 preserves the rights of States likely to be affected.

Article 10. Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:

(*a*) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(*b*) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

(*c*) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(*d*) the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

[915] See footnote 873 above.

[916] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment*, *I.C.J. Reports 1974*, p. 33, para. 78.

[917] *North Sea Continental Shelf* (see footnote 197 above), para. 85. See also paragraph 87.

[918] See footnote 873 above.

(*e*) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(*f*) the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed. This article draws its inspiration from article 6 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) *Subparagraph* (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing such harm or minimizing the risk thereof and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent the harm or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) *Subparagraph* (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission in this context recalls the decision in the *Donauversinkung* case where the court stated that:

> The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other.[919]

In more recent times, States have negotiated what might be seen as equitable solutions to transboundary disputes; agreements concerning French potassium emissions into the Rhine, pollution of United States–Mexican boundary waters, and North American and European acid rain all display elements of this kind.[920]

(5) *Subparagraph* (c) compares, in the same fashion as subparagraph (*a*), the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibility of restoring the environment. It is necessary to emphasize the particular importance of protection of the environment. Principle 15 of the Rio Declaration is relevant to this subparagraph. Requiring that the precautionary approach be widely applied to States according to their capabilities, principle 15 states:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[921]

(6) The precautionary principle was affirmed in the "pan-European" Bergen Ministerial Declaration on Sustainable Development in the ECE Region, adopted in May 1990 by the ECE member States. It stated that: "Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[922] The precautionary principle was recommended by the UNEP Governing Council in order to promote the prevention and elimination of marine pollution, which is increasingly becoming a threat to the marine environment and a cause of human suffering.[923] The precautionary principle has also been referred to or incorporated without any explicit reference in various other conventions.[924]

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[919] *Streitsache des Landes Wurttemberg und des Landes Preussen gegen das Land Baden (Wurttemberg and Prussia v. Baden), betreffend die Donauversinkung*, German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix, pp. 18 et seq.; see also A. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases, 1927 and 1928* (London, Longmans, 1931), vol. 4, p. 131; *Kansas* v. *Colorado, United States Reports*, vol. 206 (1921), p. 100 (1907); and *Washington* v. *Oregon, ibid.*, vol. 297 (1936), p. 517 (1936).

[920] See the Convention on the Protection of the Rhine against Pollution from Chlorides, with the Additional Protocol to the Convention on the Protection of the Rhine against Pollution from Chlorides; the Agreement on the Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, ILM, vol. 12, No. 5 (September1973), p. 1105; the Convention on Long-Range Transboundary Air Pollution; and the Agreement between the United States and Canada on Air Quality of 1991 (United Nations, *Treaty Series*, vol. 1852, No. 31532, p. 79, reprinted in ILM, vol. 30 (1991), p. 678). See also A. E. Boyle and D. Freestone, *op. cit.* (footnote 863 above), p. 80; and I. Romy, *Les pollutions transfrontières des eaux: l'exemple du Rhin* (Lausanne, Payot, 1990).

[921] See footnote 857 above.

[922] Report of the Economic Commission for Europe on the Bergen Conference (8–16 May 1990), A/CONF.151/PC/10, annex I, para. 7.

[923] Governing Council decision 15/27 (1989); see *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 25* (A/44/25), annex I. See also P. Sands, *op. cit.* (footnote 863 above), p. 210.

[924] See article 4, paragraph 3, of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; article 3, paragraph 3, of the United Nations Framework Convention on Climate Change; article 174 (ex-article 130r) of the Treaty establishing the European Community as amended by the Treaty of Amsterdam; and article 2 of the Vienna Convention for the Protection of the Ozone Layer. It may be noted that previous treaties apply the precautionary principle in a very general sense without making any explicit reference to it.

(7) According to the Rio Declaration, the precautionary principle constitutes a very general rule of conduct of prudence. It implies the need for States to review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge.[925] ICJ in its judgment in the *Gabčíkovo-Nagymaros Project* case invited the parties to "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant", built on the Danube pursuant to the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, in the light of the new requirements of environmental protection.[926]

(8) States should consider suitable means to restore, as far as possible, the situation existing prior to the occurrence of harm. It is considered that this should be highlighted as a factor to be taken into account by States concerned which should adopt environmentally friendly measures.

(9) *Subparagraph* (d) provides that one of the elements determining the choice of preventive measures is the willingness of the State of origin and States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures. This, however, should not underplay the measures the State of origin is obliged to take under these articles.

(10) These considerations are in line with the basic policy of the so-called polluter-pays principle. This principle was initiated first by the Council of OECD in 1972.[927] The polluter-pays principle was given cognizance at the global level when it was adopted as principle 16 of the Rio Declaration. It noted:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[928]

This is conceived as the most efficient means of allocating the cost of pollution prevention and control measures so as to encourage the rational use of scarce resources. It also encourages internalization of the cost of publicly mandated technical measures in preference to inefficiencies and competitive distortions in governmental subsidies.[929] This principle is specifically referred to in article 174 (ex-article 130r) of the Treaty establishing the European Community as amended by the Treaty of Amsterdam.

(11) The expression "as appropriate" indicates that the State of origin and the States likely to be affected are not put on the same level as regards the contribution to the costs of prevention. States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In so doing, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the preventive measures and where the affected State contributes to the costs of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in subparagraph (*d*).

(12) *Subparagraph* (e) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "carrying out the activity ... by other means" intend to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" are intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or lower risk, of significant transboundary harm.

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[925] On the principle of precaution generally, see H. Hohmann, *Präventive Rechtspflichten und -prinzipien des modernen Umweltvölkerrechts: Zum Stand des Umweltvölkerrechts zwischen Umweltnutzung und Umweltschutz* (Berlin, Duncker und Humblot, 1992), pp. 406–411; J. Cameron, "The status of the precautionary principle in international law", *Interpreting the Precautionary Principle*, T. O'Riordan and J. Cameron, eds. (London, Earthscan, 1994), pp. 262–289; H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law: The Precautionary Principle — International Environmental Law between Exploitation and Protection* (London, Graham and Trotman/Martinus Nijhoff, 1994); D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague, Kluwer, 1996); A. Epiney and M. Scheyli, *op. cit.* (footnote 879 above), pp. 103–125; P. Martin-Bidou, "Le principe de précaution en droit international de l'environnement", RGDIP, vol. 103, No. 3 (1999), pp. 631–666; and N. de Sadeleer, "Réflexions sur le statut juridique du principe de précaution", *Le principe de précaution: significations et conséquences*, E. Zaccai and J.-N. Missa, eds. (Éditions de l'Université de Bruxelles, 2000), pp. 117–142.

[926] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 77–78, para. 140. However, in this case the Court did not accept Hungary's claim that it was entitled to terminate the Treaty on the grounds of "ecological state of necessity" arising from risks to the environment that had not been detected at the time of its conclusion. It stated that other means could be used to remedy the vague "peril"; see paragraphs 49 to 58 of the judgment, pp. 39–46.

[927] See OECD Council recommendation C(72)128 on Principles relative to transfrontier pollution (OECD, *Guiding Principles concerning International Economic Aspects of Environmental Policies*) and OECD environment directive on equal right of access and non-discrimination in relation to transfrontier pollution, mentioned in the "Survey of liability regimes …" (footnote 846 above), paras. 102–130.

[928] See footnote 857 above.

[929] See G. Hafner, "Das Verursacherprinzip", *Economy-Fachmagazin* No. 4/90 (1990), pp. F23–F29; S. E. Gaines, "The polluter-pays principle: from economic equity to environmental ethos", *Texas International Law Journal*, vol. 26 (1991), p. 470; H. Smets, "The polluter-pays principle in the early 1990s", *The Environment after Rio: International Law and Economics*, L. Campiglio *et al*., eds. (London, Graham and Trotman/Martinus Nijhoff, 1994), p. 134; "Survey of liability regimes …" (footnote 846 above), para. 113; Rio Declaration on Environment and Development—application and implementation: report of the Secretary-General (E/CN.17/1997/8, paras. 87–90); and A. Epiney and M. Scheyli, *op. cit.* (see footnote 879 above), p. 152.

(13) According to *subparagraph* (f), States should also take into account the standards of prevention applied to the same or comparable activities in the State likely to be affected, other regions or, if they exist, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.

Article 11. Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

Commentary

(1) Article 11 addresses the situation in which a State, although it has received no notification about an activity in accordance with article 8, becomes aware that an activity is being carried out in the State of origin, either by the State itself or by a private operator, and believes, on reasonable grounds, that the activity carries a risk of causing it significant harm.

(2) The expression "a State" is not intended to exclude the possibility that more than one State could entertain the belief that a planned activity could adversely affect them in a significant way. The words "apply the provision of article 8" should not be taken as suggesting that the State which intends to authorize or has authorized an activity has necessarily failed to comply with its obligations under article 8. In other words, the State of origin may have made an assessment of the potential of the planned activity for causing significant transboundary harm and concluded in good faith that no such effects would result therefrom. *Paragraph 1* allows a State to request that the State of origin take a "second look" at its assessment and conclusion, and does not prejudge the question whether the State of origin initially complied with its obligations under article 8.

(3) The State likely to be affected could make such a request, however, only upon satisfaction of two conditions. The first is that the requesting State must have "reasonable grounds to believe" that the activity in question may involve a risk of causing significant transboundary harm. The second is that the requesting State must provide a "documented explanation setting forth its grounds". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the State of origin may be required to suspend implementation of its plans under paragraph 3 of article 11.

(4) The first sentence of *paragraph 2* deals with the case in which the planning State concludes, after taking a "second look" as described in paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 8. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the State of origin to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the State of origin does not satisfy the requesting State. It requires that, in such a situation, the State of origin promptly enter into consultations with the other State (or States), at the request of the latter. The consultations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 9. In other words, their purpose is to achieve "acceptable solutions" regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof, and that the solutions to be sought should be "based on an equitable balance of interests". These phrases are discussed in the commentary to article 9.

(5) *Paragraph 3* requires the State of origin to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period, if it is requested to do so by the other State during the course of consultations. States concerned could also agree otherwise.

(6) Similar provisions have been provided for in other legal instruments. Article 18 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context also contemplate a procedure whereby a State likely to be affected by an activity can initiate consultations with the State of origin.

Article 12. Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.

Commentary

(1) Article 12 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles, viz. to prevent significant transboundary harm or at any event to minimize the risk thereof.

(2) Article 12 requires the State of origin and the States likely to be affected to exchange information regarding the activity after it has been undertaken. The phrase "concerning that activity" after the words "all available information" is intended to emphasize the link between the information and the activity and not any information. The duty of prevention based on the concept of due diligence is not a one-time effort but requires continuous effort. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 12, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally, such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.[930] In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as, for example, competent international organizations.

(5) Article 12 requires that such information should be exchanged in a *timely manner*. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

[930] For example, article 10 of the Convention for the Prevention of Marine Pollution from Land-based Sources, article 200 of the United Nations Convention on the Law of the Sea and article 4 of the Vienna Convention for the Protection of the Ozone Layer speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-Range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the States parties. Examples are found in other instruments such as section VI, para. 1 (*b*) (iii), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (see footnote 871 above), article 17 of the Convention on Biological Diversity and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 12 comes into operation only when States have any information which is relevant to preventing transboundary harm or at any rate to minimizing the risk thereof.

(7) The second sentence of article 12 is designed to ensure exchange of information under this provision not only while an activity is "carried out", but even after it ceases to exist, if the activity leaves behind by-products or materials associated with the activity which require monitoring to avoid the risk of significant transboundary harm. An example in this regard is nuclear activity which leaves behind nuclear waste even after the activity is terminated. But it is a recognition of the fact that the consequences of certain activities even after they are terminated continue to pose a significant risk of transboundary harm. Under these circumstances, the obligations of the State of origin do not end with the termination of the activity.

Article 13. Information to the public

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 13 requires States, whenever possible and by such means as are appropriate, to provide the public likely to be affected, whether their own or that of other States, with information relating to the risk and harm that might result from an activity to ascertain their views thereon. The article therefore requires States (*a*) to provide information to the public regarding the activity and the risk and the harm it involves; and (*b*) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 8 or in the assessment which may be carried out by the requesting State under article 11.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular, of seeking to involve, in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration provides for public involvement in decision-making processes as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[931]

(5) A number of other recent international instruments dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Section VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

> 1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
>
> 2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code.[932]

Article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context; article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area; article 6 of the United Nations Framework Convention on Climate Change; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (art. 16); the Convention on the Transboundary Effects of Industrial Accidents (art. 9 and annex VIII); article 12 of the Convention on the Law of the Non-navigational Uses of International Watercourses; the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; the European Council directives 90/313/EEC on the freedom of access to information on the environment[933] and 96/82/EC on the control of major-accident hazards involving dangerous substances;[934] and OECD Council recommendation C(74)224 on Principles concerning transfrontier pollution[935] all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. This form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 13 is circumscribed by the phrase "by such means as are appropriate", which is intended to leave the ways in which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies and local authorities. In the case of the public beyond a State's borders, information may be provided, as appropriate, through the good offices of the State concerned, if direct communication is not feasible or practical.

(8) Further, the State that might be affected, after receiving notification and information from the State of origin and before responding to the notification shall, by such means as are appropriate, inform those parts of its own public likely to be affected.

(9) "Public" includes individuals, interest groups (non-governmental organizations) and independent experts. General "public", however, refers to individuals who are not organized into groups or affiliated to specific groups. Public participation could be encouraged by holding public meetings or hearings. The public should be given the opportunity for consultation and their participation should be facilitated by providing them with necessary information on the proposed policy, plan or programme under consideration. It must, however, be understood that requirements of confidentiality may affect the extent of public participation in the assessment process. It is also common that the public is not involved, or only minimally involved, in efforts to determine the scope of a policy, plan or programme. Public participation in the review of a draft document or environmental impact assessment would be useful in obtaining information regarding concerns related to the proposed action, additional alternatives and potential environmental impact.[936]

(10) Apart from the desirability of encouraging public participation in national decision-making on vital issues regarding development and the tolerance levels of harm in order to enhance the legitimacy of and compliance with the decisions taken, it is suggested that, given the development of human rights law, public participation could also be viewed as a growing right under national law as well as international law.[937]

Article 14. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may

[931] See footnote 857 above.

[932] See footnote 871 above.

[933] *Official Journal of the European Communities*, No. L 158 of 23 June 1990, p. 56.

[934] *Ibid*., No. L 10 of 14 January 1997, p. 13.

[935] See footnote 875 above.

[936] See ECE, *Application of Environmental Impact Assessment Principles* … (footnote 901 above), pp. 4 and 8.

[937] See T. M. Franck, "Fairness in the international legal and institutional system: general course on public international law", *Recueil des cours..., 1993–III* (Dordrecht, Martinus Nijhoff, 1994), vol. 240, p. 110. See also D. Craig and D. Ponce Nava, "Indigenous peoples' rights and environmental law", *UNEP's New Way Forward …* (footnote 901 above), pp. 115–146.

be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

Commentary

(1) Article 14 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 8, 12 and 13. States are not obligated to disclose information that is vital to their national security. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the Convention on the Law of the Non-navigational Uses of International Watercourses also provides for a similar exception to the requirement of disclosure of information vital to national defence or security.

(2) Article 14 includes industrial secrets and information protected by intellectual property in addition to national security. Although industrial secrets are a part of the intellectual property rights, both terms are used to give sufficient coverage to protected rights. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context provide for similar protection of industrial and commercial secrecy.

(3) Article 14 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It therefore requires the State of origin that is withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances. The words "as much information as possible" include, for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 14 essentially encourages and relies on the good-faith cooperation of the parties.

Article 15. Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Commentary

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the injury might occur. The content of this article is based on article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

(2) Article 15 contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the injury might occur. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who might suffer significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of possible domestic harm. It is not intended that this obligation should affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Article 15 also provides that the State of origin may not discriminate on the basis of the place where the damage might occur. In other words, if significant harm may be caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm would occur outside its jurisdiction.

(4) This rule is residual, as indicated by the phrase "unless the States concerned have agreed otherwise". Accordingly, States concerned may agree on the best means of providing protection or redress to persons who may suffer a significant harm, for example through a bilateral agreement. States concerned are encouraged under the present articles to agree on a special regime dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interests of persons" has been used to make it clear that the article is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden in its article 3 provides as follows:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured Party than the rules of compensation of the State in which the activities are being carried out.[938]

(6) The OECD Council has adopted recommendation C(77)28(Final) on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4, subparagraph (*a*), of the annex to that recommendation provides as follows:

Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution shall at least receive equivalent treatment to that afforded in the Country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status ...[939]

Article 16. Emergency preparedness

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

Commentary

(1) This article contains an obligation that calls for anticipatory rather than responsive action. The text of article 16 is based on article 28, paragraph 4, of the Convention on the Law of the Non-navigational Uses of International Watercourses which reads:

When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

The need for the development of contingency plans for responding to possible emergencies is well recognized.[940] It is suggested that the duty to prevent environmental disasters obligates States to enact safety measures and procedures to minimize the likelihood of major environmental accidents, such as nuclear reactor accidents, toxic chemical spills, oil spills or forest fires. Where necessary, specific safety or contingency measures are open to States to negotiate and agree in matters concerning management of risk of significant transboundary harm, such safety measures could include: (*a*) adoption of safety standards for the location and operation of industrial and nuclear plants and vehicles; (*b*) maintenance of equipment and facilities to ensure ongoing compliance with safety measures; (*c*) monitoring of facilities, vehicles or conditions to detect dangers; and (*d*) training of workers and monitoring of their performance to ensure compliance with safety standards. Such contingency plans should include establishment of early warning systems.

(2) While States of origin bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with other States likely to be affected and competent international organizations. For example, the contingency plans may necessitate the involvement of other States likely to be affected, as well as international organizations with competence in the particular field.[941] In addition, the coordination of response efforts might be most effectively handled by a competent international organization of which the States concerned are members.

(3) Development of contingency plans are also better achieved through establishment of common or joint commissions composed of members representing all States concerned. National points of contact would also have to be established to review matters and employ the latest means of communication to suit early warnings.[942] Contingency plans to respond to marine pollution disasters are well known. Article 199 of the United Nations Convention on the Law of the Sea requires States to develop such plans. The obligation to develop contingency plans is also found in certain bilateral and multilateral agreements concerned with forest fires, nuclear accidents and other environmental catastrophes.[943] The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region provides in article 15 that the "Parties shall develop and promote individual

[938] Similar provisions may be found in article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.E.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution (document ENVWA/R.45, annex); and paragraph 6 of the Draft ECE Charter on environmental rights and obligations, prepared at a meeting of experts on environmental law, 25 February to 1 March 1991 (document ENVWA/R.38, annex I).

[939] OECD, *OECD and the Environment* (see footnote 875 above), p. 150. This is also the main thrust of principle 14 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States (see footnote 862 above). A discussion of the principle of equal access may be found in S. van Hoogstraten, P.-M. Dupuy and H. Smets, "L'égalité d'accès: pollution transfrontière", *Environmental Policy and Law*, vol. 2, No. 2 (June 1976), p. 77.

[940] See E. Brown Weiss, "Environmental disasters in international law", *Anuario Jurídico Interamericano*, 1986 (OAS, Washington, D.C., 1987), pp. 141–169. Resolution No. 13 of 17 December 1983 of the European Council of Environmental Law concerning "Principles concerning international cooperation in environmental emergencies linked to technological development" expressly calls for limits on siting of all hazardous installations, for the adoption of safety standards to reduce risk of emergencies, and for monitoring and emergency planning; see *Environmental Policy and Law*, vol. 12, No. 3 (April 1984), p. 68. See also G. Handl, *op. cit.* (footnote 871 above), pp. 62–65.

[941] For a review of various contingency plans established by several international organizations and bodies such as UNEP, FAO, the United Nations Disaster Relief Coordinator, UNHCR, UNICEF, WHO, IAEA and ICRC, see B. G. Ramcharan, *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch* (Dordrecht, Kluwer, 1991), chapter 7 (The Practice of Early-Warning: Environment, Basic Needs and Disaster-Preparedness), pp. 143–168.

[942] For establishment of joint commissions, see, for example, the Indus Waters Treaty, 1960 and the Agreement for the Protection of the Rhine against Chemical Pollution.

[943] For a mention of these agreements, see E. Brown Weiss, *loc. cit.* (see footnote 940 above), p. 148.

contingency plans and joint contingency plans for responding to incidents".

Article 17. Notification of an emergency

The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

Commentary

(1) This article deals with the obligations of States of origin in responding to an actual emergency situation. The provision is based on article 28, paragraph 2, of the Convention on the Law of the Non-navigational Uses of International Watercourses which reads:

> A watercourse State shall, without delay and by the most expeditious means available notify other potentially affected States and competent international organizations of any emergency originating within its territory.

Similar obligations are also contained, for example, in Principle 18 of the Rio Declaration;[944] the Convention on Early Notification of a Nuclear Accident;[945] article 198 of the United Nations Convention on the Law of the Sea; article 14, paragraph 1 (*d*) of the Convention on Biological Diversity; article 5, paragraph 1 (*c*), of the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 and a number of other agreements concerning international watercourses.[946]

(2) According to this article, the seriousness of the harm involved together with the suddenness of the emergency's occurrence justifies the measures required. However, suddenness does not denote that the situation needs to be wholly unexpected. Early warning systems established or forecasting of severe weather disturbances could indicate that the emergency is imminent. This may give the States concerned some time to react and take reasonable, feasible and practical measures to avoid or at any event mitigate ill effects of such emergencies. The words "without delay" mean immediately upon learning of the emergency and the phrase "by the most expeditious means, at its disposal" indicates that the most rapid means of communication to which a State may have recourse is to be utilized.

(3) Emergencies could result from natural causes or human conduct. Measures to be taken in this regard are without prejudice to any claims of liability whose examination is outside the scope of the present articles.

Article 18. Relationship to other rules of international law

The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

Commentary

(1) Article 18 intends to make it clear that the present articles are without prejudice to the existence, operation or effect of any obligation of States under international law relating to an act or omission to which these articles apply. It follows that no inference is to be drawn from the fact that an activity falls within the scope of these articles, as to the existence or non-existence of any other rule of international law as to the activity in question or its actual or potential transboundary effects.

(2) The reference in article 18 to any obligation of States covers both treaty obligations and obligations under customary international law. It is equally intended to extend both to rules having a particular application, whether to a given region or a specified activity, and to rules which are universal or general in scope. This article does not purport to resolve all questions of future conflict of overlap between obligations under treaties and customary international law and obligations under the present articles.

Article 19. Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

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[944] See footnote 857 above.

[945] Article 5 of this Convention provides for detailed data to be notified to the States likely to be affected: "(*a*) the time, exact location where appropriate, and the nature of the nuclear accident; (*b*) the facility or activity involved; (*c*) the assumed or established cause and the foreseeable development of the nuclear accident relevant to the transboundary release of the radioactive materials; (*d*) the general characteristics of the radioactive release, including, as far as is practicable and appropriate, the nature, probable physical and chemical form and the quantity, composition and effective height of the radioactive release; (*e*) information on current and forecast meteorological and hydrological conditions, necessary for forecasting the transboundary release of the radioactive materials; (*f*) the results of environmental monitoring relevant to the transboundary release of the radioactive materials; (*g*) the off-site protective measures taken or planned; (*h*) the predicted behaviour over time of the radioactive release."

[946] See, e.g., article 11 of the Agreement for the Protection of the Rhine against Chemical Pollution; the Agreement concerning the Activities of Agencies for the Control of Accidental Water Pollution by Hydrocarbons or Other Substances capable of Contaminating Water and Recognized as such under the Convention of 16 November 1962 between France and Switzerland concerning Protection of the Waters of Lake Geneva against Pollution (1977 Official Collection of Swiss Laws, p. 2204), reproduced in B. Ruester, B. Simma and M. Bock, *International Protection of the Environment*, vol. XXV (Dobbs Ferry, N.Y., Oceana, 1981), p. 285; and the Agreement on Great Lakes Water Quality, concluded between Canada and the United States (*United States Treaties and Other International Agreements, 1978-79*, vol. 30, part 2 (Washington, D.C., United States Government Printing Office, 1980), No. 9257).

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

Commentary

(1) Article 19 provides a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the present articles. The rule is residual in nature and applies where the States concerned do not have an applicable agreement for the settlement of such disputes.

(2) It is assumed that the application of this article would come into play only after States concerned have exhausted all the means of persuasion at their disposal through appropriate consultation and negotiations. These could take place as a result of the obligations imposed by the present articles or otherwise in the normal course of inter-State relations.

(3) Failing any agreement through consultation and negotiation, the States concerned are urged to continue to exert efforts to settle their dispute, through other peaceful means of settlement to which they may resort by mutual agreement, including mediation, conciliation, arbitration or judicial settlement. These are means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations, in the second paragraph of the relevant section of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations [947] and in paragraph 5 of section I of the Manila Declaration on the Peaceful Settlement of International Disputes,[948] which are open to States as free choices to be mutually agreed upon.[949]

(4) If the States concerned are unable to reach an agreement on any of the means of peaceful settlement of disputes within a period of six months, paragraph 2 of article 19 obliges States, at the request of one of them, to have recourse to the appointment of an impartial fact-finding commission. Paragraphs 3, 4, and 5 of article 19 elaborate the compulsory procedure for the appointment of the fact-finding commission.[950] This compulsory procedure is useful and necessary to help States to resolve their disputes expeditiously on the basis of an objective identification and evaluation of facts. Lack of proper appreciation of the correct and relevant facts is often at the root of differences or disputes among States.

(5) Resort to impartial fact-finding commissions is a well-known method incorporated in a number of bilateral or multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system. Its potential to contribute to the settlement of international disputes is recognized by General Assembly resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding" and the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security adopted by the General Assembly in its resolution 46/59 of 9 December 1991, annex.

(6) By virtue of the mandate to investigate the facts and to clarify the questions in dispute, such commissions usually have the competence to arrange for hearings of the parties, the examination of witnesses or on-site visits.

(7) The report of the Commission usually should identify or clarify "facts". Insofar as they involve no assessment or evaluation, they are generally beyond further contention. States concerned are still free to give such weight as they deem appropriate to these "facts" in arriving at a resolution of the dispute. However, article 19 requires the States concerned to give the report of the fact-finding commission a good-faith consideration at the least.[951]

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[947] See footnote 273 above.

[948] General Assembly resolution 37/10 of 15 November 1982, annex.

[949] For an analysis of the various means of peaceful settlement of disputes and references to relevant international instruments, see *Handbook on the Peaceful Settlement of Disputes between States* (United Nations publication, Sales No. E.92.V.7).

[950] See article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

[951] The criteria of good faith are described in the commentary to article 9.

Annex 683

"Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly", Yearbook of the International Law Commission, A/CN.4/SER. A/1966/Add. 1 (Part 2), *International Law Commission*, 1966, pages 1-2, and 217-221

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YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

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UNITED NATIONS

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LAW OF TREATIES

[Item 2 of the agenda for the seventeenth session]

DOCUMENT A/CN.4/183 and Add.1-4

Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

[*Original text: English*]
[*15 November 1965, 4 December 1965, 20 December 1965, 3 January 1966, and 18 January 1966*]

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Introduction

1. At the first part of its seventeenth session the Commission re-examined the articles on the conclusion, entry into force and registration of treaties contained in part I of its draft articles on the law of treaties, which it had prepared at its fifteenth session[1] and submitted to Governments for their observations. The Commission provisionally adopted revised texts of twenty-five articles. One of these (article 3 (*bis*)) was an article in part II (article 48), relating to treaties which are constituent instruments of international organizations or which have been drawn up within international organizations, which it decided to include among the "general provisions" at the beginning of the draft articles. The Commission deleted four articles and postponed until the resumption of its seventeenth session in January 1966 its decision on articles 8, 9 and 13, relating respectively to participation in a treaty, opening of a treaty to the participation of additional States and accession.

[1] *Yearbook of the International Law Commission, 1962*, vol. II, p. 159.

2. At the first part of the session the Commission also had before it the Special Rapporteur's observations and proposals regarding the revision of the first three articles of part II, articles 30-32 (A/CN.4/177/Add.2). Owing to shortage of time, however, the Commission was unable to begin its re-examination of these articles.

3. At the second part of the session, therefore, the main task of the Commission will be to re-examine the whole of part II of the draft articles and to conclude its re-examination of articles 8, 9 and 13.

The basis of the present report

4. The basis of the present report is the same as that set out in paragraph 5 of the Special Rapporteur's fourth report (A/CN.4/177), namely, the written replies of Governments, the comments of delegations in the Sixth Committee of the General Assembly and the observations and proposals of the Special Rapporteur resulting therefrom. The comments of Governments and delegations on part II of the draft articles are contained in the

the question whether the case of an earlier treaty containing obligations of an "interdependent" or "integral" character should be subject to a special rule, the rules generally applicable in such cases appeared to the Commission to work out automatically as follows:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

The rules contained in sub-paragraphs (*a*) and (*c*) are, again, no more than an application of the general principle that a later expression of intention is to be presumed to prevail over an earlier one; and sub-paragraph (*b*) is no more than a particular application of the rule in article 30. These rules, the Commission noted, are the rules applied in cases of amendment of a multilateral treaty, as in the case of the United Nations protocols for amending League of Nations treaties,[118] when not all the parties to the treaty become parties to the amending agreement.

(11) The rules in paragraph 4 determine the mutual rights and obligations of the particular parties in each situation merely *as between themselves*. They do not relieve any party to a treaty of any international responsibilities it may incur by concluding or by applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty. If the conclusion or application of the treaty constitutes an infringement of the rights of parties to another treaty, all the normal consequences of the breach of a treaty follow with respect to that other treaty. The injured party may invoke its right to terminate or suspend the operation of the treaty under article 57 and it may equally invoke the international responsibility of the party which has infringed its rights. Paragraph 5 accordingly makes an express reservation with respect to both these matters. At the same time, it makes a reservation with respect to the provisions of article 37 concerning *inter se* modification of multilateral treaties. Those provisions lay down the conditions under which an agreement may be made to modify the operation of a multilateral treaty as between some of its parties only, and nothing in paragraph 4 of the present article is to be understood as setting aside those provisions.

(12) The Commission re-examined, in the light of the comments of Governments, the problem whether an earlier treaty which contains obligations of an "interdependent" or "integral" type should constitute a special case in which a later treaty incompatible with it should be considered as void, at any rate if all the parties to the later treaty were aware that they were infringing the rights of other States under the earlier treaty. An analogous aspect of this problem was submitted to the Commission by the Special Rapporteur in his second report,[119] the relevant passages from which were reproduced, for purposes of information, in paragraph (14) of the Commission's commentary to the present article contained in its report on the work of its sixteenth session.[120] Without adopting any position on the detailed considerations advanced by the Special Rapporteur, the Commission desired in the present commentary to draw attention to his analysis of certain aspects of the problem.

(13) Certain members of the Commission were inclined to favour the idea of a special rule in the case of an earlier treaty containing obligations of an "interdependent" or "integral" character, at any rate if the parties to the later treaty were all aware of its incompatibility with the earlier one. The Commission, however, noted that under the existing law the question appeared to be left as a matter of international responsibility if a party to a treaty of such a type afterwards concluded another treaty derogating from it. The Commission also noted that obligations of an "interdependent" or "integral" character may vary widely in importance. Some, although important in their own spheres, may deal with essentially technical matters; others may deal with vital matters, such as the maintenance of peace, nuclear tests or human rights. It pointed out that in some cases the obligations, by reason of their subject-matter, might be of a *jus cogens* character and the case fall within the provisions of articles 50 and 61. But the Commission felt that it should in other cases leave the question as one of international responsibility. At the same time, as previously mentioned, in order to remove any impression that paragraph 4(*c*) justifies the conclusion of the later treaty, the Commission decided to reorient the formulation of the article so as to make it refer to the priority of successive treaties dealing with the same subject-matter rather than of treaties having incompatible provisions. The conclusion of the later treaty may, of course, be perfectly legitimate if it is only a development of or addition to the earlier treaty.

Section 3: Interpretation of treaties

Article 27.[121] 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 connexion with the conclusion of the treaty;

(*b*) Any instrument which was 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.

[118] See Resolutions of the General Assembly concerning the Law of Treaties (document A/CN.4/154, *Yearbook of the International Law Commission, 1963*, vol. II, pp. 5-9).

[119] Commentary to article 14 of that report, paras. 6-30; *Yearbook of the International Law Commission, 1963*, vol. II, pp. 54-61.

[120] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 189-191.

[121] 1964 draft, article 69.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty;

(*b*) Any subsequent practice in the application of the treaty which establishes the understanding 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. [122]

Article 28. [123] **Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Commentary

Introduction

(1) The utility and even the existence of rules of international law governing the interpretation of treaties are sometimes questioned. The first two of the Commission's Special Rapporteurs on the law of treaties in their private writings also expressed doubts as to the existence in international law of any general rules for the interpretation of treaties. Other jurists, although they express reservations as to the obligatory character of certain of the so-called canons of interpretation, show less hesitation in recognizing the existence of some general rules for the interpretation of treaties. Sir G. Fitzmaurice, the previous Special Rapporteur on the law of treaties, in his private writings deduced six principles from the jurisprudence of the Permanent Court and the International Court which he regarded as the major principles of interpretation. In 1956, the Institute of International Law [124] adopted a resolution in which it formulated, if in somewhat cautious language, two articles containing a small number of basic principles of interpretation.

(2) Jurists also differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to:

(*a*) The text of the treaty as the authentic expression of the intentions of the parties;

(*b*) The intentions of the parties as a subjective element distinct from the text; and

(*c*) The declared or apparent objects and purposes of the treaty.

Some place the main emphasis on the intentions of the parties and in consequence admit a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation. Some give great weight to the object and purpose of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority, however, emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation. It is this view which is reflected in the 1956 resolution of the Institute of International Law mentioned in the previous paragraph.

(3) Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts. Treaty interpretation is, of course, equally part of the everyday work of Foreign Ministries.

(4) Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.

(5) Any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable. Accordingly the Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the inter-

[122] 1964 draft, article 71.

[123] 1964 draft, article 70.

[124] *Annuaire de l'Institut de droit international*, vol. 46 (1956), p. 359.

pretation of treaties. Admittedly, the task of formulating even these rules is not easy, but the Commission considered that there were cogent reasons why it should be attempted. First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. Secondly, having regard to the divergent opinions concerning methods of interpretation, it seemed desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation. Thirdly, a number of articles adopted by the Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties. In addition the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.

(6) Some jurists in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties, and it is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case (e.g. the *contra proferentem* principle or the use of *travaux préparatoires*). But for the purpose of formulating the general rules of interpretation the Commission did not consider it necessary to make such a distinction. Nor did it consider that the principle expressed in the maxim *ut res magis valeat quam pereat* should not be included as one of the general rules. It recognized that in certain circumstances recourse to the principle may be appropriate and that it has sometimes been invoked by the International Court. In the *Corfu Channel* case,[125] for example, in interpreting a Special Agreement the Court said:

> "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a Special Agreement should be devoid of purport or effect."

And it referred to a previous decision of the Permanent Court to the same effect in the *Free Zones of Upper Savoy and the District of Gex*[126] case. The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose.* When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of "effective interpretation". The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *ut res magis valeat* for this purpose. In the *Interpretation of Peace Treaties* Advisory Opinion[127] it said:

> "The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which... would be contrary to their letter and spirit."

And it emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty.

(7) At its session in 1964 the Commission provisionally adopted three articles (69-71) dealing generally with the interpretation of treaties, and two articles dealing with treaties having plurilingual texts. The Commission's attempt to isolate and codify the basic rules of interpretation was generally approved by Governments in their comments and the rules contained in its draft appeared largely to be endorsed by them. However, in the light of the comments of Governments and as part of its normal process of tightening and streamlining the draft, the Commission has reduced these five articles to three by incorporating the then article 71 (terms having a special meaning) in the then article 69 (general rule of interpretation). and by amalgamating the then articles 72 and 73 (plurilingual treaties) into a single article. Apart from these changes the rules now proposed by the Commission do not differ materially in their general structure and substance from those transmitted to Governments in 1964.

(8) Having regard to certain observations in the comments of Governments the Commission considered it desirable to underline its concept of the relation between the various elements of interpretation in article 27 and the relation between these elements and those in article 28. Those observations appeared to indicate a possible fear that the successive paragraphs of article 27 might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission, by heading the article "General rule of interpretation" in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present

[125] *I.C.J. Reports 1949*, p. 24.

[126] *P.C.I.J.* (1929), Series A, No. 22, p. 13; cf. *Acquisition of Polish Nationality, P.C.I.J.* (1923), Series B, No. 7, pp. 16 and 17, and *Exchange of Greek and Turkish Populations, P.C.I.J.* (1925), Series B, No. 10, p. 25.

[127] *I.C.J. Reports 1950*, p. 229.

in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled "General *rule* of interpretation" in the singular, not "General *rules*" in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. In the same way the word "context" in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word "context" in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 "There shall be taken into account *together with the context*" is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3. If the provision in paragraph 4 (article 71 of the 1964 draft) is of a different character, the word "special" serves to indicate its relation to the rule in paragraph 1.

(9) The Commission re-examined the structure of article 27 in the light of the comments of Governments and considered other possible alternatives. It concluded, however, that subject to transferring the provision regarding rules of international law from paragraph 1 to paragraph 3 and adding the former article 71 as paragraph 4, the general structure of the article, as provisionally adopted in 1964, should be retained. It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article. Once it is established—and on this point the Commission was unanimous—that the starting point of interpretation is the meaning of the text, logic indicates that "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" should be the first element to be mentioned. Similarly, logic suggests that the elements comprised in the "context" should be the next to be mentioned since they form part of or are intimately related to the text. Again, it is only logic which suggests that the elements in paragraph 3—a subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in the relations between the parties—should follow and not precede the elements in the previous paragraphs. The logical consideration which suggests this is that these elements are extrinsic to the text. But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.

(10) The Commission also re-examined in the light of the comments of Governments the relation between the further (supplementary) means of interpretation mentioned in former article 70 and those contained in former article 69, giving special attention to the role of preparatory work as an element of interpretation. Although a few Governments indicated a preference for allowing a larger role to preparatory work and even for including it in the present article, the majority appeared to be in agreement with the Commission's treatment of the matter. Certain members of the Commission also favoured a system which would give a more automatic role to preparatory work and other supplementary means in the process of interpretation. But the Commission considered that the relationship established between the "supplementary" elements of interpretation in present article 28 and those in present article 27—which accords with the jurisprudence of the International Court on the matter—should be retained. The elements of interpretation in article 27 all relate to the agreement between the parties *at the time when or after it received authentic expression in the text. Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text. Moreover, it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation. Accordingly, the Commission was of the opinion that the distinction made in articles 27 and 28 between authentic and supplementary means of interpretation is both justified and desirable. At the same time, it pointed out that the provisions of article 28 by no means have the effect of drawing a rigid line between the "supplementary" means of interpretation and the means included in article 27. The fact that article 28 admits recourse to the supplementary means for the purpose of "confirming" the meaning resulting from the application of article 27 establishes a general link between the two articles and maintains the unity of the process of interpretation.

Commentary to article 27

(11) The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute. The textual approach, on the other hand, commends itself by the fact that, as one authority[128] has put it, "*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*". Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of inter-

[128] *Annuaire de l'Institut de droit international*, vol. 44, tome 1 (1952), p. 199.

pretation to revise treaties or to read into them what they do not, expressly or by implication, contain.[129]

(12) *Paragraph 1* contains three separate principles. The first—interpretation in good faith—flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. These principles have repeatedly been affirmed by the Court. The present Court in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* said:[130]

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."

And the Permanent Court in an early Advisory Opinion[131] stressed that the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole:

> "In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense."

Again the Court has more than once had recourse to the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision.[132]

(13) *Paragraph 2* seeks to define what is comprised in the "context" for the purposes of the interpretation of the treaty. That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment, as is also the case with documents which are specifically made annexes to the treaty. The question is how far other documents connected with the treaty are to be regarded as forming part of the "context" for the purposes of interpretation. Paragraph 2 proposes that two classes of documents should be so regarded: (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; and (*b*) any instrument which was made in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. The principle on which this provision is based is that a unilateral document cannot be regarded as forming part of the "context" within the meaning of article 27 unless not only was it made in connexion with the conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties. On the other hand, the fact that these two classes of documents are recognized in paragraph 2 as forming part of the "context" does not mean that they are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case.[133] What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.

(14) *Paragraph 3*(a) specifies as a further authentic element of interpretation to be taken into account together with the context any subsequent agreement between the parties regarding the interpretation of the treaty. A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation.[134] But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case[135] the Court said: "...the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty...". Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.

(15) *Paragraph 3*(b) then similarly specifies as an element to be taken into account together with the context: "any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation". The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[136] Recourse to it as a means of

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[129] E.g., in the *United States Nationals in Morocco* case, *I.C.J. Reports 1952*, pp. 196 and 199.

[130] *I.C.J. Reports 1950*, p. 8.

[131] *Competence of the ILO to Regulate Agricultural Labour*, *P.C.I.J.* (1922), Series B, Nos. 2 and 3, p. 23.

[132] E.g., *United States Nationals in Morocco* case, *I.C.J. Reports 1952*, pp. 183, 184, 197 and 198.

[133] *Ambatielos* case (Preliminary Objection), *I.C.J. Reports 1952*, pp. 43 and 75.

[134] Cf. the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* case, *I.C.J. Reports 1948*, p. 63.

[135] (Preliminary Objection), *I.C.J. Reports 1952*, p. 44.

[136] In the *Russian Indemnity* case the Permanent Court of Arbitration said: "*...l'exécution des engagements est, entre Etats, comme entre particuliers, le plus sûr commentaire du sens de ces engagements*". *Reports of International Abitral Awards*, vol. XI, p. 433. ("...the fulfilment of engagements between States, as between individuals, is the surest commentary on the effectiveness of those engagements". English translation from J. B. Scott, *The Hague Court* Reports (1916), p. 302.)

Annex 685

"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, finalised by Mr Martti Koskenniemi, A/CN.4/L.682 and Add.1, 12 April 2006, pages 1-8, 43

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

[Agenda item 11]

DOCUMENT A/CN.4/L.682 and Add.1*

Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi**

[*Original: English*]
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* Incorporating document A/CN.4/L.682/Corr.1.

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ABBREVIATIONS

EURATOM	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
MERCOSUR	Southern Common Market
MOX Plant	Mixed Oxide Reprocessing Plant
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
RTA	Regional Trade Agreement
UNIDROIT	International Institute for the Unification of Private Law
WTO	World Trade Organization

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AJIL	*American Journal of International Law*
ECHR	European Court of Human Rights, *Reports of Judgments and Decisions*. All judgments and decisions of the Court, including those not published in the official series, can be consulted in the database of the Court (HUDOC), available from the Court's website (www.echr.coe.int).
EJIL	*European Journal of International Law*
I.C.J. Pleadings	International Court of Justice, *Pleadings, Oral Arguments, Documents*; available from the Court's website (www.icj-cij.org).
I.C.J. Reports	International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*. All judgments, advisory opinions and orders of the Court are available from the Court's website (www.icj-cij.org).
ILM	*International Legal Materials*
ILR	*International Law Reports*
IRAN–U.S. C.T.R.	*Iran–United States Claims Tribunal Reports*
ITLOS Reports	International Tribunal for the Law of the Sea, *Reports of Judgments, Advisory Opinions and Orders*. The Tribunal's case law is available on its website (www.itlos.org).
LGDJ	*Librairie générale de droit et de jurisprudence*
P.C.I.J., Series A	Permanent Court of International Justice, *Collection of Judgments* (Nos. 1–24, up to 1930 inclusive).
P.C.I.J., Series B	Permanent Court of International Justice, *Collection of Advisory Opinions* (Nos. 1–18, up to 1930 inclusive).
P.C.I.J., Series A/B	Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions* (Nos. 40–80, from 1931).
RGDIP	*Revue générale de droit international public*
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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In the present volume, "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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	Source
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European Convention on Consular Functions (Paris, 11 December 1967)	United Nations, *Treaty Series*, vol. 2757, No. 48642, p. 33.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	*Ibid*., vol. 729, No. 10485, p. 161.
Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters (Brussels, 27 September 1968)	*Ibid*., vol. 1262, No. 20747, p. 153.
Vienna Convention on the Law of Treaties (1969 Vienna Convention) (Vienna, 23 May 1969)	*Ibid*., vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	*Ibid*., vol. 974, No. 14118, p. 177.
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (London, Moscow and Washington, D.C., 10 April 1972)	*Ibid*., vol. 1015, No. 14860, p. 163.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	*Ibid*., vol. 993, No. 14537, p. 243.
Convention on the Protection of the Rhine against Pollution by Chlorides (Bonn, 3 December 1976)	*Ibid*., vol. 1404, No. 23469, p. 59.
Additional Protocol to the Convention on the Protection of the Rhine against Pollution by Chlorides (Brussels, 25 September 1991)	*Ibid*., vol. 1840, No. 23469, p. 372.

	Source
Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979)	*Ibid*., vol. 1651, No. 28395, p. 333.
European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxemburg, 20 May 1980)	*Ibid*., vol. 1496, No. 25701, p. 37.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid*., vol. 1834, No. 31363, p. 3.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	*Ibid*., vol. 2167, No. 37924, p. 3.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid*., vol. 1465, No. 24841, p. 85.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	*Ibid*., vol. 1513, No. 26164, p. 293.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	*Ibid*., vol. 1522, No. 26369, p. 3. The updated and amended text of the Protocol appears in United Nations Environment Programme, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*, 8th ed., 2009.
South Pacific Nuclear Free Zone Treaty (Rarotonga Treaty) (Rarotonga, 6 August 1985)	United Nations, *Treaty Series*, vol. 1445, No. 24592, p. 177.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention) (Vienna, 21 March 1986)	A/CONF.129/15.
Convention on Mutual Administrative Assistance in Tax Matters (Strasbourg, 25 January 1988)	United Nations, *Treaty Series*, vol. 1966, No. 33610, p. 215.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	*Ibid*., vol. 1582, No. 27627, p. 95.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989)	*Ibid*., vol. 1673, No. 28911, p. 57.
Convention on Insider Trading (Strasbourg, 20 April 1989)	*Ibid*., vol. 1704, No. 29471, p. 133.
Protocol to the Convention on Insider Trading (Strasbourg, 11 September 1989)	*Ibid*.
European Convention on Transfrontier Television (Strasbourg, 5 May 1989)	*Ibid*., vol. 1966, No. 33611, p. 265.
European Convention on Certain International Aspects of Bankruptcy (Istanbul, 5 June 1990)	Council of Europe, *European Treaty Series*, No. 136.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	*Ibid*., vol. 2105, No. 36605, p. 457.
Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on the Transboundary Effects of Industrial Accidents (Kiev, 21 May 2003)	ECE/MP.WAT/11.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity to the Convention on Biological Diversity (Montreal, 29 January 2000)	*Ibid*., vol. 2226, No. 30619, p. 208.
Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (Paris, 22 September 1992)	*Ibid*., vol. 2354, No. 42279, p. 67.
North American Free Trade Agreement (NAFTA) (Mexico City, Ottawa and Washington, D.C., 17 December 1992)	Washington, D.C., United States Government Printing Office, 1993; available from the website of the Agreement secretariat: www.nafta-sec-alena.org.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (opened for signature at Paris on 13 January 1993)	United Nations, *Treaty Series*, vol. 1975, No. 33757, p. 3.
Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993)	*Ibid*., vol. 1819, No. 31155, p. 359.
Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, *European Treaty Series*, No. 150.

	Source
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	United Nations, *Treaty Series*, vols. 1867–1869, No. 31874.
General Agreement on Tariffs and Trade 1994 (GATT 1994) (annex 1A)	*Ibid.*, vol. 1867, No. 31874.
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) (annex 1A)	*Ibid.*
Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (annex 2)	*Ibid.*, vol. 1869, No. 31874.
Agreement on Subsidies and Countervailing Measures	*Ibid.*
European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (Strasbourg, 11 May 1994)	Council of Europe, *European Treaty Series*, No. 153.
Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Strasbourg, 31 January 1995)	United Nations, *Treaty Series*, vol. 2136, No. 37251, p. 79.
UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995)	*Ibid*., vol. 2421, No. 43718, p. 457.
Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Bangkok, 15 December 1995)	*Ibid*., vol. 1981, No. 33873, p. 129.
African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty) (Cairo, 11 April 1996)	A/50/426, annex.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Oslo, 18 September 1997)	United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.
International Plant Protection Convention (Rome, 17 November 1997)	*Ibid*., vol. 2367, No. 1963, p. 223.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998)	*Ibid*., vol. 2161, No. 37770, p. 447.
Rome Statute of the International Criminal Court (Rome Statute) (Rome, 17 July 1998)	*Ibid*., vol. 2187, No. 38544, p. 3.
European Convention on the Promotion of a Transnational Long-Term Voluntary Service for Young People (Strasbourg, 11 May 2000)	Council of Europe, *European Treaty Series*, No. 175.
European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (Strasbourg, 24 January 2001)	United Nations, *Treaty Series*, vol. 2246, No. 39989, p. 29.
International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001)	*Ibid*., vol. 2400, No. 43345, p. 303.
European Convention on the Protection of the Audiovisual Heritage (Strasbourg, 8 November 2001)	*Ibid*., vol. 2569, No. 45793, p. 3.
Convention on Contact concerning Children (Strasbourg, 15 May 2003)	*Ibid*., vol. 2464, No. 44266, p. 3.
Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005)	*Ibid*., vol. 2488, No. 44655, p. 129.
Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005)	*Ibid*., vol. 2569, No. 45795, p. 33.
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 16 May 2005)	*Ibid*., vol. 2569, No. 45796, p. 91.

184. To press a perhaps self-evident point, there is no special "WTO rule" on statehood, or a "human rights notion" of transit passage, just as there is no special rule about State immunities within the European Court of Human Rights or a WTO-specific notion of "exhaustible resources". Moreover, the general rules operate unless their operation has been expressly excluded. This was the view of the Chamber of the International Court of Justice concerning the applicability of the local remedies rule in the *Elettronica Sicula S.p.A (ELSI)* case. It had no doubt that

> the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.[250]

185. It is in the nature of general law to apply generally, *i.e.* inasmuch as it has not been specifically excluded. It cannot plausibly be claimed that these parts of the law—"important principles" as the Court put it—have validity only insofar as they have been "incorporated" into the relevant regimes. There has never been any act of incorporation. But more relevantly, it is hard to see how regime builders might have agreed *not* to incorporate (that is, opt out from) such general principles. The debate about new States' competence to pick and choose the customary law they wish to apply ended after decolonization without there having been much "rejection" of old custom. Few actors would care to establish relations with a special regime that claimed a blanket rejection of all general international law. Why, in such a case, would anyone (including the regime's establishing members) take the regime's engagements seriously?

(*c*) *Fall-back onto general rules owing to the failure of self-contained regimes*

186. The third case—the "failure" of a self-contained regime—is one that most commentators would agree brings the general law into operation. However, it is far from clear what may count as "failure". In assessing this, the nature of the regime must clearly be taken into account.[251] For most special regimes, their *raison d'être* is to strengthen the law on some particular subject matter, to provide more effective protection for certain interests or to create more context-sensitive (and in this sense more "just") regulation of a matter than what is offered under the general law. Reporting and individual applications to human rights treaty bodies, and the non-compliance mechanisms under environmental treaties, clearly seek to attain precisely this. The same is true of the rapid and effective WTO dispute settlement system.

187. Sometimes the risk may emerge that a special regime in fact waters down the relevant obligations. This may be caused, for instance, by the accumulation of an excessive backlog in the treatment of individual applications, a non-professional or biased discussion of national reports, or any other intentional or unintentional malfunction in the institutions of the regime. A dispute-settlement mechanism under the regime may function so slowly or so inefficiently that damage continues to be caused, without a reasonable prospect of a just settlement in sight. At some such point the regime will have "failed"—and at that point the possibility must become open for the beneficiaries of the relevant rights to turn to the institutions and mechanisms of general international law.

188. No general criteria can be set up to determine what counts as "regime failure". The failure might be either substantive or procedural. A substantive failure takes place if the regime completely fails to attain the purpose for which it was created: members of a free trade regime persist in their protectionist practices; pollution of a watercourse continues unabated, despite pledges by riparian States parties to a local environmental treaty. Inasmuch as the failure can be articulated as a "material breach" under article 60 of the 1969 Vienna Convention, then the avenues indicated in that article should be open to the members of the regime. It cannot be excluded, either, that the facts relating to regime failure may be invoked as a "fundamental change of circumstances" under article 62 of the 1969 Vienna Convention.

189. The other alternative is a procedural failure: the institutions of the regime fail to function in the way they should. For instance, they have provided for reparation, but that reparation is not forthcoming.[252] When it is a question of how far the States parties to a special regime must continue to have resort to the special procedures, analogous considerations would seem relevant, as in the context of the requirement of exhaustion of local remedies in the law of diplomatic protection. In this regard, the main principles are enunciated in draft articles 14 and 15 of the Commission's current draft on diplomatic protection. According to article 15, local remedies do not need to be exhausted where:

"(*a*) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

"(*b*) there is undue delay in the remedial process which is attributable to the State alleged to be responsible".[253]

190. This would seem to apply when the State suffering the damage is itself a member of the regime. For those outside the regime, of course, general law continues to prevail. But what might be the situation in cases where the injury is not suffered by a formal member of the regime,

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[250] *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, p. 15, at p. 42, para. 50.

[251] See, for example, the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (footnote 203 above), pp. 40–41, paras. 115–116; see also Simma, "Self-contained regimes" (footnote 202 above), pp. 111–131; D. Alland, *Justice privée et ordre juridique international: Étude théorique des contre-mesures en droit international public*, Paris, Pedone, 1994, pp. 278–291; C. S. Homsi, "'Self-contained regimes'—no cop-out for North Korea!", *Suffolk Transnational Law Review*, vol. 24, No. 1 (winter 2000), pp. 99–123; and the various essays in Barnhoorn and Wellens (eds.) (footnote 12 above). The idea that a special regime, such as the WTO legal order, "falls back" on general international law while the degree of "contracting out" remains a matter of interpretation is also usefully discussed in Pauwelyn, *Conflict of Norms…* (see footnote 21 above), pp. 205–236.

[252] This is the example mentioned in the fourth report on State responsibility by Gaetano Arangio-Ruiz, Special Rapporteur (A/CN.4/444 and Add.1–3) (see footnote 203 above), pp. 40–41, para. 115 (*a*).

[253] *Yearbook … 2006*, vol. II (Part Two), p. 46, draft article 15.

Annex 686

"Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, A/CN.4/L.702, *International Law Commission*, 18 July 2006

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FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

Report of the Study Group of the International Law Commission

A. INTRODUCTION

1. At its fifty-fourth session (2002), the International Law Commission established a Study Group to examine the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[1] At its fifty-fifth session (2003), the Study Group adopted a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003-2006) and allocated to five of its members the task of preparing outlines on the following topics:

(a) "The function and scope of the *lex specialis* rule and the question of self-contained regimes" (Mr. Koskenniemi);

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 492-494.

(b) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community (Mr. Mansfield);

(c) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties) (Mr. Melescanu);

(d) The modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties) (Mr. Daoudi); and

(e) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules (Mr. Galicki).

2. During its fifty-sixth (2004) and fifty-seventh session (2005), the Study Group received a number of outlines and studies on these topics. It affirmed that it was its intention to prepare, as the substantive outcome of its work, a single collective document consisting of two parts. One would be a "relatively large analytical study" by the Chairman that would summarize and analyse the content of the various individual reports and the discussions of the Study Group. This bulk of the report prepared by the Chairman in 2006 is contained in document A/CN.4/L.682. The other part would be "a condensed set of conclusions, guidelines or principles emerging from the studies and discussions in the Study Group".[2] As the Study Group itself held, and the Commission endorsed, this should consist of "a concrete, practice-oriented set of brief statements that would work, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help thinking about and dealing with the issue of fragmentation in legal practice".[3]

3. During the current fifty-eighth session of the Commission, the Study Group was reconstituted; it held 10 meetings on 17 and 26 May, on 6 June, on 4, 11, 12, 13 and

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[2] *Ibid*., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 448.

[3] *Ibid*.

17 July 2006; and it completed its work. Section C sets out the conclusions of the Study Group.[4] They are a result of the extensive deliberations the Study Group had undertaken between 2004 and 2006. They are a collective product by the members of the Study Group.

B. BACKGROUND

4. In the past half-century, the scope of international law has increased dramatically. From a tool dedicated to the regulation of formal diplomacy, it has expanded to deal with the most varied kinds of international activity, from trade to environmental protection, from human rights to scientific and technological cooperation. New multilateral institutions, regional and universal, have been set up in the fields of commerce, culture, security, development and so on. It is difficult to imagine today a sphere of social activity that would not be subject to some type of international legal regulation.

5. However, this expansion has taken place in an uncoordinated fashion, within specific regional or functional groups of States. Focus has been on solving specific problems rather than attaining general, law-like regulation. This reflects what sociologists have called "functional differentiation", the increasing specialization of parts of society and the related autonomization of those parts. It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.

6. The fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by "general international law" has become the field of operation for such specialist

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[4] The following members participated in the work of the Study Group during the 2006 session: Mr. M. Koskenniemi (Chair), Mr. A. Al-Marri, Mr. C. Chee, Mr. P. Comissario Afonso, Mr. R. Daoudi, Mr. C.P. Economides, Ms. P. Escarameia, Mr. G. Gaja, Mr. Z. Galicki, Mr. R.A. Kolodkin, Mr. W. Mansfield, Mr. M. Matheson, Mr. P.S. Rao, Ms. H. Xue.

systems as “trade law”, “human rights law”, “environmental law”, “law of the sea”, “European law” and even such highly specialized forms of knowledge as “investment law” or “international refugee law”, etc. - each possessing their own principles and institutions.

7. While the reality and importance of fragmentation cannot be doubted, assessments of the phenomenon have varied. Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a predominantly technical problem that has emerged naturally with the increase of international legal activity and may be controlled by the use of technical streamlining and coordination.[5] It is in order to assess the significance of the problem of fragmentation and, possibly, to suggest ways and means of dealing with it, that the Commission in 2002 established the Study Group to deal with the matter.

8. At the outset, the Commission recognized that fragmentation raises both institutional and substantive problems. The former have to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The

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[5] “Fragmentation” is a very frequently treated topic of academic writings and conferences today. Out of the various collections that discuss the diversification of the sources of international regulation particularly useful are Eric Loquin & Catherine Kessedjian (eds.), *La mondialisation du droit* (Paris: Litec, 2000); and Paul Schiff Berman, *The Globalization of International Law* (Aldershot: Ashgate, 2005). The activity of traditional organizations is examined in José Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005). Different perspectives of non-treaty law-making today are also presented in Rüdiger Wolfrum & Volker Röben (eds.), *Developments of International Law in Treaty-making* (Berlin: Springer, 2005) pp. 417-586 and Ronnie Lipschutz & Cathleen Vogel, “Regulation for the Rest of Us? Global Civil Society and the Privatization of Transnational Regulation”, in R.R. Hall & T.J. Bierstaker, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002) pp. 115-140. See also “Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle”, *New York Journal of International Law and Politics*, vol. 31 (1999) pp. 679-993; Andreas Zimmermann & Reiner Hoffmann, with assisting editor Hanna Goeters, *Unity and Diversity of International Law* (Berlin: Duncker & Humblot, 2006); Karel Wellens & Rosario Huesa Vinaixa (eds.), *L’influence des sources sur l’unité et la fragmentation du droit international* (Brussels: Bruylant, 2006 forthcoming). A strong plea for unity is contained in Pierre Marie Dupuy, “L’unité de l’ordre juridique internationale. Cours général de droit international public”, *Recueil des Cours …*, vol. 297 (2002). For more references, see Martti Koskenniemi & Päivi Leino, “Fragmentation of International Law. Postmodern Anxieties?”, *Leiden Journal of International Law*, vol. 15 (2002) pp. 553-579.

Commission has decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the substantive question - the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law. What are the substantive effects of specialization? How should the relationship between such "boxes" be conceived? More concretely, if the rules in two or more regimes conflict, what can be done about such conflicts?

9. Like the majority of academic commentators, the Commission has understood the subject to have both positive and negative sides, as attested to by its reformulation of the title of the topic: "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques. Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world. At the same time, it may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation. Although fragmentation may create problems, they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that may have arisen in the past.

10. The rationale for the Commission's treatment of fragmentation is that the emergence of new and special types of law, so-called "self-contained regimes" and geographically or functionally limited treaty-systems, creates problems of coherence in international law. New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of "environmental law", for example, is a response to growing concern over the state of the international environment. "Trade law" develops as an instrument to respond to opportunities created by comparative advantage in international economic relations. "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity". Each rule-complex or "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighbouring specialization. "Trade law" and "environmental law", for example, have highly specific objectives and rely on principles that

may often point in different directions. In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations become general and frequent, the unity of the law suffers.

11. It is quite important to note that such deviations do not emerge as legal-technical "mistakes". They reflect the differing pursuits and preferences of actors in a pluralistic (global) society. A law that would fail to articulate the experienced differences between the interests or values that appear relevant in particular situations or problem areas would seem altogether unacceptable. But if fragmentation is a "natural" development (indeed, international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it), there have likewise always been countervailing, equally natural processes leading in the opposite direction. For example, general international law has continued to develop through the application of the Vienna Convention on the Law of Treaties of 1969 (VCLT), customary law and "general principles of law recognized by civilized nations". The fact that a number of treaties reflect rules of general international law, and in turn, certain provisions of treaties enter into the corpus of general international law, is a reflection of the vitality and synergy of the system and the pull for coherence in the law itself.

12. The justification for the Commission's work on fragmentation has been in the fact that although fragmentation is inevitable, it is desirable to have a framework through which it may be assessed and managed in a legal-professional way. That framework is provided by the VCLT. One aspect that unites practically all of the new regimes (and certainly all of the most important ones) is that they claim binding force from and are understood by the relevant actors to be covered by the law of treaties. This means that the VCLT already provides a unifying frame for these developments. As the organ that once prepared the VCLT, the Commission is in a privileged position to analyse international law's fragmentation from that perspective.

13. In order to do that, the Commission's Study Group held it useful to have regard to the wealth of techniques in the traditional law for dealing with tensions or conflicts between legal rules and principles. What is common to these techniques is that they seek to establish

meaningful relationships between such rules and principles so as to determine how they should be used in any particular dispute or conflict. The following conclusions lay out some of the principles that should be taken account of when dealing with actual or potential conflicts between legal rules and principles.

C. CONCLUSIONS OF THE WORK OF THE STUDY GROUP

14. The conclusions reached in the work of the Study Group are as follows:

1. General

(1) *International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.

(2) In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[6] For that purpose the relevant relationships fall into two general types:

- *Relationships of interpretation*. This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.

[6] That two norms are *valid* in regard to a situation means that they each cover the facts of which the situation consists. That two norms are *applicable* in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.

- *Relationships of conflict*. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the VCLT.

(3) *The VCLT*. When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT and especially the provisions in its articles 31-33 having to do with the interpretation of treaties.

(4) *The principle of harmonization*. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.

2. The maxim *lex specialis derogat legi generali*

(5) *General principle*. The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards.[7] The source of the norm (whether treaty, custom or general

[7] For application in relation to provisions within a single treaty, see *Beagle Channel Arbitration (Argentina v. Chile)* ILR vol. 52 (1979) p. 141, paras. 36, 38 and 39; Case C-96/00, *Rudolf Gabriel*, Judgment of 11 July 2002, ECR (2002) I-06367, pp. 6398-6399, paras. 35-36 and p. 6404, para. 59; *Brannigan and McBride v. the United Kingdom*, Judgment of 28 May 1993, ECHR Series A (1993) No. 258, p. 57, para. 76; *De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984, ECHR Series A (1984) No. 77, p. 27, para. 60; *Murray v. the United Kingdom*, Judgment of 28 October 1994, ECHR Series A (1994) No. 300, p. 37, para. 98 and *Nikolova v. Bulgaria*, Judgment of 25 March 1999, ECHR 1999-II, p. 25, para. 69. For application between different instruments, see *Mavrommatis Palestine Concessions case, P.C.I.J. Series A*, No. 2 (1924) p. 31. For application between a treaty and non-treaty standards, *INA Corporation v. Government of the Islamic Republic of Iran*, Iran-US C.T.R. vol. 8, 1985-I, p. 378. For application between particular and general custom, see *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Merits)*

principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.[8]

(6) *Contextual appreciation*. The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant - i.e. whether it is the speciality or the time of emergence of the norm - should be decided contextually.

(7) *Rationale of the principle*. That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Functions of lex specialis*. Most of international law is dispositive. This means that special law may be used to apply, clarify, update or modify as well as set aside general law.

(9) *The effect of lex specialis on general law*. The application of the special law does not normally extinguish the relevant general law.[9] That general law will remain valid and

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I.C.J. Reports 1960, p. 6 at p. 44. The Court said: "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules."

[8] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) I.C.J. Reports 1986*, p. 14 at p. 137, para. 274, the Court said: "In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim."

[9] Thus, in the Nicaragua case, *ibid*. p. 14 at p. 95 para. 179 the Court noted: "It will … be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."

applicable and will, in accordance with the principle of harmonization under conclusion (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[10]

(10) *Particular types of general law*. Certain types of general law[11] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable as set out in conclusions (32), (33), (40) and (41), below.[12] Moreover, there are other considerations that may provide a reason for concluding that a general law would prevail in which case the *lex specialis* presumption may not apply. These include the following:

- Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable;

- Whether the application of the special law might frustrate the *purpose* of the general law;

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[10] In the *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, I.C.J. Reports 1996*, p. 240, para. 25, the Court described the relationship between human rights law and the laws of armed conflict in the following way: "… the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant … The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".

[11] There is no accepted definition of "general international law". For the purposes of these conclusions, however, it is sufficient to define what is "general" by reference to its logical counterpart, namely what is "special". In practice, lawyers are usually able to operate this distinction by reference to the context in which it appears.

[12] In the *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, (Ireland v. United Kingdom)* (Final Award, 2 July 2003) ILR vol. 126 (2005) p. 364, para. 84, the tribunal observed: "[e]ven then, [the OSPAR Convention] must defer to the relevant *jus cogens* with which the parties' *lex specialis* may be inconsistent."

- Whether third party beneficiaries may be negatively affected by the special law; and

- Whether the balance of rights and obligations, established in the general law would be negatively affected by the special law.

3. Special (self-contained) regimes

(11) *Special ("self-contained") regimes as lex specialis*. A group of rules and principles concerned with a particular subject matter may form a special regime ("Self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

(12) Three types of special regime may be distinguished:

- Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the ILC's Draft Articles on State Responsibility.[13]

- Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of

[13] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76. In the *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) I.C.J. Reports 1980* at p. 40, para. 86, the Court said: "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse."

the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law).[14]

- Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.

(13) *Effect of the "speciality" of a regime*. The significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.

(14) *The relationship between special regimes and general international law*. A special regime may prevail over general law under the same conditions as *lex specialis* generally (see conclusions (8) and (10) above).

(15) *The role of general law in special regimes: Gap-filling*. The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.[15]

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[14] See *Case of the S.S. "Wimbledon"*, P.C.I.J. Series A, No. 1 (1923) pp. 23-4, noting that the provisions on the Kiel Canal in the Treaty of Versailles of 1919: "… differ on more than one point from those to which other internal navigable waterways of the [German] Empire are subjected … the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways … is limited to the Allied and Associated Powers alone … The provisions of the Kiel Canal are therefore self-contained".

[15] Thus, in *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57, the European Court of Human Rights canvassed the relationship between the European Convention on Human Rights and Fundamental Freedoms and general international law as follows: "the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into

(16) *The role of general law in special regimes: Failure of special regimes*. Special regimes or the institutions set up by them may fail. Failure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfil the purposes allotted to them, persistent non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. Whether a regime has "failed" in this sense, however, would have to be assessed above all by an interpretation of its constitutional instruments. In the event of failure, the relevant general law becomes applicable.

4. Article 31 (3) (c) VCLT

(17) *Systemic integration*. Article 31 (3) (c) VCLT provides one means within the framework of the VCLT, through which relationships of interpretation (referred to in conclusion (2) above) may be applied. It requires the interpreter of a treaty to take into account "any relevant rules of international law applicable in relations between the

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account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part".

Similarly in *Korea - Measures Affecting Government Procurement* (19 January 2000) WT/DS163/R, para. 7.96, the Appellate Body of the WTO noted the relationship between the WTO Covered agreements and general international law as follows: "We take note that Article 3 (2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary international law rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."

parties". The article gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

(18) *Interpretation as integration in the system.* Systemic integration governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of articles 31-32 VCLT. These paragraphs describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation. In many cases, the issue of interpretation will be capable of resolution with the framework of the treaty itself. Article 31 (3) (c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.[16]

(19) *Application of systemic integration.* Where a treaty functions in the context of other agreements, the objective of systemic integration will apply as a presumption with both positive and negative aspects:

(*a*) The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms;[17]

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[16] In the *Oil Platforms* case *(Iran v. United States of America) (Merits) I.C.J. Reports 2003*, at para. 41, the Court spoke of the relations between a bilateral treaty and general international law by reference to article 31 (3) (c) as follows: "Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law … The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty."

[17] *Georges Pinson* case (France/United Mexican States) Award of 13 April 1928, UNRIAA, vol. V, p. 422. It was noted that parties are taken to refer to general principles of international law for questions which the treaty does not itself resolve in express terms or in a different way.

(*b*) In entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.[18]

Of course, if any other result is indicated by ordinary methods of treaty interpretation that should be given effect, unless the relevant principle were part of *jus cogens.*

(20) *Application of custom and general principles of law*. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31 (3) (c) especially where:

(*a*) The treaty rule is unclear or open-textured;

(*b*) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;

(*c*) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19) (a) above, to look for rules developed in another part of international law to resolve the point.

(21) *Application of other treaty rules*. Article 31 (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

(22) *Inter-temporality*. International law is a dynamic legal system. A treaty may convey whether in applying article 31 (3) (c) the interpreter should refer only to rules of

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[18] In the *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections) I.C.J. Reports 1957*, p. 125 at p. 142, the Court stated: "It is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."

international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law.[19]

(23) *Open or evolving concepts*. Rules of international law subsequent to the treaty to be interpreted may be taken into account especially where the concepts used in the treaty are open or evolving. This is the case, in particular, where: (a) the concept is one which implies taking into account subsequent technical, economic or legal developments;[20]

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[19] The traditional rule was stated by Judge Huber in the *Island of Palmas* case (*the Netherlands/United States of America*) Award of 4 April 1928, UNRIAA, vol. II, p. 829, at p. 845, in the context of territorial claims: "… a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or fails to be settled … The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestations, shall follow the conditions required by the evolution of law".

