Mutant Stare Decisis: The Interpretation of Statutes which Incorporate International Treaties into Australian Law

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PART I — Issues Concerning a Treaty Model of Interpretation

I. Introduction

To enjoy the benefits of cooperation in many international areas it is necessary to have common rules. These areas are diverse and include such things as transport, civil aviation, finance, commerce, the environment and others. These areas do not have the high international profile of the issues of war and peace. Rather they are matters likely to be encountered in everyday life. Accordingly, these common rules are needed to regulate arrangements between parties in different states and to provide the means to enforce their rights and obligations.

Nations could once rely upon the process of custom for the formation of rules of international law but this has proved too slow to cope with the rapid advances of the twentieth century.[1] As a result, the international community, through diplomatic conferences, has agreed upon rules to apply to a variety of subject areas. Many of these agreements operate within the field of private law. The intent is to create an independent legal regime that transcends national boundaries and applies uniformly among state parties. In the formulation of these agreements, the diplomatic conference seeks to accommodate many views including those of both common law and civil law jurisdictions.

The agreements reached in diplomatic conferences have been put into effect by means of multilateral treaties[2] or conventions,[3] to many of which Australia is a party.[4] These treaties are described as 'lawmaking' or termed 'international legislation'.[5] The multilateral treaty is well suited to the task of implementing an international agreement. There is opportunity in the diplomatic conference for any nation to take part in the formulation and acceptance of the treaty. The end product is highly representative and in a form which may readily be taken into national law.

To fully establish an independent legal regime in a subject area it is not enough that a treaty binds the nation internationally. It is also necessary for the treaty to have internal legal effect. The way in which the provisions of a treaty are taken into national law is determined by the domestic constitution. In some countries, such as the United States of

1 J G Starke, *Introduction to International Law* (10th ed, London: Butterworths, 1989), 16.

2 For a treatment of terminologies see Part II.

3 For example, in international commerce — the United Nations Convention on Contracts for the International Sale of Goods; in shipping — the United Nations Convention on the Carriage of Goods by Sea, being Annexe 1 of the Final Act of the United Nations Conference on the Carriage of Goods by Sea done at Hamburg on 31 March, 1978; in civil aviation — the Warsaw Convention.

4 Australian Treaty Series.

5 Starke, *supra* note 1.

America, a treaty to which it is a party is self-executing and its terms are directly applicable in national law.[6] In others, including Australia, a treaty is non-self-executing[7] or indirectly applicable. The executive concludes the treaty and Parliament must enact legislation implementing its provisions to give it internal legal effect. In doing this, the role of the legislature alters fundamentally. The Parliament simply adds enacting sections which transplant the entire text of an international treaty into domestic law. It thereby becomes the surrogate of the international diplomatic conference. The essential supremacy of Parliament, which resides exclusively in its enacted measures,[8] is thereby subrogated to some degree.

It is the function of the court to interpret and apply legislation enacted by Parliament. Any enacted measure has 'exactly the meaning and effect which the courts declare and no more'.[9] The court is to interpret the measure 'according to the intent of them that made it'.[10] This requirement presents a dilemma for the judiciary — how is it to interpret this subrogated intent through the words used to express it? The material which the judge is to interpret, though it carries the endorsement of Parliament, has been produced from without. It is the expression of the will, but not of the mind, of Parliament. The executive and legislative branches, having fulfilled their respective roles by concluding the treaty and enacting its terms,[11] have signalled to the judiciary the need to restock its interpretative armoury to meet a hitherto seldom confronted challenge. If the judiciary fails to develop the means to interpret treaties, the attempt to create an international regime will flounder for want of a basic tenet: uniform application of uniform laws.

Australian courts, in the limited number of instances they have considered the issue, have largely applied a treaty model of interpretation to declare the meaning of these enacted measures. A treaty model of interpretation is one in which a national court takes into account the treaty attributes of the legislation and applies the methods used by an international tribunal to interpret a treaty. This paper examines the treaty model and concludes that it is correct for national courts to apply it as the only means to ensure uniform application. Despite this conclusion, the need for national courts to undergo an essential interpretative paradigm shift will also be identified. The need for the national legal culture to adopt a dualistic world view will become apparent as the elements of this new paradigm are identified. One set of precepts will dictate the approach to 'domestic legislation' while another, quite different, set will do so to 'international legislation'. The process of assignment of meaning to each differs in essence.

6 For example, Article VI of the U.S. Constitution provides 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.'

7 It has been pointed out that the use of this term in the Australian context is apt to mislead because of the particular meaning ascribed to it by the United States Supreme Court. There is no equivalent in the Australian Constitution. Accordingly, except for citations, the term 'indirectly applicable' will be used: see J Craw and W R Edeson, 'International Law and Australian Law' in K W Ryan(ed), *International Law in Australia* (2nd ed, Sydney: Law Book Co, 1984), 86.

8 J M Macrossan, 'Judicial Interpretation' (1984) 58 *Australian Law Journal* 547.

9 *Id* 547.

10 P B Maxwell, *The Interpretation of Statutes* (12th ed, London: Sweet and Maxwell, 1969), 1.

11 The early treatment of this subject will assume there is no need for the legislature to give internal legal effect to the Vienna Convention on the Law of Treaties which contains express provisions for the interpretation of treaties. This preliminary assumption is based on the suggestion (Ryan, *supra* note 7, 91) that it might operate directly in national law without legislative sanction. This view is put forward on the basis that it is one treaty that might not affect rights and duties. Whilst it is possible that it will affect rights and duties (especially by an adverse interpretation of an enacted treaty) there are no cases which constitute a definitive statement on the subject. The High Court, when it has applied the interpretative regime of the Vienna Convention on the Law of Treaties, has not suggested a need for legislative intervention. In this regard, however, it must be noted that it has not considered a legislated treaty with operation within the field of private law.

A legal dictionary will be of little use in the interpretation of 'international legislation'. The meaning assigned to words and phrases in antecedent municipal law is of little relevance to a statute which incorporates a treaty. It may be more appropriate that the reasoning of a court of another participating state party is persuasive. This realisation constitutes a serious assault on the sanctity of the doctrine of precedent as previously understood.

Whether or not the notion of the subordination of the legislative mind is sustainable, it is still possible to assert that the introduction of international treaties has resulted in dual processes of common law statutory interpretation. This dualism has caused a mutation in stare decisis. Stare decisis is now heterophyllous,[12] two different leaves bud from the same branch. Both leaves declare the will of Parliament but only one the mind of Parliament. The other declares the mind of an international diplomatic conference. Uniform international application of uniform international laws can only be achieved if the active participants in the interpretative process — the judiciary of the state parties — are able to accommodate the dualism. One part of the judicial mind is brought to domestic issues and quite another to international issues. This is so regardless of whether the legal system of the state party is common law or civilian.

The first part of this article will consider issues relevant to a treaty model of interpretation. In the second part, the response to date of English and Australian courts[13] will be surveyed before other possible models of interpretation are briefly examined. Finally, the elements of the new paradigm necessary to achieve the required result will be identified.

II. General treaty considerations and their incorporation by legislation

The introduction to this article identified an independent legal regime which is created by international agreement and implemented by treaty. The next matter which must be examined concerns the treaty characteristics acquired by the legislative measures which give internal effect to the regime. These characteristics must be taken into account by national courts if uniform application is to be achieved. This part will survey the characteristics of treaties and the issue of languages used in them. Consideration is also given to whether the way in which a treaty acquires internal legal effect by legislation is a relevant factor in interpretation. An understanding of these factors will assist a national court to appreciate the wider international process in which it participates when it considers the legislative measures giving effect to the independent legal regime.

Characteristics and terminology

The Vienna Convention on the Law of Treaties[14] defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a singular instrument or in two or more related instruments and whatever its particular designation'.[15]

Treaties are international agreements which are binding under international law.[16] The

12 This term is commonly used in botany for the phenomena whereby different kinds of leaves grow on the same plant.

13 The limitations upon such an exercise expressed by Willis, 'Statutory Interpretation in a Nutshell' (1983) 16 *Canadian Bar Review* 1, have been borne in mind. These limitations include the difficulty with the enunciation of a central authoritative principle in relation to statutory interpretation by reference to decided cases, the fact that such insights are found not in decisions but in dicta and the fallacy of the presumption that an approach, once enunciated by a court, will remain equally valid at all times and in all places.

14 Australian Treaties Series 1974 No 2, hereafter referred to as the 'Vienna Convention'. It entered into force on 27 January 1980.

15 Art 2(1)(a).

16 The Conclusion of Treaties and Other International Arrangements, Update 17 April, 1991, Department of Foreign Affairs and Trade Canberra.

word 'treaty' denotes a genus which includes the many differently named instruments by which states conclude international agreements, for example, 'convention', 'agreement', 'protocol', 'executive agreement', 'exchange of notes', 'exchange of letters', 'declaration act', 'final act', 'general act', 'covenant', 'pact' or 'concordat' (in the case of an agreement between the Pope and a head of state). A particular agreement is binding under international law, and therefore a treaty, if the parties to it so intend.[17] The terminology employed to describe these instruments is 'confusing, often inconsistent, unscientific, and in a perpetual state of flux. There is no canon which determines which name is appropriate in each case'.[18] The treaty has been described as 'the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions'.[19]

In Australian practice, 'agreement' is the general term used to denote an instrument of treaty status. These agreements, or treaties, require executive council approval while instruments of lesser standing, such as memoranda of understanding and arrangements which do not ordinarily create legal rights and obligations, do not.[20] The word 'convention' is commonly associated with multiparty treaties, although it is by no means confined to such.[21] This inquiry is concerned with conventions that have as their object laying down rules to be observed by a majority of states.[22]

Language

Up until the emergence of the 'international statute' national courts have only had to deal with enacted measures in English. This is not the case with treaties. National courts must now confront the reality of authoritative parliamentary measures before them in a foreign language or languages. There are myriad issues of language relevant to a treaty model of interpretation. The parties to a treaty are free to choose the language or languages in which it is expressed.[23] Where more than one text is used the instrument will, typically, state which language is authentic or that one or more are equally authentic.[24] In multilateral treaties negotiated under the auspices of the United Nations the English text is always one of the authentic texts.[25]

The law of treaties has been largely codified in the Vienna Convention which contains a number of specific provisions regarding the use of language. In relation to the interpretation of treaties authenticated in two or more languages, it provides:[26]

(1) Where 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

17 *Ibid*

18 McNair, *Law of Treaties* (Oxford: Clarendon Press, 1961), 22.

19 *Ibid*

20 *Supra* note 16.

