

Chapter XI

TREATIES OVER TIME

A. Introduction

333. The Commission, at its sixtieth session (2008), decided to include the topic “Treaties over time” in its programme of work and to establish a study group on the topic at its sixty-first session.⁶⁷² At its sixty-first session (2009), the Commission established the Study Group on treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission’s work on the topic.⁶⁷³ At the sixty-second session (2010), the Study Group was reconstituted under the chairpersonship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairperson on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction.⁶⁷⁴

B. Consideration of the topic at the present session

334. At the present session, the Study Group on treaties over time was reconstituted again under the chairpersonship of Mr. Georg Nolte.

335. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Chairperson of the Study Group on treaties over time and approved the recommendation of the Study Group that the request for information included in chapter III of the Commission’s report on the work of its sixty-second session (2010)⁶⁷⁵ be reiterated in chapter III of the Commission’s report on its work at the current session.⁶⁷⁶

1. DISCUSSIONS OF THE STUDY GROUP

336. The Study Group held five meetings, on 25 May, on 13, 21 and 27 July, and on 2 August 2011.

337. The Study Group first took up the remainder of the work on the introductory report prepared by its Chairperson on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction. Accordingly, members discussed the section of the

introductory report relating to a possible modification of a treaty by subsequent agreements and practice and the relation of subsequent agreements and practice to formal amendment procedures. As with respect to the other parts of the introductory report and following a proposal by the Chairperson, the Study Group considered that no conclusions should be drawn, at this stage, on the matters covered in the introductory report.

338. The Chairperson noted that the following additional documents had been submitted for consideration by the Study Group: the second report by the Chairperson on the “Jurisprudence under special regimes relating to subsequent agreements and subsequent practice”, a paper by Mr. Murase entitled “The pathology of ‘evolutionary’ interpretations: GATT article XX’s application to trade and the environment” and a paper prepared by Mr. Petrič on subsequent agreements and practice concerning a particular boundary treaty. The Study Group discussed the paper by Mr. Murase in connection with the pertinent point addressed in the Chairperson’s second report and decided to postpone the consideration of the paper prepared by Mr. Petrič until the Study Group would discuss issues of subsequent agreements and subsequent practice that are unrelated to judicial or quasi-judicial proceedings.

339. The second report of the Chairperson of the Study Group covered the jurisprudence under certain international economic regimes (WTO, the Iran–United States Claims Tribunal, the International Centre for Settlement of Investment Disputes (ICSID) tribunals and the North American Free Trade Area tribunals), international human rights regimes (the European Court of Human Rights, the Inter-American Court of Human Rights and the Human Rights Committee under the International Covenant on Civil and Political Rights) and other regimes (the International Tribunal for the Law of the Sea, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the Court of Justice of the European Union). The report explained why those regimes were covered and not others.

340. The Study Group considered the second report on the basis of the twenty “General conclusions” contained therein. Discussions focused on the following aspects: reliance by adjudicatory bodies under special regimes on the general rule of treaty interpretation; the extent to which the special nature of certain treaties—notably human rights treaties and treaties in the field of international criminal law—might affect the approach of the relevant adjudicatory bodies to treaty interpretation; the different emphasis placed by adjudicatory bodies on the various means of treaty interpretation (for example, more text-oriented or more purpose-oriented approaches to treaty interpretation

⁶⁷² At its 2997th meeting, on 8 August 2008 (see *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353). For the syllabus of the topic, see *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

⁶⁷³ See *Yearbook ... 2009*, vol. II (Part Two), pp. 148–149, paras. 220–226.

⁶⁷⁴ *Yearbook ... 2010*, vol. II (Part Two), paras. 344–354.

⁶⁷⁵ *Ibid.*, paras. 26–28.