[20] In the *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia) I.C.J. Reports 1997*, p. 7 at pp. 67-68, para. 112, the Court observed: "By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan."

In the Arbitration regarding the Iron Rhine (ÏJZEREN RIJN) Railway (Belgium v. Netherlands) of 24 May 2005, a conceptual or generic term was not in issue but a new technical development relating to the operation and capacity of a railway. Evolutive interpretation was used to ensure the effective application of the treaty in terms of its object and purpose. The Tribunal observed in paragraphs 82 and 83: "The object and purpose of the 1839 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was 'commercial communication'. It necessarily follows, even in the absence of specific wording, that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the Parties, remains in principle applicable to the adaptation and modernisation requested by Belgium", Text of award available on >http://www.pca-cpa.org>. (last visited on 14 July 2006).

(b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.[21]

5. Conflicts between successive norms

(24) *Lex posterior derogat legi priori*. According to article 30 VCLT, when all the parties to a treaty are also parties to an earlier treaty on the same subject, and the earlier treaty is not suspended or terminated, then it applies only to the extent its provisions are compatible with those of the later treaty. This is an expression of the principle according to which "later law supersedes earlier law".

(25) *Limits of the "lex posterior" principle*. The applicability of the *lex posterior* principle is, however, limited. It cannot, for example, be automatically extended to the case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty. In such cases, as provided in article 30 (4) VCLT, the State that is party to two incompatible treaties is bound *vis-à-vis* both of its treaty parties separately. In case it cannot fulfil its obligations under both treaties, it risks being responsible for the

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[21] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 31, para. 53. The Court said that the concept of "sacred trust" was by definition evolutionary. "The parties to the Covenant must consequently be deemed to have accepted [it] as such. That it is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half a 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 international law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."

In the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) I.C.J. Reports 1997*, pp. 76-80, paras. 132-147, the ICJ noted that: "[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them … [in] … the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan …".

breach of one of them unless the concerned parties agree otherwise. In such case, also article 60 VCLT may become applicable. The question which of the incompatible treaties should be implemented and the breach of which should attract State responsibility cannot be answered by a general rule.[22] Conclusions (26)-(27) below lay out considerations that might then be taken into account.

(26) *The distinction between treaty provisions that belong to the same "regime" and provisions in different "regimes"*. The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. form part of the same regime). In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization. However, the substantive rights of treaty parties or third party beneficiaries should not be undermined.

(27) *Particular types of treaties or treaty provisions*. The *lex posterior* presumption may not apply where the parties have intended otherwise, which may be inferred from the nature of the provisions or the relevant instruments, or from their object and purpose. The limitations that apply in respect of the *lex specialis* presumption in conclusion (10) may also be relevant with respect to the *lex posterior*.

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[22] There is not much case-law on conflicts between successive norms. However, the situation of a treaty conflict arose in *Slivenko and others v. Latvia* (Decision as to the admissibility of 23 January 2002) ECHR 2002-II, pp. 482-483, paras. 60-61, in which the European Court of Human Rights held that a prior bilateral treaty between Latvia and Russia could not be invoked to limit the application of the European Convention on Human Rights and Fundamental Freedoms: "It follows from the text of Article 57 (1) of the [European Convention on Human Rights], read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention … In the Court's opinion, the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions."

(28) *Settlement of disputes within and across regimes*. Disputes between States involving conflicting treaty provisions should be normally resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had, where appropriate, to other available means of dispute settlement. When the conflict concerns provisions within a single regime (as defined in conclusion (26) above), then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen.

(29) *Inter se agreements*. The case of agreements to modify multilateral treaties by certain of the parties only (*inter se* agreements) is covered by article 41 VCLT. Such agreements are an often used technique for the more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more effective or more far-reaching measures for the realization of the object and purpose of the original treaty. *Inter se* agreements may be concluded if this is provided for by the original treaty or it is not specifically prohibited and the agreement: "(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (art. 41 (1) (b) VCLT).

(30) *Conflict clauses*. When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that:

(*a*) They may not affect the rights of third parties;

(*b*) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;

(*c*) They should, as appropriate, be linked with means of dispute settlement.

6. Hierarchy in international law: *Jus cogens*, Obligations *erga omnes*, Article 103 of the Charter of the United Nations

(31) *Hierarchical relations between norms of international law.* The main sources of international law (treaties, custom, general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*.[23] Drawing analogies from the hierarchical nature of domestic legal system is not generally appropriate owing to the differences between the two systems. Nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or as expressive of "elementary considerations of humanity"[24] or "intransgressible principles of international law".[25] What effect such designations may have is usually determined by the relevant context or instrument in which that designation appears.

(32) *Recognized hierarchical relations by the substance of the rules*: *Jus cogens*. A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, Article 53 VCLT), that is, norms "accepted and recognized by the international community of States as a whole from which no derogation is permitted".[26]

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[23] In addition, Article 38 (d) mentions "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[24] *Corfu Channel case (United Kingdom v. Albania) I.C.J. Reports 1949*, p. 22.

[25] *Legality of the Threat or Use of Nuclear Weapons case*, Advisory Opinion, *I.C.J. Reports 1996*, para. 79.

[26] Article 53 VCLT: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

(33) *The content of jus cogens*. The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination.[27] Also other rules may have a *jus cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted.

(34) *Recognized hierarchical relations by virtue of a treaty provision*: *Article 103 of the Charter of the United Nations*. A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the United Nations Charter by virtue of which "In the event of a conflict between the obligations of the Members of the United Nations under the … Charter and their obligations under any other international agreement, their obligations under the … Charter shall prevail."

(35) *The scope of Article 103 of the Charter*. The scope of Article 103 extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council.[28] Given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law.

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[27] *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to article 40 of the draft articles on State Responsibility, paras. (4)-(6). See also commentary to article 26, para. (5). See also *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo/Rwanda) I.C.J. Reports 2006*, para. 64.

[28] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures) I.C.J. Reports 1998*, para. 42 and *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. the United Kingdom) (Provisional Measures) I.C.J. Reports 1992*, paras. 39-40.

(36) *The status of the United Nations Charter*. It is also recognized that the United Nations Charter itself enjoys special character owing to the fundamental nature of some of its norms, particularly its principles and purposes and its universal acceptance.[29]

(37) *Rules specifying obligations owed to the international community as a whole: Obligations erga omnes.* Some obligations enjoy a special status owing to the universal scope of their applicability. This is the case of obligations *erga omnes*, that is obligations of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal interest in the protection of the rights involved.[30] Every State may invoke the responsibility of the State violating such obligations.[31]

(38) *The relationship between jus cogens norms and obligations erga omnes*. It is recognized that while all obligations established by *jus cogens* norms, as referred to in conclusion (33) above, also have the character of *erga omnes* obligations, the reverse is

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[29] See Article 2 (6) of the Charter of the United Nations.

[30] In the words of the International Court of Justice: "… an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J. Reports 1970*, p. 3 at p. 32, para. 33. Or, in accordance with the definition, by the Instutut de droit international, an obligation *erga omnes* is "[a]n obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action". Institut de droit international, "Obligations and Rights *Erga Omnes* in International Law", Krakow Session, *Annuaire de l'Institut de droit international* (2005), article 1.

[31] *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), Draft Articles on State Responsibility, Article 48 (1) (b).

not necessarily true.[32] Not all *erga omnes* obligations are established by peremptory norms of general international law. This is the case, for example, of certain obligations under "the principles and rules concerning the basic rights of the human person",[33] as well as of some obligations relating to the global commons.[34]

(39) *Different approaches to the concept of obligations erga omnes.* The concept of *erga omnes* obligations has also been used to refer to treaty obligations that a State owes to all other States parties (obligations *erga omnes partes*)[35] or to non-party States as third

[32] According to the International Court of Justice "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character." *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J. Reports 1970*, p. 3 at p. 32, para. 34. See also *Case concerning East Timor (Portugal v. Australia) I.C.J. Reports 1995*, p. 90 at p. 102, para. 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion, I.C.J. Reports 2004*, paras 155 and 159 (including as *erga omnes* obligations "certain … obligations under international humanitarian law" as well as the right of self-determination). For the prohibition of torture as an *erga omnes* obligation, see *Prosecuto v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, ILR, vol. 121 (2002), p. 260, para. 151 and for genocide, see *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595 at para. 31, and *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo/Rwanda) I.C.J. Reports 2006*, at para. 64.

[33] *Barcelona Traction case, ibid*. This would include common article 1 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, all of 12 August 1949.

[34] The obligations are illustrated by article 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, United Nations, *Treaty Series*, vol. 610, p. 205 and article 136 of the United Nations Convention on the Law of the Sea, United Nations, *Treaty Series*, vol. 1834, p. 396.

[35] Institut de droit international, "Obligations *Erga Omnes* in International Law", Krakow Session, *Annuaire de l'Institut de droit international* (2005), article 1 (b).

party beneficiaries. In addition, issues of territorial status have frequently been addressed in *erga omnes* terms, referring to their opposability to all States.[36] Thus, boundary and territorial treaties have been stated to "represent[] a legal reality which necessarily impinges upon third States, because they have effect *erga omnes*".[37]

(40) *The relationship between jus cogens and the obligations under the United Nations Charter.* The United Nations Charter has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24 (2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*.

(41) *The operation and effect of jus cogens norms and Article 103 of the Charter*:

(*a*) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void;

(*b*) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict.

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[36] "In my view, when a title to an area of maritime jurisdiction exists - be it to a continental shelf or (*arguendo*) to a fishery zone - it exists *erga omnes*, i.e. is opposable to all States under international law", Separate Opinion of Judge Oda, *Case concerning maritime delimitation in the area between Greenland and Jan Mayen* (*Denmark v. Norway) Judgment, I.C.J. Reports 1993*, p. 38 at p. 100, para. 40. See likewise, Separate Opinion by Judge De Castro, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 165: "… a legal status - like the *iura in re* with which it is sometimes confused - is effective *inter omnes* and *erga omnes*". See also Dissenting Opinion by Judge Skubiszewski, in *Case concerning East Timor (Portugal v. Australia) I.C.J. Reports 1995*, p. 90 at p. 248, paras. 78-79.

[37] *Government of the State of Eritrea v. the Government of the Republic of Yemen (Phase one: Territorial sovereignty and scope of the dispute)*, Arbitration Tribunal, 9 October 1998, ILR, vol. 114 (1999), p. 1 at p. 48, para. 153.

(42) *Hierarchy and the principle of harmonization*. Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4) above. In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.

Annex 687

"Text of the Guide to Practice on Reservations to Treaties", Report of the International Law Commission on the work of its sixty-third session, Yearbook of the International Law Commission, A/66/10/ADD.1, *International Law Commission*, 26 April–3 June and 4 July–12 August 2011, pages 189-198, 249-252, 317-325

A/CN.4/SER.A/2011/Add.1 (Part 3)

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Volume II
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Report of the Commission to the General Assembly on the work of its sixty-third session (Addendum)

UNITED NATIONS
New York and Geneva, 2018

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.*

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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international organization and the State or international organization that has accepted the reservation and even, in certain circumstances, among all States or international organizations parties to the treaty. It goes without saying that to call the legal consequences into question *a posteriori* would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is certainly true where acceptance has been made expressly: even if there is no doubt that a State's silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more obvious when the State's position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.

(4) The dialectical relationship between objection and acceptance, established and affirmed by article 20, paragraph 5, of the Vienna Conventions, and the imposition of controls on the objection mechanism with the aim of stabilizing the treaty relations that have been disturbed, in a sense, by the reservation necessarily imply that acceptance (whether tacit or express) is final. This is the principle firmly stated in guideline 2.8.13 in the interests of the certainty of treaty-based legal relations.

2.9 *Formulation of reactions to interpretative declarations*

2.9.1 *Approval of an interpretative declaration*

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

Commentary

(1) It appears that practice with respect to positive reactions to interpretative declarations is virtually non-existent, as if States considered it prudent not to expressly approve an interpretation given by another party. This may be due to the fact that article 31, paragraph 3 (*a*), of the Vienna Conventions provides that, for the interpretation of a treaty:

> 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.

(2) The few instances of express reactions that can be found combine elements of approval and disapproval or have a conditional character, subordinating approval of the initial interpretation to the interpretation given to it by the reacting State.

(3) For example, the *Multilateral Treaties Deposited with the Secretary-General* include the text of a reaction by Israel to a declaration submitted by the Arab Republic of Egypt[1368] concerning the United Nations Convention on the Law of the Sea that is drafted in a positive fashion, even though it is probably an expression of disagreement or a warning:

> The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.
>
> In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.
>
> It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration.[1369]

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the United Nations Convention on the Law of the Sea, assuming that it is itself compatible with the Israeli interpretation. The Egyptian interpretation is, in a manner of speaking, confirmed by the reasoned "approbatory declaration" made by Israel.

(4) Another example that can be cited is the reaction of the Government of Norway to a declaration made by France concerning the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), published by the Secretary-General of the IMO:

> [T]he Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible.[1370]

It appears that this statement may be interpreted to mean that Norway accepts the French declaration insofar as (and on the condition that) it does not constitute a reservation.

(5) Even though examples are lacking, it is clear that a situation may arise in which a State or an international organization simply expresses its agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement

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[1368] "The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general régime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general régime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait" (*Multilateral Treaties* … (footnote 37 above), chap. XXI.6). The Peace Treaty was signed in Washington, D.C. on 26 March 1979 (United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100).

[1369] *Multilateral Treaties* … (footnote 37 above), chap. XXI.6. In fact, this statement expresses approval of both the classification and the substance of the Egyptian declaration; given the wording of these declarations, one may wonder whether they might not have been made as a result of a diplomatic agreement.

[1370] United Nations, *Treaty Series*, vol. 1341, p. 330; IMO, *Status of Multilateral Conventions and Instruments* … (footnote 693 above), p. 108 (footnote 1).

between the respective interpretations of two or more parties corresponds to the situation contemplated in article 31, paragraph 3 (*a*), of the Vienna Conventions,[1371] it being unnecessary at the present stage to specify the weight that should be given to this "subsequent agreement between the parties regarding the interpretation of the treaty".[1372]

(6) It is sufficient to note that such agreement with an interpretative declaration is not comparable to acceptance of a reservation, if only because under article 20, paragraph 4, of the Vienna Conventions such acceptance entails the entry into force of the treaty for the reserving State—which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, the Commission thought it would be wise to use different terms. The term "approval", which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,[1373] is used to denote a positive reaction to an interpretative declaration.

2.9.2 *Opposition to an interpretative declaration*

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization disagrees with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

Commentary

(1) Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional as positive reactions, are nonetheless sporadic. The reaction of the United Kingdom of Great Britain and Northern Ireland to the interpretative declaration of the Syrian Arab Republic[1374] in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

> The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act.[1375]

(2) The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on the Continental Shelf, concluded in Geneva in 1958, Canada declared "[t]hat it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1".[1376]

(3) The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of "interpretative declarations", which also prompted an onslaught of negative reactions by other contracting States. Tunisia, for example, in its communication of 22 February 1994, made it known that

> in that declaration [of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.
>
> The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf.[1377]

Another clear-cut example can be found in the statement of Italy regarding the interpretative declaration of India in respect of the United Nations Convention on the Law of the Sea:

> Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which "the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them". According to the declaration made by Italy upon ratification, this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it.[1378]

(4) Examples can also be found in the practice relating to conventions adopted within the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the Framework Convention for the protection of national minorities of 1995, in which they specified the meaning to be ascribed to the term "national minority", declared that it

> considers that none [State?] is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the protection of national minorities, a definition of the term "national minority", which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to

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[1371] See paragraph (1) above.

[1372] See section 4.7 below.

[1373] See Salmon (ed.), *Dictionnaire de droit international public* (footnote 1013 above), pp. 74–75 (*Approbation*).

[1374] This declaration reads as follows: "The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

The expression 'the threat or use of force' used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests" (*Multilateral Treaties …* (footnote 37 above), chap. XXIII.1).

[1375] *Ibid.*

[1376] *Ibid.*, chap. XXI.4. The German interpretative declaration reads as follows: "[T]he Federal Republic of Germany declares with reference to article 5, paragraph 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government, article 5, paragraph 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice" (*ibid.*).

[1377] *Ibid.*, chap. XXI.6. The relevant part of the Maltese declaration reads as follows: "The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured" (*ibid.*).

[1378] *Ibid.*

the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the protection of national minorities.[1379]

(5) Furthermore, the example of the statement by Italy regarding the interpretative declaration of India[1380] shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is "more accurate". This practice of "constructive" refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal:

> The Government of Italy, in expressing its objection *vis-à-vis* the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenor that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes.[1381]

Germany and Singapore, which had made interpretative declarations comparable to that of Italy, remained silent in respect of declarations interpreting the Basel Convention differently without deeming it necessary to react in the same way as the Italian Government.[1382]

(6) The practice also evoked reactions that, *prima facie*, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation.[1383] The conditions set by Austria, Germany and Turkey for consenting to the interpretative declaration of Poland in respect of the European Convention on Extradition of 13 December 1957[1384] offer a good example of this. Germany, for example, considered

> the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1 (*a*), of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a state other than that in respect of which asylum has been granted.[1385]

(7) A number of States had a comparable reaction to the declaration made by Egypt upon ratification of the International Convention for the Suppression of Terrorist Bombings of 1997.[1386] Considering that the declaration by the Arab Republic of Egypt "aims … to broaden the scope of the Convention"—which excludes assigning the status of "reservation"[1387]—the German Government declared that it

> is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany.[1388]

(8) In the context of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), a declaration by Canada concerning Arctic waters also triggered conditional reactions.[1389] France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland declared that they

> take[ ] note of this declaration by Canada and consider[ ] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations Convention on the Law of the Sea. In particular, the … Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.[1390]

(9) The declaration made by the Czech Republic further to the interpretative declaration of the Federal Republic of Germany[1391] in respect of Part X of the United Nations Convention on the Law of the Sea should be viewed

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[1379] United Nations, *Treaty Series*, vol. 2152, p. 297; Council of Europe, *European Treaty Series*, No. 157 (available from http://conventions.coe.int).

[1380] See paragraph (3) above.

[1381] *Multilateral Treaties* … (footnote 37 above), chap. XXVII.3.

[1382] On the question of "silence", see guideline 2.9.9 and commentary thereto.

[1383] This practice coincides with the practice described above of partial or conditional approval (see paragraphs (3)–(5) of the commentary to guideline 2.9.1).

[1384] Declaration of 15 June 1993: "The Republic of Poland declares, in accordance with paragraph 1 (*a*) of Article 6, that it will under no circumstances extradite its own nationals. The Republic of Poland declares that, for the purposes of this Convention, in accordance with paragraph 1 (*b*) of Article 6, persons granted asylum in Poland will be treated as Polish nationals" (United Nations, *Treaty Series*, vol. 1862, p. 474; Council of Europe, *European Treaty Series*, No. 24 (available from http://conventions.coe.int)).

[1385] United Nations, *Treaty Series*, vol. 1862, p. 476; Council of Europe, *European Treaty Series*, No. 24. See also the identical reaction of Austria to the interpretative declarations of Romania (*Treaty Series*, vol. 2045, pp. 198–202; *European Treaty Series*, No. 24).

[1386] The Egyptian "reservation" is formulated as follows: "The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, para. 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law" (*Multilateral Treaties* … (footnote 37 above), chap. XVIII.9).

[1387] See paragraphs (9)–(10) of the commentary to guideline 1.5.

[1388] *Multilateral Treaties* … (footnote 37 above), chap. XVIII.9. See also comparable declarations by the United States of America (*ibid.*), the Netherlands (*ibid.*), the United Kingdom of Great Britain and Northern Ireland (*ibid.*) and Canada (*ibid.*).

[1389] For the text of the Canadian declaration, see IMO, *Status of Multilateral Conventions and Instruments* … (footnote 693 above), p. 106.

[1390] *Ibid.*

[1391] The relevant part of the German declaration reads as follows: "As to the regulation of the freedom of transit enjoyed by land-locked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, paragraph 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the land-locked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany[, the said right] is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure" (*Multilateral Treaties* … (footnote 37 above), chap. XXI.6).

from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or recharacterizing the declaration as a reservation:

> The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention.[1392]

(10) Such "conditional acceptances" do not constitute "approvals" within the meaning of guideline 2.9.1 and must be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

(11) All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be an out and out rejection of the interpretation formulated in the declaration, a counterproposal for an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was in turn interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation. In this connection, then, a negative reaction is somewhat comparable to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against the establishment of an interpretation of the treaty that could be used against it, and against which it must speak out, as it considers it to be inappropriate.[1393]

(12) This is why, just as it preferred the term "approval" to "acceptance" to designate a positive reaction to an interpretative declaration,[1394] the Commission decided to use the term "opposition",[1395] rather than "objection", to refer to a negative reaction, even though this word has sometimes been used in practice.[1396]

(13) The Commission considered how it might most appropriately designate oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives "incompatible" and "inconsistent", choosing instead the word "alternative" so as not to constrict the definition to oppositions to interpretative declarations unduly.

(14) Adhering strictly to the subject matter of the second part, the definition selected avoids any reference to the possible effects of either interpretative declarations themselves or reactions to them. Guidelines are formulated in respect of both of these in Part 4 of the Guide to Practice.[1397]

(15) The Commission also found that, contrary to the approach it had taken when drafting guideline 2.6.1 on the definition of objections to reservations, it was not advisable to include in the definition of oppositions to interpretative declarations a reference to the intention of the author of the reaction, which was felt to be too subjective.

2.9.3 *Recharacterization of an interpretative declaration*

1. "Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization purports to treat the declaration as a reservation.

2. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

Commentary

(1) Even though in certain respects the recharacterization of an interpretative declaration as a reservation resembles an opposition to the initial interpretation, it constitutes a sufficiently distinct manifestation of a divergence of opinion to warrant devoting a separate guideline to it. This is the subject matter of guideline 2.9.3.

(2) As the definitions of reservations and interpretative declarations make clear, the naming or phrasing of a unilateral statement by its author as a "reservation" or an "interpretative declaration" is irrelevant for the purposes of characterizing such a unilateral statement,[1398] even if it provides a significant clue[1399] as to its nature. This principle is conveyed by the phrase "however phrased or named" in guideline 1.1 (replicating article 2, paragraph 1 (*d*), of the Vienna Conventions).

(3) What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements

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[1392] *Ibid.*

[1393] In this connection, see A. McNair, *The Law of Treaties*, Oxford, Clarendon, 1961, pp. 430–431.

[1394] See guideline 2.9.1.

[1395] The definition of "opposition" thus understood is very similar to the definition of the term "protestation" as provided in the *Dictionnaire de droit international public*: "Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties" (Salmon (ed.) (footnote 1013 above), p. 907).

[1396] See, for example, the reaction of Italy to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (See *Multilateral Treaties* … (footnote 37 above), chap. XXVII.3). The reaction of Canada to the interpretative declaration of the Federal Republic of Germany to the Convention on the Continental Shelf (*ibid.*, chap. XXI.4) was also registered in the "objection" category by the Secretary-General.

[1397] See, in particular, guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration).

[1398] See also guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

[1399] In this connection, guideline 1.3.2 (Phrasing and name) provides that: "The phrasing or name of a unilateral statement provides an indication of the purported legal effect."

which their authors call interpretative, and to expressly regard them as reservations.[1400] These reactions, which might be called "recharacterizations" to reflect their purpose, in no way resemble approval or opposition, since they (obviously) do not refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

(4) There are numerous examples of this phenomenon:

(*a*) The reaction of the Netherlands to the interpretative declaration of Algeria in respect of article 13, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights of 1966:

> In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it.[1401]

(*b*) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant of 1966, which, after lengthy statements of reasons, conclude:

> The Government of … therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.
>
> The Government of … therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan.[1402]

(*c*) The reactions of many States to the declaration made by the Philippines with respect to the United Nations Convention on the Law of the Sea of 1982:

> The … considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof.[1403]

(*d*) The recharacterization formulated by Mexico, which considered that

> the third declaration [formally classified as interpretative] submitted by the Government of the United States of America … constitutes a unilateral claim to justification, not envisaged in the Convention [the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, of 1988], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention.[1404]

(*e*) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the rights of the child of 20 November 1989, "adopt any legislative or statutory decision that conflicts with the Tunisian Constitution":

> The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [*sic*] of article 4.[1405]

(*f*) The reactions of 19 States to the declaration made by Pakistan with regard to the International Convention for the Suppression of Terrorist Bombings of 1997, whereby Pakistan specified that "nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination":

> The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose.[1406]

(*g*) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession to the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents of 1973, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

> The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia.[1407]

(*h*) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the Convention on the Political Rights of Women of 1953 could only be implemented in accordance with the Constitution of Bangladesh:

> In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.

[1400] Nor do the tribunals or treaty monitoring bodies hesitate to recharacterize an interpretative declaration as a reservation (see paragraphs (5)–(7) of the commentary to guideline 1.3.2).

[1401] *Multilateral Treaties* … (footnote 37 above), chap. IV.3. See also the objection of Portugal to the declaration of Algeria (*ibid.*) and the objection of the Netherlands to the declaration of Kuwait (*ibid.*).

[1402] *Ibid.* See also the objections registered by Denmark (*ibid.*), Finland (*ibid.*), France (*ibid.*), Latvia (*ibid.*), the Netherlands (*ibid.*), Norway (*ibid.*), Spain (*ibid.*), Sweden (*ibid.*) and the United Kingdom of Great Britain and Northern Ireland (*ibid.*).

[1403] Belarus, *ibid.*, chap. XXI.6; see also the reactions similar in letter or in spirit from Australia, Bulgaria, the Russian Federation and Ukraine (*ibid.*).

[1404] *Ibid.*, chap. VI.19.

[1405] *Ibid.*, chap. IV.11.

[1406] *Ibid.*, chap. XVIII.9. See the reactions similar in letter or in spirit from Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States (*ibid.*). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (*ibid.*).

[1407] *Ibid.*, chap. XVIII.7.

The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted.[1408]

(5) These examples show that recharacterization consists of considering that a unilateral statement submitted as an "interpretative declaration" is in reality a "reservation", with all the legal effects that this entails. Thus, recharacterization seeks to identify the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the "recharacterizing" State or organization. As a general rule, such declarations, which are usually extensively reasoned,[1409] are based essentially on the criteria for distinguishing between reservations and interpretative declarations.[1410]

(6) These recharacterizations are "attempts", proposals made with a view to qualifying as a reservation a unilateral statement which its author has submitted as an interpretative declaration and to imposing on it the legal status of a reservation. However, it should be understood that a "recharacterization" does not in and of itself determine the status of the unilateral statement in question. A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority. The last phrase of paragraph 1 of guideline 2.9.3 ("whereby the former State or organization purports to treat the declaration as a reservation") clearly establishes the subjective nature of such a position, which does not bind either the author of the initial declaration or the other contracting or concerned parties.

(7) The second paragraph of guideline 2.9.3 refers the reader to guidelines 1.3 to 1.3.3, which indicate the criteria for distinguishing between reservations and interpretative declarations and the method of implementing them.

(8) Even though contracting States and international organizations are free to react to the interpretative declarations of other parties, which is why paragraph 2 is worded in the form of a recommendation, as evidenced by the conditional verb "should", they are taking a risk if they fail to follow these guidelines, which should guide the position of any decision-making body competent to give an opinion on the matter.

2.9.4 *Right to formulate approval or opposition, or to recharacterize*

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting organization and by any State or any international organization that is entitled to become a party to the treaty.

Commentary

(1) In keeping with the basic principle of consensualism, guideline 2.9.4 conveys the wide range of possibilities open to States and international organizations in reacting to an interpretative declaration, whether they accept it, oppose it or consider it to be an actual reservation.

(2) With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty, and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame when the declarations themselves are not, as a general rule (and if the treaty does not otherwise provide), subject to any particular time frame.[1411]

(3) Moreover, and here reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)[1412] and that the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated by contracting States or contracting organizations (and most likely no effect at all so long as the author State or international organization has not expressed its consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted the communication of Ethiopia of its opposition to the interpretative declaration formulated by the Yemen Arab Republic with respect to the United Nations Convention on the Law of the Sea, even though Ethiopia had not ratified the Convention.[1413]

2.9.5 *Form of approval, opposition and recharacterization*

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

Commentary

(1) While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard[1414] but that any legal effects that they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions.

[1408] *Ibid.*, chap. XVI.1. See also the identical declaration by Norway (*ibid.*).

[1409] For a particularly striking example, see the reactions to the interpretative declaration of Pakistan in relation to the International Covenant on Economic, Social and Cultural Rights (see paragraph (4) (*b*) above and *Multilateral Treaties* … (footnote 37 above), chap. IV.3).

[1410] See guidelines 1.3–1.3.3.

[1411] See paragraphs (21)–(32) of the commentary to guideline 1.2 and also guideline 2.4.4 and commentary thereto.

[1412] See paragraph (4) of the commentary to guideline 2.9.5.

[1413] See *Multilateral Treaties* … (footnote 37 above), chap. XXI.6.

[1414] See paragraph (4) below.

(2) Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at the present stage,[1415] it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerably probative value when they contain recognition by a party of its own obligations under an instrument.[1416]

(3) In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which

> contribute usefully to the settlement [of a dispute]. Statements will be even more useful to the interpreter when there is no dispute, but only a problem of interpretation.[1417]

(4) Notwithstanding the undeniable usefulness of reactions to interpretative declarations not only for the interpreter or judge but also in enabling the other States and international organizations concerned to determine their own position with respect to the declaration, the Vienna Convention does not require that such reactions be communicated. As has already been indicated in the commentary to guideline 2.4.1 on the form of interpretative declarations:

> The rules governing the form and communication of reservations cannot … be purely and simply transposed to simple interpretative declarations, which may be formulated orally, and it would thus be paradoxical to insist that they be formally communicated to the other States or international organizations concerned.[1418]

(5) There is no reason to take a different approach with respect to reactions to such interpretative declarations, and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to formulate the reaction in writing in order to meet the requirements of legal security and ensure notification of the reaction. This alternative does not leave room for any intermediate solutions. Accordingly, the Commission was of the view that the word "preferably" was more appropriate than the expression "to the extent possible", used in the text of guidelines 2.1.2 (Statement of reasons for reservations), 2.6.9 (Statement of reasons for objections) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), which might convey the idea that such intermediate solutions existed.

(6) The Commission adopted guideline 2.9.5 in the form of a simple recommendation addressed to States and international organizations: it does not reflect a binding legal norm but conveys what the Commission considers to be, in most cases, the real interests of the contracting States or contracting organizations, or of any State or international organization that is entitled to become a party to a treaty in respect of which an interpretative declaration has been made.[1419] It goes without saying—as indicated by the use of the conditional ("should")—that such entities (States or international organizations) are still free simply to formulate an interpretative declaration, if that is what they prefer.

(7) Guideline 2.9.5 corresponds to guideline 2.4.1, which recommends that the authors of interpretative declarations formulate them in writing.

2.9.6 *Statement of reasons for approval, opposition and recharacterization*

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

Commentary

(1) For the same reasons that, in its view, made it preferable to formulate interpretative declarations in writing,[1420] the Commission adopted guideline 2.9.6, which recommends that States and international organizations entitled to react to an interpretative declaration state their reasons for an approval, opposition or recharacterization. This recommendation is modelled on those adopted, for example, with respect to statements of reasons for reservations[1421] and objections to reservations.[1422]

(2) Moreover, as may be seen from the practice described above,[1423] States generally take care to explain, sometimes in great detail, the reasons for their approval, opposition or recharacterization. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue".

(3) The Commission wondered, however, whether the recommendation to provide a statement of reasons ought to be extended to cover the approval of an interpretative declaration. Besides the fact that practice in the matter is extremely rare,[1424] it may be assumed that approvals are formulated for the same reasons that prompted

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[1415] See, in particular, guidelines 4.7.1, paragraph 2, and 4.7.3.

[1416] *Advisory Opinion of 11 July 1950, International Status of South-West Africa* ... (see footnote 167 above), pp. 135–136.

[1417] Sapienza, *Dichiarazioni interpretative unilaterali* ... (footnote 129 above), p. 275.

[1418] Paragraph (1) of the commentary.

[1419] Concerning the entities that may formulate an approval, opposition or recharacterization, see guideline 2.9.4.

[1420] See guideline 2.9.5 and commentary thereto.

[1421] See guideline 2.1.2 and commentary thereto.

[1422] See guideline 2.6.9 and commentary thereto.

[1423] See paragraphs (1)–(9) of the commentary to guideline 2.9.2 and paragraph (4) of the commentary to guideline 2.9.3.

[1424] See the commentary to guideline 2.9.1 above.

the declaration itself and generally even use the same wording.[1425] Although some members considered that stating the reasons for an approval might cause confusion (if, for example, reasons were given for the interpretative declaration itself and the two reasons differed), the majority of the Commission considered that there should be no distinction in that regard between the various categories of reaction to interpretative declarations, particularly in the present case, since guideline 2.9.6 is a simple recommendation that has no binding force for the author of the approval.

(4) The same applies to opposition or recharacterization. In all cases, incidentally, an explanation of the reasons for a reaction may be a useful element in the dialogue among the contracting States or contracting organizations and entities entitled to become parties.

2.9.7 *Formulation and communication of approval, opposition or recharacterization*

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to an approval, opposition or recharacterization in respect of an interpretative declaration.

Commentary

(1) The formulation in writing of a reaction to an interpretative declaration, whether approval, opposition or recharacterization,[1426] makes it easier to disseminate it to the other entities concerned, contracting States or contracting organizations or States and international organizations entitled to become parties.

(2) Although there is no legal requirement to disseminate a reaction, the Commission strongly believes that it is in the interests of both the authors of a reaction to a unilateral declaration and all the entities concerned to do so and that the formulation and communication of a reaction could follow the procedure for other types of declarations relating to a treaty, which is actually very similar—namely, guidelines 2.1.3–2.1.7 in the case of reservations, 2.4.1 and 2.4.7 in the case of interpretative declarations and 2.6.8 and 2.8.5, in the case of, respectively, objections to reservations and their express acceptance. Given that all these guidelines are modelled on those relating to reservations, it seemed sufficient to refer the user to the rules on reservations, *mutatis mutandis*.

(3) Unlike the effect produced by the formulation of reservations, however, these rules on the formulation and communication of reactions to interpretative declarations are of an optional nature only, and guideline 2.9.7 is simply a recommendation, as the use of the conditional ("should") indicates.

(4) The Commission wondered whether reference should be made in guideline 2.9.7 to guideline 2.1.7 concerning the functions of depositaries. It was decided that, since the provision is based on the idea that "the depositary shall examine whether a reservation to a treaty … is in due and proper form" and that interpretative declarations do not have to take any particular form, such a reference was unnecessary. Since there may be cases, however, in which an interpretative declaration is not permissible (where the treaty precludes such a declaration),[1427] it was deemed necessary to include the formulation of guideline 2.1.7, which sets out the course to take in the event of a divergence of views in cases of this kind.

2.9.8 *Non-presumption of approval or opposition*

1. An approval of, or an opposition to, an interpretative declaration shall not be presumed.

2. Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

Commentary

(1) Guideline 2.9.8 establishes a general framework and should be read in conjunction with guideline 2.9.9, which relates more specifically to the role that may be played by the silence of a State or an international organization with regard to an interpretative declaration.

(2) As is clear from the definitions of an approval of and an opposition to an interpretative declaration contained in guidelines 2.9.1 and 2.9.2, both essentially take the form of a unilateral declaration made by a State or an international organization whereby the author expresses agreement or disagreement with the interpretation formulated in the interpretative declaration.

(3) In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The International Court of Justice, in its 1951 advisory opinion, noted the "very great allowance made for tacit assent to reservations",[1428] and the work of the Commission has from the outset acknowledged the considerable part played by tacit acceptance.[1429] Sir Humphrey Waldock justified the principle of tacit acceptance by pointing out:

> It is (…) true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State.[1430]

[1425] It is primarily for this reason that the Commission did not consider it useful to include in the Guide to Practice a recommendation that reasons should be given for interpretative declarations themselves.

[1426] See guideline 2.9.5.

[1427] See guideline 3.5 (Permissibility of an interpretative declaration).

[1428] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 604 above), p. 21.

[1429] See Müller, "1969 Vienna Convention. Article 20: Acceptance of and objection to reservations", in Corten and Klein (eds.), *The Vienna Conventions on the Law of Treaties* … (footnote 30 above), pp. 499–500, paras. 29–30.

[1430] First report on the law of treaties, *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 67, para. 15.

(4) In the case of simple interpretative declarations (as opposed to conditional interpretative declarations[1431]), there is no rule comparable to that contained in article 20, paragraph 5, of the Vienna Conventions (the principle of which is reflected in guideline 2.8.2), so these concerns do not arise. By definition, an interpretative declaration purports only to "specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof", but it in no way imposes conditions on its author's consent to be bound by the treaty.[1432] Whether or not other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author's legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (*c*), of the Vienna Conventions were it not for the presumption provided for in paragraph 5 of that article.

(5) Thus, since one cannot proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be answered in the negative. In fact, it is inconceivable that silence could in itself produce such a legal effect.

(6) Moreover, this appears to be the position most widely supported in the literature. Horn states:

> Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in an automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation.[1433]

(7) Although inaction cannot in itself be construed as either approval or opposition—neither of which can be presumed in any way (this is stated more specifically in guideline 2.9.9 on the silence of a State or an international organization with respect to an interpretative declaration)—the position taken by Horn also suggests that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith and, more particularly in the context of treaty interpretation, through the operation of article 31, paragraph 3 (*b*), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (*a*) …
>
> (*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

(8) However, this provision does not define the "conduct" in question, and it would seem extremely difficult, if not impossible, to determine in advance the circumstances in which a State or an organization is bound to protest expressly in order to avoid being considered as having acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.[1434] In other words, it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent. As the Eritrea–Ethiopia Boundary Commission stressed:

> The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule—whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first.[1435]

(9) It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its inaction, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

(10) For this reason, paragraph 1 of guideline 2.9.8, which complements guidelines 2.9.1 and 2.9.2, unequivocally states that the presumption provided for in article 20, paragraph 5, of the Vienna Conventions is not applicable. Paragraph 2, however, acknowledges that, as an exception to the principle arising from these two guidelines, the conduct of the States or international organizations concerned may be considered, depending on the circumstances, as constituting approval of, or opposition to, the interpretative declaration.

[1431] See guideline 1.4.

[1432] The situation is evidently different with respect to conditional interpretative declarations. See *ibid.*

[1433] Horn, *Reservations and Interpretative Declarations …* (footnote 25 above), p. 244 (footnotes omitted); see also McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 168.

[1434] See, in particular, Rousseau, *Droit international public* (footnote 351 above), p. 430, No. 347.

[1435] Decision regarding delimitation of the border between Eritrea and Ethiopia, decision of 13 April 2002, Permanent Court of Arbitration, United Nations, *Reports of International Arbitral Awards*, vol. XXV (United Nations publication, Sales No. E/F.05.V.5), p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 40.

(11) Given the wide range of "relevant circumstances" (a cursory sample of which is given in the preceding paragraphs), the Commission did not think it possible to describe them in greater detail.

2.9.9 *Silence with respect to an interpretative declaration*

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

Commentary

(1) The practice (or, more accurately, the absence of practice) described in the commentary to guidelines 2.9.2 and, in particular, 2.9.1, shows the considerable role that States allow silence to play in the context of interpretative declarations. Express positive—and even negative—reactions are extremely rare. One wonders therefore whether it is possible to infer from such overwhelming silence consent to the interpretation proposed by the State or international organization making the interpretative declaration.

(2) As was noted in a study on silence in response to a violation of a rule of international law, which is fully applicable here: "silence in itself says nothing because it is capable of 'saying' too many things at once".[1436] Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because they share the view expressed therein, or they may feel that the interpretation is erroneous but that there is no point in saying so since, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct.[1437]

(3) Guideline 2.9.9 expresses this idea by applying the general principle established in guideline 2.9.8, paragraph 1, specifically to silence.

(4) Although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, it is conceivable that, in some circumstances, the silent State is nonetheless considered as having acquiesced to the declaration by reason of its conduct, or lack of conduct in circumstances where conduct is required, in relation to the interpretative declaration. This is an inverse derogation from the general principle, the existence of which must not be affirmed lightly and is by no means automatic. Silence must therefore be viewed as merely one aspect of the general conduct of the State or international organization in question.

3. *Permissibility of reservations and interpretative declarations*

General commentary

(1) The purpose of Part 3, which comes after Part 1, devoted to definitions, and Part 2, dealing with the procedure for formulating reservations and interpretative declarations, is to determine the conditions for the permissibility of reservations to treaties (and of interpretative declarations).

(2) After extensive debate, the Commission decided to retain the term "permissibility of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[1438] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[1439] in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

(3) Adhering to the definition found in article 2, paragraph 1 (*d*), of the Vienna Conventions, reproduced in guideline 1.1, the Commission accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission states very clearly in its commentary to guideline 1.8, "[d]efining is not the same as regulating … a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[1440] It goes on to say: "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation … that one can decide whether it is valid, evaluate its legal scope and determine its effect."[1441]

(4) At an early stage, the Commission opted for in French the words "*licéité*" and "*illicéité*" in preference to "*validité*" ("validity") and "*invalidité*" ("invalidity") in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term "validity" cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (*d*), of the Vienna Conventions

[1436] G. P. Buzzini, "Abstention, silence et droit international général", *Rivista di diritto internazionale*, vol. 88/2 (2005), p. 382.

[1437] See, in this connection, H. Drost, "Grundfragen der Lehre vom internationalen Rechtsgeschäft", in D. S. Constantopoulos and H. Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechtes und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebzigsten Geburtstag*, Hamburg, Girardet, 1953, p. 218: "*Wann Schweigen als eine Anerkennung angesehen werden kann, ist Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage—etwa nach vorhergegangener Notifikation—Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann*" ("The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances—following prior notification, for example—silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will").

[1438] Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see below the commentary to guideline 3.1, paragraphs (6)–(7)); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[1439] Or of the treaty as a whole with respect to certain specific aspects (see paragaraph 2 of guideline 1.1).

[1440] Paragraph (1) of the commentary.

[1441] Paragraph (2) of the commentary. See also paragraph (16) of the commentary to guideline 1.1.

objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a rule that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory", thus leading to the application of customary law. Ultimately, therefore, the rules applicable as between the author of the reservation and the author of the objection are never different from those that predated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is impossible under these circumstances to imagine an "objection" that could violate a peremptory norm.

(17) Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the permissibility of objections that purport to produce a "super-maximum" effect.[1958] These are objections in which the authors deem not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The permissibility of objections with super-maximum effect has frequently been questioned,[1959] primarily because

> the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (*b*), of the [Vienna] Conventions. Whereas "unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State", in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.[1960]

(18) It is not, however, the permissibility of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author;[1961] this is far from certain and depends, among other things, on the permissibility of the reservation itself.[1962] A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission acknowledges in its commentary to guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> [T]he Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.[1963]

(19) Furthermore, it should be stressed once again that an objection may not validly be formulated if its author has previously accepted the reservation in question. While this condition could be understood as a condition of permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.13 (Final nature of acceptance of a reservation) states that "acceptance of a reservation cannot be withdrawn or amended". There seems to be no need to revisit the issue in the present guideline.

3.5 *Permissibility of an interpretative declaration*

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

Commentary

(1) The Vienna Conventions contain no rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations. In that regard, and in many others as well, they differ from reservations and cannot simply be equated with them. Guideline 3.5 and those that follow are intended to fill that gap in respect of the permissibility of these instruments—it being understood in this connection that "simple" interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations.[1964]

(2) The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

(3) However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and … the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[1965]

(4) There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions"—which corresponds to the definition of interpretative declaration—and another to determine whether the interpretation thus proposed is valid, or, in other words, whether the meaning or scope attributed by the declarant to a treaty or to certain of its provisions is valid.

[1958] See paragraphs (24)–(25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).

[1959] See the eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 48, paras. 97–98 and footnote 160. See also the commentary to guideline 2.6.1, in particular paragraphs (24)–(25).

[1960] Eighth report on reservations to treaties, *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, para. 97.

[1961] *Ibid.*, para. 95. See also paragraphs (24)–(25) of the commentary to guideline 2.6.1.

[1962] See guidelines 4.3.4 and 4.5.3.

[1963] Paragraph (25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).

[1964] For the definition of conditional interpretative declarations, see guideline 1.4, which states that "[c]onditional interpretative declarations are subject to the rules applicable to reservations".

[1965] Paragraph (33) of the commentary to guideline 1.2.

(5) The issue of the permissibility of interpretative declarations can, of course, be addressed in the treaty itself;[1966] although quite uncommon in practice, this is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would render impermissible any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV.3 of the Free Trade Agreement between the Government of Canada and the Government of Costa Rica of 2001[1967] is an example of such a provision. Other examples exist outside the realm of bilateral treaties.[1968]

(6) It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are impermissible. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 1, states:

> Nothing in this Charter *shall be construed as** limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

> Nothing in this Charter *may be interpreted as** implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

(7) Similarly, articles 21–22 of the Framework Convention for the protection of national minorities of 1 February 1995 also limit the potential to interpret the Convention:

> *Article 21*
>
> Nothing in the present framework Convention *shall be interpreted as** implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.
>
> *Article 22*
>
> Nothing in the present framework Convention *shall be construed as** limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

(8) These examples show that the prohibition against interpretative declarations in guideline 3.5 may be express as well as implicit.

(9) This is why the Commission did not consider it necessary to provide in guideline 3.5 for a situation where an "interpretative declaration" was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not purport to modify the legal effects of a treaty, but only to specify or clarify them.[1969] This situation is covered in guideline 3.5.1.

(10) Similarly, but for different reasons, the Commission declined to consider that an "objectively wrong" interpretation—for example, one contrary to the interpretation given by an international court adjudicating the matter—should be declared impermissible.

(11) It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is impossible to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."[1970]

(12) As Kelsen has noted:

> If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value.[1971]

As has also been pointed out:

> *Le processus interprétatif [en droit international n']est en effet qu'exceptionnellement centralisé, soit par un organe juridictionnel, soit de toute autre manière. La compétence d'interprétation appartient à l'ensemble des sujets, et, individuellement, à chacun d'eux. L'éclatement des modes d'interprétation qui en résulte n'est qu'imparfaitement compensé par leur hiérarchie. Les interprétations unilatérales sont en principe d'égale valeur, et les modes concertés sont facultatifs et par là même aléatoires. Il ne faut cependant pas surestimer les difficultés pratiques. Il ne s'agit pas tant d'une imperfection essentielle du droit international que d'une composante de sa nature, qui l'oriente tout entier vers une négociation permanente que les règles en vigueur permettent de rationaliser et de canaliser.*
>
> [The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other

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[1966] Heymann, *Einseitige Interpretationserklärungen …* (footnote 147 above), p. 114.

[1967] Article XV.3 (Reservations): "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from http://www.sice.oas.org/Trade/cancr/English/cancrinPDF.asp).

[1968] See the website of the Free Trade Area of the Americas, available from http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text. The third draft agreement for the Free Trade Area of the Americas of November 2003, though still in the drafting stage, stated in Chapter XXIV, draft article 4: "This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification."

[1969] See paragraph (16) of the commentary to guideline 1.2. See also the famous dictum of the International Court of Justice in its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 157 above), p. 229; see also *Rights of Nationals of the United States of America in Morocco*, *Judgment of 27 August 1952*, *ibid.*, p. 196.

[1970] See the Commission's draft articles on the law of treaties, paragraph (4) of the commentary to draft articles 27 and 28, in the report of the International Law Commission on the work of its eighteenth session, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 218. See also Aust, *Modern Treaty Law and Practice* (footnote 155 above), p. 230.

[1971] H. Kelsen, *Pure Theory of Law*, tr. M. Knight, Berkeley and Los Angeles, University of California Press, 1967, p. 351.

way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force.][1972]

(13) Thus, "*[e]n vertu de sa souveraineté, chaque État a le droit d'indiquer le sens qu'il donne aux traités auxquels il est partie, en ce qui le concerne*" [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party].[1973] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

(14) International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, to begin with, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the "right" interpretation; they do not offer a final "objective" (or "mathematical") test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that "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**". This clarification in no way constitutes a criterion for assessing the correctness, and still less a condition of the permissibility, of the interpretations given to the treaty, but a means of deriving one interpretation. That is all.

(15) International law in general and treaty law in particular do not impose conditions for the permissibility of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration, and that comes into play in the context of determining the effects of an interpretative declaration.[1974] In the absence of any condition of permissibility, "*[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig*" ["simple interpretative declarations are therefore, in principle, admissible"],[1975] although this does not mean that it is appropriate to speak of permissibility or non-permissibility unless the treaty itself sets the criterion.[1976]

(16) In addition, it seemed to the Commission that, in the course of assessing the permissibility of interpretative declarations, one must not slip into the domain of responsibility—which, for reservations, is excluded by guideline 3.3.2. This would be the case for interpretative declarations if one were to consider that a "wrong" interpretation constituted an internationally wrongful act that "violated" articles 31 and 32 of the Vienna Conventions.

3.5.1 *Permissibility of an interpretative declaration which is in fact a reservation*

If a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

Commentary

(1) Section 1.3 of the Guide to Practice envisages a situation in which an "interpretative declaration" purports, in fact, to exclude or to modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.[1977] In such a situation, it is not an interpretative declaration but a reservation, which should be treated as such and must therefore meet the conditions for the permissibility and formal validity of reservations.

(2) The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* confirmed this approach. In that case, the United Kingdom maintained that the third reservation of France to article 6 of the Convention on the Continental Shelf was merely an interpretative declaration and hence opposed that interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this line of argument and considered that the declaration of France was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (*d*) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State … whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State". This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".[1978]

(3) While States often maintain or imply that an interpretation proposed by another State is incompatible with

[1972] Combacau and Sur, *Droit international public* (footnote 166 above), p. 171.

[1973] Daillier, Forteau and Pellet, *Droit international public* (footnote 254 above), p. 277, para. 164. See also Rousseau, *Droit international public* (footnote 351 above), p. 250.

[1974] See guidelines 4.7.1–4.7.3.

[1975] Heymann, *Einseitige Interpretationserklärungen …* (footnote 147 above), p. 113.

[1976] See paragraphs (5) and (8) above.

[1977] Guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited). It goes without saying that it is not enough for another State or another international organization to "recharacterize" an interpretative declaration as a reservation for the nature of the declaration in question to be modified (see guideline 2.9.3 (Recharacterization of an interpretative declaration) and commentary thereto, in particular paragraphs (3)–(6)).

[1978] Arbitral award of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom …* (see footnote 24 above), p. 40, para. 55.

the object and purpose of the treaty concerned,[1979] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object and purpose. If it is otherwise, the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".[1980] The reaction of Spain to the "declaration" formulated by Pakistan in signing the International Covenant on Economic, Social and Cultural Rights of 1966 also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The "declaration" must first be characterized; only then will it be possible to apply to it the conditions of permissibility (of reservations):

> The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.
>
> According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights.
>
> This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan.[1981]

(4) Therefore, the issue is not the "permissibility" of interpretative declarations. Such unilateral statements are, in reality, reservations and accordingly must be treated as such, including with respect to their permissibility and formal validity. The European Court of Human Rights followed that reasoning in its judgment in the case of *Belilos v. Switzerland*. Having recharacterized the declaration of Switzerland as a reservation, it applied the conditions for the permissibility of reservations to the European Convention on Human Rights:

> In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6 § 1 [art. 6-1] and to secure itself against an interpretation of that article [art. 6-1] which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 [art. 64] as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.[1982]

3.6 *Permissibility of reactions to interpretative declarations*

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

Commentary

(1) The question of the permissibility of reactions to interpretative declarations—approval, opposition or recharacterization[1983]—must be considered in light of the study of the permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting States or contracting organizations also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

(2) As a general rule, like interpretative declarations themselves, the approval or opposition they arouse may prove to be correct or erroneous, but that does not imply that they are permissible or impermissible.

(3) The question of the permissibility of recharacterizations of interpretative declarations should be approached slightly differently. In a recharacterization, the author does not call into question[1984] the content of the

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[1979] See, for example, the reaction of Germany to the interpretative declaration of Poland to the European Convention on Extradition of 13 December 1957 (United Nations, *Treaty Series*, vol. 1862, pp. 469–470) and to the declaration of India interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties* … (footnote 37 above), chap. IV.3 and 4).

[1980] In addition to the aforementioned example of the reservation of Spain, see the objection of Austria to the "interpretative declaration" formulated by Pakistan in respect of the International Convention for the Suppression of Terrorist Bombings of 1997, and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties* … (footnote 37 above), chap. XVIII.9). See also the reactions of Germany and the Netherlands to the unilateral statement of Malaysia (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Rome Statute of the International Criminal Court (*ibid.*, chap. XVIII.10). For other examples of recharacterization, see the commentary to guideline 1.2, footnote 149 above.

[1981] *Multilateral Treaties* … (footnote 37 above), chap. IV.3.

[1982] Judgment of 29 April 1988, *Belilos v. Switzerland* (see footnote 192 above), p. 24, para. 49.

[1983] See guidelines 2.9.1–2.9.3.

[1984] It may *simultaneously* call into question and object to the content of the recharacterized declaration by making an objection to it; in such cases, however, the recharacterization and the objection remain conceptually different from one another. In practice, States almost always combine the recharacterization with an objection to the reservation. It should be borne in mind, however, that recharacterizing an interpretative declaration as a reservation is one thing and objecting to

in the relations between the author and *all* other parties; however, it has no effect with regard to the other States parties' relations *inter se*, which remain unchanged.

(7) Although, in the case of treaties that must be applied in their entirety, the parties must all give their consent in order for the reservation to produce its effects, this unanimous consent does not, in itself, constitute a modification of the treaty itself as between the parties thereto. Here, too, a distinction should therefore be made between two normative systems within the same treaty: the system governing relations between the author of the reservation and each of the other parties, which have, by definition, all accepted the reservation, on the one hand, and the system governing relations between these other parties, on the other. The relations between the other parties remain unchanged.

(8) The same reasoning applies in the case of constituent instruments of international organizations. Although in this case the consent is not necessarily unanimous, it does not in any way modify the treaty relations between parties other than the author of the reservation. The majority system simply imposes on the minority members the position of the majority in respect of the author of the reservation, precisely to avoid the establishment of multiple normative systems within the constituent instrument. But in this case, it is the acceptance of the reservation by the organ of the organization which generalizes the application of the reservation, and probably exclusively in the other parties' relations with the reserving State or organization.

(9) Even in the event of unanimous acceptance of a reservation which is *a priori* invalid,[2534] it is not the reservation which has been "validated" by the consent of the parties that modifies the "general" normative system applicable as between the other parties. Granted, this normative system is modified if—assuming that such a possibility is admitted[2535]—the prohibition of the reservation is lifted or the object and purpose of the treaty are modified (or deemed to be modified) in order to make the reservation valid. Nonetheless, such a modification of the treaty, which has implications for all the parties, arises not from the reservation, but from the unanimous consent of the States and organizations that are parties to the treaty. It is this consent which provides the basis of an agreement to modify the treaty for the purpose of authorizing the reservation within the meaning of article 39 of the Vienna Conventions.[2536]

(10) It should be noted, however, that the parties are still free to modify their treaty relations if they deem it necessary.[2537] This possibility may be deduced *a contrario* from the Commission's commentary to draft article 19 of the 1966 draft articles on the law of treaties (which became article 21 of the 1969 Vienna Convention). In the commentary, the Commission stated that a reservation "does not modify the provisions of the treaty for the other parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations".[2538]

(11) Moreover, nothing prevents the parties from accepting the reservation as a true clause of the treaty ("negotiated reservations"[2539]) or from changing any other provision of the treaty, if they deem it necessary. However, such a modification can neither result automatically from acceptance of a reservation nor be presumed. The parties must follow the procedures set out for this purpose in the treaty or, in the absence thereof, the procedure established by articles 39 *et seq.* of the Vienna Conventions. In fact, it may become necessary, if not indispensable, to modify the treaty in its entirety.[2540] This depends, however, on the circumstances in each case and remains at the discretion of the parties. Consequently, it does not seem indispensable to provide for an exception to the principle established in article 21, paragraph 2, of the Vienna Conventions. In addition, like all the guidelines in the Guide to Practice, guideline 4.6 should be construed to mean "without prejudice to any agreement reached between the parties as to its application".

4.7 *Effect of interpretative declarations*

Commentary

(1) Despite a long-standing and highly developed practice, neither the Vienna Convention of 1969 nor that of 1986 contains rules concerning interpretative declarations, much less the possible effects of such a declaration.[2541]

(2) The *travaux préparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first special rapporteurs,[2542] Sir Humphrey Waldock[2543] was aware

[2534] See paragraphs (9)–(13) of the commentary to guideline 3.3.3.

[2535] The Commission deliberately refrained from adopting a categorical position on this point (see paragraph (13) of the commentary to guideline 3.3.3).

[2536] See paragraphs (10) and (13) of the commentary to guideline 3.3.3.

[2537] Horn, *Reservations and Interpretative Declarations …* (footnote 25 above), pp. 142–143.

[2538] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 209, paragraph (1).

[2539] See paragraph (10) of the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty).

[2540] Such a situation may occur, *inter alia*, in commodity treaties, in which even the principle of reciprocity cannot restore the balance between the parties (see Schermers, "The suitability of reservations …" (footnote 2151 above), p. 356). Article 65, paragraph 2 (*c*), of the International Sugar Agreement of 1968 seemed to provide for the possibility of adapting provisions the application of which had been compromised by the reservation: "In any other instance where reservations are made [that is, in cases where the reservation concerns the economic operation of the Agreement], the [International Sugar] Council shall examine them and decide, by special vote, whether, *and if so under what conditions**, they are to be accepted. Such reservations will only become effective after the Council has taken its decision on the matter." See also Imbert, *Les réserves aux traités multilatéraux* (footnote 25 above), p. 250, and Horn, *Reservations and Interpretative Declarations …* (footnote 25 above), pp. 142–143.

[2541] See paragraph (1) of the commentary to guideline 1.2.

[2542] Sir Gerald Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (first report on the law of treaties, *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 110).

[2543] In his definition of the term "reservation", Sir Humphrey Waldock explained that "An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation" (first report on the law of treaties, *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 31–32).

both of the practical difficulties such declarations created, and of the solution, a very simple solution, required. Indeed, several Governments referred in their comments to the draft articles adopted on first reading, not just to the absence of interpretative declarations and to the distinction that should be drawn between such declarations and reservations,[2544] but also to the elements to be taken into account when interpreting a treaty.[2545] In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. Sir Humphrey Waldock continued:

> Interpretative declarations, however, remained a problem, and possibly also statements of policy made in connection with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touched the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.[2546]

(3) Contrary to the positions expressed by some members of the Commission,[2547] the effect of an interpretative declaration "was governed by the rules on interpretation".[2548] Although "[i]nterpretative statements are certainly important, (…) it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made".[2549]

(4) At the United Nations Conference on the Law of Treaties of 1968–1969, the question of interpretative declarations was debated once again, in particular in connection with a Hungarian amendment to the definition of the term "reservation"[2550] and to article 19 (which became article 21) concerning the effects of a reservation.[2551] The effect of this amendment would have been to assimilate interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such an assimilation.[2552] Sir Humphrey Waldock, in his capacity as Expert Consultant, had

> issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations.[2553]

Consequently, he appealed

> to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter.[2554]

In the end, the Drafting Committee did not retain the Hungarian amendment. Although Mr. Sepúlveda Amor, on behalf of Mexico, had drawn attention to "the absence of a definition of the instrument envisaged in paragraph 2 (*b*) of article 27 [which became article 31]", while "interpretative declarations of that type were common in practice"[2555] and suggested that "[i]t was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations",[2556] no provisions of the Vienna Convention were devoted specifically to interpretative declarations. Sir Humphrey Waldock's conclusions regarding the effects of such declarations[2557] were thus confirmed by the work of the Conference.

(5) Neither the *travaux* of the Commission nor those of the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations have further elucidated the question of the concrete effects of an interpretative declaration.

(6) Here, too, the Commission has found itself obliged to fill a gap in the Vienna Conventions and has done so in section 4.7 of the Guide to Practice while endeavouring to remain faithful to the logic of the Conventions and, in particular, of their articles 31 and 32 on the interpretation of treaties.

[2544] See, in particular, the comments of the Government of Japan summarized in Sir Humphrey Waldock's fourth report on the law of treaties (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49), and the comment of the Government of the United Kingdom that "article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report" (*ibid.*).

[2545] See the comments of the United States of America on draft articles 69 and 70 concerning interpretation, summarized in Sir Humphrey Waldock's sixth report on the law of treaties, *Yearbook ... 1966*, vol. II, document A/CN.4/186 and Add.1–7, p. 93.

[2546] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 165, para. 13. See also the fourth report on the law of treaties by Sir Humphrey Waldock, *ibid.*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2.

[2547] See the comments of Mr. Verdross (*ibid.*, vol. I, 797th meeting, 8 June 1965, p. 151, para. 37, and 799th meeting, 10 June 1965, p. 166, para. 23) and Mr. Ago (*ibid.*, 798th meeting, 9 June 1965, p. 162, para. 76). See also Mr. Castrén (*ibid.*, 799th meeting, 10 June 1965, p. 166, para. 30) and Mr. Bartoš (*ibid*., p. 166, para. 29).

[2548] *Ibid.*, 799th meeting, 10 June 1965, p. 165, para. 14. See also the fourth report on the law of treaties by Sir Humphrey Waldock, *ibid.*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2 ("Statements of interpretation were not dealt with by the Commission in the present [section] for the simple reason that *they are not reservations and appear to concern the interpretation rather than the conclusion of treaties**").

[2549] *Ibid.*

[2550] A/CONF.39/C.1/L.23, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions ...* (A/CONF.39/11/Add.2) (see footnote 54 above), p. 112, para. 35 (vi) (*e*). The Hungarian delegation proposed the following text: "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a *multilateral* treaty, whereby it purports to exclude, to vary *or to interpret* the legal effect of certain provisions of the treaty in their application to that State."

[2551] A/CONF.39/C.1/L.177, *ibid.*, p. 140, para. 199 (ii) (*d*) and (iii). See also the explanations provided at the Conference, *Official Records of the United Nations Conference on the Law of Treaties, First Session* … (A/CONF.39/11) (see footnote 35 above), 25th meeting, 16 April 1968, p. 137, paras. 52–53.

[2552] See, in particular, the position of Australia (*ibid.*, 5th meeting, 29 March 1968, p. 29, para. 81), Sweden (*ibid.*, p. 30, para. 102), the United States of America (*ibid*., 6th meeting, p. 31, para. 116) and the United Kingdom (*ibid.*, 25th meeting, 16 April 1968, p. 137, para. 60).

[2553] *Ibid*., p. 137, para. 56.

[2554] *Ibid.*

[2555] *Ibid.*, 21st meeting, 10 April 1968, p. 113, para. 62.

[2556] *Ibid.*

[2557] See paragraph (2) of this introductory commentary above.

4.7.1 *Clarification of the terms of the treaty by an interpretative declaration*

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

Commentary

(1) The absence of a specific provision in the Vienna Conventions concerning the legal effects that an interpretative declaration[2558] is likely to produce does not mean, however, that they contain no indications on the matter, as the comments made during their elaboration will show.[2559]

(2) As their name clearly indicates, their object and function consist in proposing an interpretation of the treaty.[2560] Consequently, in accordance with the definition retained by the Commission:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.[2561]

(3) To specify or clarify the provisions of a treaty is precisely to interpret the treaty, which is why the Commission used those terms to define interpretative declarations.[2562] Although, as the commentary to guideline 1.2 (Definition of interpretative declarations) makes clear, the definition "in no way prejudges the validity or the effect of such declarations",[2563] it seems almost self-evident that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

(4) Before considering the role that such a declaration may play in the interpretation process, it is useful to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that, whereas the latter are intended to modify the legal effect of the treaty or exclude certain of its provisions in their application to the author of the reservation, the former have no aim other than to specify or clarify the meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it intends to give a particular meaning to those obligations. As Mr. Yasseen clearly explained:

> A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.
>
> A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.[2564]

(5) If the effect of an interpretative declaration consisted in modifying the treaty, it would actually constitute a reservation, not an interpretative declaration. The Commission's commentary to article 2, paragraph 1 (*d*), of its 1966 draft articles describes this dialectic unequivocally:

> States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.[2565]

(6) The International Court of Justice has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: "[i]t is the duty of the Court to interpret the Treaties, not to revise them."[2566]

(7) It may be deduced from the foregoing that an interpretative declaration may in no way modify "the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects".[2567] Whether or not the interpretation is correct, its author remains bound by the provisions of the treaty. This is certainly the meaning to be given to the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration

> may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation.[2568]

[2558] See the introductory commentary to section 4.7 of the Guide to Practice.

[2559] See paragraph (2) of the introductory commentary to section 4.7.

[2560] See paragraph (16) of the commentary to guideline 1.2.

[2561] Guideline 1.2 (Definition of interpretative declarations).

[2562] See paragraph (18) of the commentary to guideline 1.2.

[2563] Paragraph (33) of the commentary to guideline 1.2.

[2564] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 166, paras. 25–26.

[2565] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 189–190, paragraph (11) of the commentary. See also Sir Humphrey Waldock's explanations: "the crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation" (*Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 14).

[2566] *Advisory Opinion of 18 July 1950, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (see footnote 157 above), p. 229. See also the *Judgment of 27 August 1952, Rights of Nationals of the United States of America in Morocco* (*ibid.*), p. 196, and the *Judgment of 18 July 1966* in *South West Africa* (footnote 2439 above), p. 48, para. 91.

[2567] Paragraph 2 of guideline 1.1 (Definition of reservations).

[2568] Council of Europe, Report of the European Commission of Human Rights, 7 May 1986, para. 102.

(8) In other words, a State (or an international organization) may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[2569] the conduct adopted by the author of the declaration in the implementation of the treaty runs a serious risk of violating its treaty obligations.[2570]

(9) If a State or international organization has made its interpretation a condition for its consent to be bound by the treaty, by formulating a conditional interpretative declaration within the meaning of guideline 1.4 (Conditional interpretative declarations), the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by a competent third party[2571] are in agreement, there is no problem: the interpretative declaration remains merely interpretative and may play the same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation of the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by a third party, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which—*ex hypothesi*—does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this case—but in this case only—the conditional interpretative declaration produces the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations.[2572] As has been emphasized:

> Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration.[2573]

(10) In the case of a simple interpretative declaration, however, the fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the position of its author with regard to the treaty, who remains bound by it and must respect it. This position is also that of McRae:

> [T]he State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty.[2574]

(11) Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in interpreting those obligations. As the Commission noted during its consideration of the permissibility of interpretative declarations,[2575] "*[e]n vertu de sa souveraineté, chaque État a le droit d'indiquer le sens qu'il donne aux traités auxquels il est partie, en ce qui le concerne*" [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party, in regard to itself].[2576] This reflects a necessity: those to whom a legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.[2577]

(12) Interpretative declarations are above all an expression of the parties' concept of their international obligations under the treaty. They are a means of determining the intention of the contracting States or contracting organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law[2578] and the literature have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

> In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.[2579]

[2569] Article 31, paragraph 1, of the 1969 and 1986 Vienna Conventions.

[2570] See also McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 161; Heymann, *Einseitige Interpretationserklärungen* … (footnote 147 above), p. 126; or Horn, *Reservations and Interpretative Declarations* ... (footnote 25 above), p. 326.

[2571] It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by all the parties) will differ significantly from that put forward by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves (see J. Salmon (ed.), *Dictionnaire de droit international public* (footnote 1013 above), p. 604: "*Interprétation émise par l'auteur ou par l'ensemble des auteurs de la disposition interprétée − notamment, pour un traité, par toutes les parties −, selon des formes telles que son autorité ne puisse être contestée*" [An interpretation issued by the author or by all the authors of the provision being interpreted—in the case of a treaty, by all the parties—in due form so that its authority may not be questioned]).

[2572] See paragraphs (13)–(14) of the commentary to guideline 1.4.

[2573] McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 161. See also Heymann, *Einseitige Interpretationserklärungen* … (footnote 147 above), pp. 147–148. Heymann is of the view that a conditional interpretative declaration must be treated as a reservation only in the case where the treaty creates a body competent to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (*ibid.*, pp. 148–150).

[2574] McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 160.

[2575] See paragraph (13) of the commentary to guideline 3.5.

[2576] Daillier, Forteau and Pellet, *Droit international public* ... (footnote 254 above), p. 277.

[2577] See G. Abi-Saab, "'Interprétation' et 'auto-interprétation': quelques réflexions sur leur rôle dans la formation et la résolution du différend international", in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt*, Berlin, Springer, 1995, p. 14.

[2578] See footnote 2568 above.

[2579] McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 169.

(13) According to another view, on the one hand, an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; and on the other hand:

Das schließt aber nicht aus, dass sie unter Umständen als Indiz für einen gemeinsamen Parteiwillen herangezogen werden könnte.[2580]

[That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties.]

(14) The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the Government of France solely to the interpretation of the treaty: "When the French Government signed the Charter, it also made an interpretative statement specifying the meaning and scope it intends to give to the Charter or to certain of its provisions in the light of the Constitution; a unilateral statement of this kind is no more than an instrument relating to the treaty which, in the event of a dispute, may be used to interpret it."[2581]

(15) Paragraph 1 of guideline 4.7.1 takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation.

(16) Because of the very nature of the operation of interpretation—which is a process, an art rather than an exact science[2582]—it is not possible in a general and abstract manner to assess the value of an interpretation other than by referring to the "general rule of interpretation" which is set out in article 31 of the Vienna Conventions on the law of treaties and which cannot be called into question or "revisited" in the context of the present exercise.[2583] Therefore, in the Guide to Practice, the problem must necessarily be limited to the question of the authority of an interpretation proposed in an interpretative declaration and the question of its probative value for any third-party interpreter, that is, its place and role in the process of interpretation.

