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Précis Paper

Treaty Interpretation: Rules and Methods

This is a comprehensive analysis of the principles relating to treaty interpretation in international law and the application of international treaties in the domestic context.

Discussion Includes

- The nature of international law and the role of treaties
- The Vienna Convention on the Law of Treaties
- Other sources of rules governing the interpretation of treaties
- The creation of treaties
- The rules of treaty interpretation
- Use of international law in Australian courts
- Interpretation of treaties by Australian courts

Précis Paper

Treaty Interpretation: Rules and Methods

1. In this edition of BenchTV, Dr Stephen Tully (Barrister, 6th Floor St James Hall Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly and Company) discuss the principles relating to treaty interpretation.

The Nature of International Law and the Role of Treaties

2. International law comprises a system of rules and principles that govern the international relations between States and other institutional subjects of international law. States, being members of a community, recognise that there is a body of rules binding upon them as law.

3. The absence of a 'police force' or compulsory court of general competence does not mean that international law is ineffective. International law is effective because it is based on common self-interest and necessity (ie rules are needed for the international community to function). However, the content of the rules of international law can be uncertain.

4. Treaties are a formal source of international law, and create binding obligations on States as a matter of international law. Practitioners should look at two aspects: (1) Is Australia bound by the treaty?; and (2) Have there been any modifications to that treaty in terms of interpretive declarations or reservations that change the legal effect of the treaty?

5. Treaties are also a basis for establishing the jurisdiction of the International Court of Justice.

The Vienna Convention on the Law of Treaties 1969

6. The *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331 ("VCLT") addresses interpretation, application, withdrawal, validity, treaty formation, reservations, and the applicability of treaties to third parties. The VCLT is the first point of reference for questions on interpretation of treaties.

7. The VCLT applies in the following situations:

    - The document must be a 'treaty' and not another instrument. A treaty is defined as an international agreement concluded between States in written form and governed by international law, whether embodied in one or more instruments and whatever its particular designation: Art 2(1)(a), VCLT. A 'treaty' can be distinguished from an 'instrument of less than treaty status', where the parties do not intend to create legal rights or obligations or a legal relationship between themselves (eg

memoranda of understanding, arrangements or declarations). An example of such a document is the bilateral Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, considered in *Plaintiff M70/2011/Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

- The treaty must be between 'States', and not between other international actors.
- The VCLT only applies to treaties which entered into force after 27 January 1980. However, many of its provisions (including the rules on treaty interpretation) reflect customary international law.
- The rules of international law applicable to multilateral treaties (eg treaty interpretation) also apply to bilateral treaties.

8. Articles 31 and 32 of the VCLT codify customary international law on the correct approach to treaty interpretation and are applied as such by Australian courts: *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74, at [113]. Although the VCLT has not been legislatively enacted under Australian law, it has been applied on the basis that it is declaratory of customary international law. Treaties must also be interpreted within the wider context of international law: see Art 31(3).

9. Every treaty in force is binding upon the parties to it and must be performed by them in good faith: Art 26, VCLT (otherwise known as the rule of *pacta sunt servanda*). This principle is also well established as a rule of customary international law.

<u>The Creation of Treaties</u>

10. Treaties are signed by States and not governments or individual ministries – the internal division of responsibilities is left to national law. In Australia, the power to conclude treaties is conferred on the executive under s 61, *Constitution*. The treaty will be given effect under Australian law by Parliament under s 51(xxix), *Constitution*.

11. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if he or she produces appropriate full powers: Art 7, VCLT. "Full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty: Art 2(1)(c), VCLT. Certain individuals (eg heads of State) are deemed to represent their State: Art 7(2), VCLT. National law cannot be invoked to justify a failure to perform a treaty: Art 27, VCLT.

12. Under Australian law, ratification of a treaty is considered to be an executive act which has no direct legal effect upon Australian law: *Dietrich v The Queen* (1992) 177 CLR 292, Mason CJ and McHugh J at 305. However, more recent caselaw has suggested that the act is a 'positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]': *Minister for Immigration & Ethnic Affairs v Teoh (Teoh's Case)* (1995) 183 CLR 273, per Mason CJ and Deane J at 291.

The Rules of Treaty Interpretation

13. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (a rule of *jus cogens*). For the purposes of the VCLT, a peremptory norm of general international law is a norm accepted and recognised 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: Art 53, VCLT.

14. A treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose: Art 31(1), VCLT. A special meaning is given to a term of a treaty if the parties intended: Art 31(4), VCLT. Context includes the preamble, annexes and any agreement or instrument between the parties which relates to the conclusion of a treaty: Art 31(2), VCLT.

15. Treaty interpretation is a "holistic exercise": *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, Brennan CJ agreeing with McHugh J at 230-1, Dawson J at 240, McHugh J at 251–256, and Gummow J agreeing with McHugh J at 277. However, it is important to bear in mind how a treaty is drafted: as the product of diplomatic negotiations and political compromise, treaties are "not expressed with the precision of formal domestic documents": *The Commonwealth v Tasmania* [1983] 158 CLR 1.

16. Where treaties are drafted in more than one language, Art 33, VCLT provides:

- Unless the parties agree otherwise, the text is equally authoritative in each language;
- The terms of the treaty are presumed to have the same meaning in each authentic text; and
- In the event of a difference in meaning, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Use of International Law in Australian Courts

17. Subject to any contrary legislative direction, treaties are to be interpreted by Australian courts in accordance with Art 31, VCLT: *SZOQQ v Minister for Immigration and Citizenship* [2011] FCA 1237 at [22].