⁶⁷⁶ See paragraph 343 below.

in comparison with more conventional approaches); the general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role assigned by various adjudicatory bodies to subsequent practice among the various means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time from which a practice may be regarded as “subsequent”; possible authors of relevant subsequent practice; and evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. Due to a lack of time, the members of the Study Group could only discuss eleven of the conclusions contained in the second report. In the light of these discussions in the Study Group, the Chairperson reformulated the text of what have now become his nine preliminary conclusions (see sect. 3 below).

341. The Study Group agreed that those preliminary conclusions by its Chairperson would have to be revisited and expanded in the light of other reports on additional aspects of the topic and of the discussions thereon.

2. FUTURE WORK AND REQUEST FOR INFORMATION

342. The Study Group also discussed the future work with regard to this topic. It was expected that, during the sixty-fourth session (2012), the discussion of the second report prepared by the Chairperson would be completed, to be followed by a third phase, namely the analysis of the practice of States that is unrelated to judicial and quasi-judicial proceedings. This should be done on the basis of a further report on this topic. The Study Group expected that the work on the topic would, as originally envisaged, be concluded during the next quinquennium and result in conclusions on the basis of a repertory of practice. The Study Group also discussed the possibility of modifying the working method with respect to the topic so as to follow the procedure involving the appointment by the Commission of a special rapporteur. It came to the conclusion that this possibility should be considered during the next session by the newly elected membership.

343. At its meeting on 2 August 2011, the Study Group examined the possibility of reiterating the request for information from Governments which was included in chapter III of the Commission’s report on the work of its sixty-second session (2010). It was generally felt in the Study Group that more information provided by Governments in relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that chapter III of this year’s report include a section reiterating the request for information on the topic “Treaties over time”.

3. PRELIMINARY CONCLUSIONS BY THE CHAIRPERSON OF THE STUDY GROUP, REFORMULATED IN THE LIGHT OF THE DISCUSSIONS IN THE STUDY GROUP

344. The nine preliminary conclusions by the Chairperson of the Study Group, reformulated in the light of the discussions in the Study Group, are as follows.

(1) *General rule on treaty interpretation*

The provisions contained in article 31 of the 1969 Vienna Convention, either as an applicable treaty provision or as a reflection of customary international law, are recognized by the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply.⁶⁷⁷

(2) *Approaches to interpretation*

Regardless of their recognition of the general rule set forth in article 31 of the 1969 Vienna Convention as the basis for the interpretation of treaties, different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein. Three broad approaches can be distinguished:

Conventional: Like the International Court of Justice, most adjudicatory bodies (the Iran–United States Claims Tribunal, the ICSID tribunals, the International Tribunal for the Law of the Sea, and international criminal courts and tribunals) have followed approaches which typically take all means of interpretation of article 31 of the 1969 Vienna Convention into account without making noticeably more or less use of certain means of interpretation.

Text-oriented: Panel and Appellate Body Reports of the WTO have in many cases put a certain emphasis on the text of the treaty (ordinary or special meaning of the terms of the agreement) and have been reluctant to emphasize purposive interpretation.⁶⁷⁸ This approach seems to have to do, *inter alia*, with a particular need for certainty and with the technical character of many provisions in WTO-related agreements.

Purpose-oriented: The regional human rights courts, as well as the Human Rights Committee under the International Covenant on Civil and Political Rights, have in many cases emphasized the object and purpose.⁶⁷⁹ This approach seems to have to do, *inter alia*, with the character of substantive provisions of human rights treaties which deal with the personal rights of individuals in an evolving society.

The reasons why some adjudicatory bodies often put a certain emphasis on the text, and certain others more

⁶⁷⁷ Whereas the European Court of Justice has not explicitly invoked the general rule contained in article 31 of the 1969 Vienna Convention when interpreting the founding treaties of the European Union, it has, however, invoked and applied this rule when interpreting treaties between the European Union and non-member States; see, for example, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Case No. C-386/08, Judgment of 25 February 2010, European Court of Justice, paras. 41–43.

⁶⁷⁸ See, for example, WTO, report of the Appellate Body, *Brazil—Export Financing Programme for Aircraft, AB-2000-3, Recourse by Canada to article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45.