(17) With regard to the first question—the authority of the interpretation proposed by the author of an interpretative declaration—it should be recalled that, according to the definition of interpretative declarations, they are unilateral statements.[2584] The interpretation that such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value and certainly cannot bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

Neither of the parties who have an interest in the contract or treaty may interpret it after his own mind.[2585]

(18) During the discussion on draft article 70 (which became article 31 of the 1969 Vienna Convention) containing the general rule of interpretation, Mr. Rosenne expressed the view

that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties.[2586]

(19) The Appellate Body of the WTO has expressed the same idea as follows:

The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty.[2587]

(20) Since the declaration expresses only the unilateral intention of the author—or, if it has been approved by some of the parties to the treaty, at best a shared intention[2588]—it certainly cannot be given an objective value that is opposable *erga omnes*, much less the value of an authentic interpretation accepted by all the parties.[2589] Although it does not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

(21) However, it is difficult to determine precisely on what basis an interpretative declaration would be considered an "element" in interpretation under articles 31 and 32 of the Vienna Conventions. In his day, Sir Humphrey

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[2580] Heymann, *Einseitige Interpretationserklärungen* … (footnote 147 above), p. 135.

[2581] Constitutional Council, Decision No. 99-412 DC of 15 June 1999, European Charter for Regional or Minority Languages, *Official Gazette of the French Republic*, 18 June 1999, p. 8965, para. 4.

[2582] See paragraphs (11)–(12) of the commentary to guideline 3.5.

[2583] This is the reason why the final phrase in paragraph 1 of guideline 4.7.1, recalling the title of article 31 of the Vienna Conventions, refers to "the general rule of interpretation of treaties", without going into detail on its complex ramifications.

[2584] See the report of the International Law Commission on the work of its fifty-first session, *Yearbook ... 1999*, vol. II (Part Two), pp. 97–103.

[2585] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Washington, D.C., Carnegie Institution of Washington, 1916, Book II, chap. XVII, p. 200, para. 265.

[2586] *Yearbook ... 1964*, vol. I, 769th meeting, 17 July 1964, p. 313, para. 52.

[2587] Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 84 (available from the WTO website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm).

[2588] Heymann has explained in this regard: "*Wird eine einfache Interpretationserklärung nur von einem Teil der Vertragsparteien angenommen, ist die* interprétation partagée *kein selbständiger Auslegungsfaktor im Sinne der [Wiener Vertragsrechtskonvention]. Dies liegt daran, dass bei der Auslegung eines Vertrags die Absichten aller Vertragsparteien zu berücksichtigen sind und die* interprétation partagée *immer nur den Willen einer mehr oder weniger großen Gruppe von Vertragsparteien zum Ausdruck bringt*" [If a simple interpretative declaration is accepted by only some of the parties to the treaty, the *interprétation partagée* does not constitute an independent element of interpretation in the sense of the [Vienna Convention on the law of treaties]. This is because, when the treaty is interpreted, the intentions of all the parties must be taken into account, while the *interprétation partagée* expresses only the will of a more or less large group of parties], Heymann, *Einseitige Interpretationserklärungen* …, footnote 147 above, p. 135 (footnote omitted).

[2589] Concerning this hypothesis, see guideline 4.7.3 and commentary thereto below.

Waldock, in a particularly cautious manner, had allowed for the persistence of some uncertainty on the matter:

> Statements of interpretation were not dealt with by the Commission in the present [section] for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69–71. These articles provide that the "context of the treaty, for the purposes of its interpretation", is to be understood as comprising "any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion" (article 69, paragraph 2); that "any agreement between the parties regarding the interpretation of the treaty" and "any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation" are to be taken into account "together with the context" of the treaty for the purposes of its interpretation (article 69, paragraph 3); that as "further means of interpretation" recourse may be had, *inter alia*, to the "preparatory work of the treaty and the circumstances of its conclusion" (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case … In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69–71 rather than under the present section.[2590]

(22) Whether interpretative declarations are regarded as one of the elements to be taken into consideration in the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in the "context", even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

> As to the substance of paragraph 2, … the suggestion of the United States Government that it should be made clear whether the "context" includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session … But it would seem clear on principle that a unilateral document cannot be regarded as part of the "context" for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a "unilateral" or a "group" document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle—the need for express or implied assent.[2591]

(23) Sapienza also concludes that interpretative declarations which have not been approved by the other parties do not fall under article 31, paragraph 2 (*b*), of the Vienna Conventions:

> *In primo luogo, ci si potrebbe chiedere quale significato debba attribuirsi all'espressione* "accepté par les autres parties en tant qu'instrument ayant rapport au traité". *Deve intendersi nel senso che l'assenso delle altre parti debba limitarsi al fatto che lo strumento in questione possa ritenersi relativo al trattato o, invece, nel senso che debba estendersi anche al contenuto dell'interpretazione? Ci pare che l'alternativa non abbia, in realtà, motivo di porsi, dato che il paragrafo 2 afferma che dei documenti in questione si terrà conto "ai fini dell'interpretazione". Dunque, l'accettazione delle altre parti nei confronti degli strumenti di cui alla lettera (b) non potrà che essere un consenso a che l'interpretazione contenuta nella dichiarazione venga utilizzata nella ricostruzione del contenuto normativo delle disposizioni convenzionali cui afferisce, anche nei confronti degli altri Stati.*[2592]
>
> [First, it could be asked what meaning should be given to the phrase "accepted by the other parties as an instrument related to the treaty". Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or should it be understood as extending to the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account "for the purpose of the interpretation". Consequently, acceptance by the other parties of the instruments referred to in subparagraph (*b*) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.]

(24) Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

(25) In its advisory opinion on the *International Status of South-West Africa*, the International Court of Justice noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

> These declarations constitute recognition by the Union [of South Africa] Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.[2593]

(26) The Court thus clarified that declarations by States relating to their international obligations have "probative value" for the interpretation of the terms of the legal instruments to which they relate, but that they "corroborate" or support an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective elements listed in articles 31 and 32 of the Vienna Conventions.

(27) In the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,[2594] the Court was again seized with the question as to the value of an interpretative declaration. In signing and ratifying the United

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[2590] Fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49, para. 2 (observations of the Special Rapporteur on draft articles 18–20).

[2591] Sixth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1966*, vol. II, document A/CN.4/186 and Add.1–7, p. 98, para. 16.

[2592] Sapienza, *Dichiarazioni interpretative unilaterali ...* (footnote 129 above), pp. 239–240. See also *Oppenheim's International Law* (footnote 210 above), p. 1268 ("An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration").

[2593] *Advisory Opinion of 11 July 1950*, *International Status of South-West Africa* (see footnote 167 above), pp. 135–136.

[2594] *Judgment of 3 February 2009*, *Maritime Delimitation in the Black Sea* (see footnote 743 above), p. 61.

Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

> Romania states that according to the requirements of equity as it results from articles 74 and 83 of the [United Nations] Convention on the Law of the Sea[,] the uninhabited islands and without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States.[2595]

In its judgment, however, the Court merely noted the following with respect to the Romanian declaration:

> Finally, regarding Romania's declaration […], the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation.[2596]

(28) The wording is rather peremptory and seems to cast serious doubt on the utility of interpretative declarations. It seems to suggest that the declaration has "*no* bearing" on the interpretation of the provisions of the United Nations Convention on the Law of the Sea that the Court has been asked to make. However, the use of the expression "as such" allows one to shade this radical observation: while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the unilateral interpretation from having an effect as a means of proof or an element that might corroborate the Court's interpretation "in accordance with Article 31 of the Vienna Convention on the Law of Treaties".

(29) The European Court of Human Rights took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration "may be taken into account when an article of the Convention is being interpreted",[2597] the Court chose to take the same approach in the case of *Krombach v. France*, namely, that interpretative declarations may confirm an interpretation derived on the basis of the relevant rules. Thus, in order to respond to the question of whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own case law in the matter and ultimately cited a French interpretative declaration:

> The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the [European] Convention [on Human Rights] is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), no. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: "… in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court".[2598]

(30) States, too, put forward their interpretative declarations in this subdued manner. Thus, the argument by the Agent for the United States in the case concerning *Legality of Use of Force (Yugoslavia v. United States of America)* was tangentially based on the interpretative declaration made by the United States to article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, in order to demonstrate that *mens rea specialis* is an essential element in characterizing an act of genocide:

> [T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that "acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention". The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it.[2599]

(31) It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation, corroborating a meaning revealed by the terms of the treaty considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

(32) The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation—the intention of one of the States parties—and, as such, may confirm "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The phrase "as appropriate" that appears in both paragraph 1 and paragraph 2 of guideline 4.7.1 is meant to emphasize that interpretative declarations (and reactions to them) are taken into consideration on the basis of individual circumstances.

(33) In that same vein, and as guideline 4.7.1, paragraph 2, stresses, the reactions (approval or opposition) that may have been expressed with regard to the interpretative declaration by the other parties—all of them potential interpreters of the treaty as well—should also be taken into consideration. An interpretative declaration that has been approved by one or more States certainly has greater probative value as to the intention of the parties than an interpretative declaration to which there has been opposition.[2600]

[2595] *Multilateral Treaties* … (footnote 37 above), chap. XXI.6.

[2596] *Maritime Delimitation in the Black Sea* (see footnote 743 above), p. 78, para. 42.

[2597] See footnote 2568 above.

[2598] European Court of Human Rights, Judgment of 13 February 2001, *Krombach v. France*, Application no. 29731/96, *Reports of Judgments and Decisions*, *2001-II*, para. 96.

[2599] Report 1999/35, 12 May 1999, p. 9 (Mr. Andrews) (available from the website of the International Court of Justice: www.icj-cij.org).

[2600] See McRae, "The legal effect of interpretative declarations" (footnote 129 above), pp. 169–170.

4.7.2 *Effect of the modification or the withdrawal of an interpretative declaration*

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

Commentary

(1) Despite the auxiliary role to which interpretative declarations are confined under guideline 4.7.1, it should be recalled that they are unilateral statements expressing their author's intention to adhere to a given interpretation of the provisions of the treaty. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;[2601] in any case it is a corollary of the principle of good faith[2602] in its international relations, a State cannot blow hot and cold. It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position before an international judge or arbitrator, at least if the other parties have relied on it. As indicated by principle 10 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission:

> A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:
>
> … (*b*) The extent to which those to whom the obligations are owed have relied on such obligations;…[2603]

(2) It should not be inferred from the above that the author of an interpretative declaration is bound by the interpretation it puts forward—which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

> The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of the rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them.[2604]

(3) It should be recalled that under guidelines 2.4.8 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of interpretative declarations), the author of an interpretative declaration is free to modify or withdraw it at any time. Depending on the circumstances, the withdrawal or modification of an interpretative declaration may be of some relevance to the interpretation of the treaty to which it relates. However, the Commission decided not to make express mention of these two provisions because they relate to procedural rules, whereas guideline 4.7.2 is included in the section of the Guide to Practice concerning the effects of interpretative declarations.

(4) Like the author of an interpretative declaration, any State or international organization that has approved this declaration is bound by the same principles *vis-à-vis* the author of the declaration; it may modify or withdraw its approval at any time, provided that the author of the declaration (or third parties) have not relied on it.

(5) Moreover, despite its limited binding force, an interpretative declaration might constitute the basis for agreement on the interpretation of the treaty; it could also preclude such an agreement from being reached.[2605] In this connection, McRae noted as follows:

> The "mere interpretative declaration" serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties.[2606]

4.7.3 *Effect of an interpretative declaration approved by all the contracting States and contracting organizations*

An interpretative declaration that has been approved by all the contracting States and contracting

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[2601] As Judge Alfaro explained in the important separate opinion he attached to the Court's second judgment in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, "[w]hatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consiliuim suum in alterius injuriam*). (…) Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)" (*Temple of Preah Vihear* (see footnote 1435 above), p. 40). See also the Permanent Court of International Justice, Judgment of 12 July 1929, *Serbian loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 38–39; International Court of Justice, *Judgment of 20 February 1969, North Sea Continental Shelf* (footnote 1521 above), p. 26, para. 30; *Judgment of 26 November 1984, Military and Paramilitary Activities in and against Nicaragua* (footnote 2319 above), p. 415, para. 51; or *Judgment of 13 September 1990, Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 92, at p. 118, para. 63.

[2602] See the International Court of Justice, *Judgment of 12 October 1984, Delimitation of the Maritime Boundary in the Gulf of Maine Area* (footnote 339 above), p. 305, para. 130. The legal literature is in agreement on this point. Thus, as D. Bowett explained more than a half-century ago, the *raison d'être* of estoppel lies in the principle of good faith: "The basis of the rule is the general principle of good faith and as such finds a place in many systems of law" ("Estoppel before international tribunals and its relation to acquiescence", BYBIL, vol. 33 (1957), p. 176 (footnotes omitted)). See also J. Crawford and A. Pellet, "Anglo Saxon and Continental approaches to pleading before the ICJ", in I. Buffard *et al.* (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden/Boston, Nijhoff, 2008, pp. 831–867.

[2603] *Yearbook ... 2006*, vol. II (Part Two), p. 161. According to principle 10, the two other factors to be taken into account when assessing the arbitrary nature of a revocation are: "(*a*) any specific terms of the declaration relating to revocation" and "(*c*) the extent to which there has been a fundamental change in the circumstances" (*ibid.*). *Mutatis mutandis*, these two factors may also be relevant to the implementation of guideline 4.7.2.

[2604] Bowett, "Estoppel before international tribunals …" (footnote 2602 above), pp. 189–190. See also McRae, "The legal effect of interpretative declarations" (footnote 129 above), p. 168.

[2605] Heymann, *Einseitige Interpretationserklärungen …* (footnote 147 above), p. 129.

[2606] McRae, "The legal effect of interpretative declarations" (footnote 129 above), pp. 160–161 (footnotes omitted).

organizations may constitute an agreement regarding the interpretation of the treaty.

Commentary

(1) Assent to an interpretative declaration by all the other parties to the treaty, however, radically alters the situation. Thus, in the International Law Commission, Sir Humphrey Waldock recalled that the Commission

> agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential.[2607]

(2) Unanimous agreement by all the parties therefore constitutes a true interpretative agreement which represents the will of the "masters of the treaty" and thus an authentic interpretation.[2608] One example is the unanimous approval by the contracting States to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of 1928 of the interpretative declaration of the United States of America concerning the right to self-defence.[2609]

(3) In this case, it is just as difficult to determine whether the interpretative agreement is part of the internal context (article 31, paragraph 2, of the Vienna Conventions) or the external context (article 31, paragraph 3) of the treaty.[2610] The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. In a case where a declaration is made before the signing of the treaty and approved when (or before) all the parties have expressed their consent to be bound, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of article 31, paragraph 2 (*a*), or as "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" within the meaning of paragraph 2 (*b*) of the same article. If, however, the interpretative agreement is reached only after the treaty has been concluded, a question might arise as to whether it is merely a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of article 31, paragraph 3 (*b*), or if, by virtue of their formal nature, the declaration and unanimous approval combined constitute a veritable "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (art. 31, para. 3 (*a*)).[2611]

(4) Without really resolving the question, the Commission wrote in its commentary to article 27 of its 1966 draft articles (which became article 31, paragraph 3 (*a*), of the 1969 Vienna Convention):

> A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: "… the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty …" Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.[2612]

(5) The fact remains, however, depending on the circumstances—the lack of an automatic effect being indicated by the verb "may" in guideline 4.7.3—the unanimous approval by the parties of an interpretative declaration made by one of them may constitute an agreement, and an agreement among the parties as to the interpretation of the treaty must be taken into consideration when interpreting the provisions to which it relates.

5. *Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States*

Commentary

(1) As the title suggests, Part 5 of the Guide to Practice deals with reservations, acceptances of and objections to reservations and interpretative declarations in cases of succession of States. Part 5 is organized in five sections as follows:

– Reservations in cases of succession of States (5.1);

– Objections to reservations in cases of succession of States (5.2);

– Acceptances of reservations in cases of succession of States (5.3);

– Legal effects of reservations, acceptances and objections in cases of succession of States (5.4);

– Interpretative declarations in cases of succession of States (5.5).

(2) The inclusion of guidelines in this area in the Guide to Practice is all the more important given that:

– the 1969 and 1986 Vienna Conventions have no provisions on this subject except a safeguard clause,

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[2607] *Yearbook … 1966*, vol. I (Part One), 829th meeting, 12 January 1966, p. 47, para. 53. See also R. Kolb, *Interprétation et création du droit international*, Brussels, Bruylant, 2006, p. 609.

[2608] See footnote 2571 above. See also Heymann, *Einseitige Interpretationserklärungen …* (footnote 147 above), pp. 130–135; I. Voïcu, *De l'interprétation authentique des traités internationaux*, Paris, Pedone, 1968, p. 134; or M. Herdegen, "Interpretation in international law", *Max Planck Encyclopedia of Public International Law* (available from www.mpepil.com), para. 34.

[2609] AJIL, *Supplement*, vol. 23 (1929), pp. 1–13.

[2610] See paragraph (21) of the commentary to guideline 4.7.1 above.

[2611] In this regard, see, in particular, Heymann, *Einseitige Interpretationserklärungen …* (footnote 147 above), p. 130.

[2612] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, paragraph (14) of the commentary (footnotes omitted).

Annex 688

"Interpretation of the Algerian Declarations of 19 January 1981 (Claims Against U.S. Nationals)", Iran-United States Claims Tribunal, *International Law Reports* (Cambridge University Press, 1982)

II.—Procedure

i.—Procedure before the tribunal

Disputes—Arbitration—Procedure—Procedure before the tribunal —Power of tribunal to determine own rules of procedure—Procedure in default of appearance by one party

See p. 140 (*Libyan American Oil Company* v. *Government of the Libyan Arab Republic*).

ii.—Competence. Competence to Determine Jurisdiction

Arbitration—Procedure—Competence—Competence to determine jurisdiction — Interpretation of arbitration agreement — Whether tribunal may hear claims of one State against nationals of another State—The Iran-United States Claims Tribunal

INTERPRETATION OF THE ALGERIAN DECLARATIONS OF 19 JANUARY 1981 (CLAIMS AGAINST U.S. NATIONALS)

Iran-United States Claims Tribunal. 21 *December* 1981

(Lagergren, *President;* Bellet, Mangård, Kashani, Holtzmann, Shafeiei, Aldrich, Enayat, Mosk, *Arbitrators*)

Facts:—The Iran-United States Claims Tribunal (the Tribunal), was established under the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981 (the General Declaration) and the Declaration of the same Government of the same date concerning the Settlement of Claims (the Claims Settlement Declaration). In a letter dated 13 November 1981 Iran requested the Tribunal to decide whether the two Declarations conferred upon the Tribunal jurisdiction over claims of the Iranian Government against nationals of the United States (US).

Article II of the Claims Settlement Declaration determines the jurisdiction of the Tribunal. Paragraph 1 provides that the Tribunal is established for the purpose of deciding claims of nationals of the US against Iran and claims of nationals of Iran against the US and any counter claims arising out of the same contract, transaction or occurrence that constitutes the subject matter of the national's claim. However, certain claims (arising out of events of November 1979 and the Islamic Revolution in Iran, or arising under a binding contract specifically providing for the "sole jurisdiction of the competent Iranian courts") are specifically excluded. Article II (2) provides that the Tribunal shall have jurisdiction over official claims of the United States and Iran against each other arising out of contractual agreements. According to paragraph 3, the Tribunal shall have jurisdiction with regard to the performance of any provision of the General Declaration. Article II (4) gives the Tribunal jurisdiction to interpret the Agreement. Paragraph 2 (B) of the related Undertakings of the two Governments also

gives the Tribunal jurisdiction in certain disputes between banking institutions.

Iran contended that as it is the stated purpose of both Parties to terminate all litigation ''as between the Governments of each Party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration'', and in the absence of any relevant exclusion in the Claims Settlement Declaration, claims by Iran against nationals of the United States are within the jurisdiction of the Tribunal. The US submitted that such claims were not referred to in either the General Declaration or the Claims Settlement Declaration and therefore are not within the jurisdiction of the Tribunal.

Held:—by 6 votes to 3, the Tribunal does not have jurisdiction over claims by the Government of Iran against citizens of the US.

(i) According to Article VI (4) of the Claims Settlement Declaration, any question concerning the interpretation of the Agreement shall be decided by the Tribunal, and according to paragraph 17 of the General Declaration and Article II (3) of the Claims Settlement Declaration, any dispute arising between the Parties as to the interpretation of the General Declaration may be submitted to binding arbitration by the Tribunal. On this dual basis, the Tribunal has the power and the duty to give an interpretation on the point raised by Iran.

(ii) Article II of the Claims Settlement Declaration clearly shows that the Parties deliberately established a list of claims and counter claims which could be submitted to the Tribunal. Apart from requests for interpretation and disputes between the Governments, the list only mentions claims made by nationals of the US. Under paragraph 1 of that Article, however, the Parties admitted that counter claims by Iran and the US against nationals of the other State could be submitted, but this is admitted only in response to a claim made and it does not mean that each State is allowed to submit claims against nationals of the other State. Claims outside the jurisdiction of the Tribunal are expressly set out in Article II (1) and are limited to claims made by citizens of one State against the other. These specific exclusions mean that no further exceptions were contemplated.

(iii) The Tribunal rejected Iran's contention that, as the purpose of the General Declaration is stated to be the termination of all litigation between the Governments of each State and the nationals of the other, jurisdiction is therefore conferred on the Tribunal concerning any such claim. The specific provisions of both Declarations must be looked at. The General Declaration is not self-sufficient as far as the settlement of claims is concerned and does not confer on the Tribunal jurisdiction independently of the Claims Settlement Declaration. It is also doubtful whether there is any inconsistency between the two Declarations since all litigation to be terminated in January 1981, to which the General Declaration referred, consists of cases brought by nationals of the US against Iran.

(iv) Even if there was any inconsistency between the two Declarations, it is a well recognized principle of interpretation that a special provision overrides a general provision. Moreover the terms of the Claims Settlement Declaration are so detailed and clear that they must prevail over any purported intentions of the Parties.

per M. M. Kashani, S. Shafeiei and S. H. Enayat, dissenting:

The Tribunal has jurisdiction over the claims of Iran against nationals of the United States.

(i) Paragraph B of the General Declaration, comprising the mutual intent of both Governments on the settlement of all disputes between them and their nationals, is a fundamental principle which must guide the Tribunal in the interpretation of the Declarations. Such a significant stipulation cannot be treated as an incidental *motif* subject to limitative interpretation.

(ii) The Declarations have been concluded between two equal sovereign States. The principle of equality requires that the right of pleading and access exists equally for both sides. Furthermore, both Declarations have contemplated the principle of reciprocity as the main criterion of the mutual obligation of the two States. In view of these principles the sole task of the Tribunal is to interpret the Claims Settlement Declaration, Article II (1), so as to avoid conflict between the texts of the two Declarations. Therefore:

(a) From the standpoint of theory and judicial precedents, it is a well established principle that Agreements should be interpreted on the basis of the intentions and purpose of the Parties. The expressed mutual intention of the Parties is the termination of all disputes. If the Iranian claims cannot be brought to this Arbitration, and the Iranian Government despite bearing half the expenses of the Tribunal has to refer its claims to other courts and Tribunals, Iran would be put in an unequal and unjust situation.

(b) If, notwithstanding the reciprocity of the Declarations, the Claims Settlement Declaration should be interpreted in a manner that only claims of US nationals against Iran could be instituted and claims of the Iranian Government aginst US nationals are excluded, the Agreement would lose its apparent balance and turn into an Agreement without cause.

(c) The ability of Iran to file counter claims cannot be viewed as sufficient consideration for the Tribunal's one-sided jurisdiction over the claims of US nationals, since presentation of counter claims is a defensive measure from which any defendant may benefit and is not a right that has to be granted by the Claims Settlement Declaration.

(iii) Since the two Declarations were simultaneously concluded on 19 January 1981 none of the instruments may supersede or abrogate the provisions of the other. Because of the explicitness of the expressed mutual intent of the Parties, these Declarations must not be interpreted in contradictory terms. Even assuming inconsistency between the Declarations, several modes of interpretation in municipal and international law could resolve the issue.

From the standpoint of legal doctrines and judicial precedents in municipal law, it is a well established rule of interpretation that agreements should be interpreted on the basis of the intent and purpose of the Parties. Iranian law, Islamic law and the French Civil Code, Article 1156, reflect this rule. According to international law, the Vienna Convention on the Law of Treaties, which codifies existing customary international law, provides, first, for the principle of good faith in interpretation. If the mutual intent of the Parties is not applied to the interpretation of the Declarations and resort

is had to the letter of the Claims Settlement Declaration, Article II (1), the decision would be inconsistent with the principle of good faith. The International Court of Justice has applied this principle in the interpretation of international agreements, particularly where reliance on the ordinary and natural meaning of the words gives rise to conclusions contrary to the purpose of the Agreement.

The following is the text of the Decision:[1]

The Iran—United States Claims Tribunal sitting at the Peace Palace in The Hague, renders the following decision with respect to the interpretation requested by the Islamic Republic of Iran, represented by M. K. Eshragh, its agent. The United States of America was represented by A. W. Rovine, its agent.

I

By letter dated 13 November 1981, Iran requested the Tribunal to decide whether the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981 (called hereafter the General Declaration) and the Declaration of the same Government and same date, concerning the settlement of claims (called hereafter the Claims Settlement Declaration) have conferred upon this Tribunal jurisdiction over claims by the Government of Iran against nationals of the United States. Iran asked the Tribunal to give on that question an interpretation of those two Declarations. It contends that, according to paragraph B of the general principles of the General Declaration,

> it is the purpose of both parties to terminate all litigation as between the Government of each party and the nationals of the other and to bring about the settlement and termination of all such claims through binding arbitration

and that in the absence of any exclusion in the Claims Settlement Declaration, claims by Iran against nationals of the United States are within the jurisdiction of this Tribunal.

The Government of the United States has submitted on 8 December 1981, through its agent, a memorial contending that such claims are not referred to by either of those two declarations and are not within the jurisdiction of the Tribunal.

The two parties presented their oral arguments through their agents, on 15 December 1981. After having deliberated *in camera* without the presence of the agents, the Tribunal decided by a vote of 6 to 3 that the Declarations do not provide for jurisdiction by the Tribunal over claims by the Government of Iran against United States citizens, for the reasons hereafter expressed.

[1] See the Preface, page v above, for a reference to certain editorial problems arising in connection with texts emanating from this Tribunal.

II

A. According to article VI paragraph 4 of the Claims Settlement Declaration, "any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon request of either Iran or the United States", and according to paragraph 17 of the General Declaration, and Article II, paragraph 3 of the Claims Settlement Declaration, any dispute arising between the parties as to the interpretation of any provision of the General Declaration may be submitted by either party to binding arbitration by the Tribunal. On that dual basis, the Tribunal has not only the power but the duty to give an intepretation on the point raised by Iran.

B. The jurisdiction of the Tribunal over claims by Iran, the United States, and their nationals, is defined by Article II of the Claims Settlement Declaration. As it is said in the first paragraph of that article, the Tribunal is

> established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counter claim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim.

The same paragraph excludes, however, two categories of claims: on the one hand, certain claims arising out of the events of November 1979, and the Islamic Revolution in Iran, and, on the other hand, those arising under a binding contract specifically providing for "the sole jurisdiction of the competent Iranian Courts".

According to the 2nd paragraph of the same article, "the Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual agreements", and, as noted above, the 3rd paragraph provides that the Tribunal shall have jurisdiction over any dispute as to the interpretation or performance of any provision of the General Declaration. Further specific grants of jurisdiction are found in paragraph 4 of Article VI of the Claims Settlement Declaration, which, as it has already been said, also gives jurisdiction to the Tribunal for the interpretation or application of this agreement, and in paragraph 2 (B) of the related undertakings of the two Governments, concerning possible disputes among banking institutions.

It can easily be seen that the parties set up very carefully a list of the claims and counter claims which could be submitted to the arbitral tribunal. As a matter of fact, they knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.

They mentioned only on that list, aside from requests for interpretation and disputes between the Governments, claims which would be made by nationals of one of the two States. Certainly, they admitted the counter claims submitted by Iran or the United States against nationals of the other State, but under restrictive conditions which are detailed in paragraph 1 of Article II of the Claims Settlement Declaration.

Such a right of counter claim is normal for a respondent, but it is admitted only in response to a claim and it does not mean, by analogy, that each State is allowed to submit claims against nationals of the other State. It means, *a contrario,* just the opposite. Certainly also, several specified sorts of claims are expressly excluded by the same paragraph, but such exclusion is in ''the framework'' of this paragraph, *i.e.:* concerning claims made by citizens against States. Such specific exclusions do not mean that, outside of that framework, any claim which has not been excluded, should be admitted.

C. Iran pointed in its request and its argument to the principle stated in paragraph B of the General Declaration that ''all litigation'' should be terminated ''between the Government of each party and the nationals of the other'', and asserted that, except for formal and expressed exclusions, jurisdiction would be conferred on the Tribunal concerning any claim. But in the same paragraph it is expressly said that ''it is the purpose of both parties to terminate all litigation'', ''within the framework and pursuant to the provisions of the two Declarations''.

Thus, one must look at the specific provisions of the two Declarations for the implementation of this purpose.

The provisions of each Declaration must be completed by the provisions of the other.

The General Declaration sets up only principles about non intervention in Iranian affairs, return of Iranian assets, and settlement of claims, as well as return of the assets of the family of the former Shah. It is not self sufficient as far as settlement of claims is concerned. Not only does the General Declaration not confer on the Tribunal jurisdiction independently of the Claims Settlement Declaration, but it needs that complementary text. Moreover, it is doubtful that there is any inconsistency between them, because the litigations to be terminated in January 1981, to which the General Declaration referred, were litigations brought by nationals of the United States against Iran.

D. If there were any inconsistency, it is a well recognised and universal principle of interpretation that a special provision overrides a general provision.

Roman law knew that principle under the words *''specialia derogant generalibus'',* and in a recent case, the International Court of Justice

agreed on the validity of that principle. See *Ambatielos Case (Jurisdiction), I.C.J. Reports 1952.* p. 28)[1].

Moreover, the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intentions of the parties, whatever they could have been.

III

Therefore, it is decided by a majority of 6 votes to 3 that the Iran—United States Claims Tribunal has no jurisdiction over claims to be filed by the Islamic Republic of Iran against United States citizens.

The opinion of the minority will be attached hereto.

The following is the Opinion of the minority:

Introduction

The Islamic Republic of Iran by the letter dated Azar 22, 1360 (23 November 1981) requested the Iran—United States Claims Tribunal that on the basis of the Algiers Declarations dated Day 29, 1359 (19 January 1981) declare its jurisdiction on proceedings with the claims of the Iranian Government agencies and instrumentalities against the nationals of the United States. The undersigned do not concur with the majority on the interpretation that they make of the jurisdiction of this Tribunal.

1

During the past several years series of different agreements and projects resulted between the Iranian Government agencies and instrumentalities and the American corporations. These agreements have become the source of several disputes from both sides, such that the Islamic Republic Agent explained as for unjustified walkouts, interruption of the needed spareparts and equipment, nonpayment of Iranian Government taxes and duties, the maintenance and care-taking expenses of incomplete projects, and the sums that a majority of the American companies had received without performance of their obligations. The American companies, for different other reasons, have also claims against the Islamic Republic Government agencies and instrumentalities. Said disputes plus the claims arising from the sale and purchase of goods and services between the two Governments finally brought the two Governments to conclusion of the Algiers Declarations whereby deciding to terminate such disputes and through a mutually consensual arbitration to bring about their resolution and disposition. This fact was reflected in the general principles of the Declaration of Algeria as follows:

[1 19 *I.L.R.* 416.]

The undertakings reflected in this Declaration are based on the following general principles:

. . . . . .

B. It is the purpose of both parties, within the frame work of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. . . ''

This provision clearly comprising mutual intent of both Governments on settlement of disputes existing between them and their nationals is a fundamental principle to guide the Arbitral Tribunal in interpretation of the Algiers Declarations. The contracting parties realizing the significance of such mutual intent decided to stipulate their purpose under the Declaration of Algeria in such express terms constituting the corner stone of all their undertakings under both Declarations. No doubt such significant stipulation could not be treated as an incidental *motif* subject to any limitative interpretation.

2

The following general principles must also be considered in formulating consistent and reasonable interpretation of the Declarations regarding the question of jurisdiction of this Tribunal.

A. The Declarations have been concluded between two States with equal sovereignty. The principle of equality of States requires that in a sole tribunal the right of pleading and access equally exist for both sides.

B. Both Declarations have contemplated the principle of reciprocity as the main criterion (cause) of the mutual obligations of the two sovereign States. That principle has been consistently adhered to by several provisions of both Declarations such as:

(1) [T]o terminate all litigation as between the Government of each party and the nationals of the other, . . . (Declaration of Algeria, General Principle B).

(2) [C]laims of nationals of the United States against Iran and claims of nationals of Iran against the United States, . . . (Claims Settlement Declaration, Article II, paragraph 1).

(3) [O]fficial claims of the United States and Iran against each other, . . . (Claims Settlement Declaration, Article II, paragraph 2).

(4) The expenses of the Tribunal shall be borne equally by the two governments. (Claims Settlement Declaration, Article VI, paragraph 3).

3

In view of the above principles the sole task of this Tribunal is to formulate an interpretation as to appropriate application of the Claims Settlement Declaration, Article II, paragraph 1 in order to

avoid any conflict between the texts of the two Declarations simultaneously concluded by the parties. The Agent of the United States suggests that the Tribunal should read said paragraph in terms of the ''sole basis'' of the jurisdiction of this Tribunal, and as such the whole purpose of the ''general principle'' would become redundant. It is a matter of sound interpretation that redundancy of a contractual provision requires sufficient justification. Nothing in support of that position has been offered to warrant such drastic deviation from the expressed terms of the agreements. To the contrary, we have come to the conclusion that the following also supports our holding as to the jurisdiction of this Tribunal for entertaining the Iranian claims against the United States corporations.

The agreements and contracts giving rise to these claims had been concluded between the Iranian Government agencies and instrumentalities and the American companies. The United States Government, for its special administrative and economic structure does not exert such wide and diverse commercial and economic activities as assumed by the Iranian Government. The United States Government basically lacks direct control in conclusion and performance of such agreements. Therefore, in the claims giving rise to the establishment of this Arbitration the American Government is basically not a party to the disputes. Nevertheless the two governments have also entered into some purchase and sale agreements. The adjudication of disputes arising from such transactions has become the subject of particular provision of the Claims Settlement Declaration, Article II, paragraph 2.

It is a matter of fair dealing that should the American companies be permitted to sue the Iranian Government before this Tribunal a comparable jurisdiction must also be conferred to the Tribunal to deal with the enormous claims of the Iranian Government against the American companies. We therefore hold that:

(1) From the stand point of both theory and judicial precedents, it is a well-established principle of interpretation that agreements should be interpreted on the basis of intention and purpose of the parties. The expressed mutual intention of the parties is the cancellation of all American litigations. If the Iranian claims cannot be brought to this Arbitration and the Iranian Government, despite bearing half of the expenses of this Arbitration, has to refer to other courts and tribunals for prosecution and adjudication of its claims, it not only bears additional expenses, but also it would be put in an unequal and unjust situation for which it has waived a part of its sovereign immunity so that the American companies whose claims have been pending before United States courts can utilize the facilities of this Arbitration but the claims of the Iranian Government and

its instrumentalities would be left uncertain as before the Algiers Declarations.

(2) If notwithstanding the reciprocity of the Algiers Declarations and the fundmental point that in a reciprocal agreement the cause of undertaking of one party is the undertaking of the other party, the Claims Settlement Declaration should be interpreted not in a manner that only one party benefit from it and the claims of Iranian Government and its instrumentalities be excluded and consequently only the claim of American nationals and companies against Iran could be instituted. If that be the case then this agreement would obviously lose its apparent balance and turn to an agreement without cause or with superficial cause. The reason is self-explanatory; the United States, being away from much eonomic and commerial activities, would not be a person against which the Iranian nationals would file claims.

In such a situation the phrase: ''claims of nationals of Iran against the United States'', stated in the Claims Settlement Declaration, Article II, paragraph 1 becomes ineffective and purposeless and it turns more to a poetic rhythm making in the Declaration losing every useful and effective legal concept and meaning.[1]

(3) Refusing jurisdiction of this Arbitral Tribunal over the claims of the Iranian Government instrumentalities would cause institution of thousands of claims by American companies against Iran before this Tribunal while excluding Iran from any claim against them. In such situation it is unclear why Iran should bear half of the expenses of this Tribunal. It may be said that Iran may against such claims file its own counter claims but it is obvious that counter claims cannot be viewed as sufficient consideration for one sided Tribunal's jurisdiction over the claims of the United States nationals. Since counter claim is a mere defensive measure that could only be invoked against the same claimant it is not helpful in granting jurisdiction to the Tribunal for independent claims of Iran against the United States nationals. Moreover counter claim is a right that every defendant benefits from; it is not a right that has to be granted by the Claims Settlement Declaration.

4

The Algiers Declarations were simultaneously concluded on Day 29, 1359 (19 January 1981) and because of their simultaneous con-

[1] It is a rule of interpretation that agreements should be interpreted in a manner not ineffectuating or abrogating any clauses therein. French Civil Code Article 1157 emphasising said rule provides that where a contractual clause is susceptible of two meanings, the meaning should be taken that gives the clause legal meaning and effect, not the meaning that renders it useless.

clusion none of the instruments may supersede or abrogate the provisions of the other. Moreover, because of the clarity and explicitness of the expressed mutual intent of the parties, it appears that those instruments should not be interpreted in contradictory terms. Even assuming inconsistency or contradiction between the Declaration of Algeria, General Principle B, and the context of the Claims Settlement Declaration, Article II, paragraph 1, several manners of interpretation in municipal and international law could direct resolution of the issue by the Arbitral Tribunal.

A. Municipal Law. From the standpoint of both legal doctrines and judicial precedents, it is a well-settled rule of interpretation that agreements should be interpreted on the basis of intent and purpose of the parties. The Iranian law as well as the Islamic law have reflected this rule as that "contracts follow the intentions" and "provisions of the texts are for the intentions and understandings, not for the letters and the phrases".[2] The French Civil Code Article 1156 has stated the same rule that contracts should be reviewed and inquired as to mutual intent of the contracting parties, not that to stop at the letters and terms used. Article 1135 of the same Code provides for application of the law and fairness in interpretation where discovery of the real intention of the parties is impossible. In other words, it supplements the law and fairness to mutual intent of the parties. The French judicial precedents (Jurisprudence) are based on that where the letters and terms of a contract are in contradiction with the intent of the parties, the letters and terms should be set aside and the real intention of the parties be followed.

B. International law. The 1969 Vienna Convention on the Law of Treaties, entered into force in 1980, codifying customary and judicial international law, could be a useful guide where it provides for several rules of interpretation.

The first principle that the Vienna Convention Article 31, provides for interpretation is the principle of good faith. Said Article inter-relates the principle of good faith to the entire agreement and its purpose and objects. As such the good faith is not only a rule of morality but a part of codified international law that governs on all reciprocal relations among the States member to the international community.[3] Application of good faith to implementation stage of agreements has also been provided for by Article 26 of the same convention. It is obvious that if an international agreement were to be implemented on the basis of good faith, interpretation of such agreement should necessarily be made on the basis of good faith. The plain meaning of good faith in interpretation of agreements is

[2] Al-Magillah Article.
[3] *A. Verdross, Regle Général du droit de la paix,* 30 RCADI 427 (1929).

application of the spirit of honesty and respect for law. To put it more precisely it has been stated that resort should not be made to concealment of reality, fraud and deceit in relations with the other contracting party.[4]

Considering the above and taking into account that the mutual intent of the contracting parties to the Declaration of Algeria has explicitly been the settlement of all pending claims of each government and the nationals of the other, if the mutual intent is not applied to the Claims Settlement Declaration and instead resort be made to letters of the Claims Settlement Declaration, Article II, paragraph 1, for the purpose of interpretation the decision would be inconsistent with the principle of good faith. Any such ruling would presume that one contracting party through improper conduct had deviated from the mutual intent of both parties by which they are bound. Thus interpretation of the Declarations should be made in conformity with the principle of good faith and consistent with the expressed mutual purpose of the parties.

Furthermore, on the basis of Articles 31 and 32 of the Vienna Convention we thus conclude that in rendering the above interpretation the Tribunal shall consider both Declarations and read them consistent with the expressed intent of the sovereign parties in order to declare its jurisdiction to deal with Iranian claims against United States nationals. Should the literal reading of the text amount to any inconsistent, ambiguous or unreasonable result, it is the Tribunal's mandate to remedy such improper conclusion through resort to sound judicial interpretation. In its decisions the International Court of Justice has continuously applied this in interpretation of international agreements, and particularly when reliance on the ordinary and natural meanings of the word gives rise to a conclusion contrary to the subject and purpose of the agreement.[5]

[4] Union Académique Internationale, *Dictionnaire de la terminologie du droit international* 91 (1960):

> Esprit de loyauté, de respect du droit, de fidelité aux engagements de la part de celui dont l'action est en cause, absence de dissimulation, de tromperie, de dol dans les relations avec autrui.

[5] *South-West Africa* (Judgment), [1962] I.C.J. 336; [37 *I.L.R.* 3] *Polish Postal Service in Danzig* [1925] P.C.I.J. Ser. B. No. 11 at 39 [3 *Ann. Dig.* 49]:

> It is a cardinal principle of interpretation that words must be interpreted in the sense they would normaly have in their context, unless such interpretation would lead to something unreasonable or absurd;

Temple of Preah Vihear (*Judgment*), [1961] I.C.J. 33; [33 *I.L.R.* 48] Professor Sauser-Hall in *Affaire de l'or albanais* arbitral award of 1953 also refused to give effect to ordinary meanings of the words used in agreement between governments when such meanings were contrary to the purpose and object of the agreement, XII United Nations Series of Arbitral Awards 41.

We therefore conclude that the Iran—United States Claims Tribunal has jurisdiction over the claims of the Islamic Republic of Iran against the nationals of the United States.

[Report: Unpublished.]

Disputes — Arbitration — Procedure — Competence to determine jurisdiction — Arbitrability of dispute — Survival of arbitration clause

See p. 140 (*Libyan American Oil Company* v. *Government of the Libyan Arab Republic*).

III.—Evidence

Disputes—Arbitration—Evidence—Duty of tribunal to decide on best evidence available—Effect of failure of one party to appear—Evidence regarding methods of computing sums claimed

See p. 140 (*Libyan American Oil Company* v. *Government of the Libyan Arab Republic*).

V.—Miscellaneous

Disputes—Arbitration—Enforcement of award by proceedings in municipal courts—Sovereign immunity—Waiver—Act of State—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—The law of the United States

See p. 221 (*Libyan American Oil Company* v. *Socialist People's Libyan Arab Jamahiriya*).

Disputes — Arbitration — Enforcement of arbitration award by proceedings in municipal courts—Requirement of Swiss law that any proceedings against a foreign State have a close connection with Switzerland — Whether fact that arbitration held in Switzerland sufficient connection to permit proceedings for enforcement—The law of Switzerland

See p. 228 (*Socialist Libyan Arab Popular-Jamahiriya* v. *Libyan American Oil Company*).

Annex 689

H. Xue, *Transboundary Damage in International Law* (Cambridge University Press, 2003), pages 1-10

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1 Introduction

That large-scale industrial, agricultural, and technical activities conducted in the territory of one country can cause detrimental effects in the territory of another country or to areas of the global commons is by no means a novel problem in international law. Such transboundary damage has given rise to numerous theories of State responsibility or liability, focusing on remedial rules. But for a long time State practice in this field remained inconsistent and fragmentary. During the past two decades, however, the scope and content of the subject have dramatically expanded, exerting a direct impact on the codification and progressive development of international law in three important fields: (1) the regime of State responsibility; (2) international liability for injurious consequences arising from acts not prohibited by international law; and (3) international environmental law. State responsibility and international liability for injurious consequences have been two of the major issues on the agenda of the International Law Commission (ILC).

In current parlance, transboundary damage is also often referred to as environmental damage, but of a specific type, namely, environmental damage caused by or originating in one State, and affecting the territory of another. There is a vast body of international treaties on various forms of transboundary damage – pollution of international waters, long-range air pollution, land-source damage to the ocean and oil pollution, to give only a few examples. While some of the treaties directly lay down rules on liability and compensation, most contain only general provisions dealing with State responsibility and liability, leaving issues of detailed implementation aside for future action.

Amidst the worldwide demand for increased environmental protection, international jurists, academic and practicing, have again raised the topic of transboundary damage, urging more and stricter rules of

international liability for the protection of the environment. Some contend that strict liability (liability without proof of fault on the part of the actor) should be recognized as a general principle of international law, applicable to all transboundary damage cases, as already accepted by many national laws and as adopted by some international treaties. But actual practice, as witnessed in the aftermath of the Chernobyl nuclear catastrophe, has not sustained such normative claims.

The discrepancy between theory and practice raises basic questions. First of all, as the tragedy of the Chernobyl accident unfolded, international lawyers asked what kind of responsibility a State should bear under international law to prevent and remedy damage caused to other States. If the law is to impose strict liability on States, what legal mechanisms are required? Should these only be specified on an *ad hoc* basis, in particular contexts, by treaty? Or should customary rules be recognized as applicable on a more general basis, by analogy with the general practice of States at the domestic level in the field of civil liability?

In the light of these challenges, this study considers the nature and scope of the current law on international liability for transboundary damage, why it has so evolved, and how it will continue to develop in the future. No doubt the study of international liability rules is only one aspect of the problem of transboundary damage. The development of international environmental law has to a large extent changed the traditional approach of international law towards such issues by focusing on the prevention of damage at its source rather than on compensation for harm caused. Nonetheless transboundary environmental harm continues to occur and issues of liability and responsibility arise. Taking examples and case studies from the industrialized world, one objective of this study is to provide some policy guidance for those States which are bound to face similar problems in the course of their own industrialization.

The study will begin in this chapter with an introduction to basic terms and concepts, particularly the term "transboundary damage," with a view to establishing a meaningful framework for inquiry into international liability rules. Given the huge volume of legal materials and literature on international environmental law, three perspectives are purposely chosen for the study: (1) accidental damage (Chapters 2 and 3); (2) non-accidental damage (Chapters 4 and 5); and (3) damage to the global commons (Chapters 6 and 7). In these chapters, the existing legal regimes on international liability will be reviewed, and relevant legal issues examined. This approach seeks to reveal the underlying general

pattern of legal rules and the basic policy objectives they have been designed to pursue.

Obviously the law does not address damage in the abstract, but only for a specific social purpose. Thus Chapter 8 undertakes a qualitative analysis of liability rules using three criteria – normativity, equity, and efficiency. These criteria serve to determine to what extent international liability regimes will develop and to what extent States will be prepared to accept and be governed by these rules.

On the fundamental issue – the basis of international liability – recent developments, particularly the work of the ILC on State responsibility and international liability for injurious consequences, have given rise to much debate. First, the apparent distinction between State responsibility for wrongful acts and international liability for "lawful acts" (acts not prohibited by international law) challenges standard views of the basis for State responsibility for activities conducted on its territory. The normative claim that strict liability for transboundary damage under customary international law should be imposed on States equally bears on the origin of State responsibility and liability. At the core of the matter lies the fundamental question of the extent of national sovereignty in the conduct of activities within a State's own territory. The basis for imposing liability for damage caused therefrom raises the question of the extent to which perceived sovereign rights to economic development should be restrained. Chapter 9 will focus on these issues.

The scope of the subject: the definition of transboundary damage

Transboundary damage can arise from a wide range of activities which are carried out in one country but inflict adverse effects in the territory of another. Traditionally, however, transboundary damage as a term of art normally refers to border-crossing damage via land, water, or air in dyadic State relations. In international environmental law, such damage is often referred to as international environmental damage or international environmental harm.[1] But since the term "environment"

[1] In comparison with the more general term "environmental damage," the term "transboundary damage" serves to narrow the scope of the relevant damage to that which directly affects more than one State. The definition of environmental damage and equivalent terms varies among different legal instruments. Some definitions are restricted to the objectives of the given treaty and some are rather broad with general reference to the whole area. One jurist defines environmental damage broadly as

has evolved to have such broad connotations, the discussion of transboundary damage in the present study is restricted by four elements: (1) the physical relationship between the activity concerned and the damage caused; (2) human causation; (3) a certain threshold of severity that calls for legal action; and (4) transboundary movement of the harmful effects.[2] Each of these elements is explained below.

The physical relationship between the activity and the damage

Acts that may give rise to transboundary damage for the purposes of this study are those which directly or indirectly involve natural resources, e.g. land, water, air, or the environment in general. In other words, there must be a physical linkage between the activity in question and the damage caused by it. Typically, industrial, agricultural, and technological activities fall into this category. For example, when a nuclear plant is to be built in the border area, placing a vulnerable neighbor at risk, or a border airport creates a nuisance from overflight of a village situated in a neighboring country, the normal conditions of the environment are disturbed or interrupted by the activity.

More dramatic are cases where factories emit noxious fumes and, as a result, residents living on the other side of the border experience increased risk of lung or skin diseases;[3] or where a fault in a border highway construction incidentally causes a landslide that damages the crops of the neighboring farm of another country.[4] Not surprisingly, damage arising from such activities has often been addressed locally or

"damage to: (a) fauna, flora, soil, water, and climatic factors; (b) material assets (including archaeological and cultural heritage); (c) the landscape and environmental amenity; and (d) the interrelationship between the above factors": Philippe Sands, "Liability for Environmental Damage," in Sun Lin and Lal Kurukulasuriya (eds.), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (Nairobi, UNEP, 1995), p. 73, at p. 86, n. 1.

[2] In defining environmental harm and risk, Professor Schachter proposes four conditions which must exist for environmental damage to fall within the definition of transboundary environmental harm. First, the harm must be a result of human activity; secondly, the harm must result from a physical consequence of that human activity; thirdly, there must be transboundary effects; and, fourthly, the harm must be significant or substantial. See O. Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991), pp. 366–368.

[3] For instance, the *Trail Smelter* arbitration between the US and Canada, reported in RIAA, vol. III (1938), p. 1905; (1941), p. 1938; and discussed in Whiteman, *Digest of International Law* (Washington, US Government Printing Office, 1963–1973), vol. 6, at p. 253.

[4] For example, the incident between the US and Mexico in the 1950s, documented in Whiteman, *Digest*, vol. 6, at p. 260.

regionally,[5] as these incidents generally involve two or three countries in the region. The gist of this first element is that activities in one State directly give rise to harm in a neighboring State or States.

This first definitional element also encompasses the physical consequences of the activity in question. It serves to exclude activities which may cause consequential damage across a border, but not of a "physical" character – for example, expropriation of foreign property, discriminatory trade practices, or currency policies. Such damage may also be grave and material, but it is mainly of an economic or financial nature.[6] When the ILC first embarked on the topic of "international liability for injurious consequences arising out of acts not prohibited by international law," one of the major debates was whether to confine the topic to environmental damage only, or to cover all kinds of transboundary damage, tangible or intangible, especially economic, financial, and trade activities.[7] The ILC eventually reached agreement, with the approval of the General Assembly, not to include economic and financial activities, since damage caused by these activities is of a different character and should be addressed by different rules.[8] This approach is also taken in the present study.

Thus the physical element denotes "bodily, materially or environmentally" harmful consequences. Bodily harm also includes anything injurious to human senses, e.g. nuisance caused by noise, odor, etc.

[5] There is a series of studies on transboundary pollution and environmental damage carried out by the Organization for Economic Cooperation and Development (OECD): OECD, *Legal Aspects of Transfrontier Pollution* (Paris, OECD, 1977).

[6] This categorization may seem odd to private law lawyers accustomed to the concept of physical harm in tort law or civil law in domestic legal practice, which refers to damage to persons or property, while non-physical damage could include injury to reputation or invasion of privacy. See generally Page Keeton, Robert E. Keeton, Gregory Keating and Lewis D. Sargentich, *Cases and Materials on Tort and Accident Law* (3rd edn., St. Paul, West Publishing Co., 1998). The emphasis in the present context is on the physical form of the damage. Economic loss may be tangible but not physical in form. More importantly, by such classification, certain international economic, financial, and trade activities are treated separately from environmental activities.

[7] See M. B. Akehurst, "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law," *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 3–16.

[8] The Working Group set up by the ILC at its thirtieth session recommended: "[the topic] concerns the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. [It] concerns also the injurious consequences that such use or management may entail within the territory of other States, or in relation to the citizens and property of other States in areas beyond national jurisdiction": *Yearbook of the ILC* (1978), vol. II (Part Two), pp. 150–151, Doc. A/33/10, Chapter VIII, section C, Annex, para. 13.

The requirement of human causality

The second defining element is the human (i.e. anthropogenic) cause of transboundary damage. Damage that may affect more than one country is not caused by human activities alone. Natural factors, such as earthquakes, floods, volcanos, and hurricanes, can also bring about tremendous losses to human society across a wide area. For such "acts of God," so to speak, liability rules do not apply. A standard *force majeure* clause is usually contained in treaties to exonerate States from legal liability for such damage.[9] In principle, transboundary damage should have "some reasonably proximate causal relation to human conduct."[10]

Furthermore, in accordance with the principles of State responsibility and liability, remediable damage must be connected with a legal right or interest of a State, i.e. an entity with plenary legal personality in international law. In the domestic environmental law field, damage to the public domain could be claimed by the government on behalf of the State community. In international practice, such anthropocentric linkage with the rights and interests of international persons presents little problem in dyadic relations, where the injured State can be easily identified. However, in the case of damage to the global commons – namely, areas situated beyond national jurisdiction and control (e.g. polar areas, the high seas, or outer space) – it has traditionally been thought that no State can claim damage on behalf of the international community under international law if its own legal rights or interests are not directly affected. In recent years, the idea of claims for damage to the global commons has gained force,[11] as communal

[9] However, developments in international environmental law indicate the emergence of higher standards of conduct. Under the Rio Declaration adopted during the 1992 UN Conference on Environment and Development (UN Doc. A/CONF.151/26 (vol. I)), if serious or irreversible damage to the environment may occur as the result of certain human activities, the source State should consider taking precautionary measures, even when the human causation of such damage is not yet scientifically proved. Current global efforts in preventing the depletion of the ozone layer and climate change have promoted such a standard. Although this development does not preclude human cause of damage, it embodies the precautionary approach, calling for earlier preventive measures and setting higher standards of conduct. Further, human activities which directly or indirectly increase the risk of natural catastrophe may not escape liability in the event of damage.

[10] Schachter, *International Law*, p. 366.

[11] See discussion in Chapters 6 and 7. See also M. Glennon, "Has International Law Failed the Elephant?," *American Journal of International Law*, vol. 84 (1990), p. 1, at pp. 28–30; C. Stone, "Should Trees Have Standing? – Toward Legal Rights for Natural Objects," *South California Law Review*, vol. 45 (1972), p. 450; and Schachter, *International Law*, p. 367.

interests in the protection of the commons come to be recognized and expressed in various legal instruments.[12] It is still arguable, however, that all States parties to such instruments have the responsibility to protect the natural environment and the common areas, and correlative rights to see that others do so. In this regard, whether the commons are *res communis* or *res nullius* is no longer relevant, so far as they are open and accessible to all States for exploration and peaceful use under international law.[13] Therefore, transboundary damage does not solely refer to bilateral cases or to claims among a few States, as the word "transboundary" may imply. It also comprises damage to the commons arising from national activities or emanating from sources on national territory.

The threshold criterion

Transboundary damage does not necessarily give rise to international liability in all cases. As has been observed:[14]

> [t]o say that a State has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day. . . . No one expects that all these injurious activities can be eliminated by general legal fiat, but there is little doubt that international legal restraints can be an important part of the response.

International law only tackles those cases where transboundary damage has reached a certain degree of severity. Both in theory and in practice, the need for a threshold criterion has never been doubted, but what that should be has long been debated, along with the dilemma of how strict international liability rules should be. Evidently severity is a factual inquiry which changes with the circumstances of a given case. In

[12] These treaties include the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Moscow, London, and Washington, January 27, 1967), 610 UNTS 205; 6 ILM 386 (1967); the 1959 Antarctic Treaty (Washington, December 1, 1959), 402 UNTS 71; Alexandre C. Kiss (ed.), *Selected Multilateral Treaties in the Field of the Environment* (Nairobi, United Nations Environment Programme, 1983), p. 150; the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (December 5, 1979), 1363 UNTS 21; the UN Convention on the Law of the Sea (Montego Bay, December 10, 1982), 1833 UNTS 396; etc.

[13] The most relevant example is the Antarctic Treaty regime. See Chapter 6.

[14] Schachter, "The Emergence of International Environmental Law," *Journal of International Affairs*, vol. 44 (1991), p. 457; also in Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials* (3rd edn., St. Paul, West Publishing Co., 1993) at p. 1377.

different international legal instruments on natural resources and the protection of the environment, various terms qualifying the damage such as "serious," "significant," "substantial," and "appreciable" have been adopted.[15] The choice of such a term serves to set the threshold criterion for invoking international liability and to indicate the standard of conduct that State governments deem appropriate. The change of terms in the context of the ILC's early work on non-navigational uses of international watercourses, from "serious" to "appreciable" and finally to "significant," demonstrates the difficulty in deriving generally accepted rules of conduct for riparian States in the uses of international watercourses.[16] To be legally relevant, damage should be at least "greater than the mere nuisance or insignificant harm which is normally tolerated."[17] However, different limits are required for different purposes and in different contexts.

The transboundary movement of harmful effects

On the international plane, transboundary movement of harmful effects implies that more than one State is involved in or affected by the activity in question. The most straightforward example is the use of international rivers and lakes. When a river runs through more than one country, it may be considered an international river,[18] whether it serves as a boundary river or flows successively in different States. If the upstream State, in developing its water resources, either by building dams or by using the water for irrigation, brings about detrimental effects on the downstream State (e.g. the diversion of a large quantity of water

[15] Among others, see the American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States* (St. Paul, American Law Institute Publishers, 1987), vol. 2, § 601, and comment (c), pp. 103–105; the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted by the General Assembly by Resolution 51/229 of May 21, 1997 (UN Doc. A/51/869); Article 2 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the ILC on second reading in 2001, in Report of the ILC on the Work of its Fifty-Third Session, April 23–June 1 and July 2–August 10, 2001, General Assembly Official Records (GAOR), Fifty-Sixth Session, Supp. No. 10 (A/56/10), p. 370.

[16] Detailed discussions of these concepts will be presented in the following chapters, in particular Chapter 4. See also J. Barboza, "Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law," March 15, 1990, UN Doc. A/CN.4/428 (Article 2(b) and (e)), reproduced in *Yearbook of the ILC* (1990), vol. II (Part One), p. 83, at pp. 88–89 and 105.

[17] *Ibid.*

[18] There has been a long debate on the definition of an international watercourse. See the work of the ILC on the topic of the law of the non-navigational uses of international watercourses, discussed in Chapter 4.

resulting in serious damage to the crops in the territory of another State, or raising substantially the level of salinity of the water downstream, rendering it undrinkable), it causes transboundary damage. Another example is long-range air pollution. Industrial fumes produced in one State move across the border into a neighboring State, forming "acid rain" that ruins the forests and crops in that other State.

As explained above, the media for the transborder movement of the effects can be water, air, or soil. With national boundaries in mind, the term "transboundary" stresses the element of boundary-crossing in terms of the direct or immediate consequences of the act for which the source State is held responsible. It is the act of boundary-crossing which subjects the consequent damage to international remedy and initiates the application of international rules. Moreover, a "transboundary" harm may result from a transboundary movement across several boundaries that causes detrimental effects in several States. A transboundary act may also take the form of an act which causes harm in and beyond national jurisdiction or control, such as marine pollution of the high seas from land-based sources.

In the event of the transfer of hazardous technology, where there is no tangible movement of harmful substances across a border via the media of water, air, or soil, the activity may nonetheless cause detrimental environmental harm in another State. By definition, transfer of technology falls into a different category since the act, the harmful effects, and the victims are often all within one country. The word "transnational," rather than "transboundary," is usually chosen to describe situations involving the transfer of technology. The nuance lies in the fact that transfer of technology presents more an issue of international trade than a problem of environmental damage. Thus the Hague Conference on Private International Law, in its consideration of the law applicable to civil liability for environmental damage,[19] draws a comparison between the two notions. Referring to "transboundary" cases as "international," it says:[20]

> the "international" case involves the situation where human activity carried on in one country produces damage on the territory of another country. The "transnational" case is where the activity and the physical damage all occur within one country, but nonetheless there is a transnational involvement,

[19] Preliminary Document No. 9 of May 1992 for the attention of the Special Commission of June 1992 on general affairs and policy of the Conference.

[20] See T. Ballarino, "Private International Law Questions and Catastrophic Damage," *Recueil des Cours*, vol. 220 (1990-I), p. 293.

for example, because capital (including technological know-how) has been exported from another country in order to make possible the activity which has caused environmental damage and, presumably, any profits realized from such exported capital will be returned in one way or another to its country of origin.

This implies two separate categories of legal issue. Even though the activity and physical damage may have occurred within one country, the word "transnational" denotes the involvement of another State by way of business transactions surrounding the transfer of the hazardous technology.

But the distinction may be difficult to draw. For example, in the Bhopal catastrophe,[21] despite the fact that there was no transborder movement of either the act, the effects, or the victims, the resulting claims for damage were international in character. Damage was inflicted not only on the population, but also on the environment. The Bhopal incident thus possessed most of the features of a typical case of transboundary damage. At a time when transnational corporations are more and more inclined to move their business to developing countries (among other reasons, to take advantage of more lenient environmental regulations), the exclusion from the category of transboundary damage of cases which involve transboundary movement of capital or technology, rather than the harmful act or effects, is not reflective of reality.

The above four elements – physical nature, human causation, damage criterion, and boundary movement – limit the scope of the term "transboundary damage." By definition, transboundary damage embodies a certain category of environmental damage, including physical injury, loss of life and property, or impairment of the environment, caused by industrial, agricultural, and technical activities conducted by, or in the territory of, one country, but suffered in the territory of another country or in the common areas beyond national jurisdiction and control.

Three perspectives

This study is divided into four Parts, the first three of which will take an empirical approach and address the subject of transboundary harm from three perspectives: accidental damage, non-accidental damage, and damage to the global common areas. The line between accidental damage and non-accidental damage may be blurred in certain cases, and even

[21] See Chapter 2.

Annex 690

C. McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention", *International and Comparative Law Quarterly*, 2005, pp. 279-320

THE PRINCIPLE OF SYSTEMIC INTEGRATION AND ARTICLE 31(3)(C) OF THE VIENNA CONVENTION

CAMPBELL MCLACHLAN*

'Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.'

per Verzijl P, *Georges Pinson Case* (1927–8) AD no 292

I. OF FRAGMENTATION AND INTERPRETATION

A. Oil Platforms *and the Re-emergence of a Neglected Rule of Interpretation*

The recent judgment of the International Court of Justice in *Oil Platforms*[1] has shone a searchlight onto one of the most neglected corners of the interpretation section of the Vienna Convention, namely Article 31(3)(c).[2] This clause provides, with deceptive simplicity:

> There shall be taken into account, together with the context:
>
> . . . (c) any relevant rules of international law applicable in the relations between the parties.

Until very recently, Article 31(3)(c) languished in such obscurity that one commentator concluded that there was a 'general reluctance' to refer to it in

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[1] *Case concerning Oil Platforms (Iran v United States of America)* 42 ILM 1334 (2003), esp at para 41.

[2] Vienna Convention on the Law of Treaties 1969 ('VCLT').

[*ICLQ* vol 54, April 2005 pp 279–320] doi:/0.1093/iclq/lei001

international judicial practice.[3] Yet its dramatic deployment by the International Court in *Oil Platforms* as a bridge between the provisions of a treaty of friendship and the customary international law of armed conflict has served to reignite interest in the clause's potential scope and application. The interest of the International Court has coincided with renewed attention to this aspect of interpretation by other international tribunals,[4] and by the International Law Commission.[5] It is no accident that this renewed attention has surfaced at a time of increasing concern about the fragmentation of international law—a concern that the proliferation of particular treaty regimes would not merely lead to narrow specialization, but to outright conflict between international norms.[6]

This article starts from the proposition that Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.[7] As such, they must be 'applied and interpreted against the background of the general principles of international law',[8] and, as Verzijl put it in the extract above, a treaty must be deemed 'to refer to such principles for all questions which it does not itself resolve expressly and in a different way'.[9]

At this level, the principle operates, on most occasions, as an unarticulated major premise in the construction of treaties. It flows so inevitably from the nature of a treaty as an agreement 'governed by international law'[10] that one might think that it hardly needs to be said, and that the invocation of it would add little to the interpreter's analysis. Reference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process.

However, it is submitted that the principle is not to be dismissed as a mere truism. Rather, it has the status of a constitutional norm within the international legal system. In this role, it serves a function analogous to that of a

[3] Sands 'Treaty, Custom and the Cross-fertilization of International Law' *1 Yale Human Rights and Development Law Journal* (1998) 85, at 95.

[4] See, eg, the decisions of the European Court of Human Rights cited below at n 110.

[5] The Commission decided to include a study on this topic in the programme of work to be undertaken by its Study Group on Fragmentation of International Law at its 54th Session (2002): *Official Records of the General Assembly, Fifty-fifth session, Supplement No 10* (A/55/10), chap IX.A.1, para 729. A preliminary study on the topic prepared by the author in collaboration with William Mansfield (ILC(LVI)/SG/FIL/CRD.3/Rev 1) was presented at the Fifty-sixth Session in July 2004: *Report of the Study Group* (A/CN.4/L 663/Rev 1).

[6] See generally, Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003) ('Pauwelyn').

[7] See Koskenniemi 'Study on the Function and Scope of the *lex specialis* rule and the question of self-contained regimes' (ILC(LVI)/SG/FIL/CRD.1 and Add 1) ('Koskenniemi'), para 160.

[8] McNair *The Law of Treaties* (OUP Oxford 1961) 466.

[9] Above.

[10] VCLT, Art 2(1)(a).

master-key in a large building.[11] Mostly the use of individual keys will suffice to open the door to a particular room. But, in exceptional circumstances, it is necessary to utilize a master-key which permits access to all of the rooms. In the same way, a treaty will normally be capable of interpretation and application according to its own terms and context. But in hard cases, it may be necessary to invoke an express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law, applying general principles of international law.

Despite the fact that Article 31(3)(c) gives legislative expression to this fundamental principle, the International Law Commission drew back from exploring its full implications when it framed the Vienna Convention. Thus, as Waldock tellingly put it in the Commission's Explanatory Report, when explaining the omission of any more detailed rule about inter-temporality, the Commission 'abandoned the attempts to cover the point in the draft, realising that it would have involved entering into the whole relationship between treaty law and customary law'.[12]

The resulting formulation has thus been criticized as giving very little guidance as to when and how it is to be used; what to do about overlapping treaty obligations; and whether the other applicable international law is that in force at the conclusion of the treaty or otherwise. Indeed, Judge Weeramantry commented in his separate opinion in the *Gabčikovo-Nagymaros* case, that the sub-paragraph 'scarcely covers this aspect with the degree of clarity requisite to so important a matter'.[13] Thirlway concludes in even more dismissive terms that: 'It is . . . doubtful whether this sub-paragraph will be of any assistance in the task of treaty interpretation.'[14]

The issue, then, is not whether the rule found in Article 31(3)(c) exists and may be applied in some circumstances. Rather the task is one of 'operationalizing'[15] the sub-paragraph so that it may more fully perform its purpose, and, in the process, reduce fragmentation and promote coherence in international law. An exploration of what is involved in the principle behind Article 31(3)(c) will enable the elaboration of an outline approach to interpretation which will:

(a) reinstate the central role of customary, or general, international law in the interpretation of treaties;
(b) locate the relevance of other conventional international law in this process; and

[11] The author is indebted to Xue Hanquin, Ambassador of China to the Netherlands and member of the International Law Commission, for this illuminating analogy.

[12] *Yearbook of the International Law Commission* (1964) vol II, 184, para 74 ('*Yearbook*').

[13] *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep 1997, 7 at 114.

[14] Thirlway 'The Law and Procedure of the International Court of Justice 1960–1989 Part Three' (1991) 62 BYIL 1 at 58.

[15] To borrow a term employed by Sands, above n 3.

(c) shed new light on the position of treaties in the progressive development of international law over time (the so-called problem of 'inter-temporality').

In order thus to begin to unlock the full potential of Article 31(3)(c), it is first necessary to introduce some rather general ideas about the context in which it operates. This involves two elements. The first is the changing nature of the international legal system and the perils of fragmentation which it faces. The second is the process of interpretation itself: both as an aspect of legal reasoning applied to legal texts generally; and more specifically as a process of legal reasoning in international law. These two aspects are inter-linked.

B. The Changing Nature of the International Legal System

One starts from the proposition, so illuminatingly developed by Higgins, that international law is better understood as a normative system and a process rather than as rules.[16] She wisely observes that one consequence of this perspective is that: 'this entails harder work in identifying sources and applying norms, as nothing is mechanistic and context is always important'.[17] For the purposes of the present topic, this insight serves to remind us of three things. First, that all international legal acts, including the making of treaties, form part of a wider legal system. The rules of interpretation are themselves one of the means by which the system as a whole gives form and meaning to individual rules. Secondly, the content of international law changes and develops continuously—it provides a constantly shifting canvas against which individual acts, including treaties, fall to be judged. Any approach to interpretation has to find a means of dealing with this dynamism.

Thirdly, one of the characteristics which distinguishes international law from other legal systems is its horizontality.[18] Lacking a single legislature or court of plenary competence, and depending in all aspects fundamentally on state consent, international law lacks developed rules for a hierarchy of norms.[19] It draws its normative content from a wide range of sources operating at different levels of generality. Article 38 of the Statute of the International Court of Justice, which has served as a general catalogue of the sources of international law, ascribes no order of relative priority amongst those sources. The rules of customary international law, and 'the general principles of law recognized by civilized nations' are,[20] for the most part, capable of express exclusion by the detailed rules of a treaty. But in fact their role is much more pervasive, as they provide the foundations of the international

[16] Higgins *Problems and Process: International Law and How we use it* (OUP Oxford 1994), 1, 8.

[17] Ibid.

[18] Ibid.

[19] Subject to the (contested) category of peremptory norms or *jus cogens*, which are granted priority over treaties pursuant to Arts 53 and 64 VCLT.