21 Starke, *supra* note 1, 440.

22 It is quite possible to legislate the terms of a bilateral treaty or one with a limited number of parties and schedule such. On the basis that the subjugation of the mind of Parliament is much less a factor in these cases, it is not claimed that the paradigm here examined is wholly relevant to such. The negotiations concluding such could be reasonably expected to intend meanings arising from existing domestic law.

23 McNair, *supra* note 18, 30.

24 See eg the Vienna Convention art 85: 'The original of the present convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations'. The United Nations Charter 1945 was drawn up in the same five languages: see art 111 which provides that the five texts are 'equally authentic'.

25 McNair, *supra* note 18, 31.

26 Art 33.

authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree;

(3) The terms of a 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 text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the text, having a regard to the object and purpose of the treaty, shall be adopted.

In cases with two or more authentic texts in which a convention does not provide a particular text shall prevail, article 33(4) of the Vienna Convention urges a meaning which best reconciles the texts having regard to the object and purpose of the treaty. A national court will have difficulty in attributing a consistent object and purpose to a document resulting from the disparate grouping of an international conference. Accordingly, those who negotiate and conclude treaties should be urged to require that a particular text should prevail. The rule expressed in article 33(4) confirms the pre-existing practice in international law. When a treaty does not indicate which text is authentic or which, in case of divergence, should prevail, the two or more texts should help one another. It is permissible to interpret one text by reference to another.[27]

Some of the particular linguistic and grammatical problems associated with a reconciliation of text in different languages have been confronted by English courts. When guidelines were first pronounced by the House of Lords in 1977 the Vienna Convention was not in effect.[28] The approach of the House of Lords at that time may be contrasted with the treaty approach. It declared that a court must first have recourse to the English text on the basis that it is the meaning which Parliament believed the authentic foreign text to have.[29] The weakness in this reasoning is that Parliament did not apply its mind to the meaning of the English text. It merely added its endorsement so far as it was necessary to give the convention legal effect. The approach, in treaty interpretation, is to urge a meaning which best reconciles the texts having regard to the object and purpose of the treaty. The English text is not to be elevated beyond the other authentic texts.

The issue of language was again confronted by the House of Lords in 1981.[30] The measure considered at that time was the English *Carriage by Air Act* 1961[31] which enacted the terms of the Warsaw Convention. The Warsaw Convention provides for resolution in favour of the French text of any inconsistency between it and the English. In that instance the French term 'avarie' in article 26(2) was determined to carry a more extensive meaning than the corresponding word 'damage'. The requirement in this article, to give notice of *damage* within a particular time, was held to extend to a claim for *loss* on the basis that the meaning of the French term extended further than its English translation.

Despite the limitations of the House of Lords approach noted above, some other guidelines on language emerged which are still relevant. First, just as a court consults an English language dictionary for meaning and usage, it may also consult dictionaries in the languages of other authentic texts.[32] It is to use the same linguistic methods it applies to the English language.[33] The presence of other languages simply gives rise to a wider

27 McNair, *supra* note 18, 433.
28 *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141.
29 *Ibid*
30 *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251.
31 Section 1(2).
32 *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251.
33 *Ibid*

heurism. If the court has some knowledge of the relevant language there is no reason why it should not use it.[34] Secondly, the court may receive expert evidence directed not to questions of law which arise in the interpretation of the convention, but as to the meaning or possible meanings (if there be more than one) of the foreign language.[35] It will still be for the court, not the expert, to choose the meaning by applying legal methods of interpretation.[36] Thirdly, the court must itself, if necessary, be prepared to call this evidence.[37] In this context the House of Lords declined to lay down any precise rule on the methods of acquiring the meaning of a foreign text. It issued a proper warning that refuge must not be taken in the adversarial process, paying regard only to the English text unless, and until, one or other of the parties leads evidence to establish an inconsistency with the foreign text.[38] Judicial notice is to be taken of the foreign text.[39] All of these guidelines are consistent with the treaty approach to the problems of language.

There are few instances when the issue of language has been judicially considered in Australia. The High Court has indicated that when words and expressions, commonly used in the documentation by which international trade is transacted, are used in a convention they would be taken to bear the meaning which had been given to them by national courts.[40] There will be cases when this approach is not correct. In such cases, as the Warsaw Convention, where the authentic text is a language other than English, the linguistic aspects will exclude antecedent municipal law for the purpose of assigning a meaning and effect to the terms of a convention. The High Court's comments are more applicable to cases such as the Hague Rules where the terms have had long exposure in municipal law and were commonly used in pre-existing practice.

Incorporation of treaties by legislation in Australia

The method by which a Parliament implements a convention determines just what treaty attributes are acquired by the resulting legislation. As the legislative method also bears upon the issue of language, it is appropriate to consider both these aspects in the same context. However, as a prelude to an examination of the legislative method, the related question of treaty practice within the Commonwealth of Australia needs consideration.

Australian States and Territories have no international standing to conclude treaties. The Federal Government alone has that capacity as well as the responsibility for giving effect to Australia's treaty obligations.[41] The States are, however, sometimes involved with the incorporation of the terms of treaties into Australian law by state legislation.[42] Numerically, the majority of enactments of conventions into Australian law are by the Commonwealth Parliament.[43] The Commonwealth and States consult in a number of ways regarding treaty matters. A statement of principles and procedures for such consult-

34 *Ibid*
35 *Ibid*
36 *Ibid*
37 *Ibid*
38 *Ibid*
39 *Ibid*
40 *Shipping Corporation of India Ltd* v *Gamlen Chemical Co Australasia Pty Ltd* (1980) 147 CLR 142.
41 There is no express treaty making provision in the Commonwealth Constitution but it is regarded as falling within the external affairs power (s 51(xxix) and the executive power of the Commonwealth. These powers allow the making of treaties on subjects which are not within the legislative power of the Commonwealth. See the judgments of Gibbs CJ, Aickin and Wilson JJ and also the judgment of Stephen J in *Koowarta* v *Bjelke-Peterson* (1982) 153 CLR 168. The Federal Executive Council possesses exclusive and unfettered treaty making power. See also, H Burmester, 'The Australian States and Participation in the Foreign Policy Process' (1978) *Federal Law Review* 257.
42 For example, the United Nations Convention on Contracts for the International Sale of Goods implemented by the *Sale of Goods (Vienna Convention) Act* 1986 in each State.
43 There is no separate compiled list of Australian legislation which incorporates the terms of an international convention.

ations was adopted at the Premiers' Conference in June 1982 and subsequently varied by a letter to State premiers by the Prime Minister.[44]

As mentioned above, treaties to which Australia is a party are indirectly applicable. They require domestic legislation before having internal effect. Treaties are concluded by the executive branch of government and do not require legislation by Parliament unless it is intended that they should have application within Australia. A treaty concluded by the Federal Government nevertheless binds Australia internationally.[45] As in the United Kingdom, where treaties are also indirectly applicable, the executive, the legislature and the courts have accommodated each other to ensure the primacy of international law.[46] British courts have applied a rule of evidence which does not require proof of international law in the same way as foreign law.[47] Even treaties which do not require enactment are tabled in both Houses before Australian adherence. This practice gives Parliament an opportunity to consider important treaties before adoption by the executive.[48] In practice, the Minister for Foreign Affairs and Trade does not recommend to the Executive Council that Australia become party to a treaty where the Australian federal or state legal position is inconsistent with obligations to be assumed under the proposed treaty.[49]

In accordance with the treaty practice just examined, international conventions are enacted into national law in a number of ways:[50]

1. By amendment to existing state or federal legislation;[51]
2. By legislation which does not specifically refer to the convention but which gives it effect;

44 These arrangements are reproduced in a publication of the Department of Foreign Affairs and Trade entitled 'The Conclusion of Treaties and Other International Arrangements': see *supra* note 16.

45 There was an early suggestion in English law that the Crown, not the Courts, has the right and the duty to interpret treaties but this argument has been rejected (see *Stoeck* v *Public Trustee* [1921] 2 Ch 67). There are instances where an executive has protected itself against inability to observe a treaty resulting from judicial decision — see McNair, *supra* note 18, 355-358. In some other countries treaties (apart from some specific categories) automatically acquire municipal effect. The general effect of treaties within a legal system or culture, whether monist or dualist, and the constitutional basis for that effect is outside of the ambit of this paper. For a detailed consideration of these issues see eg K Holloway, *Modern Trends in Treaty Law* (London: Stevens, 1967), ch X; Starke, *supra* note 1, ch 4 and the authorities referred to therein. For a discussion on the interpretation of a treaty so as to impose different obligations domestically and internationally, see Halberstam, 'The Use of Legislative History in Treaty Interpretation: The Dual Treaty Approach' (1991) 12 *Cardozo Law Review* 1645.

46 For an expanded treatment of this area see Holloway, *supra* note 45, 288.

47 Holloway, *supra* note 45, 289. Whilst this practice has generally been adopted throughout the British Commonwealth, the effect of the New Zealand decision in the *Collector of Customs* v *New Zealand Merchants Ltd* [1987] BCL 267 is at variance with this principle. The Convention on Nomenclature for the Classification of Goods in Customs Tariffs (1960 UK Treaty Series no 29) seems to have been treated in the same manner as facts and foreign law. See W K Hastings, 'The Brussels Nomenclature in New Zealand Courts' (1987) *New Zealand Law Journal* 300 which appears to be correct in its criticism of this and other like decisions. See also, *Barry R Liggins Pty Ltd* v *Comptroller-General of Customs*, Full Court of the Federal Court of Australia, 28 October 1991 (unreported). That case involved the same convention and it was held that the explanatory notes prepared under the convention were a secondary guide only and may not be used where there is no ambiguity in the legislation. A doubt could not be created by the use of the notes and then settled by reference to the same notes.

48 For the general practice, see The Conclusion of Treaties and Other International Arrangements, *supra* note 16.

49 *Ibid*

50 See G Sawer, 'Execution of Treaties by Legislation in the Commonwealth of Australia' (1956) 2 *University of Queensland Law Journal* 297.

51 See also the British Territorial Waters Order in Council 1964, which was the subject of interpretation in *Post Office* v *Estuary Radio Limited* [1968] 2 QB 740, as an example of how effect may be given to a convention by means less than legislation. The Order in Council was construed 'so as to make it accord with the convention if the words are capable of being so construed': *Id* 760.

3. By an Act which, although it does not refer to the convention, adopts the wording thereof;
4. By an Act which includes the entire convention in one or more languages in a schedule or schedules. (This approach is more commonly used with conventions which have affect upon private legal rights.)