18. In *Zhang v Zemin* [2010] NSWCA 255, the Court held that even if there is a conflict between Australian law and international law, the Court is obliged to apply the Australian statute in accordance with its terms. As there was no ambiguity in the statute in this case, there was no need to have recourse to a rule of jus cogens.

19. However, where legislation is ambiguous or obscure, Australian courts can have regard to international law to assist them in interpreting Australian law. A treaty provision must be capable of providing assistance in construing the meaning and effect of national law: *Al-Kateb v Godwin* (2004) 219 CLR 562, per Hayne J at [238].

20. There is no authority on whether a rule of *jus cogens* would be regarded as a question of fact or of law. However, when seeking to establish whether a rule of *jus cogens* existed, a practitioner may have to lead evidence as to the practice of States.

Interpretation of Treaties by Australian Courts

21. The first step is to ascertain the operation of Australian law. However, where legislation uses terminology derived from or importing concepts which are derived from an international instrument then it is necessary to understand those concepts and their relationships to each other in order to determine the meaning and operation of an Act: *Plaintiff M47/2012 v Director General of Security & Ors* [2012] HCA 46, French CJ at [11]-[12].

22. The provisions of a treaty to which Australia is a party do not generally form part of Australian law unless and to the extent the treaty has been legislatively implemented through enactment: eg *Plaintiff M70 of 2011/Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32, Kiefel J at [218].

23. Where a treaty is referred to or adopted wholly or in part by Australian legislation, there are a number of steps that should be taken (*NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52):

    - Identify precisely what and how much of an international instrument Australian law requires to be implemented; and
    - Construe only so much of the instrument, and any qualifications or modifications of it, as Australian law requires.

24. If the legislative language follows quite closely the language of a treaty, then it can be inferred that the terms of the legislation are to be interpreted in the same way as the terms of the treaty. For example, some terms under the *Seas and Submerged Lands Act 1973* (Cth) are clearly specified to have the same meanings as under the UN Convention on the Law of the Sea. Annexing or scheduling the text of a treaty to legislation does not make that treaty part of Australian law. Legislation may expressly stipulate in its object and purpose that its provisions are intended to be construed consistently with a treaty.

25. If the meaning of a legislative provision is ambiguous, Australian courts and tribunals can have regard to similar provisions in international instruments. However even where there is no ambiguity, the principle of conformity or conformability provides that Commonwealth and State legislation is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with established rules of international law: see *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273. In addition, the presumption of compliance provides that consistency with Australia's international obligations is presumed in the absence of clear words to the contrary. Finally, the principle of uniformity specifies that treaties should be interpreted uniformly by State parties.

26. The subjective intention of a party or parties – what a negotiating party intended a word to mean, or their "true" intention – is strictly not relevant to treaty interpretation because the words used in a treaty reflect the text as agreed between the parties and the party has expressed its consent to be bound by the terms of the treaty. Nonetheless, subjective intentions can be taken into account in various ways:

- If the State issues an "interpretative declaration" indicating its understanding of a provision. An interpretative declaration is not a "reservation": a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State: Art 2(1)(d), VCLT.
- A State's preferred interpretation may be evident in its subsequent application of the treaty, and hence relevant to interpretation as subsequent practice under Art 31(3)(b), VCLT.
- The preparatory work or the circumstances of a treaty's conclusion may evidence a State's intentions, and become relevant to interpretation under Art 32, VCLT.

27. Extrinsic material can be taken into account in certain circumstances. It may be apparent from extrinsic materials that legislation was intended to give effect to a treaty. A court can consider extrinsic material to confirm the ordinary meaning of the text or to determine its

meaning when the provision is ambiguous or obscure: s 15AB(1), *Acts Interpretation Act 1901* (Cth). Extrinsic materials include explanatory memoranda, second reading speeches, and treaties or other international agreements referred to within legislation: s 15AB(2). Extrinsic sources include the form in which a treaty is drafted, subject-matter, the mischief addressed, negotiating history and comparisons with earlier or amending instruments relating to the same subject matter: *Applicant A v MIEA* (1997) 190 CLR 225, per Brennan J at 231.

28. Extrinsic material can also include subsequent practice, both of other States and between the parties. In *Macoun v Commissioner for Taxation* [2015] HCA 44, the Court considered subsequent practice in the form of decisions of the United Nations Administrative Tribunal, decisions of national courts from France and the Netherlands, an international arbitration and a UN Secretary-General statement.

29. Supplementary means of interpretation (including the preparatory work of the treaty and the circumstances of its conclusion) can also be used to confirm the meaning determined through the textual approach or to determine the meaning where the textual approach leads to ambiguity or obscurity or a result which is manifestly absurd or unreasonable: Art 32, VCLT.

30. A court may also consider output (eg recommendations, views) from institutions established under a treaty and mandated with responsibility for monitoring implementation by State parties.

31. Judicial approaches vary in terms of the use of extrinsic materials. In *Maloney v The Queen* [2013] HCA 28, for example, several members of the High Court were sceptical about the use of extrinsic materials.

BIOGRAPHY

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Dr Stephen Tully was admitted as a solicitor in 2006 before being called to the NSW Bar in 2014. Dr. Tully was previously a solicitor with the Migration and Refugee Tribunal, a Commonwealth tribunal practising administrative and immigration law. He became an Accredited Specialist in Government and Administrative Law in 2011. He is also the section editor on Immigration and International Aspects for the Australian Journal of Administrative Law. He has a broad public and private law practice.

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