[20] Art 38(1)(c) Statute of the International Court of Justice.

legal system. Rules derived from these sources may well be expressed at a very great level of generality. They may even, as in the case of general principles derived from private law sources, be inchoate in character.[21] But they are nonetheless rules of law within the international legal system for all that.

Yet within this system, the treaty has come to have a pervasive reach. This was apparent to Brierly, who, writing in the immediate aftermath of the establishment of the modern international legal system, observed that a new class of international law-making treaties was emerging, which were the substitute in the international system for legislation.[22] He commented: 'Their number is increasing so rapidly that the "conventional law of nations" has taken its place beside the old customary law and already far surpasses it in volume.'[23]

Shelton develops the consequences of this in terms of increasing stress on coherence within the international legal system. She characterizes these as issues of 'relative normativity'—problems of deciding priority amongst competing rules which may apply to the legal matter or dispute:[24]

> Until the twentieth century, treaties were nearly all bilateral and the subject matter of international legal regulation mostly concerned diplomatic relations, the seas and other international waterways, trade, and extradition. Today, the number of international instruments has grown substantially, multilateral regulatory treaties are common, the topics governed by international law have proliferated and non-State actors are increasingly part of the system. This complexity demands consideration and development of means to reconcile conflicts of norms within a treaty or given subject area, for example, law of the sea, as well as across competing regimes, such as free trade and environmental protection.

One consequence of the relentless rise in the use of treaties as a means for ordering international civil society,[25] is that the dynamic process of the development of international law now takes place in no small measure through the continuous progressive development of treaties. Thus, for example, in the *Mox Plant* case to be examined later in this paper,[26] the arbitral tribunals were invited to consider numerous international instruments in the field of environmental protection—each one building upon those that had come before.

A similar process may be observed even in the framing of bilateral treaties in the same subject area—such as, for example, foreign investment protection or free trade agreements. Each state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has

[21] Lauterpacht *Private Law Sources and Analogies of International Law* (Longmans London 1927).

[22] Brierly *The Law of Nations* (5th edn OUP Oxford 1955), citation taken from 6th edn (unchanged on this point) edited by Waldock (Clarendon Press Oxford 1963) at 58 .

[23] Ibid.

[24] Shelton 'International Law and 'Relative Normativity'' in Evans (ed) *International Law* (OUP Oxford 2003) 145 at 148–9.

[25] Ku 'Global Governance and the Changing Face of International Law' ACUNS Repts and Papers 2001 no 2.

[26] Below, Part III B.

entered with other states. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before.

In making this observation about the nature of the modern treaty-making process, it is not necessary to go so far as to contend that such common elements may point to the emergence of a norm of customary international law. Nor is the matter sufficiently disposed of as one concerning successive treaties on the same subject matter.[27] For this purpose, it is irrelevant whether the prior treaty is in force between the same parties, or different ones. The important point is that this everyday reality in the practice of foreign ministries has the inevitable consequence that treaties are developed in an iterative process in which many normative elements are shared. From having been a series of distinct conversations in separate rooms, the process of treaty-making is now better seen as akin to a continuous dialogue within an open-plan office.[28] A modern approach to treaty interpretation must adequately reflect this reality.

C. The Perils of Fragmentation

Given the extent, then, of this sharing of legal ideas and formulations, is there a real risk of the fragmentation of international law? What do we mean by fragmentation in this context? Brownlie adverted to the danger of fragmentation in 1988, writing:[29]

> A related problem is the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as 'international human rights law' or 'international law and development'. As a consequence the quality and coherence of international law as a whole are threatened. . . .
>
> A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.

Brownlie was making a point which was partly pedagogical—a bid for what might be called 'joined-up writing' in international law. But he also pointed to a broader systemic risk: that the development of specialized fields of international law—if progressed in isolated compartments—could lead to serious conflicts of laws within the international legal system. It has been this latter concern—fuelled by the proliferation of specialist international

[27] VCLT Art 30.

[28] The writer is indebted to William Mansfield for this metaphor.

[29] Brownlie 'The Rights of Peoples in Modern International Law' in Crawford (ed) *The Rights of Peoples* (Clarendon Press Oxford 1988) 1 at 15; see also his subsequent comments in [2001] ASIL Proceedings 13–15.

tribunals[30]—which has more recently preoccupied the international law community.

Thus the very enlargement in the scope and reach of international law, which has gathered pace since the end of the Cold War in the era of globalization, has called attention to the lack of homogeneity in the international legal system. As Hafner put it, in the feasibility study which prompted the International Law Commission to examine the issue of fragmentation:[31]

> Hence, the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogeneous nature of international law. This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration.

The challenge for treaty interpretation posed by this dimension of the development of international law is of a different order to that of iterative dialogue within a particular area of legal development, discussed above. Reference to external sources to inform the meaning of a legal text within a particular subject area has its own difficulties. But it is at least a cumulative process—building upon the meaning of the text. The kind of potential for serious conflict between different subjects in international law raises the question of how far the process of interpretation may be used to determine the relationship between the obligations in any particular treaty and other, potentially conflicting, obligations in other parts of international law.

The decision of the International Law Commission to take up the task of studying the fragmentation of international law, and the subsequent work of the Study Group which it established, has shown a commendably practical focus on the legal techniques which may be employed to resolve such normative conflicts. The subsequent division of the Study Group's work into five areas of research serves to remind us of the range of techniques already available to the international lawyer. They include the *lex specialis* rule;[32] the rules on successive treaties, and on the modification of multilateral treaties;[33] and the concept of *jus cogens*.[34]

However, the process of interpretation by reference to other international law obligations required by Article 31(3)(c) has a particular significance amongst these techniques. The other rules examined by the Study Group all provide an a priori solution to determine priority between substantive rules in

[30] See, eg, the collection of papers of 'The Proliferation of International Tribunals: Piecing together the Puzzle', a symposium held at New York University in October 1998, published in (1999) 31 NYU J Int'l L & Pol 679–933.

[31] Hafner 'Risks ensuing from Fragmentation of International Law', *Official Records of the General Assembly, Fifty-fifth session, Supplement No 10* (A/55/10), annex 321. The most recent report of the Study Group is dated 28 July 2004 (A/CN.4/L.663/Rev 1).

[32] Koskenniemi, above n 7.

[33] VCLT Arts 30 and 41, as to which see respectively Melescanu (ILC(LVI)SG/FIL/CRD.2) and Daoudi (ILC (LVI)/SG/FIL/CRD.4).

[34] VCLT Art 53 as to which see Golicki (ILC(LVI)/5G/FIL/(RD.5).

cases of true and irreducible conflict. These techniques employ different relational links to do this, namely:

(a) *Status:* The notion of *jus cogens* or peremptory rules is that certain rules in the international legal system have a higher status within the international legal system—being mandatory rules, from which no derogation by treaty is permitted. Further, certain multilateral treaties may themselves either expressly or in accordance with their object and purpose limit subsequent derogations;[35]

(b) *Specificity:* The concept of *lex specialis* contemplates that the more specific rule may take precedence over the general;

(c) *Temporality:* The *lex posteriori* rule ascribes priority to the most recent treaty rule on the same subject matter.

Interpretation, on the other hand, precedes all of these techniques, since it is only by means of a process of interpretation that it is possible to determine whether there is in fact a true conflict of norms at all. By the same token, the application of a technique of interpretation that permits reference to other rules of international law offers the enticing prospect of averting conflict of norms, by enabling the harmonization of rules rather than the application of one norm to the exclusion of another. It is therefore to the process of interpretation that we must now turn.

D. The Process of Interpretation

One starts from the proposition that the interpretation of legal texts is not simply an exercise in the use of language and its application to fact patterns. Of course, that is a key part of the exercise, and the interpretation of treaties will in this respect find common cause with the interpretation of other legal texts, such as national legislation. These parallels should not be ignored, as they may provide a rich source of comparative understanding on generic issues.[36] But the process of interpretation is also an integral part of the legal system in which the text is situated. Legal texts only make sense within the context of the system that gives them authority and meaning.[37] By the same token, the process of legal interpretation itself performs an integrating task within the legal system. As Koskenniemi explains:[38]

> Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles. Far from being merely an 'academic' aspect of the

[35] VCLT Art 41. See, eg, Art 311 of the United Nations Convention on the Law of the Sea 1982.

[36] For a recent very interesting contribution to the literature on the problem of time in statutory interpretation see Bradley 'The Ambulatory Approach at the Bottom of the Cliff: Can the Courts Correct Parliament's Failure to Update Legislation?' (2003) 9 Canterbury L R 1.

[37] Scobbie 'Some Common Heresies about International Law' in Evans (ed) *International Law* (OUP Oxford 2003) 59 at 65.

[38] Above n 7, para 29.

> legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators.

In this way, the process of interpretation encapsulates a dialectic between the text itself and the legal system from which it draws breath. The analogy with the interpretation of contracts is instructive.[39] For much of the time, interpretation of contracts and treaties alike will be a matter of ascertaining and giving effect to the intention of the parties by reference to the words they have used.[40] It is a natural aspect of legal reasoning to start first with the document under construction and only to look beyond it in hard cases, where reference to the document alone is insufficient or contested.[41]

But the fact that such an approach is rightly adopted as a starting-point in both contract and treaty interpretation should not be allowed to obscure its equally important counterweight: the impact of the surrounding legal system. As regards transnational contracts in private international law, the point has been put thus:[42]

> contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies . . . for failure to perform any of those obligations . . .

A very similar point may be made about the position of treaties in public international law. Its consequence for the process of interpretation of treaties is that, in order to understand how this process operates, it is necessary to appreciate the impact of the peculiar characteristics of international law as a legal system.[43] One of those characteristics has already been introduced. It is the very horizontality of the system: the lack of an omnicompetent legislature, or of a developed set of secondary rules defining the hierarchy and precedence of norms; and the diversity, and different levels of generality of the sources of international law.

The other characteristic is the nature of the international judicial process. A systematic study of the jurisprudence of international tribunals suggests a strong centrifugal tendency to chart a coherent course within international

[39] A connection already made by Grotius *De Jure Belli ac Pacis* (1646), Ch XVI 'On Interpretation', in the translation by Kelsey (Clarendon Press Oxford 1925) vol II.

[40] In contract law, this may be seen as an aspect of party autonomy or 'will theory', as to which see Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press Oxford 1979). For a recent defence of the role of the intentions of the parties in contractual interpretation, see DW McLauchlan 'The New Law of Contract Interpretation' (2000) 19 NZULR 147.

[41] Koskenniemi above n 7, para 59.

[42] *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 67, per Lord Diplock.

[43] A point famously made by Julius Stone in 'Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process' (1953) 1 Sydney LR 344.

law.[44] Despite the scepticism often expressed by academic theorists,[45] international tribunals have maintained their affection in this regard for express reference to canons of interpretation, which can be traced to the very foundation of modern international law.[46] Even Julius Stone, while contending that such canons cannot be treated as if they were rules of law, since their wide indeterminacy may be seen as a cloak for judicial creativity, nevertheless admits that they may serve a useful function by imparting 'a sense of continuity of tradition, relieving the psychological loneliness inseparable from the responsibility of policy-making'.[47]

But all international tribunals, even the International Court of Justice, are limited in their ability to integrate the disparate elements of the legal system within which they operate by a factor which distinguishes them from most national courts. That is the limitation on their jurisdictional competence, which flows from the fact that they are themselves creatures of state consent established by treaty. A constant theme in the decisions which will be examined below, and a possible explanation for the recent focus on Article 31(3)(c) itself, is the interplay between the jurisdictional constraints upon the scope of the tribunal's competence and the interpretation of the law to be applied.

What, then, may we learn from the experience of international tribunals in the interpretation of treaties? It was the special genius of Sir Gerald Fitzmaurice that, in his magisterial study of the Law and Practice of the International Court of Justice, he was able to distil a welter of jurisprudence on treaty interpretation into just six major principles: actuality; natural and ordinary meaning; integration; effectiveness; subsequent practice; and contemporaneity.[48] These principles, derived as they were from primary sources, cut through much of the circularity and sterility of earlier debates.[49] Fitzmaurice's formulation facilitated the Commission's task of drafting the interpretation code in the Vienna Convention, and has had an enduring influence on treaty interpretation.[50]

But, crucially for present purposes, and unlike McNair writing at a similar time,[51] or indeed the ILC itself the following decade, Fitzmaurice did not add a principle of systemic integration to his formulation. For him, the Principle of Integration (his Principle III) was limited in its application to the body of the

[44] Charney 'Is International Law threatened by International Tribunals?' (1998) 271 *Recueil des Cours* 101.

[45] A view particularly often expressed in the United States. See, eg, *Harvard Research Draft Convention on the Law of Treaties* (1935) 29 AJIL Supp. 937; and McDougal, Lasswell and Miller *The Interpretation of Agreements and World Public Order* (Yale UP, New Haven, 1967).

[46] Vattel *Le Droit des Gens* (1758), Ch XVII 'The Interpretation of Treaties', in the translation by Fenwick (Carnegie Institution Washington 1916) vol III.

[47] Above n 43, 364.

[48] (1951) 28 BYIL 1; (1957) 33 BYIL 204.

[49] See, eg, the debate between Lauterpacht (1949) 26 BYIL 48 and Stone, above n 43.

[50] See Thirlway above n 14.

[51] Above n 8.

Treaty. It did not apply to the broader legal system. Why, if the principle is indeed as fundamentally important as is here contended, might that have been so? One reason already suggested might be the very character of the principle as an unarticulated major premise—its existence at once obvious to anyone within the system and rarely needing to be prayed in aid. Another might have been Fitzmaurice's avowed exclusive focus on the work of the International Court of Justice. Other international tribunals, precisely because of their even more limited remit, seem to have had more occasion to make express that which the ICJ may assume.[52]

Finally, Fitzmaurice was fundamentally committed to the principle of contemporaneity in treaty interpretation (his Principle VI). He was prepared to accept that the subsequent practice of the parties themselves might shed light on the interpretation of a treaty (Principle V). But he saw other references to an external context, which he conceded might include international law, as necessarily rooted in the time when the treaty was originally concluded. For him, this was simply a particular application of the doctrine of inter-temporal law as applied to the interpretation of treaties.[53] This had the effect of setting the law in aspic, and inhibiting the development of a conception of treaties as taking their place within a dynamic legal system. As will be seen, a rigid application of this view was decisively rejected by the ILC, and has since also been rejected in the jurisprudence of the ICJ.

These introductory remarks have raised large claims about the relationship between the task of treaty interpretation and the broader theme of systemic coherence within the international legal system. It is now necessary to test those claims, and to explore their significance, by reference to the actual experience of international tribunals in hard cases. This will be done in Part III by reference to five short case studies of integration in the practice of different types of international tribunals at the turn of the 21st century; culminating in *Oil Platforms*, decided by the ICJ in November 2003.

On the basis of this analysis, it will be possible in Part IV to advance some suggestions about the proper role of Article 31(3)(c) in meeting the challenges of fragmentation against the background of general developments in international law. However, it is first necessary to introduce Article 31(3)(c) itself in its proper context; to understand its genesis; and to chart its career as the neglected son of treaty interpretation until its recent ascendancy.

[52] See the additional references cited in McNair op cit.

[53] Fitzmaurice (1957) above n 48, 225–7; and see also his earlier article dealing with intertemporality (1953) 30 BYIL 5–8. Fitzmaurice relied on the classic statement of Judge Huber in *Island of Palmas Arbitration* (1928) 2 RIAA 829, 845. Huber was concerned in that case with the acquisition of title of territory, a context which much more strongly requires the application of a principle of contemporaneity.

II. ARTICLE 31(3)(c) OF THE VIENNA CONVENTION

A. Construction

Article 31(3)(c) is found within Part III Section 3 of the Vienna Convention. This section constitutes a framework approach to the interpretation of treaties. Article 31 provides the '*General Rule of Interpretation*' in the following terms:

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 connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more of the parties in connexion 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.' [emphasis added].

Paragraph 3 lists three matters which are required to be taken into account in treaty interpretation in addition to the context. These are not ranked in any particular order. The third of them is sub-paragraph (c) referring to 'any relevant rules of international law applicable in the relations between the parties'. All of these three additional factors form a mandatory part of the interpretation process. They are not (as contrasted with the provisions of Article 32 on *travaux préparatoires*), only to be referred to where confirmation is required or the meaning is ambiguous, obscure or manifestly absurd or unreasonable.[54]

Textual analysis of Article 31(3)(c) reveals a number of aspects of the rule which deserve emphasis:

(a) It refers to '*rules* of international law'—thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules;
(b) The formulation refers to rules of international law in general. The words are apt to include all of the sources of international law, including custom, general principles, and, where applicable, other treaties;

[54] The test provided under Art 32 for reference to supplementary means of interpretation.

(c) Those rules must be both *relevant* and '*applicable* in the relations between the parties'. The sub-paragraph does not specify whether, in determining relevance and applicability one must have regard to all parties to the treaty in question, or merely to those in dispute;

(d) The sub-paragraph contains no temporal provision. It does not state whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises.

It is important also to keep in mind some more general features of the approach contained in Articles 31–2. Their broad appeal may in part be attributable to the fact that they adopt a practical set of considerations which are general and flexible enough to be applied across an almost infinitely wide cast of treaty interpretation problems. The Convention eschews taking a fixed stand on any of the great doctrinal debates on interpretation, save that it is firmly focused on objective reference points rather than the chimera of the intentions of the parties. Thus it adopts both an ordinary meaning and a purposive approach. It also permits reference to the statements of states, both before the conclusion of the treaty, and by way of subsequent practice. Yet the Convention does not purport to be an exhaustive statement of the international law rules of interpretation. It contains no mention, for example, of the *lex specialis* rule, which has had enduring significance in resolving conflicts of norms.

This is not to suggest that the Convention's rules are a mere will-o'-the-wisp, with no fixed content. On the contrary, reference, for example, to the recent experience in the WTO DSU, where the Appellate Body has been insisting that panels take the Convention's rules seriously, shows just how exacting is a proper application of the code.[55] But it serves to emphasize that the code operates as the outline of an integrated reasoning process. Although the Convention does not require the interpreter to apply its process in the order listed in Articles 31–2, in fact that order is intuitively likely to represent an effective sequence in which to approach the task. In that regard, therefore, Article 31(3)(c) must take its place as part of the wider process. As will be seen below, some of the issues where reference to external sources of international law may be helpful may be better resolved as part of an enquiry into either the ordinary meaning of the words in their context, or the object and purpose of the treaty.

B. Travaux Préparatoires

Reference to the work of the International Law Commission in the formulation of the draft articles which led to Article 31 is helpful in understanding the text of sub-paragraph (3)(c) and also in elucidating some of the controversies which were not then resolved and which may require further consideration.

[55] See the cases discussed at Part III C below, and, more generally, Cameron and Gray (2001) 50 ICLQ 248.

The first draft of articles on *interpretation* of treaties was introduced into the work of the Commission on treaties by the Third Report of the Special Rapporteur, Sir Humphrey Waldock.[56] Waldock's first formulation provided (in the then numbered Article 70(1)(b)) for the interpretation of a treaty 'in the context of rules of international law *in force at the time of its conclusion*' [emphasis added]. Waldock's formulation was a synthesis[57] derived from a resolution of the *Institut de Droit International* which called for interpretation 'in the light of the principles of international law',[58] and Sir Gerald Fitzmaurice's formulation (based on the jurisprudence of the ICJ) which emphasised the principle of contemporaneity (although without express reference to other rules of international law).

In Waldock's original formulation, this rule was complemented by an additional rule (ultimately omitted from the VCLT) dealing specifically with the intertemporal law. Draft Article 56 provided as follows:[59]

(1) A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.
(2) Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force when the treaty is applied.

Waldock's proposal for the incorporation of intertemporal provisions did not find favour with the Commission and did not survive the 1964 discussions.

Nevertheless the issue of intertemporal law continued to provoke controversy both in the responses of governments in consultations on the Commission's drafts and in the further discussions of the Commission in 1966.

The other material matter which had provoked debate in the formulation of the article was whether or not there ought to be a reference to 'principles' rather than 'rules', and (in a similar vein) whether the reference to rules ought to be qualified by the expression 'general'. In the end, neither of these proposals prevailed. The ILC Official Commentary on the Draft Articles confines its discussion on the meaning and application of what is now article 31(3)(c) to an account of the discussion on intertemporality, without shedding further

[56] '*Yearbook*' (1964) vol II.

[57] Ibid 55 para 10.

[58] *Annuaire de l'Institut de Droit International* ('*Annuaire*') (1956) 364–5. Inclusion of this reference in the resolution of the Institut had had a controversial history. It did not appear in Lauterpacht's original scheme in 1950 (*Annuaire* (1950-I) 433). A reference to the interpretative role of general principles of customary international law was subsequently added by him in 1952 (*Annuaire* (1952-I) 223). It faced considerable opposition on grounds of uncertainty, and inconsistency with the Institut's codification role (*Annuaire* (1952-II) 384–6, remarks of Guggenheim and Rolin *Annuaire* (1954-I) 228). When Fitzmaurice was appointed to replace Lauterpacht as rapporteur, there was no reference of this kind in his draft (*Annuaire* (1956) 337–8). It was only added in the course of the debate, following an intervention of Basedevant (*Annuaire* (1958) 344).

[59] *Yearbook* (1964) vol II 8–9.

light on the situations in which the Commission considered that the article might be employed.[60]

The issues received a full debate also in the Committee of the Whole at the UN Conference in Vienna convened to adopt the Convention in 1968. A number of delegations made comments about the temporal element, as well as about more general questions of interpretation. The debates on these issues were ultimately inconclusive and did not result in an amendment of Article 31(3)(c).

C. Application

Since the adoption of the Vienna Convention, Article 31 as a whole has come to be recognised as declaratory of customary international law rules of interpretation.[61]

However, despite this general approval, there appear to be few recorded instances of state practice or of the judicial use of sub-paragraph (3)(c) itself, until the recent cases discussed in Part III below. Express references to Article 31(3)(c) in the jurisprudence of international tribunals have been located only in a small number of decisions of the Iran-US Claims Tribunal and the European Court of Human Rights. For what purpose were these references made?

1. Iran–US Claims Tribunal

In the Iran–US Claims Tribunal, the issue which prompted reference to Article 31(3)(c) was the determination of the nationality requirements imposed by the Algiers Accords in order to determine who might bring a claim before the Tribunal. Thus, in *Esphahanian v Bank Tejarat*[62] the issue was whether a claimant who had dual Iran/US nationality might bring a claim before the Tribunal. The Tribunal expressly deployed Article 31(3)(c) of the Vienna Convention[63] in order to justify reference to a wide range of materials on the law of diplomatic protection in international law. These materials supported

[60] 'Articles on the Law of Treaties with commentaries adopted by the International Law Commission at its 18th session', reproduced in *United Nations Conference on the Law of Treaties 1969*, 42–3.

[61] See the summary of state practice, jurisprudence and doctrinal writings in Villiger *Customary International Law and Treaties* (Nijhoff Dordrecht 1985) 334–43. (Villiger himself comes to the more qualified conclusion that the rules were, at least in 1985, still 'emerging customary rules on interpretation which originated in Vienna'. But see now especially *Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)* ICJ Rep (1994) 6 (International Court of Justice); *Golder v United Kingdom* ECHR Ser. A, [1995] no 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases* 70 ILR 449 (1986), (Inter American Court of Human Rights); *United States—Standards for Reformulated and Conventional Gasoline* AB—1996-1 WT/DS2/AB/R, 29 Apr 1996, 16 (World Trade Organization Appellate Body).

[62] 2 Iran-USCTR (1983) 157.

[63] Ibid 161.

the Tribunal's conclusion that the applicable rule of international law was that of dominant and effective nationality.[64]

Elsewhere in its jurisprudence, the Tribunal has confirmed that: 'the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.'[65]

2. *European Court of Human Rights*

The other international tribunal which has made serial use of Article 31(3)(c) is the European Court of Human Rights ('ECHR').

The ECHR has found reference to Article 31(3)(c) especially helpful in construing the scope of the right to a fair trial protected by Article 6 of the European Convention on Human Rights. In *Golder v United Kingdom*[66] that Court had to determine whether Article 6 guaranteed a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined. The Court referred to Article 31(3)(c) in carrying out its task of interpretation. Through that route, the Court referred in turn to Article 38(1)(c) of the Statute of the International Court of Justice as recognising that the rules of international law included 'general principles of law recognized by civilized nations'.[67] It found that a right of access to the civil courts was such a general principle of law, and that this could be relied upon in interpreting the meaning of Article 6.

In *Loizidou v Turkey*,[68] the Court had to decide whether to recognize as valid certain acts of the Turkish Republic of Northern Cyprus ('TRNC'). It invoked Article 31(3)(c)[69] as a basis for reference to UN Security Council resolutions and evidence of state practice supporting the proposition that the TRNC was not regarded as a state under international law. Therefore the Republic of Cyprus remained the sole legitimate government in Cyprus and acts of the TRNC were not to be treated as valid.

That meagre crop of decisions was all the international jurisprudence that Article 31(3)(c) had yielded until 1998, when the first of the decisions to be discussed in Part III was rendered. So it is to the recent experience with the impact of systemic coherence that we must now turn.

[64] See also, to like effect, *Case no A/18* (1984) 5 Iran-USCTR 251, 260. The provision was also relied upon in a dissent in *Grimm v Iran* 2 Iran-USCTR 78, 82 on the question of whether a failure by Iran to protect an individual could constitute a measure 'affecting property rights' of his wife.

[65] *Amoco International Finance Corporation v Iran* (1987–II) 15 Iran-USCTR 189 at 222 para 112.

[66] Judgment 21 Feb 1975, ECHR Ser A no 18; 57 ILR 200 at 213.

[67] Ibid 35.

[68] 18 Dec 1996, Reports 1996–VI; 108 ILR 443 at 462 para 44.

[69] Ibid.

III. INTEGRATION IN PRACTICE

This section analyses five recent cases where different international tribunals have grappled with the role to be accorded to other international law norms in the interpretation of treaties.

The cases are:

(a) *Pope & Talbot Inc v Canada,* an arbitration conducted under the North American Free Trade Agreement ('NAFTA');[70]
(b) The *Mox Plant* litigation between Ireland and the United Kingdom;[71]
(c) The *Shrimp-Turtle*[72] and *Beef Hormones*[73] decisions of the WTO Appellate Body;
(d) The trio of decisions on the relationship between the right of fair trial and state immunity (*Al-Adsani, Fogarty*, and *McElhinney*) decided by the European Court of Human Rights;[74] and finally,
(e) *Oil Platforms*[75] in the International Court of Justice.

These cases have been chosen in part because they exemplify in microcosm many of the trends in international law introduced in Part I above. Each case is drawn from a different field of international law, which has its own developed body of rules, contained partly in custom and partly in treaty. Thus, *Pope & Talbot* is concerned with foreign investment law; *Mox Plant* with international environmental protections in the law of the sea; *Shrimp-Turtle* and *Beef Hormones* with world trade law; *Al-Adsani et al* with human rights law; and *Oil Platforms* with peace and security.

All of the cases were decided within the last six years, and they also exemplify the development of international adjudication. Four of the tribunals owe their very existence to developments in the reach of international dispute resolution over the last 12 years: the three tribunals in *Mox Plant* and the WTO Appellate Body.

[70] Award on the merits, 10 Apr 2001; award in respect of damages, 31 May 2002 (2002) 41 ILM 1347.

[71] International Tribunal for the Law of the Sea: the *Mox Plant* case (*Ireland v United Kingdom)—Request for Provisional Measures Order* (3 Dec 2001) <www.itlos.org>; Permanent Court of Arbitration: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention: Ireland v United Kingdom—Final Award* (2 July 2003) (2003) 42 ILM 1118; Permanent Court of Arbitration: the *Mox Plant* case: *(Ireland v United Kingdom)—Order No 3* (24 June 2003) (2003) 42 ILM 1187.

[72] WTO *United States: Import Prohibition of certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 Oct 1998) WT/DS58/AB/R; (1999) 38 ILM 118.

[73] WTO *EC measures concerning meat and meat products (hormones)—Report of the Appellate Body* (16 Jan 1998) WT/DS-26/AB/R.

[74] *Al-Adsani v United Kingdom*, Application no 35763/97, 123 ILR 24 (2001); *Fogarty v United Kingdom* Application no 37112/97, 123 ILR 54 (2001); and *McElhinney v Ireland* Application no 31253/96, 123 ILR 73 (2001).

[75] Above n 1.

But the cases also have a more particular significance for the present study in that they each illustrate a different facet of the problem of systemic integration in treaty interpretation. They have been ranked for that purpose in ascending order of difficulty. Thus:

(a) *Pope & Talbot* was simply concerned with the construction of a particular term in an investment treaty ('*fair and equitable treatment*') by reference to the wider body of international investment law;
(b) *Mox Plant* had to contend with a complex matrix of potentially relevant international environmental law measures alleged to bear on the parties' rights and duties under the UNCLOS and OSPAR Conventions. But the external references were still, for the most part, to other conventions and instruments specific to the subject matter of protection of the environment and the control of nuclear shipments;
(c) *Shrimp-Turtle*, on the other hand, involved a problem of contextual interpretation of the second, broader type identified in Part I. In that case, the tribunal was still plainly concerned with the construction of broad terms in the WTO Covered Agreements. But the external reference was to a set of international obligations wholly outside world trade law, namely international environmental law;
(d) *Al-Adsani* takes that process one stage further. The ECHR was there concerned with an article in the European Human Rights Convention (protecting the right to a fair trial) which did not on its terms invite consideration of the law of state immunity at all. Yet that is exactly what the Court did;
(e) *Oil Platforms* sees the International Court of Justice itself using a process of systemic coherence in interpretation so as to import wholesale into the essential security interests exception to a treaty of amity, the customary international law of armed conflict.

The cases also represent an ascending order of recognition of the potential significance of Article 31(3)(c) itself. It merits no mention at all in *Pope & Talbot*. It achieves a reference *en passant* in *Mox Plant* (before the OSPAR Tribunal) and *Shrimp-Turtle*. But, in both cases, the other international law rules advanced by the parties were ultimately held by the tribunal to be either inapplicable or not dispositive. In *Al-Adsani* and *Oil Platforms*, by contrast, Article 31(3)(c) assumes pivotal importance in the Courts' reasoning, and the other rules of international law referred to are ultimately decisive of the case.

A. Pope & Talbot Inc v Canada[76]

The first example concerns the potential impact of customary international law on the interpretation of a treaty. *Pope & Talbot* was an arbitration claim

[76] Above n 70.

brought by an American company, Pope & Talbot Inc, against Canada under NAFTA concerning the imposition of an export quota regime on timber producers.

One of the central issues in the case was whether Canada had breached Article 1105(1) of NAFTA, which provides:

> Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The parties differed both on: (a) the content of international law implicated by Article 1105(1); and (b) the question of whether or not the requirement to accord 'fair and equitable treatment' was additional to the ordinary protections of international law or subsumed within it. The investor contended that reference to a wide range of materials could be made in determining the content of international law for the purpose of Article 1105, and, in any event, that the requirement of 'fair and equitable treatment' was self-standing. Canada on the other hand (with the support of the United States Government) contended that the international law standard referred to in Article 1105 was a single standard and required that the conduct in question must be 'egregious'.

1. NAFTA Tribunal: Merits Phase

The Tribunal found in its award on the merits that the requirement to accord fair and equitable treatment was additional to the protection of international law afforded by the first phrase of the article, and that it did not comport any element of egregious conduct.[77] It arrived at that view by referring to obligations assumed by the contracting parties to NAFTA under other bilateral investment treaties into which they had entered. Under those treaties, the obligation of 'fair and equitable treatment' was construed as not limited by any minimum standard under customary international law. The Tribunal found that it was unlikely as a matter of the object and purpose of NAFTA that the States Party would have intended to assume lesser obligations as between themselves than they had already accorded to third states under bilateral investment treaties. Any other interpretation would mean that the NAFTA parties were failing to provide most favoured nation treatment for their respective nationals. The Tribunal went on to find that Canada had breached Article 1105 in denying to the investor the fair treatment to which it was entitled.

2. NAFTA Free Trade Commission

After the award on liability had been rendered, but before the hearing on damages, the States Parties convened a meeting of the NAFTA Free Trade

[77] Award on the merits, para 118, 55–6.

Commission.[78] This Commission adopted an Interpretation on 31 July 2001 in the following terms:

1 Article 1105(1) prescribes the *customary* international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. [emphasis added]
2 The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. *NAFTA Arbitral Tribunal: Damages Phase*

When the matter came back before the Arbitral Tribunal in *Pope & Talbot* at the damages stage, it was obliged to consider the meaning and effect of this interpretation. It noted, first, the addition of the word 'customary' before 'international law'. It found that the word 'customary' had been deleted from the draft text of NAFTA Article 1105 prior to the final text. The Tribunal observed:[79]

> as is made clear in Article 38 of the Statute of the ICJ, international law is a broader concept than customary international law, which is only one of its components. This difference is important. For example, Canada has argued to this Tribunal that customary international law is limited to what was required by the cases of the Neer era of the 1920's whereas international law in its entirety would bring into play a large variety of subsequent developments.

The Tribunal then held that customary international law had in any event evolved such that it now included the concept of fair and equitable treatment and that it did not require 'egregious' conduct.[80] It then proceeded to find that, even if the narrower formulation were adopted, the conduct of Canada in the case would still amount to a breach of Article 1105.

The case of *Pope & Talbot* may simply be an example of a conflict between different understandings or interpretations of general law. Although the Tribunal did not refer expressly to Article 31(3)(c), NAFTA itself contains a similar rule, enjoining the parties to interpret and apply the provisions of the Treaty in accordance with its stated objectives 'and in accordance with applicable rules of international law'.[81] The Tribunal presented the conflict as being between custom and other components of international law. But the true ques-

[78] The Free Trade Commission is, by NAFTA Art 2001(2), empowered to, inter alia, 'resolve disputes that may arise regarding [the Agreement's] interpretation or application'. Pursuant to Art 1131(2), an interpretation by the Commission of a provision of the Agreement 'shall be binding on a Tribunal'. This Interpretation may be found at: <www.worldtradelaw.net/nafta/chap11interp.pdf>.

[79] Above n 70 para 46.

[80] The Tribunal relied upon dicta of the ICJ in *Case concerning Elettronica Sicula SpA*, ICJ Rep (1989) 15 at 76.

[81] Art 102 para 2.

tion was whether there was evidence (including by reference to other investment treaties) of a shift in state practice as regards the *content* of the customary international law rule referred to in NAFTA Article 1105. That problem was not addressed by the Free Trade Commission's decision in favour of harmonization.

Subsequent NAFTA Tribunals called upon to interpret Article 1105 in the light of the Free Trade Commission's decision[82] have stressed that the customary international law standard is not to be treated as frozen in the 1920s, and that state practice in the formulation of other investment treaties may well be relevant in determining the content of the customary standard of fair and equitable treatment.[83]

B. The Mox Plant *Litigation*[84]

The second example concerns the role which reference to other *treaties* may play in the interpretation of the treaty in question. It comes from the (still pending) litigation brought by Ireland in various fora against the United Kingdom concerning the operation of the Mox nuclear reprocessing plant at Sellafield. The dispute has produced three relevant decisions:

(a) A judgment of the International Tribunal for the Law of the Sea ('ITLOS') on a request for provisional measures;
(b) An arbitration award under the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic ('OSPAR Convention') in proceedings for access to certain information concerning the operation of the Mox Plant;
(c) An order in an arbitration under the provisions of the 1982 United Nations Convention on the Law of the Sea ('UNCLOS').[85]

Each of the tribunals considered a different aspect of the relationship between the treaty regime which it was called upon to interpret and apply, and other related regimes.

1. ITLOS

ITLOS emphasized the separate and distinct nature of each of the treaty regimes referred to. It held:[86]

[82] See esp *Mondev International Ltd v USA* (2003) 42 ILM 85; and *ADF Group Inc v USA* (award dated 9 Jan 2003 in case no ARB(AF)/00/1).

[83] *Mondev* ibid 109 para 125.

[84] For references, see above n 71.

[85] In the course of that arbitration, the European Commission lodged a complaint in the European Court of Justice ('ECJ') against Ireland, alleging that Ireland, in bringing the UNCLOS arbitration proceedings was in breach of its community obligations. Complaint no C-459/03 lodged on 30 Oct 2003.

[86] Above n 71 paras 50–2.

> even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the [Law of the Sea] Convention, the rights and obligations under those agreements have a separate existence from those under the Convention;
>
> . . . the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.

As a result of this decision, the Tribunal held that it had jurisdictional competence to order provisional measures and that Ireland was entitled to constitute an arbitral tribunal under UNCLOS, which could proceed concurrently with the proceedings before an OSPAR Tribunal for the provision of information.

2. *OSPAR Arbitral Tribunal*

In the OSPAR proceedings, there were two respects in which it was contended by Ireland that a reference to other rules of international law would affect the construction of the parties' obligations under the OSPAR Convention. First, Ireland submitted that the provision in Article 9(3)(d) of the OSPAR Convention which referred to 'applicable international regulations' entailed a reference to international law and practice. This, Ireland alleged, included the Rio Declaration[87] and the Aarhus Convention on Access to Information, Public Participation and Decision-making, and Access to Justice in Environmental Matters 2001. The United Kingdom replied that the Rio Declaration was not a treaty, and that the Aarhus Convention had not yet been ratified by either Ireland or the United Kingdom.

The Tribunal accepted that it was entitled to draw upon current international law and practice in construing this treaty obligation (and in so doing made an express reference to Article 31(3)(c)). However, it held that neither of the instruments contended for by Ireland were in fact rules of law applicable between the parties and therefore declined to apply them.[88]

One of the arbitrators, Gavan Griffith QC, dissented on this point.[89] He pointed out that the Aarhus Convention was in force, and that it had been signed by both Ireland and the UK. The latter had publicly stated its intention to ratify that Convention as soon as possible. At the least, this entitled the Tribunal to treat the Aarhus Convention as evidence of the common views of the two parties on the definition of environmental information.

[87] Declaration of the UN Conference on Environment and Development *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales no E. 93.I.8 and Corrigenda), vol I: *Resolutions adopted by the Conference, resolution 1, annex I*. See also (1992) 31 ILM 874.

[88] Above n 71, paras 93–105, 1137–8.

[89] Ibid 1161–5.

Secondly, the United Kingdom had submitted that its only obligation under the OSPAR Convention had been discharged by the application in the United Kingdom of European Directive 90/313. The Tribunal held that both regimes could co-exist, even if they were enforcing identical legal obligations.[90] It observed:[91]

> The primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.

Curiously, the Tribunal did not refer to another of the Convention's provisions, which enjoined it in rather broader terms to decide 'according to the rules of international law, and, in particular, those of the Convention'.[92]

3. UNCLOS Arbitral Tribunal

When the substantive claim came before an UNCLOS arbitral tribunal, one of the objections raised by the United Kingdom to the jurisdiction of the Tribunal was that Ireland's claims were founded upon other international law instruments. The Tribunal held that there was a cardinal distinction between jurisdiction and applicable law. The limits on its jurisdiction meant that, to the extent that any aspects of Ireland's claims arose under legal instruments other than UNCLOS, such claims would be inadmissible.[93] It left open the possibility, however, that, in applying UNCLOS, it might have regard to other legal obligations between the parties in determining the content of the applicable law.

In summary, the principal issue raised by the *Mox Plant* litigation with reference to the present topic related to the interrelationship between different treaty regimes relating to the protection of the environment and the control of nuclear shipments. *ITLOS*, in underlining the distinct nature of the UNCLOS treaty regime for the purpose of maintaining parallel jurisdiction, emphasized that even identical terms used in different treaties might well have a different meaning in the light of their objects and purpose. The UNCLOS Tribunal accepted that reference to other treaties might be permissible for the purpose of interpretation, but drew a clear distinction between that and the foundation of a claim for jurisdictional purposes. The OSPAR Tribunal (which had the opportunity to consider the matter in the greatest detail) accepted the scope for reference to other rules of international law in interpretation of the OSPAR Convention. But it emphasised a clear distinction between rules of interna-

[90] The President of the Tribunal, Professor Michael Reisman, dissented on this issue: ibid 1157–60.

[91] Ibid 1144 para 143.

[92] Art 32(5)(a), referred to in Dr Griffith's dissent 1161, para 2(1) ; and see: Churchill and Scott 'The Mox Plant Litigation: the First Half-Life' (2004)53 ICLQ 643 at 670.

[93] Above n 71 paras 18–19, 1189–90.

tional law which were already in force between the parties, and evolving standards and principles which might not yet have crystallized into law applicable to the parties.

C. Shrimp-Turtle *and* Beef Hormones *in the WTO DSU*

Several decisions of the Appellate Body of the WTO have considered the application of principles of international environmental law in the interpretation of the WTO Covered Agreements. The WTO Dispute Settlement Understanding specifically requires interpretation 'in accordance with customary rules of interpretation of public international law'.[94] These cases illustrate the use of developing principles of international law in the interpretation of open-textured treaty provisions.

Thus, for example, Article XX of the General Agreement on Tariff and Trade 1947 (GATT) provides, inter alia:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . .
>
> (b) necessary to protect human, animal or plant life or health.
>
> . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

These terms are general and open-textured. Reference to the treaty language alone does not provide any ready means of determining whether a particular measure is or is not 'necessary to protect . . . animal or plant life', or 'relating to the conservation of exhaustible natural resources'.

In *Shrimp-Turtle*[95] the measure under consideration was a United States ban on the importation of a commercial seafood, shrimp, in order to protect against the incidental killing of another species, sea turtles. In its decision, the Appellate Body made extensive reference to international environmental law texts. It found that the terms 'natural resources' and 'exhaustible' in paragraph (g) of Article XX were 'by definition evolutionary'.[96] It therefore referred to

[94] Art 3(2) Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Marrakesh Agreement establishing the World Trade Organization ('DSU'), reproduced in World Trade Organization *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (CUP Cambridge 1999) 354, 355.

[95] WTO *United States: Import Prohibition of certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 Oct 1998) WT/DS58/AB/R; (1999) 38 ILM 118.

[96] Ibid, para 130 citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* ICJ Rep (1971) 31.

Article 56 of the UNCLOS in support of the proposition that natural resources could include both living and non-living resources.[97] The Tribunal also referred in support of this construction to Agenda 21[98] and to the resolution on assistance of developing countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.[99] In deciding the question whether sea-turtles were 'exhaustible', the Appellate Body referred to the fact that all of the seven recognised species of sea-turtles were listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES').

However, ultimately, the Appellate Body still found that the United States had infringed the GATT by failing to negotiate with complainant states on its ban, and thus proceeding with the unilateral measure which was in effect discriminatory. In so doing, it emphasized that the chapeau of Article XX was 'but one expression of the principle of good faith', which it found to be a general principle of international law.[100] 'Our task here', said the Tribunal expressly relying on Article 31(3)(c), 'is to interpret the language of the chapeau, seeking interpretative guidance, as appropriate, from the general principles of international law'.[101]

A similar issue has arisen in the construction of the Sanitary and Phyto-sanitary Agreement ('SPS Agreement').[102] In its decision in *Beef Hormones,*[103] the Appellate Body considered the impact of a European Union directive banning the import of hormone-fed beef. The European Union had relied for the validity of the directive on the precautionary principle, which it contended had become a general rule of customary international law. The issue raised for the Appellate Body was the consistency of that principle with Articles 5.1 and 5.2 of the SPS Agreement which specifically required a risk assessment conducted on the basis of scientific evidence. The Appellate Body found that the status of the precautionary principle as a rule of customary international law was still a matter of debate.[104] It went on to find that, although the principle could not override specific obligations under the SPS Agreement, it did indeed find reflection in some of those obligations. It held:[105]

> [A] panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS

[97] The Tribunal noted that the Complainant States had ratified UNCLOS. The United States had not done so, but had accepted during the course of the hearing that the fisheries law provisions of UNCLOS for the most part reflected international customary law.

[98] Adopted by the United Nations Conference on Environment and Development, 14 June 1992 *Report of the United Nations Conference on Environment and Development,* Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales no. E. 93.I.8 and Corrigenda).

[99] Final Act, Bonn, 23 June 1979, (1980) 19 ILM15.

[100] Above n 95, para 158.

[101] Ibid.

[102] Agreement on the Application of Sanitary and Phyto-sanitary Measures, reproduced in op cit n 94, 59–72.

[103] WTO *EC measures concerning meat and meat products (hormones)—Report of the Appellate Body* (16 Jan 1998) WT/DS-26/AB/R.

[104] Ibid para 123.

[105] Ibid para 124.

> measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, eg life-terminating, damage to human health are concerned.

However, the Tribunal concluded that:[106]

> the precautionary principle does not, by itself, and without a clear textual directive to that effective, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement.
>
> 125. We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Article 5.1 and 5.2 of the SPS Agreement.

The decisions of the Appellate Body on this issue are now the subject of a growing scholarly literature.[107] The Appellate Body has emphasised from the outset of its work that the requirement in Article 3(2) of the DSU that panels apply 'customary rules of interpretation of public international law' requires a rigorous application of the code of interpretation set out in Article 31 of the Vienna Convention to the issues before it. It has not hesitated to reverse panel decisions on the ground that they have failed to follow Article 31's interpretative approach.[108] The Appellate Body has only once mentioned Article 31(3)(c), and then in a footnote.[109] However, it has made extensive reference to other rules of international law in carrying out its interpretative function. Nevertheless, the decisions to date of the Appellate Body also show the limitations of the interpretative method as a means of integrating specific treaty obligations into the fabric of general international law. In both of the decisions just considered, the Appellate Body in the end found that the express obligations assumed by the parties under the Covered Agreements of the WTO overrode the principles of international environmental law whose application was sought.

D. Al-Adsani*: State Immunity and the Right to a Fair Trial*

In a trio of landmark decisions all handed down on 21 November 2001, the European Court of Human Rights utilized Article 31(3)(c) in order to decide whether a plea of State immunity constituted a disproportionate restriction on

[106] Ibid paras 124 and 125.

[107] See, eg, Pauwelyn 'The Role of Public International Law in the WTO: How Far Can We Go?' 95 AJIL (2001) 535; Marceau 'WTO Settlement and Human Rights' 13 EJIL (2002)753; Sands above n 3; Lowenfeld *International Economic Law* (OUP Oxford 2002) 314–39; and Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003).

[108] WTO *United States—Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body* (29 Apr 1996) WT/DS2/AB/R.

[109] Above n 95 para 158 n 157. The clause is also referred to by a WTO Panel in *United States—Section 110(5) of US Copyright Act*—World Trade Organisation Panel Report (15 June 2000) WT/DS160/R, para 6.5.5.

the right of access to court in civil claims protected by Article 6(1) of the European Convention.[110] In each case, the Court decided by majority that the plea did not offend the Convention:

(a) In *Al-Adsani*, the plea of state immunity was raised to bar a civil claim of torture against Kuwait in the English court. The ECHR was split 9 : 8;
(b) In *Fogarty*, the plea of state immunity was raised against a civil claim of sex discrimination in employment in the United States Embassy in London. The Court decided the case on a 14 : 1 majority;
(c) In *McElhinney*, state immunity was pleaded by the United Kingdom in the Irish court in a tort claim arising out of the actions of the British army on Irish soil. The case was decided on a 12 : 5 majority.

In each of these cases, the Court held that the right of access to the courts enshrined in Article 6 was not absolute. It could properly be subject to restrictions, provided that they pursued a legitimate aim and were proportionate to that aim. In making that assessment, the Court held that it should interpret Article 6 in accordance with the Vienna Convention, including Article 31(3)(c). It reasoned (in terms which are identical in each of the three judgments:[111]

> the Convention has to be interpreted in the light of the rules set out in the Vienna Convention . . . and . . . Article 31(3)(c). . . indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account . . . The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity.
>
> It follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).

These ECHR cases, present a more difficult scenario of potential conflict between the international law on State immunity and the protections enshrined in the European Convention. The Court referred to the law on sovereign immunity, not so much to resolve the meaning of a disputed term within the Convention, but rather to ascertain the foundation for a conflicting rule of international law. It then used Article 31(3)(c) as a basis for enabling it to give weight

[110] *Al-Adsani v United Kingdom* Application no 35763/97 123 ILR 24 (2001); *Fogarty v United Kingdom* Application no 37112/97) 123 ILR 54 (2001); and *McElhinney v Ireland* Application no 31253/96 123 ILR 73 (2001). The ECtHR also referred to Article 31(3)(c) in *Bantovíc v Belgium* 123 ILR 94 (2001) at 108 para 57. For a critique of the Court's approach, see Orakhelaskvili (2003) 14 EJIL 529.

[111] *Al-Adsani* ibid 40, paras 55–6; see also: *Fogarty* ibid 65, paras 35–6; *McElhinney* ibid 85, paras 36–7.

to the rule on State immunity in determining whether it was a 'disproportionate measure' curtailing the right to access of justice in Article 6 of the Convention.

Those judges of the Court who dissented did not do so on the basis that international law should be excluded from consideration in the construction of Article 6. Rather, they found that the rule of State immunity should, as a matter of international law, cede precedence to a peremptory rule of international law (*jus cogens*) prohibiting torture;[112] or admit of an exception for torts committed on the territory of the state.[113]

E. International Court of Justice: Oil Platforms

The most recent, and very significant, utilization of Article (31)(3)(c) has been by the International Court of Justice in *Case concerning Oil Platforms (Iran v United States)*.[114] In that case, the Court was called upon to interpret two provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. It was requested to determine whether actions by Iran which were alleged to imperil neutral commercial shipping in the Iran–Iraq war, and the subsequent destruction by the United States Navy of three Iranian oil platforms in the Persian Gulf, were breaches of the Treaty. The Court's jurisdiction was limited to disputes arising as to the interpretation or application of the Treaty.[115] It had no other basis for jurisdiction which might have provided an independent ground for the application of customary international law.[116]

One of the operative provisions of the Treaty provided that:[117]

> The present Treaty shall not preclude the application of measures:
> . . . (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

The United States had argued[118] that the effect of this provision was simply to exclude from the scope of the treaty all such measures, and that the provision could and should be interpreted in accordance with its ordinary meaning, leaving a wide margin of appreciation for each state to determine its essential security interests. It submitted that there was no place to read into the treaty rules derived from the customary international law on the use of force (as Iran had argued), and that to do so would violate the limits on the Court's jurisdiction.

[112] Ibid *Al-Adsani* 49–51, Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajic.

[113] Ibid *McElhinney* 88, Dissenting Opinion of Judges Caflisch, Cabral Barreto, and Vajic.

[114] Op cit n 1.

[115] Art XXI para 2.

[116] Cf the position in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Rep (1986) 14, in which the Court was asked to interpret very similar treaty language, but also had an additional basis for its jurisdiction as a result of unilateral declarations made by both parties under Art 36, para 2 of its Statute.

[117] Art XX para 1(d).

[118] Rejoinder of the United States, 23 Mar 2001, Part IV 139–40.

The Court approached the question of interpretation rather differently. It asked first whether such necessary measures could include a use of armed force, and, if so, whether the conditions under which such force could be used under international law (including any conditions of legitimate self-defence) applied.[119] Having referred to other aids to interpretation, the Court then reasoned:[120]

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by . . . the 1955 Treaty.

The Court then proceeded to apply those general rules of international law to the conduct of the United States. It concluded that the measures could not be justified as necessary under the Treaty 'since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty'.[121]

Although the Court's judgment on the merits was supported by a large majority of the judges, a wide range of different views on the question of the proper approach to interpretation were expressed in their Separate Opinions:[122]

(a) Judge *Buergenthal* took the narrowest view on Article 31(3)(c).[123] He emphasised that the Court's jurisdiction was limited to only those matters which the parties had agreed to entrust to it, and opined that this also limited the extent to which the Court could refer to other sources of law in interpreting the treaty before it. In his view, this limitation excluded reliance on other rules of international law, whether customary or conventional, and even if found in the UN Charter;[124]

(b) Judge *Simma* (who, prior to his appointment to the Court, had been the first Chairman of the ILC Study Group on Fragmentation) considered that the Court should have taken the opportunity to declare the customary

[119] Op cit n 1 para 40 1352.

[120] Ibid para 41 1352

[121] Ibid para 78 1362.

[122] The Court entered judgment by 14 votes to 2 declining to uphold Iran's claim (Judges Al-Khasawneh and Elaraby dissenting) and by 15 votes to 1 declining to uphold the United States' counterclaim (Judge Simma dissenting).

[123] Ibid 1409–13 paras 20–32.

[124] Ibid 1410 paras 22–3.

international law on the use of force, and the importance of the Charter even more firmly than it had.[125] He accepted that, given the jurisdictional constraints on the Court, this might have had to be done by *obiter dicta*.[126] Nevertheless, he upheld the role which the Court accorded to Article 31(3)(c), as allowing it to refer to both other treaty law applicable between the parties, and the rules of general international law surrounding the treaty.[127] He considered that: 'If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of treaty interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.'[128] But he also conceded that the scope of measures which might permissibly be taken to protect the essential security interests of a party may be wider than measures taken in self-defence;[129]

(c) Judge *Higgins* was, by contrast, much more critical of the Court's use of Article 31(3)(c).[130] She pointed to the need to interpret Article XX para 1(d) in accordance with the ordinary meaning of its terms and in its context, as part of an economic treaty. She considered that the provision was not one that 'on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause—at least not without more explanation than the Court provides'.[131] She concludes: 'The Court has, however, not interpreted Article XX, paragraph 1(d), by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law.'[132]

(d) Judge *Kooijmans*, although he does not mention Article 31(3)(c) in terms, develops the most nuanced analysis of the role of general international law in the interpretation of Article XX para 1(d).[133] He characterises the Court's approach as 'putting the cart before the horse',[134] since it does not begin with a proper analysis of the text of the treaty itself. But he accepts that, in order to determine whether a particular measure involving the use of force is 'necessary', the Court has 'no choice but to rely for this purpose on the body of general international law'.[135] So the right approach is to accept that the Court has no jurisdiction to rule on whether the acts complained of can be justified as acts of legitimate self-defence; and to assess the necessity of a particular measure first by reference to whether there was a reasonable threat to a party's security interests justifying protective measures. If those measures included the use of force, the assessment of the legality of those measures would be assessed against the presumptions of general international law.[136]

[125] Ibid 1430–4 paras 5–16.
[126] Ibid 1431 para 6.
[127] Ibid 1432 para 9.
[128] Ibid.
[129] Ibid para 10.
[130] Ibid 1386–8 paras 40–54.
[131] Ibid 1387 para 46.
[132] Ibid 1387 para 49.
[133] Ibid 1396–1402 paras 21–52.
[134] Ibid 1400 para 42.
[135] Ibid 1401 para 48.
[136] Ibid 1402 para 52.

The judgment of the ICJ in *Oil Platforms* represents a bold application of Article 31(3)(c) to a treaty which significantly pre-dates the VCLT. The Court does so in order to import wholesale into its treaty analysis a substantial body of general international law, including the UN Charter, in a field of the utmost importance, namely the use of force. The conduct of the state in question was then assessed by reference to the position under general international law, which in turn was applied to assess its position under the Treaty. The Court for the first time acknowledged the pivotal role of Article 31(3)(c) in this process, but did not give further guidance as to when and how it should be applied. This is regrettable, in view of the apparent disjunction in the court's reasoning, highlighted in the separate opinions, between the language of the treaty and the extensive excursus into customary international law.

The approach advocated by Judge Buergenthal is surely too narrow in that it conflates jurisdiction with choice of law, and would cut off the process of treaty interpretation from its essential hinterland. But it has to be said that the apparent leap taken by the court in its analysis invites such criticism. Surely the better approach is that advocated by Judge Kooijmans, by means of which the scope of the reference to custom could have been more firmly anchored to the treaty language. It should not be forgotten that the facts of the case located the matter as one where the 'measures . . . necessary to protect [the party's] essential security interests' involved the use of force. It is contrary to commonsense to suggest that parties to a treaty of amity concluded between two members of the United Nations after the adoption of the UN Charter can have intended to contemplate the use of force between each other of a kind outlawed by the Charter and by customary international law. The Court may well have found itself placing undue weight on a principle of interpretation to make this point, in view of the jurisdictional constraints under which it was working. But, as Judge Simma reminds us, the rules of custom and Charter with which the Court was concerned were in any event of a peremptory character, and so their impact could not properly be ignored.

IV. A PROCESS FOR THE APPLICATION OF SYSTEMIC INTEGRATION

The cases surveyed in Part III are plainly not the last word on the potential for the application of Article 31(3)(c). On the contrary, now that the genie is out of the bottle, it is likely that many more tribunals will pray its terms in aid in hard interpretation cases. However, the five case studies do provide a good range of generic types of problems encountered in the application of the principle of systemic integration. Taken together with the background factors sketched in Part I, and the analysis of Article 31 in Part II, they provide a platform upon which to advance some general observations about the approach which the interpreter of a treaty may wish to adopt in looking at general international law.

It is important to be clear about the nature and purpose of such a restatement of principles. Interpretation is, as has been earlier suggested, a process of legal reasoning. In that process, particular 'rules' of interpretation will have greater or lesser relevance, and indicate particular consequences, depending on the nature of the interpretation problem and the selection and deployment of a particular principle. It follows that the value of any elaboration of an approach under Article 31(3)(c) (or beyond it) should be judged by reference to its utility in elucidating and guiding, by way of an organised set of factors, the necessary elements in the process of interpretation.

The particular set of problems with which Article 31(3)(c) is concerned relates to the consideration of material sources external to the treaty (itself a legal text). It is thus concerned with the relationship of the general to the particular. The problem is therefore one of the *weight* to be attached to particular external material sources in the interpretation process. It is not (for the most part) a matter of constructing artificial exclusionary rules.

Nevertheless, the cases show that the problems posed by apparently conflicting norms in international law continue to present tribunals with difficult choices. In making those choices, tribunals have been actively engaged in the construction of a framework of principle within which to operate. Article 31(3)(c) in its unadorned form has been criticised as failing to provide the necessary guidance within that framework.

So it is that we must return to the three overall tasks in the 'operationalizing' of Article 31(3)(c) which were adopted at the outset, namely: the relevance of custom and general principles of law in the treaty interpretation process; the scope for references to other applicable conventional international law in this process; and the problems arising from the changing face of international law over time. It is possible to advance the relevant points as a series of numbered propositions derived from what has gone before.

A. The Role of Custom and General Principles

1. Properly conceived, customary international law and the general principles of law form two of a set of progressive concentric circles, each one constituting a field of reference of potential assistance in treaty interpretation. As Max Huber illuminatingly put it:[137]

> Il faut donc chercher la volonté des parties dans le texte conventionnel, d'abord dans les clauses relatives à la contestation, ensuite dans l'ensemble de la convention, ensuite dans le droit international général, et enfin dans les principes généraux de droit reconnus par les nations civilisées. C'est par cet encirclement concentrique que le juge arrivera dans beaucoup de cas à établir la volonté

[137] *Annuaire* (1952-I) 200–1. For a similar analysis as applied to statutory interpretation in domestic law see: Glazebrook 'Filling the gaps' in Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis Wellington 2004) 153.

> presumptive des parties 'conformément aux exigencies fondamentales de la plenitude du droit et de la justice internationale'. Ainsi que le rapporteur formule admirablement la tâche du juge.

2. Thus, it is always essential to keep in mind that Article 31(3)(c) is only part of a larger interpretation process, in which the interpreter must first consider the plain meaning of the words in their context and in the light of the object and purpose of the provision. It was for this reason, for example, that the WTO Appellate Body ultimately decided that it had to give primacy to the treaty provisions in *Shrimp-Turtle* and *Beef Hormones*. As ITLOS reminded us in *Mox Plant*, the considerations of context and object may well lead to the same term having a different meaning and application in different treaties.

3. Nevertheless, the inherently limited subject matter scope of a treaty, and the fact of its character as a creature of international law, have the consequence that international law will have a pervasive impact on treaty interpretation. This is not uncommonly recognized expressly in modern treaties (eg WTO DSU Article 3.2; NAFTA Article 102, para 2; OSPAR, Article 32(6)(a)). The Rome Statute for the International Criminal Court establishes a progressive hierarchy of norms to be applied by the Court, radiating out from the Rome Statute itself, and including both 'principles and rules of international law' and general principles of law.[138]

4. But, even when it is not made express, the principle of systemic integration will apply, and may be articulated as a presumption with both positive and negative aspects:

(a) *negatively* that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognised principles of international law or with previous treaty obligations towards third states;[139] and,

(b) *positively* that the parties are to taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way': *Georges Pinson.*

5. In applying this principle, there is an especially significant role for customary international law and general principles of law. As a WTO Panel recently put it:[140]

> the relationship of the WTO Agreements to customary international law is broader than [the reference in Article 3.2 re: customary rules of interpretation].

[138] Rome Statute of the International Criminal Court, Article 21; as to which see: Pellet 'Applicable Law' in Cassese et al *The Rome Statute of the International Criminal Court: A Commentary* (OUP Oxford 2002) 1051.

[139] *Rights of Passage over Indian Territory (Preliminary Objections) (Portugal v India) Case ICJ Rep* (1957) 142; Jennings and Watts (eds) *Oppenheim's International Law* (9th edn, Longman London 1992) 1275.

[140] *Korea—Measures affecting Government Procurement* (1 May 2000, WT 1DS163/R) 183, para 7.96

> Customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

Thus most of the cases considered in this article have involved the assertion and application of principles of customary international law (in the Iran–US Claims Tribunal cases, before the ECHR, in the emphasis on customary international law by the NAFTA Free Trade Commission, and by the ICJ in *Oil Platforms*).

6. This has been typically done in one of three situations:

(a) The treaty rule is unclear and the ambiguity is resolved by reference to a developed body of international law (as in the issue of double nationality dealt with by the Iran-US Claims Tribunal in *Esphahanian v Bank Tejarat)*;
(b) The terms used in the treaty have a well-recognised meaning in customary international law, to which the parties can therefore be taken to have intended to refer. This is the case, for example, in the construction of the terms 'fair and equitable treatment' and 'full protection and security', discussed in *Pope & Talbot Inc v Canada*; or
(c) The terms of the treaty are by their nature open-textured and reference to other sources of international law will assist in giving content to the rule. This was the position in the construction of Article XX of the GATT discussed in *Shrimp-Turtle* and *Beef Hormones*, and may well have also been considered by the ICJ to be the position in *Oil Platforms*.

7. There are two different levels at which reference to broader principles of customary international law may be necessary:

(a) within a particular part of international law (as was the case, for example in the references to custom in the foreign investment cases: *Pope & Talbot, Mondev, Esphahanian*; and in relation to environmental protection instruments in *Mox Plant*);
(b) when the court must look beyond the particular sub-system to rules developed in another part of customary international law (as in *Al-Adsani* and *Oil Platforms*).

8. In the latter case, the court is engaged in a larger process of fitting the treaty obligation into its proper place within the larger normative order. But, even in this situation, it is still essential, as Judge Kooijmans rightly reminded us in *Oil Platforms*, to relate the other norm to the treaty obligation in question.

9. The importance of the rules of customary international law and general principles of law in this process is not because of their overriding character, since international law reserves for overriding customary rules the special category of *jus cogens*. Otherwise, it must be accepted that a treaty can of course derogate from custom, provided that it does so expressly.[141] Moreover, treaties can and do expressly develop the law progressively beyond the solutions arrived at by custom. An approach which, in the name of integration, gave excessive weight to pre-existing law would potentially stifle one of the main functions of treaty-making, namely to achieve by convention further or different obligations than those which already exist.

10. Rather, the significance of such rules is that they perform a systemic or constitutional function in describing the operation of the international legal order. Examples include: the criteria of statehood (*Loizidou*); the law of state responsibility (which has influenced both the reach of human rights obligations[142] and the law of economic counter-measures in the WTO DSU);[143] the law of state immunity; the use of force; and the principle of good faith (*Shrimp-Turtle*).

11. Although the general principles of law recognized by civilized nations may well constitute, as Huber suggested, a further concentric circle, they, too, perform a similar task in locating the treaty provision within a principled framework (as was done in determining the scope of the fair trial right in *Golder*). In that regard, it should not be forgotten that Article 31 (3)(c)'s reference to 'rules of international law' comports a reference to the international legal system as a whole, many of whose rules are necessarily expressed at a high level of generality.

12. This part of the interpretation process may on occasion involve extensive investigation of sources outside the treaty in order to determine the content of the applicable rule of custom or general principle (as in *Al-Adsani* and *Oil Platforms*). Determining that content may be the subject of contention and disagreement. But this should not occasion surprise or concern. It is an unavoidable part of any 'common law' element in a legal system, even where that element is included as part of a process of treaty interpretation.

B. Other Applicable Conventional International Law

13. The second general problem, which was not resolved in the formulation of Article 31(3)(c), is the test to be applied to determine in what circumstances another rule of *conventional* international law is applicable in the relations between the parties. The problem is this: is it necessary that all the parties to

[141] See, eg, the importance of the rule requiring waivers of state immunity by treaty to be express: *Oppenheim* above n 139 351, and *Argentine Republic v Amerada Hess Shipping Corp* 109 S Ct 683 (1989).

[142] See, eg, *Loizidou v Turkey* (Preliminary Objections), ECHR, series A [1995] no 310 and *Issa v Turkey* (Application no 31831/96, 16 November 2004). See also the reliance on the public international law rules of jurisdiction in *Bankovíc* op cit n 110 paras 59–60 109.

[143] See Pauwelyn above n 6 at 271.

the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes?

14. The problem is particularly acute where the treaty under interpretation is a multi-lateral treaty of very general acceptation (such as the WTO Covered Agreements). In such a case, it is inherently unlikely that there will be a precise congruence in the identity of the parties to the two treaties. If complete identity of parties were required before the other treaty could be regarded as being 'applicable in the relations between the parties', it would have the ironic effect that the more membership of a particular multilateral treaty such as the WTO Covered Agreements expanded, the more those treaties would be cut off from the rest of international law.[144]

15. There are four possible solutions to this problem:

(a) Require that all parties to the treaty under interpretation also be parties to any treaties relied upon.[145] This is a clear but very narrow standard.

(b) Permit reference to another treaty provided that the treaty parties in *dispute* are also parties to the other treaty. This approach would significantly broaden the range of treaties potentially applicable for interpretation purposes. But it would run the risk of potentially inconsistent interpretation decisions dependent upon the happenstance of the particular treaty partners in dispute.

(c) A third option would be to require a finding that, insofar as the treaty were not in force between all members to the treaty under interpretation, the rule contained in it was treated as being a rule of customary international law.[146] This approach has the merit of doctrinal rigour. It would revert the analysis to section A above. But it could have an inappropriately restrictive effect in two situations:
   (i) It could preclude reference to treaties which have very wide acceptance in the international community (including by the disputing states) but which are nevertheless not universally ratified and which are not accepted in all respects as stating customary international law (such as UNCLOS);
   (ii) It could also preclude reference to treaties which represent the most important elaboration of the content of international law on a specialist subject matter, on the basis that they have not been ratified by all the parties to the treaty under interpretation.

(d) Establish an intermediate test which does not require complete identity of treaty parties, but does require that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty

[144] Marceau above n 107 at 781.

[145] This was the approach adopted by the GATT panel in *United States—Restrictions on Imports of Tuna*, 16 June 1994, and adopted DS29/R para 5.19.

[146] See, eg, the emphasis placed in *Shrimp-Turtle* on the fact that, although the United States had not ratified UNCLOS, it had accepted during the course of argument that the relevant provisions for the most part reflected international customary law (above n 95 para 51).

under interpretation 'in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned'.[147] This approach has in fact been adopted in some of the decisions of the WTO Appellate Body.[148]

16. It is submitted that the requirement of Article 31(3)(c) of 'rules of international law applicable in the relations between the parties' is properly consistent only with options (a) and (c), in the sense that 'parties' must be read as referring to all the parties to the treaty, so that any interpretation of the treaty's provisions imposes consistent obligations on all the parties to it. Article 2 of the Convention defines 'party' as 'a state which has consented to be bound by the treaty and for which the treaty is in force', and Article 31 is concerned with the promulgation of a general rule, which would apply to the interpretation of a treaty irrespective of whether any particular parties to it may happen to be in dispute.

17. However, this position must be qualified in two respects:

(a) if on its proper construction, a particular obligation in the treaty is owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes* (even if contained within a multilateral treaty), then the *application* of that obligation as between the relevant pair of parties (as opposed to its interpretation generally) may properly be considered in the light of other obligations applying bilaterally between those parties only;[149]

(b) in any event, as Griffith pointed out in his dissent in *Mox Plant*,[150] reference may properly be made to other treaties, even if they are not in force between the litigating parties, as evidence of the common understanding of the parties as to the meaning of the term used. This may be done pursuant to the overall requirement of Article 31(1) to consider the object and purpose of the treaty. Further, Article 31(4) permits a special meaning to be ascribed to a term, if it is established that the parties so intended. In many cases, this type of purposive enquiry will provide a better explanation for decisions referring to other treaties within the WTO DSU than Article 31(3)(c) itself. The open-textured language of exclusions in the Covered Agreements themselves calls for a programmatic interpretation which may properly take account of other material sources of international law. In doing so, the tribunal is using other treaties not so much as sources of binding law, but as a rather elaborate law dictionary.

[147] Pauwelyn above n 6, 257–63 supports this approach in the case of the WTO Covered Agreements.

[148] See, eg, the sources relied upon by the Appellate Body in *Shrimp-Turtle*, above n 95 para 51.

[149] For a recent exploration of this idea in the context of the WTO Covered Agreements, see Pauwelyn, above n 6, ch 8 440–86 and Pauwelyn 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907.

[150] See the text above at n 87.

C. Intertemporality

18. The third general issue is the question of what to do about the problem of intertemporality as it applies to treaties. When reference is to be made to other rules of international law in the interpretation of a treaty, is the interpreter limited to international law applicable at the time the treaty was framed? Or may the interpreter also refer on occasion to subsequent developments?

19. In considering this issue, it is necessary to distinguish between two different effects which subsequent developments in international law may have on a treaty:

(a) they may affect its *application*, since the treaty may have to be applied to a situation created by norms which were not in existence at the time it was concluded. This has been described as the process of *actualization* or *contemporization*;[151] or,
(b) they may affect the *interpretation* of the treaty itself, where the concepts in the treaty are themselves 'not static but evolutionary'.[152]

20. As has been seen, one of the main reasons that Waldock included the first precursor to Article 31(3)(c) in his draft of the Vienna Convention was to entrench a principle of contemporaneity: that treaties were to be interpreted in accordance with the law applicable at the time at which they were concluded. However, Waldock's proposals did not find favour with the Commission, which decided that a strict principle of contemporaneity would be unduly restrictive. Article 31(3)(c) therefore omits any key to the problem of intertemporality. Yet, of course, as Judge Weeramantry (amongst others) has pointed out, without any guidance on inter-temporality, the provision has limited utility.