The first two of these methods constitute one category of legislation; the latter two, another. In the first category, the words of the international diplomatic conference which produced the convention are not adopted. The Parliament has applied its mind to these enactments. The words used are those of the Parliament and antecedent municipal law will be applicable to the interpretation of these Acts. Different interpretative considerations apply to the second category. In this category, Parliament has merely transplanted the text of the convention into domestic law by adding its authority. Parliamentary intent has been subrogated to that of the international diplomatic conference. The words used to express this subrogated intent are those of the particular conference. Accordingly, it is left to the court to declare the meaning and effect of these words and, in so doing, must apply the treaty model.

There are three reasons why domestic precedent should not be applied to the meaning of the words used in an 'international statute'. First, prior domestic meaning was attributed on the basis of consistent parliamentary intent. It does not follow that a word in an 'international statute' has the same meaning. Secondly, in the case of a convention equally authentic in English and a language other than English, the meaning of an English word is affected by the foreign meaning. In cases where a foreign text is to prevail the prior domestic meaning can have no effect. Thirdly, legal terminology and concepts foreign to domestic law are often introduced in the text of the convention.[52]

The High Court has recognised that meaning is to be attributed to a provision in an 'international statute' on the same basis as the meaning attributed to the words in the convention.[53] The basis of interpretation is determined by whether or not the convention wording is adopted. A statute which does not adopt the convention wording is an expression of both the will and the mind of the legislature.[54] The House of Lords has also recognised that different principles of interpretation will apply depending upon whether the words of the convention are used or not.[55] Each state party must adopt the precise wording of the treaty and the same provision for language authentication. This will avoid the production of international antinomies and will eliminate the application of a wide variety of national interpretative techniques to the same document.

Summary

When Parliament chooses to adopt an entire convention by using the words in the enacting measures it is clear that the resulting statute acquires essential treaty characteristics. In such a case, the treaty model is entirely appropriate to the task of interpretation. The

52 For example, the nachfrist remedy in the United Nations Convention on Contracts for the International Sale of Goods (art 47(1)). It would be futile to apply prior sale of goods meaning in domestic sale of goods legislation which covers the same subject matter.

53 *Koowarta* v *Bjelke-Peterson* (1982) 153 CLR 168.

54 The High Court made it clear in *Shipping Corporation of India Ltd* v *Gamlen Chemical Co (Alasia) Pty Ltd* (1980) 147 CLR 142, 159, that it was the language of the rules themselves that was being examined. On the basis of the decision in the *Tasmanian Dam Case* (1983) 158 CLR 1 a statute which does not either refer to the convention or adopt its wording may, in any case, be unconstitutional. This obviously depends upon the subject matter.

55 *Supra* note 30. Cf *Salomon* v *Commissioners of Customs and Excise* [1967] 2 QB 116, 144 where it was declared proper to consult the treaty even though the domestic legislation had not specifically referred to it. The *Acts Interpretation Act* 1981 s 15AV(2)(d) allows reference to 'any treaty or other international agreement that is referred to in the Act'. The conceptual test is still whether the wording is adopted in some way or not.

presence of foreign languages adds a new dimension to statutory interpretation within this model. As the object of the enactment is to implement an international legal regime, it would be inconsistent of Parliament to elevate the English meaning. The determination of meaning and usage must take into account all of the authentic languages of the convention unless Parliament declares otherwise. A court may use its own knowledge of a foreign language, consult a foreign language dictionary or call expert evidence to assist it to find meaning. If necessary, the court may adopt an inquisitorial stance to ascertainment of meaning. A court must also note that even the English text of the convention has come to domestic law by means different from the English of domestic legislation. A particular English word used in an international convention may have a meaning different from the same word used in a domestic statute. It is not appropriate to apply prior domestic meaning to a word in a convention. In the end, the goal of the court must be to promote uniform interpretation of the convention across national boundaries.

III. Aspects of treaty interpretation

The previous part identified the treaty characteristics acquired by legislation which adopts convention wording to implement an international legal regime. This part will examine treaty interpretation in relation to the interpretation and application of this regime by national courts. Statutes which enact a treaty are to be interpreted by national courts in disputes between parties before them by applying the general rule of interpretation applied by international courts to treaty disputes between nations.[56] In the treatment of the subject there must be an acknowledgment of an accommodation between civilian and common law jurisprudence in relation to treaties. This accommodation will become apparent when treaty interpretation is examined. As a treaty is the product of an agreement involving representatives of both systems, many of the acknowledged difficulties with treaty interpretation can be traced to this source. It will be necessary for a national court to acknowledge this accommodation in its new expanded role.

General considerations

The law of treaties and their interpretation has been examined in numerous judgments,[57] texts,[58] international and national conferences[59] and is now, to a significant extent, codified in the Vienna Convention on the Law of Treaties.[60] The Vienna Convention affirms, in its preamble, that the rules of customary international law will continue to govern questions not regulated by its provisions. 'There is no part of the law of treaties which McNair approaches with more trepidation than the question of interpretation'.[61] Prior to the entry into force of the Vienna Convention, another writer on the subject[62] noted 'the principles of treaty interpretation continue to be a highly debatable matter riddled with unsolved problems and leading to *aporiae* — to areas where there are 'no roads' for cog-

56 *Koowarta* v *Bjelke-Peterson* (1982) 153 CLR 168, 264-265.

57 See the judgments of the Permanent Court of International Justice and its successor, the International Court of Justice. A list of international cases relevant to treaty interpretation is annexed in Tammelo, see *post* note 58.

58 McNair, *supra* note 18; K Holloway, *Modern Trends in Treaty Law* (London: Stevens, 1967); I Tammelo, *Treaty Interpretation and Practical Reason* (Sydney: Law Book Co, 1967) and Starke, *supra* note 1, 437 n 7 for a more extensive bibliography on the subject. The Australian Department of Foreign Affairs and Trade has published 'The Conclusion of Treaties and Other International Arrangements', *supra* note 16. It also has a monthly publication called 'Backgrounder', and publishes annually 'Treaty Action' which is published as No 1 in the Australian Treaty Series for each year. The texts of treaties which have entered into force for Australia can be found in the Australian Treaties series.

59 See, eg, the report of the 28th Session of the International Law Commission in 1972.

60 Starke, *supra* note 1, 436.

61 McNair, *post* note 18, 364.

62 Tammelo, *supra* note 58, 3.

nitive penetration'.[63] The same writer indicated that the international courts had not brought much intellectual relief in this area and that generations of distinguished international legal scholars had 'not brought the desired clarity but may even have added to the prevailing confusion'.[64] Many of the intractable problems associated with treaty interpretation have been mitigated by common acceptance of the rules of interpretation in the Vienna Convention. The rules of customary international law will continue to govern questions not regulated by the provisions of the Vienna Convention but national courts now have clearer goals in interpreting 'international legislation' than international courts have in dealing with disputes between states.

The role of municipal courts

Treaty interpretation has almost exclusively been the province of international agencies with but a small part reserved to the function of municipal courts.[65] The judgments of a municipal court cannot be binding on another state party to a treaty.[66] The earlier suggestions that the executive, rather than the judiciary, had the right and duty to interpret treaties has been noted above.[67] In the traditional treaty environment the role of municipal courts will always be limited to two areas, namely, private rights,[68] and the validity of legislation by an organ of a federal state.[69] The rules of treaty interpretation which are to be applied in the expanded role of national courts will now be considered.

General rule of interpretation

As noted above, there is common acceptance of the rules of interpretation in the Vienna Convention. Nonetheless, thinking on treaty interpretation has varied widely among commentators. The various formulated rules of interpretation were considered by McNair to obscure the main task of interpretation.[70]

The Vienna Convention declares the terms of a treaty shall be interpreted in accordance with their ordinary meaning, in context, and in the light of its object and purpose. Textual considerations have achieved an ascendancy over those of the purposive. The codification of the law of treaties in the Vienna Convention culminated almost two decades of intensive work by the United Nations International Law Commission.[71] Earlier attempts at codification have included other approaches to interpretation. The teleological approach achieved prominence in article 19A of the 1935 draft Convention on the Law of Treaties[72] but it is the modified textual approach which has achieved the more central role after many attempts at codification in the last half century. Whilst article 31 is headed 'General Rule of Interpretation' and article 32 is headed 'Supplementary Means of Interpretation', it is the former which contains an accommodation of the textual, intent and teleological approaches. Article 31 provides as follows:

63 *Ibid*

64 *Ibid*

65 The expression 'municipal court' has been traditionally used in international law. The expression 'national court' has been adopted in this article as being more appropriate in the context.

66 McNair, *supra* note 18, 346 where the text of various official statements in this regard is set out.

67 *Supra* note 45.

68 This is especially the case in states where treaties are directly applicable. The court may suffer a further limitation by the application of the act of state doctrine. It also suffers extra-territorial limitations which are relevant to its jurisdiction in the area of treaties.

69 For example, the issues which arose in the *Tasmanian Dam Case* (1983) 158 CLR 1.

70 *Supra* note 18, 365. For a detailed consideration of the leading ideas and main problems of treaty interpretation including the views of international courts, the work of the institute of international law, the work of the international law commission and various other aspects of treaty interpretation see Tammelo, *supra* note 58.

71 'Treaty Interpretation and ICJ Recourse to Travaux Preparatoires' (1991) 14 *Boston College of International & Comparative Law Review* 111, 117.

72 *Id* 115.

(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 to the relations between the parties;

(4) A special meaning shall be given to a term if it is established that the parties so intended.

The terms of article 31 indicate a moderate textualist approach with supplementary teleological assistance. It is not exclusively textualist in that it allows consideration of contemporaneous and subsequent related documentation as well as object and purpose. It has thus avoided the difficulties associated with an extreme plain meaning interpretation while at the same time properly emphasising the centrality of text.

The textualist approach is to interpret a treaty principally by establishing the meaning of the text.[73] The proponents of this approach argue that the interpreter must first analyse the text of the treaty, not the intentions of the parties apart from the text, because it is the text that manifests the intentions of the parties.[74] The textualists and those who argue that treaties ought to be interpreted by ascertaining the intentions of the parties seem to vary only on the question of whether the intentions of the parties are a subjective element which can be ascertained apart from the text. Article 31 clearly approves a wider heurism by its invitation to interpret the terms of the treaty in the context of sub-articles 2, 3 and 4. Teleological considerations still have a role to play. The approach is not purely textual in that it allows the intent of the parties to be ascertained from sources other than the pure text. The mandate in article 31(2), namely, to resort to an agreement or accepted instrument made in connection with the conclusion of the treaty, could have little application to a multilateral treaty. Its relevance must be limited to bilateral treaties or those involving a limited number of parties. Such agreements or instruments are less likely to come into existence with a convention.

