List of Annexes Accompanying the Written Replies of the United States of America

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ANNEX	DESCRIPTION
1	RICHARD K. GARDINER, TREATY INTERPRETATION (2d. ed. 2015) [excerpt]

ANNEX 1

Treaty Interpretation

Second Edition

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While, however, the preamble may be used as the source of a convenient summary of the object and purpose of a treaty, both the Vienna Convention (article 31(2)) and practice make it clear that an interpreter needs to read the whole treaty. Thus, the substantive provisions will provide the fuller indication of the object and purpose. The Appellate Body at the WTO has referred to preambles on a number of occasions, but it does so in the course of very detailed consideration of the relevant treaty's substantive provisions.[184]

5.3.3 Can the object and purpose be used to counter clear substantive provisions?

The *Oil Platforms* case considered above is but one of several ICJ cases which have been concerned with the extent of the jurisdiction conferred upon it, or another tribunal, by the parties to a dispute. The Court has in this context considered the object and purpose of the parties as requiring great care not to stretch jurisdiction beyond that specifically conferred by those parties. In doing so, and for the purposes of treaty interpretation more generally, it has answered in the negative the question that heads this section. Thus, in *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, where the dispute was whether an arbitral tribunal's award was invalid because of failure to resolve all the issues as put before the tribunal, the ICJ stated:

> ... when states sign an arbitration agreement they are concluding an agreement with a very specific object and purpose: to entrust an arbitral tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits.[185]

However, the arbitral tribunal had been asked two specific questions: the first on the validity of an agreement determining the boundary, and the second as to where the boundary should be drawn if the agreement were found invalid. Thus, the second function of the tribunal, drawing the line itself, only arose if it found the line had not been determined by the previous agreement. Finding that the previous agreement was valid and binding on the parties, the tribunal had nevertheless found that the agreement only dealt with sea areas as known at the time of the earlier agreement. Hence the line was incomplete, but the tribunal did not proceed to draw the rest of it. The ICJ found that this was not a failure of the tribunal to act as required by the reference to arbitration:

> ... although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2.[186]

[184] See, eg, *US—Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R, paras 12 and 17; *EC—Measures Concerning Meat and Meat Products (Hormones)* (1998) WT/DS26/AB/R and WT/DS48/AB/R, para 70; *Chile—Price Band System* (2002) WT/DS207/AB/R, paras 196–97; see also Reports of the Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (2006) WT/DS291/R, WT/DS292/R, WT/DS293/R, para 4.162.

[185] [1991] ICJ Reports 53, at 70, para 49.

[186] [1991] ICJ Reports 53, at 72, para 56.

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Similarly in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* a chamber of the ICJ did not accept the argument by Honduras that jurisdiction was sufficiently established by a general reference in a preamble to the special agreement on jurisdiction to the object and purpose as being to dispose completely of very long-standing disputes; regard must be had to the common intention of the parties actually expressed in the words of the agreement. The Court saw Honduras as really invoking the 'circumstances of conclusion' of the special agreement, such circumstances being a supplementary means of interpretation in article 32 of the Vienna rules and therefore an inappropriate basis on which to enlarge the meaning of the express terms.[187]

That the object and purpose of a treaty cannot be used to alter the clear meaning of a term of treaty is also well illustrated by an award of the US–Iran Claims Tribunal over a requirement that Iran maintain funds in a 'Security Account' with a third party bank at a certain level:

> Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.[188]

5.3.4 *Object and purpose identifying general scope of treaty*

While the general rule in article 31 of the Vienna Convention sees the treaty's object and purpose as shedding light on the ordinary meaning of terms used in their context, interpretation of a treaty may raise issues of more general applicability. This is interpretation of terms in a somewhat broader sense than that apparent in the general rule.

Thus, in *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* a principal issue was whether a bilateral treaty between Denmark and Norway which identified principles for delimitation of continental shelf boundaries between them (such as use of the 'median line') was applicable to *all* such boundaries, including those between their remoter territories viz Danish Greenland and the Norwegian Jan Mayen island to the north of Iceland. The ICJ considered that despite the generality of the provision referring to the areas of the continental shelf over which Denmark and Norway had sovereign rights to explore and exploit, the fact that their agreement specifically identified points on the boundary in the North Sea, coupled with the manner in which both states had implemented the Geneva Convention on the Continental Shelf, 1958,

[187] [1992] ICJ Reports 351, at 584, paras 375–76.
[188] *USA, Federal Reserve Bank v Iran, Bank Markazi* Case A28, (2000–02) 36 Iran–US Claims Tribunal Reports 5, at 22, para 58 (footnotes omitted).

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