21. When Thirlway returned to examine the jurisprudence of the International Court of Justice in the light of Fitzmaurice's principles of interpretation in 1991, he suggested that the principle of contemporaneity should, on the authority of the Court's jurisprudence, be qualified by a proviso in the following terms:

> Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention.[153]

[151] OSPAR Tribunal Arbitral Award in *Mox Plant*, above n 71 para 103 1138. Waldock anticipated this point in his initial draft formulation of Art 56 of the VCLT: see text above at n 59. This phenomenon is well developed in the case of domestic statutory interpretation by Bradley, above n 36.

[152] *Oppenheim* above n 139 1282.

[153] Thirlway, above n 14 at 57. See also: Thirlway 'The Law and Procedure of the International Court of Justice 1960–1989 (Part two), (1989) 60 BYIL 1 at 135–43 and Rosalyn Higgins 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501, 515–19.

22. In essence, this was the point which had been made in the discussions in the Commission by Jiménez de Aréchaga in 1964. He put the matter thus:[154]

> The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concept that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belong. The free operation of the will of the parties should not be prevented by crystallising every concept as it had been at the time when the treaty was drawn up.

23. However, consistent with the overall approach adopted by the Vienna Convention, it is submitted that a safe guide to decision on this issue will not be found in the chimera of the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties' intentions in this regard in the material sources referred to in Articles 31–2, namely: in the terms themselves; the object and purpose of the treaty; the rules of international law; and, where necessary, in the *travaux*. The International Court of Justice has, on several occasions, accepted that this process may be permissible where the parties insert provisions into their treaty which *by their terms or nature* contemplate evolution.[155] This was done most recently in the *Gabčikovo-Nagymaros* judgment.[156]

24. The enquiry is thus into whether the concept is, in the context in which it is used, a mobile one. Examples of when this may be so include:

(a) use of a term which carries with it an evolving meaning in general international law, and where the parties by their language intend to key into that evolving meaning in the process of conferring specific rights and duties upon each other, without adopting their own idiosyncratic definition (such as in the use of 'expropriation' or 'fair and equitable treatment' in bilateral investment treaties);
(b) the use of language in the treaty, especially as regards its object and purpose, by which the parties commit themselves to a programme of progressive development (which was the case in *Gabčikovo-Nagymaros*);
(c) the description of obligations in very general terms, which must take account of changing circumstances. Thus, the general exceptions in the GATT Article XX, discussed in *Shrimp-Turtle*, in permitting measures

[154] *Yearbook* (1964) vol I 34 para 10.

[155] See, eg, *Namibia (Legal Consequences)* Advisory Opinion, ICJ Rep (1971) 31; *Aegean Sea Continental Shelf Case (Greece v Turkey)* ICJ Rep (1978), 3.

[156] *Case concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep (1997), 7 at 76–80; See also Separate Opinion of Judge Weeramantry, ibid 113–15.

> 'necessary to protect human, animal or plant life or health' or 'relating to the conservation of exhaustible natural resources', must inherently adjust their application according to the situation as it develops over time. The measures necessary to protect shrimp may evolve depending upon the extent to which the survival of the shrimp population is threatened. Thus, the broad meaning of Article XX may remain the same. But its actual content will change over time (as the words indicated must have been intended). In that context, reference to other rules of international law, such as multilateral environment treaties, becomes a form of secondary evidence supporting the scientific enquiry which the ordinary meaning of the words, and their object and purpose, invites.

In the final analysis, then, to what extent may the principle of systemic integration, recognised and given voice through Article 31(3)(c), be said to reduce fragmentation? Contrary to the perception which seems to be developing in some quarters, the principle is certainly not a universal panacea. Indeed, it is not equipped on its own to resolve true conflicts of norms in international law. No principle which relies on techniques of interpretation alone can do that.[157] The principle of systemic integration must take its place alongside a wider set of techniques which resolve such conflicts by choosing between two rival norms.[158]

But systemic integration nevertheless offers a prospect which may in the long term have deeper significance in the promotion of coherence within and among the 'impressive federation of special areas'[159] which make up the modern international legal system. As Judges Higgins, Buergenthal and Kooijmans recently wisely observed, in considering the balance to be struck between the conflicting dictates of state immunity and liability for international crimes:[160]

> International law seeks the accommodation of this value [the preservation of unwarranted outside interference in the domestic affairs of states] with the fight against impunity, and not the triumph of one norm over another.

The principle of systemic integration in treaty interpretation operates before an irreconcilable conflict of norms has arisen. Indeed, it seeks to avert apparent conflicts of norms, and to achieve instead, through interpretation, the harmonisation of rules of international law. In this way, the principle furnishes

[157] A point made by Pauwelyn, above n 6 at 272.

[158] These include the other rules being discussed by the ILC Study Group on the Fragmentation of International Law, discussed in the text above at nn 32–5.

[159] Brownlie (2001), above n 28 at 14.

[160] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (International Court of Justice, General List no 121, 14 Feb 2002), Joint Separate Opinion, para 79, (2002) 41 ILM 536 590.

the interpreter with a master key which enables him, working at a very practical level, to contribute to the broader task of finding an appropriate accommodation between conflicting values and interests in international society, which may be said to be the fundamental task of international law today.[161]

[161] These broader ideas are developed by the author in: 'After Baghdad: Conflict or Coherence in International Law?' (2003) 1 NZJPIL 25.

Annex 691

M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), 247-248, and 425-428

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Commentary on the 1969 Vienna Convention on the Law of Treaties

By

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Abbreviations

AFDI	Annuaire français de droit international
AJIL	American Journal of International Law
Annuaire IDI	Annuaire de l'Insitut de droit international
AöR	Archiv des öffentlichen Rechts
Art(s).	Article(s)
Asian YBIL	Asian Yearbook of International Law
ATF	Arrêts du Tribunal Fédéral Suisse
Australian LJ	Australian Law Journal
Australian LR	Australian Law Reports
Australian YBIL	Australian Yearbook of International Law
Austrian JPIL	Austrian Journal of Public International Law
Austrian RIEL	Austrian Review of International and European Law
AVR	Archiv des Völkerrechts
Berkeley JIL	Berkeley Journal of International Law
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft
Brooklyn JIL	Brooklyn Journal of International Law
BYBIL	British Yearbook of International Law
ca.	circa
Californian WILJ	Californian Western International Law Journal
Canadian YBIL	Canadian Yearbook of International Law
cf.	confer
CETS	Council of Europe Treaty Series
Chicago JIL	Chicago Journal of International Law
CHRYB	Canadian Human Rights Yearbook
CILJ Southern Africa	Comparative and International Law Journal of Southern Africa
Columbia LR	Columbia Law Review
Columbia JTL	Columbia Journal of Transnational Law
Conf.	Conference
Connecticut JIL	Connecticut Journal of International Law
Cornell ILJ	Cornell International Law Journal
Cornell LQ	Cornell Law Quarterly
CoW	Committee of the Whole (of the Vienna Conference on the Law of Treaties of 1968/1969)
Current LP	Current Legal Problems
CYBIL	The Canadian Yearbook of International Law

Denver JILP	Denver Journal of International Law and Policy
Duke LJ	Duke Law Journal
diss. op.	dissenting opinion
ed(s).	edition, editor(s)
e.g.,	*exempli gratia*, for instance
ECHR	European Court of Human Rights
ECR	European Court Reports
EPIL	Encyclopedia of Public International Law
EJIL	European Journal of International Law
et al.	*et alii*, and others
f(f)	and the following (page[s], para[s]., etc.)
FAO	Food and Agriculture Organisation
Finnish YBIL	Finnish Yearbook of International Law
GA	General Assembly
GAOR	General Assembly Official Records
Georgia JICL	Georgia Journal of International and Comparative Law
Georgetown LJ	Georgetown LJ
GYBIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
Harvard LJ	Harvard Law Journal
Hastings ICLR	Hastings International and Comparative Law Review
IAEA	International Atomic Energy Agency
ibid.	*ibidem*, in the same place
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICJ Pleadings	International Court of Justice. Pleadings, Oral Arguments, Documents
ICJ Reports	International Court of Justice. Reports of Judgments, Advisory Opinions and Orders
ICLQ	The International and Comparative Law Quarterly
ICNT	Informal Composite Negotiating Text
ICTY	International Criminal Tribunal for the former Yugoslavia
Id.	*Idem*, the same person
i.e.	*id est*, that is, namely
i.f.	*in fine*, at the end
IJIL	Indian Journal of International Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Indiana LJ	Indiana Law Journal
Indian YBIA	Indian Year Book of International Affairs
Institut	*Institut de Droit international*
Int. Aff.	International Affairs (London)

Iowa LR	Iowa Law Review
Israel LR	Israel Law Review
Israel YBHR	Israel Yearbook on Human Rights
Ital YBIL	Italian Yearbook of International Law
JDI	Journal du Droit International
Journal CSL	Journal of Conflict and Security Law
Journal MLC	Journal of Maritime Law and Commerce
JT	Journal des Tribunaux
lit.	*littera*, letter
Leiden JIL	Leiden Journal of International Law
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
LoS	Law of the Sea
Maine LR	Maine Law Review
Michigan JIL	Michigan Journal of International Law
n.	footnote
N.	Note (in the margin)
New York ULR	New York University Law Review
NIEO	New International Economic Order
NILR	Netherlands International Law Review
Nordic JIL	Nordic Journal of International Law
Nordisk TLR	Nordisk Tidsskrift for International Ret. Acta Scandinavica Juris Gentium
no(s).	number(s)
NYBIL	Netherlands Yearbook of International Law
OAS	Organization of American States
ÖJZ	Österreichische Juristenzeitung
Oxford JLS	Oxford Journal of Legal Studies
ÖZAP	Österreichische Zeitschrift für Aussenpolitik
ÖZöR(VR)	Österreichische Zeitschrift für öffentliches Recht (und Völkerrecht)
OR	Official Records (of the Vienna Conference on the Law of Treaties of 1968/1969)
p(p).	page(s)
para(s).	paragraph(s)
passim	throughout
PASIL	Proceedings of the Annual Meeting of the American Society of International Law
PCIJ	Permanent Court of International Justice
Philippine LJ	Philippine Law Journal
Plenary	Plenary meetings (of the Vienna Conference on the Law of Treaties of 1968/1969)
Polish YBIL	Polish Yearbook of International Law
q.v.	*quod vide*, which see

RC	Recueil des Cours. Collected Courses of the Hague Academy of International Law
RDE	Rivista di diritto europeo
RDI	Rivista di diritto internazionale
Res/res	R(r)esolution
Revista	Revista española de derecho internacional
Revue Belge	Revue belge de droit international
Revue DI	Revue de droit international
Revue DIDC	Revue de droit international et de droit comparé
Revue DISDP	Revue de droit international, de sciences diplomatiques et politiques
Revue Egyptienne	Revue egyptienne de droit international
Revue Roumaine	Revue roumaine des Sciences Sociales
Revue Suisse	Revue suisse de droit international et de droit européen
RGDIP	Revue générale de droit international Public
RHDI	Revue héllénique de droit international
RJT	Revue juridique Thémis
RMC	Revue du Marché Commun
ROW	Recht in Ost und West. Zeitschrift für Rechtsvergleichung und innerdeutsche Rechtsprobleme
RUDH	Revue universelle des droits de l'homme
sc.	*scilicet*, in particular, namely
sep. op.	separate opinion
Sess.	Session
SJIR	Schweizerisches Jahrbuch für internationales Recht
South African LJ	South African Law Journal
South African YBIL	South African Yearbook of International Law
SR	Summary Records; *Systematische Sammlung* (systematic collection of Swiss legislation)
Stanford LR	Stanford Law Review
subpara(s).	subparagraph(s)
Suffolk TLR	Suffolk Transnational Law Review
suppl.	Supplement
Sydney LR	Sydney Law Review
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
Texas ILJ	Texas International Law Journal
Texas LR	Texas Law Review
Transactions	Transactions of the Grotius Society
UCDLR	University of California at Davis Law Review
UCLALR	University of California at Los Angeles Law Review
UK	United Kingdom of Great Britain and Northern Ireland
UN(O)	United Nations (Organisation)

UNCIO	United Nations Conference on International Organisation
UNCITRAL	UN Commission on International Trade Law
UNCLOS (III)	(Third) UN Conference on the Law of the Sea
UNRIAA	UN Reports of International Arbitral Awards
UNTS	UN Treaty Series
UPLR	University of Pennsylvania Law Review
UPU	Universal Postal Union
US(A)	United States (of America)
UTLJ	University of Toronto Law Journal
Washington LR	Washington Law Review
Wisconsin ILJ	Wisconsin International Law Journal
Vanderbilt JTL	Vanderbilt Journal of Transnational Law
Virginia JIL	Virginia Journal of International Law
vol(s).	volume(s)
WHO	World Health Organisation
Yale JIL	Yale Journal of International Law
Yale StWPO	Yale Journal of (Studies in) World Public Order
Yale LJ	Yale Law Journal
YBAAA	Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZöR	Zeitschrift für öffentliches Recht
ZSR	Zeitschrift für schweizerisches Recht

rejected.[12] In 1969 only a small change was made to the provision which was adopted by 102 votes to none.[13]

B. Interpretation of Article 18

1. Nature and Scope of Obligation

Article 18 refers in its title to a State's **obligation**. The latter is, on the one hand, of a contractual nature for States parties to the Convention. On the other, Article 18 appears declaratory of customary law (N. 20), and the obligation therefore also derives for all States from general international law. 4

While it may appear a *petitio principii* to refer in a legal norm to an "obligation", such reference can be explained with the controversy surrounding the respective legal basis of various precursors of Article 18. The Harvard Draft doubted the legal nature of such duties (N. 2), and various early ILC drafts merely stipulated an "obligation of good faith".[14] Indubitably, Article 18 gives concrete and normative meaning to the principle of good faith by protecting legitimate expectations which relations of this type generate among States.[15] 5

> The *travaux préparatoires* disclose the prevailing view of States and within the ILC, namely that good faith was too imprecise a notion to serve in itself as a basis of legal obligation.[16] As the Court found in the *Border and Transborder Armed Actions (Nicaragua/Honduras) Case*, "[good faith] is not in itself a source of obligation where none would otherwise exist".[17]

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[12] By 74 votes to 14, with six abstentions, the vote being taken by roll-call, OR 1968 CoW 105; OR Documents 131, para. 164(*i*); see the statement of Sir Francis Vallat of the *UK* delegation, *ibid*. 105, para. 44 ("unacceptable in its existing form").

[13] OR 1969 Plenary 29. The change was based on an amendment of the *Polish* delegation, the words "has exchanged instruments constituting the treaty" were introduced in para. (a), OR 1969 Plenary 29, para. 26.

[14] *E.g.*, the ILC Draft 1962, YBILC 1962 II 175; Waldock Report IV, YBILC 1965 II 45.

[15] See statements by the delegations of *India*, *Netherlands*, *Poland* and *Iraq*, OR 1969 CoW 98 ff.; Cot, Revue Belge 4 (1968) 155; Rogoff, Maine LR 32 (1980) 291 ff; Müller, Vertrauensschutz 162 ff; Zoller, Bonne foi 68 ff: Rosenne, Developments 149 at n. 9. This conclusion by the present author, which was expressed in Villiger, Customary International Law N. 469, is considered "surprising" by Klabbers, Vanderbilt JTL 34 (2001) 315.

[16] *E.g.*, the discussion in 1965, YBILC 1965 I 87 ff; *inter alia* Bartos, *ibid*. 262 f ("the obligation laid down in [Article 18] had its origin in the principle of good faith, but had since become a legal obligation"); Turner, Virginia JIL 21 (1981) 765 ("legally binding").

[17] ICJ Reports 1988 105, para. 94.

6 The obligation under Article 18 arises in the situations mentioned in paras. (a) and (b) (N. 15) **prior to the treaty's entry into force**. It follows that it is unnecessary, and somewhat imprecise, to speak of a retroactive effect of *pacta sunt servanda* (*Article 26, q.v.*) of the particular treaty,[18] since Article 18 deals with situations where the treaty has not entered into force. Similarly, it cannot be postulated that Article 18 may only be invoked *ex post facto* after the treaty's ratification or entry into force; this interpretation would render Article 18 meaningless, since it is uncertain upon signature whether or not a treaty will eventually enter into force.[19]

7 Independently of Article 18 (and its declaratory nature, N. 20), States parties to the treaty awaiting its entry into force are in any event obliged to apply all those treaty rules which are declaratory of customary law (*Issues of Customary International Law*, N. 35). It follows that the functions of Article 18 are limited to non-declaratory rules of a treaty awaiting its entry into force.

8 Finally, in the sense of a *venire contra factum proprium* it would appear that Article 18 cannot be invoked by those signatories or parties to a treaty which have themselves supported or acquiesced in the defeating "acts".

2. Principle

9 In a much criticised formulation,[20] the opening sentence in Article 18 obliges **a State to refrain from acts which would defeat the object and purpose of a treaty**.

a) Acts Defeating the Treaty's Object and Purpose

10 The terms **object and purpose** correspond with those employed throughout the Convention (*e.g.*, *Preamble*, N. 2; *Article 31*, N. 11–14). They refer to the reasons for which States parties or signatories concluded a treaty, and the continuing functions and *raison d'être* of the treaty.[21] Since treaties often

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[18] *E.g.*, I. Lukashuk, The Principle *pacta sunt servanda* and the Nature of Obligation under International Law, AJIL 83 (1989) 513 ff., 515 f. See the statement in Vienna by the *Belgian* delegation, CoW 1968 101, para. 57.

[19] See the statements in the ILC by Waldock, YBILC 1962 I 97, para. 13; Ago, *ibid.* 92, para. 61; Bartos, *ibid.* 93, para. 78; *contra* Castrén, *ibid.* 89, para. 14. Also Kolb, Bonne foi 208; Cahier, Mélanges Dehousse 33.

[20] See O'Connell, International Law I 224 ("the provision . . . is more rigid [than good faith] in that it omits the relevance of circumstances, more relaxed in that it relates the obligation only to the 'object and purpose'"); Cahier, *ibid.* 35; Morvay, ZaöRV 27 (1967) 156; Müller, Vertrauensschutz 159.

[21] See the definition in the *Reservations to Genocide Advisory Opinion*, ICJ Reports 1951 27; Crnic-Grotic, Asian YBIL 7 (1997) 152 ff.

the ILC's intention to admit liberal recourse to the "supplementary means", whereas for 15 delegations the use of these means was restricted.[28]

On the whole, it is significant that in Vienna no State proposed the deletion of the ILC Draft articles on interpretation. In fact, a substantial majority of States endorsed the ILC Draft articles, though it may be noted that claims emphasising the declaratory nature of these rules were balanced by statements that the rules were innovatory. Opinions of States on the content of the respective rules were equally divided. It is thus doubtful whether the unanimity of vote in Vienna sufficed *per se* to corroborate a *communis opinio juris* upon the respective articles.

B. Interpretation of Article 31

1. Good Faith (Para. 1)

Article 31 gives pride of place in its opening sentence in para. 1 to **good faith** (*bona fides*) which is "one of the basic principles governing the creation and performance of legal obligations".[29] The notion is also referred to in the *third* preambular para. (*Preamble*, N. 10) and in *Article 26* on *pacta sunt servanda* (*q.v.*, N. 5, 8). The crucial link is thus established between the interpretation of a treaty and its performance.[30] However, good faith as such has no normative quality (*Article 26*, N. 5).[31] 6

When interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing.[32] Furthermore, good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage.[33] Legitimate 7

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[28] See on this section Villiger, Customary International Law N. 482. The minutes are reproduced at OR 1968 CoW 166 ff, and 441 f; and OR 1969 Plenary 57 f.

[29] *Nuclear Tests Cases*, ICJ Reports 1974 268, para. 46.

[30] See the ILC Report 1966, YBILC 1966 II 221, para. 12.

[31] See the *UK* Government's Memorandum of 31 May 1990 in the *US/UK Arbitration Concerning Heathrow Airport User Charges,* BYBIL 63 (1992) 707 f ("[g]ood faith is not . . . an independent legal principle so much as a standard against which the conduct of a subject of the law can be measured . . . [T]he concept of good faith, as a general principle of law, has only marginal value as an autonomous source of rights and duties"); the *Border and Transborder Armed Actions (Nicaragua/Honduras) Case*, ICJ Reports 1988 105, para. 94; see also the 1981 *Interpretation of the Algerian Declarations of 19 January 1981* by the *Iran-US* Claims Tribunal, ILR 62 (1982) 605 f ("good faith is not only a rule of morality but a part of codified international law").

[32] See the Minority Opinion in the *Iran-US Claims Arbitration* (1981), ILR 62 (1982) 603; Jacobs, ICLQ 18 (1969) 333.

[33] See the 1981 *Interpretation of the Algerian Declarations of 19 January 1981* by the *Iran-US* Claims Tribunal, ILR 62 (1982) 605 f ("spirit of honesty and respect for law"). See generally A. d'Amato, Good Faith, EPIL 2 (1995) 599 ff.

expectations raised in other parties shall be honoured (*Vertrauensschutz*).[34] A right which has been forfeited may no longer be claimed (*venire contra factum proprium*). The prohibition of the abuse of rights, flowing from good faith, prevents a party from evading its obligations and from exercising its rights in such a way as to cause injury to the other party.[35]

8 Article 31 envisages good faith as being at the centre of the application of the General Rule. The notion prevails throughout the process of interpretation.[36]

> Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context (N. 9) and of other means of interpretation.[37] In particular, good faith implies consideration of the object and purpose of a treaty (N. 12). It plays a part in establishing the "acceptance" in subpara. 2(b) (N. 19) and in evaluating subsequent practice as in subpara. 3(b) (N. 22). Finally, good faith assists in determining recourse to the supplementary means of interpretation in *Article 32* (*q.v.*, N. 11).

2. Ordinary Meaning in Context (Para. 1)

9 According to Article 31, para.1, a treaty shall be determined **in accordance with the ordinary meaning**. The ordinary meaning is the starting point of the process of interpretation. This is its current and normal (regular, usual) meaning. A term may have a number of ordinary meanings, which may even change over time.[38] This relativist view of hermeneutics underlies Article 31 which in para. 1 requires the ordinary meaning **to be given** by the interpreter in good faith (N. 6–8) **to the terms of the treaty**.[39] In other words, that particular ordinary meaning will be established which is the common intention of the parties.[40] The relativity of the meaning of a term is confirmed by para. 4 which envisages the possibility of a "special" meaning going beyond the ordinary meaning of terms (N. 26–27).

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[34] Müller, Vertrauensschutz 128 "[good faith] fordert ein an objektiven Massstäben gegenseitiger Rücksichtnahme orientiertes Verhalten".

[35] See the *avis de droit* of the *Swiss* Federal Department of Foreign Affairs, SJIR 32 (1976) 79 ff, 82; the Swiss Federal Court, *ibid.* 28 (1972) 214.

[36] Yasseen, RC 151 (1976 III) 22 f.

[37] ILC Report 1966, YBILC 1966 II 211, para. 2; differently Zoller, Bonne foi 214, N. 231.

[38] This intertemporal aspect is essentially a matter of good faith, depending on the intentions of the parties; see Waldock Report VI, 1966 II 96, para. 7; 97, para. 13; *per contra* the 1980 *Young Loan Arbitration*, ILR 59 (1980) 530, para. 19; Yasseen, RC 151 (1976 III) 27, para. 7 (but see para. 9). It may have been the intention of the parties to "freeze" the meaning of the terms; see Thirlway, BYBIL 62 (1991) 57.

[39] Waldock Report VI, YBILC 1966 II 94, paras. 2 f.

[40] See the ILC Report 1966, YBILC 1966 II 220, para. 11.

The limits of this means of interpretation lie "in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained".[41]

Para. 1 envisages the ordinary meaning to be given to the terms of the treaty **in their context**. Treaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty, *i.e.*, **its text, including its preamble** (*Preamble* N. 5) **and annexes** (*e.g.*, maps) and the other means mentioned in paras. 2 and 3.[42] The annexes to the Convention are listed in the *Final Act* (*q.v.*; see also *Article 85*, N. 1). Article 31 thus embodies the contextual or systematic means of interpretation which aims at avoiding inconsistencies of the individual term with its surroundings.[43] Reference to the context in para. 1 confirms the relativity of the ordinary meaning (N. 9).[44] 10

3. Object and Purpose (Para. 1)

Next, the ordinary meaning of a term of the treaty will be determined **in the light of its** (*i.e.*, the treaty's) **object and purpose**.[45] The terms are used as a combined whole[46] and include a treaty's aims, its nature and its end. Indeed, a treaty may have many objects and purposes.[47] One of the objects and purposes will certainly be to maintain the balance of rights and obligations created by the treaty.[48] Article 31 thus also entrenches the teleological or functional approach.[49] It enables consideration of the different aims of particular types of treaties. 11

For instance, the intentions of the parties are often emphasised when interpreting bilateral, "contractual" treaties. By contrast, teleological interpretation has traditionally played a part in the interpretation of constitutions of international organisations (and

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[41] *South West Africa (Preliminary Objections) Cases*, ICJ Reports 1962 335 f; Jennings/Watts N. 632.

[42] Delbrück/Wolfrum III 642; for Bernhardt, ZaöRV 27 (1967) 498, reference to the "preamble and annexes" would not have been "absolutely necessary".

[43] Bleckmann, Völkerrecht N. 354.

[44] Emphatically the ILC Report 1966, YBILC 1966 II 221, para. 12: "the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty".

[45] See on the topic Crnic-Grotic, Asian YBIL 7 (1997) 155 ff; Buffard/Zemanek, Austrian RIEL 3 (1998) 311 ff, 322 ff; Linderfalk, Nordic JIL 72 (2003) 429 ff; J. Klabbers, Some Problems Regarding the Object and Purpose of Treaties, Finnish YBIL 8 (1997) 138 ff.

[46] Yasseen, RC 151 (1976 III) 57; Linderfalk, *ibid.* 433 ("perfectly synonymous"); Carreau, Droit international public N. 363 ("difficile à préciser").

[47] See the statement by Tsuruoka in the ILC 1966, YBILC 1966 I 326, para. 91 ("both singular and plural had the same meaning").

[48] Treviranus, GYBIL 25 (1982) 520.

[49] O'Connell, International Law I 255.

their implied powers) and other multilateral, "legislative" conventions.[50] The object and purpose also plays a particular part in the interpretation of human rights treaties.[51]

12 Consideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms (*ut res magis valeat quam pereat,* the *effet utile*).

As the ILC Report 1966 expounded: "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted".[52]

13 Article 31 does not state where the object and purpose may be sought. Traditionally, the preamble (*Preamble*, N. 1–2) is resorted to, or a general clause at the beginning of the treaty. The structure of Article 31 as a General Rule leaves no doubt that all the elements of Article 31 as well as the supplementary means of interpretation in Article 32 contribute to this end.[53]

14 Interpretation in the light of a treaty's object and purpose finds its limits in the treaty text itself. One of the (originally many possible) ordinary meanings will eventually prevail. In other words, Article 31 avoids an extreme functional interpretation which may, in fact, lead to "legislation" or the revision of a treaty.[54]

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[50] *Nuclear Weapons Advisory Opinion*, ICJ Reports 1996 74 f, para. 18.

[51] See the case-law of the European Court of Human Rights cited in Villiger, Festschrift Ress 325 f; the Inter-American Human Rights Court in the 1987 *Velasquez Rodriguez (Preliminary Objection) Case*, ILR 95 (1994) 243 f, para. 30 ("[the Inter-American Human Rights] Convention must… be interpreted so as to give it its full meaning"); and in the 1984 *Costa Rica Naturalization Provisions Advisory Opinion*, ILR 79 (1989) 292, para. 24 ("the interpretation to be adopted may not lead to a result that weakens the system of protection established by the [Inter-American Human Rights Convention]").

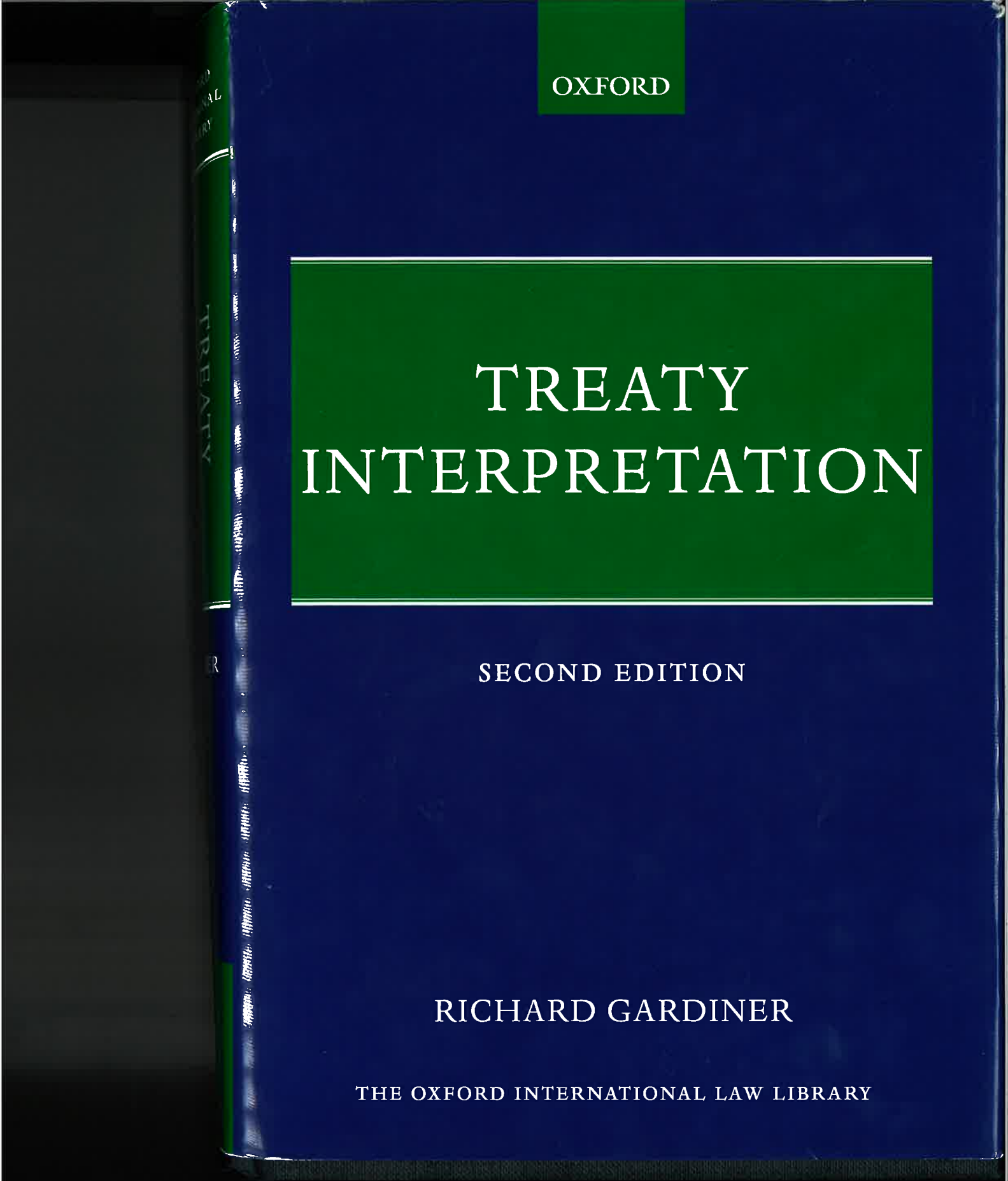
[52] YBILC 1966 II 219, para. 6.

[53] In the *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Case*, the ICJ had recourse to the "very scheme" of the convention at issue, ICJ Reports 2002 652, para. 51. See Müller, Vertrauensschutz 130 f; similarly (but with emphasis on the text), Yasseen, RC 151 (1976 III) 57, para. 6; Bleckmann, Völkerrecht N. 362; the comment by Verdross in the ILC, YBILC 1966 1/2 186, para. 14. *Contra* McDougal, AJIL 61 (1967) 993 f.

[54] ILC Report 1966, YBILC 1966 II 219, para. 6, and 220, para. 11; the *Interpretation of Peace Treaties Advisory Opinion*, ICJ Reports 1950 229; also the statement in Vienna by Jiménez de Aréchaga of the *Uruguayan* delegation, OR 1968 CoW 170, para. 67; Yasseen, RC 151 (1976 III) 57, para. 4.

Annex 692

R. Gardiner, *A Single Set of Rules of Interpretation,* in TREATY INTERPRETATION, ed. Sir Frank Berman KCMG KC (Oxford University Press, 2015), pages 5-20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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.

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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.

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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.

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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 to 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.

This quotation from an arbitral award of a very distinguished tribunal recognizes the general applicability of the Vienna rules (with article 33 being added in where language issues arise) and that neither the ICJ nor other leading tribunals have ever denied that applicability (even if positive affirmation took a little while). The unreserved recognition and endorsement of the Vienna rules is now so well evidenced in judgments and opinions of the ICJ, and likewise widely in arbitral awards and decisions of national courts, that it is tempting to cite only the key cases supporting the proposition and leave it at that. For the sake of completeness, however, the ICJ's gradual progression to affirmation of the Vienna rules is traced here in some detail.

2.1 History of recognition by the ICJ of the Vienna rules

There are no specific indications that the ICJ had particular criticisms of the Vienna rules when the Vienna Convention was concluded. However, in its judgments (that is, the collective or majority judgments) the Court was quiet about their status for quite a long time thereafter. A good analysis of how the Court came to regard them as generally applicable customary law is that by a learned commentator, former Registrar, and ad hoc judge of the Court, S Torres Bernárdez. Writing in 1998, he noted that 'the process of recognition by the Court, in so many words, of the declaratory nature of these rules has been hesitant, uneven and lengthy, going on for much longer than in the case of other rules of the Vienna Convention—more than twenty years in fact!'.[23]

Torres Bernárdez divides the progression to the Court's explicit and complete endorsement of the Vienna rules into successive periods. The first he describes as 'the initial silence' from 1970 to 1980. In this period the only references to the rules were those by individual judges in separate or dissenting opinions. He identifies Judge Ammoun as the first to refer to article 31 in 1970, the year after the Vienna Convention was concluded.[24] He also notes that in 1980, at the other end of this first decade of the existence of the Vienna rules, again in a separate opinion, Judge Sette-Camara included an assertion that, though the Vienna rules did not apply to the matter in hand by virtue of treaty obligation, its provisions would apply 'inasmuch as they embody rules of international law to which the parties would be subject independently of the Convention (Art.3(b))'.[25] In relation to international agreements not within the scope of the Vienna Convention, its article 3(b)

[23] S Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties' in G Hafner et al. (eds), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (Kluwer Law International: The Hague, 1998), 721 at 723.

[24] Torres Bernárdez, at 723, citing the judge's Separate Opinion in the *Barcelona Traction* case, [1970] ICJ Reports 304.

[25] Sette-Camara, Separate Opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion), [1980] ICJ Reports 178, at 184; and see Torres Bernárdez, at 724.

provides that the fact that the Convention does not apply is not to affect the application to such agreements of any of the rules set out in the Convention to which they would be subject under international law independently of the Convention. That clear proposition, coupled with the now established practice of regarding the Vienna rules as codified customary law, is the cornerstone of the (equally accepted) proposition that the Vienna rules apply generally, including application to treaties concluded before the Vienna Convention itself.

The second period in the development of the Court's endorsement of the Vienna rules (1980–90) is described by Torres Bernárdez as 'ensuing hesitations' of the Court with regard to the rules.[26] Nevertheless, even if it can be taken that 'hesitation' was the reason why the Court as a whole made no specific reference to the rules, Torres Bernárdez demonstrates that in the jurisdiction and admissibility phase of the *Nicaragua* case[27] the ICJ used implicitly the method and substance of the rules (although in some other cases in the same period no such close concurrence was apparent).[28] Nevertheless, individual judges made increasing reference to the rules and, in 1989, a Chamber (a panel of judges rather than the full court) of the ICJ recounted their invocation by one of the parties (Italy).[29]

Positive affirmations that the Vienna rules are of general application have become more frequent and have taken an increasingly assertive form over the years. In 1991 the ICJ referred, somewhat hesitantly, to principles of treaty interpretation which it had enunciated before the Vienna Convention was drawn up and stated:

> These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point.[30]

This judgment and that of a Chamber of the Court in the following year,[31] are classified by Torres Bernárdez as 'the first textually oriented recognitions of the rules of interpretation laid down by the Vienna Convention'.[32] Among the criticisms he makes of the first judgment recognizing the rules is that in its harking back to the Court's earlier approaches to treaty interpretation, despite its explicit acknowledgement of the Vienna rules, the Court failed to do full justice to the rules themselves

[26] Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice', at 727–29.
[27] [1984] ICJ Reports 392.
[28] Torres Bernárdez, at 727–29.
[29] *Elettronica Sicula* [1989] ICJ Reports 15, at 70, para 118; and see Torres Bernárdez, at 729–80, who saw this recognition as more formal than real, the Court providing in some judgments of the period a 'textually qualified recognition' and perhaps reflecting a remaining division of opinion among the judges between a 'textualist' approach and 'subjective', 'functional', or 'teleological' approaches: Torres Bernárdez, at 734.
[30] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* Judgment, [1991] ICJ Reports 53, at 70, para 48.
[31] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Reports 351, at 582, para 373.
[32] Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice', at 730–35.

and the system of interpretation they embody.[33] Similarly, the majority judgment of the Chamber of the ICJ in the 1992 *El Salvador/Honduras* case was viewed in his Separate Opinion by Torres Bernárdez (who as judge ad hoc gave a detailed critique) as relying excessively on the first paragraph of article 31 rather than using the whole article as an integrated rule (a serious misunderstanding of how the rules apply, but one sometimes made by various courts and tribunals).[34]

Even where the Court did not make express reference to the Vienna rules, evidence of a more comprehensive use of their substance could be seen. In *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)*, the Court stated:

> The Court has to pronounce upon the interpretation to be given to the 1965 Agreement. The Preamble to the Agreement states... The 1965 Agreement has in any event to be read in its context, in the light of its object and purpose... It is also appropriate to take into account, for purposes of interpretation of the 1965 Agreement, the subsequent practice of the Parties....[35]

2.2 Express endorsement of the Vienna rules by the ICJ

The Court has in more recent times presented application of the rules as virtually axiomatic:

> The Court now addresses the question of the proper interpretation of the expression 'without delay' in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of 'without delay', as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention [on Consular Relations]. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[36]

That the Court views the Vienna rules as general, or customary international law, seems incontrovertible. Evidence additional to the Court's express statements to that effect can be found in the Court's application of these rules to treaties made long before entry into force of the Vienna Convention.[37] This is also shown by its

[33] Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice', at 732.

[34] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Reports 351, Separate Opinion of Torres Bernárdez, 629 at 719–23.

[35] [1993] ICJ Reports 51–52, paras 26–28.

[36] *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Reports 37–38, para 83. For criticism of *how* the ICJ has applied the rules, see J Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 *Nordic JIL* 405, at 421–26.

[37] See, for example, *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045, at 1060, para 20: 'The Court will now proceed to interpret the provisions of the 1890 Treaty by applying the rules of interpretation set forth in the 1969 Vienna Convention...'. Note that as a matter of treaty relations (as contrasted with general or customary international law), the Vienna Convention states: 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the

application of the rules in cases where one or more parties to the litigation are not parties to the Vienna Convention. An example of the latter is in the judgment in *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*:

> The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention: a treaty must be interpreted in good faith... Moreover, with respect to Article 31, paragraph 3, the Court has had occasion to state that this provision also reflects customary law... Indonesia does not dispute that these are the applicable rules.[38]

In other judgments of the same era, and subsequently, the Court gave the widest endorsement to the applicability of the Vienna rules to treaties generally as customary international law along the following lines:

> The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted... Article 32 provides....[39]

It is to be noted that in its general pronouncements on the applicability of the Vienna rules, the ICJ tends to refer to articles 31 and 32 without mentioning article 33 (on the role of versions of a treaty in different languages). It seems reasonable to understand this as a consequence of the rather particular circumstances in which the latter provisions come into play, as contrasted with the likelihood of the need to consider application of the two preceding articles in every case. Where a difference between languages has been part of the interpretative argument, the ICJ has stated that the Vienna Convention provision reflects customary international law.[40]

Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States' (article 4).

[38] [2002] ICJ Reports 23–24, para 37.

[39] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, at 174, para 94. On article 32 of the Vienna rules, the court also recalled it earlier affirmations in *Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objections* [1996-II] ICJ Reports 812, para 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)* [1999-II] ICJ Reports 1059, para 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment* [2002] ICJ Reports 645, para 37. See also the ICJ's endorsements of the Vienna rules in *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Reports 161, at 182, para 41; *Case Concerning Legality of Use of Force (Serbia and Montenegro v United Kingdom) (Preliminary Objections)* [2004] ICJ Reports 36–37, para 98 and other cases by the same applicant on *Legality of Use of Force (Serbia and Montenegro v Belgium, Canada, France, Germany, Italy, Netherlands, Portugal)*; *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Reports 37–38, para 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, at 110, para 160; *Maritime Dispute (Peru v Chile)*, Judgment of 27 January 2014, para 57; and for an example of citation a specific proposition such as their applicability to interpreting provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention listing earlier cases, see *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Reports 18, para 65.

[40] See, for example, *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045, at 1062, at para 25, referring to article 33(3), and *LaGrand (Germany v USA)* [2001] ICJ Reports 466, at 502, para 101, referring to article 33(4).

2.3 Endorsement of the Vienna rules by other international courts and tribunals

The view of the ICJ has been shared by several other international courts and tribunals. The European Court of Human Rights, for example, espoused use of the Vienna rules well before the ICJ gave its full endorsement.[41] The International Tribunal for the Law of the Sea has followed the rather more sedate approach taken by the ICJ, at first by borrowing the terminology and approach of the Vienna Convention's articles on interpretation, then explicitly holding that the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention on the Law of the Sea and the 1994 implementing Agreement.[42] Similarly, arbitral practice supports the ICJ's view that the rules constitute customary international law and that this is evidenced in the practice of states which are not parties to the Vienna Convention. Thus, for example, the United States of America (which is not a party to the Vienna Convention and which sought at the Vienna conference to modify the rules) has relied on the Vienna rules in arbitral and other international proceedings.[43] For example, in proceedings before the settlement dispute bodies of the World Trade Organization:

> The United States argued that, in accordance with customary rules of international law concerning treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties, the United States had looked to the plain meaning of the terms in their context and object and purpose. The plain meaning of 'more favourable treatment' did not mean that re-imports must be excluded from safeguard action. If that were the intent, the agreement would have so stated.[44]

In the World Trade Organization dispute settlement system, the Appellate Body has frequently indicated that the rules in articles 31 and 32 of the Vienna Convention have attained the status of customary or general international law.[45] The Appellate Body has, in different cases, invoked the various constituent elements of article 31, although in an early case it laid a slightly misleading initial trail by indicating that paragraph (1) of article 31 (rather than the whole of that article) of the Vienna Convention constituted the 'general rule' for interpretation of treaties, which has led to rather heavy emphasis on the textual aspect of treaty interpretation in some cases.[46]

[41] See, for example, the European Court of Human Rights in *Golder v United Kingdom* ECtHR No 4451/70 (judgment of 21 February 1975), para 32 and numerous cases thereafter.

[42] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) (2011) ITLOS Case No 17, para 58.

[43] See, for example, award of *Arbitral Tribunal for the Agreement on German External Debt, (Belgium, France, Switzerland, UK and USA v Federal Republic of Germany)* ('*Young Loan*' case, 1980) 59 ILR 495, at 529, para 16, and see Chapter 9, sections 4.5 and 4.9; for the US proposals at the Vienna conference, see Chapter 2, sections 9 and 10.

[44] *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear* (8 November 1996) WT/DS24/R, at para 5.185.

[45] See, for example, *Japan—Alcoholic Beverages* IIWT/DS8,10–11/AB/R (1996), Part D, 10–12 and *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005) WT/DS285/AB/R, passim.

[46] See Report on *US—Gasoline* (1996) WT/DS2/AB/R, 17.

Other arbitral bodies which have made use of the Vienna rules include those established under the auspices of the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration, and those set up under the North American Free Trade Agreement.[47]

2.4 Endorsement of the Vienna rules by national courts

Courts within national legal systems frequently interpret treaties or legislation giving effect to them:

> ...in the deliberations that led to the drafting of what eventually became Articles 31–3 of the Vienna Convention... there is little that suggests awareness that by far the greater part in the judicial interpretation of international agreements falls to municipal, not international, tribunals....[48]

There are different ways in which treaties come to be interpreted, depending very largely on the constitutional arrangements of each state. In those states where international law is fully integrated with the national legal order, treaties can become fully part of that order. Thus, states whose constitutions provide for treaties to have direct effect in the internal legal order once the state has become a party to a treaty and has published it, and which regard international law as fully part of domestic law, would encounter little difficulty in accepting the applicability of the Vienna rules either as treaty provisions (if the particular state is a party to the Vienna Convention) or, now that it is generally recognized that the rules are rules of customary international law, simply as applicable law.[49]

The position is less clear in countries following the common law tradition, which tend to view treaties as having application in the internal legal order only if there has been a specific legislative act. However, once there has been legislation, this immediately presents an uncertainty whether it is the treaty itself which is to be interpreted or the legislation giving effect to it. In the case of the Vienna rules, these issues are overlaid with the further consideration of whether domestic law mandates their use, irrespective of whether the state is a party to the Vienna Convention, because the rules state customary international law. In several states which follow the common law tradition reference to the Vienna rules in the course of interpreting treaties has become much more frequent. This use sometimes appears to be based on the idea of the rules being in some sense grafted onto the established approaches to treaty interpretation. In other cases, the rules are applied more systematically.[50]

Courts in the United Kingdom have followed a trail of progressive acceptance of the applicability of the Vienna rules to issues over treaty interpretation. The first sign of this was mention of the rules by four of the five judges in the House of

[47] See Chapters 2 and 5–9 below.
[48] C H Schreuer, 'The Interpretation of Treaties by Domestic Courts' (1971) 45 BYBIL 255.
[49] See further Chapter 4, section 4.2.1 below.
[50] See further section 5.4, Chapter 4, section 4, and examples in Chapters 5–9, below.

Lords in *Fothergill v Monarch Airlines*.[51] However, only Lord Diplock referred to the rules at any length and it was the possible use of preparatory work which mainly excited the judges. This left a rather incomplete impression of the Vienna rules. Though later cases have referred to the rules much more extensively, sometimes looking at particular elements in some detail, the strong influence of precedent has meant that *Fothergill v Monarch* has acted as something of a counterweight to their systematic use.[52]

The position in the USA, which is not a party to the Vienna Convention, is rather different from that in the UK and other countries having a common law tradition. The US Supreme Court has referred to the Vienna Convention but not to the rules on treaty interpretation, preferring to rely on its own precedents on interpretation.[53] In contrast, the US Courts of Appeals have made explicit reference to the Vienna rules. However, the position of the USA internationally is different from that adopted by its Supreme Court. In international proceedings the USA has argued that the Vienna rules do govern treaty interpretation.[54]

Courts in several other states have referred to the Vienna rules.[55] While their use may have been somewhat spasmodic and infrequent hitherto, there does not appear to have been any notorious incident of outright rejection of their applicability.

3. Definitions and Key Concepts

Preliminary explanations are given here of the main terms and concepts which are used frequently in the book. Some of these raise issues of controversy which are considered in more detail later. These definitions and key concepts are not a guide to all the relevant law of treaties, let alone international law generally. However, because of the potential importance when interpreting a treaty of identifying and using its preparatory work (and associated material such as interpretative declarations, reservations, etc), a brief account of how treaties are made is included in Chapter 3.

3.1 Treaty

Article 2 of the Vienna Convention, defining terms for the purposes of the Convention, states:

> 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation…[56]

[51] [1981] AC 251 and see further Chapter 4, section 4.2.2 below.
[52] See Chapter 4, section 4.2.2 below.
[53] See E Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation' (2003–2004) 44 Va J Int'l L 431, and Chapter 4, section 4.2.3 below.
[54] See section 2.3 above and Chapter 4, section 4.2.3 below.
[55] See Chapter 4, section 4.2 below.
[56] See further Aust, *Modern Treaty Law and Practice*, Chapter 2 and Gardiner, *International Law*, at 58–65.

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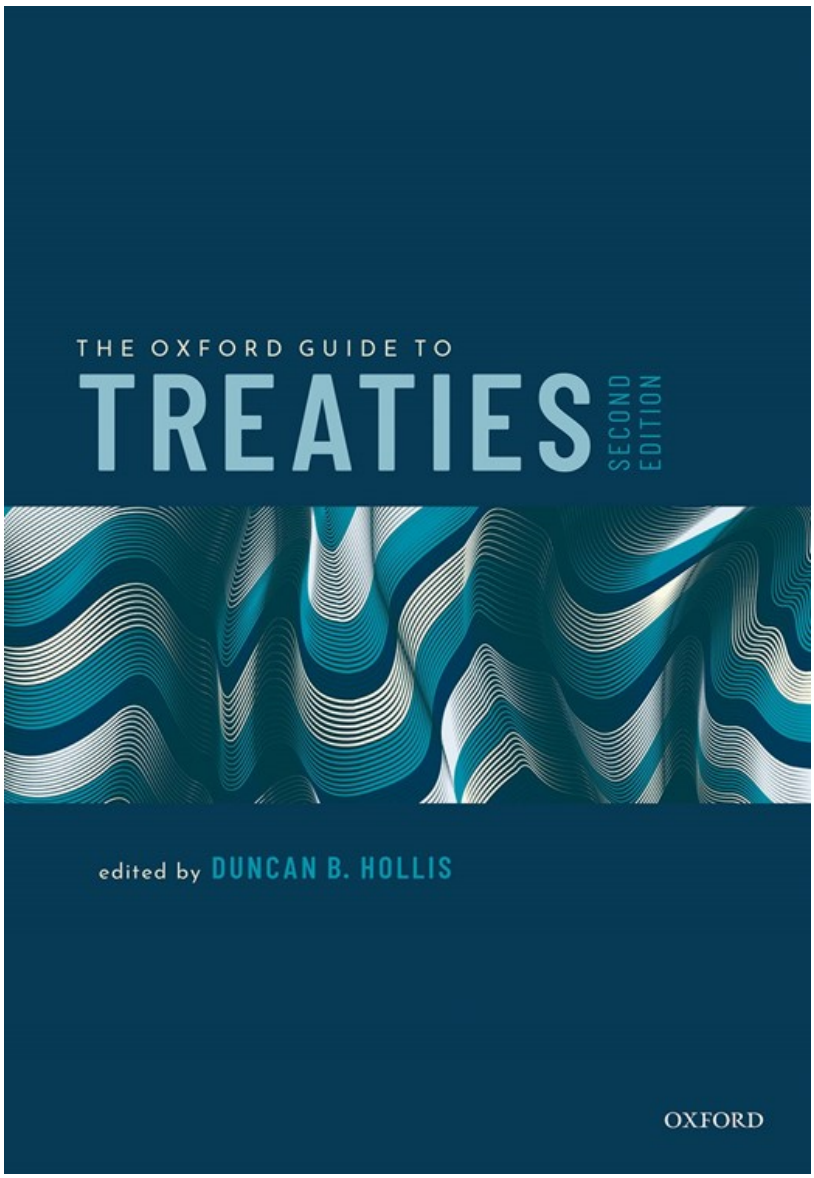

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CHAPTER

19 The Vienna Convention Rules on Treaty Interpretation

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Abstract

This chapter offers a nuanced account of one of the Vienna Convention on the Law of Treaties's seminal contributions to international law — a single set of interpretative 'principles' if not actual rules. It addresses two questions. The first is in what sense are the Vienna rules on treaty interpretation 'rules'? The second is how are the rules to be used in interpreting treaties? The answer to the first question provides much of the answer to the second one. But the second is worth additional attention, mainly because the rules' application in practice reveals interpretations that do not stand out from simply reading them.

Keywords: Good faith, Vienna Convention on the Law of Treaties, Treaties, application, Rules of treaty interpretation

Subject: International Economic Law, Arbitration, Law of Treaties, Public International Law, Sources, Foundations and Principles of International Law, Settlement of Disputes, Use of Force, War, Peace and Neutrality, Private International Law and Conflict of Laws

Collection: Oxford Scholarly Authorities on International Law

‘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 and 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.

Article 33

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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.

Introduction

The idea that there are rules applicable to interpretation of all treaties is one that in past times would have been controversial, or at best uncertain as regards the content of any such rules. Now, however, the rules in the Vienna Convention on the Law of Treaties (VCLT) are accepted as customary international law and not open to challenge.[2] Nevertheless, as a set of principles ancillary to the instruments whose interpretation they assist, and as provisions which are themselves set out in a treaty, these rules require interpretation. Their very brevity leaves considerable scope for this.

The present chapter addresses two questions. The first is in what sense are the Vienna rules on treaty interpretation 'rules'? The second is how are the rules to be used in interpreting treaties? The answer to the first question provides much of the answer to the second one. But the second is worth additional attention, mainly because the rules' application in practice reveals interpretations that do not stand out from simply reading them.

At the outset, it is important to note that too much should not be claimed for the Vienna rules. In any particular instance, the difficult part of the art of treaty interpretation involves going beyond the rules themselves, that is the evaluation and judgement required in applying the rules to a particular treaty to produce an actual interpretation. The International Law Commission (ILC), which drew up the draft articles, stated in its Commentary on them: '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
p. 461 treaties'.[3] This endorsed the analysis by the ILC's Special ↳ Rapporteur, Sir Humphrey Waldock, whose proposals avoided all the principles and maxims of interpretation then in common use. Taking as examples ones frequently referred to in their Latin forms ('*ut res magis valeat quam pereat, contra proferentem, eiusdem generis, expressio unius est exclusio alterius, generalia specialibus non derogant*'), he characterized these as 'for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning', principles whose use was thus discretionary rather than obligatory.[4] It is clear that the ILC's approach was not to exclude such principles and maxims, but to concentrate on the minimum necessary to stand as rules.

A more specific indication of the role of the rules describes their structure as having become 'the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation, and this despite the intention of the authors of the Convention that it should not establish anything like a hierarchy of rules'.[5] The image of scaffolding nicely captures the supporting and enabling role of the Vienna rules. The extent to which these rules also sustain the resulting interpretation takes the interpreter beyond this metaphor, reflecting the growing and helpful tendency of courts and tribunals to expose their use of particular elements of the rules while constructing an interpretation.

Preliminary Considerations

A prerequisite to assessing the VCLT provisions as rules for treaty interpretation is identifying what they aim to achieve. Even if one accepts that they only provide 'scaffolding for the reasoning on questions of treaty interpretation', the ultimate target provides part of the standard for their evaluation. In this respect, Waldock suggested that:

> The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty ... In most instances interpretation involves *giving* a meaning to a text.[6]

This seems unnecessarily cautious. The interpreter is always 'giving' a meaning to the text even where the meaning is perfectly obvious. The same reason gives ground to question the observation of McNair: 'Strictly
p. 462 speaking, when the meaning of the treaty is clear, it is ↳ "applied", not "interpreted".'[7] In order to apply a provision of a treaty, it must first be given meaning. Defining interpretation as 'giving meaning' inevitably imports an active role for the interpreter. Noting Waldock's apt observation that the process of interpretation is not to be viewed as a mere mechanical one, the role of the person giving a meaning to the terms of a treaty introduces elements of subjectivity and creativity. Thus, judgement is a necessary component of the process. Rules can assist judgement but cannot replace it.

A widely perceived generalization about the international legal system is that in executing legal rules, judgments are less confined to courts than in national legal systems. The truth of this need not be investigated here because treaty interpretation is not solely the province of international courts and tribunals, nor even of courts more generally. States, their governments, legislative bodies, international organizations, and many others also have to give meaning to treaty provisions.[8] National courts increasingly do tackle interpretation of treaties.[9] But so do international organizations, their constitutions being typically in the form of treaties, while their ancillary courts, tribunals, or legal secretariats may have an interpretative role as well.[10] The extent to which the Vienna rules have found a home in the practice of these bodies and within national administrations and legal systems is variable and difficult to assess. However, the trend is towards their use and no evidence exists of their being rejected.[11]

I. The Vienna Rules—Historic Controversy

A full account of the historical development of the rules of treaty interpretation is beyond the scope of this
p. 463 chapter.[12] It is, however, useful to be aware of one of the main ↳ criticisms originally levelled against the Vienna rules. Professor McDougal, a member of the American delegation at the Vienna Conference where the text of the VCLT was finalized, saw the rules as highly restrictive, with an 'insistent emphasis upon an impossible, conformity-imposing textuality'.[13] McDougal also considered that what he saw as the rigour of the ILC's insistence upon the 'primacy of the text' authorized only 'a minimum recourse to preparatory work'.[14]

That such a restrictive character is *not* the case has been amply demonstrated in practice (as discussed later); but it was equally clearly never the ILC's intention that the rules should be constricting in the way McDougal saw them in his speech to the Vienna Conference. Of his views expressed there, it has been noted: 'McDougal's speech probably caused more confusion about treaty interpretation than any intervention on the subject before or since. He so badly mischaracterized the ILC draft—and did so with such flair both at the conference itself and thereafter (publishing his prepared text in this Journal [AJIL] later that year)—that his description has taken on a totemic power that it does not deserve'.[15]

That the treaty text was taken by the ILC as the starting point for interpretation, and that wholly extraneous evidence of intention was excluded, is neither open to challenge nor surprising. Using the text as the starting point for interpretation is hardly 'conformity-imposing textuality' and 'the general rule' (which is the *whole* of Article 31) goes well beyond treaty text. At the very least, the inclusion of subsequent practice in the treaty's application and reference to rules of international law applicable in relations between the parties shows that textuality does not reign supreme. Nor was reference to preparatory work relegated to a minimal role or exceptional situations. Article 32 VCLT categorizes preparatory work as among the supplementary means of interpretation but—rather contrary to appearances from the text—was neither intended to preclude routine consideration of preparatory work nor has it done so. The ILC's view, as reported by Waldock, was that:

> This formulation [the precursor to Article 32] seemed to the Commission about as near as it is possible to get to reconciling the principle of the primacy of the text … with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear. Moreover, the rule … is inherently flexible, since the question whether the text can be said to be 'clear' is in some degree subjective.[16]

p. 464 Somewhat paradoxically, only by adopting an excessively literal approach to interpretation of the Vienna rules—an approach at variance with the text, its preparatory work, and its application in practice—could they be seen, in McDougal's words, as 'highly restrictive principles'.[17] Indeed, acknowledging that these are 'principles' is itself rather at odds with the notion of these rules being 'conformity-imposing' and 'highly restrictive'.

McDougal's criticisms may, however, appear to have some force in relation to the exact formulation of Article 32 on preparatory work (and other supplementary materials). Quite apart from their general classification as 'supplementary', the differing roles envisaged for preparatory work according to the outcome of applying the general rule seems itself at odds with the ILC's intention as expressed in Waldock's quoted statement. In practice, Article 32 has been applied without too close a regard for its precise terms, being taken more as indicative of a need for caution in using preparatory work and a reflection of its often rather haphazard character.

II. Are the Rules on Treaty Interpretation 'Rules'?

A. The general rule: Article 31

The section of the VCLT covering treaty interpretation opens with Article 31 entitled *General rule of interpretation*. Common usage describes this article, along with the next two, as the 'rules of interpretation'. A starting point for assessing the nature of these provisions as 'rules' is their content and formulation.

The title of Article 31 indicates that the whole of the article is the general rule. The use of the singular 'rule' was deliberate. The ILC's Commentary articulated a 'crucible' approach to interpretation:

> The Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. 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. Thus, Article 27 [now 31] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of

> interpretation is a unity and that the provisions of the article form a single, closely integrated rule.[18]

The first paragraph of Article 31 is couched in 'mandatory' language: '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' (emphasis added). However, while this looks like a rule in the sense of a requirement or regulation, there are a number of reasons to suggest that its meaning is not so firm and inflexible.

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First, it has to be accepted that there is commonly no single 'ordinary' meaning of a word and thus there is the need for a direct link to the context and the treaty's object and purpose. That linkage immediately qualifies any impression that the ordinary meaning is simply a literal approach. Context and object and purpose are not additional or optional elements. They are pointers to the appropriate ordinary meaning and thus must also be put in the crucible.

Second, Article 31's opening paragraph is part of a set of provisions forming the single general rule. Paragraph (3) indicates additional factors to be 'taken into account'. These factors include (a) subsequent agreement between the parties on the meaning, (b) subsequent practice showing the meaning, and (c) applicable rules of international law. The interpreter takes these factors (where present) into account in determining whether they trump any impression given by applying the first paragraph of the general rule. This demonstrates emphatically the error of treating just the first paragraph as the general rule or viewing the later stated elements of the general rule as subsidiary.

Third, paragraph (4) of Article 31 requires a special meaning to be given to a treaty term if it is established that the parties so intended. Hence, the parties to a treaty can deliberately displace the ordinary meaning or themselves guard against an overly literal interpretation.[19]

Fourth, it is apparent from Waldock's statement that, though formulated as rules, these provisions have a more liberal character:

> The Commission was fully conscious … of the undesirability—if not impossibility—of confining the process of interpretation within rigid rules, and the provisions of [the draft articles] … do not appear to constitute a code of rules incompatible with the required degree of flexibility … any 'principles' found by the Commission to be 'rules' should, so far as seems advisable, be formulated as such. In a sense all 'rules' of interpretation have the character of 'guidelines' since their application in a particular case depends so much on the appreciation of the context and the circumstances of the point to be interpreted.[20]

Fifth, the ILC's 'crucible' approach described above envisages a fluid interaction of Article 31's elements producing the legally relevant interpretation. The crucial interaction is not to be formulaic in the sense of a purely mechanical process.

1. Context contrasted with circumstances of conclusion

If the effect of these observations indicates that the Vienna rules are as much guidelines as rules, particularly given the great variation in treaties and issues to which they apply, the last part of the ILC's words (quoted at the fourth point above) does reflect a distinction made in the rules between context and circumstances of conclusion. The *context* to which Article 31(1) refers is defined in Article 31(2) to include the whole treaty text, including its preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the treaty's conclusion, and any instrument made by one or more parties
p. 466 in ↳ connection with the treaty's conclusion and accepted by the other parties as an instrument related to the treaty.

This definition gives 'context' a specific content for purposes of treaty interpretation. McDougal saw it as too prescriptive and narrow. He sought application of a principle of 'contextuality', taking into account anything that could be construed as relevant to the twin tasks of (i) realizing the shared expectation of the parties as to the outcome of the 'continuing process of communication and collaboration between the parties' (which he saw as the true concept of a treaty) and (ii) reflecting the shared values of the community.[21]

It is not, however, because the VCLT is excessively literalist in approach, or that its rules are excessively prescriptive in nature, that context is defined more narrowly than McDougal's posited principle of contextuality. Instead, the Vienna rules distinguish between (a) context as an indispensable adjunct to finding the ordinary meaning of the terms used and (b) 'the circumstances of conclusion' of a treaty which, in the Vienna scheme, are part of the supplementary means of interpretation in Article 32. True, this may place a premium on the texts that provide the element of context in the general rule as against the more general surrounding circumstances. True also that Article 31's interpretative elements are couched in mandatory terms, while the supplementary means in Article 32 are interpretative tools to which 'recourse may be had'. But this difference is more of an attempt to give guidance on priorities or emphasis than an indication that the general rule has the character of a straightjacket. The rather gentle application made in practice of differentiating between the general rule and supplementary means serves to confirm this understanding.

Article 31(2) functions to bring into consideration other material generated in connection with the treaty's conclusion. As with several other elements of the Vienna rules, this is more a description of *what* is to be considered rather than *how* the material should be used to fashion the interpretation. Even so, it still does not provide a rigid rule for demarcation of what is admissible as interpretative material.

2. Agreements and practice: Article 31(2)–(3)

Paragraphs (2)(a) and (2)(b) of Article 31 have a common feature: both refer to acts 'in connection with the conclusion of the treaty'. Beyond that, they are somewhat different. Paragraph (2)(a) defines context by looking to an instrument evidencing the agreement of all parties and hence of direct interpretative significance. An example of such an instrument is a diplomatic conference's 'Final Act', which typically provides a brief account of the proceedings leading up to the treaty's adoption and may include interpretative indications agreed by the negotiators. Paragraph (2)(b) envisages as context an instrument made by one or more parties accepted by the others as related to the treaty, but not necessarily agreed to by those others. For example, an interpretative declaration accompanying a State's instrument of ratification is made in connection with a treaty's conclusion and accepted by other parties as related to it, but may not receive those parties' agreement as to whether it is the correct interpretation.

As regards the former category (paragraph 2(a)), the principle of taking into account what amounts to an
p. 467 agreement by the parties relating to the treaty seems clear in a general ↳ sense. However, differences in

practice as to (i) what constitutes a firm agreement and (ii) the absence of precision as to when a treaty is 'concluded', combine to make the provision less of a clear rule than it may seem. It is easy enough to identify a Protocol of Signature or a specific protocol on interpretation as coming within Article 31(2)(a). An instrument described as a 'Memorandum of Understanding', whether accompanying a treaty or standing alone, may be more difficult to classify.[22] That title provides no conclusive indication as to the legal character of its content. Sometimes this term is used for an instrument containing commitments of the same character as a treaty, while at other times it is used to describe an instrument recording mere understandings or setting out the terms of a 'political commitment' which are not viewed as legally binding under international law.

The VCLT's text does not, however, specifically require interpretative agreements to be in a particular form. From the immediate context it seems probable that Article 31(2)(a) requires evidence of the fact of agreement on meaning rather than a formal legally binding agreement itself. Article 31(3)(b) requires account to be taken of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. That clearly attributes interpretative significance to the fact of agreement where there is no formal instrument. Given that approach, there is no particular reason to suppose that Article 32(2)(a) requires an agreement in treaty form. Hence, if a memorandum accompanying a treaty provides sufficiently clear evidence of agreement between the parties as to the treaty's meaning, there is little reason to exclude it.[23]

Article 31(2)(b) separately brings into interpretative play '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'. The reference to an 'instrument' does not raise the same potential uncertainty whether the 'agreement' of the parties has to be formal in the sense of a treaty. Nor does the requirement of showing that the parties other than the maker of that instrument accepted it as related to the treaty suggest that they necessarily agree to the instrument's content. The VCLT does not specify what such content may be, but, as in the case of the Article's previous paragraph, Article 31(2)(b) requires that the instrument be connected with the treaty's conclusion. It seems probable that in the context of unilateral instruments, or instruments not reflective of agreement of *all* parties, typically the content will involve interpretative declarations. Such declarations are commonly made on signature, ratification, accession, etc, along with reservations.[24]

Moreover, the moment of a treaty's 'conclusion' may be difficult to pinpoint because there is no single procedure for the various stages that follow completion of treaty negotiations and its entry into force. Signature indicates that the process of drawing up the treaty is 'concluded', but it cannot be assumed to be the only key stage when so many treaties are subject to ratification. Even within the VCLT itself, different provisions give different meanings to the term 'conclusion'.[25]

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Within the immediate context of the general rule on interpretation, an interpretative agreement connected with a treaty's conclusion (treated as context by Article 31(2)(a)) can be contrasted with 'any subsequent agreement' (to be taken into account pursuant to Article 31(3)(a)). The possibility of 'subsequent' agreement suggests that there must have been an earlier fixed point of agreement appropriate for collective action. The most likely moment for an interpretative agreement among all parties in connection with the treaty's conclusion is at signature because this could affect the basis on which States start the process of committing themselves to the treaty. However, this does not inevitably fix 'conclusion' as the moment of opening for signature. If no States signed, or if very few ratified the treaty, there might follow an agreement among all negotiating States to interpret some offending provision in a particular way, which would overcome the obstacle States had found to participation. Such an agreement seems as likely to be seen as connected with conclusion of the treaty as one made on signature.

Although the instruments to which Article 31(2)(b) refers are in the same immediate context as those in Article 31(2)(a) given their location in the general rule, their situation is somewhat different. There is no contrasting provision in Article 31(3). Nor is there the same sense of collective action involving all parties. The occasion of a deposit of an instrument of ratification may be just the moment for making a unilateral interpretative declaration. Hence 'conclusion' in Article 31(2)(b) may be more appropriately understood as including the process of successive lodging of instruments of ratification, accession, etc—or what might be viewed as a rolling process of conclusion.

Leaving aside this difficulty over the meaning of 'conclusion', a positive theme unites Articles 31(2)(a), 31(3)(a), and 31(3)(b)—the notion that agreement on interpretation among the treaty parties is the very best indicator of its proper interpretation. They are the entities with the power to amend, terminate, or replace the treaty. Beyond the imposition of a few peremptory rules, international law allows States free reign in treaty-making. Hence the parties can interpret a treaty authoritatively. Those who seek to give the first paragraph of Article 31 a stronger role than agreements of the parties or practice evidencing the parties' agreement on the meaning of a treaty provision perhaps underestimate the difference between a national system of law and international law, the latter reflecting to a major extent the sovereign character of the principal entities that it regulates.

More specifically, in its commentary on the draft articles, the ILC assimilated the effect of subsequent interpretative agreements with those made at a treaty's conclusion, albeit without treating as context such subsequent agreements by virtue of their later adoption:

> But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty it is to be regarded as forming part of the treaty ... Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.[26]

The ILC also indicated that the elements in paragraph (3) of Article 31 were no less part of the general rule
p. 469 than paragraph (2)'s provisions: 'But these three elements[27] are all of an ↳ obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.'[28]

3. Rules of international law: Article 31(3)(c)

Somewhat in contrast to the provisions on subsequent agreement and subsequent practice, Article 31(3)(c) is rather unrevealing of its intentions. It requires account be taken of 'any relevant rules of international law applicable in the relations between the parties'. Such laconic wording rather masks the provision's purpose. It appears to offer a rule requiring attention to other rules. It seems trite to say that an interpretation should take account of applicable law, though in the context of international relations, two particular issues are immediately apparent. The first is whether the law to be taken into account is that as it was at the time the treaty was made or whether evolution in the law affects its interpretation. The second issue is the extent to which other treaty relations between the parties may have an interpretative role.