The most significant conceptual defect evident in the application of the interpretative regime of the Vienna Convention is the fact that, primarily, it is a document which was intended to apply to issues between states before international tribunals. Thus, apart from the general rule it establishes, the greater part of article 31 is superfluous to the application by national courts. If an enacted bilateral treaty is involved these provisions would have more application. International courts have leaned away from the textual and more towards object and purpose when interpreting the terms of conventions which create international legal regimes.[75] The textual considerations in article 31 should be applied more rigorously in the interpretation of a bilateral treaty while the purposive considerations should take on greater importance with treaties of a multilateral nature.

73 *Id* 114.
74 *Ibid*
75 Tammelo, *supra* note 58, 9 *et seq.*

Domestic foundational approaches

The general rule in article 31 may be contrasted with the main domestic approaches. These approaches are commonly described as the literal or plain meaning rule, the golden rule and the mischief rule.[76] The literal rule[77] is purely textual in that the intention is to be found by an examination of the language used in the statute as a whole. This 'plain meaning' approach had more appeal in the 19th century when statutes were less likely to be framed in wide and general terms and where a 'plain' meaning would be less difficult to identify.[78] The golden rule directed that the grammatical and ordinary sense of the words is to be adhered to unless this adherence would lead to some absurdity or some repugnance or be inconsistent with the rest of the instrument. In these cases 'the grammatical and ordinary sense of the words may be modified to avoid the absurdity and inconsistency, but no farther'.[79] The golden rule, too, is textual as there must be a 'grammatical and ordinary sense' from which to depart. Whilst the golden rule bears some faint resemblance to the second limb of article 32 it does not find itself represented in the armoury of treaty interpretation.[80] The method of approach in the 'mischief rule', or the rule in *Heydon's* case[81] is different from that of the 'literal' and 'golden rules'. Whilst the latter are empty of notions as to the object of the legislation, the mischief rule insists that a statute cannot be interpreted properly without a knowledge of the social policy it was enacted to effect. Prior to the enactment in 1984 of s 15AB of the Commonwealth *Acts Interpretation Act* 1901[82] it was difficult for a court to ascertain the policies being pursued by the Parliament because of the rule against the admission of extrinsic material.[83] It was necessary to glean the intention of the legislature from the provisions of the statute and the policy which may be discerned from those provisions. In the Commonwealth and some State jurisdictions,[84] the courts have the assistance of legislative direction to prefer an interpretation of a provision of an Act which will promote the purpose or object underlying the Act.[85] The ambit of the court's inquiry as to intent and purpose has been widened.

76 A comprehensive treatment of the general domestic approach to interpretation will not be attempted. For a recent treatment of this subject see A I MacAdam and T M Smith, *Statutes: Rules and Examples* (2nd ed, Sydney: Butterworths, 1989), ch 12 especially at 274-276.

77 *Abley* v *Dale* 11 CB 391; *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

78 See comments about the application of this approach in *Ellerman Lines* v *Murray* [1931] AC 126, *post* note 134.

79 *Gray* v *Pearson* (1857) 6 HLC 61, 106; 10 ER 1216, 1234 per Lord Wensleydale: see also examples quoted in McAdam and Smith, *supra* note 76, 265-270.

80 The reference in art 32(b) to a result which is manifestly absurd or unreasonable does not derive, historically, from the thinking of common law courts in the enunciation of the golden rule. According to McNair, the rejection of a treaty interpretation which leads to an absurdity has been apparent at least since the time of Emmerich de Vattel in the 18th century.

81 (1584) 3 Co 7b; 76 ER 637.

82 See also, the Queensland *Acts Interpretation Act* 1954, s 14B and similar legislation in other states except Tasmania, South Australia and Northern Territory.

83 Logically this rule is quite consistent with a rigid textual approach.

84 *Acts Interpretation Act* 1901 (Cth), s 15A; *Acts Interpretation Act* 1954 (Qld), s 14A; *Interpretation Act* 1987 (NSW), s 33; *Interpretation of Legislation Act* 1984 (Vic), s 35(a); *Acts Interpretation Act* 1915 (SA), s 22; *Interpretation Act* 1984 (WA), s 18; and the *Interpretation Act* 1967 (ACT), s 11A.

85 See the difference in the Queensland section by the inclusion of the word 'best'. See also *Chugg* v *Pacific Dunlop Limited* (1990) 170 CLR 249.

Grammatical rules of construction

Both the common lawyer and civilian would observe familiar grammatical signposts in treaty interpretation. The limited consensus they share in this area owes its existence to earlier Roman inspiration. Article 31 approves recourse to the grammatical, as well as logical, methods of interpretation.[86] The maxim *noscitur a sociis* (which enunciates the proposition that a general word takes its meaning from the specific words with which it is used), and the similar *ejusdem generis* rule in relation to phrases, are both found in the jurisprudence and literature of customary international law.[87] These will continue to play a role in treaty interpretation. Similarly, the maxim *expressio unius est exclusio alterius*, (which expresses the proposition that a general word or phrase takes its colour, as well from the specific words or phrases which follow it as from those which precede it) will also continue to have application.[88]

Good faith

It is difficult to assign a precise meaning to the directive in article 31 to interpret a treaty 'in good faith'. McNair suggests a possible link with the so called rule of liberal or extensive (rather than strict) construction.[89] This notion has been linked with the rule or principle of effectiveness.[90] McNair is also sceptical of the value of these so called rules[91] and cites their rejection by international tribunals.[92] The expression is also found in article 26 of the Vienna Convention which provides 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. It appears in article 46.2 in relation to an argument regarding provisions of internal competence in tandem with the expression 'normal practice'. By adopting the prescription of article 31 to compare the meaning in the contexts of articles 26 and 46 it is more likely to be used in a sense of bona fide as honestly, without fraud, collusion or participation in wrong doing.[93] It could also be seen in a sense of not being contrary to the 'letter and spirit'.[94] The expression is also found in the interpretation provisions of other international conventions. For example, article 7 of the United Nations Convention on Contracts for the International Sale of Goods which provides: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.' In its context the expression should be used in the same sense of bona fide.

86 The several approaches to interpretation evidenced in common law and civil law find some unity in earlier Roman law: 'There is enough Roman authority in favour of strict construction to satisfy the most literal minded English judge. But it is nevertheless true that a freer attitude prevails on the continent, and that too goes back to the Roman tradition, for the texts which warn us against too literal a construction or require attention to meaning rather than words, are equally prominent', Jolowicz, *Roman Foundations of Modern Law*, 12.

87 McNair, *supra* note 18, 393; a precondition is that the general words must indicate a genus.

88 *Id* 400; the proposition is termed a contrario on the continent.

89 *Id* 385. The suggestion of a linkage relates only to the expression 'in good faith' and the rule of liberal or extensive construction. These comments predated the Vienna Convention by many years. The learned author was not commenting upon the terms of the Vienna Convention as such.

90 *Ibid* — the rule of effectiveness; that treaties are to be interpreted with reference to their declared or apparent objects and purposes. Particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words with other parts of the text and in such a way that a reason and meaning can be attributed to every part of the text.

91 *Id* chap XXI.

92 *Ibid*

93 P G Osborn, *A Concise Law Dictionary* (5th ed, Oxford University Press: Oxford, 1964).

94 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (2nd phase) ICJ Reports 1950, 383, cited by McNair, *supra* note 18, 383.

Supplementary means

The use of supplementary means is prominent in treaty interpretation. Article 32 of the Vienna Convention provides as follows:

> 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.

Supplementary means are approved to:

(1) confirm the meaning determined in accordance with the ordinary meaning, in context, and in the light of its purpose;

(2) determine when the article 31 process leaves the meaning ambiguous or obscure;

(3) determine the meaning when the process in article 31 leads to a result which is manifestly absurd or unreasonable.

These means include, but are not limited to, preparatory work and evidence of the circumstances of a treaty's conclusion.

When the draft articles were framed, it was not intended to impose a rigid order of procedure in which textual consideration must occur before the consideration of extrinsic evidence. It is rather a requirement that the supplementary means shall not become an independent alternative method that displaces consideration of the meaning to be extracted from the text.[95] The presence of article 32 in a regime of interpretation which has been urged by the High Court to apply to a statute makes it difficult to apply any of the domestic foundational approaches. The textualism of the literal and golden rules is inadequate. The required approach is far beyond the ambit encompassed by the mischief rule. It is safe to abandon the traditional foundational approaches in the new order. Just as it was logically consistent to disallow recourse to extrinsic materials in the former literalist order, recourse may now be had at the threshold through article 32. It will be difficult for courts to refuse recourse to supplementary means.

Whilst the use made of supplementary means in the civilian tradition has always been more extensive than that in English common law, both the subjectivist and objectivist sentiments can be found, with the grammar, in earlier Roman law.[96] There is no rule in the corpus juris forbidding the clarification of a written document by oral evidence[97] but the use of travaux préparatoires is never allowed without a warning they are not to be trusted indiscriminately.[98] Objective textualism is found in some of the Roman theories. One holds 'that the text of a statute once promulgated "lives a life of its own" and another that the intention with which the interpreter is concerned is not that of the legislator, but that of the law itself'.[99] Familiar Roman signposts re-emerge.

McNair notes that an English lawyer approaches the question of interpretation with a bias against resort to preparatory work.[100] Use of preparatory work is, in general, contrary to the legal tradition and instinct of the English lawyer in dealing with legislation and contracts. He acknowledges the practice of resorting to preparatory works as wide-

95 H W Briggs, 'The Travaux Préparatoires of the Vienna Convention on the Law of Treaties' (1971) 65 *American Journal of International Law* 705.
96 Jolowicz, *supra* note 86, 12.
97 *Id* 19.
98 *Ibid*
99 *Ibid* quoting ancient sources.
100 *Supra* note 18, 411.

spread in the international field.[101] It is so widespread that it would hardly be 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.[102] McNair also indicates that it is harder to establish the relevance of some piece of preparatory work in relation to multilateral treaties.[103] This is important for a court dealing with 'international legislation' to keep in mind, especially when the state did not take part in the diplomatic conference which produced the convention. There is also a presumption against citation of preparatory work against third parties, the *pacta tertiis* rule.[104] Similarly, evidence of unilateral preparatory work is excluded on the basis that the use of preparatory work is, primarily, to afford evidence of the common intention of the parties.[105] In article 32 the recourse to supplementary means does not appear to be founded in a desire to afford evidence of the common intention of the parties.