⁶⁷⁹ See, for example, *Case of Soering v. the United Kingdom*, Judgment of 7 July 1989, Application no. 14038/88, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161; and *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, Inter-American Court of Human Rights, *Series A*, No. 16, para. 58.

on the object and purpose, may lie not only in the particular subject matters of the treaty obligations concerned, but may also be due to their drafting and other factors, including possibly the age of the treaty regime, and the procedure in which the adjudicatory body operates. It is not necessary to determine the exact degree to which such factors influence the interpretative approach of the respective adjudicatory body. It is, however, useful to bear the different broad approaches in mind when assessing the role which subsequent agreements and subsequent practice play for different adjudicatory bodies.

(3) *Interpretation of treaties on human rights and international criminal law*

The European Court of Human Rights and the Inter-American Court of Human Rights emphasize the special nature of the human rights treaties that they apply, and they affirm that this special nature affects their approach to interpretation.⁶⁸⁰ The International Criminal Court and other criminal tribunals (International Tribunal for the Former Yugoslavia, International Tribunal for Rwanda) apply certain special rules of interpretation which are derived from general principles of criminal law and human rights.⁶⁸¹ However, neither the regional human rights courts nor the international criminal courts and tribunals call into question the applicability of the general rule contained in article 31 of the 1969 Vienna Convention as a basis for their treaty interpretation. The other adjudicatory bodies reviewed do not claim that the respective treaty which they apply justifies a special approach to its interpretation.

(4) *Recognition in principle of subsequent agreements and subsequent practice as means of interpretation*

All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) of the 1969 Vienna Convention are a means of interpretation which they should take into account when they interpret and apply treaties.⁶⁸²

(5) *Concept of subsequent practice as a means of interpretation*

Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given

by the WTO Appellate Body (“a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation”)⁶⁸³ combines the element of “practice” (“sequence of acts or pronouncements”) with the requirement of agreement (“concordant, common”) as provided for in article 31 (3) (b) of the 1969 Vienna Convention (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of “practice” as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).⁶⁸⁴

(6) *Identification of the role of a subsequent agreement or a subsequent practice as a means of interpretation*

Like other means of interpretation, subsequent agreements and subsequent practice are mostly used by adjudicatory bodies as one among several such means in any particular decision. It is therefore rare that adjudicatory bodies declare that a particular subsequent practice or a subsequent agreement has played a determinative role for the outcome of a decision.⁶⁸⁵ It appears, however, often possible to identify whether a subsequent agreement or a particular subsequent practice has played an important or a minor role in the reasoning of a particular decision.

Most adjudicatory bodies make use of subsequent practice as a means of interpretation. Subsequent practice plays a less important role for adjudicatory bodies which are either more text-oriented (WTO Appellate Body) or more purpose-oriented (Inter-American Court of Human Rights). The European Court of Human Rights places more emphasis on subsequent practice by referring to the common legal standards among member States of the Council of Europe.⁶⁸⁶

(7) *Evolutionary interpretation and subsequent practice*

Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense.⁶⁸⁷ The text-oriented WTO Appellate Body has only occasionally expressly undertaken an evolutionary

⁶⁸⁰ *Ireland v. the United Kingdom*, Application no. 5310/71, Judgment of 18 January 1978, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 25, para. 239; *Mamatkulov and Askarov v. Turkey*, Application nos. 46827/99 and 46951/99, Judgment of 4 February 2005, European Court of Human Rights, *Reports of Judgments and Decisions* 2005-I, para. 111; and *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (arts. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights, *Series A*, No. 2, para. 19.

⁶⁸¹ See articles 21, paragraph 3, and 22, paragraph 2, of the Rome Statute of the International Criminal Court.