First, although it is not clear from the text of Article 31(3)(c), its origins lie in the so-called 'intertemporal' rule. The ILC's initial draft on this topic considered the first limb of the intertemporal rule as requiring that 'a treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up'.[29] However, a second part of the rule required that, subject to the first limb of the rule, 'the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied'.[30]

The ILC scrapped this formulation in view of the difficulty of reconciling the principle that terms of a treaty should be interpreted in the light of international law as at the time of the treaty's conclusion with taking appropriate account of developments in the law up to the time when a difference in interpretation is being resolved. It expected intertemporal issues to be resolved by appropriate interpretation of the particular treaty in issue: 'correct application of the temporal element would normally be indicated by interpretation of the term *in good faith*'.[31] Hence, part of the intertemporal rule was ultimately included by reference to good faith in the first part of the general rule. But the main principle, expressed by Waldock was that: 'The question whether the terms used were intended to have a fixed content or to change in meaning with the evolution of the law could be decided only by interpreting the intention of the parties'.[32] Thus, this outcome leaves scope to the interpreter to decide what the treaty envisages in taking account of developments in international law.

p. 470 Second, Article 31(3)(c)'s reference to 'rules of international law applicable in the relations between the parties' is somewhat opaque as to whether it includes treaty relations. Once again, reference to the ILC's work is required to clarify the provision. An earlier draft had referred to 'rules of general international law'. The VCLT elsewhere refers to a 'peremptory norm of general international law'. In the latter context, the phrase 'general international law' was used in part to avoid confusion with general multilateral treaties.[33] There is no authoritative definition of 'general international law', so it is not possible to say if in other contexts treaties would be excluded from its scope. In Article 31(3)(c), however, the word 'general' was deleted, and a proposal to include the word 'customary' in its place was rejected, suggesting that the distinction required in relation to peremptory norms was not intended here.[34] Further, ILC debate, though sparse, clearly supported the view that treaties are potentially within the scope of Article 31(3)(c). One member of the ILC welcomed the text as amended to delete 'general':

> [the] new text should be maintained, because it set out the important principle that a treaty constituted a new legal element which was additional to the other legal relationships between the parties and should be interpreted within the framework of other rules of international law in force between them. But it should not be qualified by the insertion of the word 'general', which would exclude specific or regional rules of international law binding on the parties. That was a particularly important matter where one treaty had to be interpreted in the light of other treaties binding on the parties.[35]

Similarly, another member saw the revised wording as including 'rules of written law', a phrase that must point primarily to treaties:

> The omission of the word 'general' before the words 'international law' was justified, because a treaty concluded between several States should be interpreted in the light of the special international rules applying to those States, whether they were customary rules or rules of written law. It must be emphasized, however, that to be taken into consideration in interpreting the treaty, those rules, although not 'general', must be 'common' to the parties to the treaty.[36]

This history and analysis of Article 31(3)(c)'s text only takes one part of the way to understanding its purport. As discussed further below, the provision's role is only gradually being revealed through emerging practice.

B. Supplementary means: Article 32

The contrast between 'means' in the heading of Article 32 and 'rule' in Article 31 suggests a clear difference
p. 471 in interpretative roles. Article 31 ostensibly lays down a prescriptive rule ↳ using the mandatory 'shall' in each of its paragraphs. Article 32 offers an option: 'recourse *may* be had to supplementary means'. Yet, such a literal approach does not properly reflect the apparent differentiation and real relationship between the two articles. In effect, the meaning of 'supplementary' is built into the two functions or uses of supplementary means identified in Article 32. The first function is to 'confirm' a meaning resulting from application of the general rule in Article 31. The second is to 'determine' the meaning when the interpretation according to Article 31 leaves the meaning ambiguous, obscure, or leads to manifestly absurd or unreasonable results. Both formulations clarify the sense in which supplementary means are 'supplementary'.

From this, it becomes clear that Article 32 does not simply allow use of preparatory work in some circumstances and forbid it in others. Rather the ILC's preparatory work and the ICJ's practice in interpreting the VCLT establish a different principle.[37] The principle is that the greater the reliance to be placed on supplementary means, the more closely defined are the circumstances in which they may be used. Use to 'confirm' a meaning is unrestricted, while use to 'determine' the meaning is subject to the prerequisites stated in the article.

This is why McDougal's criticisms of the apparent relegation of preparatory work to a limited role have so little substance. McDougal proposed that supplementary means should have the same engagement in the interpretative process as all the elements in the general rule. As evidence of the important role of supplementary means (even extending beyond preparatory work), he pointed to the need of the Vienna Conference delegates to consult Waldock to understand fully the drafts they were discussing:

> In parenthesis, it could be added that the mere presence at this Conference of Sir Humphrey Waldock, in the role of former Special Rapporteur, is the best testimony, not always mute, of the impossibility in application of the textuality approach. Time after time during the course of our deliberations, even with the preparatory work of the Commission before us, we have found it necessary to appeal to Sir Humphrey for enlightenment about the 'ordinary' meanings of the simple Convention before us. The tremendous clarity he has brought to our deliberations and the enormous influence he has had with us have been due, I submit, not to his skill in flipping pages of a dictionary or as a logician, but rather his very special knowledge of all the circumstances attending the framing of our draft Convention.[38]

This entertaining caricature of the general rule's defects and of Waldock's role as proxy for—or extension of—preparatory work is actually rather destructive of the points McDougal was advancing. The Vienna Conference was concerned with establishing the final version of treaty provisions, rather than interpreting existing terms. Hence, Waldock's role was not merely as an interpreter of text. He was the conduit for communicating to the Vienna Conference the ILC's thinking behind the proposed text and for clarifying the drafts.

p. 472 The differentiation between using supplementary means to confirm a meaning and their more restricted role when providing the decisive element in establishing meaning actually provides a clearer indication of the relationship between the general rule and supplementary means than McDougal's amalgamation into one set of provisions having the same status. The provisions that were adopted show how the process may adapt to individual circumstances. The adopted text also better reflects a sensible approach to interpretation that proceeds from reviewing relevant elements and moving on, by way of a reasoned assessment, to a conclusion. Hence, Waldock reported on the ILC's approach: 'There had certainly been no intention of discouraging automatic recourse to preparatory work for the general understanding of a treaty.'[39] This, it

can be seen, is quite different from deploying preparatory work only to confirm or determine meaning in the process of interpretation.

In further response to McDougal's criticisms, reference to use of 'preparatory work' (in context, recorded preparatory work) and surrounding circumstances (in Article 32, 'the circumstances of conclusion') does reflect the direction in which an interpreter's attention is strongly drawn. The question is how far to go down that route? It seems all too obvious that treaty interpreters cannot generally have the live testimony of all those who had a hand in drawing up a treaty. So, the preparatory work must be reasonably limited to permanent records (the *travaux préparatoires*). The ILC sensibly declined to attempt a universal definition of such preparatory work. The ways in which treaties are negotiated and the modes of recording their development are too multifarious. But the ILC followed Waldock's recommended approach:

> Recourse to *travaux préparatoires* as a subsidiary means of interpreting the text, as already indicated, is frequent both in State practice and in cases before international tribunals. Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation. They are not, except in the case mentioned [agreements, instruments, and other documents ultimately covered elsewhere in the Vienna rules], an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.[40]

Noting first that Waldock was not an 'individual party' but, having been Special Rapporteur, was the guide, motivator, and mouthpiece of the ILC on this topic, the theme in this extract is integration of the use of preparatory work with the rest of the process of treaty interpretation, albeit with proper caution and appropriate evaluation. The cardinal principle for admissibility and use of preparatory work is that its cogency depends on how far it provides evidence of a 'common understanding of the parties as to the meaning' when weighed against other evidence. Thus, there is no clear-cut *rule* on preparatory work, but rather a principle requiring interpreters to use judgement.

p. 473 The VCLT's preparatory work reveals acceptance by the Vienna Conference of the ILC's draft rules virtually unchanged (except for an expansion of the provision on treaties in multiple languages). Such acceptance adds justification for importing the ILC's records into the body of preparatory work to be evaluated as evidence of the Vienna rules' meaning.[41] However, acceptance by the Conference of texts proposed by the ILC is only one factor in favour of using records as material for interpreting the rules; others include the strength of agreement within the ILC and at the Conference on any particular point and the growing subsequent practice of referring to the ILC's work on the Vienna rules.

Both McDougal and Waldock recognized that preparatory work is very readily considered by treaty interpreters. Where they differed was in the role and content of the principles reflected in Article 32. McDougal saw preparatory work as part of the whole body of interpretative evidence, making the supplementary and circumscribed role ascribed to preparatory work unacceptable to him. Waldock evidently considered the text of Article 32 to be a fair reflection of the Commission's aim of 'reconciling the principle of the primacy of the text … with frequent and quite normal recourse to *travaux préparatoires*'.[42] In any event, Waldock's view has prevailed in the interpretation given to that text in practice.

There are good reasons for distinguishing use of supplementary means, including preparatory work, to 'confirm' the meaning established by application of the general rule from using them to 'determine' the meaning where application of the general rule leaves the meaning ambiguous or obscure, or produces a result which is manifestly absurd or unreasonable. Clearly, this second use gives supplementary means,

such as preparatory work, a potentially crucial role in interpretation. It is therefore hardly surprising, or unreasonable, that where the preparatory work is to be the determining factor, its admission to that role is defined in more precise terms. Preparatory work is itself notoriously difficult to use in finding proof of the parties' common understanding. Thus, only when the general rule fails, or produces a manifestly questionable result, should primacy be given to preparatory work.

The circumstances in which preparatory work is determinative are rare. However, the opportunity to deploy it to support an interpretation resulting from application of the general rule is more common and is not subject to the qualifying conditions. Nevertheless, some difficulty centres on the term 'confirm'. In ordinary use—and perhaps misuse—one might be asked to 'confirm' one's name despite not having given it yet; one may confirm an order or reservation only made provisionally or which will lapse if not confirmed; one may confirm a booking that is already firm but for which one has forgotten the details or which one senses may not have registered adequately with the recipient, and so on.

As application of the general rule requires evaluating elements of differing weight and reliability, 'confirming' a meaning may assume a range of roles according to the circumstances. At the lightest end of the scale, it may mean little more than looking at the preparatory work to see whether any help lies there. At the other extreme, the preparatory work may weigh heavily in the balance by confirming a meaning offered by the general rule, while stopping short of being the one determining factor. Once again, a distinction made by Waldock at an early stage of deliberations on the role of preparatory work is helpful:

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> There is, however, a difference between examining and basing a finding upon *travaux préparatoires,* and the [International] Court itself has more than once referred to them as confirming an interpretation otherwise arrived at from a study of the text. Moreover, it is the constant practice of States and tribunals to examine any relevant *travaux préparatoires* for such light as they may throw upon the treaty. It would therefore be unrealistic to suggest, even by implication, that there is any actual bar upon mere reference to *travaux préparatoires* whenever the meaning of the terms is clear.[43]

This support for attributing to preparatory work a role throwing, where possible, light on the treaty's terms was accompanied by an indication of a loose approach to preparatory work being part of the 'supplementary' means of interpretation. Just as the 'crucible' approach does not see the elements of the general rule as hierarchical or sequential (other than as a logical sequence of thoughts which may be reiterated in a different order), so too the distinction between the general rule and supplementary means was not slotted into any particular sequence. Waldock noted that it was 'unrealistic to imagine that the preparatory work was not really consulted by States, organizations and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention'.[44]

In practice, the Vienna rules have received extensive attention and been referred to in many judgments, awards, and decisions—perhaps to a greater extent than the ILC expected. Those instances of interpretations that most closely track the rules tend to set out the interpretative evidence or materials, including relevant preparatory work, and follow this presentation with a reasoned analysis leading to a conclusion. To the suggestion that revealing the content of preparatory work before setting out a reasoned interpretation does not do justice to the distinction between the general rule and supplementary means, and may prejudice application of the general rule, the response is that the operative reasoning can (and should) relegate the supplementary materials to their proper role, even if the preparatory work has been disclosed at an earlier stage. Research suggests that 'international law experts might be better able than non-experts to discount irrelevant information in the process of treaty interpretation'.[45] The key is understanding the differences between the permissible roles of supplementary means of interpretation and using each of these means properly.

Thus, the essence of Article 32 is its clear distinction between the rather loose idea of confirming meaning and the much more clearly circumscribed possibility of relying on preparatory work to determine a treaty's meaning. What is agreed and binding is the treaty, not the preparatory work. The Vienna rules accept the interpretative role of well-defined ancillary material in the general rule and, with due caution, a limited role for the less well-defined preparatory work that can be elevated to a higher role only in controlled situations (ambiguity or obscurity, or manifest absurdity or unreasonableness).

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C. Languages: Article 33

The division of the rules of interpretation into a general rule and supplementary means of interpretation engendered the most substantial debate at the Vienna Conference; but it did not result in any change from the ILC's scheme. Where there was a change was in how different languages could assist or affect treaty interpretation. To the ILC's draft of what became Article 33, the Vienna Conference added a rule of last resort: where a difference of meaning remained after applying all the other Vienna rules, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted' (Article 33(4)).

Though couched in terms of a rule, the idea of 'reconciling' divergent language texts by 'having regard' to the treaty's object and purpose is not a formula of scientific precision. The starting point is stated in Article 33(1), namely that parallel language texts are equally authoritative unless it is specifically stated or agreed that a particular text is to prevail. This is accompanied by the presumption in Article 33(3) that terms have the same meaning in each authentic text. The remaining provision, Article 33(2), identifies which translations made after a treaty has been authenticated are to be treated as authentic.

Like many other elements of the Vienna rules, the article on languages is as much about identifying what is admissible material for use in interpretation as how to use that material in the interpretative process. The provision tries to identify relevant concepts and select appropriate terminology. Since the starting point of any interpretation must be a text, identification of the correct text is a prerequisite. However, the Vienna rules recognize that the aim is to interpret the *agreement* of the parties expressed in a text. The ILC therefore attached importance to the idea of there being only a *single* agreement, even if expressed in different languages. Where more than one language is used, describing the expressions of agreement in differing languages as 'texts' could indicate plurality rather than unity. Describing the expressions of agreement in different languages as 'versions' could imply an even greater departure from the concept of the unity of a treaty. Article 33 adopts a pragmatic, if inconsistent, approach. It keeps to the principle of unity by stating that the singular 'text' is equally authoritative in each language unless, where so indicated, 'a particular text' is to prevail. In reality, this acknowledges the customary usage of referring to authentic texts in different languages as 'texts' in the plural. The term 'version' is reserved for describing later translations accepted as authentic.

The article also distinguishes between the descriptions 'authentic' and 'authoritative'. It follows the concept of 'authentication' in Article 10 VCLT, namely the process for establishing a text as definitive at the end of negotiations.[46] Associating the term 'authentic' with the finalized terms in different languages leaves the word 'authoritative' to describe the subsequent status and effect of a text authenticated in different languages.

This approach in itself provides a lesson in treaty interpretation, particularly for the importance attached by the ILC to the link between ordinary meaning and context at the outset of the general rule. The ordinary meaning of 'authentic' in Article 33 is informed by the context, that is by considering use of the term in the
p. 476 Convention's provisions on ↳ treaty-making. Elsewhere than in the context of the Convention, 'authentic' may have a different ordinary meaning, as in its use by the ILC in the expression 'authentic interpretation'

(meaning one made by the parties).[47] Thus, the ordinary meaning of 'authentic' is not established by a 'conformity-imposing textuality' (in McDougal's terms), but by selecting an ordinary meaning of the term *in its context*.

More generally, the ILC recognized that discrepancies between languages are bound to occur:

> Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts.[48]

The result is that the provisions on languages do no more than raise some presumptions, leaving considerable discretion to the interpreter.

III. The Vienna Rules in Practice

The analysis of the Vienna rules thus far has essentially looked at the words of the provisions and the preparatory work recording their development to see how far the provisions have the character of prescriptive rules. It is suggested that though the general rule is couched in mandatory language and identifies in clear terms what must be taken into account, the envisaged interpretative exercise is actually quite flexible. It is dependent on which elements may be present in any given case, and even more so in that any determination made by an interpreter in a particular case depends on the application of judgement in evaluating the relationship between the various elements and their respective values in giving meaning to the treaty's terms by that process.

Just as the Vienna rules give the parties' interpretative agreement (whether express or through practice) a value potentially equal to any treaty term's ordinary meaning in its context and in the light of the treaty's object and purpose, so too do they make it appropriate to consider practice in applying a treaty. There is now very extensive practice in courts and tribunals, both international and national, showing explicit use of the Vienna rules.[49] However, neither this body of case law, nor the much less readily located practice of States in interpreting treaties when applying them, has yet established conclusively the agreement of all the VCLT parties (or of all States when the rules are viewed as customary international law) on many of the issues
p. 477 raised above. Nevertheless, examples from practice are offered ↳ here to confirm that the Vienna rules are more in the nature of principles and indications of admissible material. They reveal a quite loose structure for developing interpretations, rather than a straightjacket or formulaic set of requirements.

A. General application of the Vienna rules

There is, however, one preliminary point of practice that does constitute a firm rule: the Vienna rules are now the rules of customary international law applicable to all treaties, even though the VCLT itself is not retroactive. Thus, even though the law of treaties as stated in the VCLT has a more limited scope of application when applied to its parties than do the rules of customary international law, the Convention's provisions on treaty interpretation now reflect the latter and have general application. This is subject to one caveat since the Vienna rules allow parties to attribute special meanings to terms if they deliberately so choose; and it may well follow that they could choose to apply their own specific rules of interpretation as a means of achieving their own special meaning.[50]

How can one be sure that the Vienna rules have the wide applicability just discussed? There is a great body of evidence attesting to this, including endorsement by the ICJ.[51] That this evidence leads to the conclusion

that the rules do form part of customary international law was summed up in an arbitration in which the President of the ICJ was the presiding arbitrator, where the Award stated:

> 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 1969 [VCLT] in 1980. The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the 1969 [VCLT], 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 1969 [VCLT] ... *There is no case after the adoption of the* [1969 VCLT] *in which the International Court of Justice or any other leading tribunal has failed so to act*.[52]

That the Vienna rules have been 'acknowledged' by the ICJ, other international courts and tribunals, and national courts as the governing rules does not, however, provide a full indication, still less an assessment,
p. 478 of their actual use by such bodies. In many cases, their actual ↳ use has only been introduced gradually and remains limited in scope. Indeed, in practice, the rules are not always fully deployed.[53]

There are, moreover, two reasons why categorical assertions about the extent of use of the Vienna rules are difficult. First, there is no obligation on interpreters to provide a running commentary on how they are applying the rules of interpretation as they develop their argument in a particular instance. Hence, absence of reference to particular elements of the Vienna rules does not necessarily mean that they are not being applied. Second, all the elements of the rules may not be applicable in any particular case. For example, there may be no subsequent agreement on interpretation, no established interpretation through practice, no circumstances warranting determination of meaning by supplementary means, and so on.

Nevertheless, reported instances show a repeated focus on Article 31(1) alone, which does raise the strong suspicion that that paragraph is sometimes viewed by itself as the general rule of interpretation.[54] This suspicion is largely confirmed where a restricted view of Article 31 is stated expressly. Thus, despite longstanding authoritative assertions of the Vienna rules' applicability in UK courts, it has nevertheless been stated that:

> article 31 of the 1969 VCLT on the Law of Treaties (1980) (Cmnd 7964) provides that a treaty shall be interpreted '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'. This is the starting point of treaty interpretation to which other rules are supplementary: see articles 31(2), 31(3), 31(4) and 32. The primacy of the treaty language, read in context and purposively, is therefore of critical importance.[55]

This is correct in viewing Article 31(1) VCLT as a 'starting point' for interpretation; but the statement that the further paragraphs of Article 31 are 'supplementary' is quite at odds with the indication in that Article's heading that the *whole* of Article 31 is the general rule. The ILC emphatically confirmed and integrated this indication in its 'crucible' approach.[56] Further, Article 32's heading and its preparatory work make it clear that it is those provisions that are the 'supplementary' means of interpretation, not the successive elements of the general rule in Article 31.

The real danger of excessive emphasis on Article 31's first paragraph is that it relegates the further elements of that Article, such as subsequent agreement between the parties on interpretation and subsequent practice amounting to such agreement, to a subordinate role. Yet, such agreements are an 'authentic' interpretation and, where present, could be determinative. The ICJ has observed that 'the subsequent practice of the
p. 479 parties, within the meaning of Article 31(3)(b) of the VCLT, can result in a departure from the original ↳

intent on the basis of a tacit agreement between the parties'.[57] Thus, such an interpretative agreement achieved through practice can trump a meaning that might be derived from application of Article 31(1) alone.

B. Ordinary meaning in context

In examining the manner of the Vienna rules' application, one finds numerous cases where dictionaries have been used as the starting point for interpreting a treaty. But these neither show that the rules are based on McDougal's feared 'conformity-imposing textuality', nor do they even typically suggest a single ordinary meaning. Dictionaries tend to produce a range of probable ordinary meanings. The interpretative exercise therefore rapidly moves on to consider further elements of the general rule. In *Kasikili/Sedudu Island (Botswana v Namibia)*,[58] the ICJ stated that it was interpreting words in a treaty of 1890 between Great Britain and Germany to give them their ordinary meaning, and that it was determining the meaning of 'main channel' of the river forming a disputed frontier by 'reference to the most commonly used criteria in international law'. Judge Higgins, concurring but making her own declaration, found this 'somewhat fanciful'. She considered that no 'ordinary meaning' of the term 'main channel' existed either in international law or in hydrology:

> The analysis on which the Court has embarked is in reality far from an interpretation of words by reference to their 'ordinary meaning'. The Court is really doing something rather different. It is applying a somewhat general term, decided upon by the Parties in 1890, to a geographic and hydrographic situation much better understood today ...
>
> The Court is indeed, for this particular task, entitled to look at all the criteria the Parties have suggested as relevant. This is not to discover a mythical 'ordinary meaning' within the Treaty, but rather because the general terminology chosen long ago falls to be decided today ...
>
> At the same time, we must never lose sight of the fact that we are seeking to give flesh to the intention of the Parties, expression [*seemingly*: 'expressed'] in generalized terms in 1890. We must trace a thread back to this point of departure. We should not, as the Court appears at times to be doing, decide what *in abstracto* the term 'the main channel' might today mean, by a mechanistic appreciation of relevant indicia.[59]

This comment follows more closely the ILC's scheme that sought, not simply to avoid a 'mechanistic appreciation' of interpretative elements, but more positively to see that context and a treaty's object and purpose informed the ordinary meaning of treaty terms (at least as a precursor to use of further elements of the rules). Although context is given a broader definition than just immediate context, this does not of course exclude the use of immediate context. The WTO Appellate Body's decision in *Canada—Measures Affecting the Export of ↳ Civilian Aircraft* used both elements of context.[60] The case concerned the definition
p. 480
of 'subsidy' in the Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'). Canada argued that 'subsidy' could mean an amount measured by the cost to the government as much as the benefit to the recipient.

The Appellate Body looked to the immediate context in Article 1 SCM's definition of 'benefit', then investigated other relevant elements of that Agreement and the structure of the provision. Finding that a 'benefit does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient', logic implied the existence of a recipient as did the use of the term 'conferred'. The context supported this reading in that a related provision in the same treaty referred to the 'benefit *to the recipient* conferred *pursuant to paragraph 1 of Article 1* [the provision under interpretation]'. The Appellate Body found the structure of the whole provision to have two discrete elements, viz: 'a financial contribution by a

government or any public body' and that 'a benefit is thereby conferred', such structure suggesting that a contribution from the government flowed to a beneficiary.[61] Hence, the term referred to what the beneficiary received, not the cost to the government. It can be seen from this reasoning (if not abundantly obvious already) that reference to context cannot be usefully made in a purely mechanistic fashion and pursuing 'conformity-imposing textuality'.

Even less rule-orientated is the requirement to make an interpretation 'in the light of' the treaty's object and purpose. While this reference to a treaty's object and purpose has the role of assisting in giving meaning to the terms used (as is described later), the phrase is not simply a teleological imperative subordinating the terms of the treaty to its purpose. Rather, it is an enabling provision allowing the selection of meaning to take this factor into account.[62] It is not therefore a rule in the sense of a prescriptive formula, even though it is an indication of a factor to be considered.

Finding a treaty's object and purpose is a somewhat open-ended operation. The ILC and the ICJ have linked it with the good faith requirement in the opening words of the general rule to produce a 'principle of effectiveness'. This principle has two aspects: (i) it incorporates the Latin maxim preferring a meaning that ascribes some effect to a term rather than no effect (*ut res magis valeat quam pereat*); and (ii) it imports a teleological element into the interpretation. The ILC noted:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[63]

The ICJ applied both aspects of the principle of effectiveness in *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*.[64] Application of the narrower aspect (the Latin maxim) led it to ↳ interpret a provision referring to frontiers 'that result from the international instruments' defined in the Annex to the treaty, as meaning *all* the frontiers resulting from those instruments. The Court also applied a more general principle of effectiveness to conclude that the aim of the treaty was to resolve all the issues over these frontiers.[65]

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C. Interpretation agreed by the parties

There is relatively little cause for invitations to courts and tribunals to interpret treaties where the parties have themselves reached a clear interpretative agreement. It seems reasonably safe to say that many differences over interpretation will be resolved by the parties' agreement recorded in some form or other. Disputes are most likely to arise where there is uncertainty if there is actually agreement, where agreements are not kept, or where they produce results that one party dislikes and seeks to repudiate. However, the principle seems clear: The parties are the best interpreters of their own agreement.

Adoption of an interpretative agreement may be specifically envisaged in the treaty.[66] Such a situation is really covered by the Vienna provision requiring the context to be taken into account, meaning the full text of the treaty under interpretation. The Vienna provisions on interpretative agreements have an even greater reach than that, including as they do agreements shown by concordant practice. The latter is probably most readily evidenced by practice following an agreement or understanding.[67]

However, the ultimate test of the notion that the parties are the best interpreters of their agreement is whether they can establish by interpretation something others might view as an amendment. If *all* parties agree on the meaning of a treaty, it matters little how this could be viewed by others.[68] The process of international agreement seems loosely structured in this regard. There may be practical difficulties if there is a party who objects to a failure to follow an amending procedure, or particularly if one or more parties has constitutional requirements to follow. However, the parties are collectively masters of their own treaty relations subject to the few peremptory rules of international law. That it is difficult to find good examples

of this raising issues may be explained by the probability that if there is an amending procedure, the parties are likely to follow it if there is a need for a serious change. However, the ICJ appears to have endorsed the possibility of a changed meaning being established by practice of the parties, suggesting this must, *a fortiori*, be possible by express ↳ agreement. The ICJ viewed interpretation by subsequent practice as itself a tacit agreement, noting in *Costa Rica v Nicaragua*:

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> It is true that 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 ...
>
> This does not however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.
>
> On the one hand, the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the 1969 VCLT, can result in a departure from the original intent on the basis of a tacit agreement between the parties ...[69]

Issues arising over interpretations agreed by the parties have been the subject of detailed examination by the ILC in its work on 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' which has resulted in a set of conclusions and accompanying commentaries.[70] The conclusions provide only cautious assistance for application of the relevant Vienna rules, but the commentaries contain a compendious resource of analysis and materials on this topic.

D. Relevant rules of international law

This provision in Article 31(3)(c)—requiring account to be taken of any relevant rules of international law applicable in the parties' relations—has attracted growing attention recently. The development of international law and the proliferation of treaties have added complexity to the range of legally relevant material to be taken into account. In this context, the ILC endorsed a study of 'fragmentation' of international law, such fragmentation arising principally through the parallel development of new specialist sets of rules such as those of international environmental law and international economic law. The potential of Article 31(3)(c) for assisting in reconciling divergent regimes was a feature of this study as set out in 'the Koskenniemi Report', which also provides useful accounts of relevant practice.[71]

The ILC's work on Article 31(3)(c) offers guidance on the specific issue of using related treaties in interpretative practice:

> *Application of other treaty rules*. Article 31(3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are ↳ of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.[72]

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A more general difficulty over using relevant international law rules in treaty interpretation is shown by the ICJ's approach in the *Oil Platforms* case.[73] The majority judgment invoked the Vienna provision (Article 31(3)(c)) to use the general international law of self-defence as the starting point for interpreting whether the United States could justify its destruction of Iranian oil platforms by reference to a provision in a bilateral US–Iranian treaty. The majority found that the United States could not establish self-defence, but held that it had nevertheless not violated any treaty provisions, particularly the provision on freedom of commerce.

Oil Platforms' significance lies in its application of Article 31(3)(c). One of the judges who concurred in the outcome nevertheless considered that the majority had not used the Vienna rules correctly: 'It has rather invoked the concept of treaty interpretation to displace the applicable law.'[74] Similarly, another concurring judge opined that:

> the approach taken by the Court is putting the cart before the horse. The Court rightly starts by saying that it is its competence to interpret and apply [the bilateral treaty provision], but it does so by directly applying the criteria of self-defence under Charter law and customary law and continues to do so until it reaches its conclusion ...
>
> The proper approach in my view would have been to scrutinize the meaning of the words [in the bilateral treaty provision] ...[75]

What is important to stress about these criticisms is their indication that the majority took an illogical approach by investigating whether a defence under general international law was absent, without deciding first whether there was any breach of the treaty in issue to which a defence needed to be raised. The criticism was thus not that the majority had failed to take a sufficiently literal or textual approach when invoking Article 31(3)(c). Rather, it was that the majority had strayed outside the realm of treaty interpretation using too loose an allusion to the reference to international law in the Vienna rules.

E. Supplementary means

It is harder to find fault with the prevailing loose application of Article 32's provisions, principally as it affects use of preparatory work. As noted above, the provision's use of preparatory work 'to confirm' a meaning built up by application of the general rule does offer a very ↳ broad scope for its application. The approach taken in practice by courts and tribunals to use of preparatory work may perhaps be best exemplified by a judgment of the European Court of Human Rights where the typical form is to state the history of the applicable provision of the European Convention as part of an account of the relevant law before applying the law to the particular facts and assertions.

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Thus, in *Witold Litwa v Poland*, the Court considered whether the word 'alcoholics' in a provision of the Convention permitting 'the lawful detention ... of persons of unsound mind, alcoholics or drug addicts or vagrants' applied solely to those having an addiction to alcohol or could justify detention of someone behaving drunkenly.[76] After stating the facts and relevant domestic law, the Court set out the preparatory work, showing that there was an early concern to protect a State's right to take necessary measures to fight vagrancy and alcoholism. As the draft text developed, the right of States to take measures combating 'drunkenness' was translated as *l'alcoolisme* in the French text. That thought was recast consistent with other provisions so that it related to a person rather than a condition. By this route 'drunkenness' became transformed into 'alcoholics'.

Explicitly applying the Vienna rules, the Court accepted that an ordinary meaning of 'alcoholics' was persons who are addicted to alcohol. However, the immediate context of the treaty provision in question included categories of individuals (i) linked by possible deprivation of liberty to be given medical treatment, (ii) because of considerations dictated by social policy, or (iii) on both these grounds.[77] This suggested that the provisions allowed deprivation of liberty not only because such persons were a danger to public safety, but also because their own interests might require their detention.

The Court found that the treaty's object and purpose was not to detain persons in a clinical state of alcoholism, but to give authority for taking into custody those whose conduct and behaviour under the influence of alcohol posed a threat to public order or themselves. Such risk of public disorder or harm to the intoxicated person arose whether or not they were addicted to alcohol.[78] In reaching this interpretation, the

Court ostensibly relied on context as well as the treaty's object and purpose to displace an apparently unequivocal ordinary meaning. It then 'confirmed' this view by reference to the provision's preparatory work, noting that the commentary on the preliminary draft acknowledged the right of States to take measures to combat vagrancy and drunkenness.

Although this application of the Vienna rules seems fully in keeping with their proper use, it is difficult not to conclude that consideration of the preparatory work before formal application of the general rule convinced the Court of the correct interpretation. Further, it seems inevitable that courts and tribunals commonly consider preparatory work before formulating their judgment or award. Only in the loosest sense is this process 'confirming' a meaning established by the general rule, even if (as in the earlier example) care is taken to construct the interpretation giving respect to the structure of the Vienna rules.

Where preparatory work is being used to 'confirm' a meaning, its role is, in effect, cumulative with the application of the general rule. In practice, however, there may be a sliding scale to the effect that the clearer the result from application of the general rule, the less precision is demanded from the preparatory
p. 485 work. Where, for example, a change in terminology ↳ in the developing negotiations is not very clearly explained in preparatory work, its significance and reliability may be balanced against the clarity of the text.[79] Likewise, the implications of rejection of a proposed provision or uncontroverted assertions recorded in preparatory work as to an expected meaning can only be assessed in light of the particular circumstances and evaluation of the result of the general rule's application.[80] All too often, preparatory work is confusing and unrevealing. This has led some courts to reject its use unless it very directly and conclusively addresses the point in issue.[81]

However, in the main, from the attention courts and tribunals do give preparatory work, along with consideration of the circumstances of conclusion, it is clear that the separation of these elements into a class of supplementary means of interpretation has neither resulted in undue insistence on the 'primacy of the text' nor been taken as authorizing only the 'minimum recourse to preparatory work' foreseen by McDougal. On the contrary, the classification of preparatory work in a separate and supplementary category of rules appears to have produced little by way of diminution of their interpretative effect.

F. Languages

If anything, the part of the Vienna rules that tends to be viewed as a separate category is the content of Article 33 on interpreting treaties in multiple languages. This may be because the matter only arises in certain cases where there appears to be a potential difference between the languages which could help the interpreter. The language factor is very much individual to each treaty. There is also the considerable difficulty of working with many languages where not only the nuances of the words, but the process of thought and the legal environment behind the words may be quite alien to the interpreter.

It is, therefore, difficult to reveal any trend through the cases as distinct from showing that particular ones tackle particular points. One case from the ICJ shows how even a comparison of two languages from five authentic ones can produce a confusing picture. In the *LaGrand* case, the ICJ indicated by way of provisional measures that the United States should not execute a German national pending the Court's final decision on consular access issues.[82] LaGrand was nevertheless executed before that decision. The Court then had to determine if its indication of provisional measures imposed on the United States an international legal obligation to comply.

In deciding that its indications of provisional measures did establish legal obligations, the Court only referred in its reasoning to the French and English texts of its Statute (although Germany had included the relevant words in all five authentic languages in its memorial). The Court began by applying Article 31(1)
p. 486 VCLT. It noted considerable differences ↳ of emphasis, the French terms being of more potential

mandatory effect than the English. In the latter language, the use in the Court's statute of 'indicate' instead of 'order', of 'ought' instead of 'must' or 'shall', and of 'suggested' instead of 'ordered' implied that decisions of this kind lacked mandatory effect.

The Court concluded that it was 'faced with two texts which are not in total harmony' and proceeded to apply Article 33(4) VCLT, attempting to reconcile the texts by reference to the Statute's object and purpose.[83] The Court considered that the Statute's object and purpose was to enable the Court to fulfil its functions, principally the basic function of judicial settlement of international disputes by binding decisions. Hence, the Court was not to be hampered in the exercise of this function by the respective rights of the parties to a dispute not being preserved. Thus, the Court concluded that indications of provisional measures had to be binding.[84]

Such a brief summary does scant justice to the Court's reasoning and on the language issue it was confronted with only some of the issues that may arise. Others include: how to deploy the presumption of the same meaning in all authentic texts;[85] whether the 'original' language of a treaty has particular significance (that is where one language was used for negotiating and drafting, the others being translations);[86] how to treat texts where translations are of legal concepts in different languages;[87] reconciliation where one or more texts are clear but another is ambiguous;[88] the significance of different punctuation in different languages;[89] and use of preparatory work in reconciling differences between languages.[90]

IV. Beyond the VCLT

The Vienna rules only state the general principles of treaty interpretation. There is no indication in these rules what further means are to be used, although the listed supplementary means are not exclusive. As the Vienna rules are mainly concerned with *what* is to be taken into consideration, with only limited indications of *how* evaluation of these elements is to be accomplished, there is scope to look beyond the rules. Thus, use of traditional maxims of construction of legal instruments is not ruled out. As noted earlier, however, these are really means of analysing the context when applying the first part of the general rule.[91]

Particular approaches are not mandated by the rules such as that of 'restrictive interpretation'. The latter had been taken as applying a presumption that deference to State sovereignty requires a minimalist interpretation of the rights granted by a State in a treaty. However, the ICJ has stated that this is not part of the general rule.[92] In contrast, some general and specific interpretative approaches have developed within individual courts or institutions. For example, the European Court of Human Rights has provided a focus for development of the evolutive approach and, as one of its own doctrines, adopted a 'margin of appreciation' in favour of States' discretion.[93] However, neither of these is at variance with the Vienna rules. If the context in which the provisions of a treaty are located and a full application of the principles of treaty interpretation lead to the conclusion that a particular approach or doctrine is the right one to use, that is quite consistent with the Vienna rules.[94]

Conclusion

The convenient shorthand of describing Articles 31–33 VCLT as setting out the 'rules' of interpretation reflects the title given to the first of those provisions, but only in part their content. To the extent that they are a mandatory code, they are rules. However, their content and their proper interpretation show a nature which is more akin to principles than rules. They have not proved to be highly restrictive nor has their application suggested that they import an insistent emphasis on conformity-inducing textuality. Their flexible interpretation and application in practice attest to a character better described by the metaphor imagining them as 'scaffolding'.[95]

Recommended Reading

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C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279
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G Nolte (ed), *Treaties and Subsequent Practice* (OUP, Oxford 2013)
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R Sapienza, 'Les Déclarations Interprétatives Unilatérales et l'Interprétation des Traités' (1999) 103 *RGDIP* 601
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Notes

1 Rules for treaty interpretation from the 1969 Vienna Convention on the Law of Treaties (VCLT). References in this chapter to 'the Vienna rules' are to the articles reproduced here.

2 See RK Gardiner, *Treaty Interpretation* (2nd edn OUP, Oxford, 2015 and paperback edn 2017) ch 1, s 2. The present chapter covers much that is considered in greater detail in *Treaty Interpretation*, without citing it at every point.

3 [1966] YBILC, vol II, 218–19 [4]–[5]. This chapter is confined to the rules on treaties between States; a discussion of the rules of treaty interpretation involving international organizations is found in Chapter 22 (Specialized Rules of Treaty Interpretation: International Organizations).

4 H Waldock, 'Third Report on the Law of Treaties' [1964] YBILC, vol II, 54 [5]–[6]; cf J Klingler, Y Parkhomenko, C Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Kluwer, Alphen aan den Rijn 2019) and AA Yusuf and D Peat, '*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice' (2017) 3 Can J Comp & Contemp L 1. Sir Humphrey Waldock (the fourth Special Rapporteur on the law of treaties) was the principal architect of the Vienna rules and is referred to here in that capacity as 'Waldock'.

5 H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement 2006: Part Three' (2006) 77 BYBIL 1, 19.

6 [1964] YBILC, vol II, 53 [1] (citing Part III of the 'Harvard draft codification of international law' in (1935) 29 AJIL Supp 653, 946 (original emphasis)).

7 AD McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 365 n1. For more on the distinction between interpretation and application, see Gardiner (n 2) 26–30; but cf M Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' EJIL Talk! (14 July 2009) <https://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/>. On the ILC and this distinction, see Section II.A.3, 469 *et seq*.

8 See Gardiner (n 2) Ch 4; A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179; WM Reisman, 'Necessary and Proper: Executive Competence to Interpret Treaties' (1990) 15 YJIL 316.

9 On the role of national courts see Chapter 15 (Domestic Application of Treaties); Gardiner (n 2) Ch 4, s 4; HP Aust and G Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP, Oxford 2016); CH Schreuer, 'The Interpretation of Treaties by Domestic Courts' (1971) 45 BYBIL 255.

10 See Chapter 22, Section II, 536–40 *et seq*.

11 But for suggestions that a differential approach should be considered, see N Jain, 'Interpretive Divergence' (2017) 57 VJIL 45; see also M Waibel, 'Uniformity Versus Specialization (2): A Uniform Regime of Treaty Interpretation?' in C Tams and others (eds), *Research Handbook on the Law of Treaties* (Edward Elgar, Cheltenham 2014) 375.

12 For such an account see Gardiner (n 2) Ch 2; O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, Oxford 2011), vol I, Pt III, s 3; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009); O Dörr and K Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn Springer, Berlin 2018). For an elaboration of more detailed rules on treaty interpretation, see U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, Dordrecht 2007). For examples of detailed studies of specialized areas, see T Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing, Oxford 2016); TH Yen, *The Interpretation of Investment Treaties* (Brill/Nijhoff, Leiden 2014); L Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP, Cambridge 2014); JR Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP, Oxford 2012); I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, Oxford 2009); G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford 2007); F Engelen, *Interpretation of Tax Treaties under International Law* (IBFD Publications, Amsterdam 2004); N Shelton, *Interpretation and Application of Tax Treaties* (LexisNexis, London 2004).

13 MS McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*' (1967) 61 AJIL 992.

14 Ibid 995.

15 JD Mortenson, 'The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 AJIL 780, 810 (footnote omitted); U Linderfalk, 'AJIL Symposium: Is the Vienna Convention Hostile to Drafting History? A Response to Julian Davis Mortenson' (2 February 2014) <http://ssrn.com/abstract=2389251>.

16 Waldock, 'Sixth Report on the Law of Treaties' [1966] YBILC, vol II, 99 [20].

17 McDougal (n 13) 999.

18 [1966] YBILC, vol II, 219 [8] (emphasis in original).

19 For an example of a special meaning, see the terms 'refugee' and '*refouler*' in the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, and its 1967 Protocol (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, considered in *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, 31 [18], per Lord Bingham and cf *Sale v Haitian Centers Council* 509 US 155 (1993) 179 *et seq*.

20 Waldock, 'Sixth Report' (n 16) 94 [1].

21 MS McDougal, HD Lasswell, and JC Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, New Haven, reprint with additions 1994) xxix–xxxix, 197–9.

22 See Chapter 3, 59 *et seq*; A Aust, *Modern Treaty Law and Practice* (3rd edn CUP, Cambridge 2013) Ch 3; Gardiner (n 2) Ch 3. For an example of a protocol on interpretation, see the Protocol on the Interpretation of Article 69 of the European Patent Convention, Munich, 1973 [1974] 13 ILM 348.

23 See eg *US–UK Arbitration concerning Heathrow Airport User Charges* (30 November 1992) 102 ILR 215.

24 The ILC has included provisions on interpretative declarations in its work on reservations: see ILC, 'Guide to Practice on Reservations to Treaties' [2011] YBILC, vol II(3), 23 *et seq*.

25 See Pt II, s 1 VCLT, headed 'Conclusion of Treaties'; Arts 4, 40 VCLT; see further Gardiner (n 2) Ch 6, s 2.1.

26 [1966] YBILC, vol II, 221 [14].

27 The comment refers also to relevant rules of international law, which are the subject of Art 31(3)(c) VCLT.

28 [1966] YBILC, vol II, 220 [9]. For an extensive review of the role of subsequent agreements and practice in treaty interpretation, see the International Law Commission's 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (with commentaries) ILC Report of 70th Session, Official Records of the General Assembly, Seventy-third Session, Supp No 10 (A/73/10), ch IV, s E ('ILC Report on Subsequent Agreements and

Subsequent Practice'); G Nolte (ed), *Treaties and Subsequent Practice* (OUP, Oxford 2013); R Moloo, 'When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation' (2013) 31 Berkeley JIL 39.

29 [1964] YBILC, vol II, 8–9 (including Waldock's commentary). This reflected the classic formulation of the intertemporal rule in the words used by Judge Huber in *Island of Palmas (Netherlands v USA)* Arbitration (1928) 2 RIAA 829, 845: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled'.

30 [1964] YBILC, vol II, 8–9; Judge Huber, *Island of Palmas* (n 29) ('The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law').

31 [1966] YBILC, vol II, 222 [16] (emphasis added).

32 [1966] YBILC, vol I(2), 199 [9].

33 See eg debate in [1963] YBILC, vol I(1), 70 [40].

34 [1966] YBILC, vol I(2), 191 [74].

35 Ibid 190 [70] (Jiménez de Arechaga).

36 Ibid 197 [52] (Yasseen).

37 See eg *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045, 1076 [49]; M Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 Camb J Int'l & Comp L 136, 151–2.

38 'Statement of Professor McDougal, US Delegation, to Committee of the Whole, Vienna Conference, 19 April 1968', as reproduced in (1968) 62 AJIL 1021, 1025. This differs a little in tone but not in substance from the summary records of the Statement itself. UN Conference on the Law of Treaties, Summary Records of First Session (26 March–24 May 1968) UN Doc A/Conf.39/11, 167–8 [45] ('Vienna Conference, First Session').

39 Vienna Conference, First Session (n 38) 184 [69].

40 Waldock, Third Report (n 4) 58 [21] (emphasis in original, footnotes omitted).

41 Gardiner (n 2) 114–16.

42 See n 16 and accompanying text.

43 Waldock, Third Report (n 4) 58 [20] (footnotes omitted).

44 [1964] YBILC, vol I, 314 [65]; the phrase 'verify or confirm' had been used in an early draft of Art 32, but 'verify' was dropped as being included in 'confirm', thus suggesting a broad meaning for the latter term.

45 Y Shereshevsky and T Noah, 'Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts' (2017) 28 EJIL 1287; see also JL Dunoff and MA Pollack, 'Experimenting with International Law' (2017) 28 EJIL 1317.

46 For a more detailed discussion of the process of authentication, see Chapter 9, 219–21 *et seq*.

47 See eg the ILC's Commentary on its draft articles noting that an interpretative agreement reached after the treaty's conclusion 'represents an *authentic* interpretation by the parties which must be read into the treaty for purposes of its interpretation', [1966] YBILC, vol II, 221 [14] (emphasis added), cited by the ICJ in *Kasikili/Sedudu Island* (n 37) 1075 [49] and in the NAFTA arbitration *Methanex v USA* (Merits), Award of 3 August 2005, [2005] 44 ILM 1345, 1354 [19].

48 [1966] YBILC, vol II, 225 [6]. For many examples of difficulties and confusions in multilingual treaties see D Shelton, 'Reconcilable Differences? The Interpretation of Multilingual Treaties' (1997) 20 Hastings Intl and Comp L Rev 611.

49 See Gardiner (n 2) Part II.

50 Cf The American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 19; L Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 EJIL 585.

51 On identification of a rule in a treaty as reflecting a rule of customary international law, and the role of the ICJ and other courts and tribunals in establishing this, see draft conclusions 11 and 13 of the ILC Report on Subsequent Agreements and Subsequent Practice (n 28).

52 *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v Netherlands)* (2005) XXVII RIAA 35, 62 [45] (emphasis added). For cases of the ICJ, other international courts and tribunals, and judgments of domestic courts acknowledging the Vienna rules' applicability, see Gardiner (n 2) Ch 1, s 2.

53 See 'Opinion, Professor WM Reisman, 22 March 2010, on the International Legal Interpretation of the Waiver Provision in CAFTA Chapter 10' in connection with *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12 (CAFTA), [19] <https://www.italaw.com/sites/default/files/case-documents/ita0596.pdf>.

54 See the examples, particularly the assessment of the practice of the Inter-American Court of Human Rights, in Villiger (n 12) 436–7; Gardiner (n 2) 13–20, 136–41 (on the Court of Justice of the European Union).

55 *In Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 508, and see further Gardiner (n 2) 144–50. On the approach adopted in certain other States, see Villiger (n 12) 438.

56 See n 18 and accompanying text.

57 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, [64]; but see further n 69.
58 *Kasikili/Sedudu Island* (n 37).
59 Ibid 1113–14 [1]–[4] (Declaration of Judge Higgins).
60 WTO, *Canada—Measures Affecting the Export of Civilian Aircraft—Decision AB-1999–2* (2 August 1999) WT/DS70/AB/R.
61 Ibid 39–40 [155]–[157].
62 See the account in Gardiner (n 2) Ch 2, s 4 of the Harvard draft articles on the law of treaties where the approach to interpretation made pervasive reference to the treaty's purpose as a guide to interpretation. For an example of this element in practice see *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) Judgment* [2014] ICJ Rep 226, 251–2 [56]–[58].
63 'Commentary on draft articles' [1966] YBILC, vol II, 219 [6].
64 *Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Merits)* [1994] ICJ Rep 6.
65 Ibid 25–6 [51]–[52].
66 This can, however, raise difficulties where the parties adopt an interpretation of a provision while it is the subject of an arbitration. See eg North American Free Trade Association Agreement (Canada–Mexico–US) (signed 8, 11, 14, and 17 December 1992, entered into force 1 January 1994) [1993] 32 ILM 296 and [1993] 32 ILM 605 (Art 1131 provides that an interpretation by the NAFTA Commission is to be binding on NAFTA tribunals); *Arbitration under Chapter Eleven of NAFTA, Pope & Talbot v Canada (Award in respect of Damages)* [2002] 41 ILM 1347.
67 See, for example, Decision XV/3 of the Fifteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, where the parties indicated their desire 'to decide … on a practice in the application of Article 4, paragraph 9 of the Protocol by establishing by consensus a single interpretation of the term "State not party to this Protocol", to be applied by Parties' (11 November 2003) UNEP/OzL.Pro.15/9, 44–5.
68 Compare the indication by the ILC that subsequent agreements and subsequent practice that establish agreement of the parties on interpretation of a treaty do not necessarily have conclusive or overriding effect. ILC Report on Subsequent Agreements and Subsequent Practice (n 28) Commentary to Conclusion 3 [3]. The Commission does not offer examples, but it is conceivable that the issue could now arise where a non-State actor can invoke a treaty, such as in human rights or international investor claims.
69 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, [63]–[64]; but see ILC Report on Subsequent Agreements and Subsequent Practice (n 28) Conclusion 7 (giving further consideration, including a presumption in favour of interpretation, over amendment or modification).
70 ILC Report on Subsequent Agreements and Subsequent Practice (n 28), Ch IV.
71 See ILC, 58th Session, 'Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', finalized by M Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682, 206–44; further, ILC Report (18 July 2006) UN Doc A/CN.4/L.702; ILC Report on its 58th session (2006), UN Doc A/61/10, Supp No 10, 400–23 ('ILC Report on its 58th Session'); see also C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; Gardiner (n 2) Ch 7.
72 ILC Report on its 58th Session (n 71) 414–15 [21].
73 *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 161. For commentary, see FD Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 YJIL 315; D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281.
74 Judge Higgins, *Oil Platforms* (n 73), Separate Opinion [49].
75 Judge Kooijmans, *Oil Platforms* (n 73), Separate Opinion [42]–[43].
76 ECtHR App No 26629/95 (Judgment of 4 April 2000).
77 Ibid [60].
78 Ibid [61]–[62]. A fuller account of the case is given in Gardiner (n 2) Ch 1, s 5.1.
79 See eg *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* [1994] ICJ Rep 112, where the majority view attached more weight to what those judges saw as a meaning clear in its context as contrasted with unclear preparatory work, while the principal dissenter, Judge Schwebel, saw clear conclusions to be drawn from the preparatory work rather than finding a meaning in a term which was ambiguous and not clarified by its context. See Gardiner (n 2) 366–72.
80 Compare *Hosaka v United Airlines* 305 F.3d 989 (9th Cir 2002), certiorari denied 537 U.S. 1227 with *Pierre-Louis v Newvac* 584 F.3d 1052 (11th Cir 2009); see Gardiner (n 2) 386–8.
81 See the trend in cases in the United Kingdom to require that preparatory work must clearly and indisputably point to a definite legal intention: 'Only a bull's-eye counts. Nothing less will do'. *Effort Shipping Company v Linden Management* [1998] AC 605, 623; see also Gardiner (n 2) 383–5.
82 *LaGrand Case (Germany v USA)* [2001] ICJ Rep 466.
83 Ibid [101].

84 Ibid [102].

85 Cf *Case Concerning Elettronica Sicula SpA (ELSI) (USA v Italy)* [1989] ICJ Rep 15; WTO, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada—Appellate Body Report* (2004) WT/DS257/AB/R [59]–[60].

86 See *LaGrand* (n 82).

87 See *Ehrlich v Eastern Airlines* 360 F.3d 366 (2nd Cir 2004); *Abbott v Abbott* 130 S.Ct. 1983 (2010).

88 See *Border and Transborder Armed Actions (Nicaragua v Honduras)* [1988] ICJ Rep 69; *Wemhoff v Germany* (Judgment of 27 June 1968) Series A No 7, 23 (European Court of Human Rights); *Busby v State of Alaska* 40 P.3d 807 (Alaska Ct Appeals 2002).

89 See the discrepancy between a comma and a semi-colon in the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945, in *Trial of Major War Criminals before the International Military Tribunal, vol 1, Documents* (HMSO, London 1947); E Schwelb, 'Crimes Against Humanity' (1946) 23 BYBIL 178, 188, 193–5; see also *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—WTO Appellate Body Report* (7 April 2005) WT/DS285/AB/R.

90 See *LaGrand* (n 82); *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392.

91 See n 4 and accompanying text.

92 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 [48]; see also L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 EJIL 681; Gardiner (n 2) 406–8.

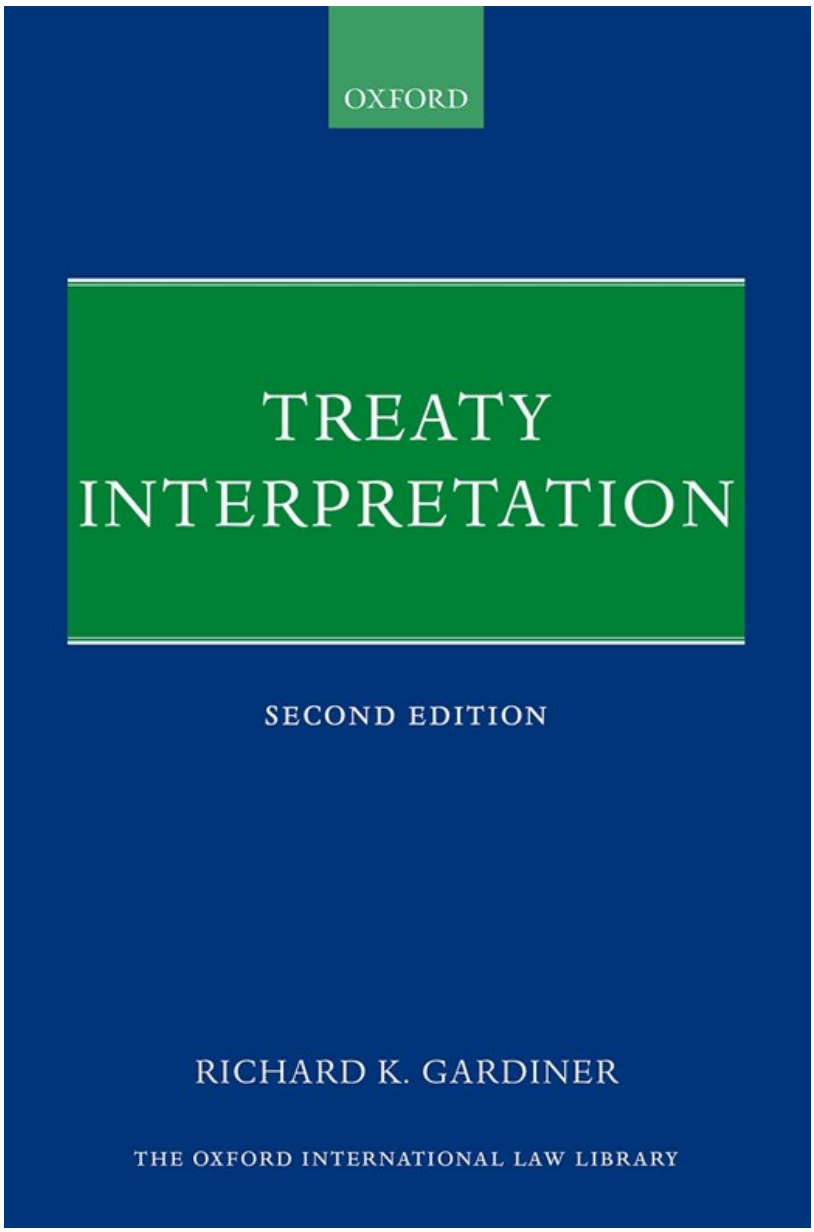
93 See A Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, Oxford 2012) 3, 17.

94 Cf G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509; I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 EJIL 605.

95 Thirlway (n 5) 19.

Annex 694

R. Gardiner, *Supplementary Means of Interpretation*, in OXFORD GUIDE TO TREATIES, ed. Duncan B. Hollis (Oxford University Press, 2020)



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CHAPTER

8 Supplementary Means of Interpretation

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Abstract

This chapter discusses the use of all supplementary means of interpretation. These are supplementary to those in the general rule in article 31. However, their function is not dictated by the label ? supplementary? but by the terms of article 32.

Keywords: Travaux préparatoires, Vienna Convention on the Law of Treaties, Treaties, conclusion

Subject: Law of Treaties, Sources, Foundations and Principles of International Law, International Economic Law, Arbitration, Settlement of Disputes

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Supplementary means of interpretation—preparatory work and circumstances of conclusion—confirming meaning—determining meaning if general rule leaves ambiguity or obscurity, or results in absurdity or unreasonable meaning

This formulation [the precursor to article 32] seemed to the Commission about as near as it is possible to get to reconciling the principle of the primacy of the text with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear. Moreover, the rule … is inherently flexible, since the question whether the text can be said to be 'clear' is in some degree subjective.[1]

It would hardlybe an exaggeration to say that in almost every case involving the interpretation of a treaty one or both of the parties seeks to invoke the preparatory work.[2]

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and 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. Introduction

This chapter covers use of all supplementary means of interpretation. These are supplementary to those in the general rule in article 31. However, their function is not dictated by the label 'supplementary' but by the terms of article 32. In fact their function is not dictated or dictatorial. In contrast to the mandatory formulation of the general rule, supplementary means are ones to which recourse 'may' be had. Conditions
p. 348 are stated in article 32 governing their use, but these are not so ↳ restrictive as they may appear. Supplementary means are not listed exhaustively in the Vienna Convention, though those most commonly used are mentioned. The most controversial issues arise over use of preparatory work. The meaning and scope of the term 'preparatory work' have been considered in Chapters 1 and 3 above.[3] The principal remaining issues are when preparatory work may be invoked in treaty interpretation, how it relates to the other Vienna rules, and what weight is to be given to its very varied content.

The Vienna Convention's provision on preparatory work exposed the most significant difference in approach to treaty interpretation among members of the ILC. It was the only part of the Vienna rules on which there was a substantial debate at the Vienna Conference in the first session (1968). These differences

in approach can be marked out as a divide between those who asserted the primacy of the text of a treaty as revealing the commitments of the parties and those (principally the US delegation) who saw the interpretative quest as a direct investigation of the intentions of the parties and of their shared expectations, with aid in that task being sought from wherever it could be found. This is to put the opposing camps in the most extreme light. Attaching the labels 'textual' and 'intention seeking' to the different approaches serves mainly to hide the realities and practicalities of treaty interpretation. Once these realities and practicalities are examined, it can be seen that the differences between the two approaches are not as great as they may appear. The core issue is what information and material outside the text of a treaty can be brought into the task of interpreting it and how this is done.

The second key to understanding the provision lies in the distinction between examining or surveying information and material, on the one hand, and using it for a particular purpose, on the other. It is one thing to read the history of a provision, quite another to say that that history is the one element which identifies the correct meaning. The provision of the Vienna Convention appears to draw a firm distinction between using the supplementary means to 'confirm' and to 'determine' the meaning of a treaty provision. The gateway to the former use of supplementary means is that the correct interpretation appears ascertainable by application of the general rule. The prerequisites for using supplementary means to 'determine' the meaning are ambiguity, obscurity, absurdity, or unreasonableness (which must be 'manifest', in the case of the last two possibilities). It will, however, be seen that these clear lines of approach (particularly confirmation) were not intended to be applied too rigidly, nor are they in practice. 'Frequent and quite normal recourse to *travaux préparatoires*' was the thought underlying the ILC's approach, as indicated in the first quotation at the head of this chapter.

There is thus both something of a paradox and an illustration in the interpretation and application of article 32 to preparatory work. Only by giving the provision the most narrow of literal meanings that it could bear does the provision look as limiting as its critics suggest. Yet by taking account of its own preparatory work
p. 349 in the manner that that preparatory work indicates, is it clear that such a ↳ limited role is not correctly attributed to it. An expansive meaning of 'confirm' is confirmed by the preparatory work. There is also plenty of evidence that a literal approach to treaty interpretation has not been applied to this element of the Vienna rules, which is a good indicator that an excessively literal approach does not hold sway in treaty interpretation generally.

2. History and Preparatory Work

2.1 Separating supplementary means from the general rule

Although the first draft of the Vienna rules was somewhat different in its layout and detail from the final text, the way in which the provisions were separated revealed the thought that certain evidence of meaning should only be used to confirm the meaning found by applying the general rule or to establish the meaning in circumstances of ambiguity, uncertainty, etc.[4] However, the separation of the 'general rule' from 'supplementary means' was not so clearly drawn as in the final version of the rules. It was this separation which was the source of controversy at the Vienna Conference and the cause of an unsuccessful attempt by the US delegation to integrate the content of articles 31 and 32 into a single provision. The core of the criticisms made by Professor McDougal (USA) of the draft rules lay in the relationship between these two provisions. Professor McDougal saw the designation 'supplementary' for article 32 as confirming primacy of a purely literal approach. To him this meant that the focus of treaty interpretation was directed to an impossible quest for an ordinary textual meaning. It meant (to him) dismissal of context in the broad sense which he gave the word, with relegation of preparatory work to a limited role, and then only after crossing excessively high hurdles. He foresaw the likely result as a general failure to consider important indicators of the 'shared expectations' of the parties and 'community values'.

Somewhat paradoxically, Professor McDougal's criticisms would only have proved cogent if interpreters had adopted an extremely literal (and rather distorted) reading of the Vienna rules, if they ignored much of the ordinary meaning of their terms, abandoned the content of article 31 beyond its first paragraph, and dismissed the abundant guidance in the ILC's preparatory work as to how the Vienna rules were to provide the launch pad for reaching proper interpretations.[5] Showing that this has not been the result is the role of the section on practice (section 4) of this chapter. However, even at the introductory phase of studying this topic, a reader of the Vienna rules and of the records of the ILC's work (including the contribution of Professor Waldock as Special Rapporteur) can see that the approach is not purely textual, and that *looking at* preparatory work and the circumstances of ↳ a treaty's conclusion is not excluded. Thus, it is difficult to see the 'rigidities and restrictions' which Professor McDougal asserted were common knowledge.[6]

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Professor McDougal sought to underline the importance of preparatory work and surrounding circumstances by citing the role of Professor Waldock at the Vienna Conference, describing his presence as 'the best testimony, not always mute' of the impossibility of applying the textuality approach. He noted that reference to Professor Waldock had often been necessary at the Vienna Conference in tribute 'not to his skill in flipping the pages of a dictionary or as a logician, but rather to his very special knowledge of all the circumstances attending the framing of our draft Convention'.[7] Although oratorically engaging, this is not persuasive. The Vienna Conference was not simply engaged in interpretation of a concluded treaty but was continuing the preparatory work of the Vienna Convention begun by the ILC. This demanded a somewhat different perception and approach. It also seems more reasonable to regard reference to Professor Waldock at the Conference for an account of the work of the ILC as something of a proxy for consulting the extensive preparatory work, a short cut to acquiring a fuller version of the thinking behind drafts that had been presented to the ILC. Courts, tribunals, writers, and other interpreters of treaties have, in practice, very much treated the records of the ILC as an aid to looking into that thinking.

At all events, Professor McDougal did not convince the Vienna Conference that reference to preparatory work and surrounding circumstances was an approach to interpretation that should be put on exactly the same footing as the elements of the general rule: for the proposal to combine the articles on interpretation was rejected.[8] Yet the separation of the two articles into general rule and supplementary means has not proved a bar to reference to preparatory work, circumstances of conclusion or other supplementary means. The Vienna rules have generally been taken as allowing liberal reference to preparatory work, even if a

decisive role in determining an interpretation is more limited. In addition, where the explanations of a preparatory body are likely to be useful to an interpreter, these are now commonly readily available, if not always in their raw form, then in published commentaries, explanatory reports, and such like.

This is not to say that there are no difficulties with the rules and how they have been applied in some cases.[9]
p. 351 But it is suggested here that the principal difficulty has ↳ not proved to be the catalogue of limitations suggested by Professor McDougal. Nor is it easy to find evidence that quantities of other useful material revealing the shared expectations of the parties have been excluded from consideration because of application of the Vienna rules. The main difficulty has been over the indication in the Vienna rules that one permissible use of preparatory work is to 'confirm' a meaning achieved by application of the general rule. If the preparatory work, so far from confirming that meaning, suggests that that interpretation is wrong, does the interpretation stand (but unconfirmed), or may it be displaced? It will be submitted here that that is not the insuperable problem that it may appear to be on a literal reading of article 32, and that in practice means can be found, compatible with the Vienna rules, for using preparatory work in the way such work was meant to be used. Non-confirming preparatory work could, for example, lead to exploration of a hitherto unnoticed ambiguity in the text and reopen evaluation of the meaning. Such a possibility is considered further below, but in understanding the role of preparatory work it is helpful first to look more closely at Professor McDougal's criticisms.

Professor McDougal linked the stigma which he saw as being attached to preparatory work by classifying it as 'supplementary means' with his perception of undue literalism being required by the general rule. He saw 'context' as being defined by reference not to 'factual circumstances attending the conclusion of the treaty, but to mere verbal texts'.[10] His understanding was that 'object and purpose' referred 'not to the actual common intent of the parties, explicitly rejected as the goal of interpretation, but rather to mere words about "object and purpose" intrinsic to the text'.[11] This view seems to have led him to underestimate the role envisaged by the Vienna rules for circumstances of conclusion of a treaty. The first basis given for his strictures about these perceived rigidities and restrictions was that principles of interpretation had seldom been considered as mandatory rules of law, 'precluding examination of relevant circumstances'.[12] 'Precluding examination' of 'relevant circumstances' seems as much to overstate the purport of the scheme of the rules as the suggestion that the combination of the reference to ordinary meaning and the rules on admissibility of preparatory work were being employed in a way 'to foreclose inquiry'.[13]

p. 352 An initial reply to these criticisms is to note that by suggesting that 'context' should properly mean the 'factual circumstances attending the conclusion of the treaty', Professor McDougal was giving 'context' a wider meaning than what might be viewed as its primary or ordinary meaning, or at least than its principal dictionary definition.[14] Much more significant, however, is that his criticism does not appear to take account of the reference to 'the circumstances of its [a treaty's] conclusion' receiving explicit mention, along with preparatory work, in article 32. It would be a distinctly odd reading of the term 'context' in article 31 that included in it 'the circumstances of conclusion', when precisely the same concept is given a specific role as a 'supplementary means' elsewhere in the rules.

2.2 Ready reference to preparatory work distinguished from basing interpretations on it alone

Underlying Professor McDougal's criticisms seems to be the notion that a great array of interpretative aids, only admitted in a limited way in article 32, was being excluded by the approach taken in separating the two articles. This was compounded, in the view of Professor McDougal, by the 'high preclusionary hurdles—designed to foreclose automatic, habitual recourse to such "supplementary means"'[15] This is wholly at odds with the balance envisaged by the ILC between primacy of the text and the ILC's expectation of 'frequent and quite normal recourse' to preparatory work noted at the head of this chapter. The Vienna rules do not impose any hurdle to *looking* at the preparatory work. This is confirmed by looking at the preparatory work in the records of the work of the ILC. In his comments on the first draft of what became the Vienna rules, the Special Rapporteur (Waldock) explained the proposed provision on preparatory work (which did not then bear the epithet 'supplementary means', but which did categorize the conditions for use of preparatory work) as being 'permissive in character'. The aim was to recognize ↳ 'the propriety of recourse to extraneous evidence or indications of the intentions of the parties'.[16] Preparatory work was therefore regarded as evidence to be used for specified purposes. He saw no difficulty in using such evidence to determine the meaning of an ambiguous or obscure term, or of a term whose ordinary meaning gave an absurd or unreasonable result. Most revealing were his observations on the distinction between reference to the preparatory work and the actual use made of such work:

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> There is, however, a difference between examining and basing a finding upon *travaux préparatoires*, and the Court itself has more than once referred to them as confirming an interpretation otherwise arrived at from a study of the text. Moreover, it is the constant practice of States and tribunals to examine any relevant *travaux préparatoires* for such light as they may throw upon the treaty. It would therefore be unrealistic to suggest, even by implication, that there is any actual bar upon mere reference to *travaux préparatoires* whenever the meaning of the terms is clear.[17]

What is clear from this is that the invariable practice was (and still is) to look at the preparatory work when there is a question of treaty interpretation; but actually basing a finding on such material needs to take place in more controlled conditions if the agreement of the parties is not to be replaced by the content of unconsummated exchanges of proposals and arguments that preceded finalization of the treaty. It is difficult to find fault with the Special Rapporteur's further comment:

> Recourse to *travaux préparatoires* as a subsidiary means of interpreting the text, as already indicated, is frequent both in State practice and in cases before international tribunals. Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as a means of interpretation. They are not, except in the case mentioned [reference to agreements, instruments, and documents annexed to a treaty or drawn up in connection with its conclusion], an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.[18]

2.3 Distinction between use of supplementary means ‘to confirm’ and ‘to determine’ the meaning

These observations of the Special Rapporteur related to the first draft of the rules which differed from what was ultimately agreed, but this does not affect their relevance as indicating the analysis of the established role of preparatory works in treaty interpretation. The role of supplementary means of interpretation, and in ↳ particular preparatory work, was eventually put into two categories differentiated by the functions of
p. 354 ‘confirming’ and ‘determining’ meaning. In its commentary on its final version of the draft articles, the ILC noted that the first of these had a further significance in its scheme of rules of interpretation:

> The fact that article 28 [now 32] admits recourse to the supplementary means for the purpose of ‘confirming’ the meaning resulting from the application of article 27 [now 31] establishes a general link between the two articles and maintains the unity of the process of interpretation.[19]

Thus the preparatory work of the Vienna Convention effectively confirms the propriety of examining the preparatory work, without precondition, of any treaty whose interpretation is in issue and sets this in the context of ‘the unity of the process of interpretation’.