The ambit of the supplementary means available in article 32 is certainly wider than the use of extrinsic material in domestic legislation.[106] The former also allows recourse to 'the circumstances of its conclusion'. In the domestic sense, it is only possible that circumstances of the Act's conclusion may be elucidated from the 'materials'. Article 32 also admits a wider heurism than the domestic legislation by allowing recourse to the circumstances of its conclusion. A court engaged in the interpretation of an 'international statute' is not limited by the constraints upon admission of extrinsic material in domestic legislation.[107] In treaty interpretation recourse to supplementary means is in the main stream.

In the relationship between articles 31 and 32, two distinct phases of interpretation are not presupposed.[108] Some caution should be also placed upon a narrow interpretation of the words in the text which might not be confirmed by further investigation of its legislative history.[109] The textual considerations in the Vienna Convention do not have to be applied before recourse to supplementary means, both aspects work together. Common lawyers should take note of this relationship.

Preparatory works

Resort to the preparatory work of the treaty is one of the principal supplementary means of interpretation. McNair defines preparatory work as 'an omnibus expression which is used rather loosely to indicate all the documents such as memoranda, minutes of conferences and drafts of the treaty under negotiation'.[110] Various types of travaux préparatoires admitted by the international court of justice have included negotiation records, minutes of commission proceedings, committee debates preceding the adoption of a convention, preliminary drafts of provisions, diplomatic exchanges, and government memoranda.[111] The inclusion of provisions for recourse to preparatory work was unanimously supported when article 28 of the 1966 draft articles of the International Law Commission was adopted.[112] The text of article 32 was taken verbatim from this article. Apart from distin-

101 *Id* 412.
102 *Ibid*
103 *Ibid*
104 *Id* chap XXIII for examples of the successful invocation of this rule before the Permanent Court of International Justice.
105 *Id* 421.
106 For example, the Commonwealth *Acts Interpretation Act* 1901, ss 15AA-15AB.
107 Section 15AB. It is not clear on what authority the High Court has directly applied the Vienna Convention which is, at least to this extent, inconsistent the *Acts Interpretation Act* 1901. See also *supra* note 11.
108 Briggs, *supra* note 95.
109 *Ibid*
110 *Supra* note 18, 411.
111 *Supra* note 71.
112 Briggs, *supra* note 95.

guishing between elements of interpretation that are of authentic or binding character and those which have the attributes of preparatory work, the International Law Commission had no intention of discouraging automatic recourse to the latter. Application of the treaty model sees the abandonment of the objective concept of legislation gleaned only from the language of the text. Subjective considerations, gleaned, in part, from the preparatory works are considered with the text.

Circumstances of conclusion

It is not clear how the court may have recourse to the circumstances of the conclusion of a convention without looking at the travaux préparatoires. Accordingly, these preparatory works would throw as much light on the circumstances of conclusion as they would upon the meaning of particular words and phrases used in the convention. Just as it is harder to establish the relevance of some piece of preparatory work in relation to a convention it would also seem difficult to highlight the circumstances of its conclusion. Travaux préparatoires have been defined to 'include materials which document their negotiations *and other circumstances* that culminated in the formal conclusion of a treaty'.[113] It may be possible to consider a former convention, drastically changed by that under scrutiny, to evince such circumstances by the change which the new convention brought about. Preparatory works may contain obsolete negotiation positions and abandoned views and can mislead an interpreter as to the intentions of the signatories at the time of signing the treaty.[114] While various circumstances may account for the absence of certain provisions an interpreter is warned not to conclude that silence indicates unanimity.[115] Crucial deliberations may occur in private and never appear in the negotiation record.[116] The presence of machiavellianism in international conferences is also noted.[117]

Summary

The difficult task of treaty interpretation has been made easier by common acceptance of the Vienna Convention approach. The provisions of the Vienna Convention have established treaty interpretative norms capable of application by courts of different legal systems to achieve uniform application. There is sufficient accommodation between civilian and common law systems evident within the Vienna Convention rules to allow the goal of uniform application to be reached. To achieve this goal national courts must be prepared to move outside of their established domestic interpretative concepts. National courts used to objective literalism will need to adjust to a pattern in which supplementary means of interpretation take on greater importance. The use made of supplementary means in treaty interpretation is more extensive than it is with domestic statutes. The distinct phases of interpretation are not presupposed, the textural considerations work together with supplementary means. As some of the provisions of the Vienna Convention are more extensive than those of domestic interpretative legislation, there must be some doubt as to the validity of applying the convention to an act of Parliament. Any doubt would be removed if Parliament enacted the Vienna Convention to apply to the interpretation of 'international statutes'.

113 *Supra* note 71, 141.
114 *Ibid*
115 *Ibid*
116 *Ibid*
117 *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251, 283.

Part II — English and Australian Developments

I. English developments

This article has established that the task before a national court which must implement an international legal regime is one of treaty interpretation. In this part, an examination will be made of the approach of English courts to the task of interpreting an English statute which incorporates the terms of a convention and compare it with the treaty approach.

History and background

The first occasion upon which any convention text was included as a schedule to a United Kingdom statute is thought to be in the *Carriage of Goods by Sea Act* 1924.[118] While this may be true in the case of a multilateral treaty which attempts uniformity of rules on a larger scale, in fact, a bilateral convention[119] was included as a schedule, in full, to an English statute as far back as 22 August, 1843. The convention[120] concerned was between Her Majesty and 'the King of the French' concerning the fisheries in the seas between the British Islands and France.[121] This Act was considered in *Marshall* v *Nicholls*.[122] There is no indication in the report of any special approach to the terminology on the basis that it was contained in an international document.[123] This is consistent with the view that bilateral documents should be interpreted domestically.

The incorporation of the Hague Rules in the *Carriage of Goods by Sea Act* 1924 represented the first incorporation of a treaty which lays down rules to be observed by a significant number of states. In order to trace the development of the policy of English courts in relation to the interpretation of legislation of this kind it is therefore appropriate to commence with a consideration of that Act.[124] Only a few years later, problems arose with the interpretation of the Hague rules. In *Hourani* v *T & J Harrison*[125] and *Gosse Millerd Ltd* v *Canadian Government Merchant Marine Ltd*,[126] both cases involving the rules, the matter of construction proceeded according to ordinary English principles. The French text of the draft convention was not consulted in either. In the latter, although the Hague Rules were construed in precisely the same manner as any ordinary United Kingdom statute, Viscount Sumner did acknowledge that the words appeared in an international convention.

118 *Id* 297 per Lord Roskill.

119 The term 'convention' is here employed to apply to a bilateral document.

120 The term 'convention' is now seldom used as referring to a bilateral treaty and is used, principally, to refer to a treaty of a multilateral nature. See discussion of terminology in Part I, II 'General Treaty Considerations and their Incorporation by Legislation'.

121 Stat 6 & 7 Vict C 79.

122 (1852) 18 QB 880.

123 This case was concerned with an exclusive remedy provided by statute. The case is, however, notable for the fact that the Court displayed nothing of the coy attitude to reference to the terms of a treaty later displayed in *Ellerman Lines* v *Murray* [1931] AC 126: see also, *post* note 134.

124 The English text of the rules was included as a schedule to the Act but was a translation from the French text of the *draft* convention. The Act received royal assent before the final convention was signed and thus the enacted English text was not an authentic English text of the final convention. The official text of both the draft convention and the final convention was French and, as indicated, the two texts were not identical. *The Maritime Conventions Act* 1911 represented an earlier attempt to secure international uniformity in maritime matters but that Act did not schedule the text of the Brussels Conventions of 1910 and, in fact, provided, in s 10, that the statute should be construed 'as one with the *Merchant Shipping Acts* 1894-1907' which, of course, was purely domestic legislation.

125 (1927) 32 Com Cas 305.

126 [1927] 2 KB 432, 435; [1929] AC 223, 236-237.

The first discernible development towards a different approach took place in 1932 with the dictum of Lord Macmillan:[127]

> It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules and the schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that the interpretation should not be rigidly controlled by domestic precedents of an antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.[128]

There was no further development for nearly a quarter of a century until 1954. Indeed, during this period, any attempts made by counsel to invite attention to the French text of the draft convention 'were firmly discouraged by the courts and sometimes even made a matter of judicial reproof.'[129] In 1954 it was regarded, for the first, as permissible for an English court to look at the French text of the draft convention.[130]

By 1967 this development was applied outside of the context of the Hague Rules. In *Salomon* v *Commissioners of Customs and Excise*[131] the Court of Appeal had no difficulty, in its interpretation of the *Customs and Excise Act* 1952, in holding that it was proper to look at the Convention on the Valuation of Goods for Customs Purposes 1950 even though the domestic legislation had not specifically referred to the Convention. According to Diplock LJ: 'I can see no reason in comity or common sense for imposing such a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment.' [132] This case is also authority for the proposition that statutes should always be interpreted so as to be in conformity with international law.[133] It also abandoned the strict literalism for which *Ellerman Lines* v *Murray*[134] had previously been authority. The House of Lords confirmed this rejection in 1977.[135]

In 1968 the Court of Appeal[136] was prepared to refer to the Convention on the Territorial Sea and the Contingent Zone[137] in its consideration of the Territorial Waters Orders in Council 1964. Diplock LJ observed:

> International conventions, which are intended to be given effect by states with differing systems of municipal law, do not employ the terms of art of the municipal law of any single country, but seek to express, usually at greater length than would be needed if the terms of art of the municipal law of any one country were used, a general concept which can be translated into the terms of art of the municipal law of each country which becomes a party to the convention.[138]

English thinking on the subject crystallised at an authoritative level in 1978.[139] However, before this development is considered it is necessary to briefly examine the effect

127 *Stag Line Limited* v *Foscolo, Mango & Company Limited & Ors* [1932] AC 328.
128 *Id* 350.
129 *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251, 298 per Lord Roskill.
130 *Pyrene Co Ltd* v *Scindia Navigation Co Ltd* [1954] 2 QB 402.
131 [1967] 2 QB 116.
132 *Id* 144.
133 *Id* 141.
134 [1931] AC 126. This is a good example of the rejection of the mischief rule in favour of the literal rule. The members of the court seemed to agree that the meaning was too plain to be controlled by the context but they did not appear to agree on what was the meaning. For a lucid and still highly relevant analysis of the interaction of these 'rules' see Willis, 'Statutory Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review* 1.
135 *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141.
136 *Post Office* v *Estuary Radio Limited* [1968] 2 QB 740.
137 Treaty Series no 3 (1965).
138 [1968] 2 QB 740, 757.
139 *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141.

upon judicial thinking of Great Britain's entry into the European Community.[140] This factor very nearly took the English approach to enacted treaties in a different direction.