⁶⁸² The European Court of Justice, when interpreting and applying the founding treaties of the European Union, has generally refrained from taking subsequent practice of the parties into account; it has, however, done so when interpreting and applying treaties between the European Union and third States. See, for example, *Leonce Cayrol v. Giovanni Rivoira & Figli*, Case No. C-52/77, Judgment of 30 November 1977, *European Court Reports* 1977, p. 2261, para. 18; and *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd. and others*, Case No. C-432/92, Judgment of 5 July 1994, *European Court Reports* 1994, p. I-3087, paras. 43 and 50.

⁶⁸³ WTO, report of the Appellate Body, *Japan—Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, Section E.

⁶⁸⁴ For example, the case of *M/V “SAIGA” (No. 1) (Saint Vincent and the Grenadines v. Guinea)*, Request for provisional measures, *Judgment of 4 December 1997*, *ITLOS Reports* 1997, p. 16, at pp. 29–30, paras. 57–59; see also *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment*, *I.C.J. Reports* 1999, p. 1045, at p. 1096, para. 80.

⁶⁸⁵ But see, for example, *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) of 9 September 2004, 2004 WL 2210709, *Iran—United States Claims Tribunal Reports*, vol. 38, p. 77, at pp. 116–119, paras. 109–117, and at p. 126, para. 134.

⁶⁸⁶ See, for example, *Demir and Baykara v. Turkey*, Application no. 34503/97, Judgment of 12 November 2008, Grand Chamber, European Court of Human Rights, paras. 52, 76 and 85; and *A. v. the United Kingdom*, Application no. 35373/97, Judgment of 17 December 2002, Second Section, European Court of Human Rights, *Reports of Judgments and Decisions* 2002-X, para. 83.

⁶⁸⁷ See also preliminary conclusions 5 and 9.

interpretation.⁶⁸⁸ Among the human rights treaty bodies, the European Court of Human Rights has frequently employed an evolutionary interpretation that was explicitly guided by subsequent practice,⁶⁸⁹ whereas the Inter-American Court of Human Rights and the Human Rights Committee have hardly relied on subsequent practice. This may be due to the fact that the European Court of Human Rights can refer to a comparatively close common level of restrictions among the member States of the Council of Europe. The International Tribunal for the Law of the Sea seems to engage in evolutionary interpretation along the lines of some of the jurisprudence of the International Court of Justice.⁶⁹⁰

(8) *Rare invocation of subsequent agreements*

So far, the adjudicatory bodies reviewed have rarely relied on subsequent agreements in the (narrow) sense of article 31 (3) (a) of the 1969 Vienna Convention. This may be due, in part, to the character of certain treaty obligations, in particular of human rights treaties, substantial

⁶⁸⁸ WTO, report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 6 November 1998, para. 130.

⁶⁸⁹ See footnote 686 above.

⁶⁹⁰ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, Seabed Disputes Chamber, International Tribunal for the Law of the Sea, *ITLOS Reports 2011*, pp. 10 *et seq.*, paras. 117 and 211.

parts of which may not lend themselves to subsequent agreements by governments.

Certain decisions which plenary organs or States parties take according to a treaty, such as the “Elements of Crime” pursuant to article 9 of the Rome Statute of the International Criminal Court or the “FTC Note 2001” in the context of the North American Free Trade Agreement (NAFTA),⁶⁹¹ if adopted unanimously, may have an effect similar to subsequent agreements in the sense of article 31 (3) (a) of the 1969 Vienna Convention.

(9) *Possible authors of relevant subsequent practice*

Relevant subsequent practice can consist of acts of all State organs (executive, legislative, and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include “social practice” as far as it is reflected in State practice.⁶⁹²

⁶⁹¹ See the reference and discussion in *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, *In the matter of an arbitration under chapter eleven of the North American Free Trade Agreement*, Award of 9 January 2003, ICSID, *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1 (2003), pp. 195 *et seq.*; *ICSID Reports*, vol. 6 (2004), pp. 470 *et seq.*, see in particular paragraph 177 of the Award. Available from <https://icsid.worldbank.org/>.

⁶⁹² See *Christine Goodwin v. the United Kingdom*, Application no. 28957/95, Judgment of 11 July 2002, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2002-VI*, paras. 84–91.