Recourse to preparatory work is always permissible under the Vienna rules to ‘confirm’ the meaning reached by application of the general rule in article 31. Where the qualifying conditions (ambiguity or obscurity of meaning, or manifest absurdity or unreasonableness of result) are met for use of preparatory work to ‘determine’ the meaning, the Vienna rules appear to envisage what is in effect replacement of an unsatisfactory interpretation produced by the general rule with one yielded up by the preparatory work. The two roles for preparatory work appear very different in their significance for interpretation. Although both are presented under the title ‘supplementary means of interpretation’, ‘to determine’ the meaning is very much to fulfil a primary role in treaty interpretation, while confirmation is only secondary and supportive.

However, the difference in roles may not be so great in practice as it appears to be. A literal reading of article 32 would result in a very limited role for preparatory work if the qualifying conditions for a determining role are not met. Preparatory work could be invoked to show that a meaning that is already plain, unambiguous, and neither absurd nor unreasonable is indeed the correct one. Other than as a congratulatory acknowledgement of the drafting and inherent clarity of a treaty, that would produce no real result from invoking the preparatory work. Investigating preparatory work to see whether it does in fact ‘confirm’ a particular meaning carries with it the implicit possibility that it does not do this. What then? The options are either to stick with the meaning achieved by the general rule or investigate the other meaning or meanings which the preparatory work suggests.

The ILC’s approach to this provision suggests that the reality is that if the interpreter finds that the preparatory work suggests a meaning which was not the one which would be first choice after applying the general rule, and which would not have immediately struck the interpreter as within the obvious range of interpretative options, the interpreter will have to reconsider the position. It would be absurd to think
p. 355 otherwise. This reality is further exemplified by the present investigation ↳ of what is meant by ‘confirm’ a meaning. In the first epigraph to this chapter, the ILC Special Rapporteur’s view is given that the formulation of the provision that is now article 32 was to give effect to the Commission’s aim of ‘reconciling the principle of the primacy of the text … with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear’.[20] An interpreter with that prime piece of preparatory work already in mind would need to interpret ‘confirm’ in the context of all the Vienna rules and the whole exercise of treaty interpretation.

Despite the apparent clear meaning of ‘confirm’, the Special Rapporteur’s explanation goes on to suggest that the subjectivity in deciding whether a term is ‘clear’ imports flexibility into the rule. Hence ‘confirm’

offers the option of not confirming and the possibility of transforming the exercise into one where the preparatory work leads to revisiting the application of the general rule to find a permissible interpretation which is then confirmed. Another possibility is that the investigation may lead to a conclusion that there is a hitherto unperceived ambiguity (or one or more of the other qualifying conditions) such that the exploration of the preparatory work is transformed from a potential confirming role to one of determining the meaning. Treaty interpretation is not working out a simple equation. This is best illustrated by the examples in the section on practice below.

Two further pieces of preparatory work of the Vienna Convention support the case for giving 'confirm' a broad meaning. First, early versions of the text had proposed recourse to further means of interpretation 'to verify or confirm' the meaning ascertained by application of the general rule. In response to suggestions that confirmation was unnecessary if the meaning of a term was clear, the Special Rapporteur (Waldock) noted that it was 'unrealistic to imagine that the preparatory work was not really consulted by States, organizations and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention'.[21] However, he recognized that 'the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorization to interpret it in the light of something else; nevertheless that was what happened in practice'.[22] This was acknowledgement that consulting the preparatory work had to be accepted as having the potential to modify an attitude formed towards the treaty text. Second, the Special Rapporteur later explained that 'verify' had been deleted because the idea of 'verification' was contained in 'confirmation'.[23] Hence 'confirm' was viewed as having a wider meaning than 'verify', one which could possibly embrace adjustment of an assumption that the meaning was clear.

3. Meaning of 'Recourse' and 'Supplementary'

The opening words of article 32 ('Recourse may be had to supplementary means of interpretation') invite particular attention to two terms: the meaning of 'recourse' and the scope of 'supplementary means'.

3.1 'Recourse'

Descriptions commonly used for considering the preparatory work are 'consulting' or 'examining' it. That the Vienna Convention provision uses the term 'recourse' has attracted little attention, probably because the circumstances of use of supplementary means of interpretation are addressed as part of the substance of the article. Controversy therefore has surrounded the interpretation of the descriptions of the circumstances, rather than the introductory word. In the light of the differentiation made by the ILC between looking at preparatory work and actually basing an interpretation on it, the term 'recourse' is apt to cover making use of the preparatory work (or other supplementary means) for the ends described in the provision, without implying that looking at preparatory work to see if it may assist is proscribed.

Were the Vienna Convention's interpretative apparatus to be deployed in making an interpretation of 'recourse', it would provide a good illustration of some of the elements of the rules. First, dictionary definitions would show that no single ordinary meaning can be isolated but that some meanings fit the context and practice better than others.[24] These meanings must, of course, be read in the context of the more specific directions in the article on how supplementary means are to be used; thus, the division is between use for confirmation and determination of meaning. However, the meanings do not exclude (and may even chime in with) the distinction recorded in the ILC's work between examining the preparatory work and basing a determination upon it.[25]

3.2 ‘Supplementary’

Any need for interpretation of the term ‘supplementary’ is largely subsumed by the substantive content of article 32, indicating the circumstances in which additional means of interpretation come into play for
p. 357 specified purposes; by practice, ↳ which includes liberal reference to both means specifically mentioned and others whose use is warranted by particular circumstances; and by the practical dynamics of interpretation which are assisted by awareness of the underlying thinking of the ILC and the clarificatory effect of the debate at the Vienna Conference on the amendment proposed by the USA.[26] As with ‘recourse’, an interpretative exercise, starting with an ordinary meaning for ‘supplementary’, would reveal some definitional notions at the root ‘supplement’ which are germane to its use here. That a supplement is something added as ‘an enhancement’ (in some senses, ‘to complete’ a work or provide reinforcement), and also ‘something added ‘to make good a deficiency’, embraces (if rather obliquely) the two potential functions of recourse to preparatory work (confirmation and determination of meaning).[27] It may be useful to note that the dictionary definitions do not include any suggestion of ‘subordinate’.

The equivalent French phrase in the Vienna Convention may suggest more ready access to further means of interpretation, using the term *des moyens complémentaires*. An English dictionary invites comparison of ‘French *supplémentaire* (1790)’ with ‘supplementary’ and ‘modern French *compl*[*é*]*mentaire*’ with ‘complementary’ as a matter of etymology, which may raise the question of whether there is correct alignment of meaning between the languages. However, the notions of ‘completing’ or ‘perfecting’ in the English term ‘complementary’ do not exclude dealing with ‘deficiencies’ according to further parts of the definition, while ‘supplement’ is defined to include ‘enhancement’ as well as ‘make good a deficiency’.[28] The content of article 32 is capable of bearing both the notions of completing and making good. Examination of practice may, therefore, prove the most useful way of ascertaining the meaning and effect of the term ‘supplementary’.[29]

3.3 Further supplementary means

More difficult is establishing the identity of other supplementary means of interpretation, given that the only immediate contextual clue is the word ‘including’ which introduces preparatory work and circumstances of conclusion of the treaty.[30] What lies beyond? ‘Means of interpretation’, when used in the context of the Vienna rules, appears to refer to material or substantive matters to be taken under consideration, rather than general interpretative principles of an analytical kind such as lawyers are accustomed to apply.[31] An example of the latter is the *eiusdem generis* principle. This assists in deciding
p. 358 whether an item is to be regarded ↳ as included in a list by applying a test of its similarity to items specifically mentioned in the list. Preparatory work and circumstances of conclusion are material elements linked to the particular treaty undergoing interpretation: the *eiusdem generis* principle is not a material element linked in a similar way, but rather a general interpretative principle which may be applicable in approaching particular material.

This distinction between material and general interpretative principles could be of importance, particularly given the somewhat optional character of recourse to supplementary means. Lawyer’s techniques, often encapsulated in well-known maxims, could be particularly useful in applying the general rule rather than depending on the accessibility being governed by whether recourse is had to the supplementary means of interpretation. However, the Vienna rules are not exclusionary and article 32 is not so restrictively applied. Thus, even though well-known interpretative devices, such as the *eiusdem generis* principle, *expressio unius exclusio alterius*, or *a contrario* could fall within the ordinary meaning of ‘supplementary means’, these devices are not rigidly viewed as exclusively within the province of that rule.[32]

3.4 Relationship between supplementary means and the general rule

For an interpreter, the initial difference between the general rule and supplementary means is that the elements of the general rule have mandatory application (a treaty 'shall be interpreted in good faith… ', 'There shall be taken into account', etc), the word 'shall' being used in treaties to denote obligation. In contrast, the supplementary means of interpretation are available to an interpreter ('Recourse may be had'), but their use is not expressed to be mandatory. This does not mean that supplementary means can be characterized as always *subordinate* to the general rule. Indeed, in the circumstances where the provisions of article 32 of the Vienna Convention envisage use of supplementary means 'to determine' the meaning, they are potentially dominant, albeit only after application of the general rule has left ambiguity, obscurity, etc in the result.

In finding a distinction between the general rule and supplementary means of interpretation to be both justified and desirable, the ILC looked mainly at the role of preparatory work and how it differed in character from the elements of the general rule:

> The elements of interpretation in article [now 31] all relate to the agreement between the parties *at the time when or after it received authentic expression in the text. Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation.[33]

p. 359 Noting that records of treaty negotiations can be incomplete or misleading and require particular discretion to determine their interpretative value, the Commission nevertheless pointed out that:

> … the provisions of article [now 32] by no means have the effect of drawing a rigid line between the 'supplementary' means of interpretation and the means included in article [31]. The fact that article [32] admits recourse to the supplementary means for the purpose of 'confirming' the meaning resulting from the application of article [31] establishes a general link between the two articles and maintains the unity of the process of interpretation.[34]

The most common understanding of 'confirming' something does inherently link article 32 to article 31, quite apart from the explicit references to article 31 in article 32. Yet the ILC's notion of 'the unity of the process of interpretation', and the general link with the provisions in article 31 which it saw as established by the term 'confirm', are sometimes overlooked or misunderstood.[35] This may in part be due to the way in which article 32 gives such apparent prominence to the determining role of supplementary means by singling out, in separately denoted subparagraphs, the situation where an interpretation according to the general rule leaves the meaning ambiguous or obscure or produces a result which is manifestly absurd or unreasonable.[36] However, as has already been emphasized, the more precisely defined circumstances in which preparatory work may 'determine' meaning must not be taken to eclipse the general acceptability of reading the preparatory work for purposes covered by the term 'confirm' ranging from providing help in understanding provisions of a treaty to working with the general rule to give them meaning. Practice provides many examples of the integration of preparatory work in the process of interpretation thus preserving the unity of the latter which the ILC sought.

4. Issues and Practice

This section tracks the two gateways which are established by article 32 and illustrates modalities of use of supplementary means. The first gateway is where application of the general rule has produced what appears to be the correct meaning which may lead to recourse to supplementary means to confirm the meaning. The main issues here are identifying the circumstances in which confirmation is to be sought and the nature of such confirmation. The second gateway is where, after application of the general rule, there remains one or more of ambiguity, obscurity, manifest absurdity, or unreasonableness. This gateway leads to use of
p. 360 supplementary means to determine the meaning.[37] Here the main issues are the nature of ↳ the four entry points for this gateway and how, once reached, the supplementary means lead to a determination of the meaning. As a preliminary matter, however, it must be noted that only sometimes do courts and tribunals identify which of these gateways they are using. In other instances their use is not explicit or there is no sign of them being used at all.

4.1 Systematic use of gateways, unsystematic use, and by-passing them

4.1.1 Explicit reference to the qualifying gateway

If circumstances arise where supplementary means have to be used to determine the meaning of provisions in a treaty, the qualifying conditions for their use are more likely to be clearly identified than where the rather loose notion of confirming a meaning is being applied. However, as courts and tribunals pay increasing attention to the Vienna rules, they do quite often state that they are using supplementary means (most commonly preparatory work) to confirm a meaning reached by applying the general rule.

For example, explicit reference to the route being followed to consideration of the preparatory work was made in the dispute between Indonesia and Malaysia concerning sovereignty over certain islands.[38] The ICJ had to decide whether a reference in an 1891 Convention to a boundary following a line of latitude continuing eastward across the island of Sebatik should be taken as extending beyond that island to separate out further islands then under Dutch sovereignty from those under British sovereignty.

The Court found that the object and purpose of the 1891 treaty was delimitation of boundaries between Dutch and British possessions within the island of Borneo itself and to resolve the status of the island of Sebatik. It found nothing in the treaty to suggest that the parties had intended to delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over any other islands.[39] Having concluded that the treaty provision read in context and in the light of the Convention's object and purpose could not be interpreted as establishing an allocation line determining sovereignty over the islands out to sea to the east of the island of Sebatik, the Court explained that it was not
p. 361 necessary to resort to supplementary means of interpretation to determine ↳ the meaning of the treaty but that it would have recourse to such supplementary means in order 'to seek a possible confirmation of its interpretation of the text of the Convention.'[40] In doing this, the Court examined not only the documents which preceded the treaty but also the history of assertions of rights by the British North Borneo Company and others, and the setting up of a joint commission by Great Britain and the Netherlands.

In this case the circumstances leading to the conclusion of the Convention were considered along with the accompanying documents forming the actual preparatory work. Since the only hint of possible extension of the line of latitude eastwards of Sebatik was in a document which had not been passed to the other side, and on a map which did not include the disputed islands, the Court found nothing in the preparatory work or circumstances of conclusion to support the Indonesian case for such an extension.[41] Explicit use of the gateway of confirmation not only led to further substantiation of the meaning derived by application of the

general rule, but also enabled the Court to evaluate the submissions of one party as to the intention of the parties to the treaty.

4.1.2 Reaching the preparatory work informally

Courts do not always indicate that the application of the general rule has led to a 'clear' meaning which is to be confirmed by reference to the preparatory work or that one of the circumstances is present which could make the preparatory work determinative of the meaning of a term or provision. This may reflect the way litigation works, with the arguments of the parties influencing the elements and shape of a court's judgment, or it may be that use of preparatory work is so much part of lawyers' interpretative apparatus that resort to consideration of it is instinctive rather than formalistic.

Thus, for example, in the *Avena* case[42] the ICJ rehearsed the arguments of the disputing parties over the preparatory work before deciding the meaning of the requirement in article 36 of the Vienna Convention on Consular Relations 1963 (here 'the Consular Convention') that the authorities of a state must inform arrested nationals of other parties 'without delay' of their right to ask for their consul to be informed of their arrest. One issue was whether 'without delay' was a synonym for 'immediately', ie immediately upon arrest. The Court found an accumulation of factors negating acceptance of 'immediately' as the correct meaning. It started its own analysis by noting that the Consular Convention offered no precise meaning through any definition provision, thus implicitly eliminating the possibility of any special meaning being established in application of article 31(4) of the Vienna Convention; but the Court did explicitly state that the
p. 362 terms would therefore have ↳ to be interpreted applying the customary law rules set out in articles 31 and 32 of the Vienna Convention.[43] The Court observed that such was the variety of terms used in the different language versions of the Consular Convention for 'without delay' and 'immediately' (in that Convention's article 14) that recourse to dictionary definitions gave no assistance.[44] This analysis effectively reflected articles 31(1) and 33 of the Vienna Convention.

Since it was clear that neither article 36 of the Consular Convention nor any of its other provisions envisage a consular officer acting in person as the legal representative of the accused or being directly involved in the criminal justice process, the Court found no indication that the object and purpose of the treaty meant that 'without delay' was to be understood as 'immediately upon arrest and before interrogation'.[45] Having thus, in effect, made its initial approach via articles 31(4), 33, and 31(1) of the Vienna Convention, the Court proceeded directly to its own assessment of the preparatory work of the Consular Convention. This revealed various strands. The ILC Special Rapporteur had explained that the Commission had proposed 'without undue delay' to allow for special circumstances which might permit information about consular notification not being given at once. There had been no consensus for including a specific time requirement for notification, no proposal to use 'immediately', and no suggestion that the time factor was linked in any way to the start of interrogation.[46] There was convergence on deletion of 'undue' from the phrase 'no undue delay', a deletion which had been proposed to avoid the implication that some delay was permissible. The Court thus concluded that 'without delay' was not necessarily to be interpreted as 'immediately' upon arrest, although there was nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it was realized that the person was, or probably was, a foreign national.[47]

The most significant points to note in this judgment are: first, the ease with which the Court swept into its consideration of the preparatory work having worked through some of the components of the general rule; second, the Court's admission to a prominent place in the argument of the recorded use by the diplomatic conference of the Special Rapporteur's explanations of the ILC's work; third, the Court's reference to individual contributions by delegations at the diplomatic conference to give a fair account of the development of the treaty text; and, finally, the Court did not make a clear distinction between use of the preparatory work to confirm a meaning and to establish a meaning (though it had noted irreconcilable

variations of dictionary meanings of the terms used in the different languages), but rather used the preparatory work in a cumulative analysis to negate a meaning of 'immediately'. This seems quite a vivid reassurance that the fears of Professor McDougal over 'preclusionary hurdles' preventing use of preparatory work and circumstances of conclusion need not be obstructive in practice.

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4.1.3 Incidental use of supplementary means

Reference to preparatory work and circumstances of conclusion of treaties is quite often included in a judgment or award's narrative account of the background. For example, in the *Arrest Warrant* case, three of the ICJ judges who considered the extent of universal jurisdiction of states, gave an account of the development of the concept of universal jurisdiction.[48] They found that states had jurisdiction under certain treaties (such as those concerning torture, hostages, hijacking, etc), jurisdiction which could be described as 'treaty-based broad extraterritorial jurisdiction'. In addition under those treaties the parties had jurisdiction to prosecute an offender found in their territory, jurisdiction which was only 'universal' by loose use of language, being really 'obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere'.[49] In examining the treaties relevant to this conclusion, the Joint Separate Opinion referred to preparatory work of the Conventions to explain their history, interpretation, and intended operation.[50] It can readily be recognized that such reference to supplementary means does not need justifying by use of one of the Vienna rules' gateways. It was simply part of the exposition of the historical development of the law and its analysis.

Incidental reference to preparatory work also occurs from time to time when courts and tribunals refer to accounts, analysis, and conclusions in works by authors having a focus on a particular treaty.[51]

4.1.4 Admitting preparatory work introduced by parties

There is an understandable tendency on the part of courts and tribunals to admit into consideration preparatory work which is proffered as such by both, or all, parties to a dispute.[52] Indeed, it is quite difficult to exclude mention of material which is unilaterally submitted even if it does not clearly form part of the
p. 364 preparatory work. Typically, the main presentation of material and argument to international ↳ courts and tribunals is in writing. Judges or arbitrators may reject material from consideration, or exclude it from their reasoning, but cannot readily prevent it being brought to their notice.

However, even where there is a firm determination by a court or tribunal that recourse to preparatory work is not necessary to reach a proper interpretation, the wide scope offered by article 32 for use of preparatory material to confirm a meaning may combine with a court's inclination to acknowledge the introduction of material by the parties. Thus, for example, in *Georgia v Russia*, the ICJ determined that a provision of the treaty referring to a dispute 'which is not settled by negotiation' set preconditions to bringing a case before the Court. The Court nevertheless considered that, given the extensive arguments of the parties and the Court's previous practice of resorting to the preparatory work to confirm its reading of a provision, a presentation of the parties' positions and an examination of the preparatory work was warranted.[53] In the event, the Court noted that, while no firm inferences could be drawn from the drafting history of the Convention as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it was possible nevertheless to conclude that the materials constituting the preparatory work 'do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation'.[54] This invites consideration of the role of confirming a meaning and, implicitly, raises the question of how to proceed if the preparatory work does suggest a different conclusion from that achieved by application of the general rule.

4.2 Confirming meaning

4.2.1 Confirming a clear meaning

In using the Vienna rules, the ICJ is sometimes quite explicit that it is using the preparatory work simply to confirm a meaning that is already clear from applying the general rule. For example, in *Territorial Dispute (Libya/Chad)* the ICJ used the general rule to establish that it was clear that in a 1955 treaty, when the parties stated that they recognized frontiers that resulted from instruments listed in an annex to the treaty, they acknowledged that these instruments defined all the frontiers even if demarcation on the ground had been left over to later work in some instances.[55] Accordingly, the Court stated:

> The Court considers that it is not necessary to refer to the *travaux préparatoires* to elucidate the content of the 1955 Treaty; but, as in previous cases, it finds it possible by reference to ↳ the *travaux* to confirm its reading of the text, namely that the Treaty constitutes an agreement between the parties which, inter alia, defines the frontiers.[56]
>
> 56 [1994] ICJ Reports 6, at 27–28, para 55.

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It may legitimately be asked why, if the meaning was so clear from application of the general rule, was it necessary to consider the preparatory work at all? The general answer is that, as acknowledged by the ILC's Special Rapporteur (Waldock) and many others, in virtually all cases where there is an issue of treaty interpretation, it is the practice to look at the preparatory work even if nothing comes of it. In the particular case, there are some deductions that can be made from reading the Court's account of the preparatory work; but it probably boils down to doing justice to the parties and their arguments, and completing the interpretative exercise. The records showed that in negotiating the 1955 treaty, the Libyan negotiators had wished to leave aside the issues of frontiers but had been persuaded that these should be determined, even in the case of one frontier in a treaty of 1919 which was difficult to apply because of events subsequent to that date. The Libyan leader had nevertheless stated in the 1955 negotiations that the 1919 Agreement was 'acceptable' and that 'implementation' of it was to be left to the 'near future'. The Court found that 'implementation' could only mean 'operations to demarcate the frontier on the ground'.[57] Thus this exploration of the negotiating history showed respect for the fact that there were, possibly, grounds for arguing that something had been left aside at one stage in the negotiation of the treaty, that this warranted examination, but that the intended outcome was clear enough.

The evident influence that preparatory work can exert, even when a court is vigorously asserting that its role is only confirmatory, is well shown in the judgment of the ECtHR in *Bankovic & Others v Belgium & Others.* [58] The Court had to decide whether the parties' commitment to 'secure to everyone within their jurisdiction' respect for rights under the European Convention on Human Rights had extraterritorial reach when NATO forces caused death, injury, and damage in Serbia, which was not a party to the Convention:

> Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words 'all persons residing within their territories' with a reference to persons 'within their jurisdiction' with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States …
>
> However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection … In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise ↳ that it is not interpreting

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> Article 1 'solely' in accordance with the *travaux préparatoires* or finding those *travaux* 'decisive'; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).[59]
>
> 59 Application no 52207/99, Decision on Admissibility (2001), at paras 63 and 65.

The ICJ and other courts and tribunals do not always express in direct or simple terms that they are using preparatory work to confirm a meaning even when using preparatory work in that role. For example, the ICJ has several times phrased its conclusions in terms indicating that it does not view the preparatory work as contradicting an interpretation at which the Court has arrived by other means:

> ... none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute.[60]
>
> The Court concludes from this that ... the text of Article 11 of UNCLOS and the *travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works ... so as to avoid or mitigate the problem of excessive length identified by the ILC.[61]
>
> 60 *LaGrand (Germany v USA)* [2001] ICJ Reports 466, at 506, para 109, and see the ICJ case *Application of the International Convention etc (Georgia v Russian Federation)* (2011), quoted at the end of section 4.1.4 above to the effect that the *travaux* in that case 'do not suggest a different conclusion'.
>
> 61 *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Reports 62, at 106, para 134.

Finding that preparatory work does not 'contradict' a conclusion, 'preclude' the possibility of interpreting a term in a particular way, and does not 'suggest a different conclusion', all indicate a form of confirmation, but give it a formulation which leaves hanging the implicit questions: what would have happened if there had been a contradiction? Could preparatory work preclude an otherwise proper interpretation? This has not been resolved in the practice of courts and tribunals. There are few cases that even come near to producing an interpretation that is entirely clear yet directly contradicted by preparatory work which is itself crystal clear.

4.2.2 Role of 'confirming' when preparatory work contradicts meaning afforded by application of general rule

One of the most prominent of recent ICJ cases in which preparatory work was in issue was *Qatar v Bahrain* in 1995.[62] The case shows that whatever the correct evaluation of the relationship between application of the general rule and recourse to preparatory work, any relevant and accessible preparatory work will normally be considered, but its confirmatory role may depend on how the material is to be read. The case inspired
p. 367 consideration of the problem of what the interpreter is to ↳ do if the preparatory work fails to confirm a meaning which emerges from application of the general rule, or if it can be read as tending to contradict that meaning. However, although the difference in approach between the majority and the principal dissent (Judge Schwebel) looks to be over how article 32 of the Vienna Convention applies, it is suggested here that the real difference was over how the preparatory work was to be read and understood. Nevertheless, the case warrants detailed attention as providing occasion for consideration of a difficult issue relating to preparatory work.

The dispute concerned maritime delimitation and territorial claims. A preliminary issue was whether Bahrain had agreed to the ICJ being seised of the case by Qatar individually rather than by joint submission by the two states. Arcane though this matter might appear, it was not merely a point for procedural obstruction. The substantial concern was how to define the extent of the dispute to be considered by the

Court, in addition to the important point of legal principle that the Court's jurisdiction is wholly dependent on the consent of the parties in dispute.

For many years the two states had been in dispute over their maritime and territorial claims. Since independence, attempts had been made to resolve these disputes through the good offices of the ruler of Saudi Arabia. In the background was the possibility of reference to the ICJ. What aspects of the differences were to be included, and how the issues were to be formulated, in any agreement to submit the dispute to the Court were the core of the persistent disagreement, rather than the principle of judicial settlement itself. One suggestion in the course of negotiations was that the agreement to submit the case to the Court should have two annexes, one Qatari and the other Bahraini, each state defining in its annex the subjects of dispute it wanted to refer to the Court. This idea was not taken up. That it was suggested, however, shows that great importance was attached to how the dispute was formulated.

The ICJ had previously held that exchanges of letters in 1987 and minutes of discussions in 1990 ('the Doha minutes') amounted to treaties.[63] The issue in the 1995 stage of the case was interpretation of provisions on submission to the ICJ, with a focus on the Arabic word transliterated as 'al-tarafan', a dual usage which Qatar translated as 'the parties' and Bahrain as 'the two parties'.[64] This was in the context of a period ending in May 1991 being reserved to try to reach a settlement through the good offices of the Saudi King. The Doha minutes (in translation) recorded agreement that: 'Once that period has elapsed, the {two} parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula [a definition of the subject and scope of the commitment to jurisdiction], which has been accepted by Qatar, and with the procedures consequent on it.'[65]

p. 368 Did the controversial term 'al-tarafan' mean each state could individually start proceedings at the ICJ or did they have to be instituted by both together (the common process of submitting a case by special agreement[66])? Qatar had made a unilateral application to the ICJ. If the agreements actually required Bahrain's concurrence, Qatar's application would have been insufficient to establish the Court's jurisdiction. The point had been closely examined in the negotiations leading to the words used. An early draft had been unambiguous, reading in translation: 'either of the two parties may submit the matter to the International Court of Justice'. This had been changed at the proposal of Bahrain to the potentially ambiguous expression 'al-tarafan'. Qatar had accepted that.

The majority of judges (supporting the Court's finding in favour of the permissibility of unilateral submission) started with the word 'may' in the complete phrase. This they found to indicate an option rather than an obligation, and hence suggested that the ordinary meaning of the words in that context was that either could submit the case. This was supported, in the view of the majority, by further contextual analysis. That the possibility of submitting the case was to be suspended until expiry of the stated period of Saudi mediation militated in favour of the possibility of unilateral submission to the Court, as did the reference to the Bahraini formula which in the circumstances left open the only procedural possibility that each party might submit distinct claims in the absence of agreement defining their scope.

The majority of the Court found this meaning so clear from application of the general rule of interpretation that the judges did not consider it necessary to resort to supplementary means of interpretation in order to *determine* the meaning of the Doha Minutes. The Court nevertheless did have recourse to these supplementary means 'in order to seek a possible confirmation of its interpretation of the text'.[67] It prefaced its consideration of the preparatory work by stating the need for caution on account of its perception that the preparatory work was fragmentary. On what might be thought the crucial change from 'either of the two parties' to 'the {two} parties' (al-tarafan), the majority said:

> The Court is unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the Doha Minutes should imply that they must be interpreted in

> accordance with Bahrain's thesis. As a result, it does not consider that the *travaux préparatoires*, in the form in which they have been submitted to it—i.e., limited to the various drafts mentioned above—can provide it with conclusive supplementary elements for the interpretation of the text adopted; whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given.[68]
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> 68 [1994] ICJ Reports 112, para 41.

p. 369 Nevertheless, it seems difficult when working with English translations of the phrase 'either of the two parties' to resist the apparently obvious implication of the deletion of 'either of' as removing the possibility of submission by either of them alone. And that was the gist of the dissent of Judge Schwebel.[69] Emphasizing that the central objective of treaty interpretation was finding the intention of the parties, and noting the controversial nature of the Vienna rules in the time leading up to their adoption, Judge Schwebel found that what the text and context of the Doha minutes left so unclear was crystal clear when the minutes were analysed with the assistance of the preparatory work.[70] Thus, he concluded, particularly in the light of the change in wording, that the correct interpretation was that an application to the Court required *joint* submission of the case.

Judge Schwebel noted that in 1987, in a draft for a letter submitting the case to the Court, Qatar provided for 'preparing the *necessary* Special Agreement in this respect …'.[71] This suggested that Qatar, no less than Bahrain, saw conclusion of a special agreement, that is joint submission, as 'necessary'. Further:

> If the object of the Parties—if their common intention—was to make clear that 'both Qatar *and* Bahrain had the right to make a unilateral application to the Court', the provision that 'either of the two parties may submit the matter' would have been left unchanged. That wording achieved that object clearly, simply, and precisely. As it was, that unchanged phraseology authorized either of the two Parties to make unilateral application to the Court. To suggest that the change of that phraseology to 'the two parties' rather imports that each of the Parties—because of that change—is entitled to make a unilateral application to the Court is unintelligible.[72]
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> 72 [1995] ICJ Reports 27, at 34–35.

For present purposes, however, Judge Schwebel's dissenting opinion is as interesting for his approach as for his conclusion. While he was at pains to reiterate the American objections to the Vienna Convention's formulation as if it labelled preparatory work a 'subsidiary' means, and (in effect) to support McDougal and the New Haven school's approach to treaty interpretation as being a matter of finding (in paraphrase) the shared intentions of the parties modified by any community values, in fact in his handling of the preparatory work in this case, Judge Schwebel's approach seems very much in line with what the Vienna rules mandate. He found the term in issue to be ambiguous: 'The expression in the Doha Minutes of "al-tarafan", however translated, is quintessentially unclear; as the Court itself acknowledges, it is capable of being construed as meaning jointly or separately.'[73] He therefore reached the proper interpretation by looking at the preparatory work—all precisely as mandated by article 32.

In contrast, the majority had expressly found it unnecessary to resort to the preparatory work to make a *determination* of the correct meaning, but rather sought *confirmation* of the ordinary meaning as they found
p. 370 it to be. This resulted in the rather elliptical conclusion to the effect that the preparatory work could not ↳ provide the Court with conclusive evidence in support of the interpretation which it had reached, but that there was no clear contradiction. This approach seems equally in line with the Vienna rules, perhaps reflecting more faithfully the differentiation between the general rule and supplementary means, even if the

Court's assessment of the inconclusive nature of the preparatory work, particularly as regards the change of wording at the crucial point, may be thought to be less in tune with seemingly obvious inferences.[74]

While, therefore, different conclusions were reached, it is not clear that their divergence is attributable to the Vienna rules or to a fault line in them. If the difference in result had to be characterized in terms of approach, it might reasonably be summarized as the majority view giving preference to what those judges saw as a meaning which was clear in its context over unclear preparatory work, while Judge Schwebel gave precedence to what he saw as clear conclusions to be drawn from the preparatory work rather than to a term which was ambiguous and not clarified by its context. However, neither approach fell outside article 32. The majority and Judge Schwebel only really differed as to how to interpret the preparatory work.

Nevertheless, the discussion offered by the two judgments does reveal an apparent difficulty in the Vienna rules. The majority judgment (understandably, given that the issues did not arise for those judges) does not disclose what the position would have been had they found their interpretation to be clearly contradicted by the preparatory work. Perhaps finding this frustrating, Judge Schwebel explored the possibility that the Court in reality discounted the preparatory work because it did not confirm the meaning to which its analysis had led.[75] If that were the position, he found it would be hard to reconcile with interpretation of a treaty in good faith 'which is the cardinal injunction of the Vienna Convention's rule of interpretation. The *travaux préparatoires* are no less evidence of the intention of the Parties when they contradict as when they confirm the allegedly clear meaning of the text or context of treaty provisions.'[76]

Judge Schwebel homed in on this in a contribution to a book, his chapter being titled 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?'.[77] This helpfully sets out
p. 371 relevant extracts from ↳ the preparatory work of the ILC and notes that more extensive use is made of preparatory work in practice, even where it contradicts an apparently plain meaning. Paradoxically perhaps, the problem presents itself in its most acute form only if one adopts a very literal meaning of 'to confirm' in article 32 of the Vienna Convention. If the whole of articles 31 and 32 are deployed in relation to that term, the picture is rather different. Even the ordinary meaning of 'confirm' is not monolithic. In a transitive mood, I may contact someone to confirm a provisional booking which I have made. I am actually going a little further than I had when originally booking because I am making firm something which previously was not. In an interrogative mode, I may telephone an airline or hotel asking them to confirm that they have received my internet booking and payment, and are keeping my reservation. I expect an affirmative response, but lurking is the fear that something may have gone wrong, in which case I will have to think again. Both situations show the comparable potential in the Vienna Convention's usage of 'confirm'.

Judge Schwebel considered that the Vienna Convention could hardly be said to be reflective of customary international law if it did not in fact fairly reflect state practice and judicial precedent:

> That practice and precedent demonstrate that preparatory work is often brought to bear on the interpretation of treaties, by the parties to those treaties and by their interpreters, and this whether the *travaux préparatoires* confirm or correct an interpretation otherwise arrived at.[78]

That this reflects the meaning of the Vienna Convention provision is 'confirmed' in the preparatory work in the ILC.[79] However, it does not show exactly what should happen if preparatory work reveals an intended divergence from the ordinary meaning; nor has exploration of the issue thrown up a clear example. *Qatar v Bahrain* did not precisely pose the issue because it could reasonably be argued that there was uncertainty as to meaning in both text and preparatory work.

Perhaps the Vienna Convention's use in article 32 of 'confirm' comes closest to an example of the preparatory work, in combination with practice, contradicting an ordinary meaning, if a very narrow meaning is ascribed to 'confirm'. As well as the ILC's own view at the head of this chapter and the

statements of the Special Rapporteur (Waldock) set out above,[80] there were also further observations in the preparatory work which may be taken as providing guidance on this issue. First, Yasseen in the ILC made clear the role he saw for preparatory work in relation to the 'clarity' of a text, stating that:

> ... the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer [to] the preparatory work or look at the circumstances surrounding the conclusion ↳ of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance. He could not accept an article which would impose a chronological order and which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself, being often influenced by the consultation of the same sources.[81]

p. 372

The Special Rapporteur (Waldock) acknowledged this, noting that it was sometimes impossible to understand clearly even the object and purpose of the treaty without such reference.[82] At the Vienna Conference, the issue was addressed head on by the delegate of Portugal:

> What would happen if, though the text was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning came to light? It was impossible to be sure in advance that those circumstances would confirm the textual meaning of the treaty. If the emphasis were placed on good faith, it would appear that in such a case those circumstances should be taken into consideration. ...[83]

83 United Nations Conference on the Law of Treaties, Official Records: First Session, p 183, para 56; and see Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?', at 544–47.

The outcome at Vienna was inconclusive save in the sense that the conference endorsed the distinction between the general rule and supplementary means. Analysis without examples is difficult to evaluate; but it is also difficult to find examples of situations in which an unquestionable interpretation ascertained by proper application of the general rule is directly contradicted by a clear indication in preparatory work of the common understanding as to the meaning held by all negotiators. Close, perhaps, are two examples given in Chapter 1, above. The most firmly established meaning of an 'alcoholic' (as one who is addicted to alcohol rather than temporarily drunk) would not in fact have been confirmed by the preparatory work, whereas a broader connotation of drunkenness, which the Court found established from the context, was strongly supported by the preparatory work.[84] Similarly, the place where an arbitral award was 'made' was not necessarily where it was signed but, as shown by the preparatory work, was a reference to the place of arbitration.[85] In both these situations reference to the preparatory work shows that a primary meaning which was, or might have been thought to be, clear was contradicted by the preparatory work. In both cases the correct meaning was not so far removed from ordinary meanings and usage of the words in issue as to preclude the proper meaning being deduced by application of the general rule, the preparatory work giving strong confirmation of this.[86]

p. 373

In any event, a divergent meaning disclosed by the preparatory work would be present in the interpreter's mind throughout any competently conducted interpretative exercise.[87] In such circumstances the unity of the Vienna rules is perhaps of greater significance than the *supplementary* character of the means identified in article 32, the rather elastic concepts of ambiguity, etc allowing for recourse to the preparatory work to determine the meaning in appropriate cases. Hence the real question would be what weight is to be given to the preparatory work. Here courts and tribunals may draw inspiration from Waldock's introductory reflection on the topic to the effect that preparatory work does not provide authentic interpretation but 'simply evidence to be weighed against any other relevant evidence of the intentions of the parties' whose '

cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty.'[88]

4.2.3 Using supplementary means to confirm 'intention'

Although the Vienna rules do not make the search for the intention of the parties a specific aim of treaty interpretation, reference to preparatory work almost inevitably points the thoughts of the interpreter in the direction of seeking the intention of the parties as much as towards the meaning of a term in a text. This was indeed explicitly stated in the explanation given by Waldock in the ILC.[89] Hence it is not surprising to find references to the intentions of the drafters of treaty provisions when preparatory work is being assessed. A good example of this is in the ICJ's Advisory Opinion on the *Wall in Occupied Palestinian Territory*.[90] One issue was whether the Fourth Geneva Convention, 1949, applied in the occupied territory of Palestine. That Convention stated that it applied (inter alia) to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties' (article 2(1)) and to 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (article 2(2)). Where the wall was in occupied Palestine, an entity whose statehood had not fully crystallized, was application of this provision excluded by the reference to 'territory of a High Contracting Party'? The Court had noted that Switzerland had concluded that, as a depositary of the Geneva Conventions, it was not in a position to decide whether the request in 1989 from the 'Palestine
p. 374 Liberation Movement' [*sic*] in ↳ the name of the 'State of Palestine' to accede inter alia to the Fourth Geneva Convention could be considered as an instrument of accession.[91] Hence there remained an issue whether the occupied territory was territory in respect of which the Conventions applied.

Making explicit reference to the Vienna rules, the Court identified two conditions of applicability in article 2(1) of the Fourth Geneva Convention: existence of an armed conflict, and that such conflict was between two contracting parties. It deduced from this that if those two conditions were satisfied, the Convention applied in any territory occupied in the course of the conflict by one of the contracting parties. This was not limited by article 2(2) because the object of that paragraph was not to restrict the scope of application of the Convention, as defined by article 2(1), by excluding territories not falling under the sovereignty of one of the contracting parties. It was directed 'simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable'.[92]

The Court supported this interpretation by stating that it reflected 'the *intention* of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power'.[93] This was shown by contrasting the provision with that of the Hague Regulations of 1907 whose drafters 'were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory', while 'the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories'.[94] In support of the latter proposition the Court referred to article 47 of the Geneva Convention. Although it is correct that article 47 provides rules for protection of persons in occupied territory without reference to such territory being that of a party to the Convention, the main support for assertions about the intentions of the drafters was to be found in the preparatory work. From examination of this, and having recited extracts from the material, the Court concluded that: 'The drafters of the second paragraph of article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.'[95]

This illustration of the use of preparatory work to ascertain the intention of the drafters shows a prominent role for the preparatory work in clarifying the meaning of a text whose literal sense could appear limitative of the application of the Geneva Convention. It should be emphasized, however, that this was only part of a

p. 375 fuller interpretative exercise, making use of other elements of the Vienna rules, including ↳ subsequent agreement by states parties to the Fourth Geneva Convention in their approval at a 1999 conference of the interpretation that the Convention applied to the occupied territory under consideration.[96]

4.2.4 Using supplementary means to 'reinforce' an interpretation

The term 'confirm' in article 32 is very loosely interpreted in practice, reference to preparatory work and circumstances of conclusion being made to substantiate an interpretation that is emerging as much as confirming one which is already pretty much clear. An example of this is in the *Legality of Use of Force* cases (2004),[97] where the ICJ interpreted provisions of its Statute in the context of the regime for access to the Court by states not parties to the Statute, including the reference in article 35(2) of the Statute to 'the special provisions contained in treaties in force'. The Court used the general rule to identify possible interpretations of 'treaties in force' and continued:

> The first interpretation, according to which Article 35, paragraph 2, refers to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text. Since the Statute of the Permanent Court of International Justice contained substantially the same provision, which was used as a model when the Statute of the present Court was drafted, it will be necessary to examine the drafting history of both Statutes. …[98]

98 *Case concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* at para 103.

It seems fair to observe that how the Court chooses to introduce its consideration of preparatory work is less significant than whether it makes use of such work in some sort of confirmatory role or to determine the meaning where other means leave this unclear. Thus, in introducing the former role, it is difficult to see any distinction between the description above of the preparatory work as 'reinforcing' a possible interpretation and that in another case where the ICJ stated that 'further confirmation' of the Court's reading of a particular provision was to be found in the preparatory work.[99]

p. 376 ### 4.2.5 Using preparatory work as general support

Allusion to preparatory work on an apparently incidental basis to support an interpretative argument is quite common. This can be justified as a use of supplementary means to confirm a meaning in a very general sense, or as less respectful of the more structured approach which the separation of the general rule and the supplementary means indicates, if read literally. So for example, in a lengthy note on interpretation of the 1965 Washington Convention's requirements as to nationality, when considering whether these had to be met by a company at the date of entering into a concession agreement or also at the date of making a request for arbitration, an International Centre for Settlement of Investment Disputes (ICSID) arbitral tribunal set out arguments including those based on analysis of the text, views of commentators, and interpretations by previous arbitral tribunals.[100] Following the latter, the tribunal simply noted that 'the *travaux préparatoires* of the Convention support the single requirement, *see* Documents … Vol. II, 287 etc'.[101]

4.2.6 Reciting and using preparatory work contrasted

The practice of the European Court of Human Rights (ECtHR) in recounting the development of relevant provisions has already been shown.[102] However, that Court makes a definite distinction between stating the record from the preparatory work and deploying that material in an interpretative exercise. This distinction is not always so clearly made. For example, in *US v Kostadinov* the Court of Appeals (Second Circuit) considered the meaning of 'mission' in the Vienna Convention on Diplomatic Relations.[103] Although the Convention defined 'members of the mission' and 'premises of the mission', the term 'mission' was not defined separately. Did the fact that someone had an office in the Bulgarian trade mission in New York entitle them to immunities? The Court set out relevant provisions of the Convention and indicated that those provisions were better understood after examining the groundwork performed by the ILC and the discussions by the delegates to the Vienna Conference which prepared the Convention.[104] The Court used this background to show that the lower court had placed emphasis on the physical aspect of the mission, whereas it could be shown from the preparatory material that a mission in the diplomatic sense consists of a group of people sent by one state to another, not the premises which they occupy in the receiving state. This Court's further use of the preparatory work in its detailed support of this and its analysis of the provisions on immunity together formed the basis for ↳ the interpretation denying immunity. While this approach
p. 377 may appear to give a greater role to the preparatory work than the Vienna rules would now warrant, unless a particular effort is made to separate systematically the elements identified by the rules, a narrative with provisions interwoven with preparatory work may make the most coherent presentation of a reasoned interpretation.

4.3 Determining meaning

4.3.1 Qualifying conditions: 'ambiguous or obscure' or 'manifestly absurd or unreasonable'

Ambiguity or obscurity in the meaning produced by application of the general rule are notions which leave generous scope for resort to supplementary means such as preparatory work. The range of ordinary meanings of a term will often be extensive and the issue giving rise to the investigation of possible interpretations may itself point to the possibility of different meanings. That a word has various dictionary definitions, while raising the ordinary notion of ambiguity, does not necessarily mean that there is ambiguity in the sense of article 32 of the Vienna Convention.[105] The Vienna rules look here to ambiguity that remains after the application of the general rule—that is, after deploying all relevant elements of the whole of article 31, not merely the ambiguity of multiple senses in a dictionary. The context, subsequent agreement, subsequent practice, etc may resolve any such ambiguity without the need for determination by supplementary means.

However, the approach of the ILC was based on the suggestion of Waldock as Special Rapporteur reproduced at the head of this chapter and indicating reconciliation of the principle of the primacy of the text 'with frequent and quite normal recourse to *travaux préparatoires* without any too nice regard for the question whether the text itself is clear'. Waldock suggested that the proposed rule was 'inherently flexible, since the question whether the text can be said to be 'clear' is in some degree subjective'. Nevertheless, it can be dictionary definitions that initially point strongly to ambiguity, and courts and tribunals have not generally analysed too closely what is meant by ambiguity in article 32. Of course dictionaries give many words more than one meaning. 'Ambiguous' itself bears seven meanings of which the one indicated as most common offers multiple choice of somewhat different senses: 'Admitting more than one interpretation, or explanation; of double meaning, or of several possible meanings; equivocal'.[106] The dictionary stage, if it occurs in interpretation, is likely to be at the outset of the interpretative exercise, but that sets the ground
p. 378 for ultimate consideration of preparatory work if the ↳ general rule provides no clear resolution. Thus, in

considering the meaning of 'without delay' in the *Avena* case, the ICJ observed that 'dictionary definitions, in the various languages of the Vienna Convention [on Consular Relations], offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term'.[107] Taking the view that neither the treaty as normally understood, nor its object and purpose, suggested that 'without delay' was to be understood as 'immediately upon arrest and before interrogation', the Court wove a number of points from the preparatory work into its argument leading to the conclusion that 'by application of the usual rules of interpretation' there was a duty on the arresting authorities to give the required information to an arrested person as soon as it was realized that the person was a foreign national.[108]

In that case the ICJ gave little to indicate the precise role it was affording the preparatory work. Although following a brief account of ordinary meaning and context, the preponderant analysis of the preparatory work suggested that the use of this supplementary means of interpretation went beyond mere confirmation. In contrast, the Appellate Body of the WTO made the process much clearer in *US—Measures Affecting Gambling*. It noted that of the 13 dictionaries consulted by the Panel on the meaning of 'sporting', some included gambling in the definition while others did not.[109] Nevertheless, it was not this that led the Appellate Body to conclude that there was ambiguity. It was only after investigating the context and possible subsequent agreement that the conclusion of ambiguity was affirmed, which opened the door to determining the meaning by using supplementary means. Thus the Appellate Body stated specifically: 'application of the general rule of interpretation set out in Article 31 of the *Vienna Convention* leaves the meaning of "other recreational services (except sporting)" ambiguous … Accordingly, we are required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the *Vienna Convention.*'[110]

These cases show what may be described as at least the presence of dictionary- derived ambiguity, leading the way to reasoning drawn from preparatory work. A different situation is where material introduced as supplementary means of interpretation is what suggests that there is ambiguity. In *HICEE v Slovak Republic*
p. 379 an arbitral tribunal considered that Dutch explanatory notes drawn up by one ↳ party to a bilateral investment treaty resolved uncertainty as to whether the term 'directly' referred to an investment made only in a company incorporated in the host state but not in a subsidiary of such a company, or whether it meant any company in the host state that was not a subsidiary of a company incorporated in a third state.[111] As to how the ambiguity had been identified, the Tribunal stated:

> It may be objected … that the whole Treaty Interpretation Issue might never have entered anyone's mind in the first place had it not been for the Dutch Explanatory Notes, in other words that it is not admissible to introduce the Notes in order to give rise to an ambiguity. But the Tribunal is unable to follow so counterfactual a line of argument. The plain fact is that the Explanatory Notes were put in argument before it, with a provenance and a relevance that cannot be gainsaid. Whether the ambiguity in the text would otherwise have occurred to either side in this dispute, or to the Counsel representing it, is a hypothetical issue on which it would not be proper for a tribunal to speculate. Suffice it to say that the Tribunal, having been confronted with the treaty text and by the highly professional argument put before it on both sides, has registered the ambiguity in its 'ordinary meaning' and is bound to note that ambiguities exist *a fortiori*; their existence does not depend on the skill of counsel in arguing how they should be resolved.[112]
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> 112 *HICEE B.V. v Slovak Republic*, para 138.

Ambiguity is not, of course, confined to one word having two or more meanings. A text may be ambiguous where provisions read together leave open different possible interpretations. In *Hosaka v United Airlines*, a US Court of Appeals endorsed the proposition that: 'It is axiomatic that an agreement subject to two or more reasonable interpretations … is ambiguous.'[113] This case (which is considered in more detail below)

concerned the 1929 Warsaw Convention which provided a set of uniform rules to be applied in national systems of law in claims against carriers asserting liability for death, injury, loss, or damage during international carriage by air. Article 28 of the Convention provided that:

(1) [any such claim was to be brought in one of four specified places] 'at the option of the plaintiff'; and

(2) 'questions of procedure shall be governed by the law of the court seised of the case'.

In issue was whether a court in a place selected by the plaintiff from one of the four specified options could decline jurisdiction on the basis that it was not the appropriate court (ie applying the doctrine of '*forum non conveniens*')? If a national system of law characterized application of the doctrine as a procedural matter, did that doctrine or the option exercised by the plaintiff prevail? This might seem an obvious situation in which to apply the principle that general provisions (such as the one on questions of procedure) do not
p. 380 derogate from specific ones. However, ↳ the Court found the text to be ambiguous, affording two possible interpretations, both of which it considered reasonable.[114]

Obscurity is less commonly instanced than ambiguity as the specific gateway to determination from the preparatory work. In practice, courts and tribunals tend to contrast provisions that are 'clear' with those that are 'uncertain'. Thus, for example, the tribunal in *Prosecutor v Dusko Tadić* stated:

> ... since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the 'context' of the Statute, it may be argued that they comprise a part of the *travaux préparatoires* ... Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is *ambiguous or obscure.* As the wording of Article 5 is clear and does not give rise to uncertainty ... there is no need to rely upon those statements.[115]

115 [1999] ICTY2 (15 July 1999), 124 ILR61, at 183–84, para 303; note that the statement that supplementary means of interpretation may *only* be resorted to when the text of a treaty is ambiguous or obscure is incomplete: ambiguity is only a precondition for recourse to preparatory work *to determine* meaning, not when *confirming* meaning; and see, similarly risking conveying an incomplete impression, Report of the ILC Sixty-eighth Session, (2013) Supplement No. 10 A/68/1, p 14, Conclusion 1, Commentary, para (3).

It is harder to find specific reference to a result of application of the general rule being expressly found to be 'manifestly absurd or unreasonable' (article 32(b)).[116] 'Monstrous', 'absurd', 'a nonsense or at least a tautology', and 'not reasonable' are some of the terms used to indicate the grounds on which arbitrators have rejected interpretations in case law pre-dating the Vienna Convention.[117] These suggest that these requirements for supplementary means to be determinative are considerably more demanding than an interpretation according to the general rule being merely unpalatable.

Article 32(b) has, however, occasionally been mentioned in a rather different context from being a gateway to use of supplementary means. This is to support rejection of a suggested meaning of a treaty provision on
p. 381 the basis that it would produce a result that is manifestly absurd or unreasonable.[118] Such invocation of ↳ this test is not four-square within article 32(b), since there it is a lead-in to using supplementary means of interpretation to *determine* the meaning when application of the general rule produces an unsatisfactory result. However, absurdity of result is sometimes argued as an aid to excluding meanings when identifying the ordinary meaning of a term.

An example of use of the concept of absurdity which could trigger reference to the preparatory work was offered in *Champion Trading Co, J T Wahba & Others v Egypt.* [119] An ICSID tribunal upheld the ordinary meaning of the provision in the 1965 Washington Convention, which excluded dual nationals from invoking protection under the Convention against a host country of the investment when also a national of that

country. In doing so the tribunal noted reference made by the respondent to the preparatory work which showed that early drafts allowing protection for dual nationals had been changed by unanimous decision to exclude such protection explicitly. However, while upholding that clear meaning for application in the instant case, the tribunal speculated that:

> This Tribunal does not rule out that situations might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, article (32)(b)). One could envisage a situation where a country continues to apply the *jus sanguinis* over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state.[120]

120 ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003, at 288.

It is, however, difficult to see how reliance on article 32 could produce a different interpretation that would avail such potential claimants of remote generations. The preparatory work would still confirm the clear exclusion. It seems more likely that the concept of 'effective nationality' would prove the focus of interpretative development through the application of article 31(3)(c) of the Vienna Convention, a concept which was considered in the present case but which did not avail when the link of nationality was not tenuous and artificially imposed.

4.3.2 Ambiguous by reference to availability of another word having one of the claimed meanings

In the example given in Chapter 1 above, in the case of *Hiscox v Outhwaite* [121] one of the central issues was where an arbitral award is 'made' within the meaning of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. When the arbitrator signed an award in Paris, was the award 'made' in France despite all other connections in the arbitration being with England? In the context of execution of legal documents, judgments, and so on, the point at which the award became concluded would
p. 382 commonly be taken as the moment at which it ↳ was signed. Nevertheless, delivery could fit the bill if that was identifiable as completion of the process. However, even given that possible uncertainty (one which was canvassed in the case), the strong inclination of the judiciary in England was towards viewing signature as the concluding act. Only the judge at first instance pointed out that had the New York Convention used the term 'signed', that would have been unambiguous. 'Made' was a different word from 'signed'. Hence he found ambiguity where the other judges did not.[122]

4.4 Modalities of use of supplementary means

4.4.1 Using and construing preparatory work

Consistent with the ILC's aim of stating only those rules of interpretation which have general application, its authorization of 'recourse' to supplementary means does not prescribe how that recourse is to be made or how the supplementary means are to be read, other than by reference to the purpose of such recourse as being either to confirm or determine a meaning. Because of the diversity of preparatory work and relevant circumstances it would, in any event, have been a hopeless task to try to include guidance in the Vienna rules. Courts and tribunals, and other interpreters, have to work out for themselves what to make of these supplementary means.

Using supplementary means for confirmation of a meaning may involve no more than recounting the stages of development of a provision. For example, in *Witold Litwa v Poland* [123] the issue was whether the word

'alcoholics' necessarily imported the notion of someone suffering addiction or could include those who are merely under the influence of too much alcohol. Having determined by application of the general rule that the latter was the correct meaning, the ECtHR found confirmation in the preparatory work, whose relevant features the Court had set out in the 'Facts' section of its judgment. This showed how the concern to allow for domestic measures on drunkenness had become transformed in drafting. The history spoke for itself, but formally its role was only confirmatory.

Rather different was the situation in the WTO Appeal Body's Report on *US—Measures Affecting Gambling.* [124] The issue was whether gambling came within the US schedule of commitments annexed to the General Agreement on Trade in Services (GATS), which included an entry 'OTHER RECREATIONAL SERVICES (except sporting)'. This entry remained ambiguous after applying the general rule of interpretation, it being unclear whether 'sporting' included gambling. Hence it was necessary to rely on supplementary means to
p. 383 determine the meaning of 'sporting'. In preparation for adoption of the GATS, the GATT ↳ Secretariat had circulated 'document W/120' to assist in defining services by providing a 'services sectoral classification list'. The list incorporated references to the 'United Nations' Provisional Central Product Classification' (CPC), which is a very detailed and multi-level classification of goods and services. The Secretariat had also circulated a document known as the '1993 Scheduling Guidelines', designed to assist in determining what should be put in a WTO Member State's annex to the GATS and how entries should be expressed. Classification was to be based on the document W/120 list, with any necessary further refinements of sectoral classifications being achieved by reference to the more detailed taxonomy in the CPC. Although W/120 and the 1993 Guidelines were not agreements on interpretation in the sense of the Vienna general rule, there was no dispute that they were preparatory work and that the USA had indicated that it had used W/120 in preparing its Annex and had sought to follow the 1993 Guidelines.[125] The CPC did not include gambling in its detailed entries for 'sporting services', but did include it in as a separate sub-class of 'other recreational services'. It was clear from this, and reinforced by the scheme of the CPC, that inclusion in one class meant exclusion from any other class, and that the reference in the US Annex to 'sporting' did not include gambling.

This simplified account of the reasoning of the WTO's Appellate Body cannot do full justice to the way in which the analysis of the preparatory work was interwoven with the relevant circumstances, and how account was taken of the context in achieving an interpretation by full application of the Vienna rules. The case does, however, illustrate how interpretation and application of preparatory work may require more than a historical tracing of the development of a provision.

While it is a consistent theme in international and national treaty interpretation that preparatory work is to be used with caution, the consequences for how such work is to be read is less clear. The contrast between an internationalist approach and a nationalist one was given in relation to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in Chapter 1 above.[126] In courts in the United Kingdom there has been a line of cases referring to the 'bull's eye' approach. This gives the impression that preparatory work is only relevant where it directly addresses and resolves the precise point in issue. The approach was formulated in *Effort Shipping Company Limited v Linden Management*:

> Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that the travaux préparatoires of an international convention may be used as supplementary means of interpretation: compare article 31 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. Following *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the travaux préparatoires to be determinative of the question of construction. But that is only possible where the court is satisfied that the travaux
> p. 384 préparatoires clearly and indisputably point to ↳ a definite legal intention: see *Fothergill v.*

> *Monarch Airlines Ltd.*, per Lord Wilberforce, at p. 278C. *Only a bull's-eye counts. Nothing less will do.*[127]
>
> 127 [1998] AC 605, at 623, per Lord Steyn, emphasis added; the comments which follow are based on a fuller account in R Gardiner, 'The Role of Preparatory Work in Treaty Interpretation', Chapter 5 in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on the Law of Treaties* (London: BIICL, 2010), 97–104.

It is puzzling that, while mentioning article 31, this statement does not focus on article 32 of the Vienna Convention and the specific roles of preparatory work in either confirming or determining the meaning of a treaty provision. The risk of the bull's eye test is twofold: it subverts the grounds for use of preparatory work and it may lead to a much narrower view of the role of preparatory work than that in the Vienna rules. Although its use in relation to acts of the European Community and EU may not represent a central role in treaty interpretation, repeated reference to it suggests that it may gain a purchase there.[128]

It is certainly the case that caution has always been the touchstone for use of preparatory work in treaty interpretation. It bears repeating in this context that its role is probably best summarised by the ILC's Special Rapporteur (Waldock) as 'simply evidence to be weighed against any other relevant evidence of the intentions of the parties', and pointing out that its cogency depends on the extent to which it furnishes 'proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty'.[129] Were the bull's eye approach to emphasize the particular importance of caution where the preparatory work is fulfilling the 'determinative' role envisaged in the Vienna rules, this could be seen as broadly in line with the idea that the cogency of the preparatory work as evidence of a particular meaning depends on how clearly it shows a common understanding. If the preparatory work is not being used to add weight to other evidence of meaning, it needs to be very strong to stand on its own.

Unfortunately, however, the effect of the bull's eye approach seems more narrowing than that. In the formulation offered above, the bull's eye approach refers to 'determination' of meaning; but because this is not set on the context of article 32 of the Vienna Convention, it remains unclear whether the approach is limited to 'determining' meaning in the sense and circumstances of article 32, or whether it applies to exclude use of preparatory work as confirming an interpretation already indicated by application of the
p. 385 general rule. This could constitute a severe ↳ limitation. Preparatory work is often too diffuse to be helpful at all. Very rarely does it provide a bull's eye. However, it is quite often somewhere in between these extremes, and it can occasionally be quite revealing even where the precise issue was not in the negotiators' minds, as is shown by the example of *Hiscox v Outhwaite*.[130] It therefore seems unfortunate that courts in the UK are tending to follow *Fothergill* and the bull's eye approach rather than using article 32 of the Vienna Convention itself as the starting point for an approach to the use of preparatory work in treaty interpretation.

Even if the preparatory work can be read as dealing only with part of the issue in dispute, it may have a role. For example, where the European Patent Convention (EPC) described exclusions from patentability, in considering the extent of the exceptions, the Court of Appeal in England asked 'What help can be had from the *travaux preparatoires* to the EPC?', continuing: 'The answer is not a lot.'[131] But, the judgment added, 'one can at least find confirmation that no overarching principle was intended', and '… one other thing emerges —by its absence. There is no indication of any intention as to how the categories should be construed— either restrictively or widely'; and, referring to the categories of exceptions from patentability: 'the categories are disparate with differing policies behind each. There is no reason to suppose there is some common factor (particularly abstractness) linking them. The *travaux preparatoires* at least confirm this.'[132]

4.4.2 Reading preparatory work to show agreement to exclude

The notion of using preparatory work to confirm a meaning established by applying the general rule can lead an interpreter to find the meaning of a term by showing that the course of the negotiations excluded an interpretation that is being put forward. For example, in the WTO *Lamb Meat* case[133] one of the issues which the panel had to decide was what enterprises constituted relevant 'domestic industries' for the purposes of taking into account producers of like products. Were farmers who had reared live lambs in the same industry as importers of fresh, chilled, and frozen lamb meat, or did those who processed and traded in lamb meat constitute the comparable domestic industry? The definition of domestic industries in the relevant treaty included assessment of whether the domestic enterprises were producers of like or directly competitive products or those whose collective output of the like or directly competitive products constituted a major proportion of the total domestic production of those products.[134]

The panel applied the general rule, starting with the proposition that '[t]o us, the ordinary meaning of this
p. 386 phrase is straightforward: the producers *of an article* ↳ are those who make *that* article',[135] and proceeded through consideration of context and other relevant interpretative matters. The Panel included consideration of the reasoning of other Panel reports in cases concerning the same wording in comparable agreements. All this led to the conclusion that 'domestic industries' had a narrow interpretation, that is, referring to 'the producers as a whole of the like end-product, i.e., lamb meat in this case'.[136] In approaching the preparatory work for confirmation, the Panel noted that in a Panel Report pre-dating the negotiation of the current Safeguards Agreement, the Panel had found that the only way a wide interpretation of 'domestic industry' could be adopted would be by amending the treaty through negotiation. Hence, when at the Uruguay Round the negotiators came to consider the industry definition, they did so against this background. Since proposals for, and objections to, changing the 'domestic industry' definition were extensively discussed in the Uruguay Round negotiations without any agreement to broaden the industry definition, the exclusion of any wider meaning was effectively confirmed.[137]

However, even where a provision which would have covered precisely the case in point is shown by the preparatory work to have been rejected or deleted in the course of negotiations, that may not demonstrate conclusively that the issue is not covered in some way in the final text.[138] One example of this, already examined above, is *Qatar v Bahrain* (1995) where deletion of a clear provision was considered by the ICJ not to preclude its interpretation of words in the agreement in the very sense whose clearer expression had been rejected.[139]

Extensive consideration of the role in interpretation of rejection of a proposed provision was given by a US Court of Appeals in *Hosaka v United Airlines*, where the Court used the preparatory work in support of an interpretation which it based on the text of the provision read in the light of the object and purpose of the treaty, also finding support in a judicial decision in another state.[140] Only when it had looked at these other elements did the Court pursue consideration of the preparatory work. Thus although the Court was not specifically applying the Vienna Convention, it followed much the same line of approach found there.

In this case the Court had to decide whether the plaintiff's choice from four defined national jurisdictions identified in the 1929 Warsaw Convention on international carriage by air could be set aside on the ground
p. 387 that the chosen one was not appropriate (using the doctrine known as '*forum non conveniens*'). The ↳ Convention described the selection as 'at the option of the plaintiff', but also indicated that 'questions of procedure shall be governed by the law of the court seized of the case'. The doctrine of *forum non conveniens* was viewed as procedural under the relevant law in the instant case.

The Court looked first to the objectives of the Convention. It noted that the main purpose of the Convention was to achieve uniformity of rules governing claims relating to international carriage by air.[141] It found that the Convention created 'a self-contained code on jurisdiction' and harmonized different national views on

jurisdiction. Application of the doctrine of *forum non conveniens* would undermine the goal of uniformity. A plaintiff could be denied the right in some countries to sue in one of the four specified forums, but not denied that right in others. It also would subject actions brought under the Convention to a doctrine which had been described in earlier case law as 'vague and discretionary.'[142] The Court therefore concluded from its analysis of the text: 'The doctrine of forum non conveniens is inconsistent with the Convention's dual purposes of uniformity and balance.'[143]

The Court found support in the preparatory work for its view that the Convention did not allow invocation of *forum non conveniens*. At the 1929 conference, the British delegation had proposed adding a provision substantially equivalent to the doctrine. The delegation considered this would give the courts 'more latitude to repress vexatious litigation, as in the case where the 'forum' of another country would be naturally indicated as being that where the debates should take place'.[144] Unfortunately, how this proposal was viewed at the conference is not known as the records simply state: 'The British Delegation did not insist.'[145] The Court in *Hosaka* noted that this left it unclear whether the proposal had been considered and rejected by the delegates or was merely abandoned by the British when other proposals for amending the draft article were accepted; but the Court observed:

> That said, the failed British amendment is not irrelevant. That the British delegation proposed an explicit incorporation of the doctrine of forum non conveniens strongly suggests that the contracting parties were cognizant of the doctrine and did not understand Article 28(2) as silently incorporating, or acquiescing in, its application. It is even more difficult to construe Article 28(2) as silently incorporating or acquiescing in the application of forum non conveniens when one considers the historical context in which the British amendment was offered and, more generally, in which the treaty was drafted and negotiated.[146]
>
> 146 305 F.3d 989 at 998.

This reading of the preparatory work led the Court of Appeals to consider what is described in article 32 of the Vienna Convention as 'the circumstances of conclusion' of a treaty. Having examined the approaches of
p. 388 different legal systems and ↳ traditions at the time of the negotiation of the 1929 Convention, the Court declined to 'infer from the treaty's incorporation of local procedural law that the drafters acquiesced in the application of *forum non conveniens*, a concept that was (and is) both alien to and unwelcome by the majority of the contracting parties. *Forum non conveniens*, which permits a Court having jurisdiction to decline it, is a feature of the common law.'[147] The Court saw the Warsaw Convention as drafted by 'civil law jurists, to whom *forum non conveniens* was an alien concept' and 'generally is unknown in legal systems following the continental civil law model'.[148] The Court therefore considered that: 'In this historical light, it is unreasonable to infer that the "continental jurists," ... would have succumbed to the British, common law point of view.'[149] Thus it concluded that:

> The more reasonable inference is that the delegates, if they had intended to permit the application of forum non conveniens, would have done so explicitly.[150]
>
> 150 305 F.3d 989 at 999.

It can be seen that this approach allows something of a supporting role for preparatory work which the 'bull's eye' approach of some British courts tends to exclude without apparent regard to the Vienna provisions.[151] The approach of the US Court of Appeals seems more closely in line with the description in article 32 of the Vienna Convention of preparatory work and circumstances of conclusion of the treaty as being generally available to 'confirm' the meaning that has been ascertained by application of the general rule in article 31, as contrasted with the more prescriptive circumstances for use of supplementary means to 'determine' the meaning.

As a footnote to this case it should be noted that although the decision in *Hosaka* is generally well attuned to the principles of treaty interpretation, it was at odds with an earlier US judicial indication by the Fifth Circuit on the issue of *forum non conveniens* under the same treaty. However, the *Hosaka* court found that the earlier decision had not considered the purposes, drafting history, and post-ratification understanding of the parties, means of construction which had been indicated by the Supreme Court as applicable to treaty interpretation in decisions after the Fifth Circuit's analysis. As well as studying the preparatory work of the 1929 Warsaw Convention, the Court in *Hosaka* did examine the preparatory work of the 1999 Montreal Convention (designed to replace the 1929 treaty) to see whether there was an indication of subsequent agreement on the interpretation of the Warsaw Convention. It found that: 'In sum, although *forum non conveniens* was discussed at length in Montreal, the drafting history does not paint a coherent picture of the parties' understanding of the Warsaw Convention'. However, the Court specifically indicated that its conclusion on the provisions of the Warsaw Convention was not an expression of opinion as to interpretation of the Montreal Convention's provisions on the same point.[152]

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4.4.3 Deduction from absence from preparatory work

The mere absence from the preparatory work of reference to an issue, or even discussion of an issue and rejection of inclusion of any provision on the matter, is unlikely to prove dispositive if a difference emerges over interpretation.[153] However, absence of mention of the point may be part of the picture that leads to an interpretation.[154] In this sense practice in use of preparatory work goes beyond the narrow confines of either confirming or determining the meaning. If closer to the former than the latter, consideration of the preparatory work is in some instances treated as more supportive of argument than confirmatory of meaning.

An example arose in the course of the ICSID arbitration *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic.* [155] The ICSID Convention includes provisions ensuring that arbitrators and conciliators have the necessary qualities (independence, impartiality, etc). These requirements are implemented by rules of procedure adopted by the ICSID Administrative Council.[156] The Convention also specifies grounds on which parties to arbitration proceedings may seek annulment of an arbitral award (including improper constitution of the tribunal, exceeding powers, corruption, and failure to state reasons). An application for annulment is determined by an ad hoc committee appointed by the Chairman of the Administrative Council. The Convention specifies that various of its articles and chapters apply to such a committee, but this list does not include chapter V on replacement and disqualification of arbitrators and conciliators. However, the rules of procedure make good this omission by applying their implementing rules on these matters to members of an ad hoc committee just as to arbitrators and conciliators.

In the *Compañía de Aguas* case, one party sought to challenge the President of the Committee on the basis
p. 390 that a partner in his law firm had previously acted for ↳ one of the disputing parties in an unrelated matter. Could the rules implementing the Convention's chapter on replacement and disqualification of arbitrators and conciliators validly extend to the situation of members of ad hoc committees when the Convention had omitted the chapter from its list of provisions applicable to such committees?