English Law and European Community Law

There are three distinct interpretative approaches applicable to English legislation:

1. The purely domestic in which English courts apply a traditional approach.
2. That involving European Union ('EU') law[141] to which the EU approach is applied. English courts are no longer the final arbiter of the meaning in this category. English courts have the task of applying the EU Treaties (ie they have to find the facts, state the issues, give judgment for one side or the other, and see the judgment is enforced) but the ultimate arbiter of the meaning of this law is the European Court of Justice at Luxembourg;[142]
3. That enacting international conventions to which a treaty model of interpretation is applied. The English court is, however, the final arbiter of meaning in this category.

Pursuant to article 177(2) of the EC Treaty, any court or tribunal of a member state may refer any matter touching on the meaning of matters set out in article 177(1), to the European Court of Justice ('ECJ'), if so requested by a party.[143] Under article 177(3) the House of Lords as the final court of appeal of Great Britain, is bound to refer such matters to the ECJ, subject to the proviso that where the law is clear[144] or the ECJ has previously decided the question, a reference need not be made.[145] The ECJ has no doctrine of stare decisis. Lord Denning has stated the obligations placed upon the English judiciary by article 177 as follows: 'Before the English judges can apply the treaty, they have to see what it means and what is its effect. In the task of *interpreting* the treaty, the English judges are no longer the final authority. They no longer carry the law in their breasts. They are no longer in a position to give rulings which are a binding force.' [146]

The interpretative pattern on the Continent is very different to the English pattern. In circumstances where an English court is to interpret the treaty 'they must follow the European pattern'.[147] Whereas in England a gap in a statute must remain open 'until Parliament finds time to fill it',[148] in Europe the gaps are 'filled in by the judges, or by regulations or directives'. It is the 'European way'.[149]

The advocacy of a bold new role for courts in the process of statutory interpretation has long been a feature of Lord Denning's judgments, even those involving purely domestic matters. In *Seaford Court Estates Ltd* v *Asher*, a case involving purely domestic matters, he advocates the gap filling approach.[150] His approach was described in *Magor and St Mellons Rural District Council* v *Newport Corporations* as 'a naked usurpation of

140 *European Communities Act* 1972.

141 Since 1 November 1993, when the Union (Maastrict) Treaty came into force, the European Economic Community (itself renamed the European Community by Article A of the Union Treaty) has been subsumed into the European Union. References to the law adjudicated upon by the European Court of Justice and the Court of First Instance will be referred to as European Union Law.

142 *European Communities Act* 1972, s 3.

143 It is possible to conclude that English sovereignty has been ceded at least to the extent that its courts are no longer the final arbiter of the meaning of a significant body of its law. See also Wade, 'What Has Happened to the Sovereignty of Parliament?' (1991) 107 *Law Quarterly Review* 1.

144 *Joined Cases 28-62 Da Costa en Siaake NV* v *Netherlands Fiscal Administration* [1963] 2 CMLR 224.

145 *Ibid*

146 *H P Bulmer Limited & Anor* v *J Bollinger SA & Ors* [1974] 1 Ch 401, 419 (emphasis added).

147 *Id* 426.

148 *Id* 425.

149 *Ibid.* This case did involve EU law and such comments are appropriate in that context.

150 [1949] 2 KB 481, 499.

the legislative function under the thin guise of interpretation'.[151] In order to understand Lord Denning's later statements[152] it is instructive to set out his approach in 1949:

> Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free of all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon's* case, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume *Eyston* v *Studd.* Put into homely metaphor it is this: a judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.[153]

Lord Denning, again, brought his teleological predilections and the European approach to the task of interpreting a statute which incorporated a truly international (as opposed to an EU) convention into English law. He clearly amalgamates the interpretative techniques of the ECJ with those required in the interpretation of international conventions generally:

> In interpreting the Treaty of Rome (which is part of our law) we must certainly adopt the new approach. Just as in Rome, you should do as Rome does. So in the European Community, you should do as the European Court does. So also in interpreting an international convention (such as we have here) we should do likewise. We should interpret it in the same spirit and by the same methods as the judges of the other countries do, so as to obtain a uniform result.[154]

Whilst the other members of the same Court of Appeal properly stressed the need to depart from the traditional English method of interpretation, their reasoning too is based upon premises which reflect a European community perspective.[155] Further evidence of the European mindset is found in Lord Denning's judgment:

> Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought. We must, therefore, put on one side our traditional rules of interpretation. We have for years tended to stick too closely to the letter — to the literal interpretation of the words. We ought, in interpreting this convention, to adopt the European method.[156]

Whilst the Court of Appeal recognised the need to depart from the traditional rules of interpretation it erred by the exclusive adoption of the European method. Lord Scarman was later to recognise both the contribution and the limitation of the Denning approach as follows:

151 [1952] AC 189, 191 per Lord Simonds.
152 *H P Bulmer Limited & Anor* v *J Bollinger SA & Ors* [1974] 1 Ch 401 and *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1977] QB 208 (when it was before the Court of Appeal).
153 *Magor and St Mellons Rural District Council* v *Newport Corporation* [1949] 2 KB 481, 499.
154 *James Buchanan & Co Ltd* v *Babco Forwarding & Shipping (UK) Ltd* [1977] QB 208, 214.
155 *Id* 221 per Roskill LJ.
156 *Id* 213.

> Lord Denning MR reconnoitred the ground — or, rather, the waters — of this new judicial operation in the area of the common market when he spoke of an incoming tide of law flowing into our rivers and estuaries: see his dicta in *H P Bulmer Ltd* v *J Bollinger SA* [1974] 1 Ch 401, 418F, 425C-H. But the waters are not confined to the legal outpourings of the Rhine or the Scheldt: they comprise the oceans of the world.[157]

The perils of the European gap filling approach were clearly demonstrated about the same time.[158] Twelve different interpretations of the provisions of articles 17 and 18 of the Convention on the Contract for the International Carriage of Goods by Road were evident in 30 decisions of European Courts where the gaps were filled in different ways.[159] The best summary of the European method, again, comes from Lord Denning: 'This means they fill in gaps, quite unashamedly, without hesitation... — it is legislation, pure and simple...they are giving effect to what the legislature intended, or may presume to have intended. I see nothing wrong in this. Quite the contrary.' [160]

The new broad approach

Having considered the impact of Great Britain's entry into the European Union upon interpretative thinking, the guidelines laid down by the House of Lords concerning the interpretation of an incorporated treaty will now be considered. This new English approach, which emerged in 1978,[161] is best encapsulated by the words of Lord Wilberforce:

> I think that the correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation: *Stag Line Ltd* v *Foscolo Mango and Co Ltd* [1932] AC 328 per Lord Macmillan at 350. Moreover, it is perfectly legitimate in my opinion to look for assistance, if assistance is needed, to the French text. This is often put in the form that resort may be had to the foreign text if (and only if) the English test is ambiguous, but I think this states the rule too technically. As Lord Diplock recently said in this House, the inherent flexibility of the English (and, one may add, any) language may make it necessary for the interpreter to have recourse to a variety of aids: *Carter* v *Bradbeer* [1975] 1 WLR 1204, 1206. There is no need to impose a preliminary test of ambiguity.[162]

The court noted that conventions, when made part of English law, may be expressed in language texts in various ways. There may be only an English statutory text which is based upon the convention, the convention itself not being incorporated into the statute. There may be an English convention text which is incorporated in the statutes. There may be a French (or other language) convention text with an English translation adopted by the English statute; there may be convention texts in two languages with or without a provision that one shall prevail in the case of doubt. 'Different principles of interpretation may apply to each of these cases.'[163]

The House of Lords unshackled the process of interpretation from technical rules of English law and precedent and adopted 'broad principles of general acceptation'. Lord Salmon indicates that 'if a corpus of law had grown up overseas which laid down the meaning of article 23, our courts would no doubt follow it for the sake of the uniformity

157 *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251, 290.
158 *Ulster-Swift Ltd* v *Taunton Meat Haulage Ltd* [1977] 1 WLR 625.
159 R Wijffels, 'Legal Interpretations of CMR; The Continental Viewpoint' (1976) 11 *European Transport Law* 208.
160 *James Buchanan & Co Ltd* v *Babco Forwarding & Shipping (UK) Ltd* [1977] QB 208, 213.
161 *James Buchanan & Co Ltd* v *Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141.
162 *Id* 152.
163 *Ibid*

which it is the object of the convention to establish. But no such corpus exists'.[164] Purely European methods of interpretation are strictly rejected: 'In the present context I do not get any assistance from methods said to be used in interpreting the treaty of Rome by the Court of Justice of the European communities.'[165] Indeed the use of such methods is considered 'speculative as well as masochistic'.[166] Lord Denning's enthusiasm for the continental approach is dismissed for the broader approach by Lord Wilberforce: 'There is no universal wisdom available across the channel upon which our insular minds can draw. We must use our own methods following Lord Macmillan's prescription in taking such help as existing decisions give us.' [167]

The following aspects of the approach emerge:

— it is on broad principles of general acceptation, 'in construing a convention as in construing an Act where the language used is capable of two interpretations one must seek to give effect to the intentions of those who made it';[168]

— it is perfectly legitimate to resort to the foreign text;

— recourse may be had to a variety of aids;

— no precise rules are laid down as to the manner in which reference to the foreign text is made.[169]

The House of Lords devised an English system which it considered was capable of meeting the particular challenges inherent in the interpretation of an international document.

The treaty approach

Three years later the House had the opportunity to elaborate upon the principles it laid down in 1977.[170] In *Fothergill* v *Monarch Airlines Ltd*[171] it considered the *Carriage By Air Act* 1961 which incorporated the amended provisions of the Warsaw Convention. The Act provided that any inconsistency between the text in English and the text in French should be resolved in favour of the meaning of the text in French. This was a case where it was not only permissible to look at the foreign text, but obligatory, as it could not be judged whether there is an inconsistency between the two texts unless both were looked at. By then the Court considered the broad approach to the interpretation of an international convention into English law as being 'well settled'.[172] Respect is accorded to its international currency and purpose according to the original approach formulated by Lord Macmillan in 1932 and adopted by the House in 1977.[173] It is clear that the approach was meant to be open-ended. The House of Lords did not consider the English text to have been drafted with strict English legal meanings in mind.[174] The Vienna Convention had entered into force by the time the House of Lords considered *Fothergill* v *Monarch Airlines Ltd.*[175] Even though the Vienna Convention did not apply to the convention before it, the House of Lords clearly stated that future treaties incorporated by legislation ought to be interpreted in the manner laid down by it. As mentioned earlier in relation to the is-

164 *Id* 161.
165 *Id* 153.
166 *Id* 153.
167 *Id* 154.
168 *Id* 155.
169 *Id* 152.
170 *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141.
171 [1981] AC 251.
172 *Ibid*
173 *Ibid*
174 *Id* 273.
175 [1981] AC 251.

sues of language, whilst the House of Lords consulted the Vienna Convention it actually applied the 'broad approach' method rather than the treaty approach.