This list was comprehensive and seemed a considered one. Therefore a literal reading produced a clear result that the Convention's rules on disqualification did not apply. Yet, given the importance of the matter, it was difficult not to wonder whether disqualification of committee members must simply have been overlooked. The committee noted that the omitted chapter's provisions were plainly apt for application to ad hoc committees. Such application would also be consistent with the object and purpose of the Convention in producing awards from bodies whose members were independent and impartial. Ad hoc committees had an important function in this regard. The committee noted that 'the *travaux préparatoires* of the Convention do not suggest that there was any particular reason for excluding the application of Chapter V'.[157] No party

to the Convention had at the time of the adoption of the arbitration rules suggested any such reason. The rule in question had been adopted unanimously and had been treated by the Administrative Council (on which all states parties were represented) as uncontroversial, nor had there been any objection when revised rules were adopted. Unanimous adoption of the rules, if not an actual agreement on interpretation of the Convention, at least amounted to subsequent practice relevant to its interpretation, a fact which (in combination with the other interpretative points) led the committee to conclude that the rule applying chapter V to disqualification of members of an *ad hoc* committee was consistent with a proper interpretation of the Convention.[158] Thus it can be seen that the silence of the preparatory work was a significant element in showing that a conclusion at odds with a literal reading of a provision was within a permissible range of interpretations when taken with other interpretative elements.

In the *Oil Platforms* case at the ICJ, an interpretative issue arose over article I of the Treaty of Amity, Economic Relations and Consular Rights, 1955, which provided: 'There shall be firm and enduring peace and sincere friendship between the United States ... and Iran.[159] Iran asserted that this did not merely state a recommendation or desire, but imposed actual obligations on the Contracting Parties, requiring them to maintain long-lasting peaceful and friendly relations.[160] Finding, to the contrary, that the provision only fixed 'an objective, in the light of which the other Treaty provisions are to be interpreted and applied', the ICJ stated:

> ... it may be thought that, if that Article had the scope that Iran gives it, the Parties would have been led to point out its importance during the negotiations or the process of ratification. However, the
> p. 391 Court does not have before it any Iranian document in support of this ↳ argument. As for the United States documents introduced by the two Parties, they show that at no time did the United States regard Article I as having the meaning now given to it by the Applicant.[161]
>
> 161 [1996] ICJ Reports 803 at 814, paras 28–29; see also *In The Matter of an Arbitration before a Tribunal constituted in accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules, Hulley Enterprises Limited (Cyprus) v The Russian Federation*, Final Award of 18 July 2014, para 1415 where an arbitral tribunal, having found that the interpretation of the relevant treaty provision according to the general rule of interpretation resulted in a meaning which was not ambiguous, obscure etc, and did not therefore need any other rule of interpretation, nevertheless also found that the preparatory work did not support the limited reading asserted by the Respondent because if a change of wording had been motivated by an intention to limit the scope of the provision, the Tribunal would have expected such a motivation to have been expressed in the record..

4.4.4 Change of word or words during negotiation of treaty

Tribunals approach with caution assertions as to the conclusions to be drawn from a change in wording during the drafting process of a treaty, particularly if there is no record at all of why the change was made. Such changes are, of course, commonly recounted where a judgment or award gives the history of the development of a provision.[162] Where the records are a sparse succession of drafts, courts and tribunals may be reluctant to conclude that a change from the wording proposed by, or favouring, one party to a dispute to the wording espoused by the other party necessarily means that the latter's preferred meaning is correct. This was the position taken by the majority in *Qatar v Bahrain*.[163] Equally, rejection of a change of wording without explanation or consensus on the meaning of retained words may yield no assistance on interpretation.[164]

4.4.5 Exclusion of preparatory work from consideration

One of the concerns over describing the means of interpretation in article 32 as 'supplementary', and over the inclusion of prerequisites for their use to determine (rather than just confirm) the meaning of a treaty provision, was that interpreters would be barred from access to relevant material in preparatory work. The grounds for this fear were open to question. In the *Lotus* case, the PCIJ, having recounted the preparatory work as presented by the French government, had stated that 'there is no occasion to have regard to preparatory work if the text of a convention is ↳ sufficiently clear in itself', but then proceeded to examine
p. 392 the preparatory work in some detail.[165] As regards case law of the ICJ, the notion of complete exclusion of the preparatory work in the case of clear meaning had receded by the time of the Vienna Conference in 1968–69. Rosenne had powerfully made the point in the deliberations of the ILC:

> It was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction.[166]

Thus it is difficult to detect substance for the fears that Vienna rules would confirm, or introduce, real limitations on the role of the preparatory work.[167] In practice, preparatory work is admitted in evidence or is within the material proffered by the litigants. Inevitably it comes to the attention of the judges, even if the use they actually make of it should be controlled by the Vienna rules.

A good example of this is the ICJ's *La Grand* case.[168] In interpreting the requirement in the Vienna Convention on Consular Relations that an arrested alien be informed without delay of 'his rights' under the treaty provision 'if he so requests' to have the consul of his nationality informed of the arrest, one question was whether there was a violation of an individual's own rights. For the claimant state (Germany), this could have provided a ground of complaint additional to its allegation that the USA directly violated its rights to have its national informed of their rights. If an individual had the right to be informed that he could ask for the consul to be informed, Germany would have a claim in right of diplomatic protection of one of its nationals if breach of that right went unremedied.

Germany argued that every national of a party to the Consular Convention who entered territory of another party had the right to be appropriately informed if arrested. Germany saw this as the ordinary meaning of the terms of the Consular Convention, which included a reference to informing 'the person concerned' of 'his rights'. The context supported this by indicating that it was for the arrested person to decide whether consular notification was to take place, thus showing that such notification was an individual right of the
p. 393 national concerned. Germany ↳ argued that the preparatory work of the Consular Convention supported this interpretation.[169]

The USA based its case against this reading principally on the conceptual argument that the Consular Convention concerned the rights of states to offer consular assistance and that, even if expressed in terms of individuals' rights, treatment due to individuals under the Consular Convention was 'inextricably linked to and derived from the right of the State, acting through its consular officer'. The USA pointed out that the relevant provision started out with an indication that it was included with a view 'to facilitating the exercise of consular functions relating to nationals of the sending State', wording which did not support the notion

that the provision gave individual nationals particular rights or treatment in the context of a criminal prosecution.[170] According to the USA, the preparatory work did not reflect a consensus that article 36 was addressing immutable individual rights, as opposed to individual rights derived from those of states.[171]

The Court found that the provision did create individual rights which could be invoked by the state of nationality of the detained person. The Court placed emphasis on the words 'his rights' and on the further provision that the state of nationality was not permitted to exercise its right to provide consular assistance to the detained 'if he expressly opposes such action'.[172] The judgment stated:

> The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8; Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991, pp. 69–70, para. 48; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 25, para. 51).[173]
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> 173 [2001] ICJ Reports 466 at 494, para 77.

It can be seen that the Court was fully regaled with the relevant preparatory work, and with the differing interpretations of it, but did not find it necessary or helpful to bring it into its judgment.

4.4.6 May preparatory work be deployed as context?

The short answer is that preparatory work clearly does *not* itself fall within the meaning of 'context' given by the Vienna Convention's article 31(2). But this does not entirely exclude the possibility that the preparatory work might contain an element of context so defined, such as the record of an agreement made by all the prospective parties as to the meaning of a term. However, the requirement in article 31(2) that
p. 394 such an agreement be 'made between all the parties in connection ↳ with the conclusion of the treaty' could usually be expected to be met by some connecting factor close to the time of signature, such as a record of the point in the final act of a conference or a reference there to its presence in some particular document within the collective preparatory work.

Any confusion over this may, at least in part, owe its origin to the broader sense of 'context' used by Professor McDougal in his campaign, as part of the USA delegation at the Vienna Conference, against the proposed formulation of the set of articles which became the Vienna rules. To him, 'context' seems to have meant everything pertinent to the negotiation of a treaty. In terms of the Vienna rules that is closer to the idea of 'circumstances of its [the treaty's] conclusion' in article 32. However, it was in fact the USA which, in the *US—Measures Affecting Gambling* case, successfully persuaded the WTO's Appellate Body that a Panel had been wrong in treating two documents which were part of the preparatory work as 'context'.[174] Although generally accepted then and subsequently as useful guidance on classification of services in Annexes to the GATS, those documents did not fit the definition of context in the Vienna rules, in contrast to the Annexes themselves, which did.

The formal significance of this distinction lies in the use to be made of preparatory work as a 'supplementary' means of interpretation. In the *US—Measures Affecting Gambling* the Appellate Body corrected the Panel's classification of the two guidance documents as context. This led the Appellate Body to follow the correct approach in applying the Vienna rules, so that it reached the conclusion by the proper route that there was ambiguity (and absurdity) such as to warrant determining the meaning by recourse to the preparatory work. Although use of the correct route to the interpretation did not in this case ultimately produce a different conclusion on the particular point, proper use of the preparatory work is important for

the integrity of the interpretative process, given the regular stress now laid on the applicability of the Vienna rules by courts and tribunals. Nevertheless, it is also important to note that use to confirm or determine meaning does not preclude other reference to the preparatory work, for example where this reveals part of the helpful background, as in *Litwa v Poland* (meaning of 'alcoholics').[175] In the Vienna Convention's terms this may involve combination of use of preparatory work and circumstances of the treaty's conclusion, but this is not a reference to context in the sense in which that term is used in the Vienna rules.

4.4.7 Using preparatory work to identify or confirm object and purpose

Resort may be made to the preparatory work to identify or confirm the object and purpose of a treaty. For
p. 395 example, at the Jurisdiction and Admissibility phase ↳ of *Nicaragua v Honduras* [176] the ICJ had to determine whether two articles of the Pact of Bogotá provided one combined route to bring a case before the Court (as Honduras argued), or two separate avenues. Finding that it was clear from the text of the treaty that there were two distinct lines of recourse, the Court supported this by reference to the object and purpose as confirmed by the preparatory work:

> It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires:* the discussion at the meeting of Committee … the delegate of Colombia explained … 'that the principal procedure for the peaceful settlement of disputes of conflicts between the American States had to be judicial procedure before the International Court of Justice' … Honduras's argument would however imply that the commitment … would, in fact, be emptied of all content, if for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and purpose of the Pact.[177]

177 [1988] ICJ Reports 69 at 89, para 46.

Another example is the ICSID arbitration in *Banro American Resources v Congo*.[178] The tribunal considered whether pursuit of diplomatic action in parallel with initiation of arbitration proceeding by, or in respect of, companies of different nationality within a group, where the state of nationality of one company was not a party to the 1965 Washington (ICSID) Convention, vitiated the tribunal's jurisdiction. Against the backdrop of the relationships of the various companies and states, the tribunal considered the objectives of the Washington Convention. Having recounted these objectives in describing features and consequences of the ICSID system, the tribunal stated that:

> This objective of taking disputes between host States and foreign private investors out of the political and diplomatic realm in order to submit them to legal settlement mechanisms was emphasized several times during the course of the travaux préparatoires of the Washington Convention.[179]

179 ICSID Case No ARB/98/7, Award of 1 September 2000 at para 16.

The tribunal supported this statement with quotations from the preparatory work.

4.4.8 Effect of interpretation recorded in preparatory work

Article 31(2) of the Vienna Convention incorporates into the context of a treaty any interpretative agreement made between all its parties and any instrument made by one or more of them if accepted by the other parties. However, in both these situations the rule only applies if the agreement or instrument was made 'in connection with the conclusion of the treaty'. There are, however, instances where negotiating states agree
p. 396 an interpretation while drawing up a provision, or where ↳ one state's interpretation is endorsed at that time by the other negotiating states. If this is only recorded in the preparatory work, without being endorsed in a final act or some other instrument connected with the conclusion of the treaty, is such an interpretation dispositive?

Although the preparatory work is one of the supplementary means of interpretation rather than part of the general rule (which includes article 31(2)), interpretations recorded in the preparatory work are likely to have force proportionate to their clarity of meaning and the comprehensiveness of their endorsement. For example, the meaning of 'return' in the Convention and Protocol on Refugees offers scope for interpretative difficulties given that the Convention defines refugee status in relation to persons outside their country of nationality, does not accord rights of entry into other countries, but does impose obligations on parties not to expel or return refugees to face persecution. In examining the preparatory work to determine whether the USA had an obligation not to turn back boats carrying people who had left Haiti in the hope of entering the USA to seek protection as refugees there, the US Supreme Court found that the negotiating history of what became article 33 included endorsement of a Swiss interpretation of the first draft to the effect that:

> ... the word 'expulsion' related to a refugee already admitted into a country, whereas the word 'return' ('*refoulement*') related to a refugee *already within the territory but not yet resident there.* [180]

180 *Sale v Haitian Centers Council* 509 US 155 at 185 (1993) (emphasis in original).

The Dutch delegation had referred to this at a later stage in the diplomatic conference. He noted that the Swiss interpretation had received support from several delegations at the time it was given and, detecting a possible consensus in its favour, he stated:

> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.
>
> 'There being no objection, the PRESIDENT *ruled* that the interpretation given by the Netherlands representative should be placed on record.'[181]

181 509 US 155 at 185 (1993) at 186 (inverted commas and emphasis in original); for different views on the extent of the obligation of non-refoulment, see decision of The Inter-American Commission for Human Rights in *The Haitian Centre for Human Rights v United States*, case no 10.675, report no 51/96 (1997) and, on 'non-refoulment' in connection with a range of international legal materials, the ECtHR in *Hirsi Jamaa and Others v Italy* Application no 27765/09, Judgment of 23 February 2012.

While the US Supreme Court felt able to draw appropriate conclusions as to the support this gave to the interpretation it derived from the text and context, it noted that the significance of the conference President's comment that the remarks should be placed on record was not entirely clear.[182] However, little value can be derived from the Court's approach. The Court did not apply the Vienna rules. Its use of context
p. 397 was sketchy and it did not consider subsequent practice and ↳ international law obligations which might have been relevant to interpretation, such as the general prohibition on sending individuals to states where they may be tortured or suffer abuse of their human rights.[183]

The structure of the Vienna rules emphasizes the caution with which preparatory work is to be approached. Even if there were ambiguity over the meaning of 'return', it would require a strong indication of complete agreement for the preparatory work to determine the meaning. Given that the Vienna Convention gives no firm status even to an interpretative declaration made on conclusion of a treaty, it is difficult to see statements in minutes as records of interpretative agreement unless the complete record is quite clear or the interpretation is in some way directly incorporated into the process of conclusion of the treaty such as by repetition in a Final Act.

4.4.9 Reading preparatory work in combination with other supplementary means

It may not always be clear whether material forms part of the preparatory work or whether it is being considered on the basis of being other supplementary means, such as circumstances of conclusion. If, for example, a provision is based on, but not identical to, terms in another treaty or instrument the explanation of the extent and effect of such 'borrowing' may play a clarificatory role. Thus, in *Johnston v Ireland*, a central issue for the ECtHR to determine was whether the right to marry in article 12 of the European Convention included a guarantee of availability of a legal process for dissolution.[184] The preparatory work showed that that article was based on article 16 of the 1948 Universal Declaration of Human Rights, which included for men and women 'equal rights as to marriage, during marriage and at its dissolution'. In explaining why the draft of what became article 12 was not as extensive as article 16 of the 1948 Declaration, the Rapporteur of the Council of Europe's Committee on Legal and Administrative Questions, had said:

> In mentioning the particular Article [of the Universal Declaration], we have used only that part of the paragraph of the Article which affirms the right to marry and to found a family, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry.[30]
>
> *Travaux Préparatoires*, vol. 1, p. 268.[185]

185 (1987) 9 EHRR 203 at 219, para 52 (square brackets in original).

p. 398 Accordingly, the Court, having started with the proposition that the words used in article 12 did not on their face include a right to divorce, supplemented that with its view that 'the travaux préparatoires disclose no intention to include in article 12 … any guarantee of a right to have the ties of marriage dissolved by divorce'.[186] Obviously where the preparatory work includes a history explaining how a particular provision developed from an earlier one, this can provide a useful confirmation of a textual interpretation, even if the earlier provision was not an actual draft but a separate legal instrument.

4.5 Circumstances of conclusion and other supplementary means

Given that the supplementary means envisaged by article 32 of the Vienna Convention are not indicated, other than that they include preparatory work and circumstances of conclusion of a treaty, it seems reasonable to take it that they are only limited by the requirement that any such means must be consistent with the Vienna rules unless otherwise agreed in the particular treaty. The host of canons of interpretation formulated over the centuries and the prevalent general maxims of construction commonly used by lawyers are too numerous to attempt to list. However, because the circumstances of conclusion of a treaty are specifically mentioned, this element of treaty interpretation warrants specific consideration, as do certain other means which have assumed prominence or may be encountered in the earlier case law but whose place in the scheme of the Vienna rules is uncertain.

4.5.1 Meaning of 'circumstances of conclusion'

What is meant by the circumstances of conclusion is not indicated in the Vienna Convention. The circumstances which cause a treaty to be drawn up, affect its content, and attach to its conclusion, are all factors which are in practice taken into account. They overlap or interact with other elements in the Vienna rules, such as the object and purpose of a treaty, instruments which may be made in connection with conclusion of a treaty, and the preparatory work. It is particularly likely that the circumstances of conclusion and the preparatory work will both be considered in the situations envisaged by article 32 of the Vienna Convention. As noted in Chapter 3 above, it is not always clear how far back in the history of a treaty its preparatory work extends. Consequently, it may not always be clear when an interpretative argument moves from considering the circumstances of conclusion of a treaty to its preparatory work. Commonly the two factors are interwoven, circumstances of conclusion receiving incidental references.

An example is in the ICJ's judgment in the *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Jurisdiction)*, where the Court found ↳ that Serbia and Montenegro was not a member of the UN and therefore did not have access to the Court under article 35(1) of the Court's Statute.[187] Turning to whether there could be access as a non-member under article 35(2) of the Statute, the Court invoked the Vienna Convention's reference to both preparatory work and circumstances of conclusion when examining the history of article 35(2). One issue was whether the reference there to jurisdiction based on 'treaties in force' meant those in force at the time of entry into force of the Statute or when a particular matter was being referred to the Court. Having found that these words could produce differing meanings, the Court looked at their origins in the predecessor treaty, the Statute of the PCIJ, at its preparatory work, and at practice of the PCIJ.

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The Court found that the provision had been included to cover cases contemplated in agreements made in the aftermath of the First World War before the Statute entered into force, but it found the preparatory work for its own Statute less helpful. What little discussion there was of the article was 'provisional and somewhat cursory' and 'took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court'.[188] The former of these two observations can be seen as a comment on the nature or quality of the evidence provided by the preparatory work, the latter as a relevant circumstance. Among other factors, in reaching its conclusion that the present Statute must be interpreted in the same way as the equivalent in the predecessor instrument, the Court noted that it was possible that no treaties from that time existed with such a provision, none having been brought to its attention, but that that 'circumstance' did not support the alternative interpretation allowing access on the basis of any treaty (being one providing for reference of a dispute to the Court), if in force subsequent to the Statute.[189] Thus the Court alluded to the circumstances of conclusion in conjunction with its analysis of the preparatory work and in relation to the potential effect of the provision in issue, but all in conjunction with analysis of the preparatory work.[190]

Another example is the *Canadian Agricultural Tariffs* arbitration.[191] The USA and Canada entered into a Free Trade Agreement (FTA) in 1988 which allowed some quantitative restrictions on imports of agricultural products. They replaced this with the North American Free Trade Agreement (NAFTA), which preserved
p. 400 several provisions of the FTA and entered into force in January 1994. Both became ↳ parties to the WTO Agreement on Agriculture, which came into force a year later. The central issue in the arbitration was whether tariffs applied by Canada to US agricultural products which exceeded their allotted quota after the NAFTA and WTO agreements came into force breached the NAFTA prohibition on new tariffs. The WTO arrangements envisaged quantitative restrictions being replaced by tariffs. In deciding that the preserved FTA provisions had the effect of bringing into the NAFTA the replacement regime for agricultural non-tariff barriers established under the WTO, the arbitral panel examined the sequence of negotiations of the three treaties and considered statements and documents which did not strictly form part of the preparatory work of the NAFTA. While the panel's conclusion was essentially based on the text of the three treaties, the circumstances of conclusion were taken into account. The panel joined together its examination of the preparatory work and the circumstances of conclusion to justify use of some material whose admissibility might otherwise have been uncertain.[192]

Circumstances of conclusion may also be allied to preparatory work when being used in a purely confirmatory role.[193]

4.5.2 Comparison with provisions in other treaties or associated material as a circumstance of conclusion

As has been noted above, courts and tribunals often make comparisons between wording of a treaty in issue and that in other treaties without indicating any basis in the Vienna rules for this. If, however, the comparable treaty provisions were part of a line of treaties in some sense linked such as by subject matter, and even more so if reference was made to them in the preparatory work, they may be treated as part of the history and warrant consideration as part of the circumstances of conclusion.

Even where reference is made to the Vienna rules, attribution to a particular rule may not be conclusive. For example, in the *Chilean Price Band* case, a WTO Panel referred to article 32 of the Vienna Convention in explaining its use of documents pre-dating the treaty which it was interpreting.[194] These documents were not, in its view, strictly part of the preparatory work, but they did shed light on what the negotiators intended to express in using certain terms of art. The Panel justified this on the basis that article 32 refers to the 'circumstances of conclusion of the treaty'. It quoted the observation of Yasseen in the ILC that:

> ... the very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—*all material which the parties had had before them when drafting the final text*.[195]

195 WT/DS207/R at para 7.35 and fn 536, citing [1966] *Yearbook of the ILC*, vol I, pt II, p 204, para 25, emphasis added by Panel.

p. 401 The Appellate Body considered that the panel had not correctly applied article 32, though as regards the scope of 'circumstances of conclusion', it noted that the parties had accepted that the material constituted information admissible under the rules of the WTO's Dispute Settlement Mechanism, even though one of them had not accepted that it was admissible as a supplementary means of interpretation.[196]

This left the position unclear but it is perhaps indicative of the rather free-ranging interpretation given to the Vienna rules in that courts and tribunals do make use of interpretative arguments involving comparison of characteristics of different treaties and associated material which may loosely be regarded as part of the circumstances of conclusion of the treaty in issue or which may simply be valuable illustrations when

seeking the meaning of a particular provision. Thus, for example, in the *Oil Platforms* case, the ICJ contrasted the types of treaties in which a general proposition affirming enduring peace and friendship is accompanied by procedural measures (explicit reference to certain provisions of the UN Charter, consultation between parties in certain circumstances such as an armed conflict with a third state, etc), and treaties such as the one in issue envisaging quite different matters (trade, consular relations, etc). Such comparison was for the purpose of identification of the object and purpose of the treaty, but seems to base itself on consideration of a wider range of materials which may be thought more aptly the province of supplementary means of interpretation.

4.5.3 Commentaries, explanatory reports, academic writing, etc

Commentaries, explanatory reports, and similar documents may be written at the same time as a treaty is being drawn up. Such material may be acknowledged in some way when a treaty is adopted or concluded, or it may be prepared after that stage. The descriptive terms for such materials are not uniformly applied, but the broad distinction is between those which are in some way linked with the preparation, conclusion, or implementation of a treaty and those which are prepared quite separately. The former may come within article 31(2)(a) or they may constitute part of the preparatory work. The latter category (quite separate material) may be admissible under article 31(3)(c) to the extent that it states international law as recognized in article 38 of the Statute of the ICJ. However, the subsidiary status given to such material in the Statute makes for a somewhat uneasy fit within the idea of 'rules of international law applicable in the relations between the parties'. This suggests that this material may be best viewed as within the category of supplementary means of interpretation, depending somewhat on its content.[197]

There are many sets of commentaries by the ILC and other bodies involved in preparatory work of treaties
p. 402 but these remain part of the preparatory work unless ↳ given some enhanced status at conclusion of a treaty. Of those specifically endorsed at the time of conclusion of treaties, prominent examples are the explanatory reports which accompany many of the conventions drawn up within the Council of Europe and those relating to Conventions drawn up by the Hague Conference on Private International Law.[198] An example of explanatory material developed in successive editions after the adoption of a treaty is the 'Handbook' promulgated by the UN High Commissioner for Refugees (UNHCR) in connection with the UN Convention on Refugees.[199] The precise basis for use of such materials is not always made clear.[200] While this may lead to failure to respect the distinction between the general rule and supplementary means of treaty interpretation, guides and commentaries are likely to contain a mixture of analysis of text, references to preparatory work, compilations of practice, etc. Their interpretative role is thus more likely to depend on which of these elements is being used than on their general character as a source of learning. The assumption seems to be that where an issue is covered in a commentary or explanatory report in a way
p. 403 which shows clearly the collective ↳ intention of those who drew up the treaty, this will be recognized as an aid to the correct interpretation.[201] This is also a possible source of guidance where treaties are based on model provisions, such as treaties for the avoidance of double taxation.[202] Where a treaty concerns a subject that is developing, arrangements may be made for continued production of explanatory and interpretative material.[203]

Commentaries written by independent experts may assume a role of almost equal value to those endorsed by the parties.[204] This may result in uncertainties of status as in the case of the 'Explanatory Report on the 1980 Hague Child Abduction Convention', prepared by Elisa Pérez-Vera and published by The Hague Conference on Private International Law (HCCH) in 1982.[205] Professor Pérez-Vera had been Rapporteur of the Commission which prepared the Convention, but her report was drawn up after the Convention's conclusion and frankly acknowledges that 'it is possible that, despite the [Rapporteur's] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective'.[206] It has nevertheless been influential in proceedings concerning child abduction.[207]

p. 404 The growing role of explanatory reports received recognition in the context of the Convention on International Interests in Mobile Equipment and its Protocol specific to Aircraft Equipment (2001) where a resolution in the Final Act mandated preparation of an 'official commentary' by the Chairman of the Drafting Committee, being 'CONSCIOUS of the need for an official commentary on these texts as an aid for those called upon to work with these documents and RECOGNISING the increasing use of commentaries of this type in the context of modern, technical commercial law instruments'.[208]

Likewise, academic guides and studies are often used by courts and tribunals to assist them in analysis of text, preparatory work, comparative case law, and argument on controversial issues.[209]

4.5.4 Other supplementary means

There are few references in case law linking material considered in judgments, decisions, and awards to supplementary means other than preparatory work and circumstances of conclusion; but it is clear that these are not the only supplementary means that are admissible, even if it is sometimes difficult to determine whether this or some other category in the Vienna rules is the most appropriate classification.

For example, some have seen maxims as supplementary means of interpretation. The history of treaty interpretation before the Vienna Convention is full of attempts to identify and list rules or 'canons' of interpretation, presumptions and 'maxims' (often graced with Latin, or in some cases French, expression). Chapter 2 above contains many pointers to the main literature on the subject and thence to much further material. Whether these items are now appropriately considered as other 'supplementary means' of interpretation is not clear. Some are better seen as useful adjuncts to the apparatus for identifying which ordinary meaning is to be given a term rather than supplementary means, but it is convenient to consider
p. 405 the present role of canons, presumptions, and maxims here in one place.[210] There is ↳ no authoritative definition of 'canons' of interpretation or construction, 'presumptions', or of 'maxims' in the specific context of treaty interpretation. Their usage sometimes makes them overlap, and their content and value is indeterminate.

The ILC in its preparatory work on the Vienna rules mostly avoided use of these terms. In its Commentary on the then draft articles to form the Vienna rules the Commission noted that some jurists 'express reservations as to the obligatory character of certain of the so-called canons of interpretation', and indicated that it had 'confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.[211] This endorsed the analysis by the ILC's Special Rapporteur, Sir Humphrey Waldock, who treated the principles and maxims of interpretation then in common use warily. Taking as examples ones frequently referred to in their Latin forms ('*ut res magis valeat quam pereat, contra proferentem, eiusdem generis, expressio unius est exclusio alterius, generalia specialibus non derogant*'), he characterized these as 'for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning', principles whose use was thus 'discretionary rather than obligatory'.[212] It is clear that the ILC's approach was to focus its own efforts on stating principles which could stand as rules.

Two categories of canons and maxims may be identified. The first consists of the type instanced by Waldock. These are certainly not excluded by the Vienna rules from use in the interpretative exercise; but, given that the rules are only a framework for treaty interpretation, leaving modalities of their application very much to the interpreter, these common principles of construction may be as useful in application of the general rule as they could be as supplementary means. A second, rather different, category comprises presumptions based on requirements of justice rather than techniques of construction. Examples of the latter category are presumptions of criminal law, such as the principles that a person should not be charged unless the alleged acts constituted a crime identified by law (*nullum crimen sine lege*) and the injunction that where there is

doubt to favour the accused (*in dubio pro reo*), which could be relevant to interpreting definitions of international criminal offences.[213]

One interpretative means of particular application in treaty interpretation, and still used by some interpreters, is the 'restrictive principle' (*in dubio mitius*).[214] It has been retained in Oppenheim, where examples and analysis are cited:

> The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of
> p. 406 states. If the meaning of a term is ambiguous, that meaning is to be preferred ↳ which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.[215]
>
> 215 R Jennings and A Watts (eds), *Oppenheim's International Law*, vol I (London: Longman, 9th edn, 1992), 1278 (footnote omitted); and see, eg, WTO Appellate Body *Report on EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB/R (1998), 64–65, para 70.

There have, nevertheless, long been grounds for questioning whether the restrictive principle should be applied to treaties which are primarily for the protection of individuals, such as human rights instruments.[216] More generally, however, the whole idea of a restrictive approach as a principle of interpretation has now become open to question in the light of observations by the ICJ in the *Navigational and Related Rights Case (Costa Rica v Nicaragua)*.[217] The Court indicated that it would make its interpretation in terms of customary international law as reflected in the 1969 Vienna Convention.[218] The court preceded its interpretation of a key disputed phrase with an indication that restrictive interpretation is not part of the general rule.

The case concerned the extent of Costa Rica's rights on the section of the San Juan river where the right bank, ie the Costa Rican side, marks the border between Costa Rica and Nicaragua pursuant to an 1858 'Treaty of Limits'. Nicaragua had argued that Costa Rica's right of free navigation for commercial purposes (*con objetos de comercio*) should be interpreted narrowly because it represented a limitation of the 'exclusive *dominium* and *imperium* over the waters of the San Juan river' (ie sovereignty) which was conferred on Nicaragua by article VI of the treaty. The Court was not convinced:

> While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. 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.
>
> A simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua's sovereignty over the river and Costa Rica's right of free navigation, characterized as 'perpetual', with each of these affirmations counter-balancing the other. Nicaragua's sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica's right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit 'perpetual', is granted only on condition that it
> p. 407 does not prejudice the key prerogatives of territorial sovereignty. ↳
>
> There are thus no grounds for supposing, *a priori*, that the words 'libre navegación … con objetos de comercio' should be given a specially restrictive interpretation, any more than an extensive one.[219]
>
> 219 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Reports 214 at 237–8, para 48; and cf *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment of 31 March 2014, para 58, where the ICJ, considering in particular the context and the treaty's object and purpose, stated:

> 'Taking into account the preamble and other relevant provisions of the Convention referred to above, the Court observes that neither a restrictive nor an expansive interpretation of Article VIII [the provision in issue] is justified'.

This firmly negates any idea that a restrictive approach should generally be taken to treaty provisions, even ones which concern matters near to the core of sovereignty such as those affecting territory. However, the indication in the judgment that restrictive interpretation has no '*a priori*' application seems not to rule out the possibility that if the normal process of treaty interpretation in accordance with the Vienna rules leads to a finely balanced outcome, the restrictive approach might still offer an element weighing in favour of the result which least impinges on the sovereignty of a protagonist which is being required to yield some right to another party.

A further approach which is now even more anomalous is the idea that an appeal can be made to the 'spirit' of a treaty. This notion has probably lost any role it once had in treaty interpretation, at least in that form.[220] However, it can be seen that the definition of 'context' in the general rule as including the whole text of a treaty allows account to be taken of the scheme and economy of a treaty; the reference to object and purpose there brings into consideration the aim of the treaty as a whole; and where the circumstances of conclusion come to be considered, these may indicate the motivation and ethos that generated the treaty's terms. Thus, the spirit may be revealed, but rather as inherent in the outcome of a more systematic approach to treaty interpretation.

One case in which 'other' supplementary means were specifically considered concerned reliance on a document which did not fall within any category in the general rule, and was not preparatory work. This was the investment arbitration *HICEE v Slovak Republic*.[221] The case concerned interpretation of a bilateral investment treaty (BIT) between the Netherlands and Czechoslovakia, the Slovak Republic being a party as successor to the latter state. At the preliminary phase the central issue was whether the phrase 'invested either directly or through an investor of a third State' applied to a company incorporated in the respondent state, that company being a subsidiary of another company incorporated there and owned by the foreign
p. 408 claimant (the ultimate holding thus being a 'sub-subsidiary'). ↳ Did 'directly' mean any investment was covered which an investor itself held in a state party to the BIT as contrasted with an investment there made through a holding company in a third state; or did 'directly' mean that the BIT covered an investor's subsidiary in the host state but not an investment held more remotely there, that is, as a sub-subsidiary? A contextual argument was derived from the contrast between holding 'directly' and through an investor of a third state. In other words 'directly' referred to an investment that was not made via a third state, but otherwise imposed no restriction on a chain of subsidiaries. For the majority, the general rule of interpretation did not resolve possible uncertainty. Such uncertainty was supported, or instigated, by a statement in Dutch Explanatory Notes produced from the archives of the respondent state (Slovakia):

> Normally, investment protection agreements also cover investments in the host country made by a Dutch company's subsidiary which is already established in the host country ('subsidiary'–'sub-subsidiary' structure). Czechoslovakia wishes to exclude the 'sub-subsidiary' from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such company. This restriction can be dealt with by incorporating a new company directly from the Netherlands.[222]

222 PCA Case No. 2009-11 (2011) at para 126.

The document containing this statement was not part of the preparatory work as it had been drawn up as part of the Dutch process for approval of the treaty. It could not be viewed as an agreement between the parties at the time of, or subsequent to, the conclusion of the treaty, there being no evidence of agreement by Czechoslovakia. Nor was there any evidence to suggest that the explanatory notes could amount to an

instrument made by one party in connection with the conclusion of the treaty and accepted by the other party as related to the treaty since there was no evidence of such acceptance.

The majority view of the tribunal was that the material should nevertheless be taken into account. It considered that the government of the Netherlands had, in the process of giving consent to the treaty, 'expressed itself formally, publicly, and in writing (with reasons) as to what had been intended by the key phrase', and the government of Slovakia in the arbitration espoused the same meaning.[223] The Tribunal noted that the material did not fall within categories enumerated in the Vienna rules but that did not mean it should be left out of consideration:

> To do so … would not … be reconcilable with the requirement that a treaty is to be interpreted 'in good faith', which the Vienna Convention consciously placed at the very head of the provisions dealing with interpretation. And the Tribunal recalls once more (as set out above) that the category of supplementary materials that a tribunal is authorized to have recourse to, 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 leaves the meaning ambiguous or obscure, is, on the terms of the Convention, not closed. The Tribunal is therefore in no doubt that the Dutch Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute ↳ valid supplementary material which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.[224]

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224 Award para 126, footnote omitted.

5. Conclusions

The supplementary means of interpretation indicated in the Vienna rules are not an exclusive list. They are 'supplementary' rather than subordinate. There is, however, a differentiation in their roles. When used 'to confirm' meaning they are of a lesser role that the general rule, but when used 'to determine' meaning they are dominant. They may always be considered to help in understanding a treaty and with a view to assessing their availability for one of the roles identified in article 32. Their admissibility in the operative reasoning of an interpretation is differentiated by function—that is, according to whether they are to *confirm* a meaning reached by applying the general rule or to *determine* the meaning of a treaty provision.

In the latter case supplementary means (most commonly preparatory work) may only be used if the result of deploying the general rule leaves the meaning ambiguous or obscure or produces a result which is manifestly absurd or unreasonable. These preconditions do *not* apply to use of preparatory work to confirm the meaning reached by application of the general rule, nor to its use for general understanding of the treaty.

The relationship between the general rule and the supplementary means of interpretation suggests that if preparatory work does not confirm the clear meaning given to a treaty provision by applying the general rule, the preparatory work is not to be taken into account. When applied in practice, however, the small amount of case law touching on this issue suggests that this is not what generally happens and some evaluation of the preparatory work takes place.

Application of the general rule tends in such cases not to produce so clear an outcome that strong evidence in preparatory work, and in the circumstances of conclusion, of a possible different meaning will be ignored. In practice, awareness of the preparatory work may reveal at an early stage the possibility of ambiguity.

Hence the general rule and supplementary means may in extreme cases operate like a see-saw, with the relatively much stronger element carrying preponderant weight. This may usually be justifiable on the basis

of the application of the general rule either producing a clearer outcome than that suggested in the preparatory work or producing a result that meets the preconditions set in article 32 for the preparatory work to be determinative. It should not be forgotten, however, that the general rule includes elements in its third paragraph which may lead away from meanings suggested by the preparatory work. The records of
p. 410 preparatory work are commonly inconclusive and are to be approached with considerable caution. ↳

Notes

1 Sir Humphrey Waldock, 'Sixth Report on the Law of Treaties' [1966] *Yearbook of ILC*, vol II, pp 99–100, para 20.

2 A D McNair, *The Law of Treaties* (Oxford: OUP, 2nd edn, 1961), 412.

3 See Chapter 1, section 3.4 and Chapter 3, section 4 above.

4 See Waldock, 'Third Report' [1964] *Yearbook of ILC*, vol II, p 52, draft articles 70 and 71.

5 See H W Briggs, 'The *Travaux Préparatoires* of the Vienna Convention on the Law of Treaties' (1971) 65 AJIL 705, at 709–10.

6 Statement of Professor McDougal, US Delegation, to Committee of the Whole, Vienna Conference, 19 April 1968, as reproduced at (1968) 62 AJIL 1021; the summary records set out a somewhat abridged and less colourful version of the statement: UN Conference on the Law of Treaties, Summary Records of First Session (26 March–24 May 1968), 167–8.

7 McDougal Statement, US Delegation, to Committee of the Whole, Vienna Conference, 19 April 1968, as reproduced at (1968) 62 AJIL 1021, at 1025.

8 The US proposal for an amendment combining the first two articles of the Vienna rules and placing all the elements on the same footing was rejected by 66 votes to 8, with 10 abstentions, UN Conference on the Law of Treaties, First and Second Sessions (1968 & 1969), Documents of the Vienna Conference (UN, New York, 1971), p 150, para 271(a). For an example of the ICJ treating explanations to a Diplomatic Conference by an ILC Special Rapporteur as an admissible part of the preparatory work, see the *Avena* case considered in section 4.1.2 below.

9 See, eg, J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) L NILR 267 and M Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 *B C Int'l & Comp L Rev* 111; but note that the former does not purport to take stock of the current position in an empirical fashion (at 269) and notes that 'interpretation consistently takes place with the help of the *travaux préparatoires*, but is rarely based on the *travaux préparatoires* alone' (at 288), while the latter reviews the case law of the ICJ mainly before it specifically endorsed use of the Vienna rules, suggesting that reference to supplementary means should be as part of the context of a treaty if requested by a party and that the ICJ and UN should have a role in identifying a collecting preparatory work (at 135); and see A I Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 3rd edn, 2012), 217–20.

10 McDougal Statement (1968) 62 AJIL 1021.

11 (1968) 62 AJIL 1012, at 1021–22.

12 62 AJIL 1012, at 1022.

13 62 AJIL 1012, at 1022; and cf J D Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 AJIL 780, at 810: 'McDougal's speech probably caused more confusion about treaty interpretation than any intervention on the subject before or since. He so badly mischaracterized the ILC draft—and did so with such flair…—that his description has taken on a totemic power that it does not deserve. In essence, he claimed that the ILC draft created a "preclusionary hierarchy" of sources that was "rigid and restrictive" in its celebration of the bare dictionary meaning of text that would take precedence over every conceivable countervailing factor, and that it "relegated" preparatory work to a "subordinate position" vis-à-vis every other source of meaning.' (footnotes omitted).

14 The *Oxford English Dictionary* gives as the fourth meaning (after three obsolete ones): 'The whole structure of a connected passage regarded in its bearing upon any of the parts which constitute it; the parts which immediately precede or follow any particular passage or "text" and determine its meaning.' But cf the example given in the OED of 'context theory': 'According to this theory, what a word means depends upon its connection in past experience with some other thing.' It would be in line with the approach of the Vienna rules, but not that of Professor McDougal, to point out that the first of these two definitions is given as the concrete usage originating some 400 years ago (and in continuing general use), while the latter is last in the list, after transferred and figurative senses, is an 'attributive and combination' usage, and was only a little more than 30 years old at the time of the Vienna Conference. Nevertheless, selection of the former as the ordinary use when interpreting the Vienna rules would not fulfil the requirements of those rules without also taking account of the context in the Convention (including the fact of reference to 'circumstances of conclusion' being a separate element), subsequent practice, and the preparatory work.

15 McDougal Statement (1968) 62 AJIL 1021, at 1022.
16 Waldock, 'Third Report on the Law of Treaties' [1964] *Yearbook of the ILC*, vol II, p 58, para 20.
17 [1964] *Yearbook of the ILC*, vol II, p 58, para 20 (footnotes omitted).
18 [1964] *Yearbook of the ILC*, vol II, p 58, para 21 (footnotes omitted, emphasis in original).
19 [1966] *Yearbook of ILC*, vol II, p 220, para 10.
20 Sir Humphrey Waldock, 'Sixth Report on the Law of Treaties' [1966] *Yearbook of ILC*, vol II, p 99, para 20.
21 [1964] *Yearbook of ILC*, vol I, p 314, para 65.
22 [1964] *Yearbook of ILC*, vol I, p 314, para 65.
23 [1966] *Yearbook of ILC*, vol I, pt II, p 270, para 34.
24 *Oxford English Dictionary* (1989) definitions 3.a and 4.a include the notion of resorting to someone or something for assistance or help, while the obsolete definition 5.a 'usual or habitual going or resorting to a place' captures the thought that preparatory work is something to which resort may be usual or habitual. It is also to be noted that the ICJ, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, faced with possible divergences between the English and French texts of the question that was posed, used 'recourse to nuclear weapons' to refer to the threat or use of nuclear weapons, thus suggesting that 'recourse' does not necessarily only mean actual use: [1996–I] ICJ Reports 226, at 238, para 20.
25 See section 2 above.
26 See section 2 above.
27 *OED* online 2012, definitions 1 and 2.
28 *OED* online entries.
29 See section 4 below.
30 The French text (*notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu*) may carry the slightly different, or additional, connotation that the preparatory work and the circumstances of conclusion are the most significant supplementary means.
31 Cf McNair, *The Law of Treaties*, Chapter XXII, and Aust, *Modern Treaty Law and Practice*, 220–1, listing further maxims and techniques commonly used by lawyers in interpretation.
32 See further section 4.5.4 below.
33 Commentary on draft articles [1966] *Yearbook of the ILC*, vol. II, p. 220, para (10), emphasis in original.
34 [1966] *Yearbook of the ILC*, vol II, p 220, para 10.
35 See also sections 2.1 and 2.3 above.
36 See J D Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 AJIL 780, at 786.
37 It is wide of the mark to treat these gateways as simply factors affecting the meaning of the terms in question; see, for example, in assessing whether an attempt to secure local remedies was a prerequisite to arbitration of an investment dispute, the assertion that: 'As a matter of treaty interpretation, however, [the disputed provision] cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd or unreasonable result proscribed by Article 32 of the Vienna Convention …': *BG Group Plc v Argentina* (UNCITRAL) Final Award of 24 December 2007, at para 147. The Vienna rules make no such proscription but enable a court or tribunal carrying out a proper interpretative exercise to have recourse to supplementary means to determine the meaning in such a situation.
38 *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625.
39 [2002] ICJ Reports 625, at para 51.
40 [2002] ICJ Reports 625, at para 53.
41 [2002] ICJ Reports 625, paras 56–58. The Court then considered subsequent practice of relevant parties, including publication of maps.
42 *Case concerning Avena and other Mexican Nationals (Mexico v USA)* [2004] ICJ Reports 12.
43 [2004] ICJ Reports 12, at 48, para 83.
44 [2004] ICJ Reports 12, at 48, para 84.
45 [2004] ICJ Reports 12, at 48, para 85.
46 [2004] ICJ Reports 12, at 48–49, para 86.
47 [2004] ICJ Reports 12, at 47, para 80, and at 48–49, paras 86–88.
48 *Case concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [2002] ICJ Reports 63, at 68–72, paras 19–31; the majority judgment did not address this matter; for another example of incidental reference to preparatory work, see *Re Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, at 799, where the House of Lords recounts preparatory work of a Hague Convention showing that no difficulty had

arisen in practical application of bilateral agreements on the same subject despite differences among states in their national law over meaning of 'civil and commercial matters'.

49 *Arrest Warrant* case, Joint Separate Opinion, [2002] ICJ Reports 63, at para 41.

50 See, eg, [2002] ICJ Reports 63, at paras 27 and 35.

51 See, eg, references to UNHCR *Handbook* section 4.5.3 below; C H Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge: CUP, 2001); and *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501 FC 91/026, at para 105.

52 See, eg, the WTO Appellate Body: 'We observe, as a preliminary matter, that this appeal does *not* raise the question whether…[two Secretariat documents] constitute "supplementary means of interpretation…". Both participants agree that they do, and we see no reason to disagree.' *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of 7 April 2005, WT/DS285/AB/R, para 196, and for further on this case, see sections 4.3.1 and 4.4.1 below.

53 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), (Preliminary Objections)*, [2011] ICJ Reports 70, at 128–9, paras 142–6, at para 142 listing previous cases in which the practice of examination to confirm a meaning had been followed.

54 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), (Preliminary Objections)*, at 130, para 147.

55 [1994] ICJ Reports 6.

57 [1994] ICJ Reports 6, at 27–28, para 55.

58 Application no 52207/99, Decision on Admissibility (2001).

62 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), (Jurisdiction and Admissibility)* [1995] ICJ Reports 6; and see Chapter 5, section 2.4.1 above, for the role of 'good faith' in interpretation in this case.

63 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility)* [1994] ICJ Reports 112.

64 [1994] ICJ Reports 112, para 34.

65 [1994] ICJ Reports 112, para 30, in the translation used by the Court from the Arabic.

66 Such joint applications following the special agreement of the parties ('compromis') are denoted in the practice of the Court by the names of the parties being separated by '/' rather than the 'v' used where a party has unilaterally brought the case without there being a compromis.

67 [1994] ICJ Reports 112, para 40.

69 [1995] ICJ Reports 27.

70 [1995] ICJ Reports 27, at 38.

71 [1995] ICJ Reports 27, at 33.

73 [1995] ICJ Reports 27, at 37.

74 See para 41 of judgment, *ad fin.*

75 Schwebel, dissenting, [1995] ICJ Reports 27, at 39.

76 [1995] ICJ Reports 27, at 39.

77 S Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (The Hague: Kluwer, 1996) 541, republished electronically at <http://www.transnational-dispute-management.com>, *Transnational Dispute Management*, vol 2, no 5 (Nov 2005); and for a response, see M H Mendelson, 'Comment on "May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?"', *Transnational Dispute Management*, vol 2, no 5 (Nov 2005). The problem appears to have been tackled head on (but not with specific reference to the Vienna rules) by the Swiss Federal Supreme Court in *Bosshard Partners Intertrading AG v Sunlight AG* [1980] 3 CMLR 664, at 674–75, para 21: 'If the wording is clear and its meaning, as it appears from the ordinary use of language and the subject and purpose of the treaty, is not patently contrary to sense, a differing interpretation only comes into question if it must be inferred with certainty, from the context or the legislative history of the treaty, that the contracting States had an agreed intention which differs from the wording' (footnote omitted). Since no authority or example is given in support of this assertion, it would be difficult to sustain in the face of the Vienna rules.

78 Schwebel, 'May Preparatory Work be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?' 547.

79 See references to records of ILC in sections 2.2 and 2.3 above.

80 See sections 1 and 2.3 above.

81 [1964] *Yearbook of ILC*, vol I, p 313, para 56.

82 [1964] *Yearbook of ILC*, vol I, p 313, para 57.

84 See *Litwa v Poland* in Chapter 1, section 5.1 above.

85 See *Hiscox v Outhwaite* considered in Chapter 1, section 5.4 above; and see below. It is to be noted that in *Hiscox v Outhwaite* the higher courts in the UK reached their conclusion without the benefit of the Vienna rules; but the facts are helpful as illustrating how proper use of the Vienna rules in academic analysis of the problem had assisted the court of first instance to a conclusion in line with the eventual legislation that was required to reverse the interpretation given by the higher courts.

86 Further examples of preparatory work in apparent conflict with an interpretation reached by application of the general rule of interpretation are *Young, James and Webster v UK* (ECtHR) Application nos 7601/76 and 7806/77, Judgment of 13 August 1981 (considered further in Chapter 10, section 5.1 below) and investment arbitrations following *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case No. ARB/00/4 (Decision on Jurisdiction, 16 July 2001) (see further Chapter 10, section 6.2.1 below).

87 For a realistic approach to the situation where material providing supplementary means of interpretation may itself have been the trigger for finding ambiguity, see *HICEE B.V. v Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, relevant extract in section 4.3.1 below.

88 Section 2.2 above.

89 See section 2.2 above.

90 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136.

91 [2004] ICJ Reports 136, at 173, para 91.

92 [2004] ICJ Reports 136, at 174, para 95.

93 [2004] ICJ Reports 136, at 174, para 95 (emphasis added).

94 [2004] ICJ Reports 136, at 174, para 95.

95 [2004] ICJ Reports 136, at 174, para 95.

96 See especially [2004] ICJ Reports 136, at 175, para 96. See also the comparable interpretative exercise referring to the intention of the drafters of the International Covenant on Civil and Political Rights, in paras 108–9 of the same advisory opinion. For other explicit references to seeking intention via preparatory work, see: *Pope & Talbot v Canada (Award in respect of Damages)* (NAFTA) (2002) 41 ILM 1347, at 1357, para 26: '…it is common and proper to turn to the negotiating history of an agreement to see if that might shed some light on the intention of the signatories', and *Klöckner v Cameroon* (ICSID Ad Hoc Committee on Annulment, 3 May 1985) 114 ILR 152, at 286, paras 118–19: 'The preparatory works of the Convention seem to indicate that the intention was to limit the institution of annulment proceedings.'

97 *Case concerning Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Reports 279, and see also other cases by the same Applicant on *Legality of Use of Force (Serbia and Montenegro v Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom) (Preliminary Objections)* [2004] ICJ Reports where the same wording recurs.

99 *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69, at 85, para 37.

100 *Vacuum Salt v Ghana* ICSID Case No ARB/92/1, (1994) 4 ICSID Rep 329, at 337–38, para 29, fn 9.

101 (1994) 4 ICSID Rep 329, at 337–38, para 29, fn 9.

102 See, eg, *Litwa v Poland* in Chapter 1, section 5.1 above.

103 99 ILR 103, 734 F 2d 905 (1984) (Sup Crt, certiorari denied).

104 99 ILR 103, 734 F 2d 905 (1984), at 106 and 907, respectively.

105 Cf G G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Points' (1957) 33 BYBIL 203, at 216 suggesting a threshold in relation to ambiguity: 'It is…not sufficient in itself that a text is *capable* of bearing more than one meaning. These meanings must be equally valid meanings, or at any rate, even if one may appear more possible and likely than the other, both must attain a reasonable degree of possibility and probability, not only grammatically but as a matter of substance and sense' (original emphasis).

106 *Oxford English Dictionary*.

107 *Case concerning Avena and other Mexican Nationals (Mexico v USA)* [2004] ICJ Reports 12, at 48, para 84, considered further in section 4.1.2 above.

108 [2004] ICJ Reports 12, at 48–9, paras 84–88.

109 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, para 165 and fn 193, also noting that: 'Some of the definitions appear to contradict one another. For instance, the *Shorter Oxford English Dictionary* definition quoted by the Panel defines "sporting" as both "characterized by sportsmanlike conduct"; and "[d]esignating an inferior sportsman or a person interested in sport from purely mercenary motives" ', and see further on this case section 4.4.1 below.

110 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, at para 195.

111 *HICEE B.V. v Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011; for further consideration of this case, see

section 4.5.4 below.

113 305 F.3d 989 (9th Cir. 2002), at 995, certiorari denied 537 U.S. 1227.

114 305 F.3d 989, at 994–6; for the use made of the preparatory work, circumstances of conclusion, and the further approach of the Court in finding that the option of the plaintiff prevailed, see section 4.4.2 below.

116 Absurdity was explicitly cited as a ground for using supplementary means in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body, Report of 7 April 2005, WT/DS285/AB/R, at para 236, but ambiguity had been found as well: see further section 4.4.1 below; see also *Indonesia—Certain Measures affecting the Automobile Industry*, WTO Panel, Report of 2 July 1998, at paras 5.332 ff, where a WTO Panel used the absurdity of the consequences of one party's argument as a ground for examining the preparatory work.

117 See citations and analysis in the *Rhine Chlorides case (Netherlands v France)*, Arbitral Award of 12 March 2004, 144 ILR 259, at 297–99, paras 73–76, considered further in Chapter 1, section 5.2 above.

118 See, eg, *Pope & Talbot v Canada (Merits Phase 2)* (2000) (NAFTA), 122 ILR 352, at 384, para 118, fn. 115 and *(Award in respect of Damages)* (2002) 41 ILM 1347 at 1350, where the tribunal relied on the argument against an interpretation that it would produce a result which was absurd in the sense of article 32 of the Vienna Convention because another provision in the treaty would apply to produce exactly the result of the interpretation in issue; and in similar vein: *Ethyl Corp v Canada (Jurisdiction)* (NAFTA) (1999) 38 ILM 708, at 728–29, para 85, and 734, fn 34.

119 ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003.

121 [1992] 1 AC 562 and see Chapter 1, section 5.4 above.

122 See Chapter 1, section 5.4.

123 ECHR App no 26629/95 (judgment of 4 April 2000); see fuller account in Chapter 1, section 5.1 above.

124 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R.

125 WT/DS285/AB/R, at paras 196 and 207.

126 Chapter 1, section 5.4 above.

128 See *Re Council Regulation (EEC) 1768/92 and Council Regulation (EC) 1901/2006, re Application No. SPC/GB/95/010 by E I du Pont Nemours & Co for an extension of an SPC* [2009] EWHC 1112, at para 17 where the test, in its application to European Community legislation, was based on it elaboration in *Higgs v R* [2008] EWCA Crim 1324. There the wording in issue was traced back to two treaties; the decision was reversed on appeal but without reference to the account to be taken of preparatory work: [2009] EWCA Civ 966. Other references to the bull's eye test include: *Bayerische Motoren Werke AG v Round & Metal Ltd* [2012] EWHC 2099 (Pat), at paras 61–3; *Fortis Bank S.A./N.V. v Indian Overseas Bank* [2011] EWCA Civ 58, para 51; *Green Lane Products v PMS International Group* [2008] EWCA Civ 358, at para 74 (CA); *Nova Productions v Mazooma Games* [2007] RPC 589, at 603, para 42 (CA); *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, at 45; *Serena Navigation Ltd and Another v Dera Commercial Establishment and Another (The "Limnos")* [2008] 2 Lloyd's Rep. 166, at 168 and 171.

129 See sections 2.2 and 2.3 above.

130 [1992] 1 AC 562, and see the study of this case in Chapter 1, section 5.4 above.

131 *Aerotel Ltd v Telco Holdings Ltd and others* [2007] 1 All ER 225 at 232, para 11.

132 [2007] 1 All ER 225 at 232, at paras 11, 12 and at 238, para 38.

133 *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* WT/DS177/R (2000).

134 Safeguards Agreement, article 4.1(c).

135 *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* WT/DS177/R (2000) at para 7.67 (original emphasis).

136 WT/DS177/R (2000) at para 7.109.

137 WT/DS177/R (2000) at para 7.110–14.

138 A good example of a record in preparatory work of an apparently clear exclusion of a proposed right which nevertheless was not determinative of an interpretation issue is in the case of *Young, James and Webster v UK* at the ECtHR, cited and considered below in Chapter 10, section 5.1 below. See also the academic discussion of the interpretative consequences of exclusion of a provision of chemical weapons from the Statute of the International Criminal Court, Rome, 1998 considered below in Chapter 10, section 5.2 below.

139 See section 4.2.2 above.

140 305 F.3d 989 (9th Cir. 2002), certiorari denied 537 U.S. 1227; for details of the treaty provisions in issue and the Court's finding of ambiguity see section 4.3.1 above.

141 305 F.3d 989 (9th Cir. 2002) at 996.

142 305 F.3d 989 (9th Cir. 2002) at 997.

143 305 F.3d 989 (9th Cir. 2002) at 997.

144 Second International Conference on Private Aeronautical Law, 4–12 October 1929, Minutes translated by R. Horner and D Legrez (1975) at 299.
145 Second International Conference on Private Aeronautical Law, 4–12 October 1929, 169.
147 305 F.3d 989 at 999.
148 305 F.3d 989 at 999.
149 305 F.3d 989 at 999.
151 See section 4.4.1 above.
152 On use of preparatory work to produce a different result in relation to the Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 1999, see *Pierre-Louis v Newvac* 584 F.3d 1052 (US Court of Appeals 11th Cir, 2009), where the Court upheld rejection of jurisdiction on the ground that a French court in Martinique was the appropriate forum; the French then court rejected jurisdiction on the basis that the plaintiff had opted for the US court and that precluded their jurisdiction under the Montreal Convention, but the US Court of Appeals nevertheless refused to allow the Florida court's decision on *forum non conveniens* to be set aside: *Galbert v West Caribbean Airways* 715 F.3d 1290 (US Court of Appeals, 11th Cir, 2013).
153 See, eg, *Re Attorney-General and Ward* 104 ILR 222 at 237, where the Canadian Supreme Court, when considering whether state complicity in persecution is a prerequisite to a valid refugee claim under the Refugee Convention, found no evidence in the drafting history suggesting that persecution was linked to state action: 'The omission of a reference to state action does not tell us much, however. The question was apparently never discussed, and the text does not reveal that any link to state action is required.'
154 See, eg, *European Molecular Biology Laboratory Arbitration (EMBL v Germany)*, Award of 29 June 1990, 105 ILR 1 at 55–56, where the tribunal stated that had there been 'a common intention to grant the Director-General the unrestricted legal status of the "diplomatic agent" [this] would have clearly surfaced during the negotiations. As the parties were not able to present minutes on the framing of the HQA, the question would have had to remain open.' For further consideration of this case, see Chapter 6, section 3.2.
155 ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee in Annulment Proceedings, 3 October 2001.
156 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965, article 6.
157 ICSID Case No ARB/97/3 (2001), para 12.
158 ICSID Case No ARB/97/3 (2001), paras 9–13.
159 *Oil Platforms (Iran v USA) (Preliminary Objections)* [1996] ICJ Reports 803.
160 [1996] ICJ Reports 803 at 812, para 25.
162 See, eg, *LaGrand (Germany v USA)* [2001] ICJ Reports 466, where the ICJ traced the parallel changes in the development of the French and English texts of part of its statute with explanations where these were recorded (see further Chapter 9, sections 4.4, 4.5, and 4.9 below; see also, in like vein, *Litwa v Poland* (ECtHR), considered in Chapter 1, section 5.1 above; and *Casado v Chile* ICSID Case No ARB/98/2, Award of 25 September 2001, where an arbitral tribunal considered the indication in preparatory work of how the term 'prescribe' had ended up as 'recommend', describing such recourse as debatable ('*la methode, discutable, d 'interprétation*'), at para 18.
163 See section 4.2.2 above; see also *Tariffs Applied by Canada to Certain US-origin Agricultural Products* NAFTA Arbitral Panel (Secretariat File No CDA-95–2008-01) Final Report of the Panel 2 December 1996 at para 153.
164 See, eg, *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1 at 46, para 52.
165 *Case of the SS 'Lotus' (France v Turkey)* PCIJ (1927), Series A, No 10, pp 16–17.
166 [1964] *Yearbook of the ILC*, vol I, p 283, para 17.
167 Cf J Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) L NILR 267, discussing the ambivalence of lawyers towards preparatory work, and indicating that 'recourse to historical origins is so pervasive that the qualification of *travaux préparatoires* as mere supplementary means of interpretation seems rather inadequate' (at 284).
168 *LaGrand (Germany v United States of America)* [2001] ICJ Reports 466.
169 [2001] ICJ Reports 466 at 492–3, para 75.
170 [2001] ICJ Reports 466 at 493, para 76.
171 [2001] ICJ Reports 466 at 494, para 76.
172 [2001] ICJ Reports 466 at 494, paras 77–78.
174 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Appellate Body Report of 7 April 2005, WT/DS285/AB/R, paras 169–78 and see further on this case in section 4.4.1 above.
175 See Chapter 1, section 5.1 above.
176 *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Reports 69.

178 *Banro American Resources, Inc. and Société Aurifére du Kivu et du Maniema SARL v Democratic Republic of the Congo* ICSID Case No ARB/98/7, Award of 1 September 2000.

182 See further G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford: OUP, 3rd edn, 2007), Chapter 5 and UNHCR, Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol [2007] *European Human Rights LR* 484.

183 The dissenting view of Blackmun J relied (in part) on the proposition that oral statements of treaty negotiators are only conditionally admissible: '…even the general rule of treaty construction allowing limited resort to *travaux preparatoires* "has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." …' (509 US at 195, citation omitted). In the light of the conference president's direction that the interpretation be recorded, it seems difficult to view it as 'not embodied in any writing', even though there may be considerable doubts whether the process amounted to endorsement by the conference.

184 (1987) 9 EHRR 203.

186 (1987) 9 EHRR 203 at 219, para 52.

187 [2004] ICJ Reports 279 at 314–15, para 91 and other cases by the same applicant on the same matter.

188 [2004] ICJ Reports 279 at 323, para 113.

189 [2004] ICJ Reports 279 at 323, para 113.

190 See also *Oil Platforms (Preliminary Objection)* [1996] ICJ Reports 803 at paras 24 ff where the parties referred to the circumstances in which the Treaty of Amity, Economic Relations and Consular Rights had been negotiated, though the Court did not single these circumstances out from other factors when examining the history of the treaty and making comparisons with others of a similar kind; see further section 4.4.3 above.

191 *Tariffs Applied by Canada to Certain US-origin Agricultural Products* NAFTA Arbitral Panel (Secretariat File No CDA-95–2008-01), Final Report of the Panel, 2 December 1996.

192 *Tariffs Applied by Canada*…, Final Report of the Panel, 2 December 1996 at paras 154 and 179.

193 See, eg, *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625 at 653–56, paras 53–58.

194 *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products* WT/DS207/R, 3 May 2002, para 7.35, fn 596.

196 *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, AB-2002–2, (2002) WT/DS207/AB/R at para 230 and fn 206.

197 See Chapter 7, section 3.2.2 above.

198 See Council of Europe Treaty Series (formerly European Treaty Series) at <http://conventions.coe.int/>.

199 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1992. The Handbook has been used in interpretation of the UN Convention on Refugees on several occasions in English and other courts, Lord Bingham noting that it 'is recognised as an important source of guidance on matters to which it relates', *Sepet and Another v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856 at 864; and see *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477 at 490 (House of Lords), citing and quoting the preambular reference to the Handbook in 'Joint Position of the European Union' adopted on 4 March 1996 (OJ 1996 L 63, p 2). However, the Handbook takes account of practice of states and their communications with the UNHCR and may therefore be seen as reflecting subsequent practice or agreed implementation, rather than supplementary means of interpretation; but cf *Chan Yee Kin v Minister for Immigration* 90 ILR 138 (Australia HC, 1989), per Mason CJ at 145: 'I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention'; *Ward v Attorney General of Canada* [1993] 2 SCR 689 (Supreme Court of Canada) 103 DLR (4th) 1, para 34: 'While not formally binding on signatory states, the Handbook has been endorsed by the states which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states'; and *Sale v Haitian Centers Council* 509 US 155 (1993) (US Supreme Court) at 182 and 197.

200 See, eg, *R v Secretary of State for the Home Department, Ex parte Read* [1989] AC 1014 at 1052 where the UK House of Lords referred to the Explanatory Report on the Convention on the Transfer of Sentenced Persons: 'Although it does not purport to be an authoritative interpretation of the Convention, it is available as an aid to construction as part of the "travaux preparatoires" and under article 31 of the Vienna Convention…'; cf *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1 at 44–45, para 48, per Lord Steyn: 'But the explanatory report has great persuasive value in the process of interpretation. For example, it is a basis on which states sign and ratify the Protocol. Inevitably, state practice will be based on the explanatory report, and in this way it becomes directly relevant to the interpretation of article 14(6): article 31(3)(b) of the Vienna Convention on the Law of Treaties'; Advocate-General Jacobs in *In re Eurofood IFSC Ltd* [2006] Ch 508 at 511 on interpretation of the Regulation successor to the European Union Convention on

Insolvency Proceedings stated: 'I consider that the explanatory report on the Convention written by Professor Miguel Virgos and Mr Etienne Schmit ("the Virgos-Schmit report") may provide useful guidance when interpreting the Regulation (…the Virgos-Schmit report "was discussed extensively and agreed to by the expert delegates but, unlike the Convention, was not formally approved by the Council of Ministers. Nevertheless, it will have considerable authority for courts in member states"). (Similarly the Court of Justice has on countless occasions referred to the explanatory reports on the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (principally the Jenard report (OJ 1979 C 59, p 1) and the Schlosser report on the Convention on the Accession of Denmark, Ireland and the United Kingdom to the Brussels Convention (OJ 1979 C 59, p 71))'; and *Malachtou v Armefti* 88 ILR 199 at 215 (Cyprus Supreme Court), referring to the European Convention on the Legal Status of Children Born out of Wedlock: 'The Explanatory Report is a supplementary means of interpretation.'

201 See Lord Steyn, *ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1.

202 These may be based on the OECD model to which reference is made in numerous cases, together with commentary; see, eg, *Staatssecretaris van Financiën v X* (Netherlands, Hoge Raad) 5 ITLR 818, paras 3.6 and 3.7 referring to explanatory notes and commentary to tax treaties, and *National Westminster Bank plc v USA* (US Court of Federal Claims) 6 ITLR 292 at 304: 'Both this court and others have recognised that the Organisation for Economic Co-Operation and Development's (OECD's) 1977 Model Double Taxation Convention on Income and on Capital (the model treaty) and the accompanying Explanatory Commentary on Article 7 Concerning the Taxation of Business Profits (the Commentary) serve as a meaningful guide in interpreting treaties that are based on its provisions…'; but cf *Russell v Commissioner of Taxation* (Federal Court of Australia) 13 ITLR 538, *Commissioner of Taxation v SNF (Australia) Pty Ltd* (Federal Court of Australia) [2011] FCAFC 74, and see further F Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications BV, 2004) at 439 ff.

203 See, eg, International Convention on the Harmonized Commodity Description and Coding System, Brussels, 14 June 1983 [1988] ATS 30, articles 6–7 setting up a committee whose functions include preparing 'Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System', considered in *Turbon International GmbH v Oberfinanzdirektion Koblenz* (ECJ Case C-250/05) [2006] All ER (D) 384.

204 See, eg, the 'Commentary on the Refugee Convention, Articles 2–11, 13–37' by Professor Grahl-Madsen (republished by the UNHCR Department of International Protection, October 1997) and references to that work in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at para 69, *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1 at paras 13, 14, 17, and 70 and *In re B (FC) (2002), R v Special Adjudicator ex parte Hoxha* [2005] UKHL 19, [2005] 4 All ER 580 at paras 15 and 68.

205 *Actes et documents de la Quatorzième session* (1980), HCCH Publications (1982), <http://www.hcch.net/upload/expl28.pdf>.

206 *Actes et documents de la Quatorzième session*, p. 428.

207 See the many cases logged on the HCCH database (INCADAT) as referring to the Report, and cf *Abbott v Abbott* 130 S.Ct. 1983 at 1995,where the US Supreme Court noted that the Federal Register identified the Pérez-Vera Report as the 'official history' of the Convention and 'a source of background on the meaning of the provisions of the Convention', but found that it, the Court, 'need not decide whether this Report should be given greater weight than a scholarly commentary', though it nevertheless pointed out that the Report supported the interpretation which the Court adopted; see Chapter 4, section 4.2.3 above for further consideration of this case.

208 See R Goode, *Cape Town Convention and Aircraft Protocol Official Commentary* (UNIDROIT, 3rd edn, 2013).

209 See, eg, *K v Secretary of State for the Home Department* [2007] 1 All ER 671 at 684, where Lord Bingham noted that the consensus in the case law (that for the purposes the UN Convention on Refugees a family group could be a particular social group) was clearly reflected in academic literature which he cited; and see *Attorney General v Zaoui* [2006] 2 LRC 206 (NZ Supreme Court) at 220 ff, where the judgment tracks the Vienna rules, taking in academic and other materials at appropriate stages; see also the endorsement by Lord Steyn of Bossuyt's 'Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights' in *R v Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, [2005] 1 AC 1; and see *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* ICSID Case No. ARB/12/14 and 12/40 (Decision on Jurisdiction, 24 February 2014) at paras 182–88 on use of 'doctrinal writings'.

210 See Aust, *Modern Treaty Law and Practice*, 220–1 where the maxims are considered as supplementary means of interpretation.

211 [1966] *Yearbook of the ILC*, vol II, p 218–9, paras 1 and 4–5. An early draft considered by the ILC did single out a specific canon or maxim for inclusion as a separate article headed 'Effective interpretation of the terms: *ut res magis valeat quam pereat*'. This was rejected on several grounds, the chairman stating as a summary: 'In so far as it stated a logical rule, it was in any case implicit in the earlier provisions…of the draft and there was perhaps no need to state it explicitly'. [1964] *Yearbook of the ILC*, vol I, p 288–91, and conclusion at p 291 para 119.

212 Waldock, 'Third Report on the Law of Treaties' [1964] *Yearbook of the ILC*, vol II, p 54, paras 5–6.

213 See Chapter 10, section 4.2 below.

214 On restrictive interpretation see Chapter 2, section 6 above.

216 See A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 EJIL 529, where an analysis is made in the light of the Vienna rules.

217 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Reports 214.

218 [2009] ICJ Reports 214 at 237, para 47.

220 See references to the spirit of a treaty in *Case of the SS* "*Wimbledon*" (PCIJ) (1923) Series A, no 1, 23; Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations* [1948] ICJ Reports 57 at 63; *Interpretation of Peace Treaties* [1950] ICJ Reports 221 at 228–29; *South West Africa (Preliminary Objections)* [1962] ICJ Reports 319 at 336; *AAPL v Sri Lanka* (ICSID) 106 ILR 417 at 445, paras 51–52, *New Zealand Maori Council v AG* (NZ Court of Appeal) 120 ILR 462 at 544; and see J Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 *Nordic JIL* 405 at 421 ff.

221 *HICEE B.V. v Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011.

223 Award para 126.