The English approach to supplementary means

The influence of the Vienna Convention can clearly be seen in the approach of the House of Lords to supplementary means. The House of Lords decided that it must have recourse to aids if, after first looking to the terms of the Convention as enacted, there is ambiguity or doubt or if a literal construction appeared to conflict with the purpose of the convention.[176] Recourse was only allowed to admissible aids which are not only relevant but also helpful and carry weight.[177] Whilst this approach to aids represents a more rigid order than intended by the Vienna Convention, the willingness of the House of Lords to depart from strict objective literalism shows how far the English developments had to come. The English bias against resort to preparatory works noted by McNair[178] had receded to a large extent.

In keeping with the goal of uniform application, the House of Lords concluded that English judges should be able to have recourse to the same aids to interpretation as their brother judges in other contracting states.[179] This recourse is especially approved in the case where the convention operates within the field of private law when it will come under the consideration of foreign courts. The general practice applied in the courts of other contracting states may be regarded.[180] The House of Lords was prepared to use the writing of jurists, international case law and preparatory works which it considered relevant and helpful.[181] In determining whether to have regard to the writings of jurists the House of Lords considered the eminence, experience and reputation of the writer concerned as the relevant factors. In relation to preparatory works, the House of Lords regarded the extent to which the material involved was public and accessible as a factor to determine its admissibility.[182] As the preparatory works of many conventions are now published by participants this problem should decrease.[183]

Summary

The last half century has seen the approach of English courts to enacted treaties developed from a stance which totally ignored their international character to one where a treaty model of interpretation is largely applied. The House of Lords has appreciated the flexibility required in the English legal system to accommodate 'international legislation'. The flexibility required of English courts extends beyond dualism. There are three approaches required. The first is the traditional objective literal approach to purely domestic legislation. Secondly, in relation to EU legislation, English courts must apply the approach of the ECJ. Thirdly, they must apply the treaty approach to other international treaties enacted by legislation. This attitudinal development led by the House of Lords is significant in a legal system where there is a great weight of tradition in favour of the objective concept of legislative intent.

176 *Ibid*
177 *Ibid*
178 *Supra* note 18.
179 *Fothergill* v *Monarch Airlines Ltd* [1981] AC 231.
180 *Ibid*
181 *Ibid*
182 *Ibid*
183 For example J Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer: Netherlands, 1989). This documentary history was compiled to contribute to what he says is the convention's ultimate goal 'uniform application of the uniform rules'. S Rosenne, *The Law of Treaties. A Guide to the Legislative History of the Vienna Convention* (Leyden: New York, 1970).

II. The Australian position

Having concluded that English courts now apply a treaty model of interpretation to statutes which enact the terms of a convention, it is next necessary to survey the response to this type of statute by Australian courts. The influence of English authority and reasoning within Australia has weakened but it is, nonetheless, still prominent.[184] Accordingly, the English approach to the interpretation of an international statute has been considered in Australia. The first such case was *Shipping Corporation of India Ltd* v *Gamlen Chemical Co (Alasia) Pty Ltd*,[185] which involved an interpretation of the Hague Rules enacted in the *Sea-Carriage of Goods Act* 1924. The High Court unanimously adopted the English approach[186] and the earlier prescription of Lord Macmillan[187] for reasons of 'certainty and uniformity of application'.[188] In *Gamlen*, the appellant based its appeal upon the premise that common law principles were not relevant to the facts of the case and that it fell to be determined simply on the proper construction of the Hague Rules themselves. The New South Wales Court of Appeal had relied heavily on antecedent common law. Its approach to the rules was that, unless their language indicated otherwise, they should not be regarded as altering the existing principles of the English common law. It had applied the traditional canon of construction that a statute will be held not to change the existing law unless it clearly evinces an intention to do so.[189] The High Court did not give as much weight to antecedent municipal law as did the Court of Appeal[190] and made it clear that it was the language of the Rules themselves which was being expounded.[191] The High Court did not altogether exclude the prior domestic meaning. It took this approach on the basis that where words and expressions, commonly used in the documentation by which international trade is transacted are used in a convention, there is 'a high probability that they had been incorporated with knowledge of the meaning which had been given to them by National Courts'.[192] It concluded that recourse to the principles of interpretation of an international convention did not exclude antecedent municipal law for the purpose of elucidating the meaning and effect of the convention and the new rules which it introduced.[193] This conclusion must be seen against the background of the long standing nature of the Hague Rules originally adopted at Brussels in 1924. The Act of 1924, in turn, had repealed the *Sea-Carriage of Goods Act* 1904.[194] In the absence of such longevity there is no basis for such a conclusion.[195]

184 Sir Anthony Mason, *Australian Law News*, Nov 1991, 15. Following the severance of links with the Privy Council the authoritative influence of English authority has weakened but this has opened the way to closer acquaintance with legal developments elsewhere. In developing and refining legal principle, the High Court has close regard to the common law as it exists and as it has developed in another jurisdiction. The Court takes account of developments in other common law jurisdictions and even Europe. In the words of the Chief Justice 'an Australian common law has emerged'.

185 (1980) 147 CLR 142

186 *James Buchanan & Co Ltd* v *Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141.

187 *Stag Line Ltd* v *Foscolo Mango & Company Ltd* [1932] AC 328.

188 *Shipping Corporation of India Ltd* v *Gamlen Chemical Co (Alasia) Pty Ltd* (1980) 147 CLR 142, 159 per Mason and Wilson JJ, Aickin J concurring.

189 *Id* 158.

190 *Ibid*

191 *Id* 159.

192 *Ibid*

193 *Ibid*

194 Section 3.

195 The *Carriage of Goods by Sea Act* 1991 gives effect to the Brussels Convention as amended by the Visby and SDR protocols as a first step to their replacement by the Hamburg Convention. In a case such as this there is a high probability that the words were incorporated with knowledge of the meaning which had been given them by national courts.

By the time the English approach was next considered by the High Court, the Vienna Convention had entered into force. In *Koowarta* v *Bjelke-Peterson*[196] Brennan J noted:

> When Parliament chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty.[197] ... A statutory provision corresponding with a provision in a treaty which the statute is enacted to implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law.[198]

To attribute a different meaning 'might be to invalidate the statute in part or in whole, and such a construction of the statute should be avoided'.[199] Brennan J then went on to spell out clearly that 'the method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in a treaty'.[200] These statements demonstrate that the Court is engaged in treaty interpretation and that it has a constitutional imperative to do so.

The High Court also directly applied the Vienna Convention. In a more direct way than his English counterparts, Brennan J applied the general rule of interpretation of treaties expressed in article 31 as the leading general rule of interpretation. The Vienna Convention was not referred to by any of the other judges in the *Koowarta* case but in the *Tasmanian Dam* case[201] it was adopted by Gibbs CJ, Mason, Wilson and Dawson JJ. Whilst it only applies to treaties concluded after it came into force, the rules of interpretation in the Vienna Convention were held to apply to the interpretation of earlier treaties on the basis that it merely states existing customary international law. Recourse to travaux préparatoires was also permitted.[202] Deane J acknowledged that: 'International agreements are commonly "not expressed with the precision of formal domestic documents as in English law" ... [and] do not possess the degree of precision which is desirable in a private contract under the common law'.[203] This acknowledgment is inherent in all of the judgments of the High Court. It recognises the need for the application of a separate set of interpretative principles when considering domestic statutes which incorporate international conventions.

The same approach was applied in the interpretation of a double taxation treaty which should be 'treated as part of the domestic law of Australia but construed in a manner appropriate for the interpretation of an international convention'.[204] It might not have been drafted with the care given to an act of Parliament.[205] The particular circumstances in *Thiel* involved an 'Agreement between Australia and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income' which was signed on 28 February 1980 and which came into force on 13 February 1981. Article 3(2) of the agreement provides that:

196 (1982) 153 CLR 168.
197 *Id* 265, see also *Quazi* v *Quazi* [1980] AC 744.
198 *Ibid*
199 *Ibid.* See also, *Attorney-General (Vict); ex rel Dale* v *The Commonwealth* (1945) 71 CLR 237.
200 *Id* 265.
201 (1983) 158 CLR 1. The *Tasmanian Dam Case* involved a consideration of the Convention for the Protection of the World Cultural and National Heritage as a basis for whether or not it made available to the Commonwealth the legislative power conferred by s 51(xxix) of the Australian Constitution. It did not directly concern the question of interpretation of a domestic statute giving the force of law to an international convention.
202 *Id*, 93-96 per Gibbs CJ; cf 223-224 per Brennan J who did not rely on the travaux in reaching his conclusion but generally approved their use subject to the qualifications in art 32 of the Vienna Convention on the Law of Treaties.
203 *Id* 261.
204 *Thiel* v *Federal Commissioner of Taxation* (1988) 85 ALR 80.
205 *Id* 87.

> In the application of this agreement by one of the contracting states, any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that contracting state relating to the taxes to which this agreement applies.

Though treated as a part of the domestic law of Australia a double taxation treaty is interpreted by the application of the treaty model. The Federal Court found authority in *Koowarta*, the *Tasmanian Dam* case and *Shipping Corporation of India Ltd* v *Gamlen Chemical Co (A/asia) Pty Ltd* for the application of the Vienna Convention on the Law of Treaties to the agreement before it. In doing so the Federal Court referred to the OECD Model Convention and the OECD Commentary not as travaux préparatoires but as documents which had been agreed to as forming the basis of the agreement and, accordingly, were afforded more weight than travaux préparatoires.[206] Nevertheless, on the basis of the convention, the court was clearly disposed to consider travaux in the event of ambiguity or obscurity in the words of the treaty.[207] The High Court has since applied this approach in *Chan* v *The Minister for Immigration and Ethnic Affairs*.[208] Again, the use of travaux préparatoires, the admissibility of extrinsic materials of that kind, and the manner of finding the meaning of the provisions in treaties have been taken for granted.[209] There are no other reported instances where an Australian court has considered the interpretive approach to statutes which enact a convention.

Whilst, in essence, their positions are similar, the High Court has declared more clearly than has the House of Lords that it is directly engaged in treaty interpretation. The House of Lords has certainly said the same by direct implication. The High Court has not yet had the opportunity to distinguish its approach to antecedent municipal law in *Gamlen*. It is important that it does so when the opportunity arises. The domestic doctrine of precedent, except for the limited exceptions discussed, has no application. There must be a recognition by courts at all levels that two distinct bodies of precedent are now being created. This recognition is the foundation upon which a new interpretative paradigm is based. Any aspiration to uniform application, the lynch pin of the international scheme, is lost without this essential paradigm shift by national courts. In the absence of this shift the effect of the application of the treaty model is severely limited.

Despite the writer's enthusiasm for the application of the treaty model, it must also be observed that the direct application of the Vienna Convention by the High Court in the interpretation of a statute which gives affect to a convention may be unconstitutional. An interpretation, based on the Vienna Convention, which is adverse to a party before an Australian court will affect rights and duties. In this regard the application of the Vienna Convention extends beyond international disputes. Despite the view noted earlier[210] it is submitted that the Vienna Convention must be given legislative effect if it is to be applied to measures enacted by an Australian Parliament.

III. The treaty model re-visited

So far this article has attempted to assert that it is correct to apply a treaty model of interpretation to statutes which give national effect to an international regime. The earlier parts have identified the treaty characteristics of such legislation and surveyed the aspects of treaty interpretation which may be applied by a national court to the issues between parties before it. It has also been demonstrated that the treaty model has been adopted by English and Australian courts. Consideration must now be given to whether there is a bet-

206 *Id* 103. See also, *Sun Life Assurance Co of Canada* v *Pearson* [1986] STC 335.
207 *Id* 103 and 120.
208 (1989) 169 CLR 379. See especially at 392 per Mason CJ; 413 per Gaudron J and 427 per McHugh J.
209 *Ibid.* See especially at 392 per Mason CJ, and 427 per McHugh J.
210 *Supra* note 11.

ter model of interpretation to apply. The question is how else could the statute be interpreted to ensure uniform application among state parties? The answer to this question involves consideration of two possible alternative models. The first alternative examined is the comparative model and the second is the model applied by the European Court of Justice at Luxembourg, which now has two decades of experience with legislation common to its member states.

A comparative model

Since a multilateral treaty is the product of an international conference, arguably the court could distil sufficient common factors from the participating legal orders to adequately interpret the enacting legislation. A court's agenda is dictated by litigants and the issues between them. The extensive history of the common law amply illustrates the truth that a body of precedent is random in its creation. Such precedent, random also in subject matter, only develops through a diachonic process of first impression and subsequent distinguishment. Whilst the common law doctrine of precedent lends itself to development 'precept upon precept, line upon line'[211] it does not lend itself to instantaneous acceptance of an entirely new framework.

Whilst the common law court is adept at the task of applying the intent of Parliament against the background of centuries of precedent, it is not systemic by instinct. The methodologies of the syllogism and stare decisis are mutually exclusive. This is not to say that the common law is inherently incapable of receiving alien ideas.[212] Rather, this very process renders the immediate reception of an alien paradigm impossible. What the treaty model has achieved by a process of gradual development is an accommodation of civilian and common law thinking and method. The treaty model, by a process of compromise, has found the unifying factors present in the two systems.

A practical barrier to the use of a comparative model of interpretation is the size and nature of the comparative task itself. These aspects of the task are evidenced in a recently published work which took eight years to complete.[213] This comparative study represents the work of a group of scholars calling themselves 'The Comparative Statutory Interpretation Group' who first met together in 1983. They have produced a set of essays about statutory interpretation as a major field of legal reasoning. The essays are mindful of the central importance of statute law in modern legal systems and consider the subject in a comparative and jurisprudential perspective. The main method of operation of the group was to develop a set of common questions which each member would answer for his own legal system. These answers were exchanged with other group members prior to their annual discussion meeting. The group, with members from nine nations, represented disparate systems; common law, civil law and mixed, east and west European, north and south American. It maintained a common purpose and approach within a framework which comprised a common set of concepts and terminology. The work provides information and insight into the interpretational practices revealed in the published opinions of the higher courts of the countries represented. With its comparative pieces it amply demonstrates the magnitude of the task before a court which would seek to extract any set of international interpretative norms. The Group maintains that scholars have traditionally underestimated the demands of a comparative approach to statutory interpretation.[214]

211 Isaiah 28:10, The Bible KJV.

212 For example, *Hadley* v *Baxendale* (1854) 9 Exch 341; 156 ER 145. The influence upon the thinking relating to foreseeability of damage of the French Civil Code and the treatise writers of the day is exampled in Danzig, 'Hadley v Baxendale: A Study in the Industrialisation of the Law' (1975) 4 *Journal of Legal Studies* 249.

213 D N MacCormick and R S Summers eds, *Interpreting Statutes — A Comparative Study* (Dartmouth: England, 1991).

214 *Ibid*

Presumably the courts would find the subject no less rigorous. To properly apply a comparative model an Australian court would also need to possess detailed knowledge of the legal process of every country forming part of the model. It would need to know which decisions were binding upon other courts of that same country and would need to concern itself that none of these were overruled.[215] On the basis of all of these factors it may reasonably be concluded that a comparative model of interpretation of enacted treaties is unworkable.

The European Union model

The second possible alternative model of interpretation employs the European Union ('EU') system of jurisprudence which has merged aspects of various national legal orders. EU law, to some extent, resembles the international legal regime effected by multilateral treaty. Their equivalent characteristics may be set out as follows:[216]

— they are common to all states which incorporate the particular treaty;[217]

— in its particular subject matter it represents an independent legal order;

— it is usually expressed to prevail over national provisions inconsistent with it;[218]

— they confer rights and impose obligations directly upon national citizens.

The most significant distinguishing factor between the European Union legal system and the international legal regime is that there is no central court in the international regime with an overarching mandate to maintain continuity. The EU has the Court of Justice of the European Communities at Luxembourg for such central purpose.[219] There is no such provision in the international legal regime effected by multilateral treaty. Rather the contrary, they are engrafted into national law to be interpreted by national courts. The international regimes do not share the object of integration which is central to the Treaty of Rome. The methods of interpretation of the Court of Justice of the European Communities lean in favour of integration and flow from a premise inappropriate to the international order.[220] The ECJ has given priority to a schematic, teleological and dynamic interpretation geared to the objects of the Treaty.[221] On this basis, its decisions should not be availed of by other national courts especially where they reason from case to case.

In the interpretation of legislation implementing an international agreement by treaty, English Courts have found the EU interpretative regime to be of no real assistance.[222] Despite the superficial equivalence of some of its characteristics the EU model is not appropriate for adoption by national courts as participants in an international legal regime. Neither of the two possible alternative models are capable of accommodating the truly international characteristics of a treaty. Though the treaty has metamorphosed, through a process of enactment, it is still an international document created beyond national boundaries. The comparative model is capable of extracting common interpretative factors from participating national legal orders but it does so from a national viewpoint. Its utility is also hampered by its inherently unwieldy nature.

The EU response to the need for uniform application was to establish a central court.

215 See also the difficulty of interpretation associated with arts 17 and 18 of the Convention on the Contract for the International Carriage of Goods by Road at note 159 and accompanying text.

216 The characteristics of EU law are enunciated by J P Warner, 'The Relationship Between European Community Law and the National Laws of the Member States' (1977) 93 *Law Quarterly Review* 349, 350.

217 This is so despite the existence of certain minor national exceptions.

218 For example, the Queensland *Sale of Goods (Vienna Convention) Act* 1986, s 6.

219 Treaty of Rome, 25 March, 1957.

220 Kutscher, 'Methods of Interpretation as seen by a Judge at the Court of Justice', Judicial and Academic Conference 27-28 September, 1976, 1-46.

221 *Ibid*

222 *Supra* note 164 and accompanying text.

This approach comes from the opposite direction to the truly international regime which relies on national courts. The treaty model allows courts within either civil or common law systems to apply accommodated interpretative norms. The question posed at the beginning of this part was how else can the statutes which give national effect to an international legal regime be interpreted other than within the treaty model. It is safe to answer this question by saying there is no other way as effective as the treaty model to achieve uniform application.

IV. Conclusions

It is the role of national courts to interpret legislation which gives internal effect to an international convention. The object of this article has been to examine whether the treaty model of interpretation is appropriate for application by national courts. General treaty considerations justify the application of the treaty model to statutes which adopt the entire text of the convention. These statutes acquire essential treaty characteristics including authentic foreign language texts which must be accorded authority by Australian courts. A convention introduces foreign legal concepts as well as foreign languages with the force of Parliament. In this context, prior domestic meaning is not relevant to the task of interpretation. It is not valid to assume that the English text of a convention is the meaning Parliament intended it to have. The meanings of all the authentic texts are equally valid and should assist each other in the task of interpretation. The real meaning is that derived with the assistance of all of the authentic texts which the diplomatic conference, not the Parliament, intended. Parliament has commanded this meaning by adopting the wording of the convention. National courts are subject to the authority of Parliament and must interpret the measure according to the intent of the drafters.

After surveying aspects of treaty interpretation by international courts it may reasonably be concluded that the treaty model is capable of adaptation by national courts to disputes between parties before them. The interpretative provisions of the Vienna Convention have established norms capable of adaptation by courts of different legal systems. By a long process of compromise the Vienna Convention has accommodated the differences between the different systems of law. It has done this in two ways. First, it has adopted attributes, common to both and, secondly, it has exposed the practitioners of each to the other. This conclusion has been fortified by the consideration of other possible models of interpretation. It has been demonstrated that the treaty model is the most effective.

The article also sought to identify other implications of the application of a treaty model as a basis for a more complete interpretative paradigm. The first implication is that the direct application of the Vienna Convention by Australian courts may be unconstitutional. The Vienna Convention must be applied by Australian Courts as participants in a wider international process and so it should be enacted by the Commonwealth Parliament to remove any doubt. This enactment will also serve to better distinguish between the tasks of international and domestic interpretation. Secondly, Australian courts are now engaged in the formation of two bodies of precedent. One is applicable to 'domestic legislation' and the other is applicable to 'international legislation'. These two bodies of precedent stem from their different characteristics and the different role of Parliament in relation to each. There has indeed been a mutation in stare